

Texas Coverage Suits Come As Court Weighs Utility Immunity

By Eli Flesch

Law360 (February 21, 2023, 9:58 PM EST) -- Large businesses operating in Texas are suing their insurers for coverage for damages from a 2021 winter storm, just as the Texas Supreme Court is weighing whether the state's electric grid operator should be immune from suits.

The coverage suits — including a \$400 million dollar bid from a Samsung unit seeking coverage for a damaged semiconductor chip manufacturing facility — have hit courts in recent weeks, approaching the two-year deadline in many policies to bring legal action connected to Winter Storm Uri claims. The 2021 freeze led to significant blackouts in freezing temperatures.

The failure to properly manage Texas's power needs during the storm has put the Electric Reliability Council of Texas, or ERCOT, in the crosshairs of a number of suits, including one from a group of insurance carriers seeking to recoup their storm payouts. Insurance professionals told Law360 that a decision from Texas' top court finding the electric operator immune from such suits could have big consequences for Texans.



A sign warns of icy conditions on Interstate Highway 35 on Feb. 18, 2021, in Killeen, Texas. Winter Storm Uri led to significant blackouts in freezing temperatures, killing more than 200 people. (Joe Raedle/Getty Images)

"The scale and scope of the damages suffered by Texas business and the citizenry is breathtaking," said Marc Gravely of the Texas firm Gravely PC. An immunity ruling, he said, would be "a huge blow to the economy of Texas — both to Texas businesses and individuals who have suffered very real damages because of the actions of ERCOT."

Whether ERCOT will face the insurers' lawsuit depends mostly on whether the Texas Supreme Court believes that it's entitled to governmental immunity even though it was created as a nonprofit organization. In a January hearing, the grid operator's counsel told the court that it performs public functions and has no autonomy from the state.

In 1996, the Public Utility Commission of Texas, a government agency, certified ERCOT as an independent organization to perform certain functions for the state's electric grid. The Fourth Court of Appeals ruled in December 2021 that ERCOT had immunity against Uri suits after a Bexar County court denied the organization's plea to the jurisdiction.

More than 100 insurance companies first sued ERCOT and other energy providers in January 2022, saying the providers were at fault for damages suffered by their policyholders during the winter storm because they didn't properly prepare for the event. The carriers said ERCOT knew the potential impact Uri could have on the state's electrical system.

More than 200 people died as a result of Winter Storm Uri. Most fatalities were the consequence of hypothermia, vehicle crashes, carbon monoxide poisoning and an inability to properly treat people with medical conditions, according to the Texas Department of State Health Services. Frozen pipes bursting in homes and commercial businesses caused much of the property damage, as is common in winter storms.

Michael John Miguel, a principal with McKool Smith who practices insurance and environmental law in the firm's Houston office, said he would expect a fairly significant bump in premiums in the short term if the Supreme Court were to find for immunity.

He added that both large and small insurers could take a financial hit if their legal avenue for recouping storm losses closes, but it would be the smaller companies most at risk of financial instability. That could in turn pressure the reinsurance companies responsible for covering storm losses incurred by insurers.

Describing his main takeaway from the allegations being made against ERCOT, Miguel said, "You're going to see brokers and insurers be a lot more proactive in looking at how their policyholders are prepared for and equipped to deal with these kinds of things."

Miguel added that the recent suits against insurers involved more sophisticated policyholders than the initial wave of claims following the storm.

Legal experts also said that insurers would likely be left without much opportunity to recover their Uri losses if the Texas Supreme Court were to find in favor of immunity.

"I believe the insurers feel they have a solid argument that ERCOT knew this could have happened and they could have prevented it with better planning, increasing capacity and reserves in advance of the 2021 storm," said Mary-Ellen King, a Thompson Coe Cousins & Irons LLP partner who represents insurance carriers.

She said the latest ice storm in Texas, in which demand for electricity didn't exceed the grid's capacity, begged the question of why that wasn't true in 2021. Hundreds of thousands were still left without power in January's winter storm, but Gov. Greg Abbott attributed those outages to local issues such as downed power lines and trees.

The property damage disputes over Uri include the Samsung suit, as well as those brought by several real estate associations seeking millions in coverage. The groups are arguing that their carriers, including Liberty Mutual, dramatically underpaid them.

In its suit, the Samsung unit said FM Global confirmed coverage under its \$2.5 billion "all risks" policy for \$126 million in damage to the facility directly resulting from freezing temperatures, but refused to cover all other losses under a "lack of services" exclusion.

Austin Energy, the public utility that operates the Samsung unit's semiconductor site, initially told

Samsung it would maintain electricity but shut down power days later, according to the suit. The facility was left without power for nearly three full days, and it took days longer to restore power to fabrication units, according to the complaint.

Texas is no stranger to property disputes that have their origins in inclement weather. In 2017, a lingering Hurricane Harvey dropped far more rain on the state than is normally expected of such storms — something that climate experts say is likely to become more common as a result of climate change. According to a report last year from the analytics company CoreLogic, Texas has the most homes at risk of hurricane-force wind damage in the U.S., at 8.8 million, but more prosaic concerns such as hail are a frequent threat.

--Additional reporting by Lauren Castle, Riley Murdock, and Ben Zigterman. Editing by Haylee Pearl and Nick Petruncio.

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