Can CO2 claims succeed?

KURT HIRSCH considers the likelihood of a successful claim concerning climate change and its environmental impacts

THE VIRGINIA Supreme Court is poised to become the first in the US to decide whether damages resulting from "global warming" are covered under comprehensive general liability (CGL) policies. A trial court found "global warming" does not trigger a duty to defend. Briefing on the appeal is complete, but oral argument has not been scheduled. A decision should not be expected before mid-2011.

Global warming claims

In most industrialised countries, addressing the increase in the Earth's average temperature caused by increasing concentrations of greenhouse gases – "global warming" – is left to governmental action. In the US, action to address the root causes of global warming has been virtually non-existent. While 187 nations signed up to the Kyoto Protocol – a United Nations treaty to stabilise greenhouse gas concentrations – the US is alone among major emitters in failing to go along.

As so often happens in the US, plaintiffs' lawyers have turned this political question into the subject of multiple lawsuits. And, as night follows day, these suits brought in their wake claims for insurance coverage. While these suits are novel, the legal theory on which they are based is as old as common law: public nuisance.

In a nuisance claim, A charges B's use of B's property interferes with A's enjoyment of A's property. This century's-old legal theory was the basis for the lead paint lawsuits that have largely failed to find favour with US courts. The last of the lead paint suits is pending in California.

Steadfast Insurance v AES

The "global warming" suit underlying the CGL claim before the Virginia Supreme Court is *Native Village of Kivalina v Exxon*. Residents of a small village on a barrier island off the Alaskan coast find their island being steadily submerged by rising sea levels. They filed suit against two dozen energy companies for their contribution to climate change.

The villagers argue the defendants emit high volumes of carbon dioxide, causing an escalated atmospheric concentration of greenhouse gases that increase global temperatures, melting the sea ice that is necessary to protect the village's shores from erosion and storms.

One of the defendants is AES Corporation, a global power company with generation and distribution businesses. Steadfast Insurance, a Zurich company, insured AES, which tendered the *Kivalina* suit to Steadfast for a defence. Steadfast agreed to defend AES subject to a full reservation of its right to later deny coverage and filed suit in Virginia state court for a declaration the Kivalina claim is not covered.

The existence of an occurrence is necessary to trigger most CGL coverage and the Steadfast policies are no different. The Virginia Supreme Court will decide whether AES's contributions to "global warming" constitute such an occurrence. Here, as in many policies, "occurrence" is essentially synonymous with "accident". Thus, the duty to defend question largely comes down to whether or not global warming cases allege damage caused by an accident.

While Steadfast was granted summary judgment on the occurrence issue, the trial court did not issue a written opinion explaining the basis for its ruling, nor was its decision explained in depth at the hearing. While an appellant may in some instances face an uphill climb in the appeal of a well-reasoned lower court decision, AES has no such hurdle to overcome here.

Not surprisingly, Steadfast and AES characterise the underlying suit differently. Steadfast focuses on AES's intentional conduct in emitting carbon dioxide and its knowledge such emissions would harm the environment.

In contrast, AES contends even though the emissions were intentional, the damage in question was not intended. AES argues a claim comprises an accident even where some damage is inevitable, if the particular damage at issue was not expected. If this sounds like a reprise of the pollution coverage litigation that filled the US courts from the late 1980s for 20 years, it is.

It is difficult to predict how the Virginia court will decide this case. Both sides acknowledge all the conduct at issue was intentional. The appeal reduces to deciding at what level of generality the harm had to be expected for the global warming to be considered an accident.

If knowledge harm of this type – as distinct for the specific alleged harm – was expected is sufficient to constitute an intended harm rather than an accident, Steadfast will probably prevail. But the Virginia court could conclude if harm to these villagers was not contemplated by AES, then the claim arises out of an accident, thus triggering the duty to defend.

Existing Virginia case law tells us little about how the court will rule. Steadfast relies on a line of authority where a duty to defend was denied because intentional conduct caused expected harms. But AES distinguishes those cases on their facts, essentially because the specific harm in those cases was expected – such as firing a weapon or sending a "junk fax".

It is possible the outcome could come down to the fact a small number of the claims in the underlying complaint use negligence-type language as opposed to allegations of intentional conduct.

Of course, the duty to defend is broad, and if any claims in a suit are covered, the duty is triggered. There are cases holding mere recitation of some negligence-type language in a complaint will not permit the claim to be considered an accident where the "facts and circumstances" of the complaint all relate to intentional conduct and known consequences thereof. But some US courts have been known to latch on to small portions of a suit to find the existence of coverage.

A secondary issue in this appeal is whether the pollution exclusion bars this claim. This issue is not at the fore, because the lower court did not rule on it. But Steadfast argues judgment in its favour can be upheld on this basis as well because, it argues, the lawsuit centres on environmental contamination, which is excluded under the policy.

AES focuses on the specific alleged contaminant – carbon dioxide – in arguing the pollution exclusion does not apply.

Other global warming suits

Kivalina is one of three major global warming cases working their way through the US courts. Another – *American Electric Power v Connecticut* – is pending before the US Supreme Court.

Just last week, the Supreme Court agreed to review the case, which asks whether federal law allows parties to sue utilities for contributing to global warming. The lower appeals court permitted the suit to proceed, ruling eight states, New York City and three environmental groups could go forward with their nuisance claims against a number of power companies. Neither a briefing schedule nor an argument date have yet been set.

Comer v Murphy Oil is the third of the cases and is also pending before the US Supreme Court – although the High Court has not yet indicated whether it will hear that dispute. In any event, the nature of the suit (property owners against energy companies alleging nuisance claims) and the issue raised (whether the plaintiffs have standing to sue for global warming damages) are similar to the *American Electric Power* case.

Conclusion

Will global warming cases hit the insurance markets like pollution claims or "Millennium Bug" claims? It cannot be foretold yet, but – between the cases pending in the Virginia and US Supreme Court – it appears likely there will be much firmer answers to such questions in 2011.

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Kivalina: the Alaskan village is pursuing a claim against Exxon