PLUNKETT COONEY

Pollution Exclusion, Exclusivity of Workers' Compensation Benefits Coverage Update

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Pollution Exclusion – Hawaii

Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.
SCCQ-23-0000515, 2024 WL 4431797 (Haw. Oct. 7, 2024)

The Supreme Court of Hawaii, in answering two certified questions from the U.S. District Court of Hawaii that were central to the issue of the defendant insurers' duty to defend its policyholder against climate change lawsuits, held that an "accident" as utilized in the definition of "occurrence" may include allegedly reckless conduct by the insured, and, as a matter of first impression, greenhouse gases are "pollutants" within the meaning of a traditional pollution exclusion of a commercial liability policy.

By way of background, Aloha Petroleum, Ltd. (Aloha) has marketed and sold gasoline in Hawaii since the early 1900s. In 2020, the City and County of Honolulu and the County of Maui sued Aloha, and others, for harm caused by climate change. The underlying lawsuits alleged that the defendants knew or should have been on notice for the last 50 years that greenhouse gases were created by the defendants' unrestricted production and use of fossil fuel products which, in turn, caused foreseeable climate changes and associated harms to people and property.

Seeking coverage for the underlying lawsuits, Aloha filed suit in the U.S. District Court of Hawaii against National Union Fire Insurance Company of Pittsburgh, PA and American Home Assurance Company, which issued several commercial general liability (CGL) policies to Aloha's parent company. Both insurers are subsidiaries of American Insurance Group (AIG). The parties filed cross-motions for partial summary judgment on the duty to defend. Due to the issues raised in the dispositive motions, the federal court certified two questions to the Hawaii Supreme Court: 1) whether an "accident" as used in the definition of "occurrence" includes recklessness, and 2) whether greenhouse gas emissions are "pollutants" that fall within the scope of a pollution exclusion.

As to the first certified question, the Hawaii Supreme Court determined that reckless conduct is more akin to negligent conduct, rather than intentional conduct for purposes of insurance, opining that "[i]nsurance exists to cover incidents that the insured didn't see coming or otherwise think were practically certain to occur." As such, the Supreme Court agreed with Aloha that the alleged losses caused by recklessness are "accidental" and are, therefore, an "occurrence."

Turning to the second certified question, the Hawaii Supreme Court determined that the CGL policies' pollution exclusions encompassed only traditional environmental pollution. The Supreme Court then examined whether greenhouse gases, including carbon dioxide, are pollutants that would fall within the traditional pollution exclusion. In its analysis, the court noted Hawaii's Air Pollution Control law and administrative regulations that consider greenhouse gases as "air pollutants;" a prior ruling that there is a right under Hawaii's Constitution to a clean and healthy environment that includes the right to a stable climate system; and the Hawaii Legislature's indication that there is an urgent need to reduce greenhouse gas emissions. The Supreme Court also noted that "reducing [greenhouse gas] emissions is the most consequential environmental pollution issue our species has faced." The Supreme Court concluded that, because greenhouse gases contaminate the atmosphere, they are "pollutants" within the meaning of the pollution exclusion.

By: Amy L. Diviney

Exclusivity of Workers' Compensation Benefits - Colorado

Klabon v. Travelers Prop. Cas. Co. of Am.
556 P.3d 793 (Colo. Sept. 30, 2024)

Answering a question of law certified to it by the U.S. District Court for the District of Colorado, the Colorado Supreme Court concluded that an employee was not barred from suing his employer's UM/UIM insurer when injured in an automobile accident while in the course and scope of his employment, even though he had collected workers' compensation benefits because of that same injury.

Plaintiff Kevin Klabon (Klabon) was involved in an automobile accident while he was in the course and scope of his employment with CMI Legacy, LLC (CMI) and operating a van owned by CMI, after another driver ran a red light and struck Klabon's vehicle. Klabon received workers' compensation benefits from his employer's workers' compensation carrier and also filed a claim with CMI's auto insurer for UM/UIM coverage.

Travelers Property and Casualty Company of America (Travelers) issued UIM benefits to Klabon in an amount less than the $1 million UM/UIM limits provided by the policy. Klabon then brought suit in state court against Travelers, alleging it unreasonably denied and delayed payments of UIM benefits. Travelers removed the case to federal court, then moved for summary judgment, arguing that Klabon was barred from recovering UIM benefits from Travelers due to his receipt of workers' compensation benefits for the same accident.

Travelers cited the "exclusivity and immunity provisions" of the Workers' Compensation Act (WCA), specifically, §§ 8-41-102, -104, C.R.S. (2024), arguing that by accepting workers' compensation benefits, the WCA was Klabon's exclusive remedy for his injuries, and he was barred from bringing a

claim against his employer's UIM insurer. Klabon disagreed, arguing that his claim for UIM benefits was "'based on the liability incurred by the driver who caused the accident,' rather than a claim against his employer." Due to some degree of controversy on this issue in the State of Colorado, the trial court judge certified the question to the Colorado Supreme Court.

Upon review of the certified question, the Colorado Supreme Court held that an employee who is injured by a third-party tortfeasor while in the course and scope of his employment, and who subsequently collects workers' compensation benefits from his employer, is not barred under section 8-41-102 from seeking UM/UIM benefits from his employer's UM/UIM insurance carrier. The Supreme Court further noted section 8-41-102 of the WCA, rather than 8-41-104, governed the matter.

The Supreme Court held that the section 8-41-102 language on "immunized insurers" did not apply to an employer's UM/UIM carrier. The court reasoned that this section of the WCA is not intended to immunize an insurance carrier that does not insure the employer's workers' compensation liability, and applying the immunity provision to UM/UIM carriers would "undermine the basis of immunity provided by the WCA, which is built upon an exchange between an employee and employer."

The Supreme Court next concluded that the exclusivity clause of section 8-41-102 did not preclude Klabon from recovering UM/UIM benefits for his injury. The appellate court reasoned that UM/UIM benefits are intended to put the injured party in the same position they would be in had the third-party tortfeasor been adequately insured. The Supreme Court disagreed with the argument that allowing Klabon to recover both workers' compensation and UIM benefits would result in him recovering duplicate benefits, even if there is some overlap among the benefits provided, as those two types of benefits "serve different purposes and offer different benefits."

By: Chelsea Saferian