
JOURNAL OF EMERGING ISSUES IN LITIGATION

Tom Hagy
Editor-in-Chief

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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

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-evacuation-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. 3d 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).