

The Future Exposed!



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Globalization and the expanding use of cutting-edge technologies have introduced potential exposure to liability that can snowball in a hurry.

In just a few short years, the insurance and commercial industries have been exposed to a myriad of emerging risks, as the trend toward corporate globalization and new communication technologies have ushered in a host of “never-thought-of-before” exposures.

Who would have guessed that the tumultuous events of last year would make media headlines out of “asset-backed commercial paper (ABCPs),” “re-adjusted balance sheet valuations” and employee and shareholder class-action lawsuits? The economic upheaval and financial volatility introduced as a result of the collapse of the investment markets toward the end of last year focused the attention of insurers, brokers and risk managers on workforce and corporate governance-related liability exposures.

In terms of property risk, it is clear now that catastrophic losses — those that would cripple an enterprise — are no longer just accidental and weather-related.

On the liability front, there is no question that class-action lawsuits are here to stay: Canadian enterprises that have thus far been relatively sheltered under a more benevolent legal system are now the targets of creative, new tort actions.

This new litigious environment has so far heralded tort actions related to securities, stock options, shareholder returns and mass tort actions related to product liability. The number of class-action lawsuits filed in B.C. rose notably by 68% — from 33 actions in 2004 to 48 actions by 2008. And since Ontario amended its securities legislation in 2005, the number of shareholder class actions has increased by 125% across the country.

Furthermore, Canada is experiencing an increasing number of class-actions mirroring pleadings in the United States, where plaintiff’s counsel are looking to “piggyback” on these large mass tort actions. The U.S. court environment is a “looking glass” for Canadian companies: more plaintiffs and solicitors in Canada are getting their ideas from south of the border.

In a similar vein, there is an alarming move by American litigation law firms to expand their activities offshore and “mine” for lawsuits against foreign companies (product liability), which are then filed in the United States where the potential financial rewards they might gain from the

courts are much more lucrative.

In many respects, the above are “emerging risks” of today. But what about the emerging risks of tomorrow?

The high level of attention senior management is paying to financial performance and corporate governance-related liability exposures is understandable given all of the above, are enterprises overlooking potentially greater emerging risks in doing so? Many of these new “perils” are evolving as a result of global product and service outsourcing and the immediate reach of Internet-based technologies.

EMERGING HAZARDS

Paul Martin, president of KRG/RRJ Insurance Group Ltd., says the recent disruption of financial markets will likely trigger further lawsuits and claims pertaining to lost jobs and shareholder losses related to directors’ and officers’ (D&O) and errors and omissions (E&O) covers. These actions, however, relate to “immediate and existing exposures” that are already largely beyond the point at which actions can be taken to negate the risk. “We tend to be a ‘reactive’ rather than ‘pro-active’ society, but risk managers and senior management of companies should not be distracted from taking appropriate actions now to limit or curtail exposure to the emerging risks of tomorrow,” he adds.

From a property risk perspective, insurers and risk managers have some understanding of the perils related to climate change, Martin says. But such exposure on the liability front is largely unknown. “There is no question that weather is going to pose increasing risks for businesses in the decades to come.”

The potential risk of liability inherent in the “new technology age” is also mind-boggling, Martin observes. This applies to enterprises engaged in design and manufacturing through to service providers of consumer-tech goods. Recent advancements in “nanotech” or “biotech” technology — as applied to products ranging from textiles in the clothing industry to sporting goods and “24-hour-lasting cosmetics” — open a

whole new liability frontier. “This not only applies to long-term, health-related impacts — for instance, the effect of mobile phones and MP3 players — but what does this mean in terms of invasion of privacy and business disruption, as society and the business community becomes increasingly reliant on technology?” he says. “The full effect of technology in terms of liability risk is not fully understood by the insurance industry and what impact this will have on commercial policyholders.”

In addition to product and service risks associated with globalization, the threat of pandemic outbreaks in different regions can leave businesses vulnerable to extended business disruption and crippling financial losses if delivery schedules are missed, Martin points out.

Many insurers have specialists who research and review the potential of “emerging liability hazards.” Judging from media reports, the following exposures should soon be appearing on insurers’ radar screens:

Globalization/outsourcing

How much control do enterprises have over the quality of a growing volume of foreign manufactured goods and the operational processes of outsourced services? What controls exist in foreign countries? Global outsourcing has significantly complicated the product liability arena.

Mobile phones

Will these devices ultimately prove to be a liability risk?

Genetic engineering

A recent tort action filed by a farmer against a biotech firm provides a glimpse of the potential liability exposures in this field.

Everyday chemical exposures

Could pumping your own gas pose a health risk?

Cyber risk

Data breaches jumped by 70% during the first half of 2008. What does this hold

for the future in terms of D&O liability exposures as well as privacy invasion?

“Taser parties”

Now that tasers are available for “personal protection,” word on the street is that “taser parties” have become the rage at high school and college parties. Indiscriminate use of tasers may lead to lawsuits filed against authorities other than the police.

Terrorism “liability”

Colombian nationals filed a class-action lawsuit in the United States against a company called Chiquita for allegedly having “knowingly engaged in an ongoing campaign of terror” by providing financial aid to paramilitary forces operating in that country. Chiquita claims the money was paid because of the “terrorist” threats against the safety of the company’s workers.

INSURER DUTY

Class-action lawsuits are growing exponentially and plaintiffs and litigation lawyers are becoming increasingly creative in exploiting the civil legal system for financial gain. As a result, perhaps one of the greatest emerging risks enterprises face today is “reputational loss.”

Unfortunately, in the past, insurers too often decided whether to settle or defend liability claims based solely on “economic merit” rather than taking into account the broader interests of their commercial policyholders.

Given the much-higher stakes associated with today’s highly litigious and global marketplace, insureds should be looking for a “partner” in terms of their insurance carrier — one that will serve the broader purpose of the enterprise rather than the simple settlement of a claim. It is therefore crucial that the insurer has the necessary resources and expertise in case handling. The role of the independent broker is also important in performing ongoing risk review/assessments of an enterprise to ensure that appropriate liability coverage and risk mitigation measures have been fully explored. ☰