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Hawaii's High Court Weighs in on Climate-Related Insurance Litigation

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In *Aloha Petroleum v. National Union Fire Insurance*, the Hawaii Supreme Court agreed to answer two certified questions from the U.S. District Court for the District of Hawaii central to that Court's ultimate determination of AIG's duty to defend against multifarious climate change-related theories of liability. The two questions were whether under Hawaii law:

1. an "accident," as undefined in the subject general liability policies, includes an insured's alleged reckless conduct and
2. greenhouse gases (GHGs) are "pollutants" (or contaminants) as defined in the policies' pollution exclusions.

The Hawaii Supreme Court correctly adopted the majority rule that recklessly caused harm is an "accident" under a general liability policy and confirmed that negligently caused harm also is an "accident." In our view, however, the Court erred in its interpretation of the pollution exclusion. In ruling that GHGs are "pollutants" or "contaminants," seemingly regardless of the context, the Court fundamentally misunderstood the claims at issue and excluded the climate-related claims.

I. What the Hawaiian Supreme Court Got Right: "Accidents" Include Recklessly Caused Harm

An insurance policy covers an "occurrence" which constitutes "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Aloha's insurers argued that Aloha had acted recklessly: it knew of the climate risk from emitting GHGs but did so anyway. In other words, the conduct – emitting GHGs in the normal course of operations – was intentional in the face of an alleged known risk. The insurers pressed the minority position that resulting harm where risk is intentionally disregarded is not an "accident." The Hawaii Supreme Court rejected that theory.

Based on its review of the evolution of commercial general liability policies, its own precedents and the plain meaning of "accident," the Hawaii Supreme Court ruled that an "accident" may include allegedly reckless conduct by the insured. Further, for purposes of insurance, the inquiry regarding intent focuses on whether the harm that occurred was expected or intended, not whether the conduct that led to the harm was intentional. Thus, an "accident" may result from an intentional act that led to an unintended harm. As the Court explained, "[a]wareness of risk differs from awareness of certain harm. Insurance covers risks." Op. at 22.

In reaching this conclusion, the Court also decisively held that "reasonably foreseeable" consequences can result from an "accident" and are covered. *Id.* at 33. Further, because negligence encompasses foreseeability, a contrary holding would make negligence and an "accident" mutually exclusive. *Id.* at 32. This would eviscerate coverage for negligence, which is commonly understood in tort law to be an "accident." It also would conflict with policyholders' reasonable expectations that they purchased insurance to cover claims for negligence, which is the most basic form of an accident. Under the *Aloha* decision, it is only where the conduct is "practically certain" from the insured's standpoint to result in damages that there is no "accident." The heart of the Court's reasoning directly distinguishes risk (covered) from certainty (not covered.) Thus, holding that an "accident" includes

allegedly reckless conduct honors the purpose of insurance: "There's a difference between awareness of the risk of harm and awareness of certain harm. That difference defines an 'accident.'" *Id*. at 35.

In the context of climate change litigation, the *Aloha* decision is notable for another reason. Previously, the highest court in only one other state had addressed whether allegations in climate- related litigation present a covered or potentially covered "occurrence." In *AES Corp. v. Steadfast Ins. Co*., the Virgina Supreme Court held that the insurer did not owe its policyholder a defense because climate change was the "natural or probable consequence" of its emissions. 725 S.E.2d 532, 537-38 (Va. 2012). The *Aloha* decision addresses, and unambiguously rejects, the AES Court's determination that "[o]bjectively foreseeable natural or probable consequences do not constitute an 'accident,' even if the insured acted negligently." Op. at 39. Instead, *Aloha* follows the majority view confirming that "occurrences" and "accidents" broadly include not only negligence but also recklessness.

II. What the Hawaiian Supreme Court Got Wrong: The Pollution Exclusion Bars GHG-Related Claims.

The Hawaii Supreme Court's explanation for its ruling on the pollution exclusion was remarkably reductive. At the highest level, it announced (for the first time) that Hawaii follows the "traditional environmental pollution" rule discussed below, and then summarily concluded that claims based on a theory of GHGs-caused climate change stem from "traditional environmental pollution." The Court's simplistic reasoning, however, belies its lack of rigor and diminishes the context of climate change which is hardly *traditional* under any supportable notion. In fact, the Court invoked the dictionary for the meaning of certain terms and propositions ("accident," "contamination") but did not make similar references to a dictionary when characterizing the claims as issue as "traditional." There simply is nothing about climate change that can be considered "inherited, established or customary" or "commonly accepted as historical." *Tradition*, Merriam Webster Dictionary.

A. The Court Erroneously Characterizes Climate Change as "Traditional Environmental Pollution"

If climate change is accurately considered both *sui generis* and a phenomenon allegedly unique unto itself, the Court's analysis breaks down. With respect to its initial decision to follow a "traditional" rule for pollution exclusions – which applies pollution exclusions only to so-called "traditional environmental pollution" events – the Court first looked to the purpose behind the pollution exclusion. Briefly, the exclusion debuted in the 1970s in response to a surge of environmental claims and the related creation of EPA in the 1960-70s. As such, many states have concluded that the intended scope of pollution exclusions is to exclude only those types of prototypical environmental events that fueled the creation of the exclusion. Other states, however, apply the pollution exclusion more broadly, which has been criticized for yielding "absurd" results, to quote the Hawaii Supreme Court and others. For example, as the Tenth Circuit explained, applying the pollution exclusion to any release of a deleterious substance might result in the exclusion of a slip and fall where someone spilled Drano on the floor. *Reg'l Bank of Colo., N.A. v. St. Paul Fire & Marine Ins. Co*., 35 F.3d 494, 498 (10th Cir. 1994).

In deciding that Hawaii will follow the "traditional" rule, however, the Court first accepted a false dichotomy that there are only two camps for the pollution exclusion: a "traditional" and a "broad" camp. In reality, there are many states that have yet to weigh in on any rule, and even within those two camps, there is hardly uniformity. Instead, there exists a constellation of rulings guided by policy language and the facts at issue. Further, there are decisions – namely in Indiana and a federal District Court in New Mexico – that follow a third approach: that terms like "pollutant" and "contaminant" are inherently ambiguous without further clarification, rendering them inoperable in standard-form pollution exclusions. We submit that it is a false choice to force climate change into some notion of what it means to be "traditional" when the subject matter is so materially different from the history

referenced by the Court. Climate change simply is not a product of that historical story so, by definition, it cannot fit into that "*tradition*."

B. The Court's Erroneous Characterization of Climate Change Corrupts its Analysis of the Doctrine of Legal Uncertainty, and it Failed to Address Factual Uncertainty

The Hawaii Supreme Court's failure to recognize nuance with respect to national trends as to the scope of pollution exclusions led it to conclude that the doctrine of legal uncertainty did not apply in *Aloha*. Under that doctrine, legal uncertainties (*e.g.*, divergent national trends) counsel in favor of finding a duty to defend. The Court, however, incorrectly concluded that the claims at issue were excluded under every understanding of the pollution exclusion, which the Court believed to be only two, and only to exist in their most reductive forms.

The Court also failed to address the issue of *factual* uncertainty – that certain theories of liability may vary in terms of how one would consider them to have arisen from supposedly "traditional" environmental pollution. Importantly, issues of legal and factual uncertainty have created coverage in other jurisdictions. *See, e.g., Nash St., LLC v. Main St. Am. Assurance Co.*, 251 A.3d 600, 613 (2020). In practice, these concepts often counsel against rushing to obtain an early ruling on the duty to defend while the record is underdeveloped. In such instances, it only invites a court to make reductive, categorical assessments regarding what the law is, what the facts are, and how the law should be applied to those facts.

As noted, the "traditional" rule, as even the Hawaii Supreme Court recognizes, is based on the intended scope of the pollution exclusion at the time it was created, which was to address issues of water, land, and air pollution from local or regional actors. The novel theories of liability at issue in climate change litigation, however, are not akin to such cases. The theories of liability in Aloha included, for example, theories that companies promoted the use of gasoline widely, and the use of gasoline in things like cars contributed to the global aggregate release of GHGs, which contributed to climate change. In short, it is not argued that the use of any given insured's gasoline was itself the cause of climate change. And these theories are in no way analogous to, for example, a discharge into a body of water in a discernable area, or even a situation where regional actors all contributed to the contamination of a discernable area.

Further, substances like CO^2 cannot be categorically described as being an environmentally harmful substance. To the contrary, CO^2 is essential to our survival, and only allegedly in the global aggregate that its volume pose a risk. To put it bluntly, there is nothing "traditional" about this novel theory of environmental harm – particularly when one understands "traditional" to refer to the prototypical environmental harms that gave rise to the pollution exclusion.

As if to compound that issue, the Court made no recognition of the fact that product liabilities are generally not considered "traditional" environmental pollution. While the insurance industry has now made efforts to isolate and address (either by expressly covering or excluding) so-called products-pollution risks, absent an express term addressing product liability, one would have assumed the Hawaii Supreme Court would have recognized that climate change caused by the use of gasoline by consumers is ultimately a novel form of a product liability unlike any "traditional" pollution event that gave rise to the pollution exclusion.

C. The Court Failed to Address the Issue of Efficient Proximate Cause

Another issue not addressed is the issue of efficient proximate cause. Generally, more is required to exclude a claim than some extenuated causal connection to excluded conduct. For example, an architect in an auto accident on the way to work did not, as a matter of efficient proximate cause, cause injury because of his

rendition of professional services. So too here can it hardly be said that all theories of liability and damages sought are the efficient proximate result of the use of the insured's products or the insured's activities. For example, increased planning costs for coastal areas, even if the result of climate change, can hardly be said to have been closely and discernably traceable to (among other things) cars relying on gasoline linked to Aloha. In other states, insureds have been successful in leveraging efficient proximate cause arguments to shut off similar theories which depend on similarly tentative causal chains. *Xia v ProBuilders Specialty Ins. Co*., 400 P. 3d 1234 (Wash 2017). If Aloha did not consider that argument in its deliberations, that was missed opportunity.

III. Other Coverage Considerations

As a final note, as is often the case with pollution exclusion issues for long tail claims, it cannot be ignored that pollution exclusions – which exist in policies as a matter of course now – did not always. Liabilities implicating conduct at times predating the pollution exclusion may enable insureds to tap older policies to obtain coverage that is argued more recent policies exclude. However, there are several concerns in that respect. First, for maximum yield, an "all sums" allocation rule would need to apply – and a variant that allows the insured to target the year or years it wishes to pay. Some states, however, follow a proration rule requiring coverage be prorated across all triggered years, with some even requiring the insured to shoulder the cost of years without coverage. Having said that, if we are addressing allocation, then coverage has been established. In addition, as a practical concern, it may be that historic coverage has been greatly reduced due to prior claims – for example, due to MTBE, PCBs, or asbestos. These considerations ultimately only further drive the need to consider choice of law when procuring insurance, when making claims, and when considering litigation.

We also would be remiss not to point out there are many other coverage issues relevant to climate change claims, including: coverage for equitable remedies; whether damages sought stem from property damage; the number of occurrences (which impacts retentions and deductibles, among other things); and the method of allocating damages across multiple years.

IV. Conclusion and Recommendation

In the end, beyond clarifying Hawaiian law on two issues, we view *Aloha* for what it is: a decision that stands as a welcome rebuke of insurers' more recent attempts to bar coverage for claims that sound in negligence and recklessness, but also shows the harmful analysis that can result when issues are not fully formulated and presented. It also serves as yet another illustration of how choice of law determinations and forum selection are both essential to coverage for these types of cases and rarely, if ever, dependent on one issue. We have explained in the past that seeking an early win on the duty to defend can be dangerous. While the seemingly low standard that applies to the duty to defend – the potential for coverage based on the complaints – may seem alluring, *Aloha* illustrates how courts may stray, and be lead astray, in their application. Instead, policy terms are first interpreted, often an incomplete record.

Although important, *Aloha's* mixed result, is confined to the state law at issue, that of Hawaii. Notably, in rejecting *AES, Aloha* itself demonstrates that it too does not represent binding authority outside the state. The insurance industry predictably will wrap its arms around the portion of the decision concerning the pollution exclusion. To that end, the carriers are left adopting flawed reasoning, and that approach can be exploited in a jurisdiction of a policyholder's choice. Policyholders should undertake this jurisdictional analysis before they are subjected to preemptive coverage litigation by their carriers.