

ALERT

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Global Insurance Group

News Concerning
Recent Insurance Coverage Issues



Virginia Supreme Court Grants Rehearing on Whether Emission of Carbon Dioxide Constitutes an “Occurrence”

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On January 17, 2012, the Supreme Court of Virginia set aside its groundbreaking judgment in *AES Corporation v. Steadfast Insurance Company*, 282 Va. 252 (2011), which held that the emission of carbon dioxide was not an “occurrence” within the meaning of a general liability policy.

This insurance coverage dispute arose out of claims filed by the Native Village of Kivalina and the City of Kivalina (collectively, Kivalina) against numerous defendants, including The AES Corporation (AES), an energy company that generates and distributes electricity in numerous states. Kivalina sought damages for injuries resulting from global warming caused by the emission of carbon dioxide. AES sought defense and indemnification from its general liability insurer, Steadfast Insurance Company (Steadfast). Steadfast denied coverage, resulting in coverage litigation in Virginia state court.

After the Virginia Supreme Court held that the allegations set forth in the Kivalina complaint did not allege an “occurrence,” AES submitted a petition for rehearing. AES argued that the court improperly based its finding that there was no occurrence on the allegation that the defendant “should have known” that emitting carbon dioxide would result in the alleged damage. AES argued that the court erred in failing to distinguish between allegations that the insured should have known that harm was *reasonably foreseeable* from allegations that the insured should have known that there was a *substantial probability* that harm would occur. AES further asserted that allegations that harm was reasonably foreseeable have traditionally resulted in the finding of an occurrence for purposes of the duty to defend.

AES cited authorities finding that “if an insured knew or should have known *there was a ‘substantial probability’* that certain results would follow from his acts or omissions, there is no ‘occurrence’ within the meaning of a CGL policy.” AES argued that the “knew or should have known” standard is a negligence standard. AES contends that the court’s decision improperly characterized Kivalina’s complaint as alleging that the harm to the village was the “natural and probable consequence” of CO2 emissions, yet Kivalina did not use any of these words in the complaint. Rather, the Kivalina complaint alleged that AES was negligent because it “should have known” its operations would harm the village.

AES argued that the court’s opinion “departs from precedent and basic principles of insurance law by treating allegations that a defendant ‘should have known’ (i.e., foreseen) a particular harm as equivalent to allegations that the insured should have known to a substantial probability that the insured’s acts would cause the harm.” In so doing, the court’s opinion “collapses the ordinary negligence standard into the intentional act standard.” The result, predicts AES, is that “insureds and plaintiffs will suffer, because they will be unable to depend on insurers to provide a defense or coverage in most tort cases.”

The Virginia Supreme Court entered an order setting aside its judgment and granting rehearing. Steadfast was ordered to file a brief in reply to the petition for rehearing, “which brief shall address only the issue raised in the petition for rehearing.” Oral argument should be heard during the court’s February 2012 session.

It is possible that the court will enter a new opinion reaching the same result, but for different reasons. When the court entered its original ruling, Senior Justice Koontz, joined by Senior Justice Carrico, filed a concurring opinion, which agreed with the result, but expressed concerns that the court's opinion contained language that was too broad on the occurrence issue. It is possible that the court will take

this opportunity to address the concerns in the concurring opinion without changing the result. However, as the court has set aside its prior ruling, any result is possible.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

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