



## Clearing the Air?

### Two Duty to Defend Cases, Two Different Results: Virginia Court Says No, But Illinois Court Says Yes

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Two recent opinions from Virginia and Illinois, both addressing duty to defend claims arising from manufacturing emissions, reached different results. The Virginia Supreme Court, in what is purportedly the first state Supreme Court case to address an insurer's duty to defend claims arising from global warming, ruled there was no duty to defend in *AES Corp. v. Steadfast Ins. Co.*, 2011 WL 4139736 (September 16, 2011). In Illinois, an intermediate appellate court found a duty to defend in *Erie Ins. Exchange v. Imperial Marble Corp.*, 2011 WL4375335 (Ill. App. 3rd Dist. Sept. 15, 2011).

#### ***AES Corp. v. Steadfast Ins. Co.***

In February 2008, Kivalina, a native community on an Alaskan barrier island, sued AES, a Virginia-based company, and other defendants in the U.S. District Court for the Northern District of California for damage to the village allegedly caused by global warming through emission of greenhouse gases. AES tendered the claim to Steadfast which defended the action but filed a declaratory judgment action. The insurer asserted there was no coverage as the complaint did not allege "property damage" caused by an "occurrence," injury occurred prior to Steadfast's coverage, and the pollution exclusion barred coverage. The trial court granted summary judgment for Steadfast, finding the complaint did not allege an "occurrence."

On appeal, the Virginia Supreme Court affirmed. Under Virginia law, "occurrence" refers to "an incident that was unexpected from the viewpoint of the insured." 2011 4139736 at \*4. The court especially noted that an injury caused by an act intentionally performed by the insured could be covered as an occurrence if "the alleged injury results from an unforeseen cause that is out of the ordinary expectations of a reasonable person." The court then stated that the dispositive issue in determining whether an accidental injury occurred is whether the resulting harm is alleged to have been a reasonably anticipated consequence of the insured's intentional act. *Id.* Even though the underlying complaint alleged negligence, the court found that allegations of negligence are not synonymous with allegations of an accident and do not support a claim of an accident where the "gravamen" of Kivalina's nuisance claim is that the damages sustained were the natural and probable consequences of AES's intentional emissions. *Id.* at \*5. The court held that Kivalina did not allege its property damage was the result of a fortuitous event and there was no duty to defend or indemnify under the CGL policies. *Id.* at \*6.



### ***Erie Ins. Exchange v. Imperial Marble Corp.***

In August 2007, a class action was filed against Imperial Marble by residents living within one mile of its plant in Somonauk, Illinois, alleging Imperial's countertop and vanity manufacturing process created odorous emissions. Imperial operated under a permit issued by the Illinois EPA. Erie denied coverage and filed a declaratory action asserting it owed no coverage based on the injury being "expected or intended" and the application of the pollution exclusion. The trial court granted summary judgment for Erie finding the emissions constituted "traditional environmental pollution" precluded by the pollution exclusion.

On appeal, the appellate court reversed. It found the underlying complaint alleged an "occurrence" and that while the emissions were intentional, the alleged resulting damage was not expected or intended. 2011 WL4375335 at \*5. Because Imperial operated pursuant to an emissions permit, the court said Imperial cannot be considered to have expected or intended injury to the plaintiffs. The court also examined Erie's pollution exclusion and found that this exclusion was "arguably ambiguous" as to whether emission of hazardous materials at levels permitted by an IEPA permit "constitute[d] traditional pollution excluded by the policy." *Id.* at \*6. The court held that ambiguities are to be resolved in favor of the insured, and found that Erie owed a duty to defend. The court did not address the duty to indemnify.

### **Commentary**

*AES* and *Imperial Marble* reach potentially conflicting results in addressing claims arising out of manufacturing emissions. *AES* determines there was no "occurrence" and does not address the application of the pollution exclusion. *Imperial Marble* finds a duty to defend by holding that there was an occurrence and the pollution exclusion was "arguably ambiguous." For both insurers and insureds, these two cases spotlight some of the arguments and possible outcomes that can emerge in a coverage dispute, depending on what state's law applies, what standards a state uses to decide if there is an "occurrence," how "expected or intended" is assessed by a given state, and the facts of a particular claim and the particular policy language at issue. While *AES* and *Imperial Marble* leave certain issues "up in the air," it is clear that emissions or climate change litigation and related coverage disputes will continue for some time.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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