

Mintz Levin Energy & Sustainability

Energy & Sustainability Connections Newsletter

Your Law Firm Link to Industry News

NOVEMBER 2017

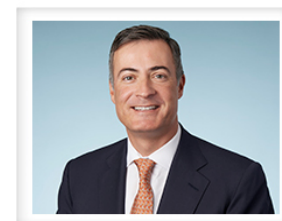
A Note from the Editors

This month's edition of Energy & Sustainability Connections brings the latest developments in energy investing, legal insights, company activity, and industry events straight to your inbox. November's **Leader in the News** is **E4TheFuture**, the leading nonprofit advocating for energy efficiency solutions in the residential energy sector, which recently welcomed ML Strategies' David O'Connor onto its Board of Directors. This month's **Legal Feature** discusses the Second Circuit's decision on make-whole premiums, rejecting the analysis of the Third Circuit in the Energy Future Holdings case. Learn the where, when, and how of the NorthEast Water Innovation Network's (NEWIN) Water Innovation Awards Night & Gala and DC's SolarWakeup Live! event in the **Event Highlights** section. Finally, learn the latest in energy legislation and funding opportunities in the **Washington Updates** section!

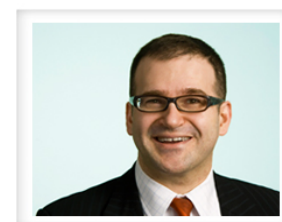
For links to industry grant opportunities and stories from the business, policy, and research sectors of the energy and clean technology industry, please [see our Energy Navigator](#).

You can [subscribe to our Energy & Sustainability Matters blog here](#).

We would also like to remind our readers that you can always ask us anything at <http://mintzedge.com/ask-anything/>. We built the MintzEdge website as a resource for entrepreneurs and investors, and hope that all of you take advantage of the site and see how it can help you.



Thomas R. Burton, III



Sahir Surmeli

RELATED INDUSTRIES

▶ [Energy & Sustainability](#)

RELATED BLOGS

▶ [Energy Sustainability Matters](#)

RELATED WEBSITES



CONTENTS

- ▶ [Leader in the News – E4TheFuture Spearheads Local and National Initiatives](#)
- ▶ [Legal Feature – Second Circuit Splits with Third Circuit on Make-Whole Premiums](#)
- ▶ [Event Highlights](#)
- ▶ [Washington Updates](#)
 - [Tax Reform & Energy](#)
 - [ANWR Legislation](#)
 - [House Hearing on Electricity Markets](#)
 - [DOE Approves New England Infrastructure and Clean Energy Project](#)

– [DOE Funding Opportunity for Offshore Wind Energy](#)

– [EPA Releases RFS Final Rule](#)

▶ [Recent M&A Activity](#)

▶ [Upcoming Events](#)

Leader in the News

E4TheFuture Spearheads Local and National Initiatives in Energy Efficiency & Welcomes ML Strategies' David O'Connor on Board of Directors

This month, we are highlighting the work of [E4TheFuture \(E4\)](#). As a leading nonprofit in clean energy, **E4** plays a critical role in promoting local innovation and residential energy efficiency solutions. The organization's [mission](#) of advancing climate protection and economic fairness is translated into impact through a [targeted, multipronged approach](#) that includes collaborating with industry stakeholders to shape federal, state, and local policy; publishing numerous comprehensive studies that inform best practices and strategies in clean energy; and advocating for emerging clean energy solutions that help build a vibrant, sustainable energy sector.

E4 is a nonprofit — endowed by the Conservation Services Group — with a long history of mobilizing support for local energy efficiency solutions. One of **E4's** most important tasks is the shaping of common sense federal, state, and regional policy advocacy enabling effective clean energy, with a strong emphasis on the residential sector. **E4** accomplishes these policy goals both directly, through strategic partnerships with lawmakers and stakeholders, as well as indirectly, through targeted research initiatives and programming that elevates and connects innovative actors in the clean energy industry.

At the national level, **E4** coordinates the [National Efficiency Screening Project](#), to develop and disseminate a National Standard Practice Manual for assessing the cost-effectiveness of energy efficiency. This widely accessible manual provides sound, unbiased guidance for developing a jurisdiction's cost-effectiveness tests. **E4** also serves on the project team developing a [National Energy Efficiency Registry \(NEER\)](#). The NEER will also enhance transparency by allowing the public and private sectors to track attributes associated with energy efficiency initiatives. Specifically, it will help states reduce emissions cost-effectively, and will support using efficiency to improve economic competitiveness and air quality.

Locally, **E4's** [Community Clean Energy Project \(CCEP\)](#) provides customers with a cooperative membership opt-in structure to provide a local, reliable, affordable, clean, and renewable electricity supply. In an effort to reinvigorate employment and networking in energy efficiency ("EE"), **E4** is also spearheading "[Faces of EE](#)," an online initiative that connects more than 2.2 million energy efficiency professionals across all 50 states working to spread awareness of the nature of their industry and influence top decision makers in clean energy policy.

On October 30, 2017, **E4** [welcomed](#) five new exceptional leaders to its board of directors, rounding out an impressive roster of local leaders committed to securing a better future for the clean energy industry. Among the new board members is Mintz Levin's own [David O'Connor](#), the Senior Vice President for Energy & Clean Technology at ML Strategies. David served as the Massachusetts commissioner of energy resources from 1995 to 2007, where he developed and managed energy policies and programs. Under his leadership, Massachusetts began its historical transformation of the electricity marketplace, to provide consumers with electricity supplier choice and to expand use of clean energy sources. He implemented inaugural standards for New England renewable energy use and certificate trading, oversaw electric and gas utilities' operation of \$150 million annually in energy-efficiency programs, and was a member of the Massachusetts team that negotiated the Regional Greenhouse Gas Initiative (RGGI).

We are excited to support David and **E4TheFuture** as they continue to mobilize the resources, leadership, and policy measures crucial to keeping residential energy efficiency solutions accessible and effective moving forward.

Legal Feature

A Momentive Decision: Second Circuit Splits with Third Circuit on Make-Whole Premiums; Adopts Sixth Circuit's Two-Step Approach in Selecting an Interest Rate in Chapter 11 Cramdowns

This post by Kaitlin Walsh was originally published on Mintz Levin's [Distressing Matters blog](#).

On October 20, 2017, the Second Circuit issued its long-awaited opinion on the appeals of plan confirmation taken by the first lien, 1.5 lien and subordinated noteholders in *In re MPM Silicones, LLC* ("Momentive"). With one exception, the Court determined that the plan confirmed by the bankruptcy court in September 2014 comports with Chapter 11 of the Bankruptcy Code. The Court remanded to the bankruptcy court in order to address the process for determining the proper interest rate under the cramdown provision of Chapter 11.

The Bankruptcy Code allows debtors to issue replacement notes pursuant to which deferred cash payments are made to secured creditors, but ultimately these payments must amount to the full value of the secured creditors' claims. In order to ensure that the creditor receives the full present value of its claim, the payments must carry the appropriate rate of interest. In this case, the bankruptcy court applied an interest rate based on the "formula" approach, and selected interest rates of 4.1% and 4.85% for the first lien and 1.5 lien notes, respectively. It was undisputed that these rates were below market, but the debtors asserted that this method was required by the Supreme Court's plurality opinion in the Chapter 13 case *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The Second Circuit adopted the Sixth Circuit's two-step approach in setting the cramdown interest rate on the replacement notes. Under this approach, the bankruptcy court must (i) ascertain whether there exists an efficient market and if so, apply a market rate of interest to the replacement notes or (ii) if no such efficient market exists, the court should then employ the formula approach endorsed by the Supreme Court in *Till*, which begins with the national prime rate and takes into account other factors.

Although the Second Circuit remanded the case to the bankruptcy court to determine which rate should be used, the Court noted that the senior noteholders presented expert testimony in the bankruptcy court that, if credited, would have established a market rate in the 5-6+% range.

In addition, the Second Circuit expressly rejected the analysis of the Third Circuit in the *Energy Future Holdings* case regarding the enforceability of "make-whole" premiums in bankruptcy. As noted in a previous post, available [here](#), the Third Circuit held that the debtor could not use a voluntary Chapter 11 bankruptcy filing to escape liability for a "make-whole" premium if express contractual language requires such payment when the borrower makes an optional redemption prior to a date certain. The Second Circuit has taken the opposite position, finding that the petition date becomes the maturity date for outstanding notes, given that they were not repaid ahead of time and therefore not entitled to the make-whole premium.

The Second Circuit also rejected the subordinated noteholders' arguments that they should have been repaid before a group of second-lien noteholders, determining that although the documentation was ambiguous, it did provide for the repayment of the second-lien holders ahead of the subordinated notes. Further, the panel disagreed that the appeals should have been dismissed as equitably moot, finding that given the scale of the debtors' reorganization, the possibility that the debtors may be required to provide, at most, \$32 million of additional annual payments over the next seven years, depending upon the bankruptcy court's analysis, would not unravel the plan or threaten the debtors' emergence.

Event Highlights

NEWIN's 2017 Water Innovation Awards Night & Gala

We are excited to sponsor the NorthEast Water Innovation Network's (NEWIN) 2017 [Water Innovation Awards Night & Gala](#) on December 5th in Boston. The annual event is a 150-person gala that showcases the human capital and talent in water innovation in the Northeast. We are proud to be a sponsor since the inception of this event, which is now in its second year. Mintz Levin serves as a Sustaining Member and Board Advisor to [NEWIN](#), the U.S.'s largest water innovation cluster association. For more information and to register for the gala, [click here](#). Congratulations in advance to this year's award winners!

SolarWakeup Live! Washington, DC

We are thrilled to sponsor SolarWakeup Live! Washington, DC on December 6th at Impact Hub DC. This event will feature four in-depth conversations about the solar market, with a focus on policy. All interviews will be hosted by Yann Brandt, the editor of the daily SolarWakeup newsletter. To learn more about the speakers and to register, [click here](#). If you plan to attend, we are excited to be able to offer you a 20% discount. Contact Cassie Bent at CMBent@mintz.com for the discount code.

NECEC's Annual Meeting

After a top-notch 10th Annual Green Tie Gala last month, we are looking forward to seeing the clean energy community again at NECEC's Annual Meeting on December 6th in our Boston office. The 2017 Annual Meeting will combine industry updates and discussions of 2018 NECEC priorities, along with an exploration of "digitalization" as a strategic framework for understanding the transformation underway in clean energy, the power sector, and the emerging clean economy. The half-day meeting will end with a networking reception. To view the full agenda and to register, [click here](#).

Washington Updates

Tax Reform & Energy

Returning from the Thanksgiving break, the focus on Capitol Hill remains on the possible passage of a tax reform bill. The House has approved its measure, and the Senate is expected to vote on its bill this week with the Senate Finance Committee having favorably reported out a tax bill before leaving for the holiday. Senate passage is likely, but not assured, given that the GOP can lose only two votes from their caucus — assuming all Democrats oppose the bill and Vice President Pence casts the tie-breaking vote. If the Senate does approve its bill, there is some uncertainty about what happens next. There could be a traditional conference process, with the House and Senate appointing conferees to work out the differences between the two measures. This could be risky, however, so we may instead see the House take up the Senate bill to expedite final passage.

The two bills include several energy-related provisions, but are not entirely aligned:

Investment Tax Credit: The House bill includes "orphan extenders" for various technologies including fuel cells, microturbines, and combined heat and power while eliminating the 10 percent solar ITC in 2026. The Senate bill maintains the ITC as currently written in law — not addressing the orphaned technologies that were left out of the December 2015 omnibus tax and spending bill.

Production Tax Credit: The House bill would repeal the inflation adjustment while terminating the "safe harbor" provision. The Senate bill maintains the PTC as currently written in law.

Advanced Nuclear Credit: The House bill would eliminate the in-service deadline of 2020, while the Senate bill maintains the credit as currently written in law.

Electric Vehicle Fleet: The House eliminates the credit, while the Senate maintains it as currently written in law.

Residential Energy Efficiency Credit: The House bill extends the credit for all qualified residential energy efficient property to include small wind, fuel cell, geothermal, and fuel cell, but includes a gradual phaseout for the existing 30 percent credit. The Senate bill maintains the credit as currently written in law.

ANWR Legislation

On November 8, Senator Murkowski (R-AK), chair of the Senate Energy Committee, released reconciliation legislation to raise \$1 billion in federal revenues. Due to budget reconciliation instructions to the Senate Energy Committee, the bill would be included in the final Senate tax reform bill and would authorize energy development in a portion of the Alaska National Wildlife Refuge known as the “1002 Area” or the Coastal Plain. The Congressional Budget Office estimates the legislation will raise \$1.092 billion over the 10-year budget window. According to Senator Murkowski, between royalties and federal income taxes, it will raise substantially greater revenues once production begins.

House Hearing on Electricity Markets

On November 29, the House Energy and Commerce Subcommittee on Energy held a hearing on “Powering America: Examining the Role of Financial Trading in the Electricity Markets” with testimony from Wesley Allen, CEO of Red Wolf Energy Trading Company; Vince Duane, Sr. Vice President and General Counsel, PJM Interconnection; Eric Hildebrandt, Director of Market Monitoring at California ISO; Max Minzner, Partner at Jenner & Block, LLP; Chris Moser, Sr. Vice President of Operations at NRG Energy; and Noha Sidhom, CEO of TPC Energy on behalf of the Power Trading Institute. The hearing examined the role and effects of financial trading in the nation’s wholesale electricity markets, and also tackled whether market design changes are necessary to ensure the efficiency of financial transactions and to protect against improper trading activity.

DOE Approves New England Infrastructure and Clean Energy Project

DOE has issued a Record of Decision and approved the Presidential permit for the proposed Northern Pass Transmission Line project. The 192-mile above and below ground alternating and direct current transmission system will deliver up to 1090 megawatts of low-emission hydropower from Quebec, Canada to Deerfield, New Hampshire. According to Northern Pass, it is estimated that construction of the transmission system will create more than 2,600 American jobs and provide more than \$600 million in annual energy cost savings for New England customers.

DOE Funding Opportunity for Offshore Wind Energy

The Department of Energy (DOE) has announced its intent to issue a Funding Opportunity Announcement entitled “U.S. Offshore Wind Research and Development Consortium.” Through this proposed funding opportunity, DOE plans to support the creation of a consortium that will conduct U.S.-specific offshore wind research and development (R&D) that addresses topics such as wind plant technology advancement; wind resource and physical site characterization; installation, operations, and maintenance; and supply chain technology solutions — all aimed at reducing the cost of offshore wind in the United States. The work is aimed at furthering DOE’s goal of accelerating the development of offshore wind technologies by supporting fundamental and applied research to reduce the cost of offshore wind energy to successfully compete in regional energy markets. DOE plans to select an administrator for this cooperative, public-private consortium through the Funding Opportunity Announcement.

EPA Releases RFS Final Rule

On November 30, the Environmental Protection Agency (EPA) met its statutory deadline for releasing the text of the final rule setting annual volumes for the Renewable Fuel Standard (RFS). Under section 211 of the Clean Air Act, the EPA is required to set renewable fuel percentage standards every year. This action establishes the annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in the year 2018. Relative to the levels finalized for 2017, the 2018 volume requirements for advanced biofuel and total renewable fuel are higher by 10 million gallons. The final rule can be found [here](#).

Recent M&A Activity

- November 14, 2017: Bonanza Creek reached a definitive [agreement](#) to be acquired by SandRidge Energy for \$746 million.
- November 13, 2017: Rice Energy was [acquired](#) by EQT for \$8.2 billion.
- November 10, 2017: Big Timber Wind was [acquired](#) by Con Edison Development for an undisclosed amount.
- November 9, 2017: BAE Energy Management reached a definitive [agreement](#) to acquire Jensyn Acquisition through a reverse merger.
- November 7, 2017: Hicksgas reached a definitive [agreement](#) to be acquired by DCC for \$200 million.
- November 6, 2017: Trans-Union Interstate Pipeline was [acquired](#) by American Midstream Partners for \$48 million.
- November 3, 2017: Infrastructure and Energy Alternatives reached a definitive [agreement](#) to acquire M III Acquisition through a reverse merger for \$255 million.
- November 2, 2017: Adelphia Gateway entered into a definitive [agreement](#) to acquire Interstate Energy Company for \$189 million.
- November 1, 2017: Southcross Energy Partners reached a definitive [agreement](#) to be acquired by American Midstream Partners for \$815 million.
- November 1, 2017: Rockwater Energy Solutions was [acquired](#) by Select Energy Services for \$566.21 million.
- November 1, 2017: Evoqua Water Technologies [raised](#) \$500 million in its initial public offering on the NYSE.
- October 31, 2017: Lithium Exploration Group was [acquired](#) by Altnet Systems for an undisclosed amount.
- October 30, 2017: Western Refining Logistics was [acquired](#) by Andeavor Logistics for \$1.7 billion.
- October 30, 2017: Forest Park Water Group was [acquired](#) by SUEZ North America for an undisclosed amount.
- October 30, 2017: Dynegy was [acquired](#) by Vistra Energy for \$1.74 billion.
- October 19, 2017: Inevit was [acquired](#) by SF Motors for \$33 million.
- October 19, 2017: Fenix International reached a definitive [agreement](#) to be acquired by Engie Africa for an undisclosed amount.

Upcoming Events

ClimateTECH 2017 – New York Times

November 29-30, 2017
San Francisco, CA

[More Info »](#)

EBC NH Program: New Hampshire Clean Energy Overview

November 29, 2017
Manchester, NH

[More Info »](#)

Startup School: Perfecting Your Pitch with Rob Hunter of HigherMe

November 29, 2017
Buffalo, NY

[More Info »](#)

EBC Energy Resources Program: Briefing by the DOER Division Directors

November 30, 2017
Boston, MA

[More Info »](#)

New England Environmental Industry Summit

December 1, 2017
Boston, MA

[More Info »](#)

Urban Mobility & IIoT Forum: New Models for Deployment in Smart Cities

December 1, 2017
New York, NY

[More Info »](#)

NEWIN 2017 Water Innovation of the Year Awards Night & Gala

December 5, 2017
Boston, MA

[More Info »](#)

Greening the Grid: New York's Energy Future

December 5, 2017
New York, NY

[More Info »](#)

POWER-GEN International

December 5-7, 2017
Las Vegas, NV

[More Info »](#)

NECEC's Annual Meeting

December 6, 2017
Boston, MA (Mintz Levin)

[More Info »](#)

Solar Wakeup Live! Washington, DC

December 6, 2017
Washington, DC

[More Info »](#)

New England Venture Summit

December 6, 2017
Randolph, MA

[More Info »](#)

Solar Power New York

December 11-12, 2017
New York, NY

[More Info »](#)

U.S. Energy Storage Summit 2017 – Greentech Media

December 12-13, 2017
San Francisco, CA

[More Info »](#)

TiE@20 Gala

December 13, 2017
Woburn, MA

[More Info »](#)

AEE's Year in Review

December 14, 2017
Webinar

[More Info »](#)

E2Tech Winter Newtorking Reception

December 14, 2017
Portland, ME

Finding the Value in Energy Storage

December 5, 2017

Boston, MA

[More Info »](#)

[More Info »](#)

NEWIEE Western New England Chapter Holiday Social

December 14, 2017

Easthampton, MA

[More Info »](#)

NECA Holiday Event

December 14, 2017

Boston, MA

[More Info »](#)

Contacts

Thomas R. Burton III

Member
Chair, Energy & Sustainability
(Boston)
617.348.3097
TRBurton@mintz.com

Sahir Surmeli

Member
Co-chair, Energy & Sustainability
(Boston)
617.348.3013
SSurmeli@mintz.com

Lisa Adams

Member
Intellectual Property (Boston)
617.348.3054
LAdams@mintz.com

Hannah Chapel

Associate
Corporate & Securities (Boston)
617.348.4868
HChapel@mintz.com

Ralph A. Child

Member
Environmental (Boston)
617.348.3021
RChild@mintz.com

Daniel I. DeWolf

Member
Co-chair, Venture Capital &
Emerging Companies;
Corporate & Securities (New York)
212.692.6223
DDeWolf@mintz.com

Jeremy D. Glaser

Member
Corporate & Securities (San Diego)
858.314.1515
JDGlaser@mintz.com

Ian A. Hammel

Member
Bankruptcy, Restructuring &
Commercial Law (Boston)
617.348.1724
IAHammel@mintz.com

Irwin M. Heller

Member
Corporate & Securities (Boston)
617.348.1654
IHeller@mintz.com

Kenneth E. Jenkins. PhD

Member
Intellectual Property (San Diego)
858.314.1082
KJenkins@mintz.com

Jonathan L. Kravetz

Member
Chair, Securities;
Corporate & Securities (Boston)
617.348.1674
JLKravetz@mintz.com

Cynthia J. Larose

Member
Corporate & Securities (Boston)
617.348.1732
CJLarose@mintz.com

Leah J. Pollema

Associate
Corporate & Securities (San Diego)
858.314.1494
LJPollema@mintz.com

Jeffrey R. Porter

Member
Environmental (Boston)
617.348.1711
JPorter@mintz.com

Jennifer Sacco Smith

Associate
Real Estate (Boston)
617.348.1678
JSaccoSmith@mintz.com

Chuck A. Samuels

Member
Antitrust/Energy Efficiency (Washington)
202.434.7311
CASamuels@mintz.com

Gabriel Schnitzler

Member
Real Estate (San Francisco)
415.432.6004
GSchnitzler@mintz.com

Nada I. Shamonki

Of Counsel
Litigation (San Diego)
310.586.3208
NIShamonki@mintz.com

Terri Shieh-Newton, PhD

Member
Intellectual Property (San Francisco)

Paul H. Dickerson
Of Counsel
Corporate & Securities (Washington)
202.460.9286
PHDickerson@mintz.com

Joanne Dynak
Project Analyst (Boston)
617.348.4415
JDynak@mintz.com

Meryl J. Epstein
Member
Corporate & Securities (Boston)
617.348.1635
MJEpstein@mintz.com

Gregory S. Fine
Member
Corporate & Securities (Boston)
617.348.3003
GSFine@mintz.com

Susan L. Foster, PhD
Member
Corporate & Securities (London)
+44.20.7776.7330
SFoster@mintz.com

William C. Geary
Member
Intellectual Property (Boston)
617.348.3046
WGeary@mintz.com

Kristin A. Gerber
Associate
Corporate & Securities (Boston)
617.348.3043
KAGerber@mintz.com

R.J. Lyman
Member
Corporate & Securities,
Project Development & Finance
(Boston)
617.348.1789
RLyman@mintz.com

Audrey C. Louison
Member
Chair, Project Development & Finance
(Washington)
202.434.7380
ALouison@mintz.com

Eric W. Macaux
Associate
Corporate & Securities,
Project Development & Finance, (Boston)
617.348.1677
EWMacaux@mintz.com

Jeffrey A. Moerdler
Member
Real Estate, Communications,
Environmental (New York) 212.692.6700
JAMoerdler@mintz.com

Neal Martin
Senior Manager of Government Relations
ML Strategies (Washington) 202.434.7458
RNMartin@mlstrategies.com

David L. O'Connor
Senior Vice President for
Energy & Sustainability
ML Strategies (Boston)
617.348.4418
DOConnor@mlstrategies.com

415.432.6084
TShieh-Newton@mintz.com

Matthew T. Simpson
Associate
Corporate & Securities (Washington)
202.434.7436
MTSimpson@mintz.com

Paula J. Valencia-Galbraith
Associate
Corporate & Securities (Boston)
617.210.6854
PVGalbraith@mintz.com

Michael D. Van Loy, PhD
Member
Intellectual Property (San Diego)
858.314.1559
MDVanLoy@mintz.com

Katy E. Ward
Contract Attorney
Environmental (Boston)
617.348.1850
KEWard@mintz.com

William F. Weld
Member
Corporate & Securities
Principal
ML Strategies
(Boston, New York, Washington)
617.348.4412
BWeld@mintz.com

Daniel E. Wilcox
Associate
Corporate & Securities (Boston)
617.348.3098
DEWilcox@mintz.com

www.mintz.com

Copyright © 2017 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

6889-ENERGY