

Hawaii Justices Hand AIG Win In Novel Climate Coverage Suit

By **Hope Patti**

Law360 (October 8, 2024, 7:31 PM EDT) -- AIG isn't obligated to cover a lawsuit accusing a Honolulu-based Sunoco subsidiary of contributing to climate change, the Hawaii Supreme Court ruled, saying a pollution exclusion in the oil giant's policy encompasses greenhouse gas emissions.

Answering certified questions from a Hawaii federal court, the state's top court **on Monday concluded** that Aloha Petroleum could not reasonably expect coverage for two underlying climate change suits because greenhouse gasses are "so clearly pollutants."

The justices also held that an occurrence, defined in part as an "accident," includes reckless conduct.

The coverage dispute stems from a pair of state court suits filed by the city and county of Honolulu in March 2020, and the county of Maui in October 2020. The suits alleged that Aloha and other oil giants, including Exxon, Chevron and BP, are responsible for the effects of global warming due to their failure to warn of the hazards of using fossil fuel products dating back to 1965. The suits included claims for public and private nuisance, strict liability failure to warn, negligent failure to warn and trespass.

Aloha sued AIG units National Union Fire Insurance Co. of Pittsburgh, Pa. and American Home Assurance Co. **in August 2022**, seeking coverage under a series of commercial general liability policies.

The parties **filed competing motions** for partial summary judgment in June 2023 over the insurers' duty to defend the underlying claims. That September, U.S. District Judge Jill A. Otake **certified two questions** to Hawaii's top court, asking the justices to answer whether an "accident" includes recklessness, and whether greenhouse gas emissions fall within the scope of a pollution exclusion.

In answering the first question, the justices found no conflict between the court's 1993 decision in [AIG Hawaii Insurance Co. v. Estate of Caraang](#) and its 2006 decision in [Tri-S Corp. v. Western World Insurance Co.](#)

In [Caraang](#), 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." The court held in its later ruling in [Tri-S](#) that recklessness "does not involve intent or expectation of injury and is thus a covered occurrence under the policy."

"There is no conflict or inconsistency between [Tri-S](#) and [Caraang](#), because [Caraang](#)'s 'reasonably foreseeable' language refers to an insured's intent, not an insured's expectation," Justice Todd W. Eddins wrote for the court, adding that [Tri-S](#)'s definition of "expected" controls.

"Awareness of risk differs from awareness of certain harm. Insurance covers risks. Per [Tri-S](#), we hold that covered 'accidents' differ from non-covered expected or intended injuries when the harm was intended or practically certain," the justice said.

This outcome, Justice Eddins said, is supported by the drafting history of the standard CGL policy, the plain meaning of "accident" and the principle of fortuity.

As for the second question, the state high court held that the pollution exclusion encompasses only

"traditional environmental pollution," which includes greenhouse gasses.

The justices rejected Aloha's contention that traditional environmental pollution only extends to hazardous waste, saying the legality and intent of a product's use is irrelevant and what matters is whether a substance causes pollution to the environment.

"Pollution doesn't just refer to unintended spills of toxic substances. Many products — pesticides, aerosols, non-reef-safe sunscreen, and fossil fuels — are inherently polluting when used in their intended way," Justice Eddins said. "What makes a product a pollutant is that it causes damage due to its presence in the environment."

Aloha's gasoline produces greenhouse gasses, which cause environmental damage because of their presence in the atmosphere, the justice said.

Law360 is following climate change lawsuits against fossil fuel companies as they make their way through state and federal courts. Keep tabs on case developments and our coverage with our **Climate Change Torts Tracker**.

Representatives of the parties did not immediately respond to requests for comment on Tuesday.

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

The AIG units are represented by Christopher J. St. Jeanos, Elizabeth J. Bower and Joseph T. Baio of Willkie Farr & Gallagher LLP; Terence J. O'Toole and Kari K. Noborikawa of Starn O'Toole Marcus & Fisher; 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 SCCQ-23-0000515, in the Supreme Court of the State of Hawaii.

--Additional reporting by Ganesh Setty. Editing by Amy Rowe.