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Hawaii Justices Asked To Weigh In On Climate Coverage Row

By **Ganesh Setty**

Law360 (September 6, 2023, 3:59 PM EDT) -- A Hawaii federal court asked the state's high court to answer whether an occurrence, defined in part as an "accident," includes reckless conduct, and whether greenhouse gas emissions fall within the scope of a pollution exclusion.

A Hawaii federal judge certified two questions to the state's Supreme Court in a dispute over coverage for climate change lawsuits. (iStock.com/KPegg)

Certifying the two questions in a coverage dispute between a Honolulu-based Sunoco LP subsidiary and two AIG units over two underlying climate change lawsuits, U.S. District Judge Jill A. Otake noted Tuesday that existing Hawaii Supreme Court precedent appears to conflict on the recklessness question.

The court is not aware, meanwhile, of any Hawaii court decision directly tackling whether greenhouse gasses constitute a "pollutant" as defined in an insurance policy, Judge Otake said, adding that "there are reasonable arguments on both sides of that question."

According to Tuesday's certification order and previous court filings, the coverage dispute stems from two lawsuits that the county of Maui and city and

county of Honolulu filed against the Sunoco subsidiary, Aloha Petroleum Ltd., in state court in October 2020 and March 2021. The underlying lawsuits, which name more than a dozen other defendant fossil fuel companies, broadly allege the companies knew for "nearly half a century" that their unrestricted production of fossil fuel products created greenhouse gas pollution and caused the climate to change.

The lawsuits specifically allege that the climatic impact of such conduct was "foreseeable," while Aloha's policies with the AIG units, National Union Fire Insurance Co. of Pittsburgh, Pa. and American Home Assurance Co., defined "occurrence" in part as an "accident," but did not provide a further definition. In denying coverage, the AIG units further argued that greenhouse gas emissions constitute a "pollutant," defined as "any ... gaseous ... irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," thus falling within various pollution exclusions in the policies.

Tuesday's certification order comes after the parties filed dueling motions for **partial summary judgment** in June over the AIG units' duty to defend the underlying claims.

Aloha and the AIG units dispute the applicability of the Hawaii high court's 2006 decision in Tri-S Corp. v. Western World Insurance Co., in which the court found that Western World had a duty to defend "because the possibility exists that [the insured] could be found liable for recklessness, which does not involve intent or expectation of injury and is thus a covered occurrence under the policy."

But that case specifically dealt with the applicability of an expected or intended injury exclusion, the AIG units countered, and does not address whether recklessness itself constitutes an accident. The units further pointed to the Hawaii high court's earlier 1993 decision in AIG Hawaii Insurance Co. v. Estate of Caraang, in which the justices found that for an insurer to owe any duty to defend, the injury "cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions."

Section 702-206(3) of the Hawaii Revised Statutes further states that a "person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result," the AIG units noted.

"This court finds it difficult, however, to overlook the plain meaning of the Tri-S Court's statement that 'recklessness ... is thus a covered occurrence,'" Judge Otake said Tuesday.

"The conflict arises from Tri-S implying that an 'accident' can be the result of recklessness, and Caraang saying that an 'accident' cannot be 'reasonably foreseeable' from the insured's perspective, a standard almost synonymous with the subjective foreseeability required by recklessness," the judge said.

As for the pollution exclusion, Aloha had maintained that the provision only extends to "traditional environmental pollution," as opposed to claims "predicated on the ordinary and intended use of a policyholder's product, and in particular ... where the climate plaintiffs are not seeking to have Aloha clean-up any alleged environmental contamination."

The AIG units, meanwhile, said that any layperson would find that greenhouse gasses pollute the environment.

Hawaii federal courts have already found that pollution exclusions apply in cases involving the inhalation of fumes from negligently poured drain cleaner and the inhalation of dust particles from a concrete recycling plant, the insurers said.

Judge Otake said that while Hawaii's air pollution control statute indeed labels greenhouse gasses as air pollutants, "there is the reasonable argument that greenhouse gasses, such as carbon dioxide, are emitted around us daily and yet are relatively harmless to our immediate health, particularly in limited amounts."

"There is also literal distance between where the covered property/persons reside and where the greenhouse effect gradually occurs, miles up in the atmosphere, further undermining an 'irritant or contaminant' finding," she added.

Representatives of Aloha and AIG declined to comment.

Aloha is represented by C. Michael Heihre and Michi Momose of Cades Schutte LLP and John M. Sylvester and Hudson M. Stoner of K&L Gates LLP.

The AIG units are represented by Terence J. O'Toole and Kari K. Noborikawa of Starn O'Toole Marcus & Fisher, Christopher J. St. Jeanos and Elizabeth J. Bower of Willkie Farr & Gallagher LLP and Matthew J. Fink and Amy J. Collins Cassidy of Nicolaides Fink Thorpe Michaelides Sullivan LLP.

The case is Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh, Pa. et al., case number 1:22-cv-00372, in the U.S. District Court for the District of Hawaii.

--Additional reporting by Riley Murdock. Editing by Abbie Sarfo.