

# Ambiguity in the Air: Why Judicial Interpretation of Insurance Policy Terms Should Force Insurance Companies to Pay for Global Warming Litigation

Travis S. Hunter\*

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\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2009; B.A., History and Classics, Davidson College, 2006.

## I. INTRODUCTION

Recently, the issue of global warming has received renewed attention in the worldwide media.<sup>1</sup> On February 2, 2007, the United Nations Intergovernmental Panel on Climate Change suggested that evidence of a warming trend is “unequivocal,” and that human activity has “very likely” been the driving force in the increased temperatures over the last fifty years.<sup>2</sup> As a result of the renewed focus on global warming, polar bears were recently added to the endangered species list,<sup>3</sup> and approximately 84% of Americans believe that humans are contributing to climate change, “with 78% saying we should do something about it ‘right away.’”<sup>4</sup> However, despite all of the evidence of global warming, a significant and influential minority still denies its existence and attacks the science linking human emissions to increased world temperature.<sup>5</sup> The minority suggests that human emissions of greenhouse gases have contributed very little to the rise in world temperatures experienced in recent years.<sup>6</sup>

Even though the science of global warming is still subject to debate, the United States has taken steps to recognize its existence.<sup>7</sup> For example, in *Massachusetts v. EPA*,<sup>8</sup> the Supreme Court ruled that the Clean Air Act expressly authorized the Environmental Protection Agency (“EPA”) to regulate carbon dioxide emissions.<sup>9</sup> The regulation of carbon dioxide relates to the issue of global warming because carbon dioxide is the chief contributor to the increase in world temperature.<sup>10</sup>

The Supreme Court holding in *Massachusetts v. EPA* is significant to the global warming debate because it is the first time that the United States Supreme Court has considered global warming and determined that carbon dioxide emissions are the main contributor to the increase in

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1. See Elisabeth Rosenthal & Andrew C. Revkin, *Science Panel Says Global Warming Is ‘Unequivocal,’* N.Y. TIMES, Feb. 3, 2007, at A1 (stating that human activity is now considered the driving force behind global warming).

2. *Id.* (citing the findings of the leading international network of climate scientists).

3. Felicity Barringer, Andrew C. Revkin & Ian Austen, *Polar Bear Gains Protection as a Threatened Species*, N.Y. TIMES, May 15, 2008, at A1.

4. Nicole Gelinas, *A Carbon Tax Would Be Cleaner*, WALL ST. J., Aug. 23, 2007, at A11.

5. See Sharon Begley, *The Truth About Denial*, NEWSWEEK, Aug. 13, 2007, at 20 (noting the impact of the global warming denial machine and the “scientific uncertainty” that surrounds the subject).

6. *See id.* at 23.

7. John D. McKinnon, *Politics & Economics: APEC Countries Expected To Pass Climate Measures*, WALL ST. J., Sept. 7, 2007, at A8.

8. \_\_\_U.S.\_\_\_, 127 S. Ct. 1438 (2007).

9. *Id.* at 1463.

10. THE CHALLENGE OF GLOBAL WARMING 7 (Dean Edwin Abrahamson ed., Island Press 1989).

world temperature. Although there are still questions about whether carbon dioxide is considered a pollutant,<sup>11</sup> the result of this holding means that the United States will see an increase in climate regulations and American businesses will be forced to alter their practices to conform to the new regulations.<sup>12</sup> Additionally, the new regulations might spawn litigation targeting American corporations if those corporations breach the climate regulations set by the EPA.<sup>13</sup> The production of greenhouse gases and the potential liability stemming from such production is now at the forefront of debate,<sup>14</sup> as corporations try to shield themselves from future lawsuits.

Even as corporations try to protect against litigation related to global warming, the directors and officers that manage the business must protect themselves against potential liability stemming from global warming. Routinely, corporations and other business entities purchase what is known as Directors and Officers (“D&O”) insurance, which protects the directors and officers of the company if they are sued in a business capacity.<sup>15</sup> Unlike a general liability insurance policy, a D&O policy does not contain a duty to defend,<sup>16</sup> but rather, is structured to unequivocally advance defense costs associated with defending the directors and officers.<sup>17</sup> Although D&O exclusions,<sup>18</sup> if applicable, could eliminate the duty to advance defense costs, such a duty remains in effect until the insurers can show definitively that the exclusions apply.<sup>19</sup>

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11. See *infra* Section III(B) for an analysis of why the Supreme Court holding might not have resolved the question of whether carbon dioxide is a pollutant.

12. But see Stephen Power & Ian Talley, *Administration Releases EPA Report, Then Repudiates It—Blueprint to Reduce Greenhouse Gases Called Too Costly*, WALL ST. J., July 12, 2008 at A2 (stating the White House still refuses to regulate greenhouse gases).

13. See JOSEPH P. MONTELEONE, GLOBAL WARMING—WILL THERE BE EXPOSURES FOR DIRECTORS AND OFFICERS AND WILL IT BE COVERED I (2007), <http://www.tsmp.com/pdf/TSMPPGlobalWarmingArticle.pdf> (discussing how directors and officers might face liability as a result of global warming litigation).

14. Although at the present time there is no litigation directly related to global warming or to a breach of a carbon emissions statute, this Comment presupposes that such litigation will eventually arise as time progresses.

15. MARTIN O’LEARY, DIRECTORS & OFFICERS LIABILITY INSURANCE DESKBOOK xi (ABA Publishing 2d ed. 2007).

16. The duty to defend is “[t]he obligation of an insurer to provide an insured with a legal defense against claims of liability, within the terms of the policy.” BLACK’S LAW DICTIONARY 544 (8th ed. 2004). The duty to defend is typical in automobile insurance policies.

17. O’LEARY, *supra* note 15, at 99 (noting the advancement provision is common in current forms of D&O policies).

18. An insurance exclusion is a “provision that excepts certain events or conditions from coverage.” BLACK’S LAW DICTIONARY 605 (8th ed. 2004).

19. See generally *Daburlos v. Commercial Ins. Co. of Newark*, 521 F.2d 18, 24 (3d Cir. 1975) (the insurer carries the burden of proof in showing the exclusion applies); *Little v. MGIC Indem. Corp.*, 649 F. Supp. 1460, 1466 (W.D. Pa. 1986), *aff’d*, 836 F.2d 789 (3d Cir. 1987) (same).

Given the debate over the existence of global warming, and the disagreement among scientists over whether or not carbon dioxide constitutes a “pollutant,”<sup>20</sup> presumably, no exclusion would apply. Furthermore, because no exclusion limits the duty to advance defense costs, insurance companies could be forced to cover the costs of litigation, whether directly or indirectly related to global warming.<sup>21</sup>

The increased concern over global warming, combined with a desire to punish companies whose activities contribute to global warming, should result in more lawsuits against corporate directors and officers.<sup>22</sup> Because a D&O insurance policy is structured to advance defense costs, rather than create a duty to defend, D&O insurers will likely be forced to pay for litigation related to global warming. The policies were not drafted to cover these costs.<sup>23</sup> The potential increase in global warming litigation, coupled with the inability of insurers to escape payment, could either bankrupt insurers or cause them to drastically alter their premiums. As a result of these potential effects, businesses across America could experience an increase in operational expenses. Although great costs could be imposed on insurance companies, forcing insurers to bear such costs might be better than the alternative—forcing directors and officers to fund their own litigation.

This Comment will discuss why the difficulty of determining whether carbon dioxide is a pollutant creates problems for D&O insurers. Additionally, this Comment will present an argument that D&O insurers should advance defense costs for global warming when such lawsuits are brought against directors and officers. Section II of this Comment will provide background for this argument by examining the differences between D&O insurance and other types of insurance. In addition, Section II will examine judicial interpretation of airborne pollutants, and the growing threat of global warming litigation. Section III will suggest how claims against directors and officers for global warming will arise in the near future and discuss why the best result is a universal

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20. See Begley, *supra* note 5, at 20 (discussing the disagreement on whether carbon dioxide is a pollutant).

21. See Little, 649 F. Supp. at 1466 (stating that the insurer has the burden of demonstrating that an exclusion definitely applies).

22. See MONTELEONE, *supra* note 13, at 2 (discussing how the focus on global warming could lead to exposure for corporate directors and officers); see also Adam M. Cole, John C. Ulin, Daniel A. Zariski & Lisa M. Cirando, *Insurance Coverage for Global Warming Liability*, 42 TORT TRIAL & INS. PRAC. L.J. 969 (2007) (discussing global warming insurance in general liability insurance policies).

23. See *In re Worldcom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 469 (S.D.N.Y. 2005) (stating the purpose of D&O insurance is to encourage capable men and women to serve on corporate boards).

determination that insurance companies have a duty to advance defense costs under current D&O policies.

## II. BACKGROUND

Before discussing why insurance companies should advance defense costs for global warming, it is important to understand the subtle differences between a D&O insurance policy and a general liability insurance policy. Additionally, it is useful to examine judicial interpretation of policy exclusions as well as previous judicial interpretation of airborne pollutants. Finally, it is necessary to understand a brief history of global warming lawsuits in order to understand why such lawsuits will become more prevalent in the near future.

### A. *The History of D&O Insurance*

Lloyd's of London introduced the first D&O policy during the Great Depression.<sup>24</sup> However, these policies did not gain widespread recognition until the 1960s.<sup>25</sup> Changes in the interpretation of securities law during the 1960s created potential liability for directors and officers, rather than just the companies they managed.<sup>26</sup> Insurers responded to these changes in interpretation by creating special policies known as D&O insurance, which were designed to shield the directors and officers of a business from liability.<sup>27</sup>

D&O insurance is distinguishable from personal liability insurance. Insurance companies use personal liability insurance to provide corporations with insurance for claims against the corporation alleging bodily injury or property damage to plaintiffs that are injured while on the premises.<sup>28</sup> D&O insurance is not intended to be general corporate insurance, but instead, is a more specialized form of insurance that specifically protects directors and officers depending on the terms of the policy.<sup>29</sup>

The increased litigation aimed at directors and officers has caused D&O insurance to become an important fixture in today's corporate world.<sup>30</sup> Recent media coverage of corporate scandals, such as the

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24. DAVID GISCHE, DIRECTORS AND OFFICERS LIABILITY INSURANCE 1 (2000), <http://library.findlaw.com/2000/Jan/1/241472.html>.

25. *Id.* at 2.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

“corporate kleptocracy”<sup>31</sup> involving media mogul Lord Conrad Black,<sup>32</sup> highlights the steady increase in lawsuits involving directors and officers.<sup>33</sup> When discussing the rationale behind D&O insurance, the court in *In re Worldcom, Incorporated Securities Litigation*<sup>34</sup> stated,

D&O insurance is not only designed to provide financial security for the individual insureds, but also plays an important role in corporate governance in America. Unless directors can rely on the protections given by D&O policies, good and competent men and women will be reluctant to serve on corporate boards.<sup>35</sup>

D&O insurance allows people of different economic status to serve as corporate board members because insurance companies promise to defend all directors and officers.<sup>36</sup>

### *B. The Basics of a D&O Insurance Policy*

The most basic function of D&O insurance is to protect directors and officers from liability stemming from their corporate positions.<sup>37</sup> However, understanding the basic language of a policy is important to understand how the policies would function in covering global warming claims.<sup>38</sup> D&O policies, as an aggregate, are specifically tailored to individual insureds, and conditions are altered to reflect bargained terms.<sup>39</sup> However, despite different provisions in D&O insurance policies as a whole, similarities exist in each coverage plan.<sup>40</sup> The most important similarity is that D&O policies do not impose a duty to defend on the insurer, but instead, require the insurer to provide coverage for

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31. See *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, No. 06C-11-108 RRC, 2007 WL 1811265, at \*5 (Del. Super. Ct. June 20, 2007) (stating the scheme to defraud the company amounted to “corporate kleptocracy”).

32. Emily Steel, Ashby Jones, & Douglas Belkin, *Press Baron Black Guilty in Fraud Case—Jury, in a Mixed Verdict, Finds Executives Skimmed Millions From Hollinger*, WALL ST. J., July 14, 2007, at A3.

33. See *In re Worldcom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 634 (S.D.N.Y. 2004) (in early 2001 Worldcom executives engaged in a scheme to manipulate public filings); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 379 (D. Del. 2002) (executives manipulated economic reports in order to raise profits and hide economic troubles).

34. 354 F. Supp. 2d 455 (S.D.N.Y. 2005) (this litigation raised coverage issues between insurer and insured based on the terms of the D&O policy).

35. *Id.* at 469.

36. *Id.*

37. *Id.*

38. O’LEARY, *supra* note 15, at 1 (discussing common policy terms).

39. *Id.* (stating coverage can differ depending on policy provisions and the law in the jurisdiction).

40. *Id.* (stating certain policy terms are common including the definition of “loss,” the advancement of defense costs, and other policy exclusions such as the pollution exclusion).

defense costs.<sup>41</sup> In order to gain a better understanding of a D&O policy and to illustrate the unique structure of a D&O insurance policy, certain provisions from typical D&O insurance policies will be discussed below.

1. *The Duty to Advance Defense Costs*

The most fundamental difference between D&O insurance and other types of widely recognized insurance, such as a general liability insurance policy, is that a D&O policy contains a duty to advance defense costs rather than a specific duty to defend.<sup>42</sup> The duty to advance defense costs means that an insurance company does not directly control the defense of any action and does not have a right to decide whether a claim is defensible. Instead, under the duty to advance defense costs, the insurance company is required to reimburse reasonable defense costs arising out of a covered claim.<sup>43</sup> Accordingly, the duty to advance defense costs permits the insured to choose the lawyer and direct the legal strategy taken in the case.

Even though the duty to advance defense costs is markedly different from a specific duty to defend, many courts equate the duty to pay defense costs with the duty to defend.<sup>44</sup> The reason for equating the two is that, much like the duty to defend, the duty to advance defense costs is triggered whenever a claim falls within the terms of the policy.<sup>45</sup> Despite this similarity, the two duties are distinct.

Additionally, the duty to advance defense costs is distinct from the duty to indemnify because the duty to advance defense costs is triggered at the beginning of the case rather than the end.<sup>46</sup> Unlike with indemnification, the duty to advance defense costs does not depend on the outcome of the case but, rather, is an absolute duty to advance costs for litigation that falls within the insurance policy terms.<sup>47</sup>

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41. *See id.* at 99 (the most current form of D&O policies provide for advancement of defense costs).

42. *Id.*

43. *Id.* at 99-100.

44. *See PepsiCo, Inc. v. Cont'l Cas. Co.*, 640 F. Supp. 656, 659 (S.D.N.Y. 1986).

45. *Wedtech Corp. v. Fed. Ins. Co.*, 740 F. Supp. 214, 221 (S.D.N.Y. 1990) (duty to pay defense costs exists whenever a complaint alleges claims covered by the policy); *Md. Cas. Co. v. Peppers*, 355 N.E.2d 24, 28 (Ill. 1976) (allegations of complaint determine the duty).

46. *See In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) (with duty to advance costs, insurer must pay defense costs as soon as attorney's fees are incurred regardless of the final disposition of the case).

47. *See In re WorldCom*, 354 F. Supp. 2d at 464; *see also W. Cas. & Sur. Co.*, 534 N.E.2d 1066, 1068 (Ill. App. Ct. 1989) (duty to defend is broader than duty to indemnify because the claims do not necessarily need to result in indemnification in order to trigger the duty to defend).

Advancement of defense costs is an important term in D&O policies because advancement provides a defendant with immediate access to capital, which is necessary to maintain a successful defense.<sup>48</sup> A typical advancement clause reads:

THE INSURER MUST ADVANCE DEFENSE COSTS  
PAYMENTS PURSUANT TO THE TERMS HEREIN PRIOR TO  
THE FINAL DISPOSITION OF A CLAIM.<sup>49</sup>

Because advancement is triggered upon the initiation of a lawsuit, the costs are paid as they are incurred. Even if the suit is settled at a later time, D&O insurers would still have to pay certain defense costs incurred prior to settlement.<sup>50</sup> The most important distinction between advancement and the duty to defend is that the duty to advance defense costs does not provide the insurance company with an opportunity to become directly involved in the litigation, and most tactical decisions are left to the defendants themselves rather than the insurance company.

## 2. *Policy Definitions and Exclusions*

Despite the fact that the duty to advance defense costs is generally construed in favor of the insured, D&O insurance does not cover every lawsuit involving the insured.<sup>51</sup> Given the high costs of defense, D&O insurance providers attempt to limit coverage by (1) defining “loss” narrowly; and (2) writing exclusions designed to sever the duty to advance defense costs.<sup>52</sup>

Many insurance policies specifically define “loss,”<sup>53</sup> but, in general, the definition is markedly similar across policies and includes things

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48. *Brady v. i2 Tech. Inc.*, No. Civ.A. 1543-N, 2005 WL 3691286, at \*3 (Del. Ch. Dec. 14, 2005); *see also Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005) (“Advancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings.”).

49. *In re Worldcom*, 354 F. Supp. 2d at 459.

50. *See In re WorldCom*, 354 F. Supp. 2d at 464 (insurer must pay defense costs as soon as attorney’s fees are incurred regardless of the final disposition of the case).

51. *See, e.g., Rice v. Liberty Surplus Ins. Corp.*, 113 F. App’x 116, 121 (6th Cir. 2004) (coverage was precluded because a dishonesty exclusion applied); *Am. Cas. Co. of Reading, PA v. FDIC*, 39 F.3d 633, 642 (6th Cir. 1994) (regulatory exclusion barred coverage).

52. *See, e.g., Rice*, 113 F. App’x at 121 (discussing a dishonesty exclusion); *Nat’l Union Fire Ins. Co. of Pittsburgh v. U.S. Liquids, Inc.*, 88 F. App’x 725, 726 (5th Cir. 2004) (*per curiam*) (discussing a pollution exclusion); *Fid. & Deposit Co. of Md. v. Conner*, 973 F.2d 1236, 1244-45 (5th Cir. 1992) (discussing an insured v. insured exclusion and a regulatory exclusion).

53. *See O’LEARY, supra* note 15, at 3 (discussing typical loss provisions).



such as settlements, judgments, and defense costs.<sup>54</sup> By specifically defining loss, insurers can limit the coverage of the policy.

Additionally, D&O policies dictate when the insurance company does not need to reimburse defense costs by including numerous exclusions.<sup>55</sup> The most common exclusions are personal injury exclusions, personal conduct exclusions, insured v. insured exclusions, and pollution exclusions.<sup>56</sup> Because global warming is most likely caused by emissions of greenhouses gases,<sup>57</sup> the pollution exclusion must be examined in great detail. Although there is no standard exclusion, the following pollution exclusion appeared in a 2004 case:

(I) alleging, arising out of, based upon, attributable to, or in way involving, directly or indirectly:

(1) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants; or

(2) any direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants, including but not limited to a Claim alleging damage to the Company or its securities holders.

Pollutants include (but are not limited to) any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes (but is not limited to) materials to be recycled, reconditioned or reclaimed.<sup>58</sup>

This exclusion is relatively broad and does not specifically mention carbon dioxide. Arguably, carbon dioxide could fit in the category of any “irritant or contaminant;” however, the exclusion, as written, is still unduly broad and could raise issues in future litigation.<sup>59</sup> The exclusion above ultimately raises two important issues that will be discussed in detail *infra* Section III: (1) whether, given the definition of pollutant, carbon dioxide qualifies as a pollutant; and (2) whether the exclusion, as written, protects insurance companies from paying defense costs

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54. See *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, No. 06C-11-108 RRC, 2007 WL 1811265, at \*2 (Del. Super. Ct. June 20, 2007).

55. O’LEARY, *supra* note 15, at 4-6.

56. *Id.*

57. See *THE CHALLENGE OF GLOBAL WARMING*, *supra* note 10, at 7.

58. *Nat’l Union Fire Ins. Co. of Pittsburgh v. U.S. Liquids, Inc.*, 88 F. App’x 725, 726 (5th Cir. 2004) (per curiam); see also *CHUBB INSURANCE, EXECUTIVE PROTECTION POLICY 4* (2008) <http://www.chubb.com/businesses/csi/chubb3080.pdf>. (discussing a D&O policy offered by Chubb Insurance).

59. See *infra* Section III.

associated with global warming. The plain meaning of the exclusion indicates that if carbon gas is not a pollutant, the exclusion, as worded,

will not apply. Therefore, D&O insurers could be left funding claims indirectly related to the greenhouse gas, carbon dioxide.

### *C. Judicial Interpretation of Insurance Terms*

In discussing the exclusions of a typical D&O policy, it is important to examine judicial interpretations of such exclusions. The judicial interpretation determines how the exclusions relate to real situations as well as how certain ambiguous exclusions affect the interpretation of the policy as a whole. Additionally, examining judicial interpretations of airborne pollutants in a general liability insurance policy is useful because courts might rely on these opinions in crafting decisions about D&O insurance.

#### *1. Interpreting D&O Policies*

Examining judicial interpretation of D&O insurance policies shows that courts broadly interpret the duty to advance defense costs.<sup>60</sup> Many courts even equate the duty to advance defense costs with the duty to defend, found in other types of insurance policies.<sup>61</sup> As with the duty to defend, courts hold that the duty to advance defense costs arises when the allegations of a complaint fall within the language of the policy.<sup>62</sup> Therefore, if any claim falls within the definition of “loss,” as defined in the policy, the duty to advance defense costs arises, and the insurer will begin to advance defense costs as these costs accrue.<sup>63</sup>

Despite the duty to advance defense costs, sometimes a complaint will allege events covered by an exclusion.<sup>64</sup> Occasionally, the events

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60. *W. Cas. & Sur. Co., v. Adams County*, 534 N.E.2d 1066, 1068 (Ill. App. Ct. 1989). The duty to defend is broader than the duty to indemnify. The duty to defend arises when the complaint alleges claims that fall within the policy. The claims do not necessarily need to result in indemnification in order to trigger the duty to defend.

61. *Shapiro v. Am. Home Assurance Co.*, 616 F. Supp. 906, 913 (D. Mass. 1985) (duty to reimburse defense costs is at least as broad as the duty to defend under traditional liability insurance provisions).

62. *See Wedtech Corp. v. Fed. Ins. Co.*, 740 F. Supp. 214, 221 (S.D.N.Y. 1990); *see also Md. Cas. Co. v. Peppers*, 355 N.E.2d 24, 28 (Ill. 1976) (allegations of the complaint determine duty to defend); *W. Cas. & Sur. Co.*, 534 N.E.2d at 1068 (duty to defend arises whenever allegations in the complaint are potentially covered).

63. *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) (insurer must pay defense costs as soon as attorney’s fees are incurred regardless of the final disposition of the case).

64. *See, e.g., Rice v. Liberty Surplus Ins. Corp.*, 113 F. App’x 116, 121 (6th Cir. 2004) (coverage was precluded because a dishonesty exclusion applied); *Am. Cas. Co. of*

giving rise to the application of the exclusion are clear, such as in cases of corporate fraud, illegal chemical dumping, and other deceptive activities.<sup>65</sup> However, the more difficult cases addressed by courts involve events that do not clearly trigger an exclusion and, therefore, must be litigated by the insurer and the insured to determine whether the insurer must advance defense costs.<sup>66</sup> These situations can arise in either of two ways: (1) the facts might not be clearly defined at the time of the dispute, such that the court cannot conclude that an exclusion will definitely apply to a given circumstance,<sup>67</sup> or (2) the language of the policy itself might be ambiguous as to whether a certain substance would qualify as an excluded substance under the policy.<sup>68</sup>

When the facts are not clearly defined at the start of the litigation, courts are generally consistent in holding that insurers must advance defense costs until one of the exclusions definitely applies to the situation.<sup>69</sup> In these cases, the burden is on the insurer to definitively establish that an exclusion applies to the circumstances in dispute.<sup>70</sup> Therefore, where an insurer cannot show that an exclusion definitely applies, courts adopt a “wait and see” approach, such that the court will order advancement of defense costs until it can be determined whether an exclusion should have applied.<sup>71</sup> Overall, because insurers can recover the defense costs from the insured at a later time, if the insurer can

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Reading, PA v. FDIC, 39 F.3d 633, 642 (6th Cir. 1994) (regulatory exclusion barred coverage).

65. See, e.g., *Rice*, 113 F. App'x at 121 (coverage was precluded because a dishonesty exclusion applied); *Nat'l Union Fire Ins. Co. of Pittsburgh v. U.S. Liquids, Inc.*, 88 F. App'x 725, 726 (5th Cir. 2004) (per curiam) (insurer was not required to defend its insured because the facts alleged in the complaint triggered the pollution exclusion).

66. See *Stratton v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 03-CV-12018-RGS, 2004 U.S. Dist. LEXIS 17613, at \*15 (D. Mass. Sept. 3, 2004) (attempting to discern whether use of the word “successor” created underlying ambiguity in the policy); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 389 (D. Del. 2002) (attempting to resolve underlying ambiguity in an insurance policy).

67. *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, No. 06C-11-108 RRC, 2007 WL 1811265, at \*12 (Del. Super. Ct. June 20, 2007) (adopting a “wait and see” approach in determining whether an exclusion would ever apply).

68. See *Stratton*, 2004 U.S. Dist. LEXIS 17613, at \*15; *Alstrin*, 179 F. Supp. 2d at 389.

69. See *PepsiCo, Inc. v. Cont'l Cas. Co.*, 640 F. Supp. 656, 666 (S.D.N.Y. 1986); *Sun-Times Media*, 2007 WL 1811265, at \*12 (“Even if it were shown at a later time that the exclusions apply, this still does not prevent the advancement of defense costs at the present time. . .”).

70. See *Shapiro v. Am. Home Assurance Co.*, 616 F. Supp. 906, 913 (D. Mass. 1985) (insurers’ duty to show the policy does not cover the claim); *Int'l Paper Co. v. Cont'l Cas. Co.*, 320 N.E.2d 619, 621 (N.Y. 1974) (same).

71. *Sun-Times Media*, 2007 WL 1811265, at \*12.

ultimately show the exclusion will apply to the events at issue, courts award defense costs when it is unclear whether an exclusion applies.<sup>72</sup>

Even more problematic for courts is the situation where the policy itself contains ambiguous terms.<sup>73</sup> In the case of pollution exclusions, courts deal with whether or not certain substances are excluded under a policy.<sup>74</sup> While courts generally hold that any ambiguity is resolved against the drafting party,<sup>75</sup> the circuit courts have split over what exactly constitutes an “ambiguous” term.<sup>76</sup> Because an insurance contract is governed by basic contract law, interpretation of certain terms depends on whether the court is willing to allow extrinsic evidence.<sup>77</sup> While some courts are willing to look beyond the plain language of the policy in order to discern the intent of the parties in drafting the exclusion,<sup>78</sup> other courts simply look at the language in the policy without examining any extrinsic evidence.<sup>79</sup> A refusal to admit extrinsic evidence can be particularly harsh for insurers because even one ambiguous term in the exclusion can result in the inapplicability of the exclusion and force an

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72. *Id.* (if it is later found that insured was not entitled to defense costs, insurer can recoup that money). *But see* O’LEARY, *supra* note 15, at 110 (recoupment of defense costs not allowed unless specifically provided in the policy).

73. *See, e.g.,* *Stratton*, 2004 U.S. Dist. LEXIS 17613, at \*15 (attempting to discern whether use of the word “successor” created underlying ambiguity in the policy); *Alstrin*, 179 F. Supp. 2d at 389 (attempting to resolve underlying ambiguity in an insurance policy).

74. *Owens Corning Fiberglas Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, No. 3.95 CV 7700, 1997 U.S. Dist. LEXIS 24255, at \*18-19 (N.D. Ohio Mar. 10, 1997) (discussing whether asbestos was a pollutant).

75. *See* *Nat’l Union Fire Ins. Co. of Pittsburgh v. U.S. Liquids, Inc.*, 88 F. App’x 725, 728 (5th Cir. 2004) (per curiam) (if court finds an ambiguity, court should construe the policy strictly against insurer); *Okada v. MGIC Indem. Corp.*, 795 F.2d 1450, 1454 (9th Cir. 1986) (ambiguous language in D&O policy must be resolved in favor of insured under Hawaiian law); *In re Worldcom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) (when ambiguity exists that cannot be resolved by extrinsic evidence, such ambiguity is read against the insurer); *Little v. MGIC Indem. Corp.*, 649 F. Supp. 1460, 1463 (W.D. Pa. 1986), *aff’d*, 836 F.2d 789 (3d Cir. 1987) (Pennsylvania law construes an ambiguous provision against drafting party).

76. *See Okada*, 795 F.2d at 1454 (finding ambiguity in D&O policy because the policy did not state what claims it was intended to cover). *Compare with* *PepsiCo, Inc. v. Cont’l Cas. Co.*, 640 F. Supp. 656, 659-60 (S.D.N.Y. 1986) (D&O policy unambiguously obligated insurer to pay defense costs as they were incurred).

77. *See* *Employers Ins. of Wausau v. Duplan Corp.*, 899 F. Supp. 1112, 1122 (S.D.N.Y. 1995) (discussing whether to allow extrinsic evidence and holding that extrinsic evidence was disallowed).

78. *See In re Worldcom*, 354 F. Supp. 2d at 464 (seemingly willing to consider extrinsic evidence); *Fid. & Deposit Co. of Md. v. Zandstra*, 756 F. Supp. 429, 431 (N.D. Cal. 1990) (noting the purpose behind a certain “insured v. insured” exclusion was to prevent collusive lawsuits).

79. *Daburlos v. Commercial Ins. Co. of Newark*, 521 F.2d 18, 26 (3d Cir. 1975) (disallowing extrinsic evidence to show intent in an insurance case).

advancement of defense costs.<sup>80</sup> Even in jurisdictions allowing extrinsic evidence, a problem may still arise with future interpretations of the pollution exclusions in a D&O policy if there is not enough evidence to show that the pollution exclusion was intended to include greenhouse gases. Science experts disagree as to whether greenhouse gases constitute pollution,<sup>81</sup> and it is likely that courts interpreting the term “pollution” contained in many D&O insurance policies will reach a similar split.

## 2. *Interpretation of Airborne Pollutants in General Liability Insurance*

Although courts have yet to examine whether carbon dioxide is a pollutant in a D&O context, courts might look to similar language in a general liability insurance policy in order to guide their determination. An examination of whether carbon dioxide is considered a pollutant under a general insurance policy might help a court determine whether the same logic should apply in a D&O context. However, even an examination of general insurance policies is problematic. In the general insurance context, the circuit courts have split over whether certain airborne pollutants, similar in chemical structure to carbon dioxide, are in fact pollutants.<sup>82</sup> Although few cases directly consider carbon dioxide, an examination of the courts’ treatment of other airborne chemicals, such as carbon monoxide, shows just how much difficulty courts have had in defining “pollutant.”<sup>83</sup>

Some courts have interpreted the pollution exclusion in a general liability insurance policy broadly in favor of the insurer. In

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80. *See Employers Ins. of Wausau*, 899 F. Supp. at 1122 (resolving ambiguity of policy terms against insurer and ordering a large advancement of defense costs).

81. Begley, *supra* note 5, at 20.

82. *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997 (4th Cir. 1998) (holding carbon monoxide was a pollutant and therefore the pollution exclusion applied); *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047 (Md. Ct. Spec. App. 1994) (holding that carbon monoxide was a pollutant that fell within the pollution exclusion); *see also* *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38 (D. Mass. 1994) (holding that carbon monoxide falls within the pollution exclusion). *But see* *Reg'l Bank of Col., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494 (10th Cir. 1994) (holding carbon monoxide was not a pollutant covered by the exclusion); *Am. States Ins. Co. v. Koloms* 687 N.E.2d 72 (Ill. 1997) (holding carbon monoxide was not a pollutant covered by the pollution exclusion); *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997) (holding carbon dioxide was a natural product of respiration and not covered by the pollution exclusion).

83. *Compare Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d at 1047 (holding that carbon monoxide was a pollutant that fell within the pollution exclusion), *with Reg'l Bank of Col., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d at 494 (holding carbon monoxide was not a pollutant covered by the exclusion).

*Assicurazioni Generali, S.p.A. v. Neil*,<sup>84</sup> after hotel guests suffered from carbon monoxide poisoning, the Fourth Circuit determined carbon monoxide was a pollutant.<sup>85</sup> The incident arose out of an accident at a Holiday Inn in Florida.<sup>86</sup> Assicurazioni Generali, S.p.A issued the insurance policy, which contained an absolute pollution exclusion that defined pollutants as “smoke, vapors, soot, fumes, acids, sounds, alkalis, chemicals, liquids, solids, gases, thermal pollutants and all other irritants or contaminations.”<sup>87</sup> Additionally, the clause excluded “the contamination of *any* environment by pollutants that are introduced *at any time, anywhere, in any way*.”<sup>88</sup> The court reasoned that the definition of pollution was very broad and naturally encompassed carbon monoxide because it was either a “fume,” a “vapor” or a “gas,” as defined by the exclusion.<sup>89</sup> The court also held that the absolute pollution exclusion was unambiguous as it was stated in the policy.<sup>90</sup>

Similarly, in *Bernhardt v. Hartford Fire Insurance Company*,<sup>91</sup> the Court of Special Appeals of Maryland held that carbon monoxide was a substance that fell within the total pollution exclusion of the insurance policy.<sup>92</sup> The court first examined the policy and attempted to determine whether the language of the policy was ambiguous.<sup>93</sup> The court stated,

Language can be regarded as ambiguous in two different respects: (1) it may be intrinsically unclear, in the sense that a person reading it without the benefit of some extrinsic knowledge simply cannot determine what it means; or (2) its intrinsic meaning may be fairly clear, but its application to a particular object or circumstance may be uncertain.<sup>94</sup>

In applying this test, the court determined that the absolute pollution exclusion was clear and unambiguous, and therefore, coverage for carbon monoxide was precluded.<sup>95</sup>

Although neither *Assicurazioni Generali* nor *Bernhardt* discussed carbon dioxide, these cases and others<sup>96</sup> interpret gaseous substances as

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84. 160 F.3d at 997.

85. *Id.* at 1006.

86. *Id.* at 999.

87. *Id.* at 999-1000.

88. *Id.* at 1000 (emphasis in original).

89. *Id.* at 1006.

90. *Id.* at 999.

91. 648 A.2d 1047 (Md. Ct. Spec. App. 1994).

92. *Id.* at 1052.

93. *Id.* at 1051.

94. *Id.*

95. *Id.* at 1052.

pollutants excluded by the pollution exclusion. Using the rationale developed in these cases, future courts could also interpret carbon dioxide to be a gas or chemical irritant that would be excluded under the policy.<sup>97</sup> However, despite the persuasive logic of holding certain airborne pollutants excluded under the policy, there is a split in authority in determining which gaseous substances constitute “pollutants.”<sup>98</sup>

Contrary to the holdings in the above cases, in *Regional Bank of Colorado, N.A. v. St. Paul Fair and Marine Insurance Company*,<sup>99</sup> the United States Court of Appeals for the Tenth Circuit determined that carbon monoxide was not a pollutant excluded under the policy.<sup>100</sup> In that case, pollutants were defined as “smoke, vapors, soot, fumes; acids, alkalis, chemicals; and waste.”<sup>101</sup> Much like in *Bernhardt*, the court examined the language of the policy to determine ambiguity and attempted to define the words in accordance with what an ordinary policyholder might determine the words to mean.<sup>102</sup>

Although the court did not directly address whether the policy was in fact ambiguous, the court stated that it would reach the same result regardless.<sup>103</sup> The court conceded that a person of reasonable intellect might consider carbon monoxide a pollutant, but it reasoned that an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a faulty heater as “pollution.”<sup>104</sup> The court also rejected the argument that carbon monoxide was an irritant, reasoning that if irritant included carbon monoxide, the definition of irritant would be virtually boundless.<sup>105</sup> The court determined that the term pollutant should be confined to substances generally thought of as pollutants.<sup>106</sup>

Likewise, the Supreme Court of Illinois in *American States Insurance Company v. Koloms*<sup>107</sup> held that carbon monoxide was not a pollutant within the meaning of the exclusion.<sup>108</sup> In this case, the

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96. See *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997 (4th Cir. 1998); *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38 (D. Mass. 1994); *Bernhardt*, 648 A.2d at 1047.

97. See Cole et al., *supra* note 22 (discussing interpretation of insurance policy terms in general liability insurance).

98. Compare *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d at 1047, with *Reg'l Bank of Col., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494 (10th Cir. 1994).

99. 35 F.3d at 494.

100. *Id.* at 498.

101. *Id.* at 496.

102. *Id.*

103. *Id.* at 497.

104. *Id.*

105. *Id.*

106. *Id.* at 497-98.

107. 687 N.E.2d 72 (Ill. 1997).

108. *Id.* at 82.

employees of a commercial building brought suit against the owners of the property, alleging fumes emitted by a defective furnace caused them injury.<sup>109</sup> Once again, the issue was before the court because the owners of the property wanted the insurer to reimburse their costs. The subject of litigation was the meaning of the term “pollutants.”<sup>110</sup> In rejecting the notion that carbon monoxide was a pollutant, the court determined that the claims did not involve a hazard traditionally associated with environmental pollution.<sup>111</sup> The court stated that the accidental release of carbon monoxide is beyond the scope of environmental pollution covered by the clause.<sup>112</sup>

Finally, in *Donaldson v. Urban Land Interests, Incorporated*,<sup>113</sup> the Supreme Court of Wisconsin reversed the grant of summary judgment and determined that carbon dioxide was not a pollutant under the pollution exclusion.<sup>114</sup> The court refused to place a natural product of respiration in the same class as “smoke, vapor, soot, fumes, alkalis, chemicals and waste” defined in the policy.<sup>115</sup> Furthermore, after considering the exclusion as a whole, the court determined that the insurance company’s definition was ambiguous.<sup>116</sup> The court concluded its analysis by stating that, even if intent were examined, the reasonable insured would not understand that the pollution exclusion would deny coverage for something as natural and universally present as carbon dioxide.<sup>117</sup>

Given the split over airborne pollutants in a general liability policy, such a split might occur if a similar issue were presented in the D&O context. Section III will examine how the circuit split in the general liability context could produce even greater, and more pronounced problems for D&O insurers.

#### *D. Background of Global Warming Litigation*

Although global warming litigation has not yet affected directors and officers directly,<sup>118</sup> an increasing number of cases have alleged

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109. *Id.* at 74.

110. *Id.*

111. *Id.* at 81.

112. *Id.* at 82.

113. 564 N.W.2d 728 (Wis. 1997).

114. *Id.* at 733.

115. *Id.* at 732-33.

116. *Id.* at 733.

117. *Id.* at 732.

118. See MONTELEONE, *supra* note 13, at 3 (examining current trends and stating how eventually directors and officers might be linked to global warming).



damages based on global warming.<sup>119</sup> Additionally, the growing number of claims against businesses based on contribution to global warming indicates that directors and officers might be targets in the near future.<sup>120</sup> In order to examine just how directors and officers might become involved in such global warming cases, one must understand how courts have dealt with other cases involving global warming.

The proliferation of global warming claims is highlighted by *Comer v. Nationwide Mutual Insurance Company*.<sup>121</sup> In *Comer*, the plaintiffs wanted the court to certify a defendant class composed of three chemical companies.<sup>122</sup> These companies had allegedly damaged plaintiffs' property by emitting greenhouse gases that contributed to global warming.<sup>123</sup> The plaintiffs demanded that the various chemical and oil companies be held accountable for contributing to global warming that exacerbated the strength of Hurricane Katrina.<sup>124</sup> Perhaps indicating a growing trend in global warming litigation, the court allowed the certification of the class action.<sup>125</sup> However, the judge cautioned plaintiffs as to the difficulty in proving the case and noted potential evidentiary problems as well as the sharp difference of opinion in the scientific community concerning the causes of global warming.<sup>126</sup>

*Comer* indicates a willingness by courts to allow parties to proceed with claims directly related to global warming.<sup>127</sup> While the judge noted difficulties in proof and the ambiguity of any claim based on alleged contribution to global warming, the case was allowed to proceed.<sup>128</sup> *Comer* highlights potential problems for other companies whose actions might contribute to global warming.<sup>129</sup> By allowing such a case to proceed, the *Comer* court opened the door to actions directly related to global warming.<sup>130</sup>

Much like *Comer*, *Friends of the Earth, Incorporated v. Mosbacher*<sup>131</sup> arose out of plaintiffs' desire to combat the effects of

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119. *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007); *Comer v. Nationwide Mut. Ins. Co.*, No 1:05CV436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123 (S.D. Miss. Feb. 23, 2006); see also Cole et al., *supra* note 22.

120. See MONTELEONE, *supra* note 13, at 3.

121. 2006 U.S. Dist. LEXIS 33123.

122. *Id.* at \*5.

123. *Id.*

124. *Id.*

125. *Id.* at \*12.

126. *Id.* (stating the difficulty of proving by a preponderance of the evidence how much defendants contributed to global warming).

127. *Id.*

128. *Id.* at \*12-13.

129. *Id.*

130. *Id.*

131. 488 F. Supp. 2d 889 (N.D. Cal. 2007).

global warming.<sup>132</sup> In this case, the plaintiffs sued defendants for contributing financial aid to projects that allegedly contributed to global warming.<sup>133</sup> The California District Court noted the effects of global warming and the increased public awareness concerning climate change.<sup>134</sup> Although the court appeared skeptical about claims relating to global warming, the court eventually allowed the plaintiffs to proceed with part of the claim.<sup>135</sup> Once again, the court's willingness to entertain such a claim illustrates that cases relating to global warming will become more prevalent in the near future.

Perhaps the most noteworthy case discussing the implications of global warming is *Massachusetts v. EPA*.<sup>136</sup> In this case, Massachusetts challenged the EPA's authority to regulate, as prescribed by the Clean Air Act, the emissions of greenhouse gases.<sup>137</sup> Prior to the lawsuit, the EPA had declined to regulate greenhouse gases because it believed that regulation was unwise and not mandated by the Clean Air Act.<sup>138</sup> Massachusetts, along with other states, challenged the EPA, alleging that the Clean Air Act mandated EPA regulation of greenhouse gases.<sup>139</sup>

The Supreme Court began its analysis by calling climate change "the most pressing environmental challenge of our time."<sup>140</sup> The Court also noted that a causal link between greenhouse gases and global warming has never been firmly established.<sup>141</sup> However, even with the ambiguity surrounding global warming and its causes, the Court focused its attention on the statutory construction of the Clean Air Act to determine whether the EPA was required to regulate emissions of greenhouse gases.<sup>142</sup>

In a 5-4 decision, the majority held that carbon dioxide was a pollutant as defined by the statute.<sup>143</sup> In interpreting the statute to define carbon dioxide as a pollutant, the Court considered the sweeping definition of "air pollutant" that included "any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air."<sup>144</sup> The Court determined that the definition was

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132. *Id.* at 891.

133. *Id.* at 892.

134. *Id.* (examining the increase of scientific studies examining global warming).

135. *Id.* at 891 (Defendants' cross motion for summary judgment was granted in part and denied in part).

136. 127 S. Ct. 1438 (2007).

137. *Id.* at 1447.

138. *Id.* at 1450.

139. *Id.* at 1446.

140. *Id.*

141. *Id.* at 1451.

142. *Id.* at 1447.

143. *Id.* at 1463.

144. *Id.* at 1460 (emphasis in original).

designed to be overly broad, as shown by the repeated use of the word “any.”<sup>145</sup> The Court declared that the statute was “unambiguous.”<sup>146</sup>

Even though the majority concluded the statute was unambiguous, not all members of the Court agreed. Justice Scalia wrote a dissenting opinion in which he criticized the majority’s characterization of carbon dioxide.<sup>147</sup> Scalia highlighted the fact that no link between the buildup of greenhouse gases and the current climate change has ever been established.<sup>148</sup> Scalia noted the complexity and evolving nature of climate change theory and stated that only future study could eliminate uncertainty and give guidance as to the best way to combat global warming.<sup>149</sup> Additionally, Scalia commented that carbon dioxide is a naturally occurring substance throughout the world’s atmosphere.<sup>150</sup> He stated that regulation of a naturally occurring substance “is not akin to regulating the concentration of some substance that is *polluting* the *air*.”<sup>151</sup>

Not only did Scalia criticize the scientific studies attempting to link greenhouse gases to global warming, but he also noted how the definition of air pollutants might not encompass greenhouse gases.<sup>152</sup> Scalia agreed with the EPA’s characterization of carbon dioxide, which was that carbon dioxide did not merit regulation, and stated that the definition of “air pollutant” must be viewed in its entirety.<sup>153</sup> According to Scalia, in order to qualify as an “air pollutant,” the substance should also qualify as an “air pollution agent.”<sup>154</sup> Scalia also warned that the majority opinion implicitly held “that *everything* airborne, from Frisbees to flatulence, qualifies as an ‘air pollutant.’”<sup>155</sup>

The importance of *Massachusetts v. EPA* cannot be understated. Not only is it the first time the Supreme Court has considered the issue of global warming and greenhouse gases, but it is also an illustration of the ambiguities surrounding global warming.<sup>156</sup> Even though the majority holding appears to resolve the question of whether carbon dioxide is a pollutant under the Clean Air Act, the question remains as to whether the holding is limited to the Clean Air Act, or whether it also covers other

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145. *Id.*

146. *Id.*

147. *Id.* at 1474 (Scalia, J., dissenting).

148. *Id.*

149. *Id.*

150. *Id.* at 1477.

151. *Id.* (emphasis in original).

152. *Id.* at 1475-76.

153. *Id.* at 1476.

154. *Id.* at 1476.

155. *Id.* at 1476 n.2 (emphasis in original).

156. *Id.* at 1474.

pollution-related issues, such as the pollution exclusions in a D&O insurance policy.<sup>157</sup> The inability to answer this question presents difficult challenges for companies offering D&O insurance policies.<sup>158</sup>

### III. ANALYSIS

With the rapid increase of “global warming litigation,” there is a possibility that actions alleging contribution to global warming will be levied at directors and officers of publicly traded companies.<sup>159</sup> This section will offer an illustration of how directors and officers might become involved in global warming litigation and examine why the ambiguity surrounding carbon dioxide presents problems in determining insurance coverage. Section III(B) will discuss why the current circuit split in general liability insurance is likely to carry over to D&O insurance, and Section III(C) will discuss why this potential circuit split regarding coverage would be particularly troublesome for insurance providers in a D&O insurance context. Finally, Section III(D) will examine how a court should attack the problem and conclude that the most equitable result would be for the court to find that the insurer must advance defense costs for directors and officers in global warming litigation.

#### A. *Illustrating the Problem*

It was not long ago that liability for global warming was unthinkable.<sup>160</sup> However, increased litigation spawned by global warming means claims against directors and officers are now a very real possibility.<sup>161</sup> These global warming actions could potentially take two forms: (1) a class action lawsuit; and (2) a shareholder derivative action.

As discussed in *Comer*, it is possible that a class action will be brought alleging that a corporation’s actions contributed to global warming.<sup>162</sup> Instead of suing the corporation, plaintiffs could sue the directors and officers managing the business. Directors and officers would be targets because, by increasing productivity at automotive

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157. See Cole et al., *supra* note 22, at 970 (discussing how the majority holding in *Massachusetts v. EPA* does not resolve whether carbon dioxide is a pollutant under a general liability insurance policy).

158. See *infra* Section III.

159. See MONTELEONE, *supra* note 13, at 3.

160. *Id.* at 2.

161. *Id.*; see also Cole et al., *supra* note 22 (discussing the necessity of general liability insurance for global warming cases).

162. *Comer v. Nationwide Mut. Ins. Co.*, No 1:05CV436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123, at \*5 (S.D. Miss. Feb. 23, 2006).

plants, oil refineries, and other chemical companies, they might face liability for decisions placing productivity over environmental protection.

Although the class action approach is a possibility, the future most likely involves shareholder derivative actions<sup>163</sup> alleging that corporate directors and officers flouted regulations of carbon dioxide.<sup>164</sup> In addition to claims for breach of carbon emission statutes, conscientious shareholders might seek to bring actions against directors and officers in order to decrease the output of carbon dioxide. These shareholders might allege that directors and officers failed to use due care<sup>165</sup> in properly managing the business.<sup>166</sup>

### 1. *A Hypothetical Claim*

In order to demonstrate what the future holds for corporate directors and officers, a brief hypothetical will be used to illustrate potential liability for global warming claims. This hypothetical will also demonstrate how D&O insurers would enter the lawsuit and pay defense costs and settlement fees for actions directly related to global warming.

With the majority holding in *Massachusetts v. EPA*, the future will see a proliferation of carbon emissions statutes designed to reduce levels of greenhouse gases, most notably carbon dioxide.<sup>167</sup> Presumably, the passage of such measures would increase the number of shareholder derivative actions.<sup>168</sup> An increase would occur because now shareholders could allege a breach of the fiduciary duty of care for failure to abide by the government mandated provisions and for failure to invest more in technologies to curb carbon emissions.<sup>169</sup>

Additionally, the derivative action form and the class action form could “double up,” meaning that one action could directly result in more

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163. A shareholder derivative action is “a suit asserted by a shareholder on the corporation’s behalf against a third party (usu. a corporate officer) because of the corporation’s failure to take some action against the third party.” BLACK’S LAW DICTIONARY 475 (8th ed. 2004).

164. See MONTELEONE, *supra* note 13, at 4 (discussing the possibility of derivative actions in cases involving global warming); see also O’LEARY, *supra* note 15, at xi (discussing the increasing difficulty of resolving derivative lawsuits).

165. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 53 (Del. 2006) (discussing the duty of care and concluding directors have a duty to not act in a negligent way when managing the company).

166. See MONTELEONE, *supra* note 13, at 4 (examining how shareholders might bring an action against directors and officers for flouting regulatory guidelines, failing to invest more in energy-friendly technology, and losing favorable settlement opportunities).

167. See *id.*

168. See *id.* (discussing how shareholders would have standing to assert derivative actions).

169. See *id.* (discussing how an action could be brought for flouting a regulatory guideline).

claims. Assume, for example, that a class action is brought for “contribution to global warming.” The impact of this class action could directly affect the shareholders because a company might not be willing to settle a case alleging something as ambiguous as a “contribution to global warming.” Refusal to settle might unnecessarily prolong litigation, which would result in the company incurring greater legal fees in defense of the action.<sup>170</sup> Diverting money for legal fees could cause shareholders to lose money because the corporation would have less money available to pay dividends. In addition to shrinking dividends, the corporation would also have less money available to repay corporate debts or engage in strategic acquisitions. This lack of capital might damage the corporation and serve as a basis for a shareholder derivative claim.

Moreover, refusal to settle might affect the corporation’s sales because of negative implications associated with global warming. American consumers, with newfound awareness of global warming issues, might be less willing to buy products from a company that is in any way associated with global warming. This refusal to buy would cause a downturn in profits and reduce the value of the corporate stock.<sup>171</sup> The sinking value of the company would provide an additional basis for a shareholder derivative claim.

The downturn in stock prices coupled with shrinking dividends would likely cause the shareholders to sue demanding accountability for “loss” incurred as a result of defending the class actions or breaching the carbon emissions statutes.<sup>172</sup> The shareholders would allege that prolonged defense of the case ultimately harmed the company, and because of this harm, the directors failed in their duty of care.<sup>173</sup> Additionally, shareholders might even allege that prolonged defense of such ambiguous claims amounted to corporate waste<sup>174</sup> because a settlement could have quickly resolved the dispute without a large expenditure of funds.

The claims of the shareholders would likely trigger the D&O insurance policy because such claims generally fall within the definition of loss. As soon as an action alleges a claim for “loss” covered by the D&O insurance policy, it is the duty of the insurance company to begin

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170. *See id.* (discussing how protracted litigation could lead to liability for loss).

171. *See id.*

172. *See id.*

173. *See id.*

174. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (a claim for corporate waste arises when a director squanders resources or irrationally gives away corporate assets).

advancing defense costs.<sup>175</sup> Insurance companies are required to advance defense costs regardless of the likelihood of success on the substantive claims,<sup>176</sup> and given the difficult problems of proving a breach of the fiduciary duty of care, success for the plaintiffs is unlikely.<sup>177</sup> However, this brief example serves to illustrate how directors and officers could face increased liability due to global warming and the willingness of courts to allow plaintiffs to proceed with cases alleging global warming.<sup>178</sup>

*B. Applying the Circuit Split Identified in General Liability Insurance to D&O Insurance*

While directors and officers face great liability, the insurance companies that protect them perhaps face a greater problem. Under the basic structure of the D&O policy, it is the duty of the insurance company to advance the defense costs associated with the actions.<sup>179</sup> Although plaintiffs are unlikely to succeed in proving a breach of the duty of care,<sup>180</sup> the insurance companies are the ones advancing the defense costs, and, ultimately, losing money.<sup>181</sup> Although the insurance company can point to the pollution exclusion in an effort to escape payment, the issue of whether carbon dioxide is a pollutant is far from settled.<sup>182</sup>

Even though the Supreme Court classified carbon dioxide as a pollutant subject to EPA regulation, the narrow split within the Court suggests the outcome might be different if the issue was raised in a different context, such as with D&O insurance.<sup>183</sup> Given the ambiguity over statutory language similar to the D&O pollution exclusion in *Massachusetts v. EPA*, the question is how a court would interpret the

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175. See *PepsiCo, Inc. v. Cont'l Cas. Co.*, 640 F. Supp. 656, 659 (S.D.N.Y. 1986); see also *W. Cas. & Sur. Co., v. Adams County*, 534 N.E.2d 1066, 1068.

176. See *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005).

177. See *In re Walt Disney Co.*, 906 A.2d at 53 (the difficulty of proving breach of duty of care is great because business decisions are protected by the business judgment rule).

178. See *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007); *Comer v. Nationwide Mut. Ins. Co.*, No 1:05CV436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123 (S.D. Miss. Feb. 23, 2006).

179. See *In re WorldCom*, 354 F. Supp. 2d at 464.

180. See *In re Walt Disney Co.*, 906 A.2d at 53.

181. See *In re WorldCom*, 354 F. Supp. 2d at 464 (insurer must pay defense costs as soon as attorney's fees are incurred regardless of the final disposition of the case).

182. See Begley, *supra* note 5, at 20 (noting the impact of the global warming denial machine and the "scientific uncertainty" that surrounds the subject).

183. See Cole et al., *supra* note 22.

exclusion in a case purely about a D&O insurance policy.<sup>184</sup> Arguably, the Supreme Court decision resolved the issue of whether carbon dioxide was a pollutant, but the holding may be limited to the issue of regulation under the Clean Air Act.<sup>185</sup> Moreover, the holding might not even be deemed relevant to interpreting similar language in an insurance policy.<sup>186</sup>

In fact, a better argument is that courts will rely on interpretations of general liability insurance exclusions when attempting to define carbon dioxide as a pollutant in a D&O insurance case. Analysis of a general liability policy would assume greater importance because general liability pollution exclusions are in the realm of insurance contracts, as are D&O policies. Therefore, when the issue arises in the field of D&O insurance, courts might be more willing to rely on relevant precedent from their own jurisdiction, while distinguishing *Massachusetts v. EPA* on the grounds that it was a case about regulation, rather than contract.

However, relying on general liability insurance cases to determine whether carbon dioxide is a pollutant would most likely create a similar circuit split to that discussed *supra* Section II(C)(2). Some courts might apply the rationale used in *Assicurazioni Generali, S.p.A. v. Neil* and conclude that the use of the word “any” truly means all airborne gases including carbon dioxide.<sup>187</sup> In that case, the exclusion would apply, and the insurer’s duty to advance defense costs for global warming litigation would not be triggered. Other courts might instead rely on *Donaldson v. Urban Land Interests, Incorporated* and conclude that the use of the word “any” is overly broad and therefore ambiguous.<sup>188</sup> This would mean that insurance companies would be forced to advance defense costs for all global warming claims.

Even if one jurisdiction determined that carbon dioxide was a pollutant excluded under the policy, it is unlikely that all other jurisdictions would uniformly adopt the holding because of the current split of authority interpreting general liability insurance policies.<sup>189</sup> The refusal to adopt a uniform holding on whether carbon dioxide is excluded from coverage would create problems for insurers because D&O

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184. See MONTELEONE, *supra* note 13, at 6 (commenting on how the issue of carbon dioxide as a pollutant is unresolved in the context of a pollution exclusion).

185. See *id.*

186. See *id.*; see also Cole et al., *supra* note 22.

187. *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1006 (4th Cir. 1998) (finding that carbon monoxide was a pollutant and therefore the pollution exclusion applied).

188. See *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728, 733 (Wis. 1997) (stating the pollution exclusion was ambiguous as related to carbon dioxide because a reasonable person would not consider a product of respiration a pollutant).

189. See discussion of circuit split *supra* Section II(C)(2).



insurance companies would be left funding litigation over emissions of carbon dioxide. While funding this litigation, insurers would also be battling against the directors and officers over whether carbon dioxide was in fact excluded under the policy as a pollutant.

*C. What the Circuit Split Would Mean: Two Options*

The potential for a circuit split in the D&O context only exacerbates the situation seen in the general liability context because, unlike in general liability cases, D&O insurers do not directly control the litigation. Although the current ambiguity surrounding airborne pollutants forced general liability insurance companies to pay in unforeseen circumstances, the problem with increased costs for the insurer was ultimately contained because the insurance company actually defends the insured and retains direct control over the litigation.<sup>190</sup> Retaining control over the litigation is a very important feature in a general liability policy because the insurer still has the option to settle at anytime and avoid further costs. In fact, given the potentially high costs for proving a “global warming case,” settlement actually might be preferable to protracted litigation, which could serve to exhaust insurance resources.

In contrast to general liability insurers, D&O insurers do not have the option of simple settlement, so as to avoid further costs of litigation. Because of the structure of the policies, the defense of the directors and officers is a decision left to the directors and officers themselves, with the insurers funding only the defense costs.<sup>191</sup> Although settlement still might be an option for the directors and officers, it is doubtful that settlement would be as prevalent because the directors and officers are free to defend themselves with the insurance company’s money. Indeed, settlement is often associated with admitting fault, which is something directors and officers will seek to avoid. Access to capital, coupled with the recent awareness and stigma attached to global warming, means that directors and officers would actually want to put up a rigorous defense in order to distance themselves from assertions that their actions exacerbated or contributed in any way to global warming. In order to maintain their positive images, as well as their positions in the company, directors and officers will most likely want to defend the action rather than settle.

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190. The duty to defend is “[t]he obligation of an insurer to provide an insured with a legal defense against claims of liability, within the terms of the policy.” BLACK’S LAW DICTIONARY 544 (8th ed. 2004).

191. See O’LEARY, *supra* note 15, at 99 (stating current terms of D&O insurance policies provide for advancement of defense costs rather than a specific duty to defend).

The desire of the directors and officers to maintain a rigorous defense ultimately means that D&O insurance companies could be funding protracted litigation associated with something as nebulous as global warming.<sup>192</sup> Although the judge in *Comer* observed the difficulty in proving a claim related to global warming,<sup>193</sup> the likelihood of success on the underlying claim would be irrelevant for D&O insurers because the duty to advance defense costs applies to any allegation that falls within the terms of the policy.<sup>194</sup> Presumably, much of the defense costs will be incurred as the directors and officers prepare for trial.<sup>195</sup> Even if the plaintiffs ultimately failed, D&O insurers would still be left with the millions of dollars in defense costs needed to prepare and maintain a successful defense.<sup>196</sup>

However, because of the difficulty in classifying carbon dioxide as an airborne pollutant, forcing advancement of defense costs is not a forgone conclusion.<sup>197</sup> The circuit split in the general liability context shows that a universal holding on whether carbon dioxide is a pollutant is a remote possibility.<sup>198</sup> However, courts willing to release D&O insurers from their duty to advance defense costs ultimately leave directors and officers funding the litigation themselves. Although this decision would greatly benefit D&O insurers, it might cause the financial ruin of smaller business entities that do not have the funding to maintain a rigorous defense. Additionally, this result might serve to exacerbate the number of global warming claims because companies paying the defense costs themselves might be more willing to settle the lawsuit rather than face the burden of paying huge defense bills. Furthermore, a settlement on a global warming issue could ruin a company due to the mere stigma associated with global warming. Shareholders of a corporation might refuse to be associated with global warming and, therefore, withdraw from the corporation.

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192. See *supra* Section III(A) and Section III(B).

193. *Comer v. Nationwide Mut. Ins. Co.*, No 1:05CV436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123, at \*5 (S.D. Miss. Feb. 23, 2006).

194. See *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005); see also *W. Cas. & Sur. Co., v. Adams County*, 534 N.E.2d 1066, 1068 (Ill. App. Ct. 1989).

195. See *In re WorldCom*, 354 F. Supp. 2d at 464.

196. See O'LEARY, *supra* note 15, at xi ("Six, seven, and eight-figure judgments and settlements are not uncommon," and the costs of derivative actions are continuing to increase).

197. See, e.g., *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728, 733 (Wis. 1997) (carbon dioxide was a natural product of respiration and not covered by the pollution exclusion).

198. See cases cited *supra* note 82.

*D. Understanding Ambiguity: Why Insurers Should Bear the Burden*

Although the potential for a circuit split involving interpretation of carbon dioxide in a D&O policy is great due to the current split in the general liability insurance context, courts should seek to avoid this result. A circuit split would create problems for both parties—the insured and the insurer—because coverage would be determined on a jurisdictional basis. Assessing coverage on a jurisdictional basis would result in numerous lawsuits between policyholders and insurance companies over whether carbon dioxide was covered in a particular jurisdiction.

In an effort to avoid a circuit split and the numerous lawsuits that would result, courts should seek to create a uniform interpretation on whether to exclude carbon dioxide from coverage. Courts should consider the purpose behind D&O insurance when crafting their decisions. Examining the purpose of D&O insurance is critical because it could influence judicial determination on whether to advance defense costs and offers the best way to avoid a potential circuit split. Although scientists disagree over whether a byproduct of human respiration (carbon dioxide) can be considered a pollutant,<sup>199</sup> courts generally hold that the purpose of D&O insurance is to allow people of all economic backgrounds to serve on a board of directors.<sup>200</sup> Forcing directors and officers to pay for their own defense in global warming cases would undermine the rationale for having D&O insurance because those unable to afford the price of a global warming lawsuit would be less likely to serve on corporate boards. By not forcing insurance companies to fund the defense costs, the courts would effectively undermine the justification behind D&O insurance.

In order to uphold the purpose and policy reasons for obtaining D&O insurance, courts should take the approach outlined in *Donaldson* and conclude that the wording of the absolute pollution exclusion is ambiguous.<sup>201</sup> This approach would force insurers to advance defense costs. Although critics might argue that this option runs contrary to the majority opinion in *Massachusetts v. EPA*,<sup>202</sup> such a decision preserves the underlying policy reasons for purchasing D&O insurance. In fact, courts should not even consider whether carbon dioxide is a pollutant.

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199. See, e.g., Begley, *supra* note 5, at 20 (noting the impact of the global warming denial machine and the “scientific uncertainty” that surrounds the subject).

200. See *In re Worldcom*, 354 F. Supp. 2d at 469.

201. See *Donaldson*, 564 N.W.2d at 733 (holding that, as written in the policy terms, the definition of pollutant was ambiguous).

202. 127 S. Ct. 1438 (2007) (carbon dioxide was a pollutant deserving EPA regulation).

Instead, courts should focus on the wording of the policy in an effort to discern ambiguity. This method of interpretation circumvents the scientific determination of whether carbon dioxide is or is not a pollutant. Additionally, the current circuit split in general liability insurance actually demonstrates that reasonable minds are capable of reaching different determinations on similarly-worded exclusions, and therefore, supports an argument that the policy is ambiguous.<sup>203</sup>

Furthering public policy is not the only reason to force advancement of defense costs. In addition to upholding the purpose of D&O insurance, courts should consider which party is best suited to bear the burden and pay for the litigation. Ultimately, the burden should be on the insurance companies to specifically exclude carbon dioxide in the pollution exclusion if they want to avoid the coverage. As stated earlier, any ambiguity in the policy is resolved against the insurance company.<sup>204</sup> This principle is applied because the insurance company writes the policy and is in the best position to specifically define what is and what is not covered. If insurance companies want to exclude claims for global warming, they should specifically state this exclusion in the policies. Not only would this specifically-worded exclusion resolve any ambiguity, but it would also give directors and officers notice that the policy definitely does not cover global warming litigation. This advance notice might even strengthen the bargaining power of the directors and officers. If directors and officers believed claims for global warming might arise, they could demand coverage for global warming litigation.

Moreover, insurance companies are in the best position to protect themselves against potential claims for global warming. First, insurance companies can directly exclude claims arising from carbon dioxide or, if directors and officers are unwilling to allow such an exclusion, the insurance companies can simply raise premiums. In fact, raising premiums is probably the best method for insurance companies to address coverage for global warming litigation. A premium increase allows insurance companies to collect more money. It also expands the coverage terms of the policy, which is ultimately better for policyholders. Higher premiums for increased coverage are economically persuasive because increased coverage should cost more money. The recognition of potential liability allows the insurer to better calculate the risks and to charge accordingly.

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203. *Compare* *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047 (Md. Ct. Spec. App. 1994) (holding that carbon monoxide was a pollutant that fell within the pollution exclusion), *with* *Reg'l Bank of Col., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494 (10th Cir. 1994) (holding carbon monoxide was not a pollutant covered by the exclusion).

204. *Supra* Section II(C)(1).

Additionally, the insurance company can simply include a forum selection clause in the policy, whereby the insurance company would select a jurisdiction adopting a broad formulation of the pollution exclusion to resolve disputes.<sup>205</sup> Although directors and officers might protest the possibility of litigating in a foreign jurisdiction, the forum selection clause is the easiest way to ensure D&O insurers are not covering unanticipated events. Insurers could limit the forum to those jurisdictions that adopt a broad formulation of the pollution exclusion, thereby ensuring that the pollution exclusion truly does protect against “any” pollution in any form.

Furthermore, although little case law exists on the D&O pollution exclusion, D&O insurers could refer to the case law that interprets the similarly-worded general liability pollution exclusion. Because the general liability pollution exclusion has been more heavily litigated, insurance companies could achieve a more foreseeable result in certain jurisdictions where courts have interpreted the pollution exclusion in the general liability insurance context. The forum selection clause would allow the insurance companies access to better case law, and, perhaps, a more favorable result.

Finally, D&O insurers retain the option to simply alter the policies. As discussed earlier in this section, the main difference between the D&O policy and the general liability policy is that the D&O policy contains a duty to advance defense costs, which ultimately causes problems because of the ambiguity surrounding global warming. Should D&O insurers wish to completely eliminate any risk of paying for global warming, they could eliminate the duty to advance defense costs and convert the D&O policies so that they resemble general liability insurance policies. However, the success of changing the policies is debatable. There remains the question of what would happen to the D&O policies currently in force, and whether directors and officers would be interested in retaining D&O insurance without the advancement provision.

Regardless of which option the insurance company uses to regulate coverage of global warming lawsuits, it is ultimately the burden of the insurer to specifically exclude coverage. Courts need to recognize that insurance companies have a wide variety of options available and, therefore, the insurance companies should bear the burden of restructuring the policy. Insurance companies are in the best position to predict coverage issues and write the policies accordingly.

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205. See BLACK'S LAW DICTIONARY 681 (8th ed. 2004) (providing a definition of forum selection clause).

## IV. CONCLUSION

Protection is the key to any insurance policy. When people pay into the insurance plan, they hope they never have to use it. However, should a lawsuit arise, people also expect the insurance company to come to their defense. The same is true in both general liability insurance and D&O insurance. Although currently there are no claims against directors and officers for contribution to global warming, such claims are not as inconceivable as they once were.<sup>206</sup> Both insurance companies, and directors and officers, must realize that the best time to plan for the future is before any lawsuit occurs.

However, barring a change in D&O insurance before the initiation of a global warming lawsuit, courts need to remember that the theory behind insurance is protection of the insured. Courts should not attempt to decide a question that has eluded the best scientists—the question of whether carbon dioxide constituents a pollutant.<sup>207</sup> Instead, courts should focus on the plain language of the insurance policy and analyze the exclusions while remembering that the fundamental concept of an insurance policy is protection of the policyholder. If courts remember the underlying purpose of D&O insurance as well as the principle that any ambiguity is resolved against the insurance company,<sup>208</sup> the courts will reach the eventual conclusion that the insurance company should advance defense costs. Only by focusing on the purpose of D&O insurance, without consideration of the scientific question, can courts avoid a circuit split and place the burden of payment on the correct party—the insurance company.

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206. See MONTELEONE, *supra* note 13, at 3 (examining current trends and stating how eventually directors and officers might be linked to global warming).

207. See Begley, *supra* note 5, at 20.

208. *Supra* Section II(C)(1).