

Will The Insurance Industry Dodge Climate Nuisance Liability Bullet?

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It was Dutch physicist Niels Bohr who said, “Prediction is very difficult, especially about the future.”

Assessing risk in a rapidly changing world is perhaps the most formidable challenge facing the insurance industry today.

Tried and true actuarial models become less trustworthy when the historical bedrock that these models are built upon begins to shift. This year, there are at least four emerging threats with the potential to impose seismic change upon the risk management landscape.

In September 2009, all three branches of the United States government were racing headlong toward efforts to mitigate the threat of man-made global warming.

The executive branch (through the U.S. Environmental Protection Agency) sought to impose greenhouse gas emission limitations; the House of Representatives passed landmark “cap and trade” legislation; and two Federal Appellate Courts recognized a viable cause of action against carbon dioxide emitters for “climate nuisance.”

Less than two years later, with the economic downturn and the 2010 midterm elections in the rearview mirror, the executive and legislative branches have slammed the brakes on their respective climate initiatives, and the focus has shifted to the judiciary.

The case at the center of the climate change controversy is *Connecticut v. American Electric Power Co., et al.*

In AEP, several states and environmental groups filed suit against power companies seeking an abatement of “the public nuisance of global warming.”

The plaintiffs alleged that the utilities’ combustion of fossil fuels had contributed to elevated levels of atmospheric CO₂ which, in turn, had led to beach erosion, droughts and floods.

After a New York Federal District Court dismissed the suit on grounds that the regulation of greenhouse gas emissions was a political question best left for the legislature, the Second Circuit Court of Appeals reversed. The appellate court’s decision in September 2009 to let the nuisance case against the utilities proceed sent shockwaves through the energy industry, opening the door for an untold number of climate change claims and lawsuits.

Last fall, the Supreme Court advised that it would hear the appeal over whether the AEP plaintiffs’ federal nuisance claims are viable. Argument is set for April 19, 2011.

Among the critical issues is whether the judiciary, through the adjudication of nuisance litigation, is the branch of government best suited to regulate greenhouse-gas emissions.

Interestingly, both the Obama administration and several conservative organizations have opposed climate litigation on the grounds that the elected branches of government are in a better position to provide a comprehensive (non-patchwork) approach to establishing a national sustainable energy strategy.

If affirmed, AEP threatens to open up a Pandora's box of global warming suits, as well as associated coverage litigation. Under the Second Circuit's ruling, any entity with "special" climate-related harm—harm that is different in kind or in scope from the general public—would have standing to pursue large GHG emitters.

The AEP decision not only threatens to create a highly undesirable balkanization of environmental regulation between one jurisdiction and the next, but it also has the potential to substantially damage the national economy. For these reasons, AEP may be the most important environmental case in a decade.

THE YEAR OF THE HURRICANE?

Although forecasting the severity of a particular hurricane season is fraught with uncertainty, there are factors that make some meaningful projection possible. It is generally recognized that higher ocean temperatures (at least 80° F) and lower wind shear (less contrasting wind speed and direction at different levels of the atmosphere) are the key elements in the creation of these powerful and destructive forces. It appears that the 2011 Atlantic Hurricane Season will be fueled by both above-average tropical Atlantic surface water temperature and anomalously low vertical wind shear. In other words, hurricanes will have more fuel and fewer impediments to formation.

As a result of these anticipated conditions, the early prognostications for the 2011 hurricane season are ominous. The renowned Colorado State meteorology team predicts 17 tropical storms, nine hurricanes, and five major hurricanes (Category 3 or higher)—as compared to an average year of 11 tropical storms, six hurricanes and two major events. Historically, one out of every four hurricanes makes U.S. landfall; and the CSU team concluded that there is a very high (73 percent) chance of a major hurricane striking the U.S. coastline.

Similarly, Tropical Storm Risk, a consortium that brings together climate experts and statisticians, predicts tropical cyclonic activity in the Atlantic that is 40 percent above normal. CSU, TSR, and the National Oceanic and Atmospheric Administration each will issue updated reports in April and May. At least until then, there is good reason for concern.

FLY ASH: THIS YEAR'S ASBESTOS?

There may never be another mass tort that combines widespread bodily injury with long-tail exposure as effectively as the "miracle mineral" of asbestos. But there are some interesting parallels between asbestos and a developing threat known as "fly ash."

Fly ash, which along with "bottom ash" makes up "coal ash," is a byproduct of the combustion of coal. Coal-fueled electricity-generation plants produce hundreds of millions of tons of fly-ash waste every year—much of which includes mercury, arsenic, lead and a half dozen other toxins.

Fly ash is often buried in landfills, but for decades, massive amounts of this waste have been used as a component of concrete and drywall.

Until recently, fly ash was not viewed as a significant environmental hazard, but at 1:00 a.m. on Dec. 22, 2008, that all began to change. That morning a dike containing fly-ash waste at the Tennessee Valley Kingston Fossil Plant ruptured, dumping 5.4 billion cubic yards of fly-ash slurry into Tennessee's Emory River. Thereafter, tests of river water showed elevated levels of arsenic, copper, lead, nickel and mercury.

Since this event, fly ash has received far more national scrutiny. In June 2010, the EPA formally advised that it was considering a reclassification of coal ash as hazardous waste. Courts have seen a sharp increase in coal-ash related bodily injury and property damage lawsuits. And, on Feb. 1, 2011, a collaborative group of medical, environmental and social justice organizations issued a report suggesting that the toxin hexavalent chromium may be leaching into residential drinking water from coal-ash dump sites.

(The report, "EPA's Blind Spot: Hexavalent Chromium in Coal Ash," is available under the resources link of www.psr.org.)

The name Erin Brockovich is commonly associated with hexavalent chromium because of a lawsuit led by the lawyer and environmental activist against Pacific Gas and Electric alleging contamination of drinking water with hexavalent chromium in the southern California town of Hinkley.

Given the increasing focus on the toxins found within coal ash—and given its presence in our buildings, infrastructure and landfills—coal-ash liability is likely on the rise.

BIG PROBLEMS IN SMALL PACKAGES?

Nanoparticles are extremely small objects, measured in terms of nanometers—equivalent to one billionth of a meter. In recent years, the use of engineered nanomaterials in consumer products like sunscreen, cosmetics, clothing and baby products has soared. These materials are sometimes small enough to enter the human body through the skin and through inhalation. As a result, substantial concern has developed because these tiny materials are often made of toxic substances, and closely resemble asbestos fibers.

For years, we have heard rumblings that nano litigation and nano class actions are just around the bend. And because no nanotech suit has yet been filed, it is tempting to consider nano exposure as "the tort that cried wolf."

But with a global market for nano-based products expected to reach a trillion dollars within the next five years, with increased scientific scrutiny associated with nano materials, and with a plaintiffs' bar watching with rapt attention, there are reasons for real concern. While it is safe to say that 2011 will not see an onslaught of nano litigation, there is every reason for insurers to carefully manage nano-related risks.