

An E&E Publishing Service

RISK: Insurance company sues Ill. cities for climate damage (Wednesday, May 14, 2014)

Evan Lehmann, E&E reporter

Illinois Farmers Insurance Co. is suing Chicago for failing to prevent flooding related to climate change in what experts say could be a landmark case that accelerates local efforts to grapple with the impacts of climbing temperatures.

The insurance company filed nine class-action lawsuits last month alleging that dozens of Chicago-area municipalities are responsible for the damage caused by a two-day downpour last year in April. The company claims that local officials are aware that climate change is causing heavier rainfalls but failed to prevent sewage backups in more than 600 homes by draining water from the region's system of tunnels and retention basins before the storm.

Farmers is asking to be reimbursed for the claims it paid to homeowners who sometimes saw geysers of sewage ruin basement walls, floors and furniture. The company says it also paid policyholders for lost income, the cost of evacuations and other damages related to declining property values. But some analysts say that Farmers likely has a bigger prize in mind.

The company, which is a subsidiary of global giant Zurich Insurance Group, could be positioning itself to avoid future losses nationwide from claims linked to floods, sea-level rise and even lawsuits against its corporate policyholders that emit greenhouse gases, said Andrew Logan, an insurance expert with Ceres.

In 2012, a different Zurich subsidiary, Steadfast Insurance Co., won another high-profile climate fight: Steadfast fought a claim submitted by its policyholder AES Corp., an electric utility, stemming from a lawsuit by Kivalina, Alaska, that accused AES of contributing to climate change by emitting carbon dioxide. The Virginia Supreme Court ruled that Steadfast wasn't liable for AES's pollution.

When viewed together, Zurich's two climate cases might represent a broader strategy to insulate itself from climate losses, Logan said. The company protected itself from corporate claims related to emissions with the Steadfast case; now it seems to be separating itself from

municipal losses in Illinois.

"I guess if you're an insurer that's really worried about the scale of liability that you might face from climate change, this would be a pretty smart way to begin to put up some walls around yourself," Logan said. "The dollars at stake [in the Illinois case] are much smaller than the precedent that's being set."

More heat, more rain

The notion that insurers could shoulder staggering climate losses emerged several years ago when Swiss Re warned that climate claims could match the industry's financial pain from paying asbestos settlements. The industry's fear is that it will be forced down the same path on climate: Asbestos victims argued that insurance companies should have warned the public about the material's dangerous effects. After all, the industry was an asbestos expert after handling countless claims, the victims asserted.

Now a similar scenario could unfold with climate change. A book-length analysis of the legal challenges faced by insurers notes that the industry's climate expertise related to natural catastrophes, climate science and adaptation resembles its level of knowledge around asbestos. One of the authors is Lindene Patton, Zurich's climate expert in North America.

"This could lead to claims against insurers arising out of their particularized knowledge of any of these issues," says the book, titled "Climate Change and Insurance."

Similarly, the lawsuit by Farmers uses the climate assertions by local officials to show that they knew about the risks of a warmer and wetter atmosphere but didn't do enough to avoid damage. The suit points to the Chicago Climate Action Plan as evidence that the city is aware of the dangers.

"The defendant knew or should have known that climate change in Cook County has resulted in greater rain fall [sic] volume, greater rainfall intensity and greater rainfall duration than pre-1970 rainfall history evidenced, resulting in greater stormwater runoff," the lawsuit says.

Farmers claims that the Metropolitan Water Reclamation District of Greater Chicago, an agency that operates the region's stormwater

system, and dozens of municipalities should have drained the network of tunnels before the storm. The sprawling system includes a massive tunnel project begun in 1968 to capture 20 billion gallons of water. The water reclamation agency notes that the Tunnel and Reservoir Plan, or TARP, is meant to handle increased runoff.

"It is the largest system of its kind," said Allison Fore, a spokeswoman for the agency. She declined to discuss the lawsuit.

'Completely preventable' damage

A Farmers spokesman described the damage as "completely preventable" and said the court case is meant to "prevent it from happening again."

"Farmers has taken what we believe is the necessary action to recover payments made on behalf of our customers," said Luis Sahagun, the company spokesman.

Legal experts say the suit is the first of its kind, and if it's successful it could have far-reaching implications in the way that municipalities approach climate change.

On one hand, the case could spur faster action to invest in stronger infrastructure and adopt more rigorous procedures before heavy rainfall. Farmers says temporary barriers, like sandbags, could have been deployed in the hours leading up to the storm.

The lawsuit could land squarely on the engineering firms that designed the stormwater system, legal experts say. That would happen after the municipalities turn to them and claim that the firms were negligent.

In that sense, the case has a better chance to succeed than perhaps the best-known climate lawsuit in which Alaskan villagers claimed that a handful of fossil fuel companies contributed to the climatic effects around Kivalina, an coastal city that could be displaced by rising seawater.

"I think it's a sounder legal argument," J. Wylie Donald, a partner at the law firm McCarter & English, said of the Farmers suit. "How are you going to show that a power plant in Ohio caused damage in Alaska?"

It's less difficult to show that Chicago officials failed to consider the

impacts of climate change when designing the stormwater system, he said.

"If you went to a jury, the jury would be much more receptive to that ... circumstance," Donald said.

Scaring cities into silence?

Several observers said that outcome could spur municipalities around the nation to quickly upgrade their stormwater systems. The most pronounced effect might be to uproot long-held design standards used by engineers when building infrastructure.

Rather than using historical data about things like rainfall, stream flow and flooding, the case might finally spur designers to use forward-looking projections that consider climate change, said Wendi Goldsmith, founder of the Bioengineering Group.

She recalled speaking with a friend who's an executive in a large engineering firm last year about the outdated standards and why his firm didn't always use modern designs on bridges, roads and stormwater systems. He said that clients often don't want them, because it adds to cost of construction.

But he also offered a prediction about how modern standards might be widely adopted.

"He said, 'Well, I think that somebody needs to lose a lawsuit,'" Goldsmith recalled. "I personally think it's the professional liability insurance companies that can make the biggest difference in this in short order."

But the outcome of the lawsuit, and its impact, is unclear. Joanne Zimolzak, a partner with the law firm McKenna Long & Aldridge, noted that a similar case failed when Louisiana homeowners sued the Army Corps of Engineers after their homes were flooded. They claimed that the Army Corps built a canal that funneled stormwater into their community. The court ruled that the corps was eligible for government immunity. Similar challenges could enter the Illinois case.

Even if the case is successful, it's possible that some of the results might not benefit the public when it comes to preparing for climate change.

"Municipalities looking at something like this might think, 'Does it make better sense for me not to adopt some type of a climate action plan?'" Zimolzak said.

But that decision could hold its own risks.

"If you had the knowledge and you failed to adopt a climate plan, then maybe that opens you up to a different kind of liability," she added.