Client Alert

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Insurance Coverage For Climate Change Cases After *AES Corp. v. Steadfast Ins. Co.*

On September 16, 2011, the Commonwealth of Virginia became the first state to have its highest court decide a global warming insurance coverage lawsuit.[1] The Supreme Court of Virginia found in favor of the insurer, concluding that a lawsuit alleging casually attenuated, if not altogether speculative, damages caused by climate change did not constitute an "occurrence" under the policyholder's contracts for commercial general liability insurance. According to the court, the alleged damages, which were allegedly caused by the policyholder's emission of greenhouse gases thousands of miles away from the damaged property, somehow were "reasonably foreseeable" to the policyholder.

But, as explained herein, the court's decision is based on flawed reasoning that departs from Virginia's well-settled rule of insurance contract construction that abrogates an insurer's duty to defend only in cases where it is *certain* that no liability could arise under the insurance contract. Moreover, the holding in *Steadfast* is so limited in scope and application that two senior justices, although agreeing with the result, apparently were compelled to pen a separate concurring opinion to underscore that the majority's holding is confined only to the "unique language of the allegations of [the underlying] lawsuit and the particular definitions of an insured 'occurrence' contained in the [policyholder's] commercial general liability ('CGL') policies with [the insurer]." Consequently, as recognized in the concurring opinion, given these and other distinguishing features, the *Steadfast* analysis "would not be applicable to the vast majority of cases where a policyholder seeks to have his insurance company provide him with a defense for an accidental tortious injury."

Background

The *Steadfast* insurance coverage lawsuit arose after an Alaskan tribal village filed suit against the AES Corporation ("AES") and numerous other oil, energy and utility companies, seeking monetary damages for harm to the village allegedly caused by global warming, which allegedly resulted from defendants' emission of greenhouse gases ("*Kivalina*").[2] Specifically, the Alaskan village alleged that the defendants emitted carbon dioxide and other gases into the atmosphere at various times and locations, which, in turn, collectively contributed to global warming, which disrupted the forming and melting of sea ice along the Kivalina shoreline, which exposed the village to storm surges, rendering the village uninhabitable. Although conclusory allegations of causation were made, none were proven or substantiated in fact.

AES tendered the *Kivalina* complaint to its general liability insurer, Steadfast Insurance Company ("Steadfast"), for a defense and indemnity. Steadfast refused to provide coverage, and litigation ensued. The Steadfast policies were standard form general liability policies, requiring Steadfast to defend AES against suits seeking damages for bodily injury or property damage caused by an "occurrence." An

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[1] *AES Corp. v. Steadfast Ins. Co.*, No. 100764, 2011 Va. LEXIS 185 (Va. Sept. 16, 2011).

[2] *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). The *Kivalina* lawsuit was originally dismissed in 2009 after the district court determined that the claim involved a political question, and the plaintiffs lacked standing. The case remains pending on appeal before the United States Court of Appeals for the Ninth Circuit.

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"occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."

On cross motions for summary judgment, Steadfast argued that the extraordinarily tenuous causative claims contained in the *Kivalina* complaint allege that AES knew or should have known that its activities would result in the harms suffered by the Kivalina village and, thus, did not allege "accidental damage" sufficient to trigger coverage under Virginia law; and, alternatively, even if the damage was unintended, coverage was barred by the policies' pollution exclusion. The circuit court granted summary judgment in favor of Steadfast, finding that Steadfast had no duty to defend or indemnify AES because the *Kivalina* claims did not constitute an "accident" or "occurrence" under Virginia law. The circuit court did not address whether the pollution exclusion barred coverage. AES petitioned for appeal.

The Supreme Court of Virginia accepted the case for review to determine whether the alleged harms in the *Kivalina* complaint constituted an "occurrence." AES argued that any alleged harm resulting from climate change must be considered an "accident" because it was unintended and/or unexpected. In support, AES cited to specific allegations of negligence in the *Kivalina* complaint that, on their face, stated that the alleged harm indeed may have been unplanned and/or unexpected.

Steadfast countered, arguing that, despite the allegations of negligence, the *Kivalina* complaint did not allege damage caused by an "occurrence." According to Steadfast, the negligence allegations were simply "naked legal conclusions" and that, when read as a whole, the *Kivalina* complaint alleged only that AES conducted intentional business activities, which produced allegedly known or reasonably foreseeable consequences of a global warming impact.

Analysis

The Supreme Court of Virginia affirmed the circuit court's decision in favor of Steadfast, finding that the *Kivalina* complaint failed to allege an "occurrence" or "accident" within the meaning of the policies. The court found that, under Virginia law, an accident is "an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." Therefore, the "dispositive issue in determining whether an accidental injury occurred is not whether <u>the action</u> undertaken by the [policyholder] was intended, but rather whether <u>the resulting harm</u> is alleged to have been a reasonably anticipated consequence of the [policyholder's] intentional act."

The court then concluded that AES knew or should have known that the emission of greenhouse gases in the course of their business operations would be the cause of the damage allegedly sustained by Kivalina (an increase in temperature that melted sea ice, exposing Kivalina to storm surges). The court based its conclusion on *Kivalina*'s claim that there is a "clear scientific consensus that the natural and probable consequence of such emissions is global warming" and, further, that the damages suffered by the Kivalina village were a natural and probable consequence of that global warming. Thus, the Virginia court found that even if AES did not in fact *intend* for the resulting harm to occur, the *Kivalina* complaint sufficiently alleged that such damage was the reasonably foreseeable consequence of AES's intentional emissions.

But, the majority's decision is seriously flawed and fails to pay homage to Virginia's rules of insurance contract construction, including those cited by the court. It is well settled in Virginia and elsewhere that an insurer must defend its policyholder unless the insurer can demonstrate that there is no possible factual or legal basis for coverage. Put another way, an insurer *must* defend its policyholder if there is a possibility of coverage. The *Kivalina* complaint clearly alleges a factual and legal basis upon which *Steadfast* may be obligated to indemnify AES. In fact, the majority acknowledges this possibility of coverage, explaining that "Kivalina alleges that … AES was negligent *if it did not know* [the damage its activities would cause]." But, the majority then altogether ignores this potential for coverage by suggesting instead that the court focus on Kivalina's sweeping allegations of intent and knowledge, stating:

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> Even if AES were negligent and did not intend to cause the damage that occurred, the gravamen of Kivalina's … claim is that the damages it sustained were the natural and probable consequences of AES's intentional emissions.

But, this shift of attention from the alleged possibility of a covered claim in favor of broad and unsubstantiated allegations of intent is plainly at odds with the majority's own recitation of controlling law, which says that "an insurer's duty to defend … arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy."

The court also appears to treat the term "occurrence," which appears in the insuring agreement portion of the policies, as a term of exclusion. Yet the court does this without regard to the rules requiring that exclusionary provisions be read narrowly and in favor of coverage. This is confirmed by the court's reliance on *Parker*,[3] a decision that involved an intentional acts exclusion, not an interpretation of "occurrence," as used in a policy's insuring agreement. But, by doing so, the court unnecessarily and improperly shifts the burden of proof from the insurer to the policyholder.

In addition, the majority apparently permitted generalized and sweeping allegations to control and derail basic insurance coverage concepts without any factual support. For instance, the *Kivalina* plaintiffs admittedly could not directly link their alleged injuries to AES's emissions, yet the plaintiffs nevertheless allege that AES contributed to their injuries. Consequently, the district court overseeing the underlying *Kivalina* lawsuit dismissed *Kivalina* on the pleadings, finding that the simple discharge of greenhouse gases was not enough to establish injury causation, particularly where, at the time the emissions occurred, carbon dioxide emissions were not even under governmental regulation. Yet, on this insurance coverage appeal, the majority concluded that the *sam*e alleged damage somehow was such a definite and foreseeable consequence of AES's emissions that there was no possibility that AES did not know, or should not have known, it would cause this harm.

Finally, the reasoning of *Steadfast* proves utterly unworkable when applied to other types of insurance claims where the policyholder's intent might be relevant to the availability of coverage. For example, in the context of automobile liability insurance, from a statistical standpoint, such as that which underscored the court's reasoning in *Steadfast*, it is a natural and foreseeable possibility that use of a motor vehicle will lead to an automobile crash. In fact, the intentional use of an automobile is a necessary requisite to a crash, and the purchase of liability insurance by the driver is evidence that the policyholder anticipated the reasonable probability that a crash might occur. But, that is not to mean that a claim for liability coverage following an automobile accident should be denied because the insured driver knew there to be a reasonable possibility that his or her driving would lead to an accident.

Nor does the court's reasoning make any sense in the context of life insurance, where there is a proven causal link between poor diet, heart disease and death. In fact, one study found that 30 percent of the risks of heart disease are related to a poor diet. But, that is not to mean that families of policyholders who consume fast food should be denied life insurance proceeds because death is a natural and probable consequence of a poor diet. Nor, by the same token, does it mean that death from a knowingly poor diet should be considered intentional or worse, a suicide. Indeed, that would be absurd. Yet, the logic that leads to such an absurdity is no different from the logic that underlies the court's decision in *Steadfast*, where the majority concluded that a mere statistical *possibility* was enough to create a causal link between the discharge of carbon dioxide and the distant and attenuated damage caused by storm surges in Kivalina, Alaska.

[3] *Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 278 S.E.2d 803 (Va. 1981).

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Implications

The obvious flaws in the logic and reasoning underlying the *Steadfast* decision strongly suggest that the decision will have a limited impact in jurisdictions outside Virginia, particularly since insurance contract construction is heavily jurisdictionally dependent. Indeed, had *Steadfast* been decided elsewhere, the outcome might have been entirely different. This would particularly be the case in jurisdictions that decline to infer intentional harm based on foreseeable consequences. For instance, other courts have concluded that an intentional act, resulting in unintentional harm, constitutes an accident in the context of general liability insurance, even where the act involves the foreseeable consequences of harm.[4] Such a construction is consistent with the ordinary rules of insurance contract construction, even those in Virginia, which require that provisions restricting coverage be read narrowly, with the insurer bearing the burden to prove each and every element of a restrictive or exclusionary policy provision.

Furthermore, even under Virginia law, under different but similar circumstances, a defense may be owed for claims for damages allegedly caused by climate change. Arguably, if not apparently, the Supreme Court of Virginia decided *Steadfast* on public policy considerations, rather than on the merits of the insurance coverage issues, as evidenced by the unworkable standard that survives the decision. Policyholders facing liability based on alleged global warming damages, therefore, should not be dissuaded by *Steadfast* and should continue to thoroughly explore the potential for coverage under their own insurance contracts if faced with alleged climate change liabilities.

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[4] *See*, *e.g.*, *Allstate Ins. Co. v. Steinemer*, 723 F.2d 873, 875 (11th Cir. 1984).