

Outer Banks Power Outage May Lead to Subrogation

On July 27, 2017, during the height of the summer tourism season, a catastrophic power outage hit two islands in the North Carolina Outer Banks. As a result of the power outage, NC Governor Roy Cooper declared a state of emergency and issued a mandatory evacuation order for all visitors to Ocracoke and Hatteras Islands. According to news reports, the power outage occurred when contractor PCL Constructors, Inc. (PCL) severed a buried transmission line while working on the nearby Bonner Bridge construction project. PCL was awarded the contract by the North Carolina DOT in 2011.

On a typical summer week, the tourist population on the islands numbers in the tens of thousands. The evacuation order remained in place throughout the following week resulting in the cancellation of travel plans and a loss of income for local businesses. As a result, we anticipate insurers will receive a number of claims for business property loss and business interruption.

North Carolina has adopted the economic loss rule that prohibits the recovery for purely economic loss in tort when there is a remedy in contract. However, when a claimant has no contractual relationship with an at-fault party, the economic loss rule does not act to bar purely economic claims. *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643 S.E.2d 28 (2007). Nevertheless, negligence claims for damages covered by property insurers may still be subject to defenses or limitations based on foreseeability and just how far the law will spread its protection for economic harms. In addition, while North Carolina law allows for the recovery of lost profits in tort, proof of these losses may require the aid of expert testimony, economic and financial data, and business records of similar enterprises. *McNamara v. Wilmington Mall Realty Corp.*, 466 S.E.2d 324, 121 N.C. App. 400 (1996).

Five class action lawsuits were filed against PCL and related entities within weeks of the outage. The plaintiffs in the first class action lawsuit filed in N.C. Superior Court in Dare County on behalf of local residents and business owners (North Carolina Action). While the North Carolina Action claims that the putative class is defined to include only or predominantly residents of North Carolina, the North Carolina Action further defines the class as:

All persons and business entities who have suffered power loss to their home or business or other real property located on Ocracoke Island, Hatteras Island or elsewhere in North Carolina as a result of the Cape Hatteras Electric Cooperative transmission line damage occurring on July 27, 2017

A second class action lawsuit was filed against PCL in U.S. District Court in the Eastern District of North Carolina (Federal Action). The Federal Action purports to define four classes: 1) A vacation renter class for vacationers that had rented properties on the island during the evacuation order; 2) A property owner class that was damaged through the loss of rental income; 3) A business owner class for all businesses on the islands that sustained business interruption losses; and 4) An hourly worker class for those employees that lost work as a result of the power outage. Other class action suits have also been filed.

While the courts have yet to certify a class in any of the initial class actions, the broadly proposed class definitions implicate the recovery rights of any person or entity that sustained a loss from this event, including subrogated insurers.



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