

Insurers Get New Weapon For Global Warming Coverage Rows

By **Bibeka Shrestha**

Law360, New York (June 27, 2012, 8:36 PM ET) -- The D.C. Circuit's Tuesday decision upholding a determination by regulators that greenhouse gas emissions threaten human health could be used as ammo for insurers' argument that pollution exclusions rule out coverage of global warming suits, experts say.

The appeals court upheld various steps the U.S. Environmental Protection Agency took to reduce greenhouse emissions after the U.S. Supreme Court held in 2007 that GHGs were air pollutants subject to regulation under the Clean Air Act.

It's likely the insurance industry will point to the D.C. Circuit's decision to bolster its argument that pollution exclusions in commercial general liability policies bar coverage for lawsuits against GHG emitters over global warming, according to Laura Foggan, a Wiley Rein LLP attorney who regularly represents insurers.

"Cases like this one reinforce that kind of self-evident point that greenhouse gases that can contribute to global warming are pollutants," Foggan said Wednesday.

John Nevius, a policyholder attorney at Anderson Kill & Olick PC, agreed that insurers would hold up the ruling in an attempt to avoid defending their insureds against climate change litigation. But he said policyholders can argue that there's a distinction between classifying something as a pollutant for the purpose of regulation and defining it under a policy exclusion.

"Whether and how the government regulates something is separate from the legal and factual inquiry as to what was intended by the language of the pollution exclusion," Nevius said. "Just because it's determined to be harmful doesn't mean it's an excluded pollutant under a general liability policy."

Even if the D.C. Circuit decision had clarified the issue, policyholders could still argue that there's a possibility of coverage because their insurance policies and its exclusions were drafted before the ruling, Nevius added.

While there has been a scarcity of court decisions on whether insurers are obligated to cover global warming suits, the Virginia Supreme Court did side against policyholders in a much-discussed opinion handed down in April.

The state high court held that Steadfast Insurance Co. had no duty to defend The AES Corp. against a lawsuit claiming the power company damaged a native Alaskan community by emitting greenhouse gases that contributed to global warming.

The court did not reach the issue of whether the pollution exclusion applied, but it found that coverage wasn't triggered because there was no "occurrence," defined as an accident under the policy. The village of Kivalina's complaint said that AES intentionally released greenhouse gases into the atmosphere and that there was a clear scientific consensus that these emissions cause global warming, the court ruling noted.

Nevius acknowledged that the Virginia decision will be cited as precedent, but said other jurisdictions could still adopt a different view based on their own state case law.

But future global warming coverage disputes will likely center on whether pollution exclusions apply, and the D.C. Circuit ruling will play a role in that debate, according to Nevius.

Foggan said she suspects Steadfast would have won the coverage dispute even if the Virginia court had tackled the pollution exclusion issue.

"I think it's really a belt and suspenders position for the insurer where there is no coverage for multiple reasons," Foggan said. "Both because there's no occurrence, but also because the pollution exclusion would apply."

Insurers are keeping an eye on any precedents that are set with regard to coverage of climate change suits, even though such lawsuits haven't gained traction in the U.S., according to Foggan.

Policyholders have been able to defeat global warming lawsuits by arguing that they involve political questions that cannot be decided by courts, she said.

The Supreme Court also dealt a blow to parties bringing climate change litigation last summer when it held that the Clean Air Act bars federal common law nuisance claims against GHG emitters over global warming. The high court left open the question of whether parties could bring similar state law claims, however.

Nevius said whether climate change lawsuits will grow more common remains to be seen, but defending against such suits can be extremely expensive and more coverage disputes are likely.

"I think there's certainly likely to be more lawsuits along these lines," Nevius said. "There's also then likely to be concomitant litigation over whether or not general liability coverage responds ... I think we're at the early stage of trying to sort all of this out."

--Editing by John Quinn.

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