existed at common law when our state's constitution came into existence;" (b) medical malpractice claims were historically triable to a jury; and (c) damages, including non-economic damages, were historically a question of fact for Kansas juries in common-law tort actions.[8]

Without much discussion of the historical nature of jury trials in medical malpractice cases or non-economic damages cases, the Kansas Supreme Court determined that K.S.A. 60-19a02 does indeed "encroach[ ] upon the rights preserved by Section 5," but such encroachment "does not necessarily render K.S.A. 60-19a02 unconstitutional under Section 5."[9] Section 5 of the Kansas Constitution mirrors article 1, section 22(a) of the Missouri Constitution, under which the Missouri Supreme Court saw fit to declare a statutory cap on non-economic damages as an unconstitutional infringement on the right to a jury trial.[10] In a strong dissent, Justice Beier took issue with the *Miller* Court majority's failure to discuss the meaning of the term "inviolate" as used in the Kansas Constitution.[11] The majority, however, went on to further analyze the patient's Section 5 challenge in conjunction with her next argument.

Second, the patient argued K.S.A. 60-19a02 violates Section 18 of the Kansas Constitution's Bill of Rights, which provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."[12] Specifically, she argued that by placing a $250,000.00 ceiling on noneconomic damages, the

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Virginia Supreme Court Limits Insurer's Duty to Defend in Climate Change Lawsuits

*by Jason Scott Johnston and Levi W. Swank**

AES Corp. v. Steadfast Insurance Co.,[1] was a closely watched Virginia Supreme Court case that, as the *New York Times* put it, basically asked whether an insurance company has to "foot the bill for a company facing damages over climate change."[2] The case was significant for the insurance industry and others interested in climate change litigation, because it was the first of its kind to reach an appellate court. The court ultimately held that an insurer has no duty to defend or indemnify against climate change-related injuries under the terms of its general commercial liability (GCL) insurance policy.

The Case

In *Native Village of Kivalina v. ExxonMobil Corp.*, the Native Village of Kivalina, an Inupiat Eskimo community and tribe located on a barrier island in northwest Alaska, sued The AES Corporation (AES) and other energy companies.[3] The lawsuit alleged that carbon dioxide emitted by AES contributed to climate change, which in turn exposed Village land to erosion from sea waves when the water would have otherwise been frozen. Steadfast, AES's GCL insurer, obtained a declaratory judgment from a Virginia trial court, holding that it had no duty to defend or indemnify AES in the *Kivalina* litigation because AES's alleged contribution to global warming was beyond the scope of the indemnity provided by Steadfast's GCL policy.[4]

The Virginia Supreme Court granted AES's appeal on the issue of whether the injuries alleged in the complaint constituted an "occurrence" covered by its insurance policy. The court affirmed the trial court decision on September 16, 2011,[5] though it later withdrew its opinion after AES petitioned for rehearing.[6] Despite much speculation that the Virginia Supreme Court would revise its earlier decision,[7] it issued a nearly identical opinion in the case's final iteration.

Using the "eight corners" approach, comparing the "four corners" of the complaint with the "four corners" of the policy,[8] the court looked first to the language of Steadfast's GCL policy. The policy obligated Steadfast to defend AES for property damage caused by an "occurrence," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."[9] Other Virginia cases defined an "accident" as "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."[10] In its complaint, however,

Kivalina alleged that AES and others had emitted millions of tons of carbon dioxide "intentionally," and that AES "knew or should have known of the impacts"[11] of carbon dioxide emissions on coastal Alaskan villages like Kivalina because of the "clear scientific consensus that global warming is caused by emissions of greenhouse gases . . . ."[12]

AES argued that the *Kivalina* complaint described an "accident" because it also alleged negligent action by AES, which it knew or should have known would result in environmental damage.[13] The court stated, however, that "negligence" and "accident" are not synonymous terms.[14] Because the Kivalina plaintiffs did not allege that

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Tenth Circuit Rejects Challenge To Judicial Merit Selection Process in Kansas

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of Supreme Court and Court of Appeals precedent to create a new "threshold inquiry" for Equal Protection analysis. According to Judge O'Brien, strict scrutiny "cannot reasonably apply to every election unable to be wedged into the fact-bound and exceedingly narrow exception established in *Salyer* and *Ball*."[25] Instead, he determined that strict scrutiny analysis should only apply to the elections of officials performing "general governmental functions."[26] As a result, though Judge O'Brien concluded that the election of Commission members was not a "limited purpose" election, he found that the "Commission does not exercise the type of governmental functions necessary to trigger strict scrutiny."[27] Like Judge Matheson, Judge O'Brien determined that the Commission is "removed from the day-to-day decisions affecting the lives of the electorate" and "has no say in matters of safety or welfare."[28] And, like Judge Matheson, Judge O'Brien concluded that limiting the franchise to attorneys furthered a rational state interest of "limit[ing] the influence of politics on the nomination process and ensur[ing] the quality of its judicial nominees."[29]

In dissent, Judge McKay exposed this inherent insufficiency in the majority's reasoning, noting that "[t]he selection of judicial candidates is quintessentially governmental in nature . . . ."[30] Quoting an article authored by Professor Nelson Lund, the dissent noted that the election in question warranted strict scrutiny '"for the same reason that the Supreme Court applies strict scrutiny to primary elections conducted by political parties and elections to the electoral college."'[31] In other words, it is of no matter that the election of Commissioners is a preliminary step in the selection of judges, because the Commission serves a powerful role in "determining who will exercise one of the three most critical governmental functions," *i.e.* the judicial function.[32] As Judge McKay concluded: '"[b]y delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices. The State's choice of a complex procedure that obscures that effect cannot alter the reality of the effect."'[33] Accordingly, Judge McKay found that strict scrutiny was appropriate, and would have struck down the attorney-only elections as unconstitutional.

In sum, *Dool* represents another setback to those hoping to reduce the control of state bar associations over the selection of state appellate judges. However, Judge McKay is the first to author a dissent in this series of cases, and it warrants watching to see if his arguments prove persuasive to future courts considering such challenges.

**Mr. Callen and Mr. Whitworth are attorneys who practice in Kansas City, Mo.*

Endnotes

1 *See* Dool v. Burke, No. 10–3320, 2012 WL 4017118 (10th Cir. Sept. 13, 2012) [hereinafter Dool].

2 *See* Carlson v. Wiggins, 675 F.3d 1134 (8th Cir. 2012); Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010).

3 Currently, 35 states use some method of the "Missouri Plan" to select their judicial nominees. Each with varying forms of how the commission is composed. Commissions are composed of as little as six members (*e.g.*, North Dakota) or as many as 49 members (*e.g.*, Minnesota).

4 Jeffrey D. Jackson, *The Selection of Judges in Kansas: Comparison of Systems*, 69 J. Kan. B. Ass'n (Jan. 2000), at 33-34 (Governor Fred Hall had been defeated in his party's primary so he decided to go after the next best thing, that being Chief Justice of the Kansas Supreme Court. He convinced a loyal supporter, then Chief Justice, Bill Smith, to resign. Next, he ceded the governorship to his Lieutenant Governor, John McCuish, who then appointed Hall to the vacant Chief Justice position. Alas, the Kansas triple play.).

5 Kan. Const. art. III, § 5.

6 Kan. Stat. Ann. §§ 20-119 *et seq*. (legislation implementing the amendment); Kan. Stat. Ann. § 20-3004(a) (applying amendment to appellate courts).

23 *See id.* at 716–17.
24 *Id.* at 717.
25 *See id.* at 718.
26 *Id.* at 723.

Virgina Supreme Court Limits Insurer's Duty to Defend in Climate Change Lawsuits

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property damage was caused by a fortuitous act, "there is no 'occurrence' within the meaning of a GCL policy."[15]

The Concurrence

While Justice Mims agreed with the majority's reasoning, he disagreed that the reasoning could be limited to the specific CGL policy and the specific facts alleged in the complaint. "Our jurisprudence," he prophesied, "is leading inexorably to a day of reckoning that may surprise many policy holders."[16] This "surprise" is that negligence may never be covered by a GCL insurance policy because proximate causation, a necessary prerequisite to a finding of negligence, requires that an alleged injury be the "natural or probable consequence" of an action. According to Justice Mims, the implication of *AES Corp.* is that, because Virginia equates an "occurrence" with an "accident," GCL "occurrence" provisions do not cover negligence.

The Limited Significance of *AES Corp.*

It is possible that the Virginia Supreme Court's decision will be analyzed and consulted by judges and litigators in other jurisdictions. But, for the reasons set forth below, the author believes its significance is likely to be limited outside Virginia. First, the GCL policy at issue in *AES Corp.* defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."[17] Based on this provision, the Virginia Supreme Court decided that "occurrence" in the GCL policy simply means "accident." It is not the only court to equate these two terms, and the history of the standard GCL policy suggests that the expansion of "accident" to include "occurrence" was intended simply to make clear that an accident could be a continuous rather than abrupt event. Hence, although some observers might say that it might seem to make the term "occurrence" mere surplusage—violating a canon of contract interpretation—the court's equation of "accident" with "occurrence" is defensible on these grounds.

What is much more controversial is the Virginia Supreme Court's interpretation of an "accident" as something that is not the "natural and probable consequence" of the insured's action, but is instead something that happens "unexpectedly."[18] The court took this definition from two past cases interpreting the meaning of the term "accident." The first of these cases does not involve an insurance contract, but rather a state workers' compensation statute.[19] As for the second case, a life insurance policy covering death by accident is a different kind of contract than is the comprehensive GCL at issue in *AES Corp.*, and so on very basic principles of contract interpretation other courts would likely hold that the two contracts should be interpreted differently.[20]

A final reason that the Virginia Supreme Court's opinion in *AES Corp.* will likely have little impact outside the Commonwealth is that judicial adoption of the alternative interpretation of "occurrence" and "accident" under the commercial GCL policy does not necessarily mean that insurers will have a duty to defend against global warming lawsuits such as *Kivalina*. The standard commercial GCL policy (including the one at issue in *AES Corp.*) also contains a "pollution exclusion" clause excluding from coverage "claims of property damage" arising out of the "discharge, release, or escape of pollutants," where "pollutants" are defined to include any "gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes . . . ."[21] Because every human being on the planet emits carbon dioxide when she exhales, there are arguments to be made that carbon dioxide emissions are not a "gaseous irritant" or "contaminant" falling within the GCL pollution exclusion, but others might argue that, given the structure and history of the GCL policy, it is this clause, if any, where the harm allegedly caused by such emissions should be excluded from coverage.

**Jason Scott Johnston is a Professor at the University of Virginia School of Law. Levi W. Swank is a third-year law student at the University of Virginia.*

Endnotes

1 725 S.E.2d 532 (Va. 2012).
2 Lawrence Hurley, *Va. Court Rules That Insurance Doesn't Cover Global Warming Claims*, N.Y. Times, Sept. 16, 2011, http://www.nytimes.com/gwire/2011/09/16/16greenwire-va-court-rules-that-insurance-doesnt-cover-glo-97999.html.
3 *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009).
4 *See* Steadfast Ins. Co. v. AES Corp., 2010 Va. Cir. LEXIS 35 (Va. Cir. Ct. Feb. 5, 2010).

5 *See* AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011).
6 AES Corp. v. Steadfast Ins. Co., 2012 Va. LEXIS 103 (Va. Jan. 17, 2012).
7 J. Wylie Donald, *Just When You Thought It Was Over, Rehearing Is Granted in* Steadfast v. AES, Climate Lawyers Blog (January 31, 2012), http://climatelawyers.com/post/2012/01/31/Just-When-You-Thought-It-Was-Over-Rehearing-is-Granted-in-Steadfast-v-AES.aspx.
8 *Id.* at 535.
9 *Id.* at 534.
10 *Id.* at 536 (citing Lynchburg Foundry Co. v. Irvin, 16 S.E.2d 646, 648 (1941)).
11 *Id.* at 534.
12 *Id.* at 534.
13 *Id.* at 536–37.
14 *Id.* at 538.
15 *Id.*
16 *Id.*
17 *Id.* at 534 (majority opinion).
18 *Id.* at 536.
19 Lynchburg Foundry Co. et al v. Irvin, 16 S.E.2d 646 (Va. 9141).
20 Zurich General Accident & Liability Ins. Co., Ltd. v. Flickinger, 33 F.2d 853 (4th Cir. 1929).
21 *See, e.g.*, Hirschhorn v. Auto-Owners Ins. Co., 809 N.W.2d 529, 531 (Wis. 2012).

Pennsylvania High Court Hears Challenge to Voter ID Law

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In March 2012, Pennsylvania adopted Act 18, a voter ID law that requires: 1) in-person voters to furnish proof of residency by way of a driver's license or other, government-issued identification, and 2) absentee voters to similarly furnish proof of their identity with their absentee voter application.[3] The law provides for provisional voting, which allows a voter who cannot satisfy the ID requirement to nonetheless vote and return with six days with the requisite ID or alternatively, proof of indigence that precluded her from securing the ID.[4] The law also makes the IDs available for free, where necessary, to ensure all voters have the opportunity to vote in compliance with the law.[5]

Two months after the adoption of the Act, ten individuals and four organizations filed the lawsuit *Applewhite v. Commonwealth* to enjoin it, alleging the law disenfranchises, burdens, and deters them and their members from exercising their right to vote, violating Pennsylvania's Constitution.[6] They brought a challenge under Pennsylvania's constitutional provision governing elections, which provides that "elections shall be free and equal."[7] They brought another claim under Pennsylvania's "qualifications of electors" provision, which enumerates the requirements for Pennsylvanians to vote, authorizing the Legislature to only regulate registration.[8] They brought a third claim under Pennsylvania's "absentee voting" provision, which provides for absentee voting and allows the Legislature to proscribe the manner, time, and place of such voting.[9]

The trial court allowed substantial amicus briefing from both sides of the issue to fully explore the merit of the Act and conducted a six day hearing with more than twenty-five witnesses and fifty exhibits.[10] On the merits, the court found the plaintiff's facial challenge to the law, which requires proof that the law is not constitutional in any application, was not sufficient because the law had a plainly legitimate sweep and because the alleged, possible burdens were not self evident on the face of the Act.[11]

The court also concluded that the law's purported disenfranchisement was neither immediate nor inevitable—a requirement to issue a preliminary injunction—because voters with special hardships like those challenging the law had alternatives such as absentee voting, provisional voting, and even judicial relief options.[12] As such, on August 15, 2012, the trial court declined to issue the requested injunction prior to the upcoming 2012 election.[13]

In its September 18, 2012 decision, the Supreme Court of Pennsylvania disagreed.[14] Observing that the trial court had properly analyzed the merit of the law in general, the Pennsylvania Supreme Court nevertheless concluded that the trial court had failed to assess whether implementation of the law was sufficiently underway to ensure that voters were not disenfranchised during the then-looming November election.[15] The court was particularly concerned that the Pennsylvania Department of Transportation, which is responsible for issuing driver's licenses, was not providing the public with the "liberal access" to the IDs contemplated under the Act.[16] The type of IDs the Department of Transportation was issuing in compliance with the Act—secure IDs—imposed rigorous proof-of-citizenship requirements, including a certified birth certificate requirement.[17] Even the Act's alternative "Department of State" ID card, which is offered under the Act as a "safety net," required a similar, rigorous Department of Transportation application vetting process.[18] While the state agencies charged with implementing the Act indicated they were in the