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Hawaii Supreme Court Rules That Greenhouse Gases Are Pollutants, Accidents Include Recklessness

There are more than two dozen suits by state and local governments against oil and gas companies over climate change-related harms. These suits allege that the industry knew their fossil fuel products would cause catastrophic climate change. But rather than mitigate emissions, the companies allegedly concealed their knowledge of the harmful effects, promoted climate science denial, and increased fossil fuel production. The increased carbon emissions caused the planet to warm, the climate to change, and the municipalities to suffer infrastructure damage and other harm.

Aloha Petroleum, Ltd. was named in two of these suits: one by the City and County of Honolulu, and another by the County of Maui. The complaints did not allege that Aloha had specific knowledge about climate change. But they alleged that Aloha was on notice that its products caused climate change based on information Aloha's corporate parent received from an industry group and publicly available scientific data. The counties' suits alleged recklessness: that Aloha knew of the climate risk but emitted greenhouse gases anyway, and that Aloha misled the public about the dangers of emitting.

Aloha tendered the suits to its commercial liability insurer, AIG, for defense. AIG declined to defend because the suits did not involve an "occurrence." The defendants' conduct was alleged

to be intentional and the impacts to the climate expected. AIG also asserted the policies' pollution exclusions.

Aloha next sued AIG in federal court for breach of contract and bad faith. Both parties moved for summary judgment. The district court certified two questions to the Hawaii Supreme Court for clarification on Hawaii law:

(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," i.e., "gaseous" "irritant[s] or contaminant[s], including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste"?

The Hawaii Supreme Court answered "yes" to both questions.

"Accident" Includes Recklessness

On the first certified question, the district court asked: if an insured is aware of the risk of harm and acts anyway, is that an accident? The district court saw a conflict between two Hawaii Supreme Court decisions – one that said recklessness can be an "accident" and another that said "accident" excludes risks of harm reasonably foreseeable from the insured's perspective.

The Hawaii Supreme Court ruled that an "accident" includes reckless conduct. It harmonized the cases that appeared to conflict, explaining that awareness of risk differs from awareness of certain harm. Insurance covers risks, but not certainties. Reckless conduct – awareness of risk of harm – falls short of practical certainty. The court clarified Hawaii law by holding 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.

In reaching this conclusion, the court rejected the approach followed by the Virginia Supreme Court in *AES Corp. v. Steadfast Ins. Co.*, the only other state supreme court case deciding

whether climate damage presents an "occurrence." In *AES*, the Virginia Supreme Court held that a power company's actions were not an accident because climate change was the natural and probable consequence of the company's emissions. Under that test, there is no accident if the damage was foreseeable. And that's so even where the insured only perceived a risk of damage (acted recklessly).

But the Hawaii Supreme Court declined to follow *AES* because Hawaii law and Virginia law differ. The court said the "natural and probable consequences" standard conflicts with Hawaii's practically certain test.

Greenhouse Gases Are Pollutants

On the second certified question, the court held that greenhouse gas emissions (GHGs) are pollutants and exemplify traditional environmental pollution that pollution exclusion are meant to exclude.

The court explained that some courts read pollution exclusions literally, while others read them more narrowly to apply only to traditional environmental pollution. The Hawaii Supreme Court said what makes a substance a contaminant, and thus a "pollutant," is whether it causes damage due to its presence in the environment.

GHGs, including carbon dioxide, produce "traditional" environmental pollution. Aloha's gasoline produces gases that accumulate in the atmosphere and trap heat. Because they are released into the atmosphere and cause harm due to their presence in the atmosphere, GHGs are pollutants. Hawaii's regulations of GHG emissions, the court noted, confirms that GHGs are pollutants.

Thus, under either a broad or narrow interpretation, emitting GHGs that cause climate change is pollution. By the policies' plain language, GHGs are "gaseous," "contaminants" that are

"released" causing "property damage." The Hawaii Supreme Court thus found that the pollution exclusion was not ambiguous as applied to GHGs.

The court also rejected Aloha's reasonable expectations argument. Aloha contended that it reasonably expected coverage for the counties' lawsuits because the insurance policies cover products liability and gasoline is Aloha's product. The court said that Aloha's reasonable expectation for products liability coverage could only extend to hazards that are not pollution. As the court explained, "[i]f a business sells a product that is inherently polluting, that fact must be part of its reasonable expectation. To hold otherwise would write the pollution exclusion out of the policy."

The case is back in front of the district court to determine whether any of AIG's earlier policies without pollution exclusions are triggered by these suits.

The case is *Aloha Petroleum, Ltd. v. National Union Fire Ins. Co. Pittsburgh, Pa.*, No. SCCQ-23-0000515 (Haw. Oct. 7, 2024).

Louisiana Supreme Court Holds That Arbitration Bar Applies to Surplus Lines Policies

Whether insurance claims can be arbitrated has been a hot topic of late in Louisiana federal courts. Louisiana has had its share of hurricanes over the past few years and disputes over property damage claims have often implicated policies of foreign insurers or surplus lines insurers that are not licensed in the state.

Louisiana has a statute that prohibits enforcement of arbitration clauses in insurance policies (La. R.S. 22:868). The general prohibition appears in Subsection A, which originally said that no insurance policy delivered in Louisiana shall have a provision "[d]epriving the courts of this

state of the jurisdiction of action against the insurer." The Louisiana Supreme Court had ruled that forum or venue selection clauses were permitted because they did not go to "jurisdiction."

In 2020, the Legislature amended the statute by revising Subsection A to read: "Depriving the courts of this state of the jurisdiction *or venue* of action against the insurer." The Legislature also added Subsection D, which says: "The provisions of Subsection A of this Section shall not prohibit a forum or venue selection clause in a policy form that is not subject to approval by the Department of Insurance." So, the revised statute allows surplus lines insurers to use forum or venue selection clauses in their policies, but not licensed insurers.

A question arose as to whether arbitration clauses in surplus lines policies were permitted under the revised statute. Federal district courts had issued conflicting decisions, but earlier this year the Fifth Circuit had ruled that arbitration clauses were like forum or venue selection clauses and thus enforceable.

But the Police Jury of Calcasieu Parish, a political subdivision of the State of Louisiana who owned 300 properties damaged in Hurricanes Laura and Delta, contested the Fifth Circuit's ruling and persuaded a federal district court judge to certify this and related questions to the Louisiana Supreme Court.

Unlike the Fifth Circuit, the Louisiana high court found that an arbitration clause was not synonymous with a forum or venue selection clause. It explained that forum selection clauses primarily concern the location where parties may pursue litigation, but they don't impact jurisdiction. Arbitration clauses, in contrast, primarily concern the method of dispute resolution, and thus deprive a court of jurisdiction over an action. The court declined to extend the definitions of "venue" or "forum" to include "jurisdiction" for purposes of allowing arbitration clauses under

Subsection D. It said, "[a]n arbitration clause cannot be categorized so broadly as a forum or venue selection clause when it operates to fully deprive courts of jurisdiction of action."

In short, the court held that Subsection D created a carve-out for forum or venue selection clauses in policies not subject to approval by the Louisiana Department of Insurance. But because the statute does not plainly state arbitration clauses are also permitted, the court found that the statute maintained Louisiana's long-standing prohibition of arbitration clauses.

Louisiana has another statute, La. R.S. 9:2778, that voids clauses in contracts involving political subdivisions of the state that call for the application of another state's law, or a suit or arbitration outside of Louisiana. The court found that Calcasieu's insurance contracts are public contracts within the meaning of La. R.S. 9:2778, and thus the prohibition applied. The Louisiana Supreme Court said it was now providing guidance and consistency on the issue given that lower state courts had been inconsistent.

The court also resolved another issue. Arbitration clauses in insurance policies issued by foreign insurers are enforceable under the Convention on the Recognition and Enforcement of Arbitral Awards, a treaty that trumps Louisiana's state law prohibition. Earlier this year, the Fifth Circuit held that non-signatory domestic insurers may use the doctrine of equitable estoppel to compel arbitration under the Convention through arbitration clauses in a foreign insurer's policy. The Louisiana Supreme Court found the Fifth Circuit's conclusion flawed and unsupported by Louisiana law because domestic insurers do not fall under the rules of the Convention and because it would conflict with Louisiana's statutory prohibition. Thus, domestic insurers may not use equitable estoppel to compel arbitration through the policies of foreign insurers.

The case is *Police Jury of Calcasieu Par. v. Indian Harbor Ins. Co*., No. 2024-CQ-00449 (La. Oct. 25, 2024).

Fourth Circuit Affirms Denial of Cryptocurrency Loss Claim Based on Lack of "Direct Physical Loss"

The insured owned substantial amounts of cryptocurrencies. He stored them on a hot wallet, a virtual storage option on third-party's servers.

In December 2021, he discovered that all his cryptocurrency had been stolen. He made a claim under his homeowners insurance policy with Lemonade Insurance Company. Lemonade denied the claim because the policy only protected, in everyday parlance, plaintiff's "stuff." Specifically, the policy required a "direct physical loss."

The insured brought a breach of contract suit in Virginia federal court. Lemonade moved to dismiss.

The district court granted the motion. The court held that cryptocurrency, by its nature, exists only virtually or digitally and has no physical or tangible existence. It therefore followed that the policy did not cover loss or theft of cryptocurrency because the loss or theft did not involve a "direct physical loss" to plaintiff's property. The court added that there was no alleged damage to any computer system and that, even if there were some "direct physical loss," that loss occurred on third-party servers, not the insured's servers.

The court also rejected the insured's contention that "direct physical loss" was ambiguous. Under Virginia law, the fact that the insured disagreed with the plain meaning of "direct physical loss" did not create an ambiguity. The court also deemed it irrelevant that Lemonade's more recent policies specifically excluded cryptocurrency. The policy's terms were already clear and to hold later changes against the insurer would discourage insurers from clarifying their policies, which would itself be harmful to insureds. The insured appealed.

The Fourth Circuit affirmed. In a per curiam opinion, the court agreed that the digital theft of digital currency does not amount to a "direct physical loss."

The case is *Sedaghatpour v. Lemonade Ins.,* No. 23-1237 (4th Cir. Oct 24, 2024). *Note: The Fourth Circuit decision is unpublished. Please refer to Federal Rule of Appellate Procedure 32.1 governing citation to unpublished opinions.*

Colorado Federal Court Resolves Insurers' Respective Duties to Defend Claim of Crop Loss Caused by Herbicide Spraying

Is an insured covered for over-spraying an herbicide that damages its neighbor's crops? That depends on the specific language of the policy.

Gregory West retained Pinnacle Agricultural Enterprises to perform aerial herbicide spraying on his property. West farmed his land under an agreement with Wheatland Farms, a Colorado farm management and operations business. But the herbicide drifted onto Sage + Sparrow's property, destroying its hemp crop.

Sage sued West, Wheatland Farms, and Patrick Simons, Wheatland Farms' general partner. Simons allegedly "engaged" Pinnacle and directed its work.

Simons was insured by FAMI. Pinnacle was insured by Starr. FAMI brought a declaratory judgment action in Colorado federal district court to resolve the insurers' defense obligations. The court found that Starr had a duty to defend, but FAMI didn't.

There was no coverage under FAMI's policy because the underlying suits fell within both the pollution exclusion and an exclusion for personal liability coverage for "property damage" from the discharge of substances from an aircraft.

The Starr policy, in contrast, had an endorsement that covered claims for damages because of property damage from the aerial application of chemicals applied by an insured. Sage did not

allege that Simons was himself using or riding in the aircraft, but that didn't matter. The policy extended the definition of "insured" to any person or organization legally responsible for a covered aircraft. In the court's view, the underlying complaint arguably alleged that Simons and Wheatland Farms were "legally responsible" for the aircraft's use under both direct and vicarious liability theories.

For these reasons, the court held that Starr, but not FAMI, had to defend.

The case is *Farmers Alliance Mut. Ins. Co. v. Starr Indem. & Liab. Co.*, 22-cv-0451 (D. Colo. Oct. 11, 2024).

Rivkin Radler LLP
926 RXR Plaza, Uniondale NY 11556
www.rivkinradler.com
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