

*AES v. STEADFAST* AND THE CONCEPT OF  
FORESEEABILITY IN CLIMATE CHANGE LITIGATION

BY  
DAVID P. VINCENT\*

*“There is no longer any credible scientific debate about the basic facts: our world continues to warm, with the last decade the hottest in modern records, and the deep ocean warming faster than the earth’s atmosphere. Sea level is rising. Arctic Sea ice is melting years faster than projected . . . . The only uncertainty about our warming world is how bad the changes will get, and how soon.”<sup>1</sup>*

I.	INTRODUCTION .....	202
II.	AES v. STEADFAST.....	204
	A. <i>Fact Summary</i> .....	204
	B. <i>Factors Underlying the Decision</i> .....	206
	1. <i>The Duty to Defend</i> .....	206
	2. <i>Pollution Exclusion for CGL Policies</i> .....	208
	3. <i>Massachusetts v. EPA</i> .....	210
	C. <i>Reasoning</i> .....	211
III.	ARGUMENTS IN FAVOR OF A DUTY TO DEFEND .....	213
	A. <i>Reasonable Expectations of the Insured</i> .....	213
	B. <i>Construe Ambiguities in Favor of the Insured</i> .....	215
	C. <i>Insurance Companies Can Regulate Behavior</i> .....	215
IV.	ARGUMENTS IN FAVOR OF A DUTY TO DEFEND ARE INADEQUATE.....	217
	A. <i>Reasonable Expectations of the Insured</i> .....	217
	B. <i>Construe Ambiguities in Favor of the Insured</i> .....	218
	C. <i>Insurance Companies Can Regulate Behavior</i> .....	218
V.	ARGUMENTS AGAINST A DUTY TO DEFEND .....	219
	A. <i>Consistent with Massachusetts v. EPA</i> .....	219
	B. <i>The Insured is Facing a Known Risk</i> .....	220
	C. <i>No Unanticipated or Unfair Burden on Insurance Companies</i> .....	222

---

\* Legal Fellow, San Diego Coastkeeper. The views expressed herein are the author’s alone and do not reflect the views of San Diego Coastkeeper. J.D., University of San Diego School of Law, 2012; B.A., University of California, San Diego, 2009.

<sup>1</sup> William D. Ruckelhaus et al., Op-Ed., *A Republican Case for Climate Action*, N.Y. TIMES, Aug. 2, 2013, at A21.

D. Does Not Deter Congress from Acting on Climate Change.....	223
VI. CONCLUSION .....	223

## I. INTRODUCTION

In the absence of national legislation tackling climate change in the United States, a new generation of tort-based lawsuits has arisen against corporate defendants, alleging that greenhouse gases emitted by such defendants have contributed to climate change that has caused real property damage to plaintiffs.<sup>2</sup> Most cases concerning liability for carbon dioxide and other greenhouse gas emissions have been unsuccessful in that they have not proceeded past the pleadings due to a lack of justiciability.<sup>3</sup> However, the Supreme Court decision in *Massachusetts v. Environmental Protection Agency*<sup>4</sup> (*Massachusetts v. EPA*) suggested that states, and potentially other landholders, have standing to sue emitters and hold them liable for property damage caused by the effects of global warming.<sup>5</sup> Therefore, *Massachusetts v. EPA* has the potential to permit United States courts to hear lawsuits

<sup>2</sup> See, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp. (Kivalina)*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (dismissing on standing grounds suit brought by village against 24 oil, energy, and utility companies, alleging nuisance claim for alleged contributions to climate change). See also David A. Grossman, *Warming Up to a Not-So-Radical-Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 39, 52 (2003) (introducing analysis of products liability and nuisance tort claims against alleged climate change contributors).

<sup>3</sup> See Blake R. Bertagna, “*Standing*” *Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 BYU L. REV. 415, 417–18 (2006) (arguing that plaintiffs in such lawsuits will be unlikely to meet Article III justiciability requirements “on three different bases: 1) they will be unable to prove that the global warming resulting from the defendant’s carbon dioxide emissions is the likely cause of their injury; 2) where they allege that the defendant’s actions will cause a future injury, they will be unable to prove that the injury will occur imminently; and 3) they will fail to prove that carbon dioxide emissions of a particular entity caused their injuries.”). See also *Kivalina*, 663 F. Supp. 2d at 868, 883 (holding that *Kivalina* claims posed nonjusticiable political questions and that the plaintiffs “otherwise lack[ed] standing under Article III of the United States Constitution”). But see Noel C. Paul, Note, *The Price of Emission: Will Liability Insurance Cover Damages Resulting from Global Warming?*, 19 LOY. CONSUMER L. REV. 468, 476 (2007) (arguing that the Supreme Court’s decision in *Massachusetts v. EPA* “could usher in a period of extensive civil litigation over global warming”).

In *Kivalina*, the city of Kivalina—located on a small island off the coast of Alaska—sued several oil and power companies to recover \$400 million, alleging in public nuisance claims that the companies “tortiously” contributed to the global warming that has severely eroded the island’s shoreline, requiring its residents to be relocated. The district court dismissed *Kivalina*’s claims on two grounds: 1) plaintiffs lack standing because their injuries are not “fairly traceable” to any of the defendants’ alleged wrongdoing; and 2) because the issues raised by the complaint require a legislative, not a judicial, solution, the claims are barred by the political question doctrine. *Kivalina*, 663 F. Supp. 2d at 877, 881. The Ninth Circuit subsequently affirmed the judgment of the district court. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012). The Supreme Court denied certiorari. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 133 S. Ct. 2390 (2013).

<sup>4</sup> 549 U.S. 497 (2007).

<sup>5</sup> See Paul, *supra* note 3, at 491–92; *Massachusetts*, 549 U.S. at 526.

arising from property damage caused by global warming and intentional greenhouse gas emissions.<sup>6</sup> Furthermore, plaintiffs are using innovative legal approaches in state courts that have the potential to succeed and open the doors of state courts to climate change related lawsuits as well.<sup>7</sup>

Emitters of greenhouse gases externalize the true social and environmental costs of their contribution to climate change onto the public.<sup>8</sup> Efforts to recover these costs, which manifest both through the costs of impacts and the costs of efforts to prevent impacts, can take the form of insurance claims as well as legal remedies.<sup>9</sup> Liability insurance providers have a general duty to defend those they insure, in addition to their responsibility to indemnify the insured for damages incurred by third parties.<sup>10</sup> The duty to defend and the duty to indemnify the insured are based upon the Commercial General Liability (CGL) policy held by the insured.<sup>11</sup> Unsurprisingly, parties insured by CGL policies argue that liabilities related to carbon dioxide emissions are covered under the policies.<sup>12</sup> However, insurers insist that this type of liability falls under the “pollution exclusion” of CGL policies.<sup>13</sup> As a result of the exclusion, the insurers argue they are not required to defend or indemnify the insured for third party damages associated with intentional carbon dioxide and greenhouse gas emissions.<sup>14</sup>

With the potential influx of climate change lawsuits inundating the United States court system, the question of whether CGL policies cover liabilities created by property damage resulting from global warming needs resolution. In April 2012, the Virginia Supreme Court held in *AES Corp. v. Steadfast Insurance Co.* (*AES v. Steadfast*) that liability insurance companies do not have a duty to defend the insured in climate change related damage claims resulting from the insured’s intentional release of carbon dioxide and other greenhouse gases.<sup>15</sup> The court reasoned that potential liabilities arising from the insured’s intentional emissions are not covered by CGL policies

---

<sup>6</sup> See Paul, *supra* note 3, at 474–75.

<sup>7</sup> 3 TOD I. ZUCKERMAN & MARK C. RASKOFF, ENVIRONMENTAL INSURANCE LITIGATION: LAW AND PRACTICE § 27:26 (2d ed. 2009).

<sup>8</sup> Christina Ross, Evan Mills, & Sean B. Hecht, *Limiting Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change*, 26A STAN. ENVTL. L.J. & STAN. J. INT’L. L. 251, 252 (2007). See also David P. Vincent, *Internalizing Externalities: An Economic and Legal Analysis of an International Carbon Tax Regime*, 92 OR. L. REV. 163 (2013) (noting that market prices for carbon based fuels and products or services that require the use of such fuels do not reflect the full social and environmental costs of their production and consumption and such externalities are oftentimes pushed from the transaction onto the public at large).

<sup>9</sup> Ross, Mills, & Hecht, *supra* note 8, at 252.

<sup>10</sup> See *generally* 2 BRUCE CORNBUM, CALIFORNIA INSURANCE LAW DICTIONARY & DESK REFERENCE § P67 (2013) (defining an insurer’s duty to defend).

<sup>11</sup> *Id.* §§ C48:3, C48:4.

<sup>12</sup> See, e.g., *AES Corp. v. Steadfast Ins. Co.* (*AES*), 725 S.E.2d 532, 533 (Va. 2012).

<sup>13</sup> See, e.g., *id.* at 533.

<sup>14</sup> See, e.g., *id.*

<sup>15</sup> *Id.* at 538.

because intentional emissions do not fall within the policy's scope of coverage.<sup>16</sup>

This paper argues that the court's decision in *AES v. Steadfast* is correct and that other jurisdictions should adhere to it when presented with similar fact patterns because the decision: 1) is consistent with the Supreme Court's holding in *Massachusetts v. EPA*; 2) holds companies responsible for their intentional actions; 3) does not put an unfair burden on liability insurance companies; and 4) does not deter the United States Congress from adopting a comprehensive plan to mitigate and adapt to global climate change. Part I of this paper will expound upon the decision in *AES v. Steadfast* and several factors underlying the decision. Part II will discuss the various arguments against the Virginia Supreme Court's decision in *AES v. Steadfast* in support of a decision favoring AES, the insured. Part III will attack the arguments proposed in the previous section that favor a duty to defend in lawsuits arising out of property damage from carbon dioxide and greenhouse gas emissions. Part IV will defend the proposition that *AES v. Steadfast* was correctly decided.

## II. AES V. STEADFAST

### A. Fact Summary

*AES v. Steadfast* arose from a lawsuit in which AES Corporation was a defendant.<sup>17</sup> The original lawsuit, *Native Village of Kivalina v. ExxonMobil Corp. (Kivalina)*,<sup>18</sup> was initiated by the native Alaskan village of Kivalina against ExxonMobil and several other defendants, including AES, in the United States District Court of the Northern District of California.<sup>19</sup> The village of Kivalina sought compensation from the defendants for climate change related destruction of its land through the federal common law of public nuisance.<sup>20</sup> In its complaint, Kivalina alleged the defendants' emission of millions of tons of carbon dioxide "intentionally or negligently" created a nuisance, in the form of global warming.<sup>21</sup> The complaint stated that AES's emissions "caus[ed] land-fast sea ice protecting the village's shoreline to form later or melt earlier in the annual cycle" and "exposed the shoreline to storm surges, resulting in erosion of the shoreline and rendering the village uninhabitable."<sup>22</sup> The complaint further asserted that AES "knew or should have known" that its activities would result in the alleged harm.<sup>23</sup> Kivalina

---

<sup>16</sup> *Id.* at 537–38.

<sup>17</sup> *Id.* at 533.

<sup>18</sup> 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

<sup>19</sup> ZUCKERMAN & RASKOFF, *supra* note 7, § 35:374; *Kivalina*, 696 F.3d at 849.

<sup>20</sup> *Kivalina*, 696 F.3d at 853.

<sup>21</sup> Plaintiff's Complaint at 63, *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 2008 WL 594713 (N.D. Cal.).

<sup>22</sup> *AES*, 725 S.E.2d at 534.

<sup>23</sup> *Id.*

alleged that the damage to the village was so extreme that the inhabitants of the village were required to relocate.<sup>24</sup>

In response to Kivalina's allegations, AES turned to its insurance policy and insisted that its provider, Steadfast Insurance Company (Steadfast), had a duty to defend the company from potential liability.<sup>25</sup> AES purchased liability insurance from Steadfast and held a CGL policy at the time of the suit.<sup>26</sup> In the CGL policies at issue, Steadfast had a duty to defend AES against lawsuits seeking damages resulting from bodily injury or property damage caused by an "occurrence."<sup>27</sup> Steadfast denied coverage and thereafter filed a declaratory judgment action in the Circuit Court of Arlington County in Virginia, the jurisdiction in which AES is headquartered.<sup>28</sup> Steadfast denied coverage based on three grounds: 1) the *Kivalina* complaint did not allege "property damage" caused by an "occurrence" as the policies defined "occurrence";<sup>29</sup> 2) the alleged injuries arose before Steadfast's coverage incepted; and 3) the greenhouse gas emissions alleged in *Kivalina* were "pollutants," excluded from coverage by virtue of the policies' pollution exclusion.<sup>30</sup>

On cross-motions for summary judgment, Steadfast argued, among other things, that the *Kivalina* complaint did not allege property damage caused by an occurrence because the complaint asserted that AES "knew or should have known" that its intentional activities would lead to global warming that damaged the village.<sup>31</sup> An "occurrence" is defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."<sup>32</sup> AES argued that any alleged harm resulting from climate change must be considered an "accident" because it was unintended or unexpected, as acknowledged by the "knew or should know" language in the *Kivalina* complaint, despite that the policies do not define "accident."<sup>33</sup> The circuit court granted summary judgment in favor of Steadfast, finding it had no duty to defend AES because the *Kivalina* complaint did not allege an "occurrence."<sup>34</sup>

---

<sup>24</sup> *Kivalina*, 663 F. Supp. 2d 863, 869.

<sup>25</sup> *AES*, 725 S.E.2d at 533.

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* at 534. *See also Is Negligence Still Insurable in Virginia? AES Corp. v. Steadfast Insurance Co.*, <http://www.mcguirewoods.com/Client-Resources/Alerts/2012/4/IsNegligenceStillInsurableinVirginia.aspx> (last visited Feb. 15, 2014) (summarizing *AES v. Steadfast*).

<sup>28</sup> *Steadfast Ins. Co. v. AES Corp.*, No. 2008-858, 2010 WL 1484811 (Va. Cir. Ct. Feb. 5, 2010); *AES Corporation*, <http://aes.com/aes/index?page=contactus> (last visited Feb. 15, 2014) (noting Arlington, Virginia, as the headquarters of the AES Corporation).

<sup>29</sup> *AES*, 725 S.E.2d at 533-34. The CGL "policies define 'occurrence' as follows: 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful condition. The policies specify that Steadfast has no duty to defend or indemnify AES against damage suits to which the policies do not apply." *Id.* at 534 (internal quotations omitted).

<sup>30</sup> *Id.* at 533.

<sup>31</sup> *Id.* at 533-34.

<sup>32</sup> *Id.* at 536.

<sup>33</sup> *Id.* at 536-37.

<sup>34</sup> *Id.* at 533-34.

On appeal, the central issue in *AES v. Steadfast* was “whether the circuit court erred in ruling that a civil complaint filed against [AES] did not allege an ‘occurrence’ as that term is defined in AES’s contracts of insurance with [Steadfast], and that Steadfast, therefore, did not owe AES a defense or liability coverage.”<sup>35</sup> The Virginia Supreme Court affirmed the decision of the circuit court holding that Steadfast did not have a duty to defend AES in the *Kivalina* lawsuit.<sup>36</sup>

### *B. Factors Underlying the Decision*

To fully understand the Virginia Supreme Court’s decision in *AES v. Steadfast*, it is important to be familiar with insurance companies’ duty to defend, the CGL “pollution exclusion” policy, and the Supreme Court’s decision in *Massachusetts v. EPA*. This Part addresses these three topics before further discussing the *AES v. Steadfast* decision.

#### *1. The Duty to Defend*

In addition to their duty to indemnify the insured, insurance companies have a duty to defend the insured from third party liabilities that come within the scope of the CGL policy.<sup>37</sup> The duty to defend requires insurance companies to “indemnify until it becomes clear that there can be no recovery” under the CGL policy.<sup>38</sup> To fulfill its duty to defend, the insurer must enlist legal counsel to represent the insured and must also pay the legal fees and costs sustained in litigation on behalf of the insured.<sup>39</sup> Furthermore, if the insurer disputes its duty to defend and loses, the insurer may also be required to pay “the cost incurred by the insured . . . in establishing the insurer’s duty to defend.”<sup>40</sup> Accordingly, if the court found Steadfast had a duty to defend AES in its lawsuit with Kivalina, Steadfast could be responsible for paying all of AES’s defense costs, as well as the litigation costs and attorney’s fees AES incurred in determining whether Steadfast had a duty to defend.<sup>41</sup>

The insurer’s duty to defend the insured is related to, but broader than, the insurer’s duty to indemnify the insured.<sup>42</sup> If claims against the insured are

---

<sup>35</sup> *Id.* at 533.

<sup>36</sup> *Id.* at 538.

<sup>37</sup> 46 C.J.S. *Insurance* § 1628 (2013).

<sup>38</sup> *Id.*

<sup>39</sup> Eliot M. Harris, *The Duty to Defend: What Insurers, Insureds and Their Counsel Need to Know When Faced With A Liability Coverage Dispute*, [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/duty.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/duty.html) (last visited Feb. 15, 2014).

<sup>40</sup> Craig F. Stanovich, *Duty to Defend in the CGL Policy*, <http://www.irmi.com/expert/articles/2002/stanovich08.aspx> (last visited Feb. 15, 2014).

<sup>41</sup> *See id.* *See also* Harris, *supra* note 39 (“There is the potential that if the insurer loses the declaratory judgment action on its merits, the insurer could be held liable not only for defense costs of the underlying lawsuit . . . but also for the cost incurred by the insured in the declaratory judgment action.”).

<sup>42</sup> 46 C.J.S. *Insurance* § 1628 (2013).

“potentially covered [by the CGL policy] the insurer has to fund the insured’s defense against the third party’s claim.”<sup>43</sup> Furthermore, even if the claim against the insured is not proven, the insurance company bears the cost of the defense and is not permitted to seek reimbursement.<sup>44</sup> Courts “impose an immediate defense obligation” on the insurer once the insured shows there is “potential for coverage.”<sup>45</sup>

In all circumstances, the statements made in the complaint(s) filed against the insured determine whether or not an insurer has a duty to defend.<sup>46</sup> Generally, an insurance company’s duty to defend “is excused only when a complaint unambiguously excludes coverage under the policy.”<sup>47</sup> Therefore, if a third party claim is conceivably covered by the policy, the insurance company’s duty to defend stands.<sup>48</sup> Furthermore, the duty to defend is not extinguished even if allegations in a complaint are “groundless, false, or fraudulent.”<sup>49</sup> The insurance company is excused of its duty to defend the insured only when the complaint against the insured does not advance any allegations that would be covered under the CGL policy.<sup>50</sup> In summary, an insurer must defend the insured when the insurer may be required to indemnify the insured under the CGL policy.<sup>51</sup>

Furthermore, all allegations in the third party’s complaint do not need to fall within the scope of the insured’s policy to trigger the insurer’s duty to defend.<sup>52</sup> If one of the allegations made by the third party falls within the scope of the insured’s CGL policy, then the duty to defend is triggered.<sup>53</sup> The insurer must also pay all litigation fees associated with the lawsuit even if most of the allegations in the complaint fall outside the scope of the CGL policy.<sup>54</sup> Nevertheless, when litigation is finished, “the insurer is entitled to seek reimbursement at the conclusion of the litigation if the insurer can show that certain fees and expenses are solely allocable to uncovered causes of action.”<sup>55</sup> Therefore, if Steadfast had a duty to defend AES in *Kivalina*, it would be required to pay all of AES’s litigation costs up front, even though one of the claims did not fall within the scope of the CGL policy AES purchased.<sup>56</sup>

---

<sup>43</sup> CORNBUM, *supra* note 10, § P67:2.1.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* § P67:5.

<sup>46</sup> C.T. Drechsler, Annotation, *Allegations in Third Person’s Action Against Insured as Determining Liability Insurer’s Duty to Defend*, 50 A.L.R.2d 458, 465 (1956). *See also* 16 SONJA LARSEN, GEORGIA JURISPRUDENCE: INSURANCE § 19:9 (2013).

<sup>47</sup> LARSEN, *supra* note 46.

<sup>48</sup> *See id.*

<sup>49</sup> *See* Drechsler, *supra* note 46, at 474.

<sup>50</sup> *See AES*, 725 S.E.2d 532, 535–36 (Va. 2012).

<sup>51</sup> *See* Dreschler, *supra* note 46, at 472.

<sup>52</sup> *Id.* at 506–07; LARSEN, *supra* note 46, § 19:12.

<sup>53</sup> Dreschler, *supra* note 46, at 506–07; LARSEN, *supra* note 46, § 19:12.

<sup>54</sup> Drechsler, *supra* note 46, at 478.

<sup>55</sup> CORNBUM, *supra* note 10, § P67:2.1.

<sup>56</sup> *See AES*, 725 S.E.2d 532, 538 (Va. 2012) (holding that AES had not alleged facts to show its claims were covered by the CGL policy).

## 2. Pollution Exclusion for CGL Policies

Another issue underlying the *AES* decision is the environmental “pollution exclusion” for CGL policies.<sup>57</sup> In 1980, Congress cracked down on pollution by passing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>58</sup> CERCLA “regulates the cleanup of existing, inactive, and abandoned hazardous waste disposal sites”<sup>59</sup> and was enacted as a solution to widespread industrial pollution.<sup>60</sup> In response to CERCLA, insurance companies tried to limit the coverage of their CGL policies in order to exclude coverage for liabilities related to intentional pollution on the part of the insured.<sup>61</sup>

CERCLA states that “any person<sup>62</sup> who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for all costs of removal or remedial action incurred by the United States Government or a State.”<sup>63</sup> Because CERCLA applied *ex post facto*, “businesses which generated, treated, or disposed of toxic chemicals suddenly found themselves liable for tremendous cleanup costs from past activities, even if such activities were entirely legal at the time.”<sup>64</sup> Consequently, insurance companies providing coverage to polluters under CGL policies were also confronted with unexpected liability.<sup>65</sup>

Insurance companies “fought to deny pollution coverage” for CGL policies out of fear that they would be obligated to indemnify the insured for tremendous liabilities under CERCLA.<sup>66</sup> However, the battle for court recognition of the “pollution exclusion” was not easy and insurers were initially required to indemnify CGL policyholders from the enormous, unanticipated liabilities created by CERCLA.<sup>67</sup> Before CERCLA, CGL policies were known as *Comprehensive* General Liability policies.<sup>68</sup> The use of the term “comprehensive” gave the insured the impression that the policy

---

<sup>57</sup> See Paul, *supra* note 3, at 480, 485.

<sup>58</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012).

<sup>59</sup> Theresa Gooley, *The Changing Environment: Interpreting the Pollution Exclusion in the Context of CERCLA Liability*, 44 *DRAKE L. REV.* 153, 153 (1995).

<sup>60</sup> ALAN PALMITER & FRANK PARTNOY, *CORPORATIONS: A CONTEMPORARY APPROACH* (1st ed. 2010).

<sup>61</sup> See Gooley, *supra* note 59, at 154.

<sup>62</sup> “[B]oth individuals and corporations are included within the definition of ‘person’ under Section 101(21) of CERCLA.” *United States v. McGraw-Edison Co.*, 718 F. Supp. 154, 157 n.1 (W.D.N.Y. 1989) (citation omitted). “The term ‘person’ means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” 42 U.S.C. § 9601(21) (2006).

<sup>63</sup> 42 U.S.C. § 9607(a)(2)–(a)(4)(A) (2006).

<sup>64</sup> Gooley, *supra* note 59, at 160 (quoting Thomas W. Kennedy, *Hazardous Wastes and Commercial Liability Insurance: Are You Covered?*, 54 *KY. BENCH & B.* 12, 12 (1990)).

<sup>65</sup> *Id.* at 154.

<sup>66</sup> Paul, *supra* note 3, at 485; Gooley, *supra* note 59, at 169.

<sup>67</sup> Paul, *supra* note 3, at 481–82.

<sup>68</sup> *Id.* at 479–80.

covered all third party liabilities.<sup>69</sup> However, insurance companies intended for CGL policies to cover “accidents” and denied coverage to policyholders when they caused intentional harm.<sup>70</sup> Insurance companies attempted to clarify CGL policy coverage with the courts and insured parties by drafting the pollution exclusion.<sup>71</sup> Insurers drafted the pollution exclusion so it would apply when policyholders intentionally polluted, even if the policyholders did not intend to harm a third party.<sup>72</sup> Nevertheless, courts were reluctant to acknowledge the pollution exclusion because the insured parties understood the CGL policies to be comprehensive.<sup>73</sup>

Court interpretations of the attempted pollution exclusion were inconsistent across the United States.<sup>74</sup> In response to the judicial inconsistency with respect to the CGL policy’s pollution exclusion of liability related to intentional releases, the insurance industry attempted to clarify its intent by changing the coverage in CGL policies from “accident” based to “occurrence” based.<sup>75</sup> The new occurrence based policy was intended to further clarify the pollution exclusions under the CGL policies by limiting coverage to accidents that took place within a limited time window, thereby excluding coverage for the insured if it polluted over a period of time.<sup>76</sup> The exclusion required pollution to be “sudden and accidental” for it to be covered under CGL policies.<sup>77</sup> Moreover, insurance companies changed the name of such policies to *Commercial* General Liability policies to clarify that the policy was not comprehensive. However, even with the clarifications, some courts continued to decide in favor of the insured.<sup>78</sup>

Insurance companies oftentimes contend that their absolute pollution exclusion is clear and unambiguous and must be read literally.<sup>79</sup> Courts generally have favored the insurance companies’ position in cases involving traditional environmental pollution.<sup>80</sup> Other courts have adopted this

---

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 480.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 481.

<sup>73</sup> *See id.* at 481–83.

<sup>74</sup> Gooley, *supra* note 59, at 170. *See also* Bentz v. Mut. Fire, Marine & Inland Ins. Co., 575 A.2d 795, 799–801 (Md. Ct. Spec. App. 1990) (discussing various approaches courts have used to interpret pollution exclusion clauses).

<sup>75</sup> Gooley, *supra* note 59, at 167.

<sup>76</sup> Richard D. Williams, *Intent of the Drafters: The Pollution Exclusion and the Insurance Commissioner Documents*, 579 PLI/Comm 415 (1991).

<sup>77</sup> Gooley, *supra* note 59, at 169.

<sup>78</sup> *See, e.g.*, California v. Allstate Ins. Co., 201 P.3d 1147, 1159–61 (Cal. 2009).

<sup>79</sup> *See, e.g.*, Hous. Auth. Risk Retention Grp., Inc. v. Chicago Hous. Auth., No. 02 C 4474, 2003 WL 22282385, at \*4 (N.D. Ill. Sept. 30, 2003), *aff’d*, 378 F.3d 596 (7th Cir. 2004) (noting exclusion “bars coverage for bodily injuries resulting from exposure to pollution, regardless of origin,” i.e., on- or off-site); Harrison v. R.R. Morrison & Son, Inc., 862 So. 2d 1065, 1071 (La. Ct. App. 2003) (holding that policy language is not ambiguous and bars coverage for gasoline leak); Holland Hitch Co. v. Twin City Fire Ins. Co., No. 1:01-CV-779 at \*9–10 (W.D. Mich. Mar. 14, 2003).

<sup>80</sup> *See, e.g.*, Crabtree v. Hayes-Dockside, Inc., 612 So. 2d 249, 253 (La. Ct. App. 1992); Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1437 (9th Cir. 1993), *rev’d*, 10 F.3d 1448; Cent. Ill. Pub. Serv. Co. v. Allianz Underwriters Ins. Co., 608 N.E.2d 155–56, 159 (Ill. App. Ct. 1992); U.S.

position for other types of underlying claims as well.<sup>81</sup> The efforts of the insurance companies eventually were sufficient to persuade state courts to recognize the pollution exclusion, and CGL policies were no longer held to cover damages caused by intentional pollution.<sup>82</sup>

However, the momentum underlying this juridical interpretation has begun to slowly deviate toward judicial adoption of policyholders' narrow interpretation of the pollution exclusion.<sup>83</sup> Further information on this juridical change will be addressed in Part II to support policyholders' contentions that the insurance company's interpretation of policy language ignores the familiar and reasonable connotations of the words used, and sometimes defined, in the pollution exclusion.<sup>84</sup>

### 3. *Massachusetts v. EPA*

One factor influencing the Virginia Supreme Court's decision in *AES v. Steadfast* is the Supreme Court's ruling in *Massachusetts v. EPA*, which held that carbon dioxide is an air pollutant under the federal Clean Air Act.<sup>85</sup> In

---

*Bronze Powders, Inc. v. Commerce & Indus. Ins. Co.*, 679 A.2d 674, 677 (N.J. Super. Ct. App. Div. 1996) (finding that the insured's intentional discharges of copper sulphates were not covered by the insurers); *Hathaway v. Lumbermens Mut. Casualty Co.*, No. 89-2199 (Mass. Super. June 8, 1992).

<sup>81</sup> See, e.g., *Quadrant Corp. v. Am. States Ins. Co.*, 76 P.3d 773, 773 (Wash. Ct. App. 2003) (holding that coverage for bodily injury claim arising from inhalation of fumes from liquid waterproofing material was barred "[b]ecause the underlying injury and cause of action [were] the result of a pollutant acting as a pollutant."); *Mark I Restoration SVC v. Assurance Co. of Am.*, 248 F. Supp. 2d 397, 404 (E.D. Pa. 2003) (holding that the use of chemicals, deodorizers and odor eliminators to "deskunk" an apartment "satisfie[d] the criteria for 'pollutant' in the pollution exclusion"); *Ferrell v. State Farm Ins. Co.*, No. A-01-637, 2003 Neb. App. LEXIS 123, at \*17 (Neb. Ct. App. May 13, 2003) (holding that mercury is a pollutant and barring coverage for a claim by a tenant of an apartment building); *Mich. Municipal Risk Mgmt. Auth. v. Seaboard Surety Co.*, No. 235310, 2003 Mich. App. LEXIS 1869, at \*9-10 (Mich. Ct. App. Aug. 7, 2003) (holding that the pollution exclusion is "unambiguous" and barring coverage for underlying claims involving basements flooded with sewage due to negligent installation of a bulkhead). *But see* *Holland Hitch Co. v. Twin City Fire Ins. Co.*, No. 1:01-CV-779 (W.D. Mich. Mar. 14, 2003) (illustrating a case in which the majority opinion limited the broad interpretation only to "traditional environmental pollution"). See also *Hous. Auth. Risk Retention Grp., Inc. v. Chi. Hous. Auth.*, No. 02 C 4474, 2003 U.S. Dist. LEXIS 17442, at \*20 (N.D. Ill. Sept. 30, 2003) (providing an instance where a federal court noted that, "it is clear that the type of pollution alleged in the Underlying Litigation here does constitute 'traditional environmental contamination,' i.e., the 'gradual or repeated discharge of hazardous substances into the environment.'").

<sup>82</sup> See Richard L. Bradford, *The Personal Injury Endorsement: An Unwarranted Straining to Obtain Insurance Coverage for Environmental Damage*, 11 J. LAND USE & ENVTL. L. 111, 124-26 (1995) (describing insurance companies' pecuniary interests and jurisdictional successes related to the implementation of pollution exclusion clauses).

<sup>83</sup> See *infra* Part III.A.

<sup>84</sup> *Id.*

<sup>85</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007); David P. Vincent, *Administrative Absurdity: Why the Judiciary Should Uphold EPA's Use of the Administrative Necessity and Absurd Results Doctrines Within the Tailoring Rule*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 393, 394 (2011-12) ("In this watershed decision, the Court found greenhouse gases ('GHGs'), including carbon dioxide, to be 'air pollutants' as defined and regulated by the Clean Air Act.").

*Massachusetts v. EPA*, Massachusetts and several other states and nongovernmental organizations sued the EPA in an attempt to require EPA to regulate carbon dioxide emissions under the Clean Air Act.<sup>86</sup> Under the Clean Air Act, EPA is required “to regulate greenhouse gas emissions from new motor vehicles if EPA determines that greenhouse gases ‘cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.’”<sup>87</sup> The Clean Air Act defines air pollutant as “any air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>88</sup>

Before *Massachusetts v. EPA*, EPA did not classify carbon dioxide as a pollutant.<sup>89</sup> Although the cause of global warming was widely accepted to be an increase of carbon dioxide levels in the atmosphere, EPA had difficulty classifying carbon dioxide as a pollutant because it is different from other pollutants and greenhouse gases.<sup>90</sup> Unlike other pollutants and greenhouse gases whose optimal level in the atmosphere is zero, the optimal level of carbon dioxide is not zero because the earth requires a certain level of it in the atmosphere.<sup>91</sup>

In *Massachusetts v. EPA*, EPA argued that carbon dioxide was not an air pollutant under the Clean Air Act because “Congress did not intend it to regulate substances that contribute to climate change.”<sup>92</sup> However, the Supreme Court disagreed and sided with Massachusetts on the issue, holding that the statutory text did not support EPA’s interpretation of the Clean Air Act.<sup>93</sup> After *Massachusetts v. EPA*, courts must decide cases while keeping carbon dioxide in mind as a pollutant.<sup>94</sup>

### C. Reasoning

In *AES v. Steadfast*, the Virginia Supreme Court based its decision on the language of the CGL policy between AES and Steadfast, as is the rule when deciding whether an insurer has a duty to defend.<sup>95</sup> To determine if the insurer has a duty to defend on behalf of the insured, the court will look at “only the allegations in the complaint and the provisions of the insurance policy.”<sup>96</sup> The CGL policies in question required Steadfast “to defend AES against suits claiming damages for bodily injury or property damage, if such

---

<sup>86</sup> *Massachusetts*, 549 U.S. at 505.

<sup>87</sup> 42 U.S.C. § 7521(a)(1) (2006); Lauren E. Schmidt & Geoffery M. Williamson, *Recent Developments in Climate Change Law*, COLO. LAW 63 (2008).

<sup>88</sup> 42 U.S.C. § 7602(g) (2006) (emphasis added).

<sup>89</sup> *Massachusetts*, 549 U.S. at 505.

<sup>90</sup> Richard A. Epstein, *Carbon Dioxide: Our Newest Pollutant*, 43 SUFFOLK U. L. REV. 797, 799 (2010).

<sup>91</sup> *Id.*

<sup>92</sup> *Massachusetts*, 549 U.S. at 528.

<sup>93</sup> *Id.* at 528–29.

<sup>94</sup> *Id.* at 532.

<sup>95</sup> *AES*, 725 S.E.2d 532, 537–38 (Va. 2012); Stanovich, *supra* note 40.

<sup>96</sup> *AES*, 725 S.E.2d at 535.

damage ‘is caused by an ‘occurrence’.’<sup>97</sup> The policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful condition.”<sup>98</sup> Therefore, to decide whether Steadfast had a duty to defend AES in its lawsuit with Kivalina, the court needed to determine whether AES’s liability arose from an “occurrence” within the meaning of the CGL policies AES purchased from Steadfast.<sup>99</sup> If such an occurrence were found, Steadfast would have a duty to defend AES in the underlying case.

The Kivalina complaint contended “AES engaged in energy-generating activities using fossil fuels that emit carbon dioxide and other greenhouse gases, and that the emissions contributed to global warming, causing” damage to the village’s shoreline.<sup>100</sup> AES argued that the damage was accidental and met the definition of an “occurrence” under its CGL policies.<sup>101</sup> In furtherance of its point, AES maintained that because one of the allegations in Kivalina’s complaint was “that the consequences of AES’s intentional carbon dioxide and greenhouse gas emissions were unintended,” the damage was “accidental” and fell within the scope of “occurrence” in its CGL policies purchased from Steadfast.<sup>102</sup> However, AES did not assert that Kivalina’s other allegation, “that AES ‘knew *or should know*’ that its activities in generating electricity would result in the environmental harm suffered by Kivalina,” created a duty to defend on the part of Steadfast.<sup>103</sup> Nevertheless, Steadfast would be required to defend the entire suit up front if even one allegation came within the scope of the CGL policy because of the requirements of a duty to defend, as described in Part II.B.1.<sup>104</sup>

On the other hand, Steadfast argued that AES’s emissions were not accidental and did not meet the definition of an “occurrence” under the CGL policies.<sup>105</sup> Steadfast claimed that even if AES did not intend to harm the village of Kivalina, AES did intend to emit carbon dioxide and greenhouse gases into the atmosphere, causing both of Kivalina’s allegations in the complaint to fall outside the scope of “occurrence” under the CGL policies purchased by AES.<sup>106</sup>

The Virginia Supreme Court agreed with Steadfast: Because AES intentionally emitted carbon dioxide, all of the complaint’s allegations of harm fell outside the definition of “occurrence” in the CGL policy.<sup>107</sup> The

---

<sup>97</sup> *Id.* at 534.

<sup>98</sup> *Id.* at 536.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 534.

<sup>101</sup> *Id.* at 537.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at 536–37.

<sup>104</sup> *See* CORNBUM, *supra* note 10, § P67:2.1 (explaining that insurers with a duty to defend imposed as a matter of public policy must front legal expenses, as long as one claim is potentially covered).

<sup>105</sup> *AES*, 532 S.E.2d at 533–34.

<sup>106</sup> *Id.* at 537.

<sup>107</sup> *Id.* at 536.

court further reasoned that even if the consequences were accidental or unintended by AES, they were not “natural and probable.”<sup>108</sup>

### III. ARGUMENTS IN FAVOR OF A DUTY TO DEFEND

Although the Virginia Supreme Court based its decision in *AES v. Steadfast* on well accepted principles of insurance and contract liability, there are several possible arguments against the court’s decision and in favor of finding a duty to defend.<sup>109</sup> This Part addresses these arguments in the following order: 1) the decision does not take into account the reasonable expectations of the insured; 2) the decision does not construe the ambiguities of the CGL policy in favor of the insured; and 3) the decision does not consider the possibility that a duty to defend would cause insurers to regulate the behavior of the insured and reduce carbon dioxide and greenhouse gas emissions.

#### A. Reasonable Expectations of the Insured

One argument for deciding *AES v. Steadfast* in favor of AES and finding that Steadfast had a duty to defend is the “reasonable expectations of the insured” doctrine.<sup>110</sup> This doctrine “authorizes a court confronted with an adhesion contract to enforce the reasonable expectations of the parties under certain circumstances.”<sup>111</sup> Policyholders contend that the insurance companies’ interpretation of policy language ignores the familiar and reasonable connotations of the words used, and sometimes defined, in the pollution exclusion.<sup>112</sup> Policyholders also contend that the policy language is ambiguous and, therefore, according to the rules of insurance policy construction, must be interpreted in favor of coverage.<sup>113</sup>

---

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., *AES*, 725 S.E.2d at 535–36 (noting the primacy of the insurance contract in the duty to defend context, and introducing the insurance liability concept of the reasonable expectations of the insured).

<sup>110</sup> See Paul, *supra* note 3, at 483.

<sup>111</sup> *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 801 (Utah 1992) (citing Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 838 (1990)). See also Arthur J. Park, *What to Reasonably Expect in the Coming Years From the Reasonable Expectations of the Insured Doctrine*, 49 WILLAMETTE L. REV. 165, 165–67 (2012).

<sup>112</sup> See Park, *supra* note 111, at 171–73 (noting academic and judicial criticism of the highly technical “incomprehensible verbosity” of standard form insurance contracts (internal citation omitted)).

<sup>113</sup> Henderson, *supra* note 111, at 827. The trend to interpret the pollution exclusion narrowly, and to enforce the exclusion only under the limited circumstances for which it originally was drafted, began with such state high court decisions as *American States Insurance Co. v. Koloms*, 687 N.E.2d 72, 79 (Ill. 1997), and *Lititz Mutual Insurance Co. v. Steely*, 785 A.2d 975, 977 (Pa. 2001). In *Koloms*, the Illinois Supreme Court held that “the exclusion applies only to those injuries caused by traditional environmental pollution,” and did not apply to the accidental release of carbon monoxide from a broken furnace in a commercial building. *Koloms*, 687 N.E.2d at 82. The court considered the historical background of the pollution

The doctrine can be broad and courts have used it in the following three ways: “(i) [to construct] an ambiguous term in the insurance contract to satisfy the insured’s reasonable expectations; (ii) [to refuse to enforce] the ‘fine print’ of an insurance contract because it limits more prominent provisions giving rise to the insured’s expectations; and (iii) [to refuse to enforce] an insurance contract provision when it would frustrate the reasonable expectations of coverage created by the insurer outside of the contract.”<sup>114</sup> The first and third reasons are applicable to the decision in *AES v. Steadfast* and the second is outside the scope of the case at hand.

If the reasonable expectations of the insured doctrine were applied to *AES v. Steadfast*, Steadfast might have a duty to defend AES in its lawsuit with Kivalina. The pollution exclusion of the CGL policy at issue did not specifically state that carbon dioxide and greenhouse gases were pollutants and, consequently, there is ambiguity with regard to whether the substances are pollutants excluded from coverage.<sup>115</sup> Under this doctrine, the ambiguity should have been construed in favor of AES. Therefore, the Virginia Supreme Court might have wrongly determined Steadfast did not have a

---

exclusion and observed that “[o]ur review of the history of the pollution exclusion amply demonstrates that the predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the enormous expense and exposure resulting from the ‘explosion’ of *environmental* litigation.” *Id.* at 81. (internal quotation marks omitted). The court went on to note: “Similarly, the 1986 amendment to the exclusion was wrought, not to broaden the provision’s scope beyond its original purpose of excluding coverage for environmental pollution, but rather to remove the ‘sudden and accidental’ exception to coverage which . . . resulted in a costly onslaught of litigation.” *Id.* The court further stated: “We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its *raison d’être*, and apply it to situations which do not remotely resemble traditional environmental contamination.” *Id.* The *Koloms* court also rejected the insurance company’s argument that its deletion of language regarding the discharge of pollutants “into or upon land, the atmosphere, or any watercourse or body of water” broadened the scope of the exclusion, and concluded that, “the deletion of the aforementioned language does not portend an expansion of the pollution exclusion beyond the context of traditional environmental contamination.” *Id.* at 81–82.

In *Lititz*, the Pennsylvania Supreme Court concluded that the pollution exclusion was ambiguous and did not bar coverage for an underlying lead paint poisoning claim. *Lititz*, 785 A.2d at 982. The court determined that the definition of a “pollutant” in the exclusion encompassed lead-based paint, but that the “process by which lead-based paint becomes available for human ingestion/inhalation,” did not unambiguously involve “a type of motion that can be characterized as a discharge, dispersal, release or escape,” as required by the policy language. *Id.* at 981. The court stated: “One would not ordinarily describe the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior surface of a residence as a discharge (‘a flowing or issuing out’), a release (‘the act or an instance of liberating or freeing’), or an escape (‘an act or instance of escaping’). Arguably such deterioration could be understood to constitute a ‘dispersal,’ the definition of which (‘the process . . . of . . . spreading . . . from one place to another’) may imply a gradualism not characteristic of other terms. Any such inconsistency in meaning simply indicates, however, that the exclusionary language does not clearly include or exclude the physical process here at issue, but is, as to that process, ambiguous. Such ambiguity requires that the language be interpreted in favor of the insured.” *Id.* at 982 (citations and footnotes omitted).

<sup>114</sup> *Allen*, 839 P.2d at 801.

<sup>115</sup> Reply Brief of Appellant at 14–15, *AES*, 725 S.E.2d 532 (Va. 2012) (No. 100764).

duty to defend AES in *Kivalina v. ExxonMobil Corp.* if the case were analyzed under this doctrine alone.<sup>116</sup>

### *B. Construe Ambiguities in Favor of the Insured*

Another argument against the *AES v. Steadfast* decision is that the pollution exclusion is ambiguous as to whether carbon dioxide is a pollutant and the ambiguity should be resolved in favor of the insured.<sup>117</sup> It is well established in insurance policy litigation that ambiguities are resolved in favor of policyholders because insurance companies are responsible for drafting the policies and are in a better position to prevent any ambiguity.<sup>118</sup> Therefore, any event in which CGL policy coverage is questionable should be covered by the policy because it is ambiguous.<sup>119</sup> As one commentator put it: “even if courts choose to honor the [pollution] exclusion, however, they should recognize that the phrase ‘sudden and accidental’ is susceptible to varying interpretations and is inherently ambiguous.”<sup>120</sup>

If this reasoning alone were applied in *AES v. Steadfast*, then Steadfast might have had a duty to defend AES in its potential liability to Kivalina, because the CGL policy did not specifically address third party liabilities connected to intentional carbon dioxide emissions.<sup>121</sup> The Virginia Supreme Court could have decided that the pollution exclusion was ambiguous in that it did not specifically enumerate which pollutants were covered under the exclusion. This way, Kivalina’s allegation that if AES unintentionally harmed the village by intentionally emitting carbon dioxide and other greenhouse gases into the atmosphere would have come within the scope of the policy and triggered Steadfast’s duty to defend.<sup>122</sup>

### *C. Insurance Companies Can Regulate Behavior*

A third argument against the court’s decision in *AES v. Steadfast*, and in favor of finding a duty to defend, is that insurance companies should be liable in global warming related suits because it will create a system of

---

<sup>116</sup> See *AES*, 725 S.E.2d 532, 538 (Va. 2012).

<sup>117</sup> Paul, *supra* note 3, at 494.

<sup>118</sup> See Eric D. Beal, *Posner and Moral Hazard*, 7 CONN. INS. L.J. 81, 90 n.51 (2000–01) (citing JEFFERY W. STEMPER, INTERPRETATION OF INSURANCE CONTRACTS: LAW & STRATEGY FOR INSURERS AND POLICYHOLDERS §11.1 (1994)).

<sup>119</sup> See, e.g., *Forest-Gardner, Inc. v. Nat’l Union Fire Ins. Co.*, 959 P.2d 265, 273 (Cal. 1998) (quoting *La Jolla Beach & Tennis Club, Inc. v. Indus. Indemnity Co.*, 884 P.2d 1048, 1053 (1994)).

<sup>120</sup> Paul, *supra* note 3, at 494.

<sup>121</sup> See *AES*, 725 S.E.2d at 537 (“[T]he relevant policies only require Steadfast to defend AES against claims for damages for bodily injury or property damage caused by an occurrence or accident.”).

<sup>122</sup> See *id.* at 536–37 (identifying AES’s characterization of Kivalina’s allegation to that effect).

behavior regulation.<sup>123</sup> If insurance companies were required to bear the large cost of climate change related damages, they would have an incentive to grant CGL policies only to responsible emitters.<sup>124</sup> As a result, many companies would need to change their business practices regarding emissions to obtain liability insurance, thereby incentivizing emissions reduction programs in the United States.<sup>125</sup>

Congress has never regulated carbon dioxide, and there is currently no discussion of legislation addressing climate change mitigation and carbon dioxide emissions reductions at the federal level.<sup>126</sup> Furthermore, Congress has not contemplated any comprehensive greenhouse gas emissions regulation since 2008 when the Senate debated the Lieberman-Warner Climate Security Act, which proposed a nationwide cap and trade program for the United States.<sup>127</sup> For this reason, some legal scholars see insurance companies as a possible way—or maybe the only way—to reduce carbon dioxide and greenhouse gas emissions across the United States.<sup>128</sup> If the Virginia Supreme Court decided *AES v. Steadfast* in favor of AES, then insurance companies would need to respond by reducing their exposure to liability.<sup>129</sup> This response would result in stricter regulation of policyholders with regard to their carbon dioxide and greenhouse gas emissions, creating a private system of behavior regulation that is ideal in the absence of federal action.<sup>130</sup>

---

<sup>123</sup> See generally Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors that Harm the Environment*, 61 DUKE L.J. 1111 (2012) (arguing that a reorientation of government behaviors, law, and policy can create a system of behavior regulation).

<sup>124</sup> See DAVID ZILBERMAN, EXTERNALITIES, MARKET FAILURE, AND GOVERNMENT POLICY 1 (1999), available at <http://are.berkeley.edu/courses/EEP101/Detail%20Notes%20PDF/Cha03,%20Externalities.pdf> (discussing measures by which government can internalize production externalities).

<sup>125</sup> Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 955 (1988) (“[A]ctivities for which coverage is excluded, can create incentives for the insured to follow that advice.”).

<sup>126</sup> Schmidt & Williamson, *supra* note 87, at 63.

<sup>127</sup> *Id.* at 65–66. See also PHILLIP A. WALLACH, U.S. REGULATION OF GREENHOUSE GAS EMISSIONS 3–4 (2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/10/26%20climate%20change%20wallach/26%20climate%20change%20wallach.pdf>.

<sup>128</sup> See, e.g., Anastasia Telesetsky, *Insurance as a Mitigation Mechanism: Managing International Greenhouse Gas Emissions through Nationwide Mandatory Climate Change Catastrophe Insurance*, 27 PACE ENVTL. L. REV. 691, 705–706 (2010).

<sup>129</sup> “If greenhouse gases are determined to be ‘pollutants’ as defined in relevant insurance policies, CGL and certain [errors and omissions insurance policy] and [directors and officers liability insurance policy] exposures may be reduced and environmental liability insurance exposure would increase.” Christina M. Carroll and Christopher Baker, *AES v. Steadfast — The First Climate Change Liability Coverage Battle and the Future of Climate Change Coverage Disputes*, MCKENNA LONG & ALDRIDGE, LLP, Nov. 1, 2011, available at [http://www.mckennalong.com/media/resource/1660\\_illr-11%2011-aes%20v%20steadfast.pdf](http://www.mckennalong.com/media/resource/1660_illr-11%2011-aes%20v%20steadfast.pdf).

<sup>130</sup> See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 236 (2012) (positing that rising insurance premiums will incentivize the insured populace to pressure lawmakers for climate change abatement policies).

## IV. ARGUMENTS IN FAVOR OF A DUTY TO DEFEND ARE INADEQUATE

The arguments in favor of imposing a duty to defend in lawsuits that allege property damage from intentional emissions of carbon dioxide and greenhouse gases are inadequate. This Part presents counterarguments to the arguments proposed in the previous section in their respective order.

*A. Reasonable Expectations of the Insured*

The reasonable expectation of the insured argument does not hold up in *AES v. Steadfast*. The pollution exclusion has existed for several decades and has been consistently recognized in courts since the late 1980s.<sup>131</sup> Additionally, “[w]here the policyholder does not suffer from lack of legal sophistication or a relative lack of bargaining power, and where it is clear that an insurance policy was actually negotiated and jointly drafted, [a court] need not go so far in protecting the insured from ambiguous or highly technical drafting.”<sup>132</sup> AES is a sophisticated actor and likely understood the terms of its CGL policy and its exclusions.<sup>133</sup> This sophistication makes it extremely unlikely that AES reasonably believed its potential liability in *Kivalina* would come within the coverage limitations of its CGL policy.<sup>134</sup> It is more likely that AES acted in bad faith in demanding that Steadfast defend the company against its possible emissions related liability.<sup>135</sup>

Before purchasing the policy from Steadfast, AES should have clarified whether liabilities from its emissions were covered by the CGL policy, because AES at least had reason to doubt whether Steadfast would indemnify emissions related liabilities. Companies purchasing CGL policies have an opportunity to contract around the general provisions in order to meet each company’s specific needs.<sup>136</sup> Therefore, AES should have made certain the CGL policy indemnified the company from liabilities related to its emissions because the company was a sophisticated actor and may have had the ability to influence the policy provisions.<sup>137</sup>

---

<sup>131</sup> Gooley, *supra* note 59, at 154.

<sup>132</sup> *AIU Ins. Co. v. FMC Corp.*, 799 P.2d 1253, 1265 (Cal. 1990).

<sup>133</sup> *AES*, 725 S.E.2d 532, 533 (Va. 2012) (“AES is a Virginia-based energy company that holds controlling interests in companies specializing in the generation and distribution of electricity in numerous states, including California.”).

<sup>134</sup> *See id.* at 536, 538; Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 *CONN. INS. L.J.* 21, 51 (1998) (“When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow.”).

<sup>135</sup> *See AES*, 725 S.E.2d at 533, 536; Jerry, *supra* note 134, at 54, 56 (implying that the insurer has no duty to defend when the insured would not reasonably believe that the policy should cover the incident that is being litigated).

<sup>136</sup> *See, e.g.*, Jeffrey T. Knebel, *The Role of Insurance in Environmental Liability*, 3 *FORDHAM ENVTL. L. REV.* 21, 38–39 (implying that companies have the opportunity to negotiate the terms of their CLG policies).

<sup>137</sup> *See AES*, 725 S.E.2d at 533–34.

*B. Construe Ambiguities in Favor of the Insured*

The argument that the pollution exclusion is ambiguous as to whether carbon dioxide and other greenhouse gases are pollutants is also insufficient to merit a decision in favor of the insured. By not specifically listing carbon dioxide liabilities as exclusions in its CGL policies, Steadfast was not ambiguous or misleading in drafting its CGL policy exclusions.<sup>138</sup> Rather, Steadfast did not list carbon dioxide as a specific pollutant because it intended the exclusion to encompass all pollutants.<sup>139</sup> If insurance companies were required to list each specific scenario in CGL policy exclusions to successfully avoid indemnifying the insured, it would be impossible for insurance companies to exclude unanticipated liabilities like those created under CERCLA.<sup>140</sup> Therefore, in addition to the language contained in the policy, it is important to look at the intention of the insurance company in drafting the exclusions.<sup>141</sup>

The language in the pollution exclusion of CGL policies references the intent of the insurer to exclude itself from all third party claims arising from the intentional release of pollutants.<sup>142</sup> The pollution exclusion of AES's CGL policy clearly stated that coverage was limited to pollution or contamination injuries when the pollution or contamination is caused by the "sudden and accidental" discharge of pollutants or contaminants.<sup>143</sup> Insurers use broad language in the exclusion not to be ambiguous, but to ensure that they will avoid liability for all pollution, including pollution liabilities that were unforeseeable at the time the policy was drafted.<sup>144</sup> The language in the CGL policy pollution exclusion indicates that insurers intended to renounce all potential liabilities from intentional pollution and it is all encompassing, not ambiguous.<sup>145</sup>

*C. Insurance Companies Can Regulate Behavior*

The argument that insurers can regulate behavior is also insufficient to merit a duty to defend on the part of Steadfast. Insurance companies can be used to regulate the behavior of private emitters; however, the insurers should not be able to regulate retroactively. Climate change tort suits are

---

<sup>138</sup> See Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (3d Cir. 1998) (standing for the proposition that failing to explicitly enumerate the ways in which a document applies does not necessarily "demonstrate ambiguity.").

<sup>139</sup> See *AES*, 725 S.E.2d at 533 (implying that Steadfast intended the pollution exclusion to include releases of carbon dioxide).

<sup>140</sup> See Paul, *supra* note 3, at 485, 498 (stating that the 1987 exclusions adopted by the insurance industry were created to prevent courts from holding insurance companies liable for "continuous or gradual pollution," including emissions of carbon dioxide, and to protect the insurance companies from being held liable under CERCLA).

<sup>141</sup> See *id.* at 481–82.

<sup>142</sup> See *id.* at 481.

<sup>143</sup> Barry Zalma, *Fraud: The Holiday Issue*, ZALMA ON INSURANCE, Dec. 15, 2011, <http://zalma.com/blog/page/7/?p=pagdjrdrgrgvqzlk> (last visited Feb. 22, 2014).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

based on CGL policies already in existence.<sup>146</sup> The parties of the contract agreed to certain terms, and the insurer cannot change the provisions of the policy and impose certain behavior requirements where there were none before.<sup>147</sup> If an insurance company changed the terms of a contract that it already bargained for, such change becomes a unilateral contract modification.<sup>148</sup> Unilateral contract modifications are strictly prohibited in contract law.<sup>149</sup> Consequently, it would be acceptable for insurers to regulate behavior with future policies that required insured parties to adhere to certain emissions standards, but insurers could not force their current policyholders to agree to anything more than the provisions contained in the CGL policy.

#### V. ARGUMENTS AGAINST A DUTY TO DEFEND

In *AES v. Steadfast*, the Virginia Supreme Court correctly held that Steadfast did not have a duty to defend AES. The court found that insurers should not be held accountable for damages arising out of the intentional emission of carbon dioxide and greenhouse gases by the insured as: (1) the ruling is consistent with *Massachusetts v. EPA*; (2) it holds the emitting parties accountable for their actions and deters companies from emitting greenhouse gases and carbon dioxide; (3) there is no unfair burden placed on insurance companies; and (4) the decision does not deter Congress from enacting comprehensive legislation to address global climate change.

#### A. Consistent with *Massachusetts v. EPA*

One argument supporting the *AES v. Steadfast* holding that Steadfast did not owe a duty to defend AES is the Supreme Court's determination in *Massachusetts v. EPA*, which held that GHGs are air pollutants under the Clean Air Act.<sup>150</sup> Because of this holding, "it logically follows that greenhouse gases are . . . pollutants for purposes of an insurance policy."<sup>151</sup> If the Virginia Supreme Court found a duty to defend, the court's decision in *AES v. Steadfast* would not be consistent with precedent. The holding in

---

<sup>146</sup> See *AES*, 725 S.E.2d at 533–34 (framing the issue as a disagreement between the parties about how the CGL language resolves the dispute, thereby assuming that it does apply).

<sup>147</sup> See, e.g., *id.* at 533 (standing for the converse proposition that if the duty to pay does not fit within the express terms of the CGL policy, then the insurer has no such duty); RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979) ("[F]ormation of a contract requires . . . mutual assent."); 2 TODD I. ZUCKERMAN & MARK C. RASKOFF, ENVIRONMENTAL INSURANCE LITIGATION LAW & PRACTICE § 18:24 (2009) ("[M]ost states require that insurers obtain the policyholder's consent to new terms which reduce prior policy's scope of coverage.").

<sup>148</sup> Jerry, *supra* note 134, at 29–30.

<sup>149</sup> See *id.*

<sup>150</sup> *Massachusetts*, 549 U.S. 497, 532 (2007).

<sup>151</sup> Christina M. Carroll & Christopher Baker, *AES v. Steadfast — The First Climate Change Liability Coverage Battle and the Future of Climate Change Coverage Disputes*, Bloomberg Fin. L.P. (2011), <http://about.bloomberglaw.com/practitioner-contributions/aes-v-steadfast/> (last visited Feb. 22, 2014).

*Massachusetts v. EPA* reinforces the CGL pollution exclusion application to liabilities arising from the insured's intentional emissions of carbon dioxide and greenhouse gases.<sup>152</sup>

Some legal scholars try to distinguish the *Massachusetts v. EPA* holding that carbon dioxide is a pollutant from the CGL pollution exclusion cases by arguing that the Court's holding only applies narrowly to the specific facts of *Massachusetts v. EPA*.<sup>153</sup> However, based on the language in *Massachusetts v. EPA*,<sup>154</sup> it is unlikely that the Supreme Court intended a limited application of its holding.<sup>155</sup> In *Massachusetts v. EPA*, the Supreme Court determined that "the broad language of [the Clean Air Act] reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence."<sup>156</sup> The Court further cited itself in a previous case stating that "[t]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"<sup>157</sup> This logic is consistent with the insurer's logic in drafting the pollution exclusion to cover a broad array of possible pollutants.<sup>158</sup>

### B. The Insured is Facing a Known Risk

Furthermore, in *AES v. Steadfast*, the Virginia Supreme Court's decision was correct because it places the cost of damages on the party best able to control the risk.<sup>159</sup> Climate change and its damages are widely known.<sup>160</sup> Moreover, the fact that increasing carbon dioxide emissions are the cause of global climate change is well established.<sup>161</sup> Therefore, companies reasonably

---

<sup>152</sup> See generally *Massachusetts*, 549 U.S. at 523 (finding that greenhouse gases are a pollutant which present a serious and imminent economical threat, and that remediation costs alone could reach hundreds of millions of dollars).

<sup>153</sup> See *id.* at 520–30 (footnote omitted) (internal quotations omitted) (rejecting EPA's distinction that carbon dioxide is not an "air pollutant" because the CAA defines an "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air," indicating that Congress intended the CAA to be construed and applied broadly). See generally Carroll & Baker, *supra* note 151 (distinguishing *Massachusetts* because the court did not hold that "carbon dioxide is a pollutant for purposes of insurance law.").

<sup>154</sup> See *Massachusetts*, 549 U.S. at 532 ("Because greenhouse gases fit well within the Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.").

<sup>155</sup> See *id.* at 528–30 (focusing on Congress' use of the word "any" in the definition of air pollutant, and stating that "on its face, the definition embraces all airborne compounds of whatever stripe.").

<sup>156</sup> *Id.* at 532 (signaling readers to see *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

<sup>157</sup> *Yeskey*, 524 U.S. at 212 (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985)).

<sup>158</sup> See Paul, *supra* note 3, at 480, 486–87 (discussing various interpretations of broadly worded insurance clauses excluding pollutants from coverage).

<sup>159</sup> See Abraham, *supra* note 125, at 949–53 (describing policy structures that prevent pollution through risk allocation upon the insured).

<sup>160</sup> Schmidt & Williamson, *supra* note 87, at 63.

<sup>161</sup> *Id.*

should know that their actions to increase levels of carbon dioxide in the atmosphere contribute to global warming and the resultant property damage.<sup>162</sup>

Companies like AES that emit significant amounts of carbon dioxide and greenhouse gases should bear the cost of damages caused by climate change because they knew, or should have known, that emissions would contribute to global climate change.<sup>163</sup> Because of their knowledge, companies in AES's position have the best ability to control the risk of being liable for climate change damages.<sup>164</sup> Companies might argue that the effects of carbon dioxide and greenhouse gases on the environment are a new development in science and that the CGL policies should cover damages associated with intentional emissions for this reason. However, this argument does not stand, because emitters should have been aware of global climate change when they purchased their CGL policies as these policies are generally renewed on a year-to-year basis.<sup>165</sup>

Moreover, some legal scholars argue that insurers should bear the cost of climate change damages because tremendous amounts of liability would be detrimental to emitters.<sup>166</sup> However, this is not the case because both insurers and emitters are equally able to bear the costs of climate change damages.<sup>167</sup> Even arguing that it is not worse for emitters than it would be for insurers, it is still detrimental for both parties. Emitters would not have insurance at all if the liability were not detrimental to them. Just because they are capable of covering the potential liability with their profit margins does not mean it would not leave them worse off. In this case, it may simply be a matter of which actor society chooses to place the burden upon. Although one may argue that energy prices may increase if companies are liable for these damages, it is important to consider that prices may increase regardless of the party incurring the additional costs. Thus, the difference might not be substantial. If emitters are liable for the damages, this increase

---

<sup>162</sup> See, e.g., *Massachusetts*, 549 U.S. 497, 521–22 (2007) (holding that plaintiffs had Article III standing based on injuries due to respondent's failure to regulate greenhouse gas emissions); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011) (affirming by an equally divided Court the Second Circuit's determination that plaintiffs had Article III standing based on injuries suffered from petitioner's greenhouse gas emissions).

<sup>163</sup> See J. Stephen Berry & Jerry B. McNally, *Allocation of Insurance Coverage: Prevailing Theories and Practical Applications*, 42 TORT TRIAL & INS. PRAC. L.J. 999, 1018 (2007) ("[T]he year-by-year increases in policy limits must have reflected an increasing awareness of the escalating nature of the risks sought to be transferred." (quoting *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A. 2d 974, 993 (N.J. Sup. Ct. 1994))).

<sup>164</sup> Abraham, *supra* note 125, at 949–53. See also *AES*, 725 S.E.2d at 538.

<sup>165</sup> See *AES*, 725 S.E.2d. at 536–37; Jim L. Julian & Charles L. Schlumberger, *Essay—Insurance Coverage for Environmental Clean-Up Costs Under Comprehensive General Liability Policies*, 19 U. ARK. LITTLE ROCK L. REV. 57, 60 (1996).

<sup>166</sup> See CHRISTINA M. CARROLL ET AL., CLIMATE CHANGE AND INSURANCE 31, 143 (2012) (referring to the emitting insureds' perspective that the insurance company should indemnify them).

<sup>167</sup> See *id.* at 92, 195 (pointing out that insurers and insureds are equally poised to plan for and mitigate their risk from different types of climate change related liability, and framing the outcome in *AES* as a victory).

in operating costs may force emitters to raise prices.<sup>168</sup> If insurers are liable, they may raise the emitting company's insurance premiums, which emitters may, in turn, pass to consumers.

*C. No Unanticipated or Unfair Burden on Insurance Companies*

Insurance companies did not intend to cover liabilities from suits related to climate change.<sup>169</sup> This intent on the part of the insurance companies is referenced in the wording of CGL policies and their exclusions.<sup>170</sup> The revisions of the pollution exclusion and the affidavits submitted to the insurance commissioner show that insurers tried to make this intent clear in the policies and did not intend to mislead the insured.<sup>171</sup> Insurers even changed the name of the liability insurance policies they offered from "Comprehensive General Liability" to "Commercial General Liability."<sup>172</sup> If courts determine that liability insurers have a duty to defend in cases with third party liabilities associated with climate change, it would be unfair because the insurers took great efforts to disclaim this type of liability.<sup>173</sup>

Furthermore, insurance companies can only bear significant amounts of risk when they have prepared for that risk.<sup>174</sup> Forcing insurance companies to bear the cost of climate change when they did not anticipate the liability would be detrimental to the liability insurance industry and would cause undesirable outcomes, such as increased premiums and reductions in coverage.<sup>175</sup> Moreover, in addition to the increased premiums due to the costs of compensating third parties for damage related to climate change, insurance prices would also need to increase to cover for the costs incurred defending unanticipated lawsuits.<sup>176</sup>

---

<sup>168</sup> See Daniel A. Farber, *Apportioning Climate Change Costs*, 26 UCLA J. ENVTL. L. & POL'Y, 21, 32–33 (2008).

<sup>169</sup> See Paul, *supra* note 3, at 479–84 ("Insurers and courts had widely understood this requirement to mean that insurers would not cover risks voluntarily assumed by the insured, nor risks the insured knowingly or intentionally incurred.")

<sup>170</sup> *Id.*

<sup>171</sup> Until the mid-1980s, the standard commercial general liability form was called the "Comprehensive General Liability" coverage. The word "comprehensive" turned out to be a problem because the policyholders claimed the term indicated "broad" or "full" coverage. Various courts of law, agreeing that this term was less than crystal clear, sided with the policyholders and held the insurance companies to cover many claims which were not intended to be included in the policy. Thus, around 1984 the standard policy form was renamed to "Commercial General Liability coverage."

<sup>172</sup> R. Stephen Burke, *Pollution Exclusion Clauses—The Agony, the Ecstasy, and the Irony for Insurance Companies*, 17 N. KY. L. REV. 443, 443–44 (1990).

<sup>173</sup> See *id.* at 444–45.

<sup>174</sup> See Berry & McNally, *supra* note 163, at 1004.

<sup>175</sup> Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1580–81 (2008).

<sup>176</sup> See Burke, *supra* note 172, at 471 (discussing the likelihood of "decades of litigation to resolve the problems raised by the new pollution exclusion").

*D. Does Not Deter Congress from Acting on Climate Change*

If liability insurers were required to indemnify the insured for liabilities related to its intentional emissions, Congress would have less of an incentive to take steps forward with national regulation of carbon dioxide and greenhouse gas emissions because the injured would be compensated through the court system. This method of compensating for damages caused by climate change is undesirable because regulation through the insurance industry and the court system would likely be significantly less effective than any comprehensive regulation by the federal government.<sup>177</sup>

As a result, plaintiffs alleging climate change related damages would see state courts as the most likely place for recovery.<sup>178</sup> The consequences of climate change litigation occurring in state court include inconsistent laws throughout the country regarding carbon dioxide emissions.<sup>179</sup> This outcome is extremely undesirable and would make it difficult for companies operating in multiple states to comply with the law.<sup>180</sup> Comprehensive federal legislation would be a more effective and straightforward approach to regulating carbon dioxide and greenhouse gas emissions; the holding in *AES v. Steadfast* does not hinder a federal initiative because it does not allow compensation through the court system.<sup>181</sup>

## VI. CONCLUSION

The Virginia Supreme Court was correct in holding in *AES v. Steadfast* that the insurer does not have a duty to defend the insured in lawsuits arising from the insured's intentional emissions of carbon dioxide under CGL policies. The decision is consistent with the Supreme Court's interpretation of a pollutant in *Massachusetts v. EPA*; it holds emitters accountable for harm to third parties that they could have anticipated; it does not impose an unanticipated and unfair burden on insurance companies; and it does not deter Congress from enacting legislation to address climate change.

Although there are several possible arguments in favor of finding a duty to defend in *AES v. Steadfast*, even the strongest arguments do not hold up under scrutiny. The pollution exclusion is unambiguous; it is clear with regard to what kinds of pollution liabilities are covered under CGL

---

<sup>177</sup> See J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1506, 1522 (2007) (positing that state regulation is likely to be ineffective in the immediate term and in the long term, because few states have pursued regulation at all, and ultimately inconsistent state-level regulation will create leverage for industry to compel a less stringent federal regulatory scheme).

<sup>178</sup> See ZUCKERMAN & RASKOFF, *supra* note 7, § 27:11 (asserting that states and courts are regulating emissions in the absence of congressional action).

<sup>179</sup> See DeShazo, *supra* note 177, at 1506.

<sup>180</sup> *Cf. Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 8 n.5 (D.C. Cir. 2011) (acknowledging advantages of federal regulation for companies operating in multiple states).

<sup>181</sup> See Schmidt & Williamson, *supra* note 87, at 63–64. See also *AES*, 725 S.E.2d. at 538.

policies.<sup>182</sup> The insurance companies' intent to be excused from damages related to intentional conduct on the part of the insured has been clarified several times through redrafting CGL policies and years of litigation; it would be unfair to hold insurers liable for damages they clearly meant to exclude from coverage.<sup>183</sup> Furthermore, large energy companies like AES are legally sophisticated and it is unlikely that they reasonably believe that the insurer has a duty to defend against emissions related liabilities. Policyholders should be required to clarify the policy exclusions with the insurance company before purchasing a CGL policy, especially when there is reason to doubt whether liabilities arising out of day-to-day operations will be covered under the policy, as is the case with greenhouse gas and carbon dioxide emitters.

Despite President Obama's recent plans to use the executive power to require reductions in the amount of carbon dioxide emitted by the nation's power plants,<sup>184</sup> there are currently no federal regulations concerning carbon dioxide and greenhouse gas emissions.<sup>185</sup> If CGL policies covered liabilities arising from the insured's intentional release of carbon dioxide and greenhouse gas emissions, then the insured would have no incentive to reduce its emissions because it would suffer no costs. To give emitters an incentive to reduce emissions, emitters need the threat of consequences for their actions. Therefore, *AES v. Steadfast* is correct and other jurisdictions should follow suit.

---

<sup>182</sup> See Paul, *supra* note 3, at 500.

<sup>183</sup> See *id.* at 503–04.

<sup>184</sup> Mark Landler & John M. Broder, *Obama Unveils New Plans to Address Climate Change*, N.Y. TIMES, June 26, 2013, at A17.

<sup>185</sup> Schmidt & Williamson, *supra* note 87, at 63, 65.