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WHAT IS AN “ACCIDENT”?

The standard commercial general liability insurance policy provides coverage for bodily injury or property damage caused by an “occurrence.” The term “occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful condition.” In the recent case of *AES Corp. v. Steadfast Ins. Co.*, ___ Va. ___, ___ S.E.2d ___, 2011 WL 4139736 (2011), the Virginia Supreme Court addressed the meaning of “accident” and provided guidance, and possible fodder, for future litigation.

The plaintiff in the underlying case was a native village in Alaska that brought suit against AES Corp., a Virginia-based energy company. The plaintiff alleged that AES was responsible for the emission of greenhouse gases that caused global warming. Global warming had allegedly caused the melting of sea ice which, in turn, had rendered the village uninhabitable. The complaint included allegations that there was a clear scientific consensus that the natural and probable result of carbon dioxide emissions was global warming and damage such as that suffered by the village. With respect to the grounds for imposing liability, the plaintiff asserted that AES knew or should have known what the effects of the emission of greenhouse gases would be and that it had negligently or intentionally created a public nuisance.

The court focused on the issue of foreseeability and endorsed the view that an accident refers to “an incident that was unexpected from the viewpoint of the insured.” However, “[i]f a result is the natural and probable consequence of an insured’s intentional act, it is not an accident.” The court recognized that intentional acts may have unintended consequences. The question is thus not whether the action was intended but whether the resulting harm is alleged to have been a reasonably anticipated consequence of the insured’s intentional act.

Because the underlying complaint included allegations of negligence, the court considered whether such allegations were alone sufficient to establish that the underlying loss had been the result of an accident. The court held that a CGL policy does not provide coverage for all negligent acts. Rather than looking at the nature of the act, the focus should be on whether the complaint alleges that the natural and probable consequences of the intentional act were to cause injury. In a statement that may provoke further litigation, the court opined that “[w]hen the insured knows or *should have known* of the consequences of his actions there is no occurrence and no coverage.” (emphasis by the court). The court found that gravamen of the complaint was that the damages were the natural and probable consequences of AES’s intentional emissions and, therefore, the allegations of negligence did not support a claim of an accident.

Senior Justices Koontz and Carrico filed a concurring opinion in which they expressed concern that the majority had not adequately explained that the argument presented by the insurer would not be applicable to the vast majority of cases where a

policyholder seeks to have his insurer provide him with a defense for an accidental tortious injury. The concurring justices stated that the majority had based its decision regarding the duty to defend on the foreseeability of the harm arising from the insured's act about which he "knew or should have known" when undertaking the act rather than on the rule that an insurer's duty to defend should be abrogated only where it is certain that no liability could arise from the contract of insurance. The concurrence explained that the allegations effectively contended that the harm was not only foreseeable but "inevitable."

The concurrence is significant because we do not believe the majority intended to equate foreseeability with non-accidental conduct. As another court explained:

To adopt [the insurer's] interpretation that an injury is not caused by accident because the injury is reasonably foreseeable would mean that only in a rare instance would the comprehensive general liability policy be of any benefit. . . . Under [the insurer's] 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.

City of Carter Lake, Iowa v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1058 (8th Cir. 1979).

AES is also significant in that the court reaffirmed a number of the principles to be applied in determining whether there is a duty to defend. For the first time, the court expressly endorsed the "eight corners" rule whereby the allegations within the four corners of the complaint are compared to the provisions within the four corners of the insurance policy to determine whether there is a duty to defend.