

Greenhouse Gas Emissions/Pollution Exclusion: Hawaii Supreme Court Addresses Insurance Coverage Issue Arising in Climate Change Litigation



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

10/10/2024

The Supreme Court of the State of Hawaii (“Hawaiian Court”) addressed in an October 7th Opinion an insurance coverage issue arising in a climate litigation matter. *See Aloha Petroleum, Ltd. vs. National Union Fire Insurance Company of Pittsburgh, PA, et al.*, SCCQ-23-0000515.

The Court addressed whether several Commercial General Liability (“CGL”) insurance policies provided coverage for climate-change litigation against an oil company.

The City and County of Honolulu, Hawaii and County of Maui, Hawaii (collectively, “Counties”) filed judicial actions against a number of oil companies in United States District Court for alleged climate-change related damages. One of the companies was Aloha Petroleum, Ltd. (“Aloha”).

Aloha requested that National Union Fire Insurance Company of Pittsburg, PA, and American Home Assurance Company provide a defense under CGL policies they had issued to Aloha. The two insurance companies are subsidiaries of American Insurance Group (henceforth collectively denominated, “AIG”).

The United States District Court certified two questions to the Hawaiian Court. The two questions addressed terms in the CGL policies that had been issued to Aloha.

The questions included:

- Does the term “accident” include an insured’s reckless conduct?
- Do Greenhouse Gases (“GHGs”) constitute “pollutants” as defined in the policies’ pollution exclusions?

The Hawaiian Court first notes that AIG policies cover an “occurrence”. Further, the policies are noted to define an “occurrence” as an “accident”. “Accident” is not defined in the CGL policies.

The Counties have alleged that Aloha acted recklessly. In other words, they argue that Aloha was cognizant of climate risks but regardless emitted GHGs anyway and misled the public about the dangers of emitting such gases.

An accident is held by the Hawaiian Court to include reckless conduct. It cites three reasons for the holding:

- Prior precedents have held that recklessness may be an “occurrence”.
- Plain meaning of “accident” supports the idea that an “accident” includes reckless conduct.

- Interpreting an “accident” to include reckless conduct honors the principal of fortuity.

The Hawaiian Court then holds that GHGs are pollutants under the CGL insurance policies’ pollution exclusion clause. Therefore, it holds that coverage is barred for emitting (or misleading the public about emitting) GHGs.

Five reasons are put forth for this conclusion:

- Climate-heating gases are cited as an example of the “traditional environmental pollution” that the pollution exclusion was designed to exclude.
- A plain-language reading adopted by some courts concludes that GHGs fit the exclusion’s definition of “pollutant”.
- The legal uncertainty rule does not prompt a duty to defend because of uncertainty about the exclusion because GHGs are “pollutants” under any reasonable interpretation.
- There are not two plausible interpretations in this case, therefore the exclusion is not ambiguous.
- Aloha’s reasonable expectation of coverage does not stretch to encompass traditional pollution claims.

Therefore, despite the fact that the Hawaiian Court determined that reckless conduct falls within the scope of the term “occurrence”, the application of the pollution exclusion to the GHGs may preclude coverage under the policies with these terms in relation to this matter.

A copy of the Opinion can be downloaded [here](#).