



ARIAS•U.S. 2018 Fall Conference
November 7–9, 2018
New York Marriott at Brooklyn Bridge

EMERGING RISKS

Opioids -- Robert A. Kole, Choate Hall & Stewart LLP

Concussions -- Richard J. Pratt, Troutman Sanders LLP

Talc -- Heather Simpson, Kennedys CMK LLP

Climate Change/Extreme Weather -- Laura Foggan, Crowell & Moring LLP

#MeToo -- Joe Farrell, Latham & Watkins LLP

Moderator: Cynthia R. Koehler, AXA XL

Climate Change

Laura Foggan,
Crowell & Moring LLP

Climate Change:

It's not a question of whether climate change is real, but whether you can ascribe blame for it.

Laura A. Foggan
lfoggan@crowell.com

AON Reports that:

**2017 was costliest year
ever for weather
disasters -- \$344
Billion**

**2017 was the second
costliest for insured
losses -- \$134 Billion**

2017: Inga Beale (then Lloyd's CEO), after paying first-party property claim amounts at a rate more than double the prior year, advises the London Market:

“We are seeing the impact of climate change - - particularly on these weather losses, with rising sea level that impacts and increases the amount of loss and rising sea temperatures that increases the frequency and likelihood of some of these hurricanes hitting land.”

Climate Change:

Laura A. Foggan
lfoggan@crowell.com

Pending Climate Change Suits:

- County of San Mateo
- County of Marin
- City of Santa Cruz
- City of Richmond
- City and County of San Francisco & City of Oakland
- City of New York
- City of Boulder
- King County
- Rhode Island
- Mayor & City Council of Baltimore

Damage to the municipality's property, as well as to the public at large.

Nuisance due to sea level rise, increased flooding and intensified storms.

Trespass due to sea level rise and increased flooding onto property.

Defendants' knowledge (for decades) of global warming, sea level rise and other climate change.

Strict liability (failure to warn and design defect), and negligent failure to warn.

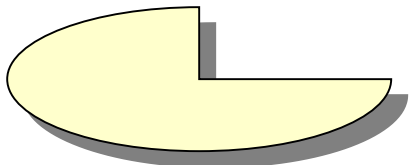
Climate change "data" regarding impact of sea level rise in particular geographic location.

Laura A. Foggan
lfoggan@crowell.com

Insurance Coverage Issues and Implications



Venue and Choice of Law
Federal vs. State Court
Duty to Defend vs Duty to Indemnify



Is there Property Damage During the Policy Period?
What is the Trigger of Coverage?
How Are Losses to Be Allocated?



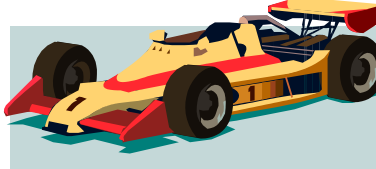
D&O Exposures:
Investor Climate Fraud
Environmental Mismanagement
SEC Disclosure Issues



Do Climate Change Suits Arise from An Occurrence?
How many Occurrences?
Do Knowledge and Fortuity Defenses Apply?



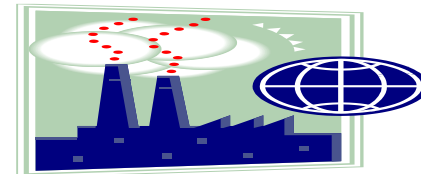
First Party Issues:
Direct Physical Loss
Flood vs. Wind
Business Interruption and CBI



Do Claims Fall Within the Products/Completed Operations Hazard?

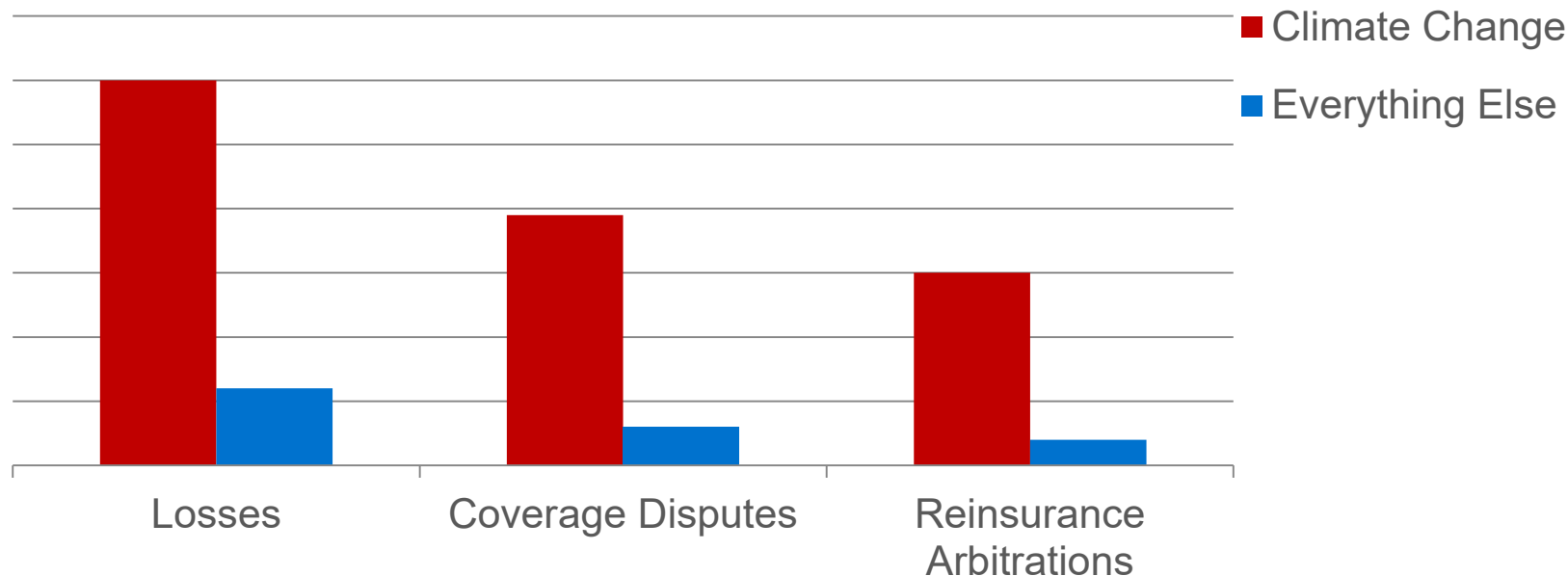


Do Climate Change Suits seek "Damages"?
Do Suits allege "Property Damage"?



Do Pollution Exclusions Apply?
Sudden & Accidental (1973-1985); Absolute (1986 -); Total (1988-)

Most Likely to Produce Losses, Prompt Coverage Disputes, Require Reinsurance Arbitrations*



*Based on Subjective ARIAS Audience Assessments; Results Not Guaranteed.

Opioids

Robert A. Kole,
Choate Hall & Stewart LLP

Opioid Exposures - Magnitude

- Approximately 1,100 cases in the MDL
- Several hundred more in state courts
- 49,000 people died in 2017
- Estimated societal costs in 2016: **\$504 billion**
- Bloomberg estimated settlement: **\$50 billion**
- Potential plaintiffs: almost everyone
 - Governments (federal, state, local, Tribal)
 - Hospitals
 - Third-party payers
 - Anyone who purchased health insurance
 - Addicted people

Opioid Exposures - Developments

- Defendants' motions to dismiss largely denied in the MDL
- Settlement conversations heating up: Judge aggressively pursuing
- Trial scheduled for September 2019
- Defense costs: hundreds of millions of dollars and rapidly increasing
- Federal Government has indicated an interest in joining MDL
- Status of coverage litigation – very early stages

Concussions

Richard J. Pratt,
Troutman Sanders LLP



Legal Developments

- Mehr v. FIFA
 - On July 16, 2015, a lawsuit against FIFA and other US-based soccer organizations alleging that the defendants did not adequately reduce the risk of concussions was dismissed
 - As to FIFA, the court held that it did not have jurisdiction over it, and as to the US-based soccer organization defendants, the court held that the plaintiff-players did not make out a cognizable claim. No injury, no causation, no redressability
- In re: National Hockey League Players' Concussion Injury Litigation
 - July 13, 2018, a request to certify a class action lawsuit against the NHL, alleging a “knowing failure to warn” players about concussions, was denied
- Hardin-Ploetz v. NCAA
 - A former Texas college football player's widow sued the NCAA in Texas State Court alleging that the NCAA should have prevented her husband's CTE. The case went to trial, but settled on June 15, 2018 after 3 days
 - The case apparently represented the first ever trial about the NCAA's responsibility for a football player's CTE

Breadth and Prevalence

Breadth: Not just boxing and football. Helmets?

- Lacrosse
- Ice Hockey
- Baseball
- Soccer
- Rugby
- Extreme sports
- Military service

Prevalence: Ann Mckee, Boston University, Center for Traumatic Encephalopathy Brain Bank

- CTE allegedly found in 99% (110 out of 111) of former NFL players' brains (2017)
- And there's a lot of concussions out there. 1.6 to 3.8 million a year in sports and recreation
- One recent rugby injury report indicated a rate of 20.9 concussions every 1,000 hours of match play

Military Service

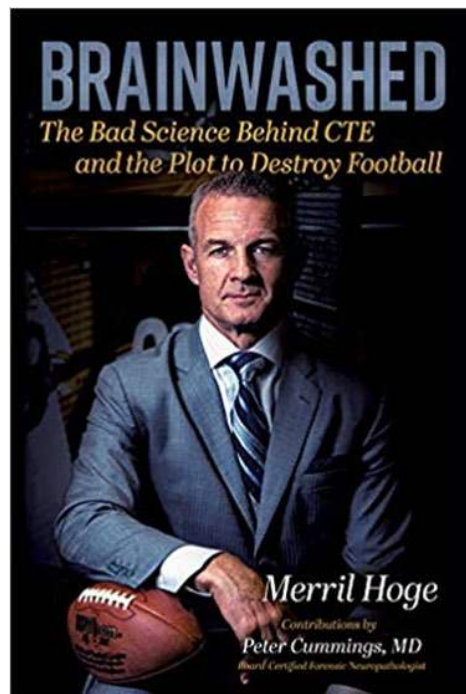
New Emerging Issues

- *60 Minutes: Combat Veterans Coming Home With CTE* (CBS television broadcast, September 16, 2018)



The Potential Counter-Narrative to CTE

Merril Hoge, *Brainwashed: The Bad Science Behind CTE and the Plot to Destroy Football* (Oct. 2018)



Talc

Heather Simpson,
Kennedys CMK LLP

Background on Talc

- Naturally occurring mineral mined from the earth
- Two types – Industrial Talc & Cosmetic Talc
 - Industrial may contain high concentrations of other non-talc minerals
 - Cosmetic is “pure” talc, more highly regulated, has a smoother feel
- Tremolite and anthophyllite are minerals often claimed to be the alleged asbestos contamination within talc, however, they exist in both asbestiform and non-asbestiform variations
- Debate continues over whether talc is carcinogenic, whether it be directly or due to the presence other contaminants

Overview of Talc Litigation

- Two Main Theories:
 - Talc-based products contain asbestos and cause mesothelioma/asbestos-related diseases
 - Talc-based products themselves cause ovarian cancer
- Defendants include:
 - Cosmetic - Johnson & Johnson, Imerys, Colgate-Palmolive
 - Industrial - RT Vanderbilt
- MDL Litigation venued in NJ federal court. Many lawsuits in MO and CA.
- Recent Results:
 - Ingham (MO) - \$4.69B against J&J on ovarian cancer - July 2018 – Pending post-trial motions
 - Weirick (CA) – Mistrial on meso case against J&J - September 2018
 - Von Salzen (CA) – Mistrial on meso case against J&J – October 2018
 - Henry (NJ) – Defense verdict in favor of J&J on meso claim - October 2018

Potential Coverage Issues

- **Trigger of Coverage**: Ovarian cancer claims not based upon inhalation. What is the disease process and when does “bodily injury” occur? Likely battle of experts.
- **Allocation**: Which allocation approach will apply? Will an “unavailability exception” apply? How does claims-made coverage factor in?
- **Asbestos Exclusions**: Likely defense to traditional meso claims but what about ovarian cancer claims? What if plaintiff asserts a hybrid theory?
- **Punitive Damages Exclusions**: Are punitive damages uninsurable as a matter of law/public policy? Do policies expressly exclude punitive damages?
- **Expected or Intended/Known Loss**: What did talc miners/manufacturers know and when?

#MeToo

Joe Farrell,
Latham & Watkins LLP