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Supreme Court of Virginia Holds That CGL Policy Does Not Cover Climate Change Suit

Advisen
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The Supreme Court of Virginia has ruled that an underlying lawsuit filed against an energy company policyholder alleging losses caused by the policyholder's contributions to global climate change are not potentially covered by a CGL policy, precluding an insurer's duty to defend, because the suit failed to allege an "occurrence." As the first coverage suit addressing claims for such damage, the Virginia high court's decision in *The AES Corporation v. Steadfast Insurance Company*, Record No. 100764 (Va. Sept. 16, 2011), likely will play a prominent role in future determinations by other courts as to whether insurance coverage for such claims is available. The Supreme Court of Virginia's ruling in *AES* provides insurers with a viable argument that the threshold "occurrence" requirement is not satisfied by allegations of damage caused by policyholders' intentional operations that contribute to global climate change.

Practice Areas

General Liability
Climate Change
Insurance

Climate Change Suit, Coverage Litigation and Appeal

In *AES*, the policyholder, a Virginia-based energy company, sought coverage under CGL policies issued by the insurer for an underlying suit filed against it and numerous other companies by the governing bodies of an Inupiat village located on a barrier island in northwest Alaska. In the underlying suit, *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2010), the plaintiffs alleged that the companies' energy-generating operations are responsible for substantial greenhouse gases that have been emitted into the atmosphere. The *Kivalina* plaintiffs alleged that these gases trap atmospheric heat and cause global warming, which, in turn, caused Arctic sea ice that protects their village's shoreline from winter storms to form later or

melt earlier each year. As a result, they alleged, the village suffered extensive damage, forcing the community of approximately 400 people to relocate. The *Kivalina* complaint alleged that the policyholder and the other defendants intentionally emitted large amounts of carbon dioxide and other greenhouse gases into the atmosphere while knowing that their emissions would contribute to global warming and injure communities such as the plaintiffs'. The complaint also contained allegations, however, that the defendants knew "or should have known" that the impact of their emissions would contribute to global warming and harm the plaintiffs' property, that the defendants had intentionally "or negligently" caused a public nuisance, and that the defendants committed "negligent acts or omissions" and engaged in "negligent" conduct.

The policyholder sought coverage under CGL policies issued by the insurer providing coverage for an "occurrence," defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." The policies also contained a pollution exclusion barring coverage for "[a]ny injury or damage which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." The policy defined "pollutants" as "any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The insurer agreed to provide a defense under a reservation of rights and subsequently filed a declaratory judgment coverage action in Virginia state court. The policymaker counterclaimed. The insurer first moved for summary judgment, arguing that it had no duty to defend based on, *inter alia*, the "occurrence" and pollution exclusion provisions of the policies. In light of the parties' citing to evidence extrinsic to the "eight corners" of the underlying complaint and the insurer's policies, the trial court held that questions of fact existed and denied the motion. The policyholder subsequently moved for summary judgment on its counterclaim, arguing that the insurer owed a duty to defend. With the focus this time only on the "eight corners," the trial court granted summary judgment in favor of the insurer, holding that it did not owe a duty to defend because the underlying complaint did not allege an "occurrence" within the meaning of the policies. The court did not address whether the pollution exclusion also barred coverage.

VirginiaSupreme Court: Lack of Occurrence Precludes Coverage

On appeal, the Supreme Court of Virginia affirmed. The court explained that, under Virginia's "eight corners" rule, courts examine only the allegations contained in the underlying complaint and the provisions of the insurance policy in determining whether an insurer owes a policyholder a defense duty. The court noted that, under Virginia law, an insurer's duty to defend is broader than its duty to indemnify, but the court also explained that neither duty arises "if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations." As to "occurrence"- based policies, the court explained, the terms "occurrence" and "accident" are synonymous and refer to an incident that was unexpected from the policyholder's viewpoint. According to Virginia case law, the court noted, an accidental injury is one that happens by chance, unexpectedly and fortuitously. Noting that the underlying complaint alleged that the policyholder intentionally released greenhouse gases into the atmosphere as part of its electricity-generating operations, the court explained that Virginia law does not recognize intentional acts as covered "occurrences" or "accidents." However, the court continued, if the alleged injury results from an unforeseen cause and is not

a reasonably anticipated consequence of the policyholder's intentional act, coverage is available. Thus, whether the policyholder was entitled to coverage turned on whether the village's alleged injuries resulted from "unforeseen consequences that a reasonable person would not have expected to result from [the policyholder]'s deliberate act of emitting carbon dioxide and greenhouse gases," according to the court.

The court rejected the policyholder's argument that, because the village's complaint alleged that the policyholder "[i]ntentionally or negligently" engaged in tortious acts, it was entitled to coverage under *Parker v. Hartford Fire Insurance Co.*, 278 S.E.2d 803 (Va. 1981), which the policyholder argued holds that a policyholder is entitled to coverage when negligence is alleged. The court also rejected the policyholder's argument that, because the underlying complaint asserted that the policyholder "knew or should know" that its electricity-generating activities would result in environmental harm to the village, the injuries alleged by the village were accidental from its viewpoint and, therefore, an unintentional "occurrence." The court distinguished *Parker*, explaining that, unlike the policy involved in that case, the insurer's policies "do not provide coverage for all damage resulting from [the policyholder]'s negligent acts" but, instead, only impose a defense duty for claims alleging injury "caused by an occurrence or accident." According to the court, because the underlying complaint plainly alleged that the policyholder intentionally released carbon dioxide into the atmosphere as a regular part of its operations and that a scientific consensus exists that such emissions result in global warming and damages of the type that the village suffered, no coverage was available under the policy.

Regarding the underlying complaint's references to negligence and related "should have known" standards, the court explained that "[w]hether or not [the policyholder]'s intentional act constitutes negligence, the natural and probable consequence of that intentional act is not an accident under Virginia law." Moreover, "allegations of negligence are not synonymous with allegations of an accident, and, in this instance, the allegations of negligence do not support a claim of accident," the court held. Even if the policyholder was negligent and did not intend to cause the village's damage, the court explained, "the gravamen of [the village]'s ... claim is that the damages it sustained were the natural and probable consequences of [the policyholder]'s intentional emissions." Citing leading insurance treatises, the court explained that, when a policyholder "knows or should have known of the consequences of [its] actions, there is no occurrence and therefore no coverage." Because the underlying complaint alleged that the policyholder should have anticipated the damage resulting from its emissions, such alleged damage was "the natural and probable consequence of [the policyholder]'s intentional actions," the court held. Therefore, it held, the complaint did not allege damage resulting from a fortuitous event or accident, precluding coverage under the policy.

Implications

As the first decision of a state high court to address liability coverage for global warming claims, *AES* could serve as a bellwether for future coverage litigation over such claims. Insurers can take heart not only in the bottom-line no-coverage determination reached by the Supreme Court of Virginia, but also by the court's arrival at that determination based on the lack of an "occurrence." In future coverage litigation, insurers will be able to invoke *AES* to argue that the threshold "occurrence" requirement is not satisfied by allegations of damage caused by policyholders' intentional operations that contribute to global climate change. Typically,

insurers find it difficult to succeed on arguments that no "occurrence" has taken place, given that courts typically require only that the alleged loss-and not the policyholder's acts-be unintended in order for coverage obligations to arise. To the extent that underlying allegations in other climate change cases subject to future coverage litigation are similar to those asserted by the village here, *AES* provides insurers with a viable argument that no coverage is available for lack of an "occurrence." Even if an "occurrence" is alleged, insurers in many cases will be able to rely on other policy provisions, such as the pollution exclusion appearing in more recent policies. Here, the Supreme Court of Virginia did not need to address the applicability of the pollution exclusion in light of its no-"occurrence" holding.

Along with the favorable *AES* result, insurers may be encouraged by the U.S. Supreme Court's decision in *American Electric Power Co. v. Connecticut*, 132 S. Ct. 2527 (2011), which potentially could decrease insurers' exposure to coverage for climate change suits by limiting the theories upon which such suits may rely. Although the Court in *AEP* did not reach consensus on whether plaintiffs in such suits lack standing, the Court did hold that Congress, in passing the Clean Air Act, displaced federal common law regulation of greenhouse gas emissions. Therefore, the Court held, underlying plaintiffs could not assert claims seeking abatement of greenhouse gas emissions based on a nuisance theory under federal common law. This aspect of the *AEP* decision at least limits one avenue by which underlying plaintiffs such as the village in *AES* might impose liability upon policyholders for climate change-related damages. The Court, however, did not address whether the Clean Air Act displaces state law, leaving the viability of such claims under state nuisance law open for consideration in the future. Thus, climate change litigation is likely to continue, and insurers are likely to be faced with coverage claims for such suits in the foreseeable future. The Virginia high court's *AES* decision, however, provides favorable early precedent for insurers facing future climate change coverage claims.