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Climate, Energy and Sustainability Advisory

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In a major victory for insurers, the Virginia Supreme Court held that insurance companies do not have to defend utility companies accused of intentional wrongdoing in connection with climate change liability lawsuits. In *AES Corp. v. Steadfast Insurance Co.*,[1] the court concluded that the underlying climate change claims in the *Kivalina* lawsuit did not constitute an "occurrence" under AES' commercial general liability (CGL) policies. Because the court decided the case on the occurrence issue, the court did not reach the issue of whether the pollution exclusion might apply.

The decision in *AES* has important implications for both insurers and companies with potential exposure to climate change-related tort claims. Although policyholders and their counsel are likely to now press coverage issues in more favorable jurisdictions, the decision nonetheless stands as a significant step towards resolving the question of whether such claims are covered under CGL policies. For more about the likely progress of climate change litigation, see also "Is Past Prologue To Climate Change Liability?" *Law360* (May 31, 2011).

Proceedings Below
Appellant AES Corporation is a defendant in *Native Village of Kivalina v. ExxonMobil Corp.*, one of the first climate change nuisance cases brought in federal court. The *Kivalina* plaintiffs, an Inupiat village located off the coast of Alaska, allege that greenhouse gas emissions from AES and other oil, energy, and utility companies have contributed to climate change which, in turn, has eroded the village's coastline and rendered it uninhabitable. The complaint alleges that AES intentionally emits millions of tons of carbon dioxide and thereby "intentionally or negligently" created a nuisance, global warming. Kivalina further asserts that AES "knew or should have known" that its activities would result in the environmental harm to Kivalina.

CONTACTS

For further information regarding the topic discussed in this update, please contact one of the professionals below, or the attorney or public policy advisor with whom you regularly work.

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Christina Carroll, Randy Evans, and Joanne Zimolzak are authors of a book to be released later this year entitled "Climate Change and Insurance."

After being sued, AES asked its insurer, Steadfast Insurance Company, to defend. Steadfast refused and thereafter filed a declaratory judgment action in Virginia (where AES is headquartered). Steadfast denied coverage based on three grounds: (1) the *Kivalina* complaint did not allege "property damage" caused by an "occurrence" under its policies; (2) the alleged injuries arose before Steadfast's coverage incepted; and (3) the GHG emissions alleged in *Kivalina* were "pollutants" excluded from coverage by virtue of the policies' pollution exclusion.

For the occurrence argument, the at-issue policies defined "occurrence" as "an accident, including continuous, repeated exposure to substantially the same general harmful condition." The trial court granted summary judgment for Steadfast, holding that the insurer had no duty to defend AES because the *Kivalina* complaint did not allege an "occurrence" within the meaning of the CGL policies issued to AES by Steadfast.

Proceedings on AppealAES appealed to the Virginia Supreme Court, which heard oral argument on April 19, 2011. AES argued that because the complaint alleged that AES "[i]ntentionally or *negligently*" created a

[1] Virginia Supreme Court Case No. 100764.

nuisance, the damage alleged by plaintiffs in *Kivalina* constitutes an "accident" and thus an "occurrence." AES further argued that because the complaint alleges that AES "knew or should have known" that generation of electricity would result in the environmental harm suffered by Kivalina, the complaint alleges, at least in the alternative, that the consequences of AES's intentional carbon dioxide emissions were unintended. The court disagreed.

The court held that an allegation of negligence does not equal an occurrence. Whether or not AES's intentional act constitutes negligence, the natural and probable consequence of that intentional act is not an accident under Virginia law. Thus, the Virginia Supreme Court held that the underlying *Kivalina* complaint did not allege an "occurrence," such that Steadfast has no duty to defend AES under the CGL policies.

Interestingly, in their concurrence, Senior Justices Lawrence Koontz and Harry Carrico cautioned against reading the majority's holding too broadly. The concurrence emphasized that the insurer is relieved of its duty to defend only where it is certain that no liability could arise from the contract of insurance. The concurrence warned that the mere fact that the alleged harm resulting from AES's emissions was foreseeable did not excuse Steadfast from its duty to defend. Rather, the concurrence focused upon whether AES was negligent as to the relevant intentional act or in terms of the forseeability of the consequences. In the *Kivalina* complaint, plaintiffs alleged that the release of greenhouse gases was an intentional act and did not allege that act was done negligently. Rather, in the concurrence's view, the complaint alleged that AES was only "negligent" in the sense that it knew or should have known that its actions would cause injury. The concurrence agreed, therefore, that the injury to Kivalina alleged in the complaint did not arise from an accident and was not an occurrence under the CGL policies.

Randy Evans, a partner who specializes in climate change litigation insurance, noted that "this is just another step in the long path for climate change litigation and insurance. Eventually, the market will respond after the courts and various legislative and administrative entities have clarified whether allocated risk can be established and transferred in a quantifiable way."

Implications for Companies and Insurers with Potential Climate Change-Related Tort Exposure:

1. Notwithstanding the favorable outcome for the insurer, the AES decision may not be dispositive in coverage cases filed in less favorable jurisdictions for insurers or in cases where the allegations pled and/or the language of the relevant insuring agreements differs from those at issue in *AES*. Company Executives and Risk Managers are advised to seek specific advice from their brokers and counsel regarding whether their individual policies afford coverage.

2. As additional climate change cases are filed, either under state tort law or based on other legal theories that may emerge, new insurance coverage cases may follow in other jurisdictions involving different legal standards.

3. Climate change litigation (both liability and related coverage litigation) is likely to continue to evolve as claimants and interest groups respond and adapt to court rulings like *AES*.

4. Companies relying on the availability of insurance proceeds to defray costs associated with climate litigation may have to consider the implications on reporting obligations.