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09/26/2011 06:51:00 PM EST

Reaction to the Recent Climate Change Insurance Coverage Decision by the Virginia Supreme Court

Posted by [John G. Nevius](#)



By [John G. Nevius, Esq., P.E.](#)

The September 16 decision in Virginia allowing a subsidiary of Zurich to avoid its duty to defend a climate-change related claim is ironic. On the one hand, anthropogenic links to climate change are the subject of considerable political debate. As I understand it, however, the majority of federal elected officials identify as skeptics on this issue. Nonetheless and on the other hand, the Virginia Supreme Court has now held that the alleged "damages [the plaintiff] sustained were the natural and probable consequences of [the defendant policyholder's] intentional emissions." Accordingly, because the injury alleged did not arise from an Accident or Occurrence there was no possibility of coverage and, therefore, no duty to defend. However, if anthropogenic climate change is a myth, then the plaintiff's claims are frivolous and protection against frivolous claims is a significant part of why companies buy liability insurance in the first place. It seems like the Court took all of the plaintiff's allegations as true in conducting its coverage analysis.

The selection of Virginia state court as the forum for a declaratory judgment action on this issue based upon a case that is on appeal from the U.S. District Court for the Northern District of California brought by a Native Village in Alaska was no accident either. After all, Virginia's Supreme Court previously had ruled that alleged injury associated with natural effects of the municipal chlorination of drinking water was excluded from any possibility of coverage because of a pollution exclusion. The forum selection appears to have paid off. This case likely will be cited in all subsequent cases involving the duty to defend climate change-related liability. One thing is certain; it will not put the debate to rest. Virginia is only one state. Brokers, Risk Managers, Directors and Officers and General Counsel, among others should take note. The any-possibility-of-coverage standard for establishing an insurance company's duty to defend is very, very broad for a reason, but those doing business in Virginia may want to consider supplementing their general liability (and, perhaps D&O) coverage if they are concerned about climate change risk(s).

What this decision does not do, however, is provide a highest state court decision regarding the extent to which carbon dioxide and other so-called greenhouse gases may fall within the ambit of "pollutants" for purposes of standard-form "absolute" pollution exclusions. These exclusions, originally intended to exclude coverage for Superfund liability, have become a default coverage defense virtually whenever allegedly toxic substances are involved. A pollution exclusion was one of the defenses raised in this case in the lower court. However, because of an apparent procedural glitch, was not an issue before the court on appeal. We all naturally emit carbon dioxide. The extent to which our emissions constitute a "pollutant" will have to be decided in a different case, but it is unlikely the issue - and the attendant coverage disputes - will go away any time soon.

John G. Nevius (jnevius@andersonkill.com) is a shareholder in the New York office of Anderson Kill & Olick, P.C., and is chair of the firm's Environmental Law Group. Mr. Nevius has successfully resolved and litigated a variety of legal and technical matters, most of which involve insurance coverage. Mr. Nevius has extensive experience trying or arbitrating complex environmental, telecommunications, construction, real estate and work-place safety disputes on behalf of policyholder clients.

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Read an earlier blog post by John Nevius on this case: [Two Key Rulings Pending in Global Warming Suits](#).

Lexis.com subscribers can access the Lexis enhanced version of the Virginia Supreme Court decision: [AES Corp. v. Steadfast Ins. Co., 2011 Va. LEXIS 185 \(Va. Sept. 16, 2011\)](#) with core terms, case law links, and Shepard's.

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Barry Zalma wrote re: [Reaction to the Recent Climate Change Insurance Coverage Decision by the Virginia Supreme Court](#)
on Tue, Sep 27 2011 1:52 PM

The reason the court gave for turning down the case had nothing to do with climate change -- it used the eight corners rule to find no duty to defend because there was no allegation of an "occurrence" and because the underlying suit was couched totally in intentional torts. I don't know of any policy that insures against intentional act that cause injury expected or intended from the standpoint of the insured. What is needed is a plaintiffs counsel -- in an eight corners state -- to allege sufficient facts to establish an "occurrence" or fortuitous event that caused injury to the plaintiff.

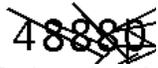
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