



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomediamedia.com

Global Warming Raises Risks For Directors, Officers

By Erin Coe

Law360, New York (October 14, 2008) -- With the turbulence in the financial market holding the current spotlight, many companies may not be too concerned about the legal risks that global warming may pose on their business or their officers and directors.

But even if shareholder and derivative suits are not likely to flood the courts tomorrow, the problem of climate change is becoming a growing threat for companies that would be well advised to rethink their directors and officers liability insurance policy and disclosure practices, attorneys say.

"Global warming is the kind of issue that is not going to go away. There are too many interested parties, including nongovernmental organizations and regulatory organizations, and it will remain a prominent issue," said Kevin M. LaCroix, an attorney and partner of Ohio-based OakBridge Insurance Services, which is focused on management liability issues.

Many public companies already have D&O liability insurance that is triggered when directors and officers are targeted in a derivative or shareholder suit. But language in the policy may not automatically cover the individuals if a suit alleges the company board mismanaged global warming policies or officers misrepresented risks from global warming that caused the company's stock price to plummet.

These types of claims have not surfaced yet, but as scientific evidence draws closer links between a rise in global temperatures and the emission of greenhouse gases, the greater the chance for companies to be exposed to liability, according to Mark S. Hersh, deputy head of Reed Smith LLP's insurance recovery group in Chicago.

"I expect to see more and more claims against companies related to global warming and an increase in claims that implicate D&O insurance," Hersh said.

In light of the U.S. Supreme Court's ruling last year that greenhouse gas emissions are a "pollutant" under the Clean Air Act, the decision could affect D&O insurance policies, which often have a pollution exclusion.

"The decision gives ammunition to insurance companies to say greenhouse gas emissions are pollution," he said.

When companies negotiate insurance policy terms, attorneys said they should consider getting securities claims carved out of the pollution exclusion or nix the pollution exclusion altogether so that derivative suits and shareholder claims arising out of global warming matters are covered under the policy.

Closely reviewing and negotiating the language in the policy is essential, according to Joseph P. Monteleone, an insurance partner in Tressler Soderstrom Maloney & Priess LLP's Manhattan and Newark, N.J., offices.

"It's more important for the policy language to be resolved when a company is buying the product than waiting for a claim that causes a dispute over the way the policy is worded," he said.

Attorneys also said companies may want to narrow the bodily injury and property damage exclusion, which is typically part of D&O insurance policies, and look into stand-alone Side A coverage, which would provide an extra safety valve for directors and officers by giving them a separate policy from the company.

Hersh also recommended companies should consider whether they want governmental or regulatory actions covered for their directors and officers.

"There is a question as to whether governmental claims are covered under a D&O policy. If they are lawsuits, yes, but there are a lot of differences among policies over whether investigations are covered," he said.

The greater focus on global warming may also drive companies to revise their disclosure procedures, and recent efforts by state regulators and environmental groups may hint at how high the disclosure bar could be raised.

Xcel Energy entered a settlement with the New York State attorney general in August agreeing to voluntarily disclose information to investors on business risks from global

warming. The deal came after the attorney general subpoenaed several energy firms about whether their plans to develop power plants would lead to higher costs to meet standards on carbon emissions.

Ceres, a public interest group, called on the U.S. Securities and Exchange Commission last year to augment existing disclosure requirements so companies make more disclosures to investors about material risks from climate change, such as the costs to reduce their carbon footprint.

Its request is still pending, but some critics complain that the new requirements overlap with existing disclosures and would force companies to speculate about developments years in advance.

"D&O claims are likely to grow out of the evolving expectations of what public companies are required to disclose," LaCroix said.

LaCroix said major utilities are already taking proactive measures to disclose information on climate change and activities to reduce their carbon footprint, and other companies that fear they are more likely to be targeted by claims over global warming may feel pressure to provide more information to investors as well, such as the transportation, heavy manufacturing and even dry-cleaning industries.

Companies that are already volunteering more information on risks related to climate change should make sure that the corporate social responsibility officer charged with voluntary disclosures is working closely with the chief financial officer charged with mandatory disclosures, according to Jeffrey A. Smith, who heads up Cravath Swaine & Moore LLP's environmental group in Manhattan.

"Companies' voluntary and mandatory disclosures should be in sync so they are not vulnerable to claims that they withheld information in SEC filings," Smith said.

While companies that start volunteering information could receive early action credit and other benefits, Smith said he believed disclosures related to climate change should not interfere with the fundamental freedom of how a company board decides to run a company.

However, he said company boards that are out of sync with what is increasingly accepted as prevailing science will have a harder time arguing that their decisions were well-informed and could be leaving themselves open to liability.

"The more climate change is obvious to everybody, the harder it will be for the board to say it didn't think that was an issue," Smith said.

All Content © 2003-2008, Portfolio Media, Inc.