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## Texas Storm Impact on the Energy Sector – A Checklist for Policyholders

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As winter storms continue to grip Texas, the energy sector has been hit hard. Some companies have been left without power and water for days on end. Others—like power generators—have suffered from frozen equipment that has left them unable to provide much-needed services. Freezing conditions have caused extensive property damage (e.g., water damage due to ruptured pipes, collapsed equipment and roofing due to ice and snow), and many roads remain impassable.

In addition to the extraordinary property loss and business interruption, many in the energy sector are also concerned about potential lawsuits and investigations. In response to the ERCOT-managed power grid's inability to meet Texas' enormous demand, both state and federal regulators recently announced plans to investigate the cause of the ongoing Texas energy crisis. On Tuesday, Texas Governor Greg Abbot issued an executive order "to review the preparations and decisions by ERCOT so we can determine what caused this problem and find long-term solutions."<sup>1</sup> The same day, the Federal Energy Regulatory Commission and the North American Electric Reliability Corporation likewise announced a "joint inquiry into the operations of the bulk-power system during the extreme winter weather conditions currently being experienced by the Midwest and South central states."<sup>2</sup> The scope of these investigations is likely to expand with the effects of the energy shortage—such as recent reports of declining water pressure and water treatment throughout the state.<sup>3</sup>

While it remains unclear whether government investigations will result in findings of civil or criminal liability, past instances of mass outages indicate a high likelihood of civil litigation—including class actions—for energy price spikes, personal energy, property damage, and other losses caused by the lapse in energy generation. Indeed, Plaintiffs' lawyers are publicly soliciting clients and alleging that some companies took undue advantage of the scarcity in production by charging exorbitant prices for energy. While the viability of those suits remains unclear, companies must be prepared to face them.

Given the extreme magnitude of this weather event, Texas may be dealing with the aftermath for months, and insurance—both for an insured's own losses (first-party) and for damages claimed by others (third-party)—will play an integral part of those recovery efforts. Given the flood of claims we are sure to see, businesses need to fully understand and take advantage of the breadth of their coverage now rather than risk being last in line.

### First-party insurance

- **Property Policies** — These policies principally insure against damage to the insured's property. These may also offer business interruption coverage (lost revenue due to an interruption in one's operations), contingent business interruption coverage (lost revenue due to an interruption in the operations of one's

<sup>1</sup> <https://www.foxnews.com/politics/abbott-orders-investigation-texas-energy-company-blackouts-freezing-temperatures>.

<sup>2</sup> <https://www.ferc.gov/news-events/news/ferc-nerc-open-joint-inquiry-2021-cold-weather-grid-operations>.

<sup>3</sup> <https://www.nbcnews.com/news/us-news/texas-contending-water-nightmare-top-power-crisis-n1258208>.

customers or suppliers), service interruption (losses caused by the interruption of incoming or outgoing utilities and other services), “extra expense” coverage (expenses incurred to resume or continue normal business operations), and transit coverage (loss of property in transit). There may also be coverage for interruptions caused by government acts, including municipal and state orders and decisions. These policies may protect power generators who could not come online due to frozen equipment, as well as many other businesses otherwise impacted by the outages. But a key issue will be the waiting periods included in the policies; indeed, some policies include 45-day waiting periods, only after which the policies’ business interruption coverage becomes available. For more information on coverage for business interruption losses, read our recent alert, [Southern Exposure: Recovering Business Interruption Loss From Winter Storms & Rolling Blackouts](#).

- **Pollution** — These policies are often hybrid first-party/third-party policies and may contain coverage for clean-up efforts and other first-party losses due to the release of pollutants caused by this extreme weather event.
- **Specialized** — Certain industries, like the energy industry, have specialized coverage that may come into play. For example, certain policies geared towards energy generators offer coverage for output shortfalls or forced outages. It is critical for companies to fully understand the scope of their insurance program to fully take advantage of any specialized coverages.

## Third-party insurance

- **Commercial General Liability (CGL)** — These policies insure against many of the perils normally associated with owning a business. For example, if a power company started a fire that burned down a house, or if a landlord’s unsafe premises injured its tenants, a CGL policy may cover the ensuing claims. These policies may also provide coverage for suits alleging that some sort of negligence led to property damage or injury during the storm or outages. Because CGL policies are designed to be front-line coverage for businesses confronting third-party claims, businesses should immediately notify them in the event of any third-party claims or demands arising out of this storm.
- **Professional Liability/ Errors and Omissions (E&O)** — These policies insure against, among other things, design defects. After a disaster, particularly where infrastructure is involved, it is common to see claims against those responsible for designing and managing failed systems. For example, a local power company or its contractors may be sued for designing a distribution network that was unreasonably vulnerable to ice storms. Professional liability policies may provide some relief in covering such claims.
- **Directors and Officers (D&O)** — These policies protect company management (and often the company itself) when sued for wrongful acts arising out of the management-related misconduct. As with professional liability claims, it is common after a disaster to see certain high-profile individuals in companies accused of mismanaging the disaster. For example, an executive of a power generator or natural gas company may be sued for disregarding weather-related safety protocols or warning signs. Companies may also be sued by shareholders if the company’s value drops precipitously. These policies may also provide coverage for government investigations.

This is not an exhaustive list of all types of coverage and terms differ significantly from policy to policy. Because of the flood of claims sure to follow under all types of coverage, companies need to act now to understand the coverage available to them, make the necessary claims, and document their losses.

The following checklist contains general advice which may assist policyholders with documenting losses, assessing available first- or third-party coverage, and submitting an insurance claim.

## **1. Manage your property/business operations and document your claim appropriately.**

- a. Act to reasonably protect and preserve property from loss or damage. Many first-party policies have so-called “sue and labor” clauses requiring the insured to mitigate covered loss or damage, with the associated cost of this mitigation payable by the insurer to the extent of its interest.
- b. Document the scope and nature of the damage to insured property, or, as appropriate, to the operations of the insured’s business. This may include everything from taking photographs of damage to creating and preserving records of business operations and your efforts to continue or resume your business as soon as possible.
- c. Permit the insurer reasonable access to inspect and review the damaged property or records relevant to your claim.
- d. Act diligently in repairing damaged property and in restoring business operations interrupted by the storm. Let your insurer know before making significant repairs to (or other disposition of) covered property.
- e. Seek an advancement of funds for both property damage and business interruption, particularly when some substantial quantum of covered loss and damage is known. Policyholders should keep in close communication with insurance adjusters to ensure that appropriate advances are paid in a timely manner.
- f. In the event that third-parties are responsible for some portion of the insured’s loss or damage, the insured must not compromise claims against such third-parties without the insurer’s consent.

## **2. Know your insurance policy.**

- a. Review your policy with your insurance broker, counsel or other insurance professional to understand what is covered, what is excluded and what obligations you have as a corporate policyholder.
- b. Commercial property policies may insure more than just the cost to rebuild or to replace damaged property, related income lost from business interruption, and the other coverages noted above.
- c. Be familiar with the attendant limitations, such as deductibles (or waiting periods), and sublimits to take full advantage of available coverage.
- d. All policies may have exclusions that should be considered.

**3. Comply with policy conditions regarding notice and proof of loss.**

- a. Be aware of what events require notice to the insurer, what information needs to be submitted with your claim and what specific deadlines the policy includes for providing this information.
- b. If you are unsure whether notice is appropriate or what information should be included with your notice, contact your insurer, your insurance broker, counsel or another insurance professional.
- c. Many property policies require not only “notice” to an insurer, but the submission of a formal proof of loss. For property damage claims, this submission will include details regarding the scope and value of the damage claimed by the insured.
- d. For business interruption claims, the proof of loss will include the value of the lost income for which the insured is seeking payment. In complex claims, preparation of the proof of loss may take months of work and often requires the assistance of one or more professionals, including accountants, architects, auditors, engineers or others.
- e. Check to see if your policy insures the cost of professional fees incurred by the insured to prepare and certify the details of an insured’s loss or damage.
- f. Take note of the deadline to submit the proof of loss, as well as other deadlines imposed by your policy. In the event that such deadlines or other policy conditions cannot reasonably be met despite the insured’s reasonable diligence, the insured should obtain advance consent or other relief from the insurer, which should be documented in writing.
- g. Many policies will include contractual limitations periods requiring insureds to bring suit within a certain number of years from the date the insured discovered the loss. Note that under Texas law, a contract that purports to impose a limitations period that is less than two (2) years is void. See TEX. CIV. PRAC. & REM. CODE § 16.070.

**4. Establish and follow a communications protocol with your insurer.**

- a. Establish and follow a clear communications protocol with the insurer regarding the claim.
- b. Communicate regularly with the insurer regarding the claims process, either directly or through an intermediary (broker or counsel).
- c. Identify one point of contact to communicate with the insurer, through whom all communications will be directed upon appropriate review by the necessary stakeholders.
- d. Determine from the insurer’s adjuster exactly what the insurer’s expectations are, including requests for information and the anticipated timing for fulfillment.
- e. Establish and document corresponding expectations regarding the anticipated schedule for receipt of insurer’s position regarding coverage and any payments.
- f. Confirm all substantive communications from the insurer promptly and in writing, including (1) requests for information; and (2) positions regarding coverage.

- g. Respond to requests for information from the insurer on a timely basis and confirm receipt of the requested information in writing.
- h. Do not speculate regarding either the cause or amount of property damage or related business interruption loss in internal communications among the stakeholders responsible for managing the insurance claim.
- i. Keep attorney-client communications confidential. Any materials prepared in anticipation of litigation, including documents created on behalf of the insured by brokers, consultants or other agents, should be kept confidential.