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.

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