Client Alert

April 2012

AES v. Steadfast

On Friday, April 20th, the Virginia Supreme Court held unanimously in *AES v. Steadfast* (Va. S. Ct. No. 100764) that an insurer has no duty to defend or indemnify claims for harm related to climate change under the terms of a CGL policy. Clearly troubled by the rationale the court was compelled by precedent to apply, concurring Justice Mims noted that the court's "jurisprudence is leading inexorably to a day of reckoning that may surprise many policy holders." He went on later to state that while he agreed with the outcome, "[o]ur precedents may have painted us into a jurisprudential corner."

AES is a defendant in *Native Village of Kivalina v. Exxon Mobil*, in which a native Alaskan village seeks money damages from a group of oil, utility and coal companies on the theory that the defendants' emission of greenhouse gases constitutes a nuisance. Upon initiation of the *Kivalina* litigation, AES promptly tendered the complaint to its insurer, Steadfast Insurance Company, seeking a defense and indemnity under its general liability policies. The insurance policies required Steadfast to defend AES against suits seeking damages caused by bodily injury or property damage caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." Steadfast denied coverage and filed a declaratory judgment action in Virginia state court, seeking a determination that it had no duty to defend or indemnify AES.

On cross-motions for summary judgment, Steadfast argued that the *Kivalina* complaint did not allege "accidental damage" within the meaning of the policy because the complaint asserted that AES's intentional business activities resulted in the foreseeable consequence of global-warming damage to the village. In the alternative, Steadfast argued that coverage was barred by the policy's pollution exclusion. AES argued that any alleged harm resulting from climate change must be considered an "accident" because it was unintended and/or unexpected, as acknowledged by certain allegations in the *Kivalina* complaint. The trial court granted summary judgment in favor of Steadfast, finding it had no duty to defend or indemnify AES because the *Kivalina* complaint did not allege an "accident" or "occurrence."

AES appealed to the Supreme Court of Virginia. The Supreme Court affirmed, holding that claims for damage allegedly caused by a policyholder's emission of greenhouse gases was "reasonably foreseeable" to the policyholder and, therefore, could not be considered an "accident" or "occurrence" that triggers coverage under standard form general liability policies.

AES petitioned the Supreme Court for rehearing on the ground that the court's holding conflicts with longstanding precedent. AES argued that the court's opinion redefined "accident" to exclude coverage in virtually all negligence cases, instead of applying precedent finding coverage unless a defendant "should have known to a substantial probability" that harm would occur. The court granted the petition.

In Friday's decision, the court affirmed that Steadfast has no duty to defend or indemnify AES in connection with the *Kivalina* claims. Under existing Virginia law, the court's examination is limited by the "8 corners rule" to only the four corners of the complaint and the four corners of the policy, a construction followed by a minority of states. The court construed the *Kivalina* complaint as alleging that climaterelated harm was "the natural or probable consequence" of the intentional release of carbon dioxide into the atmosphere. While coverage may exist where an intentional act results in an unforeseen harm, the court reasoned, it does not where the resulting harm is alleged to have been reasonably anticipated or

"the natural or probable consequence" of the insured's intentional act. In response to AES's argument that negligence claims trigger coverage, the court explained that under Virginia precedent, negligence is not synonymous with accident, and the *Kivalina* action differs from most negligence actions because it asserts only that the defendants "knew or should have known" that a particular harm would result, not that the intentional acts were done negligently. Justice Mims wrote separately, agreeing with the majority, but also "acknowledg[ing] the broader effect that this conclusion … may have on other CGL policies[.]" No justices dissented.

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