TRAUB LIEBERMAN

INSURANCE LAW BLOG

October 17, 2024

Hawaii Supreme Court Finds Climate Change Lawsuit Barred by "Pollution Exclusion"

BY: Jason Taylor

On October 7, 2024, the Hawaii Supreme Court answered the question of whether an "accident" includes an insured's reckless conduct in emitting harmful greenhouse gases ("GHGs") and whether such emissions are "pollutants" as defined in a general liability policy's pollution exclusion. In *Aloha Petro., Ltd. v. National Union Fire Insurance Co. of Pitt., PA, No.*, 2024 Haw. LEXIS 179 (Oct. 7, 2024), the Hawaii Supreme Court answered in the affirmative as to both certified questions from the United States District Court for the District of Hawaii, holding that an insured's reckless conduct can be an "accident" and that GHGs are "pollutants" under the policies' pollution exclusions.

In the underlying case, the County of Honolulu and the County of Maui (the "Counties") sued Aloha Petroleum, Ltd. ("Aloha") and several other fossil fuel companies for climate change-related harms. Namely, the Counties alleged that the fossil fuel industry knew that its products would cause catastrophic climate change, and rather than mitigating their emissions, defendants concealed such knowledge, promoted climate science denial, and increased their production of fossil fuels. Aloha was allegedly on notice that its products caused harmful climate change through its former parent company, Phillips 66, and its current parent company, Sunoco. Given this knowledge, the District Court determined that the Counties allegations constituted reckless conduct by Aloha.

Aloha demanded a defense in these suits from National Union Fire Insurance Company of Pittsburgh, PA and American Home Assurance Company, both subsidiaries of American Insurance Group (AIG). The policies were standard commercial general liability (CGL) policies issued between 1984-1989 and 2004-2010, which generally defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policies also included "pollution" exclusions, which while varied, generally precluded coverage for "property damage" which would not have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of "pollutants" at any time.

As to the first question, the Hawaii Supreme Court found that Aloha's reckless conduct in allowing damaging emissions and concealing knowledge of the resulting harm can be an "accident." According to the Court, recklessness does not involve intent or expectation of injury, and therefore, is a covered occurrence under the policy. Thus, an insured's awareness of a possible or probable risk can be an "accident," unless or until the risk crosses the line into "practical certainty" where it is no longer accidental. The Hawaii Supreme Court also found that recklessness fits within the plain meaning of "accident", namely, that it is an unfortunate event resulting especially from carelessness or ignorance, and does not necessarily involve a certainty or lack of fortuity.

More notably, the Hawaii Supreme Court also found that the pollution exclusions barred coverage for emitting (or misleading the public about emitting) GHGs. The exclusions precluded coverage, in relevant part, when "the actual, alleged, or threatened… release" of "pollutants" causes "property damage." The policies defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

© Traub Lieberman Straus & Shrewsberry LLP

While the Hawaii Supreme Court's decision included a lengthy discussion of pollution-related issues, the Court ultimately identified five reasons to support its decision. First, the Court concluded that climate-heating gases are an example of "traditional environmental pollution" that the pollution exclusion was designed to exclude. Second, following the plain-language reading adopted by some courts, GHGs fit the exclusion's definition of "pollutant." The Court reasoned that Aloha's gasoline was found to have produced GHGs, which accumulated in the atmosphere and trapped heat, thus causing harm due to their presence in the atmosphere. Therefore, the Hawaii Supreme Court concluded that GHGs are "pollutants" encompassed within the pollution exclusion.

Third, the Court found that the "legal uncertainty" rule did not trigger a duty to defend because uncertainty about the exclusion did not affect the outcome as GHGs were "pollutants" under any reasonable interpretation, according to the Court. Fourth, the Hawaii Supreme Court found that there was only one plausible interpretation of the exclusion, and therefore, no ambiguity in the policies' pollution exclusions. Finally, the Court rejected Aloha's claimed "reasonable expectation" of coverage finding that the insured's expectation could not, and did not, stretch to encompass traditional pollution claims, which included those claims at issue before the Court.

As climate-change related litigation continues to increase, carriers may increasingly look to similar "pollution" exclusions to bar or limit coverage. The Hawaii Supreme Court's decision is one of the first reported decisions by a State's highest court analyzing such issues and finding the pollution exclusion applicable to such claims. It will be interesting to see if other courts confronted with these issues follow suit.

© Traub Lieberman Straus & Shrewsberry LLP