Utilities providing electric, natural gas, water and telephone service are heavily regulated by state public utility commissions and federal agencies. Unlike non-regulated businesses, public utilities may be prohibited from making more than a “reasonable” profit, may be prohibited from entering certain non-regulated business arenas, may not discriminate in rates charged to similarly situated customers, and may be required by law to provide utility services at below normal tariff rates to low income customers. Utilities are also constrained by geographic or political boundaries from expanding their presence in the global marketplace.

As a result, and in order to keep utility rates as low as possible, it has long been accepted that public utilities may, under certain circumstances, disclaim or limit their liability for losses caused by their own conduct. An early United States Supreme Court case, Primrose v. Western Union Tel. Co., 154 U.S. 1 (1894), upheld a limitation of liability in a Western Union contract, where no willful misconduct or gross negligence was alleged. Twenty-five years later, in Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921), the Supreme Court again upheld a limitation of liability, this time in a telegraph company’s tariff. Today, the law continues to favor public utilities. The majority of courts that have considered the issue have held that a public utility may, in its tariff, disclaim or limit liability for negligence, although not for gross negligence or willful misconduct. Cases adopting the “majority” view include not only those seeking recovery for economic loss, but also

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1 A tariff is a schedule of rates and services filed by a public utility with a state’s public utility commission or federal agency. Upon approval of the tariff by the agency, the tariff has the force and effect of law and is part of any contract between the utility and its customer, regardless of the customer’s knowledge or assent. Lauer v. New York Tel. Co., 231 A.D.2d 126, 129, 659 N.Y.S.2d 359, 361 (3rd Dep’t 1997); Computer Tool & Eng’g Inc. v. Northern States Power Co., 453 N.W.2d 569 (Minn. Ct. App. 1990).
actions for personal injury and property damage.²

Not surprisingly, given the expansion of the law over the last several decades protecting the rights of consumers, a number of courts have explicitly rejected the “majority” view and have held that a public utility may not disclaim or limit liability for negligence.³ These courts focus on the public policy implications of allowing monopolistic utilities to promulgate unilateral waivers as a condition of receiving a necessary service. See Municipality of Anchorage v. Locker, supra, 723 P.2d at 1265 (void as against public policy; consumers are in no position to shop elsewhere if they are unhappy about tariff limitations); The Gas House, Inc. v. Southern Bell Tel. Co., supra, 26 N.C. App. At 677-678, 217 S.E.2d at 104. As the court stated in Allen v. Michigan Bell Tel. Co., supra, 18 Mich. App. At 637, 171 N.W.2d at 692:

Implicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered. Where goods and services can only be obtained from one source (or several sources on non-competitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without. Depending on the nature of the goods or services and the purchaser’s needs, doing without may or may not be a realistic alternative.

In refusing to enforce tariff limitations, some courts also look to the fact that utilities are under a “public duty” to exercise reasonable care, and should not, therefore, be permitted to relieve themselves of liability for negligence through exculpatory language. See e.g. Abel Holding Co., Inc. v. American Dist. Tel. Co., supra, 147 N.J. Super. At 269-270, 371 A.2d at 114-115. The contractual concept of “unconscionability” also underlies some decisions refusing to adopt the “majority” view. See e.g. Pigman v. Ameritech Publ’g, Inc., supra, 641 N.E.2d at 1033 (finding tariff exculpatory clause to be unconscionable).

At the other extreme, a few courts have held that a public utility may limit or disclaim liability for both ordinary and gross negligence. See Los Angeles Cellular Tel. Co. v. The Superior Court of Los Angeles County, 65 Cal. App. 4th 1013, 76 Cal. Rptr. 2d 894 (Cal. Ct. owed for ordinary and gross negligence, even for personal injury); Professional Answering Serv., Inc. v. Chesapeake & Potomac Tel. Co., 565 A.2d 55 (App. D.C. 1989) (economic loss case).

Even where the “majority” view has been adopted, a subrogating carrier may be able to circumvent tariff defenses by utilizing several strategies. First, a close reading of the applicable tariff may reveal that the tariff,


by its own terms, does not apply to the type of negligence being alleged, or to the resulting damages. Subrogation cases against electric utilities can arise out of any number of factual scenarios: A transformer explosion might cause a power outage affecting a wide geographic area and causing economic loss only; a power surge may cause a fire in a home or business; an electric power line can fall, causing a fire; a utility employee may negligently perform repairs in a home or business, causing damage or a fire. The act or damage for which the utility seeks to be insulated from liability may simply not be within the tariff’s scope.

For example, in Michigan Basic Prop. Ins. Ass’n v. Detroit Edison Co., 240 Mich. App 524, 618 N.W.2d 32 (2000), a subrogation case involving fire damage alleged to have been caused by a power surge, the plaintiff successfully argued that the tariff limitation did not, by its terms, apply to its allegations that the utility was negligent in its fire prevention procedures and procedures relating to power transmission equipment. 240 Mich. App. at 537; 618 N.W.2d at 39. Additionally, in ZumBerge v. Northern States Power Co., 481 N.W.2d 103 (Minn. Ct. App. 1992), the plaintiff alleged that his cattle were harmed by “stray voltage.” The court ruled that the tariff only exonerated the utility from liability caused by “interruptions or disturbances” in electric service or from consequential damages resulting from the “use of service,” neither of which applied to plaintiff’s allegations. 481 N.W.2d at 107.

Utility tariffs may also be challenged in the same way that contractual exculpatory clauses are challenged. See Abel Holding Co., Inc. v. American Dist. Tel. Co., supra, 147 N.J. Super. At 269-70; Wolf v. Ford, 335 Md. 525, 644 A.2d 522 (1994) (analyzing tariff provisions as an exculpatory clause); DeFrancesco v. Western Pennsylvania Water Co., 329 Pa. Super. At 530, 478 A.2d at 1306. Thus, a tariff may be challenged on the grounds that it (1) must be strictly construed against the utility, (2) must not affect a matter of interest to the public or state, (3) must relate entirely to the parties’ private affairs, and (4) must not be unconscionable as a contract of adhesion. Id., citing, Employers Liab. Assurance Corp., Ltd. v. Greenville Bus. Men’s Assoc., 423 Pa. 288, 224 A.2d 620 (1966). See also Abel Holding Co., Inc. v. American District Tel. Co., supra, 174 N.J. Super. At 269, 371 A.2d at 114; Pigman v. Ameritech, supra, 641 N.E.2d at 1032; Municipality of Anchorage v. Locker, supra, 723 P.2d at 1265.

Finally, even courts adopting the “majority” view hold that utilities may not exculpate themselves from willful misconduct or gross negligence. Thus, allegations and evidence of gross negligence may be sufficient to circumvent utility tariffs. A subrogation plaintiff should also consider alleging other causes of action not specifically disclaimed by utility tariffs, or which might be void as against public policy if disclaimed, including causes of action for fraud or misrepresentation, and causes of action arising from violations of consumer protection statutes.

In sum, while utilities in many states are effectively insulated from liability for purely economic losses caused by service interruptions resulting from their own negligence, factual scenarios presented by typical subrogation cases may be beyond the scope of tariff disclaimers. Even where a
case arguably falls within an exculpatory provision, allegations and evidence of gross negligence or willful misconduct will, in most states, be sufficient to defeat a tariff defense. Tariff defenses are not a death-knell, and a careful analysis of the tariff and the applicable facts will be effective in overcoming utility tariff defenses in many subrogation cases.

For additional information concerning Cozen O’Connor’s Subrogation and Recovery Program, please contact:

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