IS GLOBAL WARMING A COVERED "ACCIDENT"? AN ANALYSIS OF *AES Corp. v. Steadfast Insurance Co.*

REX HEINKE*
WARREN J. BIRO**

***

This article discusses whether or not commercial liability insurers have a duty to provide coverage to policyholders who are sued because their activity contributes to global warming. The article focuses on a decision by the Virginia Supreme Court in AES Corp. v. Steadfast Insurance Co. in which the plaintiff insurance company sued its policyholder claiming that the act of emitting carbon dioxide into the atmosphere was not an "occurrence" as defined in the insurance policy and therefore no coverage was required. The Virginia Supreme Court agreed, ruling that coverage by the insurer was not necessary for any period in which the policyholder knew, or should have known, that the emission of carbon dioxide had a substantial probability of causing harm.

***

I. INTRODUCTION

In *AES Corp. v. Steadfast Insurance Co.*,[1] the Virginia Supreme Court held that claimed injury due to a power company's alleged contribution to global warming was not an "accident."[2] Therefore, although the insurance company had issued the power company several commercial general liability ("CGL") insurance policies that provided coverage for an "occurrence," the insurance company did not have a duty to provide coverage for the insured's cost of defense because those policies defined "occurrence" as an "accident."[3] This Article contends the Virginia Supreme Court's decision in *AES* was wrong, and the insurance company should have been required to provide the insured with a defense.[4]

---

* Akin Gump Strauss Hauer & Feld LLP, Los Angeles. Mr. Heinke argued on behalf of AES in the Virginia Supreme Court.

**Akin Gump Strauss Hauer & Feld LLP, Los Angeles.

[1] AES Corp. v. Steadfast Ins. Co., 725 S.E.2d 532 (Va. 2012).

[2] *Id.* at 537.

[3] *Id.* at 538.

[4] The views expressed in this Article are those of the authors. They do not necessarily reflect the views of the AES Corporation or Akin Gump Strauss Hauer & Feld LLP.

II. BASIC FACTS

The plaintiff in *AES* was Steadfast Insurance Company, a global insurance provider. From 1996 to 2000 and 2003 to 2008, Steadfast issued a series of CGL policies to the defendant, AES Corporation, a Virginia-based energy company that produces electrical power around the world.[5]

In the underlying litigation that gave rise to the issues in *AES*, the Native Village and City of Kivalina ("Kivalina"), a native community in Alaska, brought suit against AES and numerous other energy companies in 2008 in the Northern District of California. Kivalina alleged it was harmed as a result of global warming to which defendants contributed through the emission of greenhouse gases.[6]

Specifically, Kivalina contended: (1) defendants' fossil-fuel-fired electrical generating plants emit large quantities of carbon dioxide as a waste by-product of combustion,[7] (2) defendants fail to reduce these emissions by not using "alternatives to fossil fuel combustion,"[8] (3) these emissions "mix in the atmosphere"[9] and "merge[] with the accumulation of emissions in California and in the world,"[10] (4) the emissions further accumulate in the upper atmosphere and trap heat, along with carbon dioxide emitted many years ago by other sources,[11] (5) over a period of time the trapped heat raises the temperature of the atmosphere,[12] (6) the increased temperature raises ocean temperatures, which melts Arctic glaciers and ice caps, including Arctic sea ice in the upper northwest corner of Alaska that ordinarily builds up in front of Kivalina during the winter,[13] (7) this leads to sea ice forming later or melting earlier than usual in front of Kivalina, with the ice not being as substantial,[14] (8) this results in Kivalina, located on an Alaskan coastal barrier island, being more vulnerable to waves and storm surges that cause erosion and flooding, which render the island uninhabitable.[15]

---

[5] *AES Corp.*, 725 S.E.2d. at 533.

[6] *Id*.

[7] Complaint for Damages; Demand for Jury Trial at 2, 4, 7, Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N. D. Cal. 2008), *aff'd*, 696 F.3d 849 (9th Cir. 2012) (No. 08-01138) [hereinafter *Kivalina* Complaint]; *AES Corp.*, 725 S.E.2d. at 534.

[8] *Kivalina* Complaint*, supra* note 7, at 23–24.

[9] *Id*. at 34.

[10] *Id.* at 3.

[11] *See id.* at 31.

[12] *Id.* at 31; *see also id.* at 32 (alleging that the fourteen warmest years on record have all occurred since 1990).

[13] *Id.* at 33, 45.

[14] *Id.* at 45.

[15] *Id.*; AES Corp. v. Steadfast Ins. Co., 725 S.E.2d 532, 534 (Va. 2012).

Kivalina further asserted that there is "a clear scientific consensus that global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion and methane releases from fossil fuel harvesting."[16] Thus, Kivalina alleged that AES and the other defendants "*intentionally* emit[] millions of tons of carbon dioxide and other greenhouse gases into the atmosphere annually" and "*knew or should have known*" of the "impacts of [their] emissions on global warming."[17] Kivalina contended that "[d]espite this knowledge," AES continued to emit greenhouse gases as part of its daily business operations.[18] Kivalina concluded that AES "[i]ntentionally or negligently," has "created, contributed to, and/or maintained" global warming causing Kivalina's alleged injuries, and that AES and the other defendants intentionally and negligently violated federal and state nuisance law.[19]

AES requested that Steadfast provide it with a defense pursuant to the terms of its CGL policies. Steadfast provided a defense, but under a reservation of rights, and filed a declaratory judgment action in Virginia to determine whether Steadfast had a duty to defend AES.[20]

The Virginia trial court held that "Steadfast has no duty to defend AES in connection with the underlying *Kivalina* litigation because no 'occurrence' as defined in the policies has been alleged in the underlying Complaint."[21] AES appealed to the Virginia Supreme Court, which granted discretionary review.[22]

III. STEADFAST'S ARGUMENT

In making its argument that it had no duty to defend AES in the underlying Kivalina litigation, Steadfast pointed out that the CGL policies only applied to complaints alleging an "occurrence," which is defined in the CGL policies as an "accident."[23] Steadfast contended that Kivalina's complaint did not allege damages caused by an accident, but rather by

---

[16] *AES Corp.*, 725 S.E.2d. at 534.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 534–35. The Ninth Circuit rejected Kivalina's federal claims on the grounds that the federal Clean Air Act displaced any federal common law nuisance claim. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012). The federal court then declined to hear the state claims. *Id*. at 858.

[20] *AES Corp.*, 725 S.E.2d. at 533.

[21] Steadfast Ins. Co. v. AES Corp., No. 2008-858, 2010 WL 1484811 (Va. Cir. Ct. 2010).

[22] *AES Corp.*, 725 S.E.2d. at 535.

[23] Brief of Appellee, AES Corp. v. Steadfast Insurance Co., 715 S.E.2d 28 (Va. 2011) (No. 100764) 2010 WL 6893536, at *11, *18.

intentional conduct with known consequences. That is, Steadfast alleged that AES "knew or should have known" its actions would result in global warming and Kivalina's alleged injuries.[24]

Steadfast further contended that Kivalina alleged there was a clear scientific consensus that global warming is caused by the release of the type of greenhouse gases that AES regularly emitted every day.[25] Accordingly, Steadfast asserted it did not owe AES a defense because allegations of intentional conduct with known consequences are not allegations of an accident. Thus, it argued, Kivalina's allegations were outside the scope of the CGL policies that Steadfast issued to AES.[26]

IV. AES'S ARGUMENT

AES contended that well-established law distinguishes between an insured's acts and the consequences of its acts.[27] While AES acknowledged that intentional conduct that has direct and certain consequences is not an accident, it asserted that Kivalina's alternative allegation that AES acted intentionally in emitting greenhouse gases, but only "knew or should have known" the consequences of its action described an accident.[28]

More specifically, AES contended that Kivalina alleged that AES engaged in intentional conduct that, through a highly attenuated causal chain, led to global warming and damage to Kivalina.[29] AES contended that because Kivalina did not allege the harm was solely a direct and certain consequence of its acts, it was also an accident, so there was coverage.[30]

V. FIRST DECISION

The Virginia Supreme Court issued two decisions.[31] In its first decision, the Court held, consistent with standard insurance law, that to

---

[24] *Id.* at *12–13, *26–27.

[25] *Id.* at *19–20.

[26] *Id.* at *20.

[27] Brief of Appellant, AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011) (No. 100764), 2010 WL 6893538, at *14–15.

[28] *Id*.

[29] *Id* at *14. The District Court in the underlying case held that causation was so attenuated that Kivalina had not even successfully pled causation under Article III of the federal constitution. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 880–82 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012).

[30] Brief of Appellant, *supra* note 27, at *14–16.

[31] AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011), *reh'g granted, opinion set aside*, 725 S.E.2d 532 (Va. 2012), *and superseded*, 725 S.E.2d 532 (Va.

determine if Kivalina's allegations come within the coverage provided by Steadfast's CGL policies, the "four corners" of the complaint must be compared with the "four corners" of the policy.[32] This is the *eight corners rule* (sometimes referred to as the *four corners rule*) that a duty to defend is determined by the underlying complaint's allegations and the terms of the policy.[33]

The Virginia Supreme Court also recognized, again consistent with standard insurance law, that Steadfast's duty to defend is broader than its obligation to pay a judgment, and arises whenever the complaint alleges any facts and circumstances, even in the alternative, that fall within the risks covered by the policy.[34]

Referencing authorities like *City of Carter Lake v. Aetna Cas. & Sur. Co*,[35] and Barry R. Ostrager and Thomas R. Newman's *Handbook on Insurance Coverage Disputes*,[36] the Virginia Supreme Court concluded that Steadfast did not have a duty to defend because "[w]hen the insured knows or should have known of the consequences of his actions, there is no occurrence and therefore no coverage."[37] The Court went on to hold that "[i]f an insured knew or should 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."[38]

VI. REHEARING

AES petitioned for rehearing, arguing that the duty to defend is excused only when the complaint alleges that a defendant knew or should have known to a *substantial probability* that its conduct would cause the alleged harm, not merely when a defendant "should have known."[39]

2012) [hereinafter AES I]; AES Corp. v. Steadfast Ins. Co., 725 S.E.2d 532 (Va. 2012) [hereinafter AES II].

[32] AES I, *supra* note 31, at 31–32.

[33] *Id.*

[34] *Id.* at 32 (quoting Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 475 S.E.2d 264, 265–66 (Va. 1996)).

[35] 604 F.2d 1052 (8th Cir. 1979).

[36] 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.03[c] (15th ed. 1990).

[37] AES I, *supra* note 31, at 33–34 (citing OSTRAGER & NEWMAN, *supra* note 36).

[38] *Id*. at 34 (citing OSTRAGER & NEWMAN, *supra* note 36 (citing City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1058–59 (8th Cir. 1979)).

[39] Petition for Rehearing at 4–6, AES Corp. v. Steadfast Ins. Co.,725 S.E.2d 532 (Va. 2012) (No. 100764).

In making its argument, AES cited the very authorities relied on by the Court. AES pointed out that *City of Carter Lake* and Ostrager & Newman stand for the proposition that there is no "occurrence" within the meaning of a CGL policy if an insured knows or should have known there was a *substantial probability* that certain results would follow from the insured's acts.[40] However, if the insured only "should have known" of the consequences of his actions, then there is an "occurrence."[41] Thus, AES asserted that because Kivalina did not allege that AES "should have known to a *substantial probability*" that its actions would harm the village (Kivalina merely alleged that AES *should have known* this), there was an occurrence, and thus Steadfast owes AES coverage.[42]

AES also argued that by omitting the "to a substantial probability" element, the Court had redefined "accident" to exclude coverage in virtually all negligence cases because "should have known" is a foreseeability standard (that is, a mere negligence standard), and that to have a claim for negligence, a plaintiff must at least allege that a defendant "should have known" the consequences of its actions.[43]

AES further argued that if "should have known" allegations would defeat coverage, then there would almost never be coverage for an accident, because any plaintiff alleging negligence will allege that the defendant "should have known" of the consequences of its acts.[44] AES quoted *City of Carter Lake*, an authority the Virginia Supreme Court had relied on, rejecting the very argument the Virginia Supreme Court adopted: "Under [this] construction of the policy language if the damage was foreseeable then the insured is liable, but there is no coverage, and if the damage is not foreseeable, there is coverage, but the insured is not liable. This is not the law."[45]

The Virginia Supreme Court granted rehearing.[46]

---

[40] *Id.* at 4–5 (citing OSTRAGER & NEWMAN, *supra* note 36, at 658–59 ("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.")).

[41] *Id.* at 5 (citing City of Carter Lake, 604 F.2d at 1059 ("if the insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions then there has not been an occurrence or accident.")).

[42] *Id.* at 1.

[43] *See id.* at 9–10.

[44] *See id.* at 10.

[45] *Id.* (citing City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1058 (8th Cir. 1979)).

[46] AES II, *supra* note 31, at 532 n.1.

VII. SECOND DECISION

In its second and final decision, the Virginia Supreme Court held that Kivalina alleged that the result of AES's intentional acts was not merely foreseeable, but a "natural or probable consequence" of those acts, and thus the resulting alleged injury was not an accident.[47] This holding is surprising because Kivalina, in its underlying complaint, did *not* assert that the harm it allegedly suffered was the "natural and probable consequence" of AES's intentional acts - it merely alleged that AES "knew or should have known" that would be the consequence.[48] Thus, Kivalina did not allege that AES knew to a substantial probability that harm would result. The Court did not discuss the substantial probability issue.

The Court further held that a natural or probable consequence of AES's intentional emissions of carbon dioxide was global warming because Kivalina alleged there is a scientific consensus that such emissions cause global warming.[49] However, as actually alleged by Kivalina, the consensus was equivocal, albeit it was alleged to have become more certain over time.[50]

Moreover, Steadfast began issuing CGL policies to AES in 1996.[51] Because Kivalina alleged the consensus became less equivocal over time,

---

[47] *Id.* at 537–38.

[48] *Id.* at 534.

[49] *Id.* at 537.

[50] Kivalina cited in its complaint twenty-seven examples from 1896 to 2007 to support the allegation that there is a "clear scientific consensus that global warming is caused by emissions of greenhouse gases." Kivalina Complaint, *supra* note 7, at 33–39. But the majority of these examples use subjective language that merely suggests carbon dioxide emissions "could," "may," or "should" result in global warming. *See, e.g., id.* at 33 ("In 1956 scientist Gilbert Plass published a paper in American Scientist stating that global warming *could be* a 'serious problem to future generations.'" (emphasis added)); *id.* at 34 ("The First Annual Report of the U.S. Council on Environmental Quality in 1970 contained a Chapter entitled 'Man's Inadvertent Modification of Weather and Climate,' which stated that 'air pollution alters climate and *may* produce global changes in temperature . . . .'" (emphasis added)); *id.* at 35 ("[I]n 1988, NASA scientist James E. Hansen published results showing that 'global greenhouse warming *should rise* above the level of natural climate variability within the next several years, and by the 1990s there *should be* a noticeable increase in the local frequency of warm events . . . .'" (emphasis added)); *id.* at 37 ("In 1995 the [Intergovernmental Panel on Climate Change (IPCC)] published its Second Assessment Report in which it stated that 'the *balance of evidence suggests* a discernible human influence on global climate . . . .'" (emphasis added)); *id.* ("In 2001 the IPCC . . . stated that 'most of the observed warming over the last 50 years *is likely* to have been due to the increase in greenhouse gas concentrations . . . .'" (emphasis added)).

[51] AES II, *supra* note 31, at 533.

but did not allege when the consensus became certain, AES - at the very least - was entitled to coverage under some of the policies when the alleged consensus was still equivocal. The Court did not discuss this issue, either.

VIII. PROPER RULE

The proper rule, as reflected in *City of Carter Lake* and Ostrager and Newman, is that there is no coverage for an "accident" if either: (1) the insured's acts were intentional and it knew what the consequences of those acts would be; or (2) it "acted intentionally and should have known to a substantial probability" what the consequences of its acts would be.[52]

This rule ensures that only true accidents are covered, and that mere negligence allegations where a defendant should have known about the consequences of its acts will not defeat coverage. The Virginia Supreme Court's holding will, as *City of Carter Lake* and the two concurrences to the Virginia Supreme Court's two decisions recognized,[53] eliminate insurance coverage in all negligence cases if it is followed in other cases.

IX. HYPOTHETICAL

A hypothetical illustrates the issue presented and its proper resolution. Suppose there are two lanes of automobile traffic going in opposite directions east and west. Suppose further that the insured driver is

---

[52] *See* OSTRAGER & NEWMAN, *supra* note 36, at 658 ("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."); City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1059 (8th Cir. 1979) ("If the insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions then there has not been an occurrence or accident . . . .").

[53] *See* City of Carter Lake, 604 F.2d at 1058 ("To adopt [the] interpretation that an injury is not caused by accident because the injury is reasonably foreseeable would mean that only in a rare instance would [a CGL] policy be of any benefit to [the insured] . . . ."); AES I, *supra* note 31, at 34 (Koontz, J., concurring) ("In my opinion, the majority does not adequately explain that the argument which Steadfast makes here would not be applicable to the vast majority of cases where a policyholder seeks to have his insurance company provide him with a defense for an accidental tortious injury."); AES II, *supra* note 31, at 538–39 (Mims, J., concurring) (asserting the majority's holding suggests "accidents" as defined by CGL policies do not include acts of negligence, and thus "[o]ur jurisprudence . . . is leading inexorably to a day of reckoning that may surprise many policy holders").

in the south lane of the two lanes headed west and decides to change to the north lane. That act is indisputably intentional.

The question is: What did the driver know about the consequences of his intentional act of changing lanes? Whether his act of changing lanes is an "accident" depends on what he knows about its consequences. If the driver makes the lane change, but does not bother to look in his rear view mirror or to check his blind spot, and collides with another car, that is surely a covered "accident." He should have known what could happen, which is an "accident."

On the other hand, if the driver engages in the same intentional act, but before switching lanes sees his mortal enemy next to him and knowing he is there still changes lanes, that is not an "accident." Not only was the act intentional but the consequences were known and indeed intended.

Similarly, assume the same hypothetical but the lane change is made at rush hour in a heavily congested urban area and the lanes are filled with traffic. Then not only is the act intentional, but the driver can be said to have known to a "substantial probability" that the consequence of his action would be a collision. Again, the act would not be covered.

However, with global warming, while the act of emitting carbon dioxide was intentional, the consequence was not known or at least not known to a substantial probability. Therefore, there should have been coverage. In sum, the Virginia Supreme Court in *AES* got it wrong.