SOLUTIONS

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MAKING IT WORTH THE RISK: Risk Transfer Methodology for Renewables

The world of renewable energy is entering its next generation, one that will be ushered into being by President Obama and his team, working with government, industry, and ultimately consumers. His mandate calls for 10% of energy to come from renewable sources by the year 2012. The future is now, as the saying goes, and it is essential to alter our view as to how consumers use and utilize energy.

In California, the sight of solar panels on a rooftop is not something new; among other things, they are used to heat pools or provide domestic electricity. Wind farms, similarly, are far from uncommon. Anyone who drives over the Altamont Pass can see thousands of modern white windmills pumping kilowatts into the grid. Iowa and, in fact, the entire mid-west have seen alternative fuel production facilities come into existence near feedstocks, corn fields, or soy bean farms. For some time now, scientists in the Bay Area have been developing new strains of algae, which are converted into biodiesel, butanol, or ethanol and used as alternative fuels in vehicles or as substitutes for petroleum-based products. The city of San Francisco has contracted to develop a cogeneration facility to turn solid wastes into liquid, and restaurant grease into either fuel or yellow grease. These measures increase use of renewable energy and reduce dependency on oil, but they are only the beginning for an industry whose time has come.

The Energy Policy Act of 1992 (EPAct) set ambitious goals for flex fuel vehicles, but there were no filling stations to pump E85, so those goals were not met. Fast forward to 2008, a time when you can rest assured that domestic auto manufacturers were bound under their assistance programs to produce flex fuel vehicles or alternatives to gasoline-powered cars. Once these vehicles were produced, where were they able to fill up? According to the California Department of Energy, there are a total of 19 E85 stations and 36 biodiesel stations for a state of 38 million.

In California, utility companies must obtain 20% of their power from renewable resources by 2010. The California Solar Initiative calls for 3,000 MW of solar produced electricity by 2016. Utility company PG&E has had its latest proposal for a traditional power plant construction project delayed due to its inability to demonstrate that it will be able to meet its commitment, with current alternative energy projects (bio-mass, solar, wave, and wind) in planning or pre-operational phases. The reality is that on a utility scale, there are insufficient projects planned or in process to meet the mandates for renewable energy, at least in the state of California.

The question of "how do we get there from here?" looms large for inventors, investors, project developers, and scientists. Along with the new products and systems being created come new challenges, both from an operational risk perspective and from a pure risk perspective. Insurance brokers in the alternative energy marketplace have their choice of several insurance carriers to provide coverage for traditional exposures (automobile, fire, general liability, and workers' compensation risks, etc.), but when special issues related to these operations need to be addressed, this list significantly diminishes. Environmental and pollution liability represent two areas that are increasingly becoming difficult or expensive to transfer from the renewable energy provider to an insurer.

Manufacturing a combustible material in a closed environment is nothing new. Oil and gas companies

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have been cracking hydrocarbons in their catalytic processes for centuries to turn fossils into fuels. A new generation of manufacturers is working on new organisms with better technology, reduced cycle times, and modern day synthesis capabilities. But, at the end of the production day, they are creating a highly volatile potential pollutant for use in a combustible system.

When an alternative fuel is manufactured at scale, it means millions of barrels per year. Petrobras in Brazil has a facility that will yield 15 million barrels of cellulosic ethanol per year, for example. When that fuel is manufactured, it still needs to find its way into the fuel delivery system. There are no infrastructures, pipes, or transportation facilities to get it to the refinery where it needs to be blended.

In October, 2008, in the Bay Area a tanker truck overturned and it melted portions of Interstate 880 in Oakland. This is not an untraditional exposure, but one that will be ever-increasing as these new facilities come on line and ship their products to other facilities. To someone in the traditional world of manufacturing gasoline from oil, it is understood that these hazards exist. Additionally, they understand the immediate exposures, like a truck fire or long-term exposures and liability for underground storage tanks created by their businesses, and they are experts at understanding the risks they will retain or transfer. The new order of entrepreneurs and manufacturers may be no less knowledgeable about risk transfer, but may not be as aware of the risk transfer programs that are available or being developed.

The risk transfer methodology deployed needs to be specific to the needs of each renewable energy company. The application in a solar company is different than that of a wind energy producer, and it is different still for a fuel manufacturer. New products are available or being created that will allow a renewable energy company to transfer several liabilities, such as carbon credits, efficacy, tax, and warranty, to enumerate a few. The level of retention or transfer is left for the individual company to decide. A start-up or Series A round company may elect to deploy their capital differently than a more mature, Series B, private equity funded, or public company.

For instance, there are some relevant examples to be found in the solar power supplier domain. Solar providers have statistical data on "sun days" and projections of throughput to the grid – if there are fewer days, there are penalties and sometimes other consequences. The right exclusive risk transfer solutions can fund those exposures via an insurance policy, in a financial transaction that shifts potential consequence from the purchaser to an insurer. Transfer protocols have been negotiated to transfer warranty risk from the balance sheet, something that is an industry standard for all manufacturers of solar collecting apparatus. Some terms, customarily five to twenty year warranties, representing the performance of their installed units, are required of the solar cell manufacturer. As a consequence, they are obligated to maintain that as a liability on their balance sheet, since the possibility of having a purchaser draw down on that facility exists in the event of a failure or lack of performance to some specified criteria set forth in the purchase agreement.

When making the return on investment decision, the issue of "surviving a catastrophe" also needs to be a factor in the equation. In today's economic environment, it is imperative that a company explore every possible avenue in finding ways to enhance the terms of any project - fuel manufacturing plant, utility scale solar, or wind development. Project financing is increasingly reliant on ever-diminishing margins and key deliverables from power providers and purchasers, as specified in the terms of power purchase agreements or fuel delivery contracts. The risk transfer initiatives employed should seek to smooth the curve, and effectively eliminate risk in a portion of the alternative energy provider's operations.

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HOW UNRESOLVED COMPLAINTS ESCALATE INTO RETALIATION LAWSUITS

A recent Seventh Circuit case reminds us that employers should make sure to let employees know how their complaints have been resolved. Title VII prohibits sexual harassment and retaliation against an employee who complains of harassment – even if it turns out the behavior isn't illegal. When the supervisor, who takes the complaint, resolves the matter but doesn't let the employee know, the employee may complain again this time to the supervisor's supervisor about how the matter was handled. Under Title VII, the second complaint is also protected and the U.S. Court of Appeals for the Seventh Circuit held that a supervisor may not retaliate against an employee for making the second complaint. *Magyar v. St. Joseph Regional Medical Center, No. 07-2197 (7th Cir.9/12/08).*

Sexual Harassment

A few months after Magyar started the job, a 52 year old male co-worker sat on her lap and whispered "you're pretty." It was the second time the co-worker sat on her lap and made such a comment. Magyar testified that she thought it was just a one-time occurrence and that she didn't know what to do because it was her first "real" job.

Magyar reported the second incident to her supervisor, the head of surgery services. When the supervisor refused to talk to the co-worker unless Magyar filed a formal complaint, Magyar told the supervisor she had been sexually harassed in the past and was sensitive to the behavior. The supervisor agreed to speak with the co-worker and apparently did so late that day. Court records indicated that the co-worker wanted to apologize but the supervisor advised against it.

Lack of Follow Up

The supervisor never let Magyar know what happened. Magyar never heard how the complaint was dealt with. Then, approximately six weeks later, Magyar complained to the hospital's corporate counsel. In response, the supervisor was instructed to meet with Magyar but the meeting digressed when the supervisor pressed Magyar about why she complained to the corporate counsel's office. Two days later Magyar saw a posting for her job and wrote to the corporate counsel complaining of retaliation. Magyar told them she was also upset and that she needed to reveal her assault to get her supervisor to act. Eventually, her job was restructured and Magyar was terminated.

Lessons to Be Learned

There are a number of lessons here, not the least of which is to notify employees about how their complaints have been resolved. It also would have been important for the hospital's corporate counsel to ensure that the supervisor did not retaliate against Magyar when the second complaint was raised. Finally, any posting or revision of an employee's position, particularly one who has made a complaint of harassment, should be reviewed carefully by corporate counsel.

While the facts of this case are important, the general theme is even more so – employees continue to be protected after making follow-up complaints and are entitle to protection from retaliation at that time and into the future. In addition – let the complainant know what has resulted from his/her complaint.

Contributed by Jessica Roe, Bernick-Lifson-Greenstein-Greene-Liszt, P.A., Attorneys at Law

MEDICARE AND COBRA

There is often confusion about how Medicare and COBRA interact with each other. An Internal Revenue Service publication in 2004 changed to a degree how plans treat COBRA when Medicare is involved.

In order to understand the decisions, it is important to look back to two laws called TEFRA and DEFRA passed in the early 1980s. These laws essentially provided that active employees over age 65 and over

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age 65 dependents of active employees are guaranteed the right to continue in the health plans of employers with 20 or more employees on the same basis as employees and dependents under age 65. Prior to these two laws, group benefit plans could force individuals over age 65 into lesser coverage under Medicare Supplement plans. Under TEFRA and DEFRA, individuals age 65 or over can elect to participate in Medicare **and** the employer benefit plan. In this case, the employer benefit plan pays its benefits before Medicare considers any charges.

Another important development in how Medicare and COBRA interact occurred in the mid 1990s with a lawsuit commonly referred to as the Geissal case. The court was asked to determine how existing coverage affected an individual's right to elect COBRA. When COBRA was enacted, the Law itself said that a person's right to COBRA continuation could be terminated if he/she subsequently becomes covered under another group health plan after the Qualifying Event. COBRA Regulations, however, indicated that a person who had existing coverage when a COBRA event occurred could not elect COBRA. In the Geissal case, the court upheld the application of the "becomes covered" wording in the Law itself.

One of the original premises of COBRA was that if a dependent loses coverage ***solely*** due to the employee becoming covered by Medicare, the dependent would have 36 months of COBRA eligibility. Basically this provision was based on the assumption that active employees and their covered dependents could lose coverage automatically under the employer plan when the employees turn 65 and become eligible for Medicare. This application did not take into consideration the changes instituted by TEFRA and DEFRA.

Ultimately, the federal government began to understand the role that TEFRA and DEFRA play in the relationship between Medicare and COBRA. They then instituted an interpretation that said that when an employee works beyond age 65 and elects Medicare prior to retirement, the dependent spouse who is under age 65 can elect up to 36 months of COBRA from the point the employee became eligible for Medicare. For example, the employee turns 65 and elects Medicare Part A but works until he turns 65 years and 2 months. His dependent spouse, who is age 62, can elect 33 months of COBRA coverage (36 months less three months – Medicare becomes eligible on the first day of the month in which the person turns 65).

Unfortunately, the above interpretation has caused confusion among employers and claim payers. The Internal Revenue Service issued Letter Ruling 2004-22 that clarified that the initial wording, allowing the spouse 36 months from the point the employee chooses not to continue coverage, is not the intent of the Law. They essentially upheld the second interpretation above.

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