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Arguing The Future Of Climate Change Litigation

Law360, New York (May 3, 2011) -- On Tuesday, April 19, 2011, two separate oral arguments were held that will help determine the future of climate change litigation — and whether and how insurance coverage is available to defend against certain climate-change claims.

The first case involves whether valid nuisance and other claims related to climate change can be brought against industrial emitters of greenhouse gases. The second case addresses whether an insurance company has a duty to defend such nuisance or other claims under the standard-form provisions of most Comprehensive Commercial General Liability insurance policies.

Connecticut v. AEP

The first oral argument, in Connecticut v. AEP, took place before the U.S. Supreme Court. This case is considered a bellwether on the issue of the viability of tort claims, specifically nuisance, involving alleged harm associated with climate change. It is one of three closely watched cases in this area, the other two being Comer v. Murphy Oiland The Native Village of Kivalina v. ExxonMobil. The Connecticut case was brought by several states seeking reduction in the emission levels from some of the top coal-burning power generators in the nation.

In oral argument in the Connecticut case, the Supreme Court heard from the group of states and New York City seeking to reduce emissions made by a handful of coal-burning utilities. The emissions identified represent a significant percentage of national carbon-monoxide sources. Much has changed since the suit was initially filed in 2004.

At that time, climate change itself was disputed and the Bush administration was arguing that it had no authority to regulate CO2 or other greenhouse gas emissions. Then, in Massachusetts v. EPA in 2007, the United States Supreme Court held that the EPA has the authority to regulate GHGs as pollutants and that the EPA's finding that it has discretion whether to regulate such gasses was inadequately based and needed to be reconsidered.

Accordingly, in April 2009, The EPA issued an "endangerment" finding on CO2, paving the way for federal regulation under the Clean Air Act. Subsequently, the EPA has taken steps to implement various rules on emissions. Meanwhile, the case was dismissed in federal court in New York in 2006, then reinstated by the Second Circuit Court of Appeals in September 2009.

The EPA's apparent progress toward regulation by that point, along with other reasons, led the Obama administration to argue against the states in this case. The regulatory steps taken also potentially undermine the states' argument that federal courts must fill the vacuum left by the Legislative and Executive branches' alleged failure to act.

The EPA activity can be used to support those who argue in favor of dismissal and application of the Political Question Doctrine, i.e., that regulation of air emissions and the disputes over global warming are political questions inappropriate for the Judicial branch to address. In the recent oral pleadings, even the states' counsel implicitly acknowledged that if the EPA actually issues the regulations currently under consideration, the justices should block the suit.

Initial reports on the oral argument refer to "seemingly unanimous skepticism" on the part of the justices (AP, April 19), with Justice Ruth Bader Ginsburg and Chief Justice John Roberts both questioning the extent to which U.S. District Court judges should get involved in complex and far-reaching disputes like this one over air emissions from multiple sources. This skepticism may foreshadow a political question determination.

Dismissal by the Supreme Court would make it harder for future plaintiffs to bring successful generalized nuisance or other claims related to climate change in federal court. As Justice Antonin Scalia noted, however, the plaintiff's attorneys are likely to bring similar suits in state court if the Supreme Court finds that there is no federal cause of action related to global warming.

In an ironic twist, Justice Sonia Sotomayor had been on the Second Circuit panel allowing the case to proceed and from which appeal was taken. In recusing herself, Judge Sotomayor left open the possibility of a split court. In the event of a 4-4 "tie", the court typically issues a per curiam decision essentially affirming the lower court's holding. Such decisions generally are terse and are deemed not to set actual Supreme Court precedent. The justices, however, may attach dissenting opinions.

Steadfast Ins. Co. v. AES

The second oral argument garnered a much lower profile. However, as the first insurance coverage case to come out of climate-change litigation, it has been closely watched by potential stakeholders.

This oral argument was held before the Supreme Court of Virginia and involved a dispute over whether a defendant in the above-referenced Kivalina case (presently on appeal to the Ninth Circuit, having been dismissed by the district court) is entitled to a defense by its general liability insurance company. See Steadfast Ins. Co. v. AES (the coverage case was allowed to proceed in light of the appeal and it is unlikely to go away even if the appeal by plaintiffs is unsuccessful because the district court judge expressly mentioned that that the plaintiffs could refile in state court).

The underlying Kivalina case was brought by a native Alaskan village located on an exposed peninsula of land. The village must now be relocated. While sea level is a factor, the lack of a reliable stabilizing ice pack surrounding the peninsula to mitigate winter-storm impact has been identified as a significant element of the compensable harm. As in Comer, the plaintiffs in Kivalina seek relief from an array of large corporations that allegedly have contributed substantially to global warming through their historic emissions.

In the coverage case argued last week in Virginia, Steadfast made two central arguments that no duty to defend exists. The first involved identification of an "occurrence" — that is, an accidental happening of the sort that can trigger a viable liability claim. The “occurrence” concept is vague, but has been used to argue that a claim should be denied because it is not sufficiently accidental or because it did not arise out of a specific event or events.

Steadfast argued that because the Kivalina plaintiffs alleged long-term corporate knowledge of AES’s emissions, the underlying lawsuit did not allege conduct that could be an “occurrence” because the alleged conduct was not sufficiently “accidental.” AES argued that it was the resulting harm from the alleged conduct that was the issue, not whether the conduct itself was intentional.

The Virginia trial court had initially granted summary judgment to Steadfast, a Zurich subsidiary, holding that the allegations against the Virginia-based energy company AES, involving CO2 emissions and climate change, did not constitute an "occurrence." This holding was reached after an earlier round of summary motions from both sides in which judgment was denied because of questions of fact related to each side's reliance on extrinsic evidence in supporting their motions.

Given the potential stakes, the parties' initial emphasis on extrinsic background materials may just reflect overenthusiasm. This initial denial may also explain a procedural glitch that seems to have arisen.

The first round of briefing also involved the second central defense to coverage, i.e., standard-form exclusionary language regarding pollution. The “absolute” pollution exclusion was introduced in or around 1985 as a way to exclude liability coverage for Superfund cleanup liabilities (the language of the exclusion borrows heavily from the federal statute). It has since been used beyond its original intent in attempts to preclude coverage for all manner of claims where some sort of “irritant” or “contaminant” may be involved — even parts of the air we breathe.

The procedural glitch arose because the parties disputed whether the pollution exclusion issue was properly before the court. It had been rejected as a coverage defense based upon questions of fact in the initial round of summary judgment and was not assigned as cross-error by Steadfast after appeal of the results of the second round of summary judgment during which it was not raised.

Following the trial court's initial denials, a second round of summary motions was filed. These motions were based solely upon two documents, the underlying complaint and the policy language, reflecting the so called eight-corners rule for determining the duty to defend. After this second round of briefing and a grant of summary judgment in favor of Steadfast on the "occurrence" issue, an appeal by AES ensued.

The issue of whether and how CO2 emissions might be excluded from coverage as "pollutants" has been the subject of considerable debate. Steadfast argued that every substance "is proper and benign in its proper place and proper quantity," but can become a pollutant when such boundaries are exceeded.

AES argued that CO2 was not identified specifically in the insurance policy, as some other substances are, and is an "omnipresent" and naturally occurring "odorless and colorless gas" "critical to the survival of animal and plant life." Chief Justice Cynthia Kinser noted that the trial judge had identified questions of fact surrounding application of the exclusion and that no cross-error had been assigned.

Turning back to the central issue of an "occurrence," Justice William Mims indicated that a key issue for him was whether and how an "accident" could be identified from within the allegations in the Village of Kivalina's complaint against AES. Several issues were identified and argued over on this point.

First, there was a question about from whose perspective the accident determination should be made — an objective standard or from the subjective viewpoint of the policyholder? Second, is the conduct at issue the intentional business activity or the unintended consequences thereof? On this point, Steadfast argued the former and that "insurance does not and should not cover harm resulting from ordinary business operations."

Steadfast also countered a traffic accident analogy put forth by AES. In doing so, Steadfast argued that a motorist intentionally changing lanes after glancing in the rearview mirror, could not then have an "accident" with a car behind it as that term is used in Commercial General Liability insurance policies.

It is impossible to predict how the Virginia court will decide these issues. The court previously has refused to overturn a trial court ruling that naturally occurring organic compounds arising from chlorination of drinking water are excluded "pollutants." This earlier decision in the City of Chesapeake case may explain why the coverage litigation involving a case filed in Northern California, brought by Alaskan residents, was filed in Virginia. However, the Virginia justices appeared to be less skeptical of the policyholder's position in the Steadfast case than the Supreme Court justices were of the states' in the Connecticut case.

One thing is certain: Legal disputes related to climate change and the insurance industry's obligations related thereto will be with us for a long time to come. The Supreme Court is expected to issue a decision at the end of its term in June. The court may use this case to revisit and clarify some of the issues arising out of its recognition of climate change in the prior Massachusetts v. EPA case. The Virginia Supreme Court is expected to rule soon. It appears less likely to address the pollution-exclusion defense than the issue of occurrence.

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