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RECENT DEVELOPMENTS IN INSURANCE COVERAGE LITIGATION

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I. INTRODUCTION

There have been many important developments during the past year in the sphere of insurance coverage litigation. While uniformity among the states may not be the rule, recent cases illustrate the factors that most often influence the courts' analyses and rulings. A practitioner's best and most cogent advice requires an understanding of the "hows" and "whys" of coverage-related decisions. This article considers recent cases that address emerging coverage areas and those that provide significant developments in existing coverage disputes. It is our hope that practitioners will find the topics in this article of interest, and that the analysis will be of assistance to insurance coverage litigators.

II. COVERAGE RELATED TO FAULTY WORKMANSHIP CLAIMS

For twenty-five years, courts have debated whether and to what extent faulty workmanship claims are covered by ISO's 1986 revisions to commercial general liability policies. One court this past year succinctly described the resulting jurisprudence as "an intellectual mess."[1] Subsequent decisions have done little to clean up that "mess."

A. *Policy Language at Issue*

Commercial general liability (CGL) policies cover "property damage" caused by an "occurrence" during the policy period. They generally define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[2] The term

1. Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., Op. No. 26909, S.C. Sup. Ct. Shearouse Adv. Sheet No. 1, pp. 32–51 (S.C. Jan. 7, 2011), *available at* www.sccourts.org/opinions/indexAdv.cfm?year=2011&month=1 (*Crossman I*), *withdrawn on rehearing and superseded by*, 717 S.E.2d 589 (S.C. 2011) (*Crossman II*).
2. *See, e.g.*, CG 00 01 10 01 § V(13) (ISO Properties, Inc. 2000).

"accident" in turn is left undefined, leaving it to courts to decide whether particular conduct is "accidental" and therefore covered.

"Property damage" typically is defined to include "[p]hysical injury to tangible property, including all resulting loss of use of that property."[3] It generally does not, however, include damage to the work and materials furnished by or on behalf of the insured (referred to as "your work" in the policy) unless the work was performed by a subcontractor.[4] It also generally does not cover property damage that was intended or expected, nor property damage that the insured was required to pay pursuant to a contractual obligation.[5]

Courts disagree not only as to whether faulty workmanship, such as defectively designed or manufactured products, satisfies the above policy definitions, but also as to the appropriate framework for addressing such coverage-related issues.

B. *Crossman I and II Confront "An Intellectual Mess"*

1. Background

The South Carolina Supreme Court attempted to bring some clarity to these issues in its decision in *Crossman I*, which involved claims that subcontractors had negligently installed siding on Myrtle Beach condominiums, resulting in repeated water intrusion and damage.[6] The condominium owners sued Crossman Communities of North Carolina, Inc., the developer, for negligence, breach of express and implied warranties, unfair trade practices, and breach of fiduciary duty arising out of the allegedly negligent construction by subcontractors.[7] The owners sought repair, maintenance, and reconstruction costs; lost use; diminished value; and other damages.[8] After settling the condominium owner claims, Crossman sought coverage from its CGL carrier, which brought a declaratory judgment action.[9] In the original *Crossman I* opinion, the trial court found coverage.[10] The South Carolina Supreme Court initially reversed the trial court, finding no coverage for the damages.

2. National Survey

The court began its analysis with a survey of the rulings of other state courts that had addressed the issue, characterizing the "majority rule" as

3. *Id*. § V(17).
4. *See id*. § I Coverage A(2)(l).
5. *See id*. § I Coverage A(2)(a) and (b).
6. *See Crossman I*, S.C. Sup. Ct. Adv. Sheet No. 1, at 33–34.
7. *See id*.
8. *See id*. at 34.
9. *See id*.
10. *See id*.

being that "claims of poor workmanship, standing alone, are not occurrences that trigger coverage under a CGL policy."[11] The court identified two general justifications for this rule. First, CGL policies are intended to insure tort risks, which the court described as risks that the product will cause bodily injury or property damage to others, not business risks, which the court characterized as risks that the product will not meet contractual expectations.[12] As the court summarized, "CGL policies are not intended to insure risks that the business can and should control."[13] The second justification articulated in favor of the majority rule rested on the notion that faulty workmanship cannot be considered "accidental" because it possesses no element of "fortuity."[14] Instead, property damage is "a natural and ordinary consequence of the faulty work and, therefore, not accidental."[15]

The court then summarized what it called the "minority rule" as being that faulty workmanship could constitute an occurrence if the resulting damage was neither intended nor expected.[16] These courts found an "occurrence" whether liability was tortious or contractual in nature and whether damage was to property of the insured or of a third party, although replacement costs would not be considered "property damage."[17]

3. Recent South Carolina Precedent

In *Crossman I*, the court critiqued two of its own recent cases involving coverage claims for faulty workmanship. In a 2005 decision, *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*,[18] the court had ruled that damage to the work product itself caused by faulty workmanship could not constitute an occurrence, because, it ruled, such damage was not accidental. However, in a 2009 decision, *Auto Owners Insurance Co. v. Newman*,[19] the court had ruled that claims for damages to property other than the subject work product could be covered, if the damage resulted from "continuous or repeated" exposure to harmful conditions such as water penetration, because CGL policies explicitly included such exposure as an "accident" constituting an "occurrence."[20] The court in *Newman* had found that the "fortuity"

11. *See id.* at 38.
12. *See id.* at 38–39.
13. *Id.* at 40.
14. *Id.*
15. *Id.* (citing Monticello Ins. Co. v. Wil-Freds Const., Inc., 661 N.E.2d 451 (Ill. App. Ct. 1996)).
16. *See id.*
17. *See id.*
18. 621 S.E.2d 33 (S.C. 2005).
19. 684 S.E.2d 541 (S.C. 2009).
20. *See id.* at 545.

otherwise required for "accidents" was not an element of "continuous or repeated" accidents.[21]

Less than two years later, *Crossman I* overruled the 2009 *Newman* decision, holding that "fortuity" was a required element for any "accident" to be treated as an "occurrence," whether it produced an isolated event or "continuous or repeated" exposure.[22] In particular, the court stated that faulty workmanship gave rise to coverage only if it resulted in "an unintended, unforeseen, fortuitous, or injurious event."[23] Because water damage was the "natural and expected consequence" of negligently installed siding, the court found the damage claimed was not the result of an occurrence and hence was not covered.[24] The court also elected to "clarify" its ruling in *L-J*, holding that "work product" should be defined narrowly to include only the specific component as to which the work was negligently performed. As the court stated, "Where faulty workmanship causes damage to non-defective components of a project, it is the presence or absence of an occurrence that will answer the coverage question."[25]

4. Reaction and Rehearing

Crossman I resulted in the quick passage of state legislation designed to limit judicial ability to construe the term "occurrence"[26] and in the filing of numerous amici briefs from contractors seeking reconsideration. The resulting August 2011 decision in *Crossman II* reversed *Crossman I*, resurrected the decision in *Newman*, and affirmed the trial court's finding of coverage. On rehearing, the court now found the "continuous or repeated exposure" clause in the definition of "occurrence" to be ambiguous and therefore construed it in favor of the insured. Discarding the "fortuity" requirement in this context, the court found that long-term water intrusion caused by negligently installed siding satisfied the "continuous or repeated exposure" language.[27]

The court in *Crossman II* also noted the importance of the "property damage" requirement, stressing the "difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'"[28] Although

21. *Crossman I*, S.C. Sup. Ct. Adv. Sheet No. 1, at 44 (addressing *Newman*, 684 S.E.2d at 545).
22. *See id*. at 47.
23. *Id*. at 49. It is not clear what the court meant by "injurious," which does not seem to fit with the rest of the terms in that phrase.
24. *Id*. at 49–50.
25. *Id*. at 48.
26. S.C. Code § 38–61–70 (2011).
27. *Crossman II*, 717 S.E.2d at 593.
28. *Id*. (quoting United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 889–90 (Fla. 2007)).

Crossman II omitted *Crossman I*'s discussion clarifying *L-J*, the ruling stated, consistent with the discussion in the earlier opinion, that "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage.' "[29]

5. Illinois Reaches a Different Result

Illustrating the lack of any national consensus on these issues, the Northern District of Illinois, applying Illinois law and confronting facts very similar to those presented in *Crossman*, reached the opposite result in *Nautilus Insurance Co. v. 1735 W. Diversey, LLC*,[30] a duty-to-defend-and-indemnify declaratory judgment case. That case involved negligent installation of exterior masonry that resulted in water damage to condominium units over a prolonged period.

The court in *Nautilus* ruled that damage to a construction project resulting from construction defects is not an "accident" under Illinois law, which defines "accident" to exclude the natural and ordinary consequences of an act.[31] The insurance policy at issue in *Nautilus* contained the "continuous or repeated exposure" language that proved pivotal in *Crossman II*. However, the court did not discuss that phrase. Moreover, unlike the *Crossman* opinions, the court refused to treat damage to "components" outside the scope of work differently from damage to components within that work. In the court's words, "It is the Regal Lofts Condominiums themselves that are damaged, not something within and separate from the condominiums."[32] Accordingly, "damage to the structure itself—regardless of whether the Insureds worked on that particular part of the structure—cannot be an accident."[33]

6. Other Recent Cases Finding an "Occurrence"

Predicting Arkansas law, the Eighth Circuit ruled that faulty workmanship constituted an occurrence in *Lexicon, Inc. v. Ace American Insurance Co*.[34] In that case, a general contractor sought reimbursement for damage resulting from a collapsed silo as the result of a subcontractor's faulty welding work. The court acknowledged that under Arkansas law, faulty workmanship could not be an accident as to the silo itself, because it was foreseeable that faulty workmanship would damage the product being worked on.[35] However, the court ruled, collateral damage to third parties may not have

29. *Id*. at 594.
30. No. 10 C 425, 2011 WL 3176675 (N.D. Ill. July 21, 2011).
31. *See id*. at *3.
32. *Id*. at *5.
33. *Id*.
34. 634 F.3d 423 (8th Cir. 2011) (predicting Arkansas law).
35. *See id*. at 426 (citing Essex Ins. Co. v. Holder, 261 S.W.3d 456, 460 (Ark. 2008)).

been foreseeable.[36] The Eighth Circuit found support for its ruling in the subcontractor exception to the "your work" exclusion to CGL policies.[37] According to the court, that exception would be meaningless if faulty subcontractor work could never result in an "accident."[38]

Another decision that relied heavily on the presence of the subcontractor exception is *Thomas v. Nautilus Insurance Co*.[39] In *Thomas*, a homeowner sued the general contractor for, among other things, damage to the home resulting from defective sheetrock installation by a subcontractor.[40] The court ruled the insurer had a duty to defend the claims under Montana law, pursuant to which an "accident" was defined as an unexpected happening that occurred without intention or design on the part of the insured.[41] The existence of the subcontractor exception to the "your work" exclusion convinced the court that faulty workmanship could be a covered occurrence under appropriate circumstances.[42]

The Georgia Supreme Court similarly found faulty workmanship to be an "occurrence" in *American Empire Surplus Lines Insurance Co. v. Hathaway Development Co*.,[43] which affirmed summary judgment in favor of a contractor against a subcontractor's insurer. In that case, general contractor Hathaway claimed that a subcontractor was responsible for faulty plumbing. The court held that faulty workmanship could be an "occurrence" if it caused "unforeseen or unexpected damage to other property."[44] Thus, even a deliberate act that caused unintended damage could give rise to an occurrence.[45] The court declared this result to be "in accord with the trend in a growing number of jurisdictions."[46] The plumbing defects at issue, which included such things as the installation of four-inch pipe under a contract calling for six-inch pipe, were held on summary judgment to constitute "occurrences" within the meaning of the policy.[47]

7. *Robinson Fans*—Application of the "Majority Rule"

Courts in what *Crossman I* described as the "majority" of states rejecting coverage for faulty workmanship sometimes nonetheless find coverage

36. *Id*. at 427.
37. *See id*.
38. *See id*.
39. No. CV 11–40-M-DWM-JCL, 2011 WL 4369519 (D. Mont. Aug. 24, 2011), *adopted by* 2011 WL 4369496 (D. Mont. Sept. 19, 2011).
40. *See id*. at *1.
41. *See id*. at *5.
42. *See id*. at *6.
43. 707 S.E.2d 369 (Ga. 2011).
44. *Id*. at 372.
45. *See id*.
46. *Id*. at 371.
47. *See id*. at 372.

under particular facts. An example of such a case is *National Fire Insurance Co. of Hartford v. Robinson Fans Holdings, Inc.*,[48] in which the claim was that industrial fans failed catastrophically as the result of design defects. Addressing whether the insurer had a duty to defend the underlying action, the court acknowledged that Pennsylvania law construed CGL policies as providing coverage only for tort injuries, and that they were not to be treated as performance bonds guaranteeing contractual performance.[49] The complaint, however, which determined the scope of any duty to defend, apparently did not allege contractual design requirements. Accordingly, the court held, the source of the claim that the fans were negligently designed appeared to have arisen out of general duties imposed by tort law, independent of any contractual provisions.[50] As a result, the court found the complaint pled an "occurrence" sufficient to trigger a duty to defend.[51]

The South Carolina Supreme Court's efforts in *Crossman I* to address the "intellectual mess" arising from the different approaches taken to the construction of the "occurrence" and "property damage" terms in CGL policies were well intentioned. The mess, however, remains. Practitioners need to be very aware of the specific approaches and rationales to these issues followed in the jurisdictions in which they practice.

III. COVERAGE-RELATED CLASS ACTIONS

In the past year, there have been a number of notable decisions regarding insurance coverage-related class actions. In property insurance cases, insurers were largely successful, scoring victories in the U.S. Seventh Circuit and the Louisiana Supreme Court, but losing a significant class certification ruling in the District of Arizona. In auto insurance cases, insurers also obtained favorable rulings in the Illinois intermediate appellate court and in the Western District of Washington. Life insurers did not fare as well, losing several major decisions in class action litigation over the use of so-called checkbook accounts to pay policy proceeds. In addition, a post-*Wal-Mart* certification of a class in a health insurance coverage case illustrates a central principle—class actions focusing on across-the-board coverage denials are sometimes appropriate for certification, while suits involving issues on which insurance adjusters are given significant discretion are less likely to be certified. These and other significant decisions are discussed below.

48. No. 10–1054, 2011 WL 1327435 (W.D. Pa. Apr. 7, 2011), *reconsideration denied*, 2011 WL 2842303 (W.D. Pa. July 18, 2011).
49. *See id.* at *3.
50. *See id.* at *5.
51. *See id.*

A. *Property Insurance Class Actions*

In property insurance class actions, the two most significant decisions in the past year were the Seventh Circuit's opinion in *Kartman v. State Farm Mutual Auto Insurance Co*.[52] and the Louisiana Supreme Court's decision in *Dupree v. Lafayette Insurance Co*.,[53] both of which reached results favorable to insurers.

Kartman involved claims that State Farm was inconsistent in adjusting claims for hail damage to roofs. The Southern District of Indiana granted certification under Federal Rule of Civil Procedure 23(b)(2) of a class seeking injunctive relief requiring State Farm to reinspect all of the roofs of class members' homes using a "uniform and objective" standard.[54] The Seventh Circuit reversed. In doing so, the panel explained that "[i]nsurance entails a promise to pay covered losses, not a covenant to use a particular standard for evaluating property damage."[55] The court concluded that "[i]f a given policyholder was fully compensated for the damage attributable to the hailstorm, then State Farm . . . satisfied its contractual obligation *regardless* of whether it used a 'uniform and objective' *or* an ad hoc standard to assess the damage."[56]

The Seventh Circuit's holding appears particularly useful to insurers in defending against class certification in coverage-related class actions because it is consistent with the proposition that claim adjustments must be evaluated holistically on a case-by-case basis for compliance with policy requirements, irrespective of the standard used. The Seventh Circuit further concluded that injunctive relief was not appropriate because (1) monetary damages would be an adequate remedy; and (2) injunctive relief would not be "final" as required by Rule 23(b)(2) because there would need to be individualized determinations on whether there was a breach of contract and on damages.[57]

In *Dupree*, the Louisiana Supreme Court found that six different property-related insurance issues arising out of Hurricane Katrina litigation for which class certification was granted were improperly certified by the lower courts. The court's decision could be of substantial benefit to insurers in defending against class certification in property insurance cases, particularly in state courts where class certification standards vary and may not be as rigorous as in federal courts. In addressing plaintiffs' claim that the insurer improperly used pre-Katrina pricing in preparing damage estimates, the Louisiana

52. 634 F.3d 883 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 242 (Oct. 3, 2011).
53. 51 So. 3d 673 (La. 2010).
54. *See* No. 1:07-CV-474-WTL-TAB, 2009 WL 348909 (S.D. Ind. Feb. 6, 2009).
55. *Kartman*, 634 F.3d at 890.
56. *Id*.
57. *See id*. at 892–93.

Supreme Court held that certification was improper because causation and the scope of damages would need to be determined on a claim-by-claim basis, and the facts of each loss would have to be evaluated in depth to determine if the insurer underpriced the claim.[58] On the issue of general contractor overhead and profit, the court found that certification was also improper because "the determination of whether the services of a general contractor would be reasonably likely to be required is a fact question that will be different for every insured" based on whether the work "necessitated the engagement of a general contractor to supervise and coordinate the work."[59] Similarly, with respect to permits and sales tax, "the factfinder would have to determine whether the particular damage was due to a covered peril, whether a permit was required to repair the damage, and whether the claimant was denied costs of the permit."[60]

Certification of claims for additional living expenses and civil authority was also rejected because a separate determination on each claim would be required as to whether the house became uninhabitable due to covered damage and whether there was a civil authority prohibiting access due to covered damage to neighboring premises.[61] The bad faith claims likewise would require an intensive individualized inquiry into each claim.[62] Given the breadth of issues addressed, *Dupree* provides a road map for insurers to contest class actions for certain property claims resulting from catastrophe-related damages.

Another notable opinion is the District of Arizona's decision in *Guadiana v. State Farm Fire & Casualty Co*.[63] In *Guadiana*, the plaintiff's house had polybutylene (PB) piping that leaked. Plaintiff claimed that it was not feasible to repair a leaky section of pipe because of a recognized defect in this kind of piping (chlorine causes it to crack) and that State Farm was contractually obligated to replace all of the piping in the house. Plaintiff further sought coverage for those parts of the structure that had to be torn out in order to access the piping.[64] The trial court initially denied certification of a nationwide class based on differences in state law, but granted certification of an Arizona statewide class. State Farm argued that individual issues regarding causation of the damage to the piping would predominate, but the federal court disagreed, concluding that "[i]f [plaintiff] can prove

58. *See Dupree*, 51 So. 3d at 688.
59. *Id*. at 691.
60. *Id*. at 692.
61. *See id*. at 693–96.
62. *See id*. at 699.
63. No. Civ. 07–326 TUC FRZ, 2010 WL 5071069 (D. Ariz. Dec. 7, 2010), *adopted by* 2011 WL 1211327 (D. Ariz. Mar. 31, 2011).
64. *See id*. at *2.

that PB systems can *never* be repaired, then it does not matter why the pipe burst."[65] The trial court also found that plaintiff had presented adequate expert testimony that PB plumbing is considered inappropriate for use in home plumbing systems, and that when it leaks the entire piping system must be replaced.[66]

B. *Auto Class Actions*

A significant focus of auto insurance class actions has been to insurers using software to evaluate claims for medical expenses. One important recent decision addressing this issue is the Illinois intermediate appellate court's decision in *Bemis v. Safeco Insurance Co. of America*,[67] in which a chiropractor claimed that Safeco used computer software to improperly reduce the cost of his professional services, purportedly in breach of the insurance contract requirement to pay "the usual and customary charges incurred for reasonable and necessary medical expenses. . . ."[68] The intermediate appellate court held that the trial court abused its discretion in certifying a class on this issue. The appellate court reasoned that even if the named plaintiff could prove that *Safeco*'s computer database use was inaccurate "it does not follow that all the other class members submitted usual and customary charges representing reasonable and necessary medical expenses" and, therefore, the predominance requirement for a class action to proceed was not satisfied.[69] One concurring judge, however, suggested that on remand plaintiff could present expert testimony to demonstrate that Safeco did not pay the reasonable and necessary charges in an across-the-board manner.[70]

An additional developing issue in auto insurance class actions concerns the insurer's obligation to pay for diminution in value of a repaired vehicle. In *Hovenkotter v. Safeco Insurance Co. of America*,[71] the plaintiff brought a putative class action on this issue under uninsured/underinsured motorist coverage. The Western District of Washington denied certification of a nationwide class, chiefly based on differences in state law and differences in policy language.[72]

Another significant decision that warrants attention from practitioners is *Kincaid v. Erie Insurance Co*.,[73] a putative class action alleging that the insurer

65. *Id*. at *5.
66. *See id*. at *7.
67. 948 N.E.2d 1054 (Ill. App. Ct), *appeal denied*, 955 N.E.2d 468 (Ill. Sept. 28, 2011).
68. *Id*. at 1056–57.
69. *Id*. at 1059.
70. *See id*. at 1170 (Donovan, J., specially concurring).
71. No. C09–0218JLR, 2010 WL 3984828 (W.D. Wash. Oct. 11, 2010).
72. *Id*. at *7–8.
73. 944 N.E.2d 207 (Ohio 2010), *modified by* 941 N.E.2d 805 (Ohio 2011).

improperly failed to reimburse the insured for expenses and lost wages incurred in assisting with the defense of liability claims. Although the insured never asked for such reimbursement, his contention appeared to be that the insurer should have proactively attempted to find out what the expenses were and reimburse them.[74] The Ohio Supreme Court, in a sharply divided four-to-three decision, held that there was no justiciable controversy because the insured had never presented a claim for these expenses and the insurer had not denied a claim. The Ohio court wrote that "it defies common sense to expect an insurer to pay for incidental expenses that it does not know its insured incurred."[75] This is an important decision because it is common in insurance coverage-related class actions for a plaintiff to assert that some small portion of an insurance claim improperly was not paid, but often there was no request for payment before the lawsuit was filed. In *Kincaid*, however, there were three dissents, asserting that this was an inappropriate issue on which to decide the matter on the pleadings where the insured had alleged that all conditions precedent to coverage were satisfied. One of the dissenting judges also concluded that because the insurance policy was silent on how the insured should seek reimbursement, the policy was ambiguous, making the filing of a lawsuit sufficient notice.[76]

C. *Life Insurance Class Actions*

Recent life insurance class actions have focused on insurers' use of "checkbook" accounts to pay policy proceeds. Instead of sending a check to the beneficiary for the policy proceeds, the insurer places the proceeds into an interest-bearing account held by the insurer and provides the beneficiary with a checkbook from which he or she may write checks at any time for all or part of the proceeds. In the past year, motions to dismiss class actions on this issue were denied by federal courts in Massachusetts and Nevada, and a Massachusetts federal judge granted class certification.[77] These cases tend to turn on construction of the policy or employee benefit plan language. In the Nevada case, for example, the policy provided that "Payment shall be made to the Beneficiary of record . . . immediately after receipt of such proof and of proof that the claimant is entitled to such payment."[78] The court concluded that this provision required the insurer, MetLife, to pay the benefits "(1) immediately and (2) in one sum."[79] The trial court

74. *See id*. at 208–09.
75. *Id*. at 210.
76. *See id*. at 214 (Pfeifer, J., dissenting).
77. *See* Keife v. Metro. Life Ins. Co., 797 F. Supp. 2d 1072 (D. Nev. 2011); Otte v. Life Ins. Co. of N. Am., 275 F.R.D. 50 (D. Mass. 2011); Lucey v. Prudential Ins. Co. of Am., 783 F. Supp. 2d 207 (D. Mass. 2011).
78. *Keife*, 797 F. Supp. 2d at 1077.
79. *Id*.

found that MetLife had not complied with that obligation by providing a checkbook "because MetLife maintained possession and control of the funds."[80]

In a multidistrict litigation on this issue against Prudential in the District of Massachusetts, Prudential's motion to dismiss was denied because the life insurance policy required a lump sum payment, and the court concluded that "[a] lump-sum payment by check (which actually transfers the funds to the beneficiary) is simply not the same as a lump-sum payment by checkbook (which allows the insurance company to retain the funds and earn interest on them)."[81] The trial court also denied the motion to dismiss the fraud claim, finding that an alleged misrepresentation by Prudential that the account was "a personal interest bearing account" was sufficient to allege fraud.[82]

The District of Massachusetts granted class certification in *Otte v. Life Insurance Co. of North America*.[83] Defendants did not dispute commonality[84] but the defendants did argue that there was significant variation among the summary plan descriptions and other governing plan documents for each employer's benefit plan. The trial court rejected this argument, indicating, without much explanation, that differences in plan documents would not affect defendants' fiduciary obligations.[85] The trial court, however, was more persuaded by the defendants' predominance argument, which was that an individualized analysis of the statute of limitations defense because whether a claim was time barred depended on when class members obtained actual knowledge of the alleged breach of fiduciary duty. The trial court concluded that sub-classing was appropriate, by separating potentially time-barred claims from those that were clearly timely.[86] Given the success that the plaintiffs' bar has had thus far on this issue, it is likely that life insurers will continue to face class action litigation, although the insurers' clarification of policy language may address some of the coverage issues.

D. *Health Insurance Class Actions*

In *Churchill v. CIGNA Corp.*,[87] plaintiff alleged improper denial of health insurance claims seeking certain types of treatment for autism known as

80. *Id.*
81. *Lucey*, 783 F. Supp. 2d at 212.
82. *Id.* at 215.
83. 275 F.R.D. 50 (D. Mass. 2011).
84. Notably, this was briefed and decided before the Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
85. *See Otte*, 275 F.R.D. at 55–56.
86. *See id.* at 58.
87. No. 10–6911, 2011 WL 3563489 (E.D. Pa. Aug. 12, 2011).

applied behavior analysis and early intensive behavioral treatment (collectively ABA). CIGNA denied these claims under an exclusion for experimental or investigative treatment, allegedly employing a policy of universally denying all such claims on this basis.[88] The trial court found that the new commonality requirement articulated by the Supreme Court in *Wal-Mart* was satisfied because, in contrast to the discretion that Wal-Mart gave store managers over employment decisions, "Cigna indisputably has a national policy of denying coverage for ABA to treat ASD [autism spectrum disorder]" and "the central question here is whether Cigna's denial of medical coverage for ABA as a treatment for ASD on the basis that such treatment is investigative or experimental was proper, and the answer to this question will resolve each class member's individual claim."[89] The trial court also found that the predominance requirement was satisfied because there was no evidence that the policy of denying these claims was any different for any of the ERISA plans managed by CIGNA. Rather, "Cigna made a class-wide determination that ABA was experimental in all cases. The propriety of this determination—specifically, whether it violates ERISA—can easily be litigated in a single forum."[90] The trial court did not address whether, assuming the treatment was not "experimental or investigative," predominating individual issues would arise regarding whether the treatment would be appropriate for particular children based on their condition.

Churchill illustrates a broader principle of these cases. When an insurer adopts a bright-line rule requiring denial of *all* claims of a particular type, without any exceptions and without any individualized assessment, that type of policy or practice may be appropriate for class certification. In contrast, where discretion is given to frontline personnel and intensive individualized, fact-based determinations are made on coverage, as in *Dupree*, certification is likely to be denied.

IV. AN INSURER'S DUTY TO INDEMNIFY

That "the duty to defend is broader than the duty to indemnify" is one of the fundamental principles of insurance law; a maxim oft repeated by policyholders and insurers alike. As such, recent Texas case law, including a decision by the Fifth Circuit in *Colony Insurance Co. v. Peachtree Construction, Ltd.*,[91] which held that a duty to indemnify can attach absent a duty to defend, may come as something of a surprise.

88. *Id.* at *2.
89. *Id.* at *4.
90. *Id.* at *6.
91. 647 F. 3d 248 (5th Cir. 2011).

The *Peachtree* case arose out of a routine additional insured coverage dispute involving a contractor, a subcontractor, and their respective insurers. Peachtree Construction, Ltd. was hired by the Texas Department of Transportation to serve as the general contractor for a highway repaving project.[92] Peachtree, in turn, subcontracted with CrossRoads, L.P. to supply and install construction signs, barricades, and warning devices at the construction site.[93] Pursuant to the subcontract, CrossRoads was required to name Peachtree as an additional insured under its own primary and excess layer policies, and such coverage was to be primary to Peachtree's own insurance coverage.[94] A fatal motorcycle accident occurred at the construction site shortly after the project commenced, resulting in a wrongful death suit being brought against Peachtree.[95] The suit alleged, among other things, that Peachtree was negligent in "failing to use required and reasonable signage, barricades, and warnings to drivers of a hazardous drop-off."[96] Peachtree claimed additional insured status under CrossRoads' primary policy, which was issued by Colony Insurance Co. Colony agreed to provide Peachtree with a defense subject to a reservation of rights.[97]

Colony subsequently filed suit against Peachtree and its insurer (Travelers) seeking a declaration that it had no duty to defend or indemnify Peachtree.[98] The basis for Colony's position in this regard was the language of its additional insured endorsement, which stated that a person or organization "is an additional insured only with respect to liability arising out of [the named insured's] ongoing operations" for the putative additional insured.[99] Colony argued that because the underlying suit did not specifically allege any negligence on the part of CrossRoads, it could have no coverage obligations to Peachtree as an additional insured.[100]

Colony successfully moved for summary judgment before the Northern District of Texas. The court held that based on Texas's eight-corners rule, Colony owed no duty to defend Peachtree in the underlying suit because the allegations in the complaint were limited to Peachtree's own negligence.[101] Although the allegations of negligence related to work within the scope of CrossRoads' contract, the court nevertheless held that it would

92. *See id*. at 251.
93. *See id*.
94. *See id*.
95. *See id*.
96. *Id*. (internal quotation marks omitted).
97. *See id*.
98. Colony Ins. Co. v. Peachtree Constr., Ltd., 2009 WL 3334885, at *3 (N.D. Tex. Oct. 14, 2009), *vacated and remanded by* 647 F.3d 248 (5th Cir. 2011).
99. *Id*. at *3–4.
100. *See id*.
101. *See id*. at *4.

be improper to consider extrinsic evidence in the form of the Peachtree-CrossRoads subcontract in considering whether Colony owed a defense to Peachtree.[102] The aspect of the court's decision that generated the most controversy, however, was its finding with respect to a potential duty to indemnify. Having found that Colony did not have a duty to defend Peachtree, the district court concluded that Colony could have no corresponding duty to indemnify Peachtree, citing generally to a Northern District of Texas case for the proposition that "because the duty to defend is broader than [the] duty to indemnify, the absence of a duty to defend generally forecloses the duty to indemnify."[103]

Nearly two months after the Northern District's ruling on summary judgment in *Peachtree*, the Texas Supreme Court issued its decision in *D.R. Horton-Texas, Ltd. v. Markel International Insurance Co., Ltd.*[104] *D.R. Horton*, like *Peachtree*, involved questions of additional insured coverage in the context of a general contractor seeking coverage under its subcontractor's policies. D.R. Horton, a general contractor, was sued for a mold condition in a home it constructed.[105] Not named as a defendant was the subcontractor that performed the masonry work believed to have been responsible for the mold. D.R. Horton tendered its defense to the subcontractor's insurer, but the insurer denied coverage on the basis that the underlying suit contained no specific allegations concerning the subcontractor's work. The lower court ruled in favor of the insurer, holding that based on the eight-corners rule, the insurer owed no duty to defend and, as such, it could have no corresponding duty to indemnify.[106]

On appeal, the Texas Supreme Court did not address the aspect of the lower court's rulings on the duty to defend. Rather, the court addressed whether the lower court's ruling on indemnity was correct, particularly in light of the fact that D.R. Horton had submitted evidence raising factual questions as to whether the subcontractor was responsible for the mold condition. The court explained that the eight-corners rule is a test uniquely limited to determining the duty to defend, whereas the duty to indemnify "depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy."[107] As such, explained the court, "even if Markel [the subcontractor's primary insurer] has no duty to defend D.R. Horton, it may still have a duty to

102. *See id*.
103. *Id*. at *5.
104. 300 S.W.3d 740 (Tex. 2009).
105. *See id*. at 742.
106. *See id*. at 743.
107. *Id*. at 744.

indemnify D.R. Horton as an additional insured," depending on what facts could be established in the underlying suit.[108] In reaching this conclusion, the court rejected the blanket statement that a duty to indemnify cannot exist where there is no duty to defend, reasoning that "[t]hese duties are independent, and the existence of one does not necessarily depend on the existence or proof of the other."[109] Thus, the court concluded that the grant of summary judgment in Markel's favor on the duty to indemnify was premature.

The *D.R. Horton* decision factored heavily in the Fifth Circuit's decision in *Peachtree*. The *Peachtree* court explained that based on Texas's eight-corners rule, an insurer's duty to defend can be determined "at the moment the petition is filed."[110] As such, the Fifth Circuit agreed that Colony had no duty to defend Peachtree in the underlying wrongful death suit, since the underlying complaint contained no allegations concerning CrossRoads' own negligence, and no extrinsic evidence could be considered on this issue. By contrast, explained the court, "an insurer's duty to indemnify generally cannot be ascertained until the completion of litigation, when liability is established, if at all."[111] In other words, the court held that the lack of a duty to defend is not conclusive of whether a duty to indemnify exists, since these duties are determined based on different criteria altogether.

The Fifth Circuit acknowledged that in most instances, if an underlying complaint does not trigger a defense obligation, then it will not trigger an indemnity obligation, hence the origin of the general rule that there can be no duty to indemnify absent a duty to defend.[112] The court stated that this rule is not absolute and that there are instances where a duty to indemnify can be triggered even in the absence of an initial duty to defend. With this in mind, the Fifth Circuit concluded that the lower court erred in how it evaluated Colony's duty to indemnify Peachtree. Specifically, the lower court failed to consider extrinsic evidence suggesting that Peachtree's liability did arise out of CrossRoads' own negligence, thus triggering an indemnity obligation under the Colony policy.[113] As such, the court held that the lower court's grant of summary judgment in favor of Colony was "both premature and incorrect."[114]

The *Peachtree* decision, in tandem with the Texas Supreme Court's decision in *D.R. Horton*, may come as a surprise to insurance professionals of

108. *Id.*
109. *Id.* at 745.
110. 647 F.3d 248, 253 (5th Cir. 2011).
111. *Id.*
112. *See id.* at 253–54.
113. *See id.* at 255.
114. *Id.*

the belief that there can be no duty to indemnify absent a duty to defend. As the *Peachtree* court conceded, such an outcome is not typical, since in most instances, if a coverage defense, such as a policy exclusion, negates a duty to defend then it also will negate a duty to indemnify. In this regard, it may be telling that *Peachtree* and *D.R. Horton* both involved additional insured issues, where the coverage defense, at least on the duty to defend, was based on the lack of specific allegations of negligence against the policy's named insured. Nevertheless, these cases demonstrate the need for counsel, at least when Texas law applies, to be mindful of the fact that the duty to indemnify is not necessarily concurrent with the duty to defend, but instead is based on entirely difference considerations.

V. COVERAGE RELATED TO CLIMATE CHANGE

This past year also saw a number of significant developments related to climate change liability law, including the justiciability of climate change tort claims and insurance coverage for such claims. As to the former, the U.S. Supreme Court determined that one group of plaintiffs could not proceed with their federal common law public nuisance claims against carbon dioxide emitters, but left open the issue of whether other types of climate change tort claims may proceed. Indeed, other claims presently remain ongoing. As to the latter, the opening round regarding the existence of climate change liability insurance coverage went to insurers, although some have cautioned that the decision was a narrow one and that additional coverage litigation in this area should be expected.

Much remains to be seen concerning whether and to what extent climate change tort claims and related insurance coverage litigation will proceed in the future. However, an examination of the history of these claims and the significant events that have taken place in this area during the past year provides some useful clues.

A. *Climate Change Tort Claims*

During 2011, there were significant developments in each of the three most significant climate change tort cases filed to date: *Connecticut v. American Electric Power Co.*, *Native Village of Kivalina v. Exxon-Mobil Corp.*, and *Comer v. Murphy Oil USA, Inc.*[115] *Connecticut v. American Electric Power* dates back

115. Am. Elec. Power Co. v. Conn., 131 S. Ct. 2527 (2011); Native Vill. of Kivalina v. Exxon-Mobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09–17490 (9th Cir.); Comer v. Murphy Oil USA. Inc., 585 F.3d 855 (5th Cir. 2009), *vacated*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc), *mandamus denied*, *In re* Comer, 131 S. Ct. 902 (2011) (mem.).

to 2004, when eight state attorneys general, the City of New York, and three land trusts filed two complaints in the Southern District of New York alleging that American Electric Power (AEP) and certain other electric power companies are responsible for about 10 percent of all carbon dioxide emissions from human activities in the United States.[116] The complaints alleged that the power companies created a common law public nuisance by contributing to global warming, with concomitant harm to the environment, the states' economies, and public health. Plaintiffs sought permanent injunctive relief requiring the power companies to abate the nuisance by capping and then reducing their emissions "by a specified percentage each year for at least a decade."[117] The trial court dismissed both cases on grounds that they present "non-justiciable political questions" because their resolution would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."[118]

A two-judge panel of the Second Circuit vacated the trial court's dismissal and allowed plaintiffs' claims to go forward. In reversing as to the political question issue, the panel described the case as an "ordinary tort suit" and held that a decision by a single federal court regarding whether the emissions of "six domestic coal-fired electricity plants" constitutes a public nuisance does not set a national or international emissions strategy or implicate broader policy issues that arguably would fall within the purview of the political branches.[119] The panel further held that plaintiffs have standing to bring their claims, having sufficiently alleged that their current and future injuries are "fairly traceable" to and caused by the defendants;[120] that plaintiffs can assert claims under the federal common law of nuisance; and that plaintiffs' claims are not displaced by federal legislation.[121] As to this latter point, the panel found that because there is no comprehensive federal greenhouse gas regulatory scheme, the Clean Air Act (CAA) and other legislation do not displace the plaintiffs' federal common law public nuisance claims.[122]

The Supreme Court granted certiorari and on June 20, 2011, reversed the Second Circuit's decision.[123] The court held eight-to-nothing that the plaintiffs could not proceed with their federal common law public nui-

116. *See* Conn. v. Am. Elec. Power Co., 582 F.3d 309, 316 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011).
117. *Id.* at 318.
118. Conn. v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271–74 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011).
119. 582 F.3d at 325.
120. *See id.* at 345, 349.
121. *See id.* at 387–88.
122. *Id.*
123. *See* 131 S. Ct. at 2540.

sance claims against the carbon dioxide emitters because the Clean Air Act and the EPA actions it authorizes "displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[124] While the Court's decision effectively precludes plaintiffs and similarly situated parties from seeking to limit greenhouse gases under federal common law, it leaves open the possibility that parties may pursue similar claims under state common law.[125] The Court did not resolve whether the political question doctrine bars tort suits related to climate change, which potentially would have been a more broadly applicable basis for reversal.[126] Thus, in future actions seeking damages for harm resulting from climate change based on state common law theories, issues of preemption of state law, standing, and the political question doctrine remain unresolved.

B. *Other Climate Change-Related Civil Litigation*

Two other currently pending cases present similar common law claims of public nuisance against various defendants based on alleged contributions to global warming. In *Native Village of Kivalina*, an Inupiat Eskimo village sued twenty-four oil, coal, and electric utility companies, alleging that their emissions have contributed to global warming and thereby caused Arctic Sea ice to diminish.[127] In *Comer v. Murphy Oil USA*, Mississippi coastal residents and landowners instituted a class action lawsuit against numerous oil and coal companies and chemical manufacturers, alleging that their emissions "contribut[ed] to global warming" and "added to the ferocity of Hurricane Katrina."[128] Significantly, plaintiffs in both of these cases are private parties seeking monetary damages in addition to other relief.

As in *Connecticut v. American Electric Power*, the defendants in the *Kivalina* and *Comer* cases successfully moved to dismiss those respective actions on grounds that the plaintiffs lacked standing and the claims were barred by the political question doctrine.[129] Although the Supreme Court's decision in the *AEP* case likely is dispositive of the federal common law nuisance claims in the case, the *Kivalina* plaintiffs' state law claims were dismissed without prejudice and could be revived.[130]

The subsequent history of the *Comer* case is more convoluted: a panel of the U. S. Fifth Circuit initially disagreed with the district court's dismissal,

124. *Id*. at 2537.
125. *Id*. at 2540.
126. *Id*. at 2535.
127. *See* 663 F. Supp. 2d 863 (N.D. Cal. 2009).
128. 585 F.3d 855, 861 (5th Cir. 2009).
129. *See* Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942885 (S.D. Miss. Aug. 30, 2007); Native Vill. of Kivalina, 663 F. Supp. 2d 863 (N.D. Cal. 2009).
130 *Vill. of Kivalina*, 663 F. Supp. 2d at 883.

and the case was remanded for arguments on the merits.[131] Thereafter, the Fifth Circuit, left with a bare quorum due to the recusal of seven justices (apparently due to conflicts raised by stock-ownership issues), voted to hear the *Comer* appeal en banc, automatically vacating the panel's earlier decision.[132] The subsequent recusal of an eighth justice resulted in the loss of the quorum necessary to hear the appeal. The Fifth Circuit ultimately dismissed the *Comer* appeal entirely, finding it lacked authority to reinstate a panel decision that has been vacated.[133] The plaintiffs filed a petition for a writ of mandamus to the Supreme Court, seeking to require the Fifth Circuit to reinstate the plaintiffs' appeal.[134] Although the plaintiffs' mandamus petition was denied,[135] Comer and his fellow plaintiffs refiled their climate change tort action in the Southern District of Mississippi.[136] The new action, based on diversity jurisdiction, alleges public and private nuisance, trespass, negligence, strict liability, and conspiracy causes of action under Mississippi law, as well as a request for declaratory relief that that federal law does not preempt state law claims.[137]

C. *Kivalina Insurance Claim: AES Corp. v. Steadfast Insurance Co.*

After being sued by the *Kivalina* plaintiffs, AES approached its insurer, Steadfast Insurance Co., to defend the lawsuit in accordance with its CGL policies.[138] Steadfast agreed to defend AES subject to a reservation of rights, but then filed an action in Virginia state court seeking a declaration that it had no duty to defend or indemnify AES.[139] Steadfast denied coverage based on three grounds: (1) the underlying complaint did not allege property damage caused by an "occurrence" as defined in the policies; (2) coverage was precluded by a "loss in progress endorsement" because the alleged injuries arose before the inception of coverage under the policies; and (3) the greenhouse gas emissions alleged in the underlying complaint were "pollutants" excluded from coverage under the policies' pollution exclusions.[140]

The trial court granted summary judgment for Steadfast based solely on the ground that the release of carbon dioxide and other greenhouse gases into the atmosphere by AES did not constitute an "occurrence" as

131. 585 F.3d 855 (5th Cir. 2009).
132. 598 F.3d 208 (5th Cir. 2010).
133. 607 F.3d 1049 (5th Cir. 2010) (en banc).
134. *In re* Comer, 131 S. Ct. 902 (2011) (mem.).
135. *Id.*
136. *See* Complaint, Case No. 1:11-cv-00220-LG -RHW (S.D. Miss. May 27, 2011).
137. *Id.* Claims 1–4 and ¶¶ 36, 41.
138. *See* AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28, 30 (Va. 2011)
139. *See id.*
140. *Id.*

defined in the CGL policies.[141] The Virginia Supreme Court upheld the trial court's decision. Under Virginia law, courts must apply the eight-corners rule in a declaratory judgment action to determine whether an insurer has a duty to defend its insured in litigation. The court explained that the eight-corners rule involves a comparison of the underlying complaint with the policy at issue "to determine whether the allegations in the underlying complaint come within the coverage provided by the policy."[142] If after this comparison "it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations," the insurer would not have a duty to defend the underlying litigation.[143]

The court focused its reading of the CGL policies on the definition of "occurrence." In all of the policies at issue, Steadfast agreed to defend AES in litigation involving allegations of "property damage" if such damage was caused by an "occurrence."[144] The policies defined the term "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful condition."[145] In the absence of an "occurrence" as defined by the policies, Steadfast would have no duty to defend or indemnify AES in litigation involving allegations of "property damage."[146]

The touchstone for the court's interpretation of the term "occurrence" was the word "accident." The court stated that the terms "occurrence" and "accident" are "synonymous and . . . refer to an incident that was unexpected from the viewpoint of the insured."[147] The court then turned to its jurisprudence to determine the meaning of "accident," which it stated was "commonly understood to mean 'an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated.' "[148] The court further stated that "[a]n intentional act is neither an 'occurrence' nor an 'accident' and therefore is not covered by the standard policy."[149] Finally, the court opined that where "a result is the natural and probable consequence of an insured's intentional act, it is not an accident."[150]

141. *See* Steadfast Ins. Co. v. AES Corp., 2010 WL 1484811 (Va. Cir. Ct. Feb. 5, 2010).
142. *AES Corp.*, 715 S.E.2d at 32.
143. *Id.*
144. *Id.* at 30.
145. *Id.*
146. *See id.*
147. *Id.* at 32 (quoting Utica Mut. Ins. Co. v. Travelers Indem. Co., 286 S.E.2d 225, 226 (Va. 1982)).
148. *Id.* (quoting Lynchburg Foundry Co. v. Irvin, 16 S.E.2d 646, 648 (Va. 1941)).
149. *Id.* (quoting *Utica Mut.*, 286 S.E.2d at 226).
150. *Id.*

Having interpreted the definition of "occurrence" in the policies to signify unintended or not reasonably anticipated incidents, the court reviewed the underlying complaint to determine whether it alleged an "occurrence" that would fall within the policies' coverage. Importantly, the *Kivalina* plaintiffs alleged that AES "*intentionally* emits millions of tons of carbon dioxide and other greenhouse gasses into the atmosphere annually" and that AES "*knew or should have known* of the impacts of [its] emissions. . . ."[151] The court focused on this language in determining that AES's release of greenhouse gases into the atmosphere did not constitute an "accident." The court held that the issue turned on whether the allegations in the underlying complaint could be construed as alleging that the injuries "resulted from unforeseen consequences that a reasonable person would not have expected to result from AES's deliberate act of emitting carbon dioxide and greenhouse gases."[152] It rejected AES's arguments that the *Kivalina* plaintiffs' allegations of "negligence" in the alternative sufficiently alleged an "occurrence" as defined in the policies.[153] Although the court acknowledged that "allegations of negligence are not synonymous with allegations of an accident," it ultimately concluded that "in this instance, the allegations of negligence do not support a claim of an accident."[154]

Importantly, there was no dispute that AES was intentionally emitting greenhouse gases into the atmosphere. The court's analysis focused on whether the damages alleged by the *Kivalina* plaintiffs were "the natural and probable consequences of AES's intentional actions."[155] Even if AES had acted negligently and did not intend the alleged damages, the court explained, the *Kivalina* plaintiffs alleged that the "damages it sustained were the natural and probable consequences of AES's intentional emissions."[156] Thus, the underlying complaint did not provide allegations that the alleged property damage resulted from an "accident, and such loss is not covered under the relevant CGL policies."[157] In a concurring opinion, two justices cautioned against reading the majority's holding too broadly. The concurrence wrote to emphasize that the holding was "limited to the unique language of the allegations of [the underlying] lawsuit and the particular definitions of an insured 'occurrence' contained in AES' commercial general liability ('CGL') policies with Steadfast."[158] In the concurrence's view,

151. *Id.* at 30 (emphasis in original).
152. *Id.* at 33.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 34.
158. *Id.* (Koontz, Sr. J., concurring).

the policy at issue in *Kivalina* "provided insurance against negligent tortious injuries, not intentional ones [and] excluded coverage for the natural and probable consequences of an intentional act."[159] The concurrence also believed that AES's intentional act of releasing greenhouse gases was "inherently negligent because the resulting injury was the natural and probable consequence of the means employed to do the act."[160]

On October 17, 2011, AES filed a petition for rehearing.[161] AES contended that the Virginia Supreme Court incorrectly held that there is no "occurrence" under CGL polices where the underlying complaint alleges the insured "should have known" its conduct would cause the alleged harm.[162] AES argued that only where the underlying complaint alleges that the defendant "should have known *to a substantial probability*" that its conduct would cause the alleged harm should the insurer be excluded from its duty to defend.[163] Without the "substantial probability" requirement, AES argued, "virtually all negligence cases" will be excluded from coverage.[164] Finally, AES asserted that the chain of causation alleged in *Kivalina* was "so attenuated" that AES could not have known to a "substantial probability" that its emission of greenhouse gases would result in climate change and the alleged resulting damage to the Kivalina coastline.[165]

D. *Future Considerations*

It is likely that future coverage litigation concerning climate change-related tort claims will focus on the insurers' duty to defend such claims. Insurers will continue to argue that they have no such duty for the same or similar reasons articulated in the *AES* briefing. On January 17, 2012, the Virginia Supreme Court issued an order setting aside its prior decision and granting AES's petition for rehearing, possibly signaling the court's reservations that it may have interpreted the definition of "occurrence" in the policies at issue too broadly.[166]

The Virginia Supreme Court in the *AES* case did not address Steadfast's arguments that the emission of greenhouse gases fell under the CGL policies' pollution exclusions that were at issue.[167] This significant issue will

159. *Id.* at 35.
160. *Id.*
161. Steadfast Pet. for Rehearing, Record No. 100764 (Va. Oct. 17, 2011).
162. *Id.* at 1.
163. *Id.*
164. *Id.*
165. *Id.* at 7–9. In an amicus brief filed the same day, the Virginia Trial Lawyers Association argued that "the language in the Court's current opinion risks foreclosing coverage for many if not all negligence-based torts in Virginia, rendering liability insurance largely useless." Virginia Trial Lawyers Association Amicus Brief, Record No. 100764 (Va. Oct. 17, 2011).
166. Order Granting Pet. for Rehearing, Record No. 100764 (Va. Jan. 17, 2012).
167. *See AES Corp.*, 715 S.E.2d 30.

undoubtedly be considered in future insurance coverage litigation involving climate change issues.

There are no reported insurance decisions in which a court has upheld an insurer's decision to deny coverage based upon a pollution exclusion in the greenhouse gas emissions context. Whether an insurer has a duty to defend or indemnify based upon a "pollution exclusion" argument is, of course, a fact-specific determination. Many courts require an alleged "pollutant" to be a "traditional" environmental pollutant before allowing it to trigger a pollution exclusion under the rationale that insureds have reasonable expectations of coverage for claims involving "non-traditional" pollution.[168] But other courts have concluded that the broad boilerplate language in the Steadfast policies to define a pollutant as any "solid, liquid, gaseous or thermal irritant or contaminant" is sufficient to trigger the exclusion of claims involving, among other irritants or contaminants, carbon monoxide,[169] nitrogen dioxide,[170] and hydrogen sulfide.[171]

Insurers defending future claims involving greenhouse gases will undoubtedly continue to argue that pollution exclusions apply to greenhouse gases such as carbon dioxide. The strongest arguments available to insurers are based upon the broad language generally found in pollution exclusions, state law recognizing that such exclusions apply to "non-traditional pollutants," and *Massachusetts v. EPA*, the Supreme Court decision stating that the EPA can regulate greenhouse gases under the Clean Air Act.[172] In contrast, the strongest argument available to policyholders is that carbon dioxide is not a "traditional" pollutant and claims involving such should be excluded from coverage. One option that insurers may consider in responding to these developments in climate change insurance litigation is to change the definition of "pollutant" to specifically include carbon dioxide and other greenhouse gases.

168. *See*, *e.g.*, MacKinnon v. Truck Ins. Exchange, 73 P.3d 1205, 1208–18 (Cal. 2003) (stating that pollution exclusion was created as a reaction to required environmental cleanups under federal law and therefore only apply to remediation costs arising from such "traditional environmental pollution"); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 75–82 (Ill. 1997); Am. States Ins. Co. v. Kiger, 662 N.E.2d 945, 948–49 (Ind. 1996).

169. Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1047, 1051 (Md. Ct. Spec. App. 1994).

170. League of Minn. Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419, 421–22 (Minn. Ct. App. 1989).

171. United Nat'l Ins. Co. v. Hydro Tank, Inc., 497 F.3d 445, 452–53 (5th Cir. 2007), *reh'g denied and aff'd as modified*, 525 F.3d 400 (5th Cir. 2008).

172. 127 S. Ct. 1438 (2007).