Sui Generis

Providing Insight into the Contours of Emerging Insurance Coverage and Environmental Issues

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So Much for Global Warming Claims

Despite what some political pundits may believe about the causes of Global Warming, the Virginia Supreme Court has ruled that allegations that companies intentionally emitted green house gases resulting in storm surges rendering an Alaskan island uninhabitable are not the result of an "occurrence" under CGL policies. Rather, when such harm is the natural and probable consequence of an intentional act, the harm cannot be the result of an "occurrence."

In *AES Corp. v. Steadfast Ins. Co.,* issued on April 20, 2012, the Virginia Supreme Court used Virginia's Eight Corners Rule to box in plaintiffs – a Native American community living on a barrier island in Alaska that has become prone to flooding and is allegedly uninhabitable due to the defendants' emissions of green house gases. The target defendants in the underlying action were power generation companies and other heavy green house gas emitters.

The Allegations

In the underlying action, the Native Village of Kivalina and City of Kivalina (Kivalina) alleged that AES "intentionally [emitted] millions of tons of carbon dioxide and other greenhouse gases into the atmosphere annually." The Complaint further alleged that AES "knew or should have known of the impacts of [its] emissions" of carbon dioxide, but that "[d]espite this knowledge" of the "impacts of [its] emissions on global warming and on particularly vulnerable communities such as coastal Alaskan villages," AES "continued [its] substantial contributions to global warming."

Occurrence – Focus on the Harm Rather than the Initial Act

In determining if the Kivalina Complaint alleged an "occurrence", the court – like others in many jurisdictions – focused on the ultimate harm alleged rather than the act that preceded the harm - to determine if an "occurrence" was alleged in the Complaint.

Foreseen or Unforeseen – that is the Question

> The court framed the occurrence issue as follows:
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> [R]esolution of the issue of whether Kivalina's Complaint alleges an occurrence covered by the policies turns on whether the Complaint can be construed as alleging that Kivalina's injuries, at least in the alternative, resulted ***from unforeseen consequences that were not natural or probable consequences of AES's deliberate act of emitting carbon dioxide and greenhouse gases.*** (emphasis added).
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> The heart of the court's analysis is succinctly found in the following passage:
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> However, even though the insured's action starting the chain of events was intentionally performed, when the alleged injury results from an unforeseen cause that is out of the ordinary expectations of a

> reasonable person, the injury may be covered by an occurrence policy provision. 20 Eric M. Holmes, Appleman on Insurance 2d § 129.2(I)(5) (2002 & Supp. 2009). In such a context, ***the dispositive issue in determining whether an accidental injury occurred is not whether the action undertaken by the insured was intended, but rather whether the resulting harm is alleged to have been reasonably anticipated or the natural or probable consequence of the insured's intentional act.*** See id.; see also Fidelity & Guar. Ins., 238 Va. at 462, 384 S.E.2d at 615.

Subjective or Objective – Both Please

The court also – without much analysis – stated that to obviate an "occurrence," "it must be alleged that the result of an insured's intentional act was more than a possibility; it must be alleged that the insured subjectively intended or anticipated the result of its intentional act or that objectively, the result was a natural or probable consequence of the intentional act." The court's evidence that the harm was natural or probable? The court – relying on the Complaint – stated that "Kivalina also alleges that ***there is a clear scientific consensus*** that the natural and probable consequence of such emissions is global warming and damages such as Kivalina suffered."

Ultimately, the court held that Steadfast is not obligated to defend AES because the "acts as alleged in the complaint were intentional and the consequences of those acts are alleged by Kivalina to be not merely foreseeable, but natural or probable. Where the harmful consequences of an act are alleged to have been not just possible, but the natural or probable consequences of an intentional act, choosing to perform the act deliberately, even if in ignorance of that fact, does not make the resulting injury an 'accident' even when the complaint alleges that such action was negligent."

Query – would the outcome have been different had Kivalina taken the position of some of our perspective Presidential candidates?

A copy of the opinion can be found here.

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