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Climate change and liability – Everything you need to know about climate change and liability

In the USA, the debate over climate change is increasingly being held in the courtroom, with a growing number of claims for damages by US states and cities, environmental associations and private persons against energy companies, car makers and authorities. And although courts have thus far offered little encouragement to the plaintiffs in these cases, climate change is nevertheless becoming an increasingly important topic for liability insurance.

Climate change is increasingly becoming an issue of major concern for the public, as the growing weight of evidence strongly suggests that the rise in global temperature is substantially attributable to anthropogenic greenhouse gases. We have even started to see the first climate change lawsuits, primarily in the USA, which now makes it a topic of relevance for liability insurance in addition to the more obvious property exposure. In this article, Munich Re examines the main climate change and liability issues.

What sort of lawsuits are there?

There are essentially three types of lawsuit: Firstly, actions against authorities accused of not making adequate use of the powers given to them by the legislature to control greenhouse gas emissions. The most prominent example of this is the case Massachusetts vs. EPA (Environmental Protection Agency), which the US Supreme Court decided on in 2007.

Secondly, there are lawsuits against private companies which seek injunctive relief against emissions or generally try to prevent activities that would cause more emissions (e.g. Connecticut vs. American Electric Power).

Thirdly, there are claims for damages (e.g. California vs. General Motors, Comer vs. Murphy Oil). Such actions are primarily directed against companies with especially high CO2 emissions, such as the oil, coal and chemical industries, car manufacturers or meat producers. Another option are lawsuits against companies that finance industries with high CO2 emissions and therefore make it possible for climate changas to occur. For example, in the case Friends of the Earth vs. Mosbacher, banks had to defend themselves against the accusation that when awarding loans to companies that use fossil fuels they disregarded environmental regulations, such as information requirements, set out in the National Environmental Policy Act (NEPA).

Such actions are not necessarily directed at an entire company. Shareholders could proceed against individual board members or managers who have failed to prevent

liability claims or the imposition of government sanctions against the company, or who have violated a duty to provide adequate information or warnings. This latter case is all the more likely given the fact that there are still no clear guidelines governing the extent to which companies are obliged to provide information about their greenhouse gas emissions or about the de facto and legal consequences of climate change. This means that courts handling lawsuits on such matters still have a very broad scope for discretion.

Who brings these lawsuits?

Most actions so far have been brought by US states, US cities and NGOs (non-governmental organizations). However, initiatives have also come from private persons that have suffered from the effects of climate change such as the victims of Hurricane Katrina (Comer vs. Murphy Oil) or the Inuit people. Actions could also be brought by representatives of other industries that have suffered as a result of global warming, such as fishing or winter sports.

What is the legal basis for such lawsuits?

Actions against state organizations for their failure to act are usually based on violations of environmental protection regulations, especially the Clean Air Act (CAA), NEPA, the Endangered Species Act (polar bears) or the Kyoto Protocol. Claims for damages, on the other hand, are usually based on common law, and have seen a wide variety of approaches tried. As most actions require some form of property ownership (private nuisance) or the violation of a specific duty towards the plaintiff on the part of the defendant (negligence), there is an increasing tendency to try to treat the emission of greenhouse gases as "public nuisance". This requires proof that the rights of the public have been affected. Such infringements may include health hazards or disruptions to public infrastructure, bodily injury and property damage, but also pure financial losses, business interruption and environmental losses.

What are the chances of such actions succeeding?

While lawsuits against state organizations have had varying degrees of success, claims for damages have so far failed. Firstly, so the reasoning goes, these cases involve political issues that need to be decided on by the legislature and executive and not by the courts. Secondly, it does not seem acceptable to blame defendants for "doing nothing more than lawfully engaging in their respective spheres of commerce".

In spite of this, plaintiffs have won the odd decision here and there: for example, in Friends of the Earth vs. Mosbacher in 2007 the District Court of the Northern District of California denied the defendant’s motion for summary judgment and went to great lengths to explain this decision. This can be seen as a sign that judges do not view such actions as completely hopeless. An important milestone for the prospective success of compensation claims was the decision by the US Supreme Court in Massachusetts vs. EPA, although the case actually dealt with a failure to act on the part of an authority: the Supreme Court ruled that greenhouse gases are to be considered pollution in the meaning of the Clean Air Act, which had previously been disputed, as greenhouse gases also occur naturally in the atmosphere without any

anthropogenic influence. The Supreme Court also accepted the right of US (coastal) states to sue as they face the prospect of direct losses to their territories in the event of rising sea levels due to global warming.

What is Munich Re's position?

It is undisputed that climate change is a global problem and that individual countries or market participants alone cannot hope to solve the problem. The responsibility for ensuring that this subject is taken seriously ultimately lies with governments, the private sector and consumers. How we deal with climate change is frequently the subject of national and international political debate.

Climate protection and the question of who should pay for the costs of climate change are matters for politicians, not for compensation cases in the civil courts. Moreover, given the high transaction costs involved it would be hugely inefficient in economic terms to have such matters resolved by civil jurisdiction. The emissions trading model pursued in the Kyoto Protocol, on the other hand, is highly efficient. It endeavours to cut emissions overall and readily accepts that there are polluters that produce a lot of emissions. Against this background, it would be counter-productive and defeat the object of the system to have lawsuits against the biggest CO2 emitters. It is also worth pointing out that the principle of insurance does not work in the case of compensation claims for climate change. If everyone is partially responsible, an equal balance provided by the community of insureds cannot be realised.

Is it important for Munich Re to distinguish between direct and indirect losses?

Compensation claims based on the fact that the policyholder has contributed to climate change and thus (in part) caused a loss, in other words a direct loss, should not be carried by the insurance industry. It is different in the case of losses only indirectly related to climate change – perhaps resulting from a failure to meet consultancy obligations because policyholders such as engineers, architects or consultants have not considered the consequences of climate change (cf. D&O). Such losses are not based on climate change itself but on the fact that someone has neglected to give the subject sufficient consideration in his or her professional activity. These losses are not untypical of liability insurance.

Just as the consultancy professions have to take account of legal or social trends, they also have to consider scientific aspects such as climate change.

Our position can be summed up as follows:

—Coverage but more detailed assessment of the individual aspects of indirect losses

Compensation claims based on clear misconduct on the part of the policyholder beyond the mere emission of greenhouse gases are a standard topic for liability insurance. In such cases, especially in professional liability and D&O, Munich Re in general provides reinsurance cover and deploys underwriting instruments to deal with those instances where the policyholder's

risk management proves inadequate. For the exposed risk groups therefore, it will be necessary to examine more closely the extent to which the policyholder has taken account of climate change.

—"Watching brief" and more restrictive stance on direct losses

Claims for losses caused by a policyholder’s direct impact on the climate should not be carried by the insurance industry. Munich Re assumes that there will not be any successful lawsuits involving this point. This is due to the fundamentally political nature of the liability issues, the absence of unlawfulness and the lack of evidence proving the causality of individual losses. Even if courts should change their point of view in this regard, Munich Re will not provide any corresponding capacity.

Opinion: "No change in underwriting"

"Neither civil jurisdiction nor tort law is suitable for dealing with the direct consequences of climate change", is how Heike Trilovszky, Head of Corporate Underwriting, summarizes the current discussion on this subject.

The USA is witnessing an increasing number of lawsuits related to the effects of global warming, albeit with scant chance of success.

Why has Munich Re chosen now to state its position on the topic of "climate litigation"?

Heike Trilovszky: This topic is the subject of mounting public concern, especially in the USA, but the discussion at the moment is simply too emotional. As a global reinsurer, it is our job to consider such issues in a more matter-of-fact way. Our clients are also keen to hear our views on the subject. Ultimately, climate change and its consequences are an important strategic topic for Munich Re. This is why we have to look at all the aspects involved.

Munich Re was one of the first companies to warn about the consequences of climate change.

Do you not welcome the idea that those at least partly responsible for climate change should be held liable?

Trilovszky: Happily, politicians are now taking climate change seriously and there is broad international agreement that global warming needs to be stopped. But civil law is not the right way to solve this problem. It needs to be tackled at a socio-political level.

How?

Trilovszky: This has to be decided by society and its political representatives, above all the legislature. In our opinion, tort law is a wholly unsuitable vehicle for this purpose – an opinion, incidentally, that US courts share with us.

Is there any need for Munich Re to take action in terms of ist underwriting practice, such as introducing new exclusions?

Trilovszky: For now – no. Insuring the indirect consequences of climate change is part of our daily business, for example when a loss occurs due to a breach of reporting requirements or because someone fails to comply with his professional duties of care. This is insurable and will remain so. Nevertheless, we do examine whether climate litigation should be included in pricing considerations for certain classes of business. However, the direct consequences of climate change cannot, in our opinion, be addressed through tort law. Our current underwriting practice is therefore adequate. Should jurisdiction or legislation significantly change, however, modifications to our underwriting policy may indeed become necessary. After all, an incalculable risk is an uninsurable risk.