

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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Coverage College Update – The 5th Annual White and Williams Coverage College is fast approaching. We are all looking forward to it and busily getting ready for October 6. There are currently over 500 people registered and a long waiting list. If you are registered, and your plans have changed, please let Katie McDonald know so that we can offer your spot to someone on the waiting list. We appreciate that. Write to Katie at Mcdonaldk@whiteandwilliams.com

September 17, 2011

Chilly Reception: Virginia Supreme Court Rejects Coverage For Power Plant For Damages Allegedly Caused By Global Warming

First Case To Address This Much-Talked-About Coverage Issue

I admit that I don't know much about global warming. Maybe it is a legitimate threat to mankind's existence or maybe it's the greatest urban legend since [little Mikey died from eating Pop Rocks](#). Either way, global warming is no longer just a scientific issue, but now firmly rooted as a business one as well. And lawyers are getting in on the act. Lots of law firms have expanded their footprint to include global warming practice groups (perhaps dusting off those Y2K practice groups).

But this much I do know about global warming – if it's the reason why the thermometer occasionally hits the high 60s in Philadelphia in January or February, then let's all keep spewin' out greenhouse gases. [Environmentalists – You can send hate mail to Maniloffr@whiteandwilliams.com.]

With the potential for global warming to cause various forms of damage, the past few years have seen insurance coverage hobbyists writing articles speculating on the availability of liability insurance coverage for companies whose operations allegedly contributed to global warming. But with actual suits seeking damages for global warming not yet clogging judge's dockets, and only one decision (that I know of) addressing the insurance coverage issues (a couple more have tangentially addressed the issues), the discussion has taken place much more in articles and at insurance conferences than in briefs.

Yesterday the Virginia Supreme Court, in the closely watched case of *The AES Corp. v. Steadfast Insurance Company*, issued its decision in the first case to address the availability of insurance coverage for damage allegedly caused by a company's emissions of greenhouse gases. The court concluded that no coverage was owed. Despite the complexity and controversy over global warming, the court's opinion was relatively brief

and straightforward. It goes like this (Please forgive the extensive verbatim quoting from the opinion – but it’s Saturday.)

“AES is a Virginia-based energy company that holds controlling interests in companies specializing in the generation and distribution of electricity in numerous states, including California.” *AES* at 1.

“[The Native Village of] Kivalina is located on the tip of a small barrier reef on the northwest coast of Alaska, approximately seventy miles north of the Arctic Circle. ... [I]n the Complaint, Kivalina alleges that AES engaged in energy-generating activities using fossil fuels that emit carbon dioxide and other greenhouse gases, and that the emissions contributed to global warming, causing land-fast sea ice protecting the village's shoreline to form later or melt earlier in the annual cycle. This allegedly exposed the shoreline to storm surges, resulting in erosion of the shoreline and rendering the village uninhabitable.” *Id.* at 3-4.

In February 2008, Kivalina filed suit in the United States District Court for the Northern District of California against AES and numerous other defendants for allegedly damaging the village. *Id.* at 1-2.

Steadfast provided AES a defense under a reservation of rights and filed a declaratory judgment action seeking a determination that it did not owe defense or indemnity to AES. Steadfast asserted no "occurrence;" any alleged injury arose prior to the inception of Steadfast's coverage; and the pollution exclusion. *Id.* at 2.

The trial court granted Steadfast’s motion for summary judgment that no coverage was owed on the basis of no “occurrence.” The parties soldiered on to the Virginia Supreme Court, which affirmed the decision of the trial court. *Id.* at 2-3.

The Virginia high court addressed whether a defense was owed to AES under Virginia’s “eight corners” rule. AES argued that, despite the allegations in the complaint, that it intentionally caused global warming, the complaint also alleged that AES acted *negligently* and that AES "knew or *should know*" that its activities in generating electricity would result in the environmental harm suffered by Kivalina. AES made the very arguments that you would expect to see from a policyholder in a duty to defend situation like this – “[T]he damage to the village resulting from global warming caused by AES's electricity-generating activities was accidental [thus, an “occurrence”] because such damage may have been unintentional.” *Id.* at 11.

Despite the allegations of negligence in the complaint, and despite Virginia’s adherence to the “eight corners” rule, the Virginia Supreme Court held that the complaint did not allege an “occurrence.” The court stated:

In the Complaint, Kivalina plainly alleges that AES intentionally released carbon dioxide into the atmosphere as a regular part of its energy-producing activities. 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. 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.

Kivalina alleges that AES knew or should have known the damage that its activities would cause, that AES was negligent if it did not know, and that AES was negligent in acting in concert with other defendants in creating a nuisance.

However, allegations of negligence are not synonymous with allegations of an accident, and, in this instance, the allegations of negligence do not support a claim of an accident. Even if AES were negligent and did not intend to cause the damage that occurred, the gravamen of Kivalina's nuisance claim is that the damages it sustained were the natural and probable consequences of AES's intentional emissions.

Id. at 12-13.

The most significant thing about *AES v. Steadfast* is not that the court found no coverage for property damage allegedly caused by global warming, but that it is the first decision to address the issue. In my experience, when it comes to coverage for emerging issues, the first decision to address the issue – and especially here when it is from a supreme court – takes on a disproportionate significance compared to all subsequent decisions. For future policyholders seeking coverage for global warming damages, regardless of the state where they find themselves, *AES v. Steadfast* is now the case to beat and must be distinguished.

A copy of yesterday's Virginia Supreme Court decision in *The AES Corp. v. Steadfast Insurance Company* can be accessed here:

<http://www.courts.state.va.us/opinions/opnscvwp/1100764.pdf>

Please let me know if you have any questions.

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