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Climate change litigation – are you protected?

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In a ground-breaking case, a fossil fuel company has commenced proceedings against its insurer for refusing to cover a climate lawsuit.

Aloha Petroleum (a subsidiary of Sunuco) has brought a claim against AIG's National Union Fire Insurance Company of Pittsburgh, alleging that insurers had failed to defend Aloha against climate claims brought by government bodies in the state of Hawaii, in breach of their obligations under the policy. Aloha seeks cover for the costs of defending those claims, which already exceed USD880,000. The claim by Aloha is similar to a claim by Gulf Oil against its insurer, Everest, brought in the courts of Massachusetts in June this year.

The Aloha case relates to allegations that the various petrochemical companies engaged in a co-ordinated effort to deny the threat posed by global heating, to discredit the science of the climate crisis, and to deceive the public about the reality and consequences of the impacts of fossil fuel pollution.

Claims such as these are likely to be extremely costly. Even if the claims ultimately fail, defence costs will run into many millions of dollars, and are very often not recoverable in the US courts. This could therefore amount to a significant exposure for insurers, if the claims are covered under the policy.

The insurers in both cases deny cover on the basis that – in their view – the lawsuits are caught by the pollution exclusions in the policies. Whilst we will have to wait and see the outcome of these particular cases, insurers will be mindful of the Bank of England's climate stress test earlier in 2022, which concluded that many insurers had not properly considered the potential impact on their business of climate change lawsuits and similar actions.

Having said that, many insurers are now taking a keen interest in the environmental credentials of their insureds and are amending or endorsing their policies accordingly. Indeed, the LMA has published a climate change exclusion model clause, which is being increasingly used in the market, together with more specific exclusions.

Considerations for underwriters

Underwriters should be carefully assessing the risk of climate change claims being brought against their insureds, particularly in petrochemical and other similar industries.

Where underwriters do not intend to cover such claims, they should consider applying specific clauses rather than relying on existing pollution exclusions, in order to reduce the prospect of coverage disputes.

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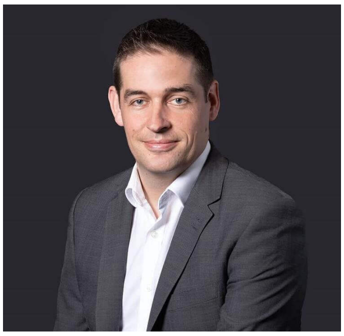

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