

The Green Impact – on Litigation

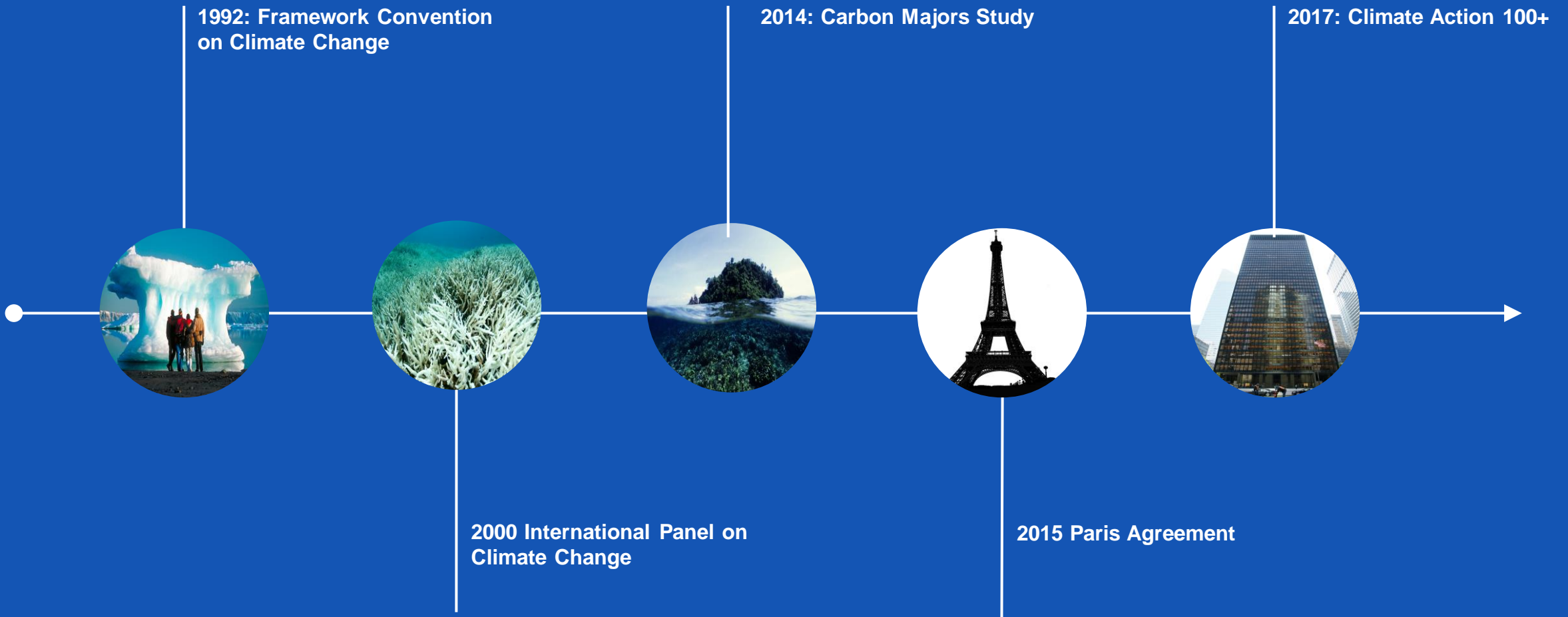
Jane Mandigo, Swiss Re

“Climate Change poses a
still unquantified risk for the
insurance and reinsurance
industry.”

”



30 Year History of Climate Change Initiatives





“Risks related to climate change are so expansive as to be uninsurable and therefore . . . climate change **exclusions will be written into policies in the near future.**”

[Climate change exclusions likely to be written into commercial general and excess liability policies \(canadianunderwriter.ca\)](https://canadianunderwriter.ca)

Today's Discussion

- The Trek Toward Liability
- Thinking About Coverage

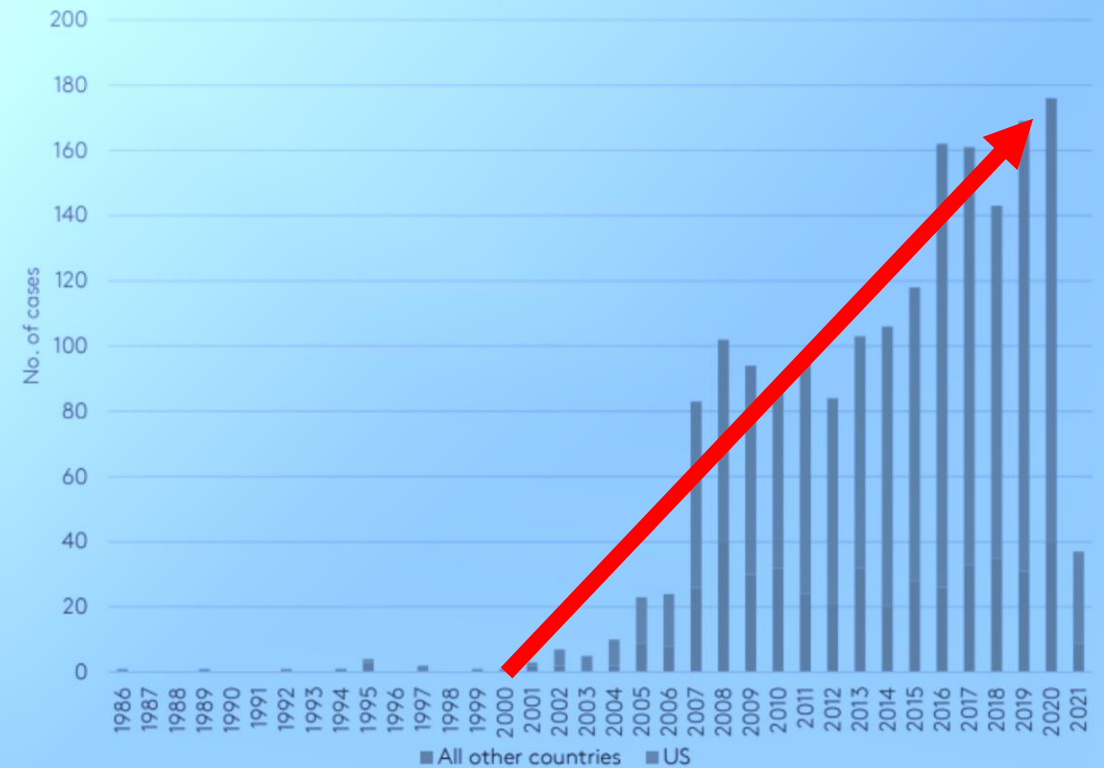


The trek toward liability:



Global Climate Change Litigation is dramatically increasing.

Figure 1.1. Total cases over time, US and non-US, to 31 May 2021



Note: These data are from the databases and may be incomplete, as discussed in the Introduction.
Source: Authors based on CCLW and Sabin Center data

Surprisingly (?), litigating parties have points of agreement:

- In California litigation, defendants, including **Chevron**, participated in preparing a joint primer for the judge, in which they **largely AGREED on the fundamentals of climate change**:

“We believe climate change is real . . . We recognize the findings of the Intergovernmental Panel on Climate Change (IPCC) that the use of fossil fuels contributes to increases in global temperatures. www.chevron.com/corporate-responsibility/climate-change

Cases against private companies will have to check 4 boxes:

- Duty
- Breach
- Causation
- Damages



Industries Exposed

- Energy: Oil , Gas & Coal
- Food and Agriculture
- Plastics
- Transportation
- Other Energy
- Manufacturing/Industrial



Climate Change Litigation

Non-Government defendants: focus on Oil and Gas

Main theories of liability include public nuisance, negligence,, human rights violations

Most cases dismissed due to lack of standing, political question, preemption, causation, lack of remedy

ESG: Environmental, Social, Governmental



Climate Change is increasingly viewed as a tool to influence policy outcomes and corporate behavior

ESG investing and scoring will increase attention toward climate disclosures



Even if these climate suits continue to be dismissed, the defense costs to insurers could be staggering.

“Adam Krauss, Senior Counsel, Traub Lieberman *Climate Change Litigation & the Reinsurance Implications, IACP Declarations, June 2019*”

A dense forest of evergreen trees, likely spruce or fir, is shown from an elevated perspective. Sunlight filters through the canopy, creating a misty atmosphere with visible rays of light. The trees are dark green, and the overall scene is serene and natural.

Thinking about: Insurance Contracts and Coverage Issues



Policy
Language

Policy
Exclusions

Coverage
Extensions

Theories of recovery

- Public Nuisance
- Trespass
- Unjust enrichment
- Strict Liability
- Product Liability
- Human Rights
- Constitutional Rights



Climate Change Coverage Issues

- ❖ Was there an occurrence?
- ❖ How many occurrences were there?
- ❖ Was there bodily injury or property damage?
- ❖ Was there a loss?
- ❖ Was there accident?
- ❖ What is the trigger of coverage?
- ❖ How should damages be allocated?



Climate Change Exclusion Issues

- ❖ Pollution Exclusion
- ❖ Known Loss
- ❖ Expected or Intended Injury
- ❖ Products Completed Operations
- ❖ Intentional Conduct Exclusion
- ❖ (FL) Exclusion for BI/PD





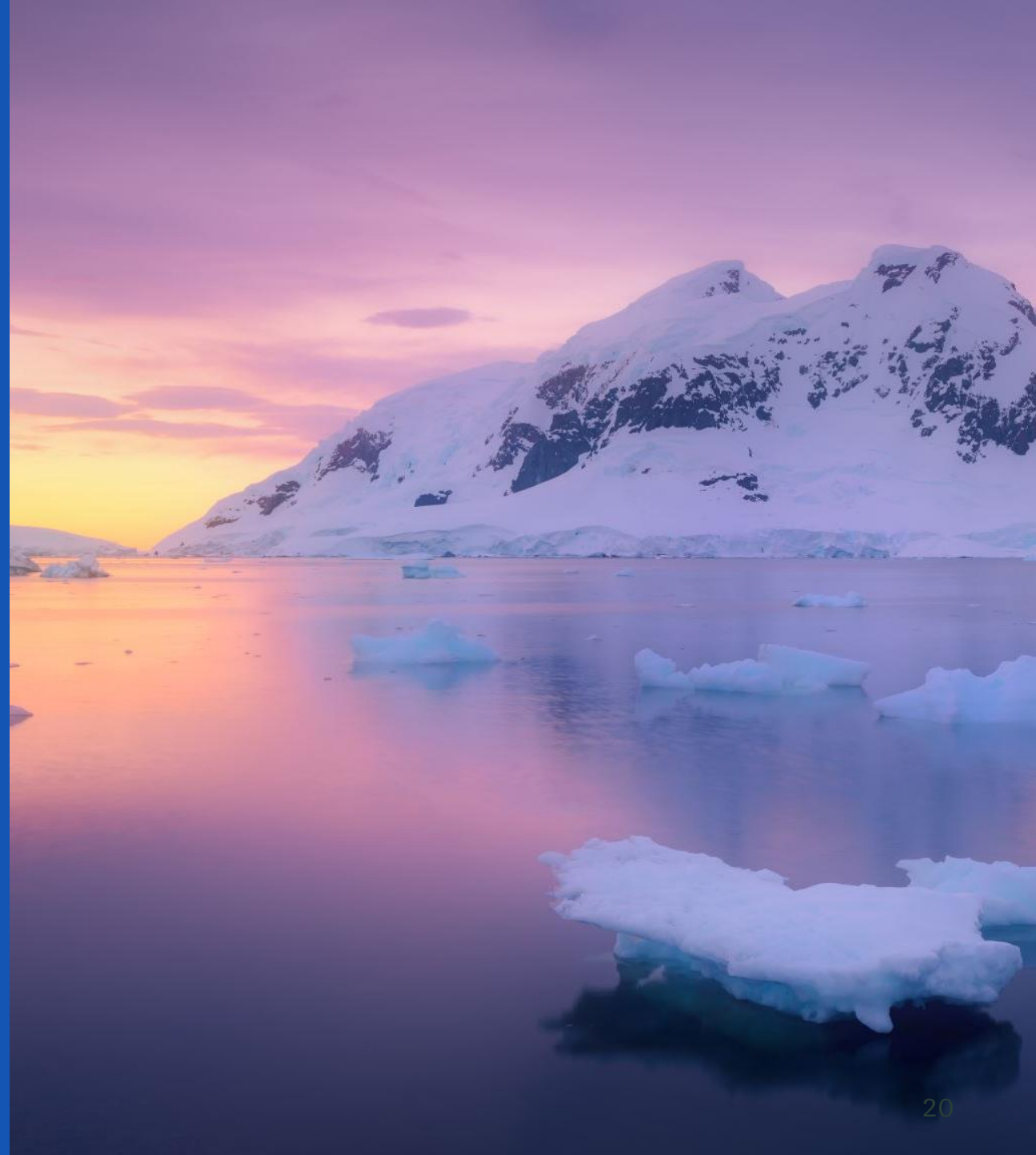
Pollution Exclusions

- “Absolute” Exclusions
- “actual alleged threatened discharge, dispersal, seepage, migration, release or escape of pollutants”
- Does pollution exclusion cover gradual, unintentional emissions vs. only sudden, intentional pollution or both?
- Products/Completed Operations
Exception to the Pollution exclusion: “if pollutants escape or are released from an insured’s product”

Only one reported coverage decision – *AES v Steadfast*.

A native Alaskan village sought money damages on the theory that the defendants' emission of greenhouse gases constituted a nuisance.

Steadfast **denied coverage** and filed a declaratory judgment action in Virginia state court, seeking a determination that it had **no duty to defend or indemnify AES**.





Court held:

“If an insured knew or should have known that certain results were the **natural or probable consequences** of intentional acts or omissions, there is **no ‘occurrence’** within the meaning of a CGL policy.”



Where are all the coverage cases?

- High SIR's
- Defendants retaining control
- Lots of ROR's for notices
- Legal efforts focused on defense v. coverage
- Liability cases will bring coverage actions



Risks

- *Donaldson v. Urban Land Interests:*
 - Claims arising out of inhalation of inadequately ventilated exhaled CO₂ was **not excluded** by an insurer's pollution exclusion.
 - "We are hesitant to conclude that a reasonable insured would necessarily view exhaled CO₂ in the same class as "smoke, vapor, soot fumes, acids, alkalis, chemicals and waste."
 - **YET:** the definition of pollutant was: "any solid, liquid, gaseous or thermal irritant or contaminant" and 'waste' was defined as including materials to be recycled, reconditioned or reclaimed.
 - The pollution exclusion is ambiguous because ULI could reasonably expect coverage.

Silent Climate

If policy language does not expressly
address climate change

AND

no exclusion applies:

= Coverage ?



Financial and Professional Lines:

Will these be the first successful “climate change” cases?

Do not have to prove direct causal contribution to climate change.

Cases to be based on failure to disclose, misrepresentation, failure to prepare for climate change.



Climate Change D&O Litigation

- 2016: *Ramirez vs. Exxon*
- 2018: *NY v. Exxon*
- 2019: *Colditz v. Exxon*
- 2019: *Montini v. Exxon*

Allegations that Exxon hid and misrepresented potential costs of climate change

Case Dismissed

- Allegations: “[Exxon] systematically and repeatedly deceived investors about the significant impact that future climate change regulations could have on the company’s assets and value.” NY AG Press Office Statement



Are these climate change claims?:

- Misrepresentation: Greenwashing?
- ***Bentley v. Oatly Group AB, Jochims v. Oatly Group AB, Kistendt v. Oatly Group AB***: SCA against oat milk company alleging greenwashing—"making the product seem more sustainable than it is". STATUS: Pending
- Actions to stop corporate activity?
- ***In re Tesla, Inc. Stockholders Litigation***: Stockholders filed claims against proposed acquisition of SolarCity Corporation by Tesla.
- ERISA breach of fiduciary duty claims?
- ***Fentress v. Exxon*** and ***Lynn v. Peabody Energy*** assert that fiduciary duties were breached when plans retained company stock.

Exclusions: Will D&O pollution exclusions apply?

What is **pollution**?



- ❖ *Massachusetts v. EPA*: held that GHGs are pollution under the Clean Air Act
- ❖ Some D&O policies expressly define GHG's as pollutants
- ❖ Even where there is a pollution exclusion, policies can include claw-backs or extensions for shareholder pollution claims.



Coverage Extensions

- ❖ Some D&O policies offer enhancements for '**environmental mismanagement claims**':
- ❖ "**environmental event**": can be defined to include GHGs
- ❖ A major insurance broker has stated that "best practices" call for "enhancing" existing D&O insurance to expressly include coverage for potential "environmental mismanagement claims."



Good idea:

Planning ahead . . .



