

# THE TIMES THEY ARE A CHANGIN'

Litigation Issues Arising out of Climate  
Change and Green Energy Transition



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# PRESENTATION OVERVIEW

1. “Transformational” litigation against and by governments
2. Federal regulation. *But see West Virginia v. EPA*
3. Litigation over land use and permitting
4. Litigation over “climate effects”
5. Risk mitigation tools — insurance and contractual provisions

# PROLIFERATION OF LITIGATION

“The legal profession’s concern over climate change isn’t new (the first climate lawsuit was filed in 1986), but what is new is the unprecedented scale and diversity of claims related to climate change across the United States and internationally.”

- [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2021-2022/january-february-2022/climate-litigation-rising/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2021-2022/january-february-2022/climate-litigation-rising/)

# “TRANSFORMATIONAL” LITIGATION

Claims for failure to protect natural resources and violation of human/civil rights.

Seek to bring about social change and government action

- *Milieudefensie et al. v. Royal Dutch Shell* (2019)  
[plc.https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339/](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339/)
- *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (affirming summary judgment in 2015 lawsuit by group of 21 Oregon teenagers)

# STATE AND LOCAL GOVERNMENT SUITS

## CONSUMER PROTECTION

- States Attorney General versus Oil & Gas Majors and Trade Groups
- “The State alleges that Defendants developed a widespread campaign to deceive the public about the dangers of fossil fuels and to undermine the scientific consensus linking fossil fuel emissions to climate change.”

*Minnesota v. Am. Petroleum Inst., No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021)*

# STATE AND LOCAL GOVERNMENT SUITS

## FIRST AMENDMENT CHALLENGE TO MUNICIPAL SUITS

- ExxonMobil sought pre-suit discovery against municipal and NGO plaintiffs over alleged coordinated lawsuits to engage in intentional tortious conduct and abuse of process to chill or affect speech in violation of the U.S. and Texas Constitutions.
- District Court denied special appearance, appellate court reversed finding lack of minimum contacts to support personal jurisdiction.
- City of San Francisco v. Exxon Mobil Corp., No. 02-18-00106-CV, 2020 WL 3969558 (Tex. App.-Ft. Worth, June 18, 2020), pet. denied (Feb. 18, 2022)

# CORPORATE ESG DISCLOSURES

## CLAIMS OF CORPORATE MISREPRESENTATIONS

- Lawsuits over disclosure of risks posed by climate change and companies' efforts to address climate change ("Green Washing")

## SEC PROPOSED DISCLOSURE RULE

- "climate-related risks that are reasonably likely to have a material impact on [a company's] business, results of operations, or financial condition,"
- "climate-related financial statement metrics in a note to their audited financial statements
- Supply chain member compliance?
- <https://www.sec.gov/news/press-release/2022-82>



# FEDERAL REGULATION

## WEST VIRGINIA V. EPA

- *SCOTUS upheld EPA's authority to set limits on the amount of pollution reduction that power plants need to achieve under Clean Air Act.*
- *Overtaken EPA's rule making authority "to compel the transfer of power generating capacity from existing [coal] sources to wind and solar" under Affordable Clean Energy (ACE) Rule*

*W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022)*

# LAND USE AND PERMITTING

## NGO CLAIMS OF INSUFFICIENT ENVIRONMENTAL REVIEW

- *Environmental Defense Center vs. BOEM*, 36 F.4th 850 (9th Cir. 2022)  
(challenge to fracking permit review)

# LAND USE AND PERMITTING

## EXECUTIVE ACTION

- *“Federal agencies must evaluate all relevant environmental impacts – including those associated with climate change – during environmental reviews.”*

<https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews>

# LAND USE AND PERMITTING

## TORT BASED CLAIMS

“Advances in the science of extreme weather event attribution have the potential to change the legal landscape in novel ways. Identifying the human influence in events once known as 'acts of God' is likely to inform litigation relating to claims and liability for damages. Attribution science is also leading to better predictions of the expected severity of certain types of weather-related natural disasters.”

Marjanac, S., Patton, L. & Thornton, J., *Acts of God, human influence and litigation*. Nature Geosci 10, 616–619 (2017)

# TORT BASED CLAIMS

- “Big Tobacco” claims against industry participants for fraud, negligence, products liability, nuisance and trespass.
- States Attorney Generals and municipalities
- Allegations that oil & gas majors production and promotion of fossil fuels caused or contributed to global warming.
- Recovery of costs of providing existing and new services and development of new infrastructure.

## TORT BASED CLAIMS

### COUNTY OF SAN MATEO ET AL. V. CHEVRON CORP ET AL.

- Claims against industry participants for nuisance, negligence, products liability, and trespass
- Alleged that major oil & gas companies' production and promotion of fossil fuels caused or contributed to global warming inducing a rise in sea level.

*Cnty. of San Mateo et al. v. Chevron Corp. et al*, 32 F.4th 733 (9th Cir. 2022) (remanding the case to state court)

# TEXAS CLIMATE EFFECTS LITIGATION

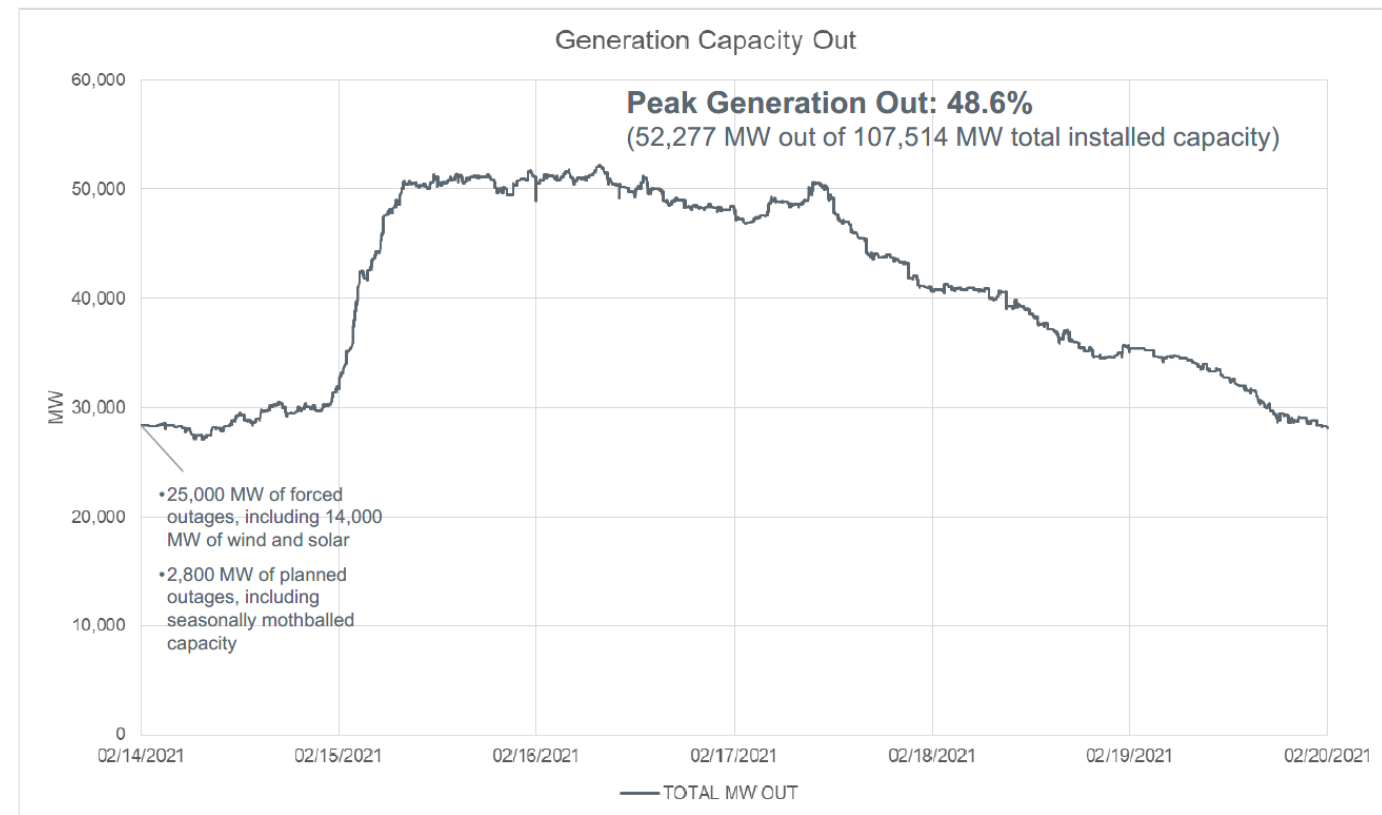


<https://www.houstonchronicle.com/business/energy/article/Did-PUC-go-too-far-in-raising-power-prices-to-the-17130255.php>



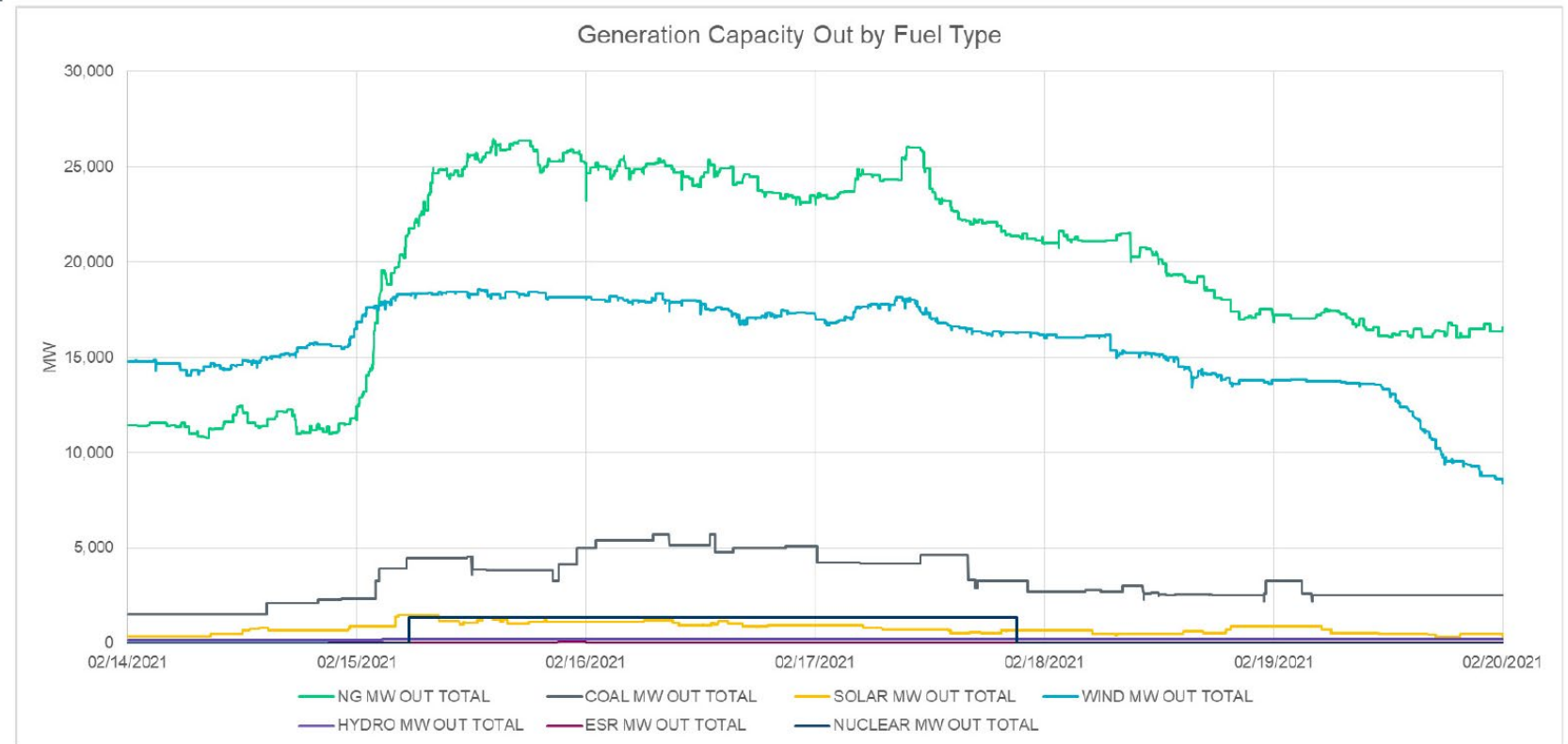
# TEXAS CLIMATE EFFECTS LITIGATION

## Generation Capacity Out February 14 – 19, 2021



# TEXAS CLIMATE EFFECTS LITIGATION

## Generation Capacity Out by Fuel Type



# TEXAS CLIMATE EFFECTS LITIGATION

## IN RE WINTER STORM URI, MDL CASE NO. 5.00140

- Plaintiffs: 450+ Insurance companies and 650+ consumers
- Defendants: ERCOT, Power Generators, TDUs, TREs, Natural Gas
- Claims: failure to weatherize equipment/operations, participation in load shedding programs, failure to secure alternative sources of electrical power/fuel under
- Causes of action: Negligence, nuisance, tortious interference, conspiracy, unjust enrichment
- Threshold Issues: duty, causation, jurisdiction

# TEXAS CLIMATE EFFECTS LITIGATION

## WINTER STORM URI OTHER LITIGATION

- Other Litigation
  - Natural Gas and Electricity Cost
    - Among Market Participants/ERCOT
    - Among Gas-Electricity Suppliers/Consumers

# TEXAS CLIMATE EFFECTS LITIGATION

## WINTER STORM URI LITIGATION IMPLICATIONS

- Resiliency/Sustainability of Energy Sources
- Liability of Public/Private Infrastructure Operators & Managers

### Tariffs and Jurisdictional Issues

- Duties to the Downstream Consumers for Contractually Supplied Goods
- Standards of Care for CO2 Generating Operations
- Supply Chain & Impracticability of Performance

# RISK MITIGATION

**INSURANCE COVERAGE**

**CONTRACT PROVISIONS**

# INSURANCE COVERAGE DISPUTES

- **LAWSUITS BY GOVERNMENTAL AND NON-GOVERNMENTAL ENTITIES CLAIMING THE DEFENDANT CONTRIBUTED TO CLIMATE CHANGE AND ITS EFFECTS**
- **MINEFIELD OF COVERAGE ISSUES UNDER CGL POLICIES**

# INSURANCE COVERAGE DISPUTES

- **KEY COVERAGE ISSUE UNDER CGL POLICY:**

**Is it a claim for damages because of personal injury or property damage?**

*E.g., Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571 (Ind. 2007) (claim seeking to compel defendant to install equipment to reduce emissions was not a claim for damages because of personal injury or property damage)



# INSURANCE COVERAGE DISPUTES

- **KEY COVERAGE ISSUE:**

**Was the damage caused by an “occurrence”?**

*E.g., AES Corp. v. Steadfast Ins. Co., 725 S.E.2d 532 (Va. 2012)*  
(claim alleging the defendant knew it was contributing to climate change did not allege an “occurrence” and, therefore, insurer had no duty to defend)

# INSURANCE COVERAGE DISPUTES

- **KEY COVERAGE ISSUE:**

**Is the claim excluded by a pollution exclusion?**

- Issue whether naturally occurring substances like CO2 constitute a “pollutant.”
- many policies now explicitly include anything that could contribute to global warming as a “pollutant.”

# DEFENSES TO BREACH OF CONTRACT

**FORCE MAJEURE**

**COMMON-LAW DEFENSES**

# FORCE MAJEURE PROVISIONS

- Most commercial contracts have a “force majeure” provision.
- Force majeure is a contract provision, not a legal doctrine.
- Force majeure provisions typically excuse non-performance/hinderance or extend the time to perform when performance was prevented by a defined force majeure event.
- Force majeure provisions usually do not excuse the failure to pay money (e.g., rent, note payments etc.).
- Natural disasters (flood, fire, hurricane, drought) usually qualify as force majeure events. May include supply chain interruptions.
- Foreseeable events – especially market and price fluctuations – are not force majeure events unless clearly specified. Change in regulations?

# COMMON LAW DEFENSES

**IMPRACTICABILITY**

**FRUSTRATION OF PURPOSE**

# IMPRACTICABILITY

- Most states (including Texas) recognize and accept the common-law impracticability doctrine as a defense to breach of contract.
- Includes impossibility and illegality of performance.
- Based on the Restatement (Second) of Contracts or equivalent common law.

# IMPRACTICABILITY

## ▶ Restatement (Second) of Contracts § 261:

“Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”

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- Impracticable when it cannot be performed without extreme and unreasonable difficulty, expense, injury, or loss to a party.
- Not applicable if the contract otherwise assigns the risk (e.g., a force majeure provision applies)



# FRUSTRATION OF PURPOSE

- Most states recognize and accept the common-law frustration of purpose doctrine as a defense to breach of contract.
- No clear recognition as a distinct common-law defense in Texas.
- Based on the Restatement (Second) of Contracts or equivalent common law.

# FRUSTRATION OF PURPOSE

## ▶ Restatement (Second) of Contracts § 265:

“Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

# FRUSTRATION OF PURPOSE

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- The frustrated purpose must be central to the contract.
- Substantial frustration requires more than impracticality or financial difficulty.
- Not applicable if the contract otherwise assigns the risk.

# FRUSTRATION OF PURPOSE

## CLASSIC EXAMPLES

- Krell v. Henry [1903], 2 K.B. 740 (the “coronation case”)
- Indus. Dev. & Land Co. v. Goldschmidt, 206 P. 134 (Cal. Ct. App. 1922)
- Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944)

# FRUSTRATION OF PURPOSE

## FRUSTRATION OF PURPOSE WAS SUCCESSFULLY ASSERTED IN A FEW CASES BASED ON COVID SHUT-DOWN ORDERS

### Examples:

- Bay City Realty, LLC v. Mattress Firm, Inc., 2021 WL 1295261 (E.D. Mich. Apr. 7, 2021)
- UMNV 205-207 Newbury, LLC v. Caffè Nero Americas Inc., 2021 WL 956069 (Mass. Super. Ct. Feb. 8, 2021)

# FRUSTRATION OF PURPOSE

## **MOST COURTS FOUND COMMON-LAW FRUSTRATION OF PURPOSE PREEMPTED BY A FORCE MAJEURE CLAUSE**

### Examples:

- In re CEC Ent., Inc., 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020)
- The Gap Inc. v. Ponte Gadea New York LLC, 2021 WL 861121 (S.D.N.Y. Mar. 8, 2021)

# TEMPORARY FRUSTRATION

## ▶ Restatement (Second) of Contracts § 269:

“Impracticability of performance or frustration of purpose that is only temporary suspends the obligor’s duty to perform while the impracticability or frustration exist but does not discharge his duty or prevent it from arising unless his performance after the cessation of impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.”

## TEMPORARY FRUSTRATION

- **VERY LITTLE CASE LAW ADDRESSING**
- **SUCCESSFULLY ASSERTED IN ONLY A HANDFUL OF CASES**
- **UNCLEAR IN TEXAS**



# DEFENSES TO BREACH OF CONTRACT

**TAKE-AWAY: COURTS WILL ALWAYS TRY TO FIND THE ANSWER IN THE TERMS OF THE CONTRACT INSTEAD OF IN COMMON-LAW DOCTRINES**

**IF YOU WANT PROTECTIONS, PUT THEM IN THE CONTRACT**



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