

### 3 Legal Takeaways For Oil And Gas Sector Post-Hurricane Ida

By **Keith Goldberg**

*Law360 (August 31, 2021, 10:24 PM EDT)* -- Hurricane Ida is the latest storm to wallop key Gulf Coast locations for the U.S. oil and gas industry, and like previous storms, it will leave plenty of litigation in its wake.

Ida, which struck the Louisiana coast on Sunday, forced the shutdown of offshore drilling in the Gulf of Mexico as well as that of several refineries, petrochemical facilities, pipelines and a major port in the Bayou State.

The industry, which is largely still in damage assessment mode, has learned from past Gulf storms to craft tighter contractual and insurance provisions to deal with damages and service disruptions. Still, attorneys say there are enough gray areas that significant litigation remains likely in the future.

"The effects of the hurricane last well past when the storm moves through," Holland & Hart LLP energy litigation partner Chris Chrisman said.

Here are three takeaways regarding Ida's impact on the oil and gas industry:

#### **Damage Will Take Time to Assess**

Compared to the clear and obvious impact on the power sector — miles of felled transmission lines and widespread outages, including the entire city of New Orleans — Ida's impact on oil and petrochemical facilities is still being determined, which means the scope of the damage won't be immediately apparent, attorneys say.

Many facilities shut down before Ida made landfall as a Category 4 hurricane. While some facilities including pipelines have restarted, others have yet to be fully accessed or determined whether they can start back up again given the widespread power outages in the region.

"They have to start back up, and only then are those [facilities] going to be surveyed and evaluated to see what kind of damage they suffered and whether they can come back online," Chrisman said.

Environmental and safety liabilities will be the most immediate issue, attorneys say. Once those are assessed, then attention will shift to potential liabilities resulting from any service disruptions. Other issues loom further back in the litigation queue, including insurance and workers' compensation coverage.

"Those are the kind of things we're not going to know, and those are the kinds of legal issues that aren't presented upfront for months, if not years," Chrisman said. "But they're still going to be out there."

### **Contracts Have Incorporated Lessons From Past Storms ...**

Baked into most oil and gas contracts are so-called force majeure provisions that allow companies to suspend contractual obligations such as production requirements due to circumstances beyond their control, such as natural disasters.

The energy industry grappled with that in the aftermath of previous Gulf storms including Hurricanes Katrina, Rita and Harvey. Attorneys say companies have gotten better at allocating risks in contracts and crafting more detailed force majeure provisions when it comes to disruptions of oil and gas supplies.

"The contracting parties have gotten a lot smarter about how to define firm purchases ... and giving you room for exit from a potentially large claim, either as a marketer or as an ultimate purchaser," said McKool Smith PC's Willie Wood, who focuses on energy litigation.

Given the increased integration of the oil and gas industry from the wellhead to a petroleum product's end use, companies are also increasingly accounting for force majeure events at other points on the oil and gas supply chain even if their facilities are able to run, attorneys say.

"Sellers who have specific sources of supply ... [are] making sure the contract language is very clear that if that path is disrupted, they're entitled to the benefits of force majeure," said Kirstin Gibbs, who co-leads Morgan Lewis & Bockius LLP's energy industry team.

Reed Smith LLP partner John Ellison, who represents policyholders in insurance litigation and has done Katrina-related work, said Katrina and subsequent storms also prompted changes in how energy companies secure insurance coverage. Companies themselves bought more flood insurance protection, while Louisiana lawmakers and insurance regulators crafted stricter rules over policy exclusions, Ellison said.

"Policyholders have more weapons available to them to get the coverage they are due," said Ellison.

### **... But Not All Contracts Will Be Bulletproof**

Energy companies may have tried to de-risk their contractual obligations, but litigation is unavoidable after a storm as large and destructive as Ida, attorneys say.

For starters, given the Gulf Coast's historic and increasing propensity for hurricanes, energy companies are expected to be better prepared to operate in such conditions. Attorneys contrasted Ida with Winter Storm Uri, which unexpectedly froze gas supplies and infrastructure in Texas earlier this year.

A hurricane "may temporarily excuse you for performance, but you're expected to be prepared to perform," said Jeff Nichols, who co-heads Haynes and Boone LLP's energy industry group. "Winter Storm Uri was much more of a shock to the system in terms of legal documentation. People were much more aware of hurricanes being force majeure issues, but nobody was really prepared for a winter storm outage."

As always, litigation will usually come down to the specific language in a contract. Attorneys say hurricanes might not necessarily be a force majeure issue in some contracts, while others may be written loosely enough to create an expectation that companies will still be able to find other ways to transport gas or petroleum products if a storm has disrupted the main supply route, for example.

"That's really what a lot of [Winter Storm Uri] litigation pending in Texas is about — whether the contracts clearly delineate a specific path in order to excuse performance," Gibbs of Morgan Lewis said. "Hopefully we'll get some clarity on those issues when we start getting court decisions from Winter Storm Uri."

Even if Ida-related damages are covered by companies' insurance policies, there are still bound to be fights over the extent of that coverage, said Reed Smith's Ellison. That includes whether an invocation of force majeure can be directly tied to the storm, such as if a company made a reasonable effort to restart operations or can make up any service shortfalls elsewhere.

Ellison said he's been involved in matters where insurers have challenged the direct, causal link between hurricanes and force majeure claims. And with the oil and gas industry already financially reeling from the COVID-19 pandemic before Ida hit, Ellison said he expects insurers to use the pandemic to draw a harder line with companies.

"I think unfortunately for policyholders, [the pandemic] is likely to be a mantra that is going to be used by a lot of insurance companies to argue that the amount of coverage is less than the policyholder thinks it should be," Ellison said.

--Editing by Alanna Weissman and Daniel King.