



## Alerts

### The Hawaii Supreme Court Determines that Greenhouse Gases are "Pollutants" and Ruled Coverage for Climate-Related Claims is Barred by Pollution Exclusions

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*Insights for Insurers*

On October 7, 2024, the Hawaii Supreme Court, responding to questions certified by the United States District Court for the District of Hawaii, determined that insurers had no duty to defend Aloha Petroleum ("Aloha") in two climate-change-related cases.

This represents only the second substantive decision on coverage for climate change or global warming claims and marks the first ruling specifically addressing the application of any pollution exclusion.

The Hawaii Supreme Court ruled in favor of the insured on the "occurrence" issue, determining that an "accident" includes an insured's reckless conduct. It ruled in favor of the insurers on the pollution exclusion issue, determining that greenhouse gases are "pollutants" as defined in the policies' various pollution exclusions.

#### The Underlying Actions

The underlying actions were brought against Aloha and other fossil fuel companies, including Exxon, Shell, Chevron, BP, and ConocoPhillips, by the City and County of Honolulu and the County of Maui. They assert five causes of action:

1. trespass (primarily entry of ocean water onto county property);
2. public and private nuisance (unreasonable sale of fossil fuels interfering with counties' and a community's property rights);
3. negligence;
4. strict liability; and
5. failure to warn about the dangers of their products.

The complaints assert that the counties were damaged by increased planning costs, erosion, beach loss, flooding, decreased freshwater, damage to water infrastructure, harm to endemic species, increased risk of extreme heat and storms, and damage to native Hawaiian cultural resources. The counties requested an unspecified amount of compensatory and punitive damages, equitable relief, disgorgement of profits, attorney fees, and other costs.

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## The Coverage Action

Aloha brought the instant action against the American International Group (AIG) entities seeking a declaration that they are required to defend and indemnify Aloha in connection with the underlying actions.

The parties cross-moved for partial summary judgment on the duty to defend. The District Court certified two questions to this court:

1. "For an insurance policy defining a covered 'occurrence' in part as an; 'accident,' can an 'accident' include recklessness?"
2. "For an 'occurrence' insurance policy excluding coverage of 'pollution' damages, are greenhouse gases 'pollutants,' e., 'gaseous' 'irritant[s]' or contaminant[s], including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste?"

The Hawaii Supreme Court accepted both questions and ordered a briefing by the parties.

### 1. Reckless Conduct Can Constitute an "Occurrence"

On the "occurrence" issue, the Hawaii Supreme Court reconciled an apparent conflict in its prior decisions. In *Tri-S Corp. v. Western World Ins. Co.*, P.3d 82 103 (Hawaii 2006), the court held that recklessness may be an "occurrence."

However, in *AIG Haw. Ins. Co., Inc. v. Est. of Caraang*, 851 P.2d 321 (Hawaii 1993), the court held that an "occurrence" requires an injury that is not "the expected or reasonably foreseeable result of the insured's own intentional acts or omissions." In the instant decision, the court clarified that, in *Caraang*, "reasonably foreseeable" referred to the reasonably foreseeable results of an insured's intentionally harmful conduct as another way of invoking the intentional conduct exception to coverage.

The court stated that "when an insured perceives a risk of harm, its conduct is an 'accident' unless it intended to cause harm or expected harm with practical certainty." The court stated that the plain meaning of "accident" supports the notion that it includes reckless conduct and that reading still honors the principle of fortuity.

The court acknowledged that its decision departs from *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532 (Va. 2012) – a Virginia Supreme Court decision that held that an insurer had no duty to defend against a lawsuit remarkably similar to the underlying actions here.

In *AES*, the court concluded that AES' actions were not an "accident" because climate change was the "natural or probable consequence" of AES' emissions. Like the counties' lawsuits, Kivalina's suit alleged that AES "knew or should have known of the impacts of [its] emissions" yet "continued [its] substantial contributions to global warming." *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532 (Va. 2012).

According to the court, the difference in outcome results from the contrast between Virginia law and Hawaii law. The *AES* "natural or probable consequences" standard is inconsistent with *Tri-S*' "practically certain" test.

### 2. Greenhouse Gases are "Pollutants" Barred by Pollution Exclusions

On the second question, the court concluded that greenhouse gases are "pollutants" under the insurance policies' various pollution exclusion clauses and the exclusion bars coverage for emitting (or misleading the public about emitting) greenhouse gases.

The court applied the policyholder-friendly interpretation limiting the application of pollution exclusions to "traditional environmental pollution," looking at what it determined to be the "predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the enormous expense and exposure resulting from the explosion of environmental litigation."



It deemed the commonly used "plain meaning interpretation" employed by most courts as making the pollution exclusion too sweeping. The court held that "what makes a substance a 'contaminant'—and thus a 'pollutant'—is whether it causes damage due to its presence in the environment."

The court determined that greenhouse gases, including carbon dioxide, are an example of the "traditional environmental pollution" that the pollution exclusion was designed to exclude. Such gases are released into the atmosphere and cause harm due to their presence in the atmosphere. The court noted that the state's regulation of greenhouse gas emissions confirms that greenhouse gases are pollutants. Because greenhouse gases contaminate the atmosphere, they are a "pollutant." Further, "the alleged deceptive marketing about [greenhouse gases] that forms the basis of the lawsuits falls within the scope of the exclusion."

This court stated that it recognizes a "legal uncertainty" rule when determining insurance coverage, but the uncertainty of which standard is applied is not coverage determinative because, under either the traditional pollution or the plain language readings, greenhouse gasses are "pollutants."

The court rejected the notion that the exclusion is ambiguous because there are not two plausible interpretations and determined that Aloha's alleged "reasonable expectation of coverage does not stretch to encompass traditional pollution claims."

## Key Takeaways

1. This decision is notable, particularly in view of the paucity of coverage decisions addressing the merits of insurance coverage for climate-change-related claims. The lack of coverage decisions, at least with respect to indemnity, is a reflection, in part, of the success policyholders have had in defeating climate change cases on standing, political questions, and other threshold questions on its merits. Causation and other issues have been difficult for plaintiffs to overcome.
2. The court's ruling on the "occurrence" issue may be persuasive to some courts, but in view of a contrary ruling by the Virginia Supreme Court, the standards on "occurrence" differ from state to state, and depending upon the allegations in a particular matter, many courts may not find the decision persuasive on this issue.
3. This decision is the first state high court decision to address whether greenhouse gases are "pollutants" in the context of climate-change-related claims. Significantly, even applying policyholder-friendly standards such as the "traditionally environmental" limitation on pollution exclusions and the "legal uncertainty rule" and addressing the duty to defend, the court determined that greenhouse gases are a "pollutant" for which coverage is barred. The U.S. Supreme Court previously determined that greenhouse gases are a pollutant for purposes of the Clean Air Act. *v. EPA*, 549 US 497 (2007).
4. Coverage for climate-change-related claims also may be barred by prior coverage settlement agreements and dismissal orders. A number of other coverage issues may be presented, including "known loss" and other fortuity-related issues, non-compliance with notice and other policy conditions, satisfaction of claim-made requirements, application of other exclusions, failure to satisfy policy definitions such as "bodily injury," as well as issues such as trigger, allocation, and number of occurrences.

Learn more about the significance of the ruling in this [Law360 Expert Analysis](#) authored by Hinshaw attorneys Scott Seaman and Gar Lauerman (*subscription may be required*).