Insurance Responding to Disasters: Surfside Building Collapse, Wildfires, CO-VID

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NATURAL DISASTERS

DEALING WITH THE NEW NORMAL

"IT'S A MATTER OF GLOBAL IMPORTANCE. THE ISSUE IS WHAT TO DO ABOUT IT."

—RICHARD LEHFELDT

More than 50 inches of rain in five days in Houston. The first mass evacuation of the Florida Keys in decades. Puerto Rico's electric grid essentially destroyed, with at least a year until full power will be restored. With millions of people affected and hundreds of lives lost, the full damage is still being tallied, and the financial cost is now estimated in the hundreds of billions of dollars.

The devastating hurricanes in 2017—Harvey, Irma, and Maria—on top of the deluge of other major storms in recent years, have raised new questions about whether the U.S. electrical grid is up to the task, given the "new normal" of severe weather.

"It's a matter of global importance," says Richard Lehfeldt, a partner in Crowell & Moring's Energy Group. "The issue is what to do about it. It's not as if it arose out of nowhere."

The severity of the threat is daunting. A U.S. Government Accountability Office study found that Superstorm Sandy-like events that once took place every 500 years in 1800 are now occurring every 25 years. Worse yet, by 2045, those superstorms could come once every five years.

That growing hazard prompted the U.S. Department of Energy last year to direct the U.S. Federal Energy Regulatory Commission to examine, among other things, whether the U.S. electrical grid is reliable and resilient enough to address these severe and recurrent stresses to the system, and what resources are needed to strengthen resiliency and respond rapidly to major weather events. While that rulemaking ended early this year, the commission reiterated its commitment to ensuring that the national grid is able "to withstand or recover from disruptive events."

Several entities share responsibility for monitoring and ensuring the safety and reliability of the grid. The North American Electric Reliability Corporation is designated by FERC to ensure the grid's reliability. The Department of Homeland Security and the Department of Defense each look at the grid from the perspective of national security. The key questions: What are vital resources and critical energy infrastructure? Which facilities must be capable of operating in a severe weather event, no matter what? And how do we restore resources after an incident?

A LOCAL MATTER

Government policymakers can require resilience planning, seek to formally price reliability and resiliency, and offer subsidies to promote preferred behaviors in order to make the grid more reliable. Federal and state regulators can issue specific regulations compelling risk management in the design and management of electrical generation and transmission facilities. But part of the problem is that while safety and reliability are of national importance, the federal government doesn't have direct control over maintenance of the grid. Currently, most key resources' choice decisions about what to build and what kind of power generation to have are made by state regulators, through contested regulatory hearings, and not the typical authorization and appropriations process used for most public works projects.

"All of those state-level decisions are then somehow supposed to be integrated and harmonized at the federal level, which doesn't always happen," says Lehfeldt. "The questions that are now increasingly being asked by regulators and legislators, at both the state and federal level, pertain to security, reliability, and now the new word 'resiliency.' The issue is: What resources do we need now that these extreme weather conditions are becoming the new normal?"

THINKING OUTSIDE THE GRID

One way being considered to protect the grid from severe weather is the establishment of so-called microgrids—full-fledged, miniature utility systems, capable of "islanding" their operations and continuing to function even in the event of a long-term, regional power outage. These can be expensive systems, but cities and states now see an increasing need for microgrids to prepare for outages that can last weeks or even months. The city of Princeton, New Jersey, for example, has one, as does the New York University Manhattan campus. The Princeton microgrid maintained service through the worst of Superstorm Sandy.

Another tactic under consideration rests on the question of whether some retail customers might settle for a reduced level of service, essentially paying less in exchange for agreeing to suffer service interruptions during severe weather disruptions. Such multi-tiered service already exists during power restoration, when utilities triage service calls to ensure that essential customers (hospitals, fire and police departments, food suppliers) return first to full service.

IS INSURANCE A SOLUTION?

Of course, one of the biggest issues is who should bear the financial burden. "How are we going to pay for the added security or reliability that is necessary because we are no longer talking about a 100-year storm, but about something that occurs more frequently?" asks Laura Foggan, a Crowell & Moring partner and a member of the firm's Insurance/Reinsurance Group. "Insurance is an important part of the solution. Of course, the higher number of weather events means there are greater losses and increased costs for insurers as well, but insurers can help minimize or prevent loss, as well as spread the financial burden of losses from climate change."

The insurance industry can play a role in helping prepare for future severe weather because the companies have a tremendous amount of data and knowledge about loss avoidance and prevention, Foggan says. "One of the things insurers can do is partner with government regulators both at the state and federal level to identify and articulate loss-prevention strategies that will benefit society as well as insurers," she says. Loss prevention or mitigation of physical damage to key infrastructure—such as electrical grids—saves costs of repair, as well as the important downstream costs to private industry and society that result from loss of infrastructure function.

Policymakers must also consider whether government help in financing recovery may promote repetitive losses. Currently, the federal government is the last line of defense for many victims of hurricanes and floods through the National Flood Insurance Program, which provides coverage for about 5 million homes and businesses.

As the costs of hurricanes increase, so do the questions about whether this subsidized insurance is the best solution, because it costs all U.S. taxpayers yet benefits so few homeowners. And Foggan says questions continue to be raised as to whether such pricey, subsidized insurance products in fact incentivize real estate development in geographic areas that are just too high risk to sustain such projects.

"HOW ARE WE GOING TO PAY FOR THE ADDED SECURITY OR RELIABILITY THAT IS NECESSARY BECAUSE WE ARE NO LONGER TALKING ABOUT A 100-YEAR STORM, BUT ABOUT SOMETHING THAT OCCURS MORE FREQUENTLY?"

—LAURA FOGGAN

WHO PAYS FOR DISASTER?

If a home or business is built in a known floodplain, should the government have to help pay for the damage when a flood occurs? What role should private insurance companies play?

Those are questions that the U.S. Congress is debating as it restructures the National Flood Insurance Program. The NFIP provides subsidized insurance to homes in at-risk flood areas that might not otherwise be able to get coverage.

Many countries are struggling with how to handle flood coverage. The U.K. has a new approach to addressing the availability and affordability of private homeowners' flood coverage through Flood Re, a not-for-profit levy and pool system that is designed to provide affordable insurance to up to a half-million households in high-risk flood areas.

The closest thing the U.S. has to this is in Florida, where a law allows private flood insurance.

Michelle Linderman, a London-based partner at Crowell & Moring and a member of the firm's International Trade Group, says that as forward-looking as Flood Re is, it does have its faults.

The first is that despite the program's goal to provide affordable insurance, critics say its policies are still too expensive. Moreover, it is only available to homeowners and not for commercial properties.

Finally, it does not provide any means to encourage actions that might reduce future risk from flooding.

However, Linderman notes, "despite its shortcomings, Flood Re is a good example of how government can work with the private sector to bring about change that benefits hundreds of thousands of households."

"FLOOD RE IS A GOOD EXAMPLE OF HOW GOVERNMENT CAN WORK WITH THE PRIVATE SECTOR TO BRING ABOUT CHANGE THAT BENEFITS HUNDREDS OF THOUSANDS OF HOUSEHOLDS."

—MICHELLE LINDERMAN

CLIENT ALERT

California Bill Requiring Insurer Fossil Fuel Disclosures Includes Controversial Provisions

February 3, 2022

On January 25th, 2022, California Assembly member, Marc Levine, introduced AB-1694, a bill that would require insurance companies to disclose details of all investments made in fossil fuel-related entities and all insurance provided for fossil fuel-related companies and projects. The bill directs the California Department of Insurance to publish these disclosures on its website and would authorize the Insurance Commissioner to take regulatory action to prohibit or restrict investments and insurance for fossil fuel-related companies and projects. The last aspect is the most controversial portion of the newly proposed California legislation.

The American Property Casualty Insurers Association ("APCIA") described AB 1694 as "potentially dangerous." Denni Ritter, APCIA assistant vice president for state government relations, explained that "This bill gives broad authority to the California Department of Insurance to prevent an insurer from investing in or insuring a fossil fuel-related entity or project." He emphasized that "this bill could needlessly jeopardize funding for important projects working to develop alternatives to fossil fuel, by limiting investment and insurance for local utilities," contradicting its goal and the public policy objectives of tackling climate change. He also noted that the bill "could force necessary businesses, like gas stations or power plants, to go without insurance, putting the public and our state's economic recovery at risk."

Though the bill requires insurers to annually disclose fossil fuel-related investments and underwriting, California insurers already make these disclosures. Insurers in California and six other states each year complete the Insurer Climate Risk Disclosure Survey, which was adopted by National Association of Insurance Commissioners in 2010.

AB-1694 was introduced by Assembly member Levine who is campaigning for California State Insurance Commissioner. In a press release, he stated, "Insurance companies want to raise rates due to climate risk, yet are investing and underwriting the fossil fuel industry - the very industry that exacerbates climate change. If we are serious about fighting the climate crisis, we need transparency from the insurance industry created by AB 1694."

The bill would add the following provisions to the state's Insurance Code:

1183.

(a) On or before January 1, 2024, and on or before each January 1 thereafter, an admitted insurer shall disclose both of the following to the department in a form and manner determined by the department:

(1) All of the insurer's investments in fossil fuel-related entities.

(2) All of the fossil fuel-related companies and projects that the insurer underwrites or otherwise insures.

(b) On or before April 1, 2024, and on or before each April 1 thereafter, the department shall publish the information submitted pursuant to subdivision (a) on its internet website.

(c) The commissioner may take regulatory action to prohibit or restrict insurers from investing in fossil fuel-related entities or underwriting or otherwise insuring fossil fuel-related companies and projects.

It is expected to be considered by the California State Assembly this Spring.

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Tips for Filing Successful Wildfire Claims

Scott P. DeVries And Michael L. Huggins | *November 2, 2020*

Sparked by both lightning storms and a "gender reveal" gone wrong, this year's devastating wildfires had claimed more than five million acres on the West Coast of the United States by mid-October, causing substantial damage and contaminating the air with dangerous amounts of smoke from California to Washington State. Experts anticipate that the fires will keep burning throughout the year and into 2021. Accuweather founder and CEO Dr. Joel N. Myers called 2020 "the worst fire season in history," estimating that the total damage and economic loss would be between $130 billion and $150 billion.

Fortunately, many businesses are fully insured, and insurance companies will work with policyholders to process claims and help get companies back up and running. However, it does not always work that way for every insured. Property insurance may cover most of the losses from a fire, but when and how to present a claim can materially affect how much a company can recover and when. This can be extraordinarily difficult at any time, but especially when a fire has destroyed everything.

Policyholders need a focused plan for filing insurance claims and determining what to do next. While coverage terms may differ, the following tips can help a wide array of businesses file claims under commercial property or business interruption policies.

Preparing Evidence Ahead of Time

Any insurance claim requires a detailed inventory of the damaged/destroyed property. This is the last thing anyone wants to do when dealing with a tragedy, and it is extraordinarily difficult to prepare anything comprehensive after a fire.

Before disaster strikes, take extensive video of the business property—you can decide what to submit if and when the need arises. Prepare a detailed inventory, including photos of the employees and customers rather than worrying about the documentation you need to promptly submit a comprehensive claim. This will help expedite and maximize payment.

Securing and Understanding the Policy

If you do not have a copy of your insurance policy in your go-bag or another safe, accessible place, request a copy from the insurer. The policy is a contract, delineating what the insurance company agreed to cover and their limits and deductibles. Even if your business has not been affected, talk with your broker about available coverage extensions that might enhance your coverage and avoid post-fire surprises.

You do not need to know whether your policy covers specific types of damage before submitting your claim. Wildfires cause a wide variety of damages, with the actual property damage most often caused by fire, ash or smoke. Businesses incur many other types of losses that may be covered, however. These could include bills from the fire department for the cost of responding; expenses to move property to avoid the fire; and business interruption losses arising from property damage/destruction, blocked access or damage to the supply chain. These are just examples—the coverage is broad and you should consult your policy regarding all losses.

Talking to others in the community can help with some questions, but keep in mind that policies differ and it is important to understand what your specific policy covers and its limits. Having full knowledge of the policy is critical to assessing your rights and insurers' responses.

Preparing a Claim

Policyholders often ask when they need to submit a claim. While the policy will often contain specifics, and different policies will provide different timelines, it is best to submit your claim as soon as possible. Note that insurers commonly cite late submission as a basis for denial.

Insurers have a right to reasonable documentation of a claim before paying. The sooner they have it, the sooner they can consider your claim on its merits. The policy will specify whether to submit a hard copy or file online, but either way, keep a copy.

Different insurers have different requirements of what you need to submit. It is good practice to provide as much information as you have available at the time you submit your claim, including details of the items destroyed or damaged (photos and videos are helpful), estimates and other documentation.

business. The sooner the insurer has the information it really needs, the sooner you will be in a position to settle. Talk with the insurer about staging payments—paying where they have sufficient information while you gather additional information for other areas.

Your credibility is vitally important for achieving the best possible settlement, so only claim what you are entitled to. Do not overstate or pad with the expectation the insurer will take an unreasonable position. When you or the insurer discover mistakes, correct them as soon as possible.

Interacting with Adjusters Post-Claim

Assume the best about the insurer—that they want to be your partner in the process. Give them a chance to do the right thing, but do not confuse their being friendly for having your best interests at heart.

Many claims adjusters will try to help, but even the best are dealing with thousands of claims from people facing the same horrible situation. It can be a blur for them too, so take careful notes of every communication. To build and support this relationship, be empathetic and treat them with respect, understanding the number of claims they are handling. Respond to reasonable requests for information as quickly as possible.

Some actions just will not wait: Businesses will want to get up and running again by hiring contractors and starting repairs or rebuilding. Insurers typically will understand and reimburse as required by the policy. But when it comes to non-immediate actions, give insurers a reasonable opportunity to participate in the process—after all, you are looking to them to pay. However, many policies state the insured must seek the insurer's approval to repair or replace anything. Without its consent, the insurer may refuse to pay for expenses "voluntarily" incurred.

Reading the Insurer's Coverage Position

The first response you receive after submitting your claim is typically the insurer's acknowledgement of receipt of your claim. Shortly thereafter, the insurer will provide a longer response identifying any additional information it needs to further evaluate your claim, and/or its position on whether your claim is covered. Read this communication carefully. What is the insurer agreeing to pay? What is it rejecting? Is it leaving the door open for further payment upon receipt of more information?

Try to provide as much of the requested information as reasonably possible. That said, sometimes insurers request more information than they legitimately need. Reach out to discuss their requests want to seek the opinion of a lawyer specializing in insurance recovery. They can review the insurer's position, provide advice on your rights and help you negotiate with the insurer.

At some point in the claims process, the adjuster will make an offer. Sometimes, this will be to fully compensate you for the loss. Other times, the insurer will offer less, hoping you will take its word regarding the claim value, or accept the offer because you need the money. While it may seem inappropriate, recognize this is part of the process for many insurers. As difficult as it will be, think of it as a business negotiation—which it is for them. Often, they may have missed something, in which case, determine what that is and respond in a balanced fashion—acting out of anger can be counterproductive. Policyholders' lawyers can be helpful in this process.

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Wildfire Claims and Coverage

Scott P. DeVries and Yosef Y. Itkin*

Abstract: *Wildfires destroys millions of acres a year in the United States, spewing smoke across much of the nation. The cost of damage alone over the past several years soars into the hundreds of billions. When policyholders turn to their insurers many benefit from the coverage they wisely secured. But not all policyholders get the coverage they believe they paid for. When and how they present their claims is a critical factor. In this article, the authors strive to provide a comprehensive understanding of coverage risks, the regulatory landscape, and navigating the all-important claims process.*

Introduction

Sparked by lightning storms, devastating wildfires claimed more than 10 million acres in 2020, releasing substantial amounts of smoke above the western United States. Accuweather founder and CEO Dr. Joel N. Myers called 2020 "the worst fire season in history," and estimated that the total damage and economic loss would be between $130 billion and $150 billion.[1] And 2021 was not any better. According to the Insurance Information Institute, in 2021, while the hottest temperatures on record were recorded in California, Nevada, Oregon, Washington, and Arizona, and drought conditions reached an all-time high, the number of wildfires remained approximately the same (58,900) although the number of acres destroyed reduced to 7.1 million acres from the year before.[2] Some of the wildfires were among the largest on record with the Bootleg Fire in Oregon destroying 400,000 acres and the Marshall Fire in Colorado causing an estimated $1 billion in losses.

Fortunately, many individuals and businesses are fully insured, and most insurance companies work with policyholders to process claims and help them rebuild and get them back up and running. However, it does not always work that way for every insured. While property insurance may cover much of the losses

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from wildfires and other catastrophic events, not every policyholder is made whole or anything approaching this.[3] And even for those that are fully insured, when and how to present a claim can materially affect how much they recover and when. This can be extraordinarily difficult at any time, but especially when a fire has destroyed everything.

This article is intended to provide an overarching and comprehensive understanding of the risks that may arise, the available coverages and the issues that may present, the emerging regulatory overlay and the claims process. While coverage terms may differ, pursuit of a cohesive strategy can facilitate what may be a complex and frustrating process.[4] In providing this analysis, it is important to underscore that the terms of the policy, as well as corresponding state law (both in construing contracts as well as any regulatory schemes), ultimately control and must be carefully considered.

Types of Wildfire-Related Loss

Wildfires take a devastating toll on individuals and businesses alike. Lives are upended. Physical structures are decimated. Contents are destroyed by fire and smoke. Businesses of all sorts are forced to close. Roads are closed, shutting down (or at least slowing down) interstate commerce and adversely affecting supply chains. As firefighters and others battle the fires at considerable personal risk, municipalities and innumerable others incur massive wildfire suppression costs. In addition to policyholders who themselves sustain loss, they may be liable to third parties who assert that policyholder actions caused them to sustain loss as well.[5] These are just a small number of the types of claims that can present.

Which Policies May Provide Coverage for Wildfire-Related Loss?

Homeowners are typically covered by a state approved and standard form fire insurance policy that specifies the minimum coverage that must be provided. As Justice Croskey explained in a leading California treatise on insurance litigation:

> States began regulating fire insurance policies in the 1800s. Later, the insurance industry began to expand the perils covered by a fire insurance policy. The first perils that were added related to the actual occurrence of a fire (smoke and water damage). Other perils, such as windstorm and hail, were later added. Eventually, fire and seven other perils became known as "fire and extended coverage." Competitive pressures caused the insurance industry to continue to expand the fire policy. Fire and 16 specified perils became known as "fire and additional extended coverage."[6]

While wording may vary by state (and by insurer), the policies typically cover loss to the dwelling, other structures, personal property, and loss of use. The policies also may cover loss due to civil authority where, while the insured property itself may not have been damaged, there has been damage to other property.

Businesses often have similar forms of property coverage. They also frequently purchase business income coverage by which the insurer agrees to pay for lost business income associated with direct physical loss or damage caused by a covered event (here, the wildfire). These policies also may cover what is referred to as contingent business interruption, which provides coverage for losses arising from damage sustained by the businesses supply chain. Builders risk policies may cover property in the course of construction. And an array of coverage modifying endorsements are available on each.

Issues That May Affect the Nature and Extent of the Insurance Company's Obligation to Pay for Policyholder Losses

Coverage grants in fire insurance policies broadly provide coverage subject to the specified limits and sublimits. The typical policy covers "physical loss or damage" and it is generally understood that wildfires destroying the policyholder's property satisfy this requirement. Where this occurs, there is no issue that the wildfire is the "direct" cause of the loss. This is not to say, however, that insurers are obligated to pay the entire loss and we now turn to some of the issues that they raise.

Fire Policies and Coverage for Smoke Damage

Some insurers argue that these policies are limited to fire damage to the insured property and do not include smoke damage associated with nearby fires. A treatise frequently cited by insurers states otherwise: "The concept that fire insurance covers non-fire damage which is the proximate result of fire finds application also when the fire occurs on other property and causes harm to the insured property. In such case, the harm to the insured property, even though it is a non-fire harm, has long been recognized to be the result of fire, and, therefore, within the policy coverage."[7]

Case law is to like effect, finding that coverage for smoke loss exists under a commercial property policy that requires "physical loss or damage." For example, a policyholder suffered direct physical loss or damage where a theater had to cancel outside performances because of "poor air quality caused by the wildfire smoke."[8] There was no permanent damage; the performances were cancelled solely because of the poor air quality. The policyholder suffered "direct physical loss of or damage to" insured property because the smoke made the theater "uninhabitable" and "unusable for its intended purpose."

Certain businesses such as wineries and vineyards face unique challenges with respect to coverage for smoke loss. When smoke from nearby fires taints grapes, degrading their quality and decreasing their value, these businesses may seek coverage under property and business interruption policies. While insurers may acknowledge that property policies cover harvested grapes, the specific timing and location of the smoke taint can become an issue.[9] If smoke particles settle on the grapes while they are still in the field with the physical damage occurring before the grapes are harvested, coverage may also be available under the winery's crop insurance policy.

Business Interruption Claims, Causation, and Evacuation Orders

Often, the wildfire destroys the property and business operations cease until the property reasonably can be rebuilt and reopened. In this situation, insurers acknowledge that the fire has caused physical loss of or damage to insured property.

However, insurers may raise issues when the insured property is not itself damaged but cannot be used for its intended purpose, as was the case in the Sierra Nevada range in 2021 when the Candor wildfire was largely uncontained. Agencies may issue a mandatory evacuation order requiring businesses to close, causing them to incur substantial loss of business income.[10] While not arising in a wildfire context, insurers may argue that a recent California Court of Appeal decision in *The Inns by the Sea v. California Mutual Ins. Co.* permits them to avoid paying for these losses.[11] Courts are unlikely to accept this argument, which, in addition to being counter to logic where the wildfire is the efficient proximate cause of the order, would conflict with long-standing California precedent providing that issues of causation should be decided by the trier of fact.[12]

Interplay Between Coverage Grants and Exclusions and the Anti-Concurrent Cause Provision

Insurers may cite exclusions in an attempt to reduce or avoid liability. The insurance industry has long relied on the Insurance Services Office (ISO) to draft standard form policy language and secure approval as required by state regulatory agencies. ISO Form HO 00 03 10 00 (Section I—Exclusions, Part B) provides the following form exclusionary language:

> We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.
>
> 1. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in A. above to produce the loss.
> 2. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

3. Faulty, inadequate or defective:
   a. Planning, zoning, development, surveying, siting;
   b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
   c. Materials used in repair, construction, renovation or remodeling; or
   d. Maintenance of part or all of any property whether on or off the "residence premises."

Other form exclusions may exclude "landslides, mudslides or mudflows" (ISO form Section I—Exclusions, Part A(2)), "settling, shrinking, bulging or expansion" of pavement or foundations (ISO form Section I—Perils Insured Against, Part A(2)(c)), or for water damage (ISO form Section I—Exclusions, Part A(3)).

As a general rule, where there are multiple causes of a loss, some that are covered and others that are not, the loss is deemed covered.[13] To avoid this outcome, many insurers insert in their policy what is referred to as an "anti-concurrent cause" provision barring coverage wherever at least one of the causes of a loss is not covered. This issue presents in the wildfire context in various ways. For example, after a wildfire, there can be mudslides, building collapses, water damage, smoke or soot damage, or other sorts of damage.

"Landslides, mudslides or mudflows" occurring *because of* the wildfire should not constitute a "concurrent cause" and should not affect the availability of coverage.[14] However, to the extent they arise from independent climatic conditions,[15] insurers may argue that they are "concurrent causes" limiting their obligations. For example, in *Miller v. American Family Mutual Ins. Co.*[16] (Waldo Canyon Fire), firefighters used 20,000 to 30,000 gallons of water to extinguish a house fire; this water seeped into the ground and damaged the home's foundation. The insurer argued that the earth movement exclusion barred coverage regardless of whether the loss was caused in whole or in part by the firefighters' efforts. The court rejected this argument, holding the exclusion was ambiguous as to whether it barred for earth movement caused *solely* by an otherwise covered man-made event. As for the insurer argument that the anti-concurrent cause provision barred coverage, the court held that it would only bar coverage if the earth movement was caused in part by natural causes *unrelated* to the fire. (*See also Stankova v. Metro. Prop. & Cas. Ins. Co.*[17] where mudslide occurring one month after wildfire was deemed caused by the wildfire).

Similarly, it is not uncommon for policies to exclude "settling, shrinking, bulging or expansion" of pavement or foundations or water damage. *Encompass Ins. Co. v. Berger* addressed availability of coverage for fire and settling losses in the context of a Santa Barbara wildfire (Jesusita Wildfire).[18] Rather than view the loss as an all-or-nothing, the wildfire was determined to be the efficient proximate cause of much of the insured's loss, with several aspects of foundation damage emanating from preexisting soil conditions excluded.

"Increase in Hazard" Condition

Some policies contain an "increase in hazard" condition. Where present, the insurer may argue that this provision excuses liability for losses occurring where the hazard is increased by any means within the control or knowledge of the policyholder.[19] As at least one court has held, an increase in hazard condition is not technically considered an exclusion, but rather a condition subsequent, which is a matter of defense to be pleaded and proved by the insurer.[20]

Contingent Business Interruption Insurance (aka Dependent Properties Claims) and Supply Chain Issues

In many instances, while the insured property does not sustain fire or smoke damage, wildfires can wreak havoc on the business supply chain. For some, contingent business interruption coverage may be a solution. Contingent business interruption insurance extends coverage for the loss of prospective earnings because of an interruption in the insured's supply chain that is caused by damage to property that the insured neither owns nor operates.[21] Typically, the property covered is of a supplier or customer. For example, in 2000, Ericsson Telecom A.B., a mobile phone manufacturer, presented a substantial contingent business interruption claim based on a fire that damaged a Royal Philips Electronics semiconductor plant.[22] Royal Philips supplied critical components for Ericsson's mobile phones. The fire caused Royal Philips to close its plant, halting Ericsson's phone production for six weeks, resulting in substantial losses.

Issues may arise concerning who qualifies as a supplier under the terms of the policy. *Archer-Daniels-Midland Co. v. Phoenix Assur. Co. of New York* addressed this issue, taking a broader approach and interpreting "any supplier of goods or services" to mean an "unrestricted group of those who furnish what is needed or desired."[23] As time has passed, insurers have limited "suppliers" to those with a direct relationship and some courts have so construed the provision. For example, in *Pentair, Inc. v. American Guarantee and Liability Ins. Co.*, a power substation that provided power to two factories that in turn provided product to two Pentair subsidiaries sustained physical damage following an earthquake.[24] Damage to the power substation was insufficient to invoke contingent business interruption coverage because the power station was a supplier of the factories, not a supplier directly or indirectly of the insured.[25]

Valuation of Loss, Sublimits, and Amount of Potential Recovery

Various types of coverage are available and there has been extensive litigation concerning the amount of coverage provided by one policy form or another. For example, the policyholder may have purchased market value coverage (the value of the house at the time of the wildfire), replacement coverage subject to a policy limits cap, guaranteed replacement cost coverage, or some variation on the theme. While the property may be properly valued when the insurance is purchased, it may become undervalued at the time of loss due to factors like inflation or home improvements that were not disclosed to the insurer. And, however generous the limits may be when the policy is procured, as one court discussed, it may be insufficient when "surge pricing" occurs after a wildfire.[26]

These concepts were discussed in considerable detail in *Vulk v. State Farm General Ins. Co.* (Boles Wildfire) where the policyholder purchased a policy providing replacement coverage subject to a policy limit that supposedly reflected the estimated cost to rebuild the home.[27] After the wildfire destroyed the home, it was rebuilt at a materially greater cost. In rejecting the policyholder's argument for complete reimbursement, the court held that it was the policyholder's obligation to select the coverage it wanted (in this case, guaranteed replacement value), that under the circumstances presented, the agent had no special obligation to recommend alternatives, and that recognized exceptions to this rule were not present.

In another case, the policyholder purchased replacement cost coverage (value of lost or damaged building) as well as extended replacement cost coverage (cost to repair or replace) for their home.[28] After the home was destroyed by a northern California wildfire, the policyholder undertook plans to rebuild but because of obstacles in the rebuilding process such as the overwhelming demand for architects, contractors, and others that bogged down the permitting process, the demand surge that dramatically increased pricing (factors which the insured characterized as "factually and legally impractical and/or impossible" to overcome), and questions concerning whether the insurer would pay the extended replacement cost, the policyholder sold the property at a loss. The insurer agreed to pay the value of the damaged building but declined to pay for the cost of replacement because the policyholder did not satisfy the condition precedent—replacement of the property. The court accepted the insurer's position, reasoning that the policy language controlled and that there was no evidence of anticipatory breach.[29]

Policies also may contain sublimits that can affect the scope of recovery. For example, *SECURA Ins. v. Lyme St. Croix Forest Co.* addressed whether a wildfire (the Germann Road Fire) that expanded and refueled over the course of several days and 7,442 acres constituted a single uninterrupted cause of all damages, and thus one occurrence subject to the policy's per occurrence limit of $500,000, or multiple occurrences each time the fire spread to new property permitting collection of sublimits for each occurrence up to the policy aggregate of $2 million.[30] The Court of Appeal held that each of the events that occurred over the course of several days and over an extended geographic area could constitute a break in causation under the "cause" theory adopted by Wisconsin courts and provide for multiple occurrences. However, on appeal to the

Wisconsin Supreme Court, the Court ultimately held that the fire constituted a single event and thus, the $500,000 per occurrence limit was applicable.[31]

Enacted State Regulations Facilitate the Claims Process and Assist Policyholders Affected by a Wildfire

Given the increasing exposures associated with climate change, numerous insurers have sought to withdraw from the wildfire-related coverage market or increase rates to a level where they are effectively unavailable.[32] States have been resistant to their doing so. As one commentator reports, "[e]ven where insurers have tried to withdraw policies or raise rates to reduce climate-related liabilities, state regulators have forced them to provide affordable coverage anyway, simply subsidizing the cost of underwriting such a risk policy or, in some cases, offering it themselves."[33] At least 30 states have developed regulation, referred to as "Fair Access to Insurance Requirements" (FAIR), to ensure the continued availability of insurance.[34] The FAIR plan provides a channel to insurance for property owners who would be stuck without any reasonable access to insurance without state intervention.[35]

For example, the California legislature created the California version of the FAIR Plan in 1968 to provide homeowners in high-risk areas access to basic property insurance.[36] The basic policy is limited to damage to the dwelling and its contents from fire with limited coverage for smoke and it provides no benefits to third parties; broader coverage is available for a price.[37] Until 2019, homeowners were forced to purchase an expensive and inconvenient "difference in conditions" coverage on top of their limited FAIR Plan policy if they wanted coverage similar to what is covered in a typical homeowners insurance policy. However, in 2021, a California trial court upheld the California Insurance Commissioner's 2019 order mandating that the FAIR Plan offer more comprehensive coverage.[38]

Challenges to obtaining fire insurance coverage are not unique to homeowners—agricultural businesses, including wineries, ranchers, and farm owners in high risk areas have all faced similar problems in gaining access to affordable insurance.[39] These kinds of businesses may be particularly susceptible given they are located in more rural areas that are especially vulnerable to wildfires. Until recently, these businesses were left without a lifeline because they were excluded under the California Insurance Code from benefiting from the FAIR Plan. To resolve this problem, California recently approved legislation to ensure that the FAIR Plan also provides commercial coverage for these outdoor businesses.[40]

Actions Policyholders Can Take Before the Wildfire

Preparing Evidence Ahead of Time

Any insurance claim requires a detailed inventory of the damaged/destroyed property. This is the last thing anyone wants to do when dealing with a tragedy, and it is extraordinarily difficult to prepare anything comprehensive after a fire.

Before disaster strikes, it is advisable to take a detailed extensive video of the property. Prepare a detailed inventory, including photos of the insurance policy's declarations page, then save everything on a cloud platform. This way, if there is a disaster, the policyholder can focus on the health, safety, and other needs of its employees and customers rather than worrying about the documentation needed to promptly submit a comprehensive claim. This will help expedite and maximize payment.

Securing and Understanding the Policy

If a policyholder does not have a copy of its insurance policy in a go-bag or another safe, accessible place far from the potential wildfire zone, it should request a copy from the insurer. The policy is a contract, delineating what the insurance company agreed to cover and their limits and deductibles. Even if the business has not been affected, it is advisable to talk with the broker about available coverage extensions that might enhance coverage and avoid post-fire surprises.

As discussed above, there are reasons a policyholder may not have secured adequate coverage to fully replace its home or business even if the insurer covers the claim. For example, improvements or an increase in cost of building materials may indicate an increase in coverage is warranted. To ensure adequate coverage, it is advisable to conduct periodic reevaluations.

After the Wildfire—Preparation, Submitting, and Negotiating the Claim

Policyholders do not need to know whether their policy covers specific types of damage before submitting a claim. Wildfires cause a wide variety of damages, with the actual property damage most often caused by fire, ash, or smoke. Businesses incur many other types of losses that may be covered, however. These could include bills from the fire department for the cost of responding; expenses to move property to avoid the fire; and business interruption losses arising from property damage/destruction, blocked access, or damage to the supply chain. These are just examples—the coverage is broad and the policyholder and its representatives should consult your policy regarding all losses.

Talking to others in the community can help with some questions, but keep in mind that policies differ and it is important to understand what the specific policy covers and its limits. Having full knowledge of the policy is critical to assessing the policyholder's rights and insurers' responses. Professionals can help in this process.

Preparing a Claim

Policyholders often ask when they need to submit a claim. While the policy often contains specifics, and different policies provide different time lines, where possible, it is advisable to submit the claim as soon as reasonably possible. Note that insurers commonly cite late submission as a basis for denial with jurisdictions varying on the import of "late" submission.

The policy provides insurers with a right to reasonable documentation of a claim before paying. Often, they will decline to consider a claim on its merits until such documentation is provided (of course, the devastating effect of wildfires may affect the availability of documentation and presumably this will be considered in assessing claims). The policy will specify whether to submit a hard copy or file online, but either way, keep a copy.

Different insurers have different requirements on the level of detail required. It is good practice to provide as much information as is available at the time the claim is submitted, including details of the items destroyed or damaged (photos and videos are helpful), estimates, and other documentation.

While some supplementation can be expected, back-and-forths associated with repeated insurer requests for more information may, unfortunately, take time. The sooner the insurer has the information it *really* needs, the sooner the policyholder will be in a position to settle. In certain situations, the insurer may be amenable to staging payments—paying where they have sufficient information while the policyholder gathers additional information for other areas.

While the insurance company must comply with its defined obligations, claims resolution is a negotiation. Throughout, credibility is vitally important for achieving the best possible settlement, so only claim what you are entitled to. Overstating or padding in the expectation that insurers will take an unreasonable position is not advisable. When mistakes are discovered (whether by the policyholder or the insurer), they should be corrected as soon as possible.

Proof of Loss

Policies may contain a "Proof of Loss" provision, which requires the policyholder to submit detailed information in a form they swear to within a fixed number of days after the event, giving rise to the claim occurs. Some insurance companies argue that this is a condition precedent to making any coverage claim. Jurisdictions vary on the viability of the insurer argument. In California, a policyholder has 60 days to submit a proof of loss, and to the extent there is any concern that this deadline cannot be satisfied, requests to the insurer to extend the deadline are routinely granted.

California subscribes to what is referred to as the "notice-prejudice" rule, the California Supreme Court holding that while the insurer may assert defenses based on a breach of a condition in the policy, "the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby."[41] This principle was addressed in the context of the Station Wildfire in Southern California where policyholders did not submit the requisite forms within the specified period, prejudicing its ability to investigate smoke and soot damage.[42] The court rejected the insurance company's motion for summary judgment, holding that it was not prejudiced because the insured had cooperated with it and had the opportunity to conduct its own testing.

Interacting With Adjusters Post-Claim

Assume the best about the insurer—that they want to be a partner in the process. It is advisable for policyholders to assume the best and give insurers a chance to do the right thing, but do not confuse their friendliness for having a policyholder's best interests at heart (notwithstanding the requirement that insurers must place the interests of the policyholder before their own).

Many claims adjusters will try to help, but even the best are dealing with thousands of claims from people facing the same horrible situation. It can be a blur for them too, so take careful notes of every communication and/or communicate in writing via email or letter as opposed to a phone call to maintain a record. To build and support the relationship with the adjuster, be empathetic and treat them with respect, understanding the number of claims they are handling. Respond to reasonable requests for information as quickly as possible.

Some actions cannot wait. Businesses will want to get up and running again by hiring contractors and starting repairs or rebuilding. Insurers typically will understand and reimburse as required by the policy.

But when it comes to non-immediate actions, it is advisable to give insurers a reasonable opportunity to participate in the process. This is more than merely a matter of courtesy, partnering, or strategerie; many policies state the insured must seek the insurer's approval to repair or replace anything. And if the policyholder does not attempt to secure the insurer's advance consent, the insurer may refuse to pay for expenses "voluntarily" incurred.

Reading the Insurer's Coverage Position

The first response provided after submitting the claim typically is the insurer's acknowledgement of receipt of the claim. Shortly thereafter, the insurer will provide a longer response identifying any additional information it needs to further evaluate the claim, and/or its position on whether the claim is covered. Read this communication carefully. What is the insurer agreeing to pay? Will it make an advance payment on agreed to claims while other issues are being discussed/investigated? What is it rejecting? Is it leaving the door open for further payment upon receipt of more information?

The policyholder should attempt to provide as much of the requested information as reasonably possible. That said, sometimes insurers request more information than they legitimately need. It is advisable to attempt to reach out to discuss these requests and the burdens associated with compliance. All communications and agreements should be confirmed in writing.

If the insurer denies coverage for the claim or does not pay what the policyholder believes it should, the policyholder may want to seek the opinion of a lawyer who specializes in insurance recovery. The lawyer can review the insurer's position, provide advice on rights, and help negotiate with the insurer.

At some point in the claims process, the adjuster will make an offer. Sometimes this will be to fully compensate the policyholder for the loss. Other times the insurer will offer less, hoping the policyholder will take its word regarding the claim value, or accept the offer because the policyholder needs the money. While it may seem inappropriate, recognize this is part of the process for many insurers. As difficult as it will be, think of it as a business negotiation—which it is for them. Often, they may have missed something, in which case determine what that is and respond in a balanced fashion—acting out of anger can be counterproductive. Policyholders' lawyers can be helpful in this process.

Conclusion

The wildfires are causing enormous losses for innumerable businesses on the West Coast. Often, you should be able to work with your adjuster to reach a satisfactory resolution. But where needed, you may wish to reach out to policyholder-side lawyers—whether to test what you may be entitled to or to help maximize recovery.

Notes

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1. https://www.accuweather.com/en/severe-weather/wildfires-in-western-us-could-cause-130-billion-to-150-billion-in-losses/812654. Among the larger wildfires in 2020 were the August Complex fire, which destroyed 1 million acres, and the LNU Lightning Complex, SQF Complex and Glass fires, each of which caused more than $2 billion in losses. *See* https://www.iii.org/fact-statistic/facts-statistics-wildfires.

2. *See* https://www.iii.org/fact-statistic/facts-statistics-wildfires.

3. Differing natural and man-made disasters can present some of the same issues and some very different ones. A comprehensive discussion of the panoply of issues is provided in Wall, DeMugno, Plitt, Cat. Claims: Insurance Coverage for Natural and Man Made Disasters (2017).

4. As this article focuses on the rights and obligations as between policyholders and insurance companies, it does not address issues concerning the insurance company's right to seek subrogation from third parties such as those associated with fireworks companies, individuals improperly extinguishing campfires or cigarettes or debris burning, or, in certain situations, construction or utility companies. *See* Anthony Livingston, "In Hot Pursuit," Claims Management (CLM) (October 28, 2016), https://www.theclm.org/Magazine/articles/In-Hot-Pursuit/1273.

5. *See e.g.*, *Genesis Ins. Co. v. McKillop*, 2005 WL 2044849 (D. Colo. 2005) (Teacher taking students on field trip fails to extinguish campfire).

6. Croskey, et al., *Cal. Practice Guide: Insurance Litigation* (The Rutter Group 2021) ¶¶ 1:57-8.

7. 10A Steven Plitt, et al., *Couch on Insurance* 3d §149:34. (1995 updated 2019).

8. *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., 2016 WL 3267247, at *2 (D. Or. June 7, 2016), *vacated on parties' request*, 2017 WL 1034203 (D. Or. Mar. 6, 2017).

9. *See, e.g.*, *Hoopes Vineyard LLC v. U.S. Fire Ins. Co*., 21:cv-09755 (N.D. Cal. Dec. 17, 2021) (involving a claim by a winery for wine loss due to smoke damages and an issue of whether the damage occurred after the wine was harvested).

10. *See* New York Times, "Evacuations Ordered Near Lake Tahoe as the Caldor Fire Chokes Region" (updated September 6, 2021), https://www.nytimes.com/2021/08/30/us/caldor-fire-evauation-order-california.html.

11. 71 Cal. App. 5th 688 (2021).

12. *See, e.g.*, *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 412 (1989) (concluding that "the question of causation is for the jury to decide.").

13. Note that in some jurisdictions, courts may distinguish as between first-party claims (*see Garvey*, applying "efficient proximate cause" standard) and third-party claims where any covered cause triggers coverage. *See, e.g.*, *State Farm Mutual Automobile Ins. Co., et al., v. Partridge,* 10 Cal. 3rd 94 (1973).

14. *See, e.g.*, National Weather Service, Flood After Fire—Burned Areas Have an Increased Risk of Flash Flooding and Debris Flows (https://www.weather.gov/bou/floodafterfire) (alert attributing wildfire alteration of terrain and destruction of vegetation to increase flooding

risk). See also Derrick Taylor, *Three People Are Killed and a Fourth Is Missing After a Flood Rushes Through Northern Colorado*, N.Y. Times, (July 27, 2021), https://www.nytimes.com/2021/07/27/us/colorado-flash-flood.html; Rosanna Xia, *Heavy Rain Unleashes Mud, Debris Flows in Northern California Areas Burned by Wildfire*, L.A. Times, (Oct. 24, 2021), https://www.latimes.com/california/story/2021-10-24/rain-debris-flow-dixie-caldor-fire-burn-areas; Drenching Rain Hits SoCal as Powerful Storm Moves In; Evacuations Issued (Mar. 28, 2022), https://www.cbsnews.com/losangeles/news/drenching-rain-likely-for-la-monday-as-storm-moves-in/ (risk of mudflows and flooding at the Apple and El Dorado fire burn scars).

15. While the concept of concurrent wildfires and rain seems counterintuitive, they do occur on occasion, and in fact, occurred on multiple occasions during 2021. In fact, the effect of the wildfire may make the ground more susceptible to landslides or mudslides, a causation path suggesting they were initiated and solely caused by the wildfire and are not "concurrent" non-covered causes. *See, e.g.*, United States Geological Survey, Post-Wildfire Landslides Becoming More Frequent in Southern California (Feb. 25, 2021), https://www.usgs.gov/news/state-news-release/post-wildfire-landslides-becoming-more-frequent-southern-california ("Wildfires make the landscape more susceptible to landslides when rainstorms pass through as the water liquefies unstable, dry soil and burned vegetation.").

16. 104 F. Supp. 3d 1232 (Dist. Colo. 2015).

17. 788 F. 3d 1012 (9th Cir. 2015).

18. No. CV 12-08294-MWF PJWX, 2014 WL 4987978, (C.D. Cal. Oct. 7, 2014).

19. *See, e.g.*, Cal. Ins. Code §2071(a) (establishing standard form provisions of a fire insurance policy, including that "this company shall not be liable for loss occurring [] while the hazard is increased by any means within the control or knowledge of the insured.").

20. *See D & S Realty, Inc. v. Markel Ins. Co.*, 280 Neb. 567, 587 (2010) (concluding that regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage).

21. *CII Carbon, L.L.C. v. Nat'l Union Fire Ins. Co. of Louisiana*, 918 So. 2d 1060, 1061, n.1 (La. Ct. App. 2005); *see also Arthur Anderson LLP v. Fed. Ins. Co.*, 416 N.J. Super. 334, 339 (App. Div. 2010) (holding

this coverage "gives the insured coverage for the loss of sales or revenue sustained when its business is interrupted as a result of damage to property that disrupts the flow of goods and services with a supplier or customer.").

22. Carolyn Aldred, Ericsson filing, Business Insurance (Oct. 8, 2000), 2000 WLNR 1264461, https://www.businessinsurance.com/article/20001008/STORY/10001910?template=printart.

23. 936 F. Supp. 534, 541 (S.D. Ill. 1996).

24. 400 F.3d 613 (8th Cir. 2005).

25. *See also Millennium Inorganic Chemicals Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 744 F.3d 279, 286 (4th Cir. 2014) (holding that a natural gas production facility was not a "direct contributing property" to qualify under contingent business interruption coverage).

26. The contract terms will govern so long as the coverage terms meet or exceed those specified by statute. *See, e.g.*, *St. Cyr v. California FAIR Plan*, 223 Cal. App. 4th 786 (2014) and *California FAIR Plan v. Games,* 11 Cal. App. 5th 1276, 1295 (2017).

27. 69 Cal. App. 5th 243 (2021).

28. *Tarakanov v. Lexington Ins. Co.*, 441 F. Supp. 3d 887 (N.D. Cal. 2020).

29. The case also presented issues of whether the policyholder counsel had asked the insurer to accept a hypothetical claim, whether the insurer failed to respond to various communications, and the timing of denials, all factors which may limit widespread application of this case.

30. 378 Wis. 2d 740, *rev'd and remanded*, 384 Wis. 2d 282 (2018).

31. *SECURA Ins. v. Lyme St. Croix Forest Co., LLC,* 384 Wis.2d 282, 299 (2018).

32. In the analogous earthquake insurance context, California permitted insurers to exit the market for earthquake coverage, creating in its place the California Earthquake Authority. According to the CEA, payments are limited to the amount of funds available, the result being that, depending on the value of claims made, policyholders who purchase this insurance may obtain materially less coverage than anticipated when the premiums are paid.

33. Abrahm Lustgarten, *How Climate Migration Will Reshape America*, N.Y. Times Magazine (Sep. 15, 2020), https://www.nytimes

.com/interactive/2020/09/15/magazine/climate-crisis-migration-america.html.

34. *Id*.

35. *See, e.g.*, Cal. Ins. Code §10094 (Insurance under the FAIR plan is intended to make available basic property insurance to any "persons having an interest in real or tangible personal property who, after diligent effort … are unable to procure such insurance through normal channels from an admitted insurer.").

36. *Wexler v. California Fair Plan Ass'n.*, 63 Cal. App. 5th 55, 58 (2021) (Woolsey Wildfire).

37. *Id*. at 59.

38. Press Release, California Department of Insurance, Court Upholds Insurance Commissioner Lara's Order to Expand FAIR Plan "Last Resort" Coverage to Better Protect Homeowners (July 20, 2021), https://www.insurance.ca.gov/0400-news/0100-press-releases/2021/statement073-2021.cfm.

39. A spokesperson for the Wine Institute stated that "the industry has been hit hard by the limited availability of affordable property insurance in recent years, as well as reports of significant increases in premiums." Shawn Rice, *Calif. Wineries Prep for Coverage Fight for Wildfire Smoke*, Law360 (Dec. 3, 2021), https://www.law360.com/articles/1437517/.

40. Press Release, California Department of Insurance, Commissioner Lara Approves New Coverage Options for Farms and Agricultural Businesses Under State's FAIR Plan (Jan. 21, 2022), https://www.insurance.ca.gov/0400-news/0100-press-releases/2022/release005-2022.cfm.

41. *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305 (1963).

42. *Henderson v. Farmers Group, Inc.*, 210 Cal. App. 4th 459 (2012).