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The Nonoccurrence Of Greenhouse Gas Emissions

Law360, New York (January 25, 2012, 1:55 PM ET) -- On Sept. 16, 2011, the Virginia Supreme Court upheld an insurer's denial of coverage for greenhouse gas damage claims against the AES Corp. (AES) because the court found that no "occurrence" took place as that term was defined in AES's standard general liability insurance policies. As a result, the court found that AES's insurer did not owe AES a defense or indemnity coverage (see AES Corp. v. Steadfast Insurance Co., VA, No. 100764, Sept. 16, 2011).

The case is important because insurers will use this case to argue that greenhouse gas (GHG) emissions do not constitute an occurrence under a standard general liability policy — at least in Virginia.

Background of the Case

AES is a Virginia-based energy company that holds controlling interests in companies specializing in electricity generation and distribution throughout numerous states (collectively, AES affiliates). AES paid premiums to Steadfast, its insurance carrier, for commercial general liability (CGL) policies and was covered during the relevant period.

Steadfast is an Illinois-based company and an indirect subsidiary of Zurich Financial Services, a global insurance provider. AES elected to bring the lawsuit in Virginia, the state of its incorporation.

The underlying case arose when the native village of Kivalina, Alaska, and the city of Kivalina, Alaska, jointly filed a lawsuit in California against the AES affiliates and 23 other defendants — all oil, energy and utility companies (collectively, the energy companies) — asserting public nuisance and concert of action claims that AES and the other energy companies' collective emission of GHGs during their energy-generating activities damaged Kivalina.

Specifically, Kivalina's complaint alleged that:

- The energy companies used fossil fuels in their energy-generating activities;
- The use of these fossil fuels caused the energy companies to intentionally or negligently emit annually excessive amounts of carbon dioxide and other GHGs into the atmosphere;
- Such GHG emissions contributed to global warming;

- The energy companies knew or should have known of the global warming impacts of their GHG emission, based on “a clear scientific consensus” that global warming is caused by GHG emissions;
- The global warming caused the sea ice that historically attached to the Kivalina coastline and acted as a barrier against coastal storms and waves in the Chukchi Sea to attach later in the year, be thinner and less extensive, and break up earlier in the year;
- Due to the above global warming impacts, the sea ice no longer protected Kivalina’s shoreline, causing substantial erosion of this shoreline to occur from its exposure to the coastal storm waves and storm surges, and resulting in the shoreline’s destruction and in Kivalina’s becoming uninhabitable; and
- The energy companies’ GHG emissions were the proximate cause of Kivalina’s injuries.

AES tendered the claim to Steadfast, but Steadfast denied coverage claiming:

- The lawsuit filed against AES did not allege “property damage” caused by an “occurrence,” both of which were necessary for there to be coverage under the policies;
- The alleged injury arose prior to the time that AES was covered under the policies; and
- Kivalina’s allegations in the complaint fell within the scope of the pollution exclusion in the policies.

Steadfast then sought a declaratory judgment in Virginia state court that it did not owe AES a defense or indemnity.

The Virginia Court Agreed With Steadfast and Found No Coverage

The definition of “occurrence” in the policies and the specific allegations set forth in the complaint proved to be the pivotal issues in this case. All of AES’s policies stated that Steadfast would defend AES against damages for bodily injury or property damage, if such damage was caused by an “occurrence.”

“Occurrence” in each policy was defined to mean “an accident, including continuous or repeated exposure to substantially the same general harmful condition.” Other clauses in each policy stated that Steadfast had no duty to defend or indemnify AES against lawsuits to which the policy did not apply.

The historical interpretation and common usage attributed to key words in the policies played a critical role in the appellate court’s ruling. Under Virginia law, the terms “occurrence” and “accident” are synonymous, as both refer to an incident that the insured views as unexpected.

Also, under Virginia law, “accident” is commonly understood to mean an event having an effect that is not the natural or probable consequence of the action, or an event that happens unexpectedly and is not intended or reasonably anticipated as a result of such action.

Moreover, an “intentional act” under Virginia law is not considered to be an “accident” or an “occurrence.” Therefore, an intentional act would not qualify as an “occurrence” under an insurance policy.

However, Virginia law also holds that even if an insured’s intentional acts start a chain of events, and if the alleged injury results form an unforeseen cause that is out of the ordinary expectations of a reasonable person, then the injury may be covered as an “occurrence” under any insurance policy.

The court in this instance reiterated that when the insured knows or should have known of the consequences of its actions or omissions, then there is no occurrence, and therefore no coverage under a CGL policy. Whether Kivalina's injuries were a result of unforeseen consequences that a reasonable person would not have expected to occur from AES's intentional actions was the determining factor in this case.

In this instance, the Virginia court ruled in favor of Steadfast, holding that AES should have anticipated the damages that would result from the AES affiliates' GHG emissions.

Moreover, the court held that even if AES were ignorant of the effect of the AES affiliates' GHG emissions, or did not intend for the resulting damages to occur, the damages were nevertheless the "natural and probable consequence" of the AES affiliates' intentional actions, rather than the result of a fortuitous event or accident.

Implications of This Ruling

This case is significant for several reasons.

First, all policyholders who emit GHGs should be aware that insurance companies will henceforth rely on it to deny coverage for GHG claims. An examination of the lower court's ruling, compared to that of the Virginia Supreme Court's ruling, is instructive for this purpose.

This case originally stemmed from the Native Village of Kivalina v. ExxonMobil Corp., 63 F. Supp.2d 863 (Dist. Court, ND California 2009).

In the California case, the federal district court held that Kivalina's global warming claims were not justiciable under the political question doctrine and that the California court lacked jurisdiction to consider the merits of Kivalina's federal public nuisance claim, as such resolution would require the California court to make policy determinations relating to the use of fossil fuels and other energy sources, and to weigh and balance their social utility, value and benefit against the environmental, economic and social consequences harms caused by their use.

As the California court did not determine whether the defendants in the California case were guilty of committing a public nuisance, the question of defendants' intent to cause harm under a tort theory was never reached.

Moreover, the California court held that Kivalina lacked standing to bring this case in federal court under Article III of the U.S. Constitution, as Kivalina failed to establish that the injury it sustained was caused by a fairly traceable connection between such injury and the defendants' conduct that resulted in such injury.

For Kivalina to have proven such a "fairly traceable" connection, it only needed to show that there was a substantial likelihood that the defendants' actions caused its harm. The California court held that Kivalina failed to meet this burden of proof because it found that global warming is a phenomena that is the result of the emission of GHGs over long periods of time by a multitude of sources from all over the world rather than from defendants alone.

Therefore, it found that the source of the GHGs were undifferentiated and could not be traced back to defendants as the "seed" of Kivalina's injury. According to the California court, "[I]t is not plausible to state which emissions — emitted by whom and at what time in the last several centuries and at what place in the world — 'caused' Plaintiffs' alleged global warming related injuries."

Additionally, the California court noted that to satisfy the "fairly traceable" causation requirement, a distinction needs to be made between persons who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to the defendant.

The California court concluded that the allegations in Kivalina's complaint demonstrate that Kivalina was not within the zone of discharge. Implicitly, this means that because Kivalina was outside the zone of discharge, AES was not negligent under a tort law analysis.

Therefore, based on the California court's holdings that (i) Kivalina lacked standing for a federal nuisance claim, such that the question of defendants' intent to cause harm was not addressed, and (ii) Kivalina's injury was not "fairly traceable" to the defendants, due to defendants not being the "seed" of Kivalina's injury and to Kivalina's being outside of the zone of discharge, AES reasonably could have concluded that another court, similar to the California court, would hold that AES lacked the intent for the damages Kivalina sustained.

The Virginia Supreme Court completely ignored the California case precedent. As the Virginia Supreme Court plainly states, "only the allegations in [Kivalina's] complaint and the provisions of the insurance policy are to be considered in deciding whether there is a duty on the part of the insurer to defend and indemnify the insured."

By only looking at the complaint and the insurance policy — the "eight corners rule" — the Virginia Supreme Court leapfrogged over the legal analysis in the California case, dismissing as irrelevant the California court's rationale and holdings that there was no federal nuisance, and that AES's actions were not fairly traceable to Kivalina's injuries.

By taking this approach, the Virginia Supreme Court disregarded the California court's holding that AES lacked the requisite intent under tort law to cause Kivalina's harm.

Failure to consider the lower court's rationale, treating its rulings on the facts of the case as nonexistent, and taking Kivalina's allegations in the complaint as true and meritorious while ignoring the California court's determination that such allegations lacked merit put AES at a disadvantage.

Moreover, the Virginia Supreme Court found intent by AES where, based on the facts of the case, no such intent existed.

Second, insurance law is state-based. A GHG emitter should understand the applicable law in every jurisdiction in which they operate.

Conclusion

GHG emitters now more than ever need to be particularly aware of their GHG emissions. Other state courts may look to the Virginia Supreme Court and the AES case as a benchmark to follow.

A best practice for a GHG emitter is for it to be keenly aware of the exact terms of the coverage language in its insurance policies. As the AES case illustrates, a GHG emitter, no matter how large or small, needs to have a solid grasp on how key terms such as "occurrence" in its insurance policy's coverage language may be interpreted by a court.

GHG emitters, therefore, should have their coverage attorneys review their insurance policies and should negotiate for the best and most expansive language possible so as to leave the possibility for coverage open should GHG claims be made against them.

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