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Webinar

SEVERE WEATHER EVENTS

**THE WINTER STORM URI EXAMPLE: UPDATES, WHAT'S NEXT,
AND LESSONS LEARNED FOR THE ENERGY SECTOR**

PRESENTERS: Brad Fagg | Kirstin Gibbs | Michelle Pector | Sergio Oehninger | Jim Tynion

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Presenters



Brad Fagg



Kirstin Gibbs



Michelle Pector



Sergio Oehninger



Jim Tynion

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Introduction: Themes, trends, and takeaways for the Energy Sector

- Winter Storm Uri example, but impacts that are increasingly associated with other blackouts, summer storms, floods, etc.
- Issues are multi-faceted, diverse, sometimes conflicting, but at the end of the day interrelated
- Timelines, evolution of matters
 - Some are immediate (before the ice has melted)
 - Some incubate for years
- Market impacts, potential structural changes
- Importance of reaching out to counsel early when these events occur

Overview

- Texas litigation update (*Michelle Pector*)
- Commercial impacts, force majeure (*Kirstin Gibbs*)
- Finance and markets (*Jim Tynion*)
- Government and other investigations (*Brad Fagg*)
- Special issues for insurance coverage (*Sergio Oehninger*)

Texas litigation update

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The Texas Litigation Example: An Avalanche of Claims Asserted Following Storm Uri

- Severe weather events involving injury, property damage, death, and business interruption are fertile grounds for litigation
- Plaintiffs' lawyers follow severe weather events closely for litigation opportunities
- The aftermath of Storm Uri has resulted in hundreds of lawsuits being filed across Texas in a four month period and still continuing
- Hundreds of defendants in the gas and power industries have been sued
- Many defendants sued repeatedly in different courts by the same firms using different plaintiffs

Who Is Being Sued

- Grid operator
- Utility companies
- Power generators
- Power distribution companies
- Power transmission companies
- Natural gas operators
- Natural gas suppliers
- Natural gas pipeline operators and owners
- Retail energy companies
- Renewable energy suppliers
- Counterparties

Types of Cases Being Filed

- Mass tort cases
- Price-gouging class actions
- Commodity contract disputes
- Force majeure disputes
- Wrongful death cases
- Property damage cases
- Personal injury lawsuits
- Insurance recovery disputes
- Bankruptcies

Tort Claims Being Asserted by Plaintiffs

- Negligence
- Gross Negligence
- Product Liability and Strict Liability
- Negligent Misrepresentation and Intentional Misrepresentation
- Fraud
- Civil Conspiracy
- Breach of Continuing Duty to Warn
- Tortious Interference with Contract
- Violations of Texas Deceptive Trade Practices Act
- Conversion

Contract and Warranty-Based Claims Being Asserted

- Breach of Contract
- Breach of Express Warranties
- Breach of Implied Warranty of Fitness for Particular Purpose
- Declaratory Judgment
- Unjust Enrichment
- Applications for Temporary Restraining Orders
- Applications for Temporary/Preliminary Injunctions

Relief Being Sought by Plaintiffs

- Compensatory Damages
- Actual Damages
- Consequential Damages
- Treble Damages
- Punitive/Exemplary Damages
- Prejudgment and post-judgment interest
- Attorney's fees, costs and expenses
- Costs of Court
- Declaratory Relief
- Injunctive Relief

Initial Procedural Defense Remedies Available

- Make a Request for Dismissal/Non-Suit to Plaintiffs' counsel
- Removal to Federal Court based on CAFA, diversity or federal question
- Motion to Transfer to Multi-District Litigation Panel
- Motion to Transfer to Another Court or jurisdiction
- Motions to Dismiss
- Pleas to Jurisdiction
- Special Appearance
- Various Procedural and Substantive Challenges to Injunction Proceedings

The Texas MDL and Removal Example

- More than 100 plaintiffs sued in excess of 150 defendants – case removed under CAFA/mass tort exception; remand efforts ongoing in federal court
- Same Plaintiffs' firm filed a second case with less than 100 plaintiffs suing in excess of 300 defendants to avoid this removal exception
- After more than 100 similarly situated cases were filed asserting claims of negligence and gross negligence in connection with personal injury, property damage and death cases, a Motion to Transfer to a Texas MDL filed
- The Motion was subsequently granted and all tag along cases stayed pending the appointment of the MDL Judge, which has now occurred
- Transfer to MDL provides economic savings, continuity in legal decisions, discovery efficiencies and more manageable litigation

Commercial impacts, force majeure

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Impact of Curtailment of Natural Gas Supply During Severe Weather Events

- Often parties contract for purchases and sales of natural gas using model agreements such as the “NAESB” or “ISDA” master agreements
- Cover standard may be selected for breach of performance by seller or buyer
- Typically, force majeure excuses performance and cover damages do not apply
- Questions to consider:
 - Has force majeure been modified by any Special Provisions to the Base Contract or the Transaction Confirmation?
 - Does the Transaction Confirmation include force majeure language to cover dedicated seller supplies or reserves, or delineate deliveries along a specific path to a point?
 - Are purchases and sales at a pooling point where alternatives are readily available?

Natural Gas Supply Disputes Stemming from Winter Storm Uri

- Was performance actually suspended?
 - Gas received by buyer during Winter Storm Uri
- Was proper notice provided?
 - When was it communicated?
 - How was it communicated?
- Does the seller have an obligation to provide gas when prices are exorbitantly high?
 - What are “reasonable efforts”?
- Has the Seller’s transportation path been sufficiently detailed to excuse performance in the event of qualifying events of force majeure?

Finance and markets

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Project Finance Model

- Force majeure usually does NOT suspend debt repayments
- Sponsor/Owner Risk allocation/mitigants
- Renewable Projects—Tax equity Concerns
- ISDA/Hedge financings

Markets/Regulatory considerations

- Prudent Utility Standards
- FERC/NERC rules
- State Regulators
- Texas reactions to Storm Uri

Government and other investigations

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Investigations

- Preservation orders
 - FERC
 - CFTC
- Pressure on agencies to push jurisdictional boundaries
- Tensions with internal investigations, third-party litigation, commercial issues, and disputes

Special issues for insurance coverage

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Maximizing Insurance Assets In The Wake Of Extreme Weather Conditions

- Historic extreme weather caused tremendous damage and suffering, impacting countless businesses.
- Pursuing insurance claims can be a crucial first step in recovery.
- The Insurance Council of Texas, a trade association that represents insurance carriers, announced that “the arctic blast that hit Texas in February of 2021 could be **the largest insurance claims event in the state’s history.**”
- However, maximizing insurance assets following extreme weather events can be a complicated process with significant hurdles and hidden challenges.

Insurance Coverage for Property Damage, Business Losses, and Liabilities

Goals of Insurance Section:

- Provide an understanding of potentially available insurance coverages
- Outline steps to preserve claims, including notice to the insurer and documenting statements/proofs of loss
- Discuss the pros and cons of filing & pursuing a coverage claim

Insurance Coverages Potentially Triggered by Extreme Weather Conditions

- Property Damage Coverages
 - Commercial Property
 - Business Interruption
 - Contingent Business Interruption
 - Service Interruption
- Liability Coverages
 - Commercial General Liability (CGL)
 - Directors and Officers Liability (D&O)
 - Errors & Omissions (E&O)

Insurance for Property Damage, Business Losses, and Liabilities

- Coverage will depend on policy language, the specific circumstances, and applicable state law
- Filing a notice of claim and proof of loss to protect rights
- Future events may impact claims for coverage

Preserving Claims; Recovering Insurance Proceeds

- Notice to Carrier
 - Provide notice to the insurance company “promptly” or “as soon as practicable” in the event of loss.
- Proofs/Statements of Loss
 - Establish a timeline, including the issuance dates and durations of civil authority orders and supplemental orders that limited or prohibited access.
- Coverage Litigation
 - Policyholder may find it prudent to initiate its own coverage action in an appropriate forum to preserve and pursue insurance recoveries.

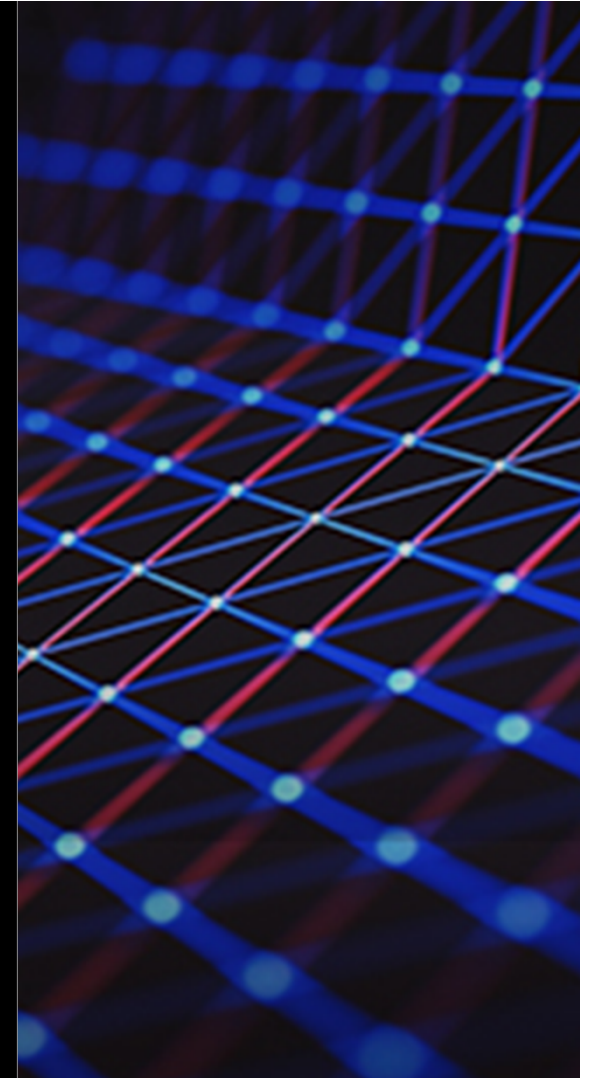
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



Biography



Brad Fagg

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With emphases on the energy and federal procurement industries, Brad Fagg guides sophisticated commercial clients through high-stakes contractual and regulatory disputes, and government and internal investigations. He also advises on predispute counseling matters. As co-leader of both the firm's energy litigation practice and government contracting practice, Brad has handled scores of major matters for utilities and other energy companies. He often serves as lead counsel at trial and in appellate proceedings. Brad is the pro bono partner for the firm's Washington, DC office.

Biography



Kirstin Gibbs

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Kirstin Gibbs, co-leader of the firm's energy industry team, as well as a leader of the climate change and sustainability working group, represents pipelines, producers, traders, marketers, utilities, and end users, on a host of issues. She handles transactional matters related to the development of new oil and gas infrastructure and regularly provides assistance with negotiation of midstream transportation and storage agreements, complex asset management agreements, and commodity transactions. Kirstin also counsels global clients interested in addressing climate change and sustainability initiatives by investing in clean energy technologies, including renewable natural gas and hydrogen, and decarbonizing their operations.

Biography



Michelle Pector

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Michelle Pector is a seasoned trial lawyer and trusted counselor who is co-chair of Morgan Lewis’s energy litigation practice, the Chair of ML Women and a member of the firm’s COVID-19 Texas Taskforce. For two decades, Michelle has represented energy and technology clients in a wide range of business, consumer and employment disputes with an emphasis on complex commercial litigation, severe weather litigation, personal injury matters, trade secret disputes, business fraud, supply chain disputes, alleged corporate wrongdoing, consumer litigation, and M&A disputes. Michelle also has significant experience defending class actions for energy clients and handling injunction proceedings.

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Biography



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Michelle Pector is a seasoned trial lawyer and trusted counselor who is co-chair of Morgan Lewis’s energy litigation practice and a member of the firm’s COVID-19 Texas Taskforce. For two decades, Michelle has represented energy and healthcare clients in a wide range of business and employment disputes with an emphasis on complex commercial litigation, injunction proceedings, trade secret disputes, business fraud, supply chain disputes, alleged corporate wrongdoing, consumer litigation, and M&A disputes. Michelle also has experience defending class actions for energy clients.

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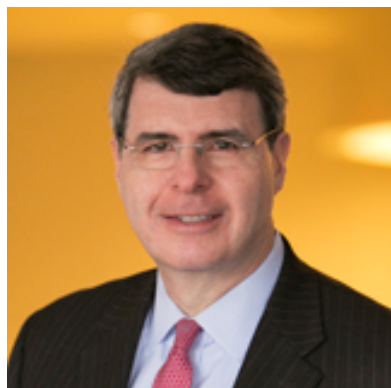
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Sergio Oehninger represents companies in complex insurance coverage and bad-faith disputes in the United States and around the world. He counsels multinational corporations on insurance coverage and risk management issues arising in various industries, including financial services, retail, energy, technology, real estate, construction, and hospitality. Sergio's advice focuses on risks such as cyber and data breaches; commercial general liability; directors and officers; professional liability; employment practices; property and casualty; business interruption; excess, umbrella, and integrated risks; specialized insured and reinsured risks under occurrence based or claims-made policies; and surety bond risks. More recently, Sergio has counseled dozens of clients on insurance recoveries for COVID-19-related business interruption and other claims.

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Biography



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With experience in project finance and renewable energy matters, James T. Tynion III counsels clients on financings and investments. He focuses his practice in the energy and related infrastructure industries, and represents companies in construction, term and tax equity project financings, greenfield development, and mergers and acquisitions (M&A). Jim has been active in the US wind energy industry for more than 25 years, and is one of the pioneers in the wind, solar, and renewables tax equity, finance, and M&A markets.

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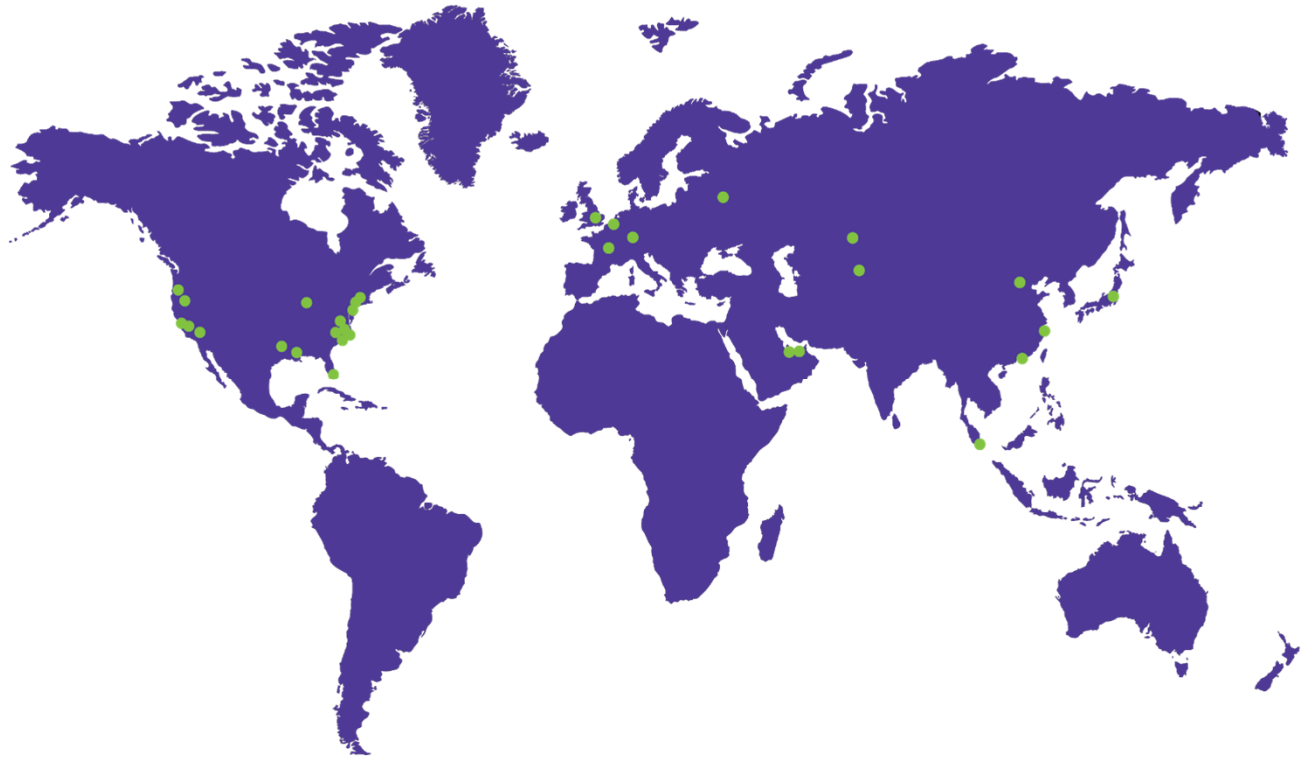
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