Given Recent Ruling, Will Negligence Claims Be Covered Under CGL Policies in Virginia?

by Peter M. Gillon and James P. Bobotek

The Virginia Supreme Court recently issued a very troubling opinion for Virginia-based policyholders. In AES Corp. v. Steadfast Insurance Co.,[1] *the court held that when a lawsuit alleges that a company engaged in an intentional or volitional act where (i) it subjectively intended or anticipated the result, or (ii) the result was a natural or probable consequence of the intentional act, that company is not entitled to a defense or indemnity under its commercial general liability insurance coverage because a covered "occurrence" has not been alleged.*

The *AES* decision arises from litigation since dismissed by the U.S. District Court for the Northern District of California—litigation developed and funded by a group of high-profile plaintiffs' lawyers to establish a cause of action for property damage caused by climate change. In *Native Vill. of Kivalina v. ExxonMobil Corp.*[2], the plaintiffs, a group of Inupiat Eskimos who were forced to abandon their seaside village north of the Arctic Circle due to excessive erosion allegedly caused by sea level rise due to global warming, brought suit against AES and other power companies alleged to be the largest carbon dioxide emitters. AES tendered the suit to Steadfast, which accepted the defense subject to a reservation of rights and then filed a declaratory judgment action against AES in the Circuit Court for Arlington, Virginia. After both sides moved for summary judgment, the trial court ruled that Steadfast had no duty to defend AES because the Kivalina plaintiffs' complaint did not include allegations falling within the applicable CGL policies' definition of "occurrence." AES petitioned for, and was granted, an appeal to the Virginia Supreme Court.

Notwithstanding the underlying complaint's specific allegations of negligence by AES, the Supreme Court concluded that "[e]ven 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." The court concluded that "[i]f an insured knew or should

[1] No. 100764, 2012 Va. Lexis 81 (Va. April 20, 2012).
[2] 663 F. Supp.2d 863 (N.D Cal. 2009).

have known that certain results would follow from his acts or omissions, there is no 'occurrence' within the meaning of a comprehensive general liability policy." Thus, the trial court's ruling was affirmed.

AES then petitioned for rehearing, arguing that each of the authorities on which the Supreme Court relied stated that no occurrence would exist only where it was alleged that the insured knew to a "substantial certainty" or "substantial probability" that injury would occur. AES asserted that the standard actually applied by the Supreme Court was very different from the standard applied by the cited authorities, which required knowledge of the resulting harm "to a substantial certainty." As the Kivalina plaintiffs made no such "substantial certainty" allegation, AES argued that the court's holding was in error. The Supreme Court granted AES' petition for rehearing, entertained oral argument, and then issued its April 20 decision.

The April 20 decision, however, was almost a verbatim replication of the Supreme Court's earlier decision. There is no discussion of "substantial certainty" or "substantial probability," although the court once again relied on the same authorities. Virginia law, according to the court, is as follows:

> For coverage to be precluded under a CGL policy because there was no 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 Kivalina plaintiffs did not allege that AES intended the erosion of the spit, so the underlying complaint must have been read by the Supreme Court as alleging that the erosion in Alaska was a natural or probable consequence of the emissions of carbon dioxide from plants of AES located somewhere other than Alaska. This interpretation is most troubling, as there were no allegations in the underlying complaint that the alleged damage in Alaska was a "substantial certainty" or a "natural or probable consequence." Moreover, the Supreme Court ignored the wide body of Virginia case law stating that an insurer must defend its insured unless there is no possibility of coverage. The Supreme Court stood that jurisprudence on its head, ignoring the Kivalina plaintiffs' allegations that, if proved, would have obligated Steadfast to indemnify AES. Most courts agree that under the standard "occurrence" definition, an unnatural or improbable consequence of an intentional act can be "accidental." See, e.g., *State Farm Fire & Cas. Co. v. Superior Court*, 164 Cal. App. 4th 317 (Cal. Ct. App. 2008) (insured intended to throw claimant into swimming pool, but was unaware of a step, and therefore injury from landing on step was accidental and thus an "occurrence.").[3]

This decision will have major implications on Virginia policyholders, at least until it is clarified through subsequent decisions. We anticipate insurers raising the lack of an "occurrence" as a basis to deny a wide range of claims, including product defect and product liability claims based on allegations that a claimant's damages were a "natural or probable consequence" even if the defendant did not know of the inherent harm when it sold its product. This could create a gap in policyholders' commercial general liability and other such third-party coverages, at least until this issue is clarified through subsequent decisions or legislative action. Until then, we recommend that policyholders undertake one or more of the following options:

- Endorse CGL policies to ensure that they are governed by another state's law.

[3] Interestingly, the federal district court in which the *Kivalina* lawsuit was filed dismissed the case in response to AES' motion to dismiss, finding that the plaintiffs could not link their alleged damages to AES' emissions. Yet the Virginia Supreme Court concluded that the exact same allegations of damages were a "natural or probable consequence" of AES' emissions.

- Endorse CGL policies to provide a definition of "occurrence" that is in line with the vast majority of courts' interpretation and application of that term. We suggest the following definition:

  > Occurrence means (i) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; or (ii) an intentional act from which "bodily injury" or "property damage" arises, unless the insured subjectively intended the resulting "bodily injury" or "property damage."

- Approach members of the Virginia General Assembly to request a legislative correction to the Supreme Court's very troubling ruling.

If you have questions, please contact the Pillsbury attorneys with whom you regularly work, or the authors:

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