Green Chemistry And Updates On Global Warming Litigation

KAREN M. BORG

Regulatory Changes Ahead: California's Green Chemistry Initiative

California recently became the first state to enact legislation allowing its regulators to use "green chemistry" through restrictions or bans on toxic products. California's legislation is similar to the EU's REACH (Regulation for Registration, Evaluation, Authorization and Restriction of Chemicals) regulations enacted in 2007. Green chemistry is the process for reducing or eliminating the use of hazardous materials. Green chemistry is a fundamentally new approach to environmental protection, which focuses on reducing or eliminating the use of toxic chemicals from the start, rather than managing them at the end of the lifecycle.

In September 2008, Governor Schwarzenegger signed two green chemistry bills that put two of the initiatives into action. One of the bills authorizes California's Department of Toxic Substances Control to identify and prioritize chemicals of concern, evaluate alternatives and specify regulatory responses. The second bill requires an online Toxics Information Clearinghouse be established to provide public access to information on the toxicity of chemicals. The state has until January 2011 to develop the regulations necessary to implement the two bills.

In December 2008, the California Environmental Protection Agency released the Green Chemistry Initiative Final Report. The report makes six recommendations designed to improve the safety of consumer goods and products sold in California and give consumers, manufacturers and retailers new ways to assess the dangers of common chemicals in goods we use daily. The goal is to eliminate or reduce the use of toxic substances in products and manufacturing processes, and increase disclosure of chemical risk information. The initiative seeks to shift the focus from managing wastes at the end of a product's lifecycle to designing chemicals, processes and goods that have little or no adverse affects during the manufacturing, use or disposal of a product.

The recommendations are to 1) expand pollution prevention programs to more business sectors to refocus additional resources on prevention rather than clean up; 2) develop green chemistry workforce education and training programs; 3) create the nation's first online product ingredient network to disclose chemical ingredients for products sold in California, while protecting trade secrets; 4) create an online toxics clearinghouse to help prioritize chemicals of concern; 5) accelerate the quest for safer products by creating a process to evaluate chemicals of concern and data needs and alternatives to ensure product safety and reduce or eliminate the need for chemical-by-chemical bans; and 6) move toward a "cradle-to-cradle" economy that will produce "benign-by-design" products in part by establishing a California Green Products registry.

The California Green Chemistry program is a comprehensive effort, much like REACH in the EU, to better control and manage the use of toxic materials in consumer products. This will likely lead to more stringent laws and regulations and similar legislation in other states.

Updates on Global Warming Litigation

Over the past five years, private plaintiffs and state attorneys general have filed more than a dozen actions against a variety of industries relating to global warming and greenhouse gas (GHG) emissions. So far, none of these actions have made it beyond the initial pleading stage. Most of the cases filed in GHG litigation have been based on public nuisance or injunctive claims, and in each instance have been rejected by the courts. For obvious reasons, private plaintiffs in tort litigation face significant hurdles in attempting to make such a claim stick. Although it is unclear where the GHG and global warming related litigation may go, if anywhere, plaintiffs' lawyers will no doubt continue their efforts to craft new theories in an effort to achieve relief from the courts.

In *Massachusetts v. United States Environmental Protection Agency*, 127 S. Ct. 1438 (2007), a group of States, local governments and private organizations alleged that the Environmental Protection Agency abdicated its responsi-

bility under the Clean Air Act to regulate the emissions of greenhouse gas emissions from new motor vehicles. Petitioners asked the United States Supreme Court to determine whether the EPA has the statutory authority to regulate greenhouse gas emissions, and if so, whether its reasons for refusing to do so are consistent with the statute. The Supreme Court stated that "the EPA does not dispute the existence of a casual connection between man-made greenhouse gas emissions and global warming." The Supreme Court held that the Environmental Protection Agency had the statutory authority to regulate carbon dioxide emissions from new motor vehicles as air pollution under the Clean Air Act. The Supreme Court established a framework for judicial review in this area, emphasizing that the political branches must make policy choices concerning global warming and to the extent any State is dissatisfied with those choices, the role of the judiciary is to review those choices through administrative challenges.

In *Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), several states and the city of New York brought claims under federal common law and state law, to abate the public nuisance of global warming. The plaintiffs sought an order holding each of the electric utility defendants jointly and severally liable for contributing to an ongoing public nuisance of global warming, and enjoining the defendants by reducing its emission of carbon dioxide by a specified amount each year. The court dismissed the claims holding that the suit raised non-justiciable political questions beyond the limits of the court's jurisdiction.

A federal court dismissed the state's attorney general's lawsuit against automakers for GHG emissions on the grounds that regardless of the type of relief sought under federal common law, whether a nuisance claim or damages, a court "must still make an initial policy decision [before] deciding whether there has been an unreasonable interference with a right to the general public." *People of the State of California v. General Motors Corp.*, 2007 WL 2725871 (N.D. Cal. 2007).

In Mississippi, a federal judge dismissed plaintiffs' claims that greenhouse gases emitted by oil and power companies increased the severity of the damage caused by Hurricane Katrina. The plaintiffs in that case sought monetary recovery for property damage. The court granted defendants' motions to dismiss finding that the plaintiffs' claims raised political questions beyond the court's reach.

At this point, the political question issue has knocked out the nuisance and injunctive relief claims described above and prevented plaintiffs from getting beyond the pleadings stage. In early 2008, a new set of private plaintiffs emerged with an arguably more concrete set of harms.

The most recent "global warming public nuisance" lawsuit was filed by residents of an Alaskan village alleging that global warming is destroying their village and they must eventually abandon their village and be forced to relocate. The plaintiffs allege that the defendants, members of the oil and electric utility industries, have contributed to global warming through emissions of large quantities of greenhouse gases, and caused property damage and flooding. Plaintiffs also allege that certain defendants have "conspired to create a false scientific debate about global warming in order to deceive the public." The plaintiffs seek compensatory damages for the cost of relocating their village as well as a declaration of joint and several liability for future damages. The oil and utility companies moved to dismiss the plaintiffs' claims. Defendants argued that the plaintiffs cannot show that the defendants' conduct was a substantial factor in causing the damage to plaintiffs' village. Defendants further argued that the Clean Air Act displaces the authority of the courts, which cannot regulate nationwide GHG emissions through nuisance claims. The court has not yet ruled on defendants' motion.

Although plaintiffs in GHG and global warming related litigation face significant legal, factual and procedural hurdles to recovery, plaintiffs have in the past overcome similar hurdles in other areas of mass tort litigation. It remains to be seen whether they can do the same in this arena.

Karen M. Borg is a partner with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. She is a member of the firm's Mass Tort and Products Liability practice group. The views expressed are personal to the author.