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A Failure Of Logic In Va. Supreme Court GHG Case

Law360, New York (April 23, 2012, 1:08 PM ET) -- The Virginia Supreme Court issued its opinion on rehearing in the greenhouse-gas case of AES Corp. v. Steadfast Ins. Co., No. 100764 (Va. April 20, 2012). On rehearing, the Virginia Supreme Court affirmed its initial decision excusing Steadfast from having any duty to defend AES in connection with a suit brought by an Alaska native group, the Kivalina, alleging that the routine emission of greenhouse-gases by AES's power-generating activities was the proximate cause of certain environmental changes adversely affecting the Kivalina people.

The Virginia court offered a bit more subtle analysis on rehearing en route to the same erroneous result it previously adopted. As the concurring opinion notes, "[o]ur precedents may have painted us into a jurisprudential corner." Concurring Opinion of Justice Mims at 19.

The court holds that coverage is not available "[e]ven if AES were negligent and did not intend to cause the damage that occurred." Slip op. at 14. This confounding result was characterized by the concurring justice as "a day of reckoning that may surprise many policy holders," nonetheless concluding that prior Virginia jurisprudence "lead[s] inexorably" to this counterintuitive result. Concurrence at 16.

In the principal opinion, the court sought to limit the damage from its holding by arguing essentially that the unique factual allegations in the Kivalina complaint led to this result under the "eight corners" rule — that is, the basic duty-to-
defend test under which the allegations of the complaint are compared to the policy language.

The opinion starts by saying that "the terms 'occurrence' and 'accident' are 'synonymous and ... refer to an incident that was unexpected from the viewpoint of the insured." Slip op. at 9. But the court goes awry by adopting the converse of this premise as being the logical equivalent: That is, that an incident that was expected cannot result in an "occurrence."

Here, the court makes a basic error in logic: "The converse does NOT necessarily have the same truth value as [does] the original conditional statement." www.regentsprep.org/Regents/math/geometry/GP2/Lconvers.htm (Within the principles of logic, a contra-positive does have the same truth value, but the easy solipsism of assuming that the converse to a proposition also is true is so common as to bear a specific name for this logical error or formal fallacy "affirming the consequent.")

So, the court states that "[if] a result is the natural or probable consequence of an insured's intentional act, it is not an accident." Slip op. at 10.

But this view allows for a full hindsight analysis, even when at the time of the initial act, the insured acted reasonably, non-negligently, carefully, taking all known reasonable

scientific precautions against the possibility of injury. Compare Transamerica Ins. Group v. Meere, 694 P.2d 181, 143 Ariz. 351, 356 (1984) ("The provision is designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will 'pay the piper' for the damages.").

In other words, the virtuous insured who does everything known ex ante to avoid a loss can lose coverage, according to the Virginia Supreme Court, simply because it acted deliberately. This is insupportable. Courts routinely find coverage where the consequences of an intended act — though caused by that act — are neither desired nor expected by the insured.

E.g., City of Johnston, N.Y., v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d. Cir. 1989) ("Ordinary negligence does not constitute an intention to cause damage; neither does a calculated risk amount to an expectation of damage."); James Graham Brown Foundation Inc. v. St. Paul Fire & Marine Ins., 814 S.W.2d 273, 278 (Ky. 1991) ("if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable.")

If it were otherwise, that conduct which gives rise to a theory of liability against the insured proves the nonapplicability of coverage; in this case, the only way the Kivalina could seek to hold AES liability was to posit a causal link between AES's conduct and their injury, but the Virginia Supreme Court says that it is precisely that causal link that negates coverage. Compare Messersmith v. American Fidelity Co., 133 N.E. 432, 432 (N.Y. 1921) (Cardozo, J.) ("to restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.").

The Virginia court tries to avoid this criticism by claiming inconsistently that it is saying that "[f]or coverage to be precluded under a CGL [commercial general liabiltiy] policy because there was no occurrence, it must be alleged that the result of an insured's intentional action was more than a possibility; it must be alleged that the insured subjectively intended or anticipated the result of its intentional act." Slip op. at 11.

Had the court stopped its sentence there, the holding would have been fine — and would have resulted in a judgment for AES. The court, however, articulates the additional rule that coverage can be precluded where "objectively, the result was a natural or probable consequence of the intentional act." Id.

But if I turn right on red without coming to a full stop and without looking both ways carefully and, if I hit a pedestrian in the crosswalk, then "objectively, the result was a natural or probable consequence of the intentional act." Coverage cannot be eliminated in that circumstance; indeed, if my act produced an outcome that was not the probable consequence, then I would not be liable in tort at all.

So, only if a victim is a foreseeable plaintiff can negligence liability attach. See Palsgraf v. Long Island RR Co., 162 N.E. 99 (N.Y. 1928). It is more than basic to say that factual causation ("but for") is not the same as "legal" causation, as the AES court recognizes, slip op. at 14 n.3, but the Virginia Supreme Court says that any time there is factual causation that is the natural consequence of the intended act, there is no coverage.

Existing Virginia authority makes clear that unintended liability from intentional actions is covered by insurance policies. Erie Ins. Exchange v. Sipos, 64 Va. Cir. 55 (Va. Cir. Ct. 2004) (insured who disposed of property from an apartment under the mistaken belief that it was unwanted debris when it really belonged to a new tenant was entitled to coverage because action was an accident).

The Virginia Supreme Court errs not only in its formal logic and rationalization; the court

fails to recognize that, paraphrasing another Virginia judge, "we must never forget that it is a [contract] we are expounding." McCulloch v. Maryland, 17 U.S. 159, 200 (1819).

The point of construing an insurance contract — as opposed to a legislative pronouncement or an interpretation of the common law — is that the parties to the contract used words that are given a meaning as used "in the mouth of a normal speaker of English, using them in the circumstances in which they were used." Oliver Wendell Holmes, The Theory of Legal Interpretation, Collected Legal Papers, 203, 204 (1920).

The circumstances here include the unassailable facts that the language was proffered by the insurance company and that the insurance company had every opportunity to choose not to sell AES coverage. An insurance policy must be construed consistent with its dominant objective to provide indemnity to the insured. E.g., Harris v. Glens Falls Ins. Co., 493 P.2d 861, 862 (Cal. 1972).

The point of underwriting is to have the insurance company see what the insured's operations are and then to choose to limit or exclude coverage based on particularized terms of the contract. Here, however, the Virginia court is saying that inherent to AES's operations is the risk of a claim such as the Kivalina brought, and that — as a matter of law — it was impossible for AES to insure that risk.

While the court does not invalidate the insurance contract on public policy grounds — and that ship sailed a century ago, Breeden v. Frankford Marine Plate Accident & Glass Ins. Co., 119 SW 576 (Mo. 1909) — it does essentially the same thing in ruling that any injury caused by AES that is sufficiently foreseeable, but not foreseen, as to allow for tort liability cannot be insured.

So, only involuntary actions or wildly unforeseeable consequences for which strict liability is imposed can be insured, according to the Virginia Supreme Court, which is surely not what the court intended.

The court in AES does not even cite the rules on contract construction before leaping into an abstract discussion of the principles of "accidents" and "occurrences." This is plain error even under the same court's prior decisions. E.g., Ayres v. Harleysville Mut. Cas. Co., 172 Va. 383, 389-93 (Va. 1939).

In AES, the court violates its own prior warning in this context to avoid "any attenuated theorizing." Id. at 382. The jurisprudential cul de sac the court drives itself into is one that the court should back out of as soon as possible.

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