

McGuireWoods

**Legal Alert: How Small Businesses
May Recover Under Insurance Policies
for Recent Wildfire Losses**

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I. INTRODUCTION

Insurance policies can play an important role in helping businesses recover from a disaster. They may provide funds to pay not only for physical damage to and loss of property, but the loss of income while business property is repaired, rebuilt, or replaced, and for a substantial time thereafter while a business returns to normal.

While this guide is not intended to provide legal advice on the specifics of any loss, it does provide an overview on the insurance claim process and how a business may be able to ensure it gets the maximum amounts available under its insurance policies.¹

This guide starts with an overview of the types of insurance coverage that may be available for losses from the fires. It then discusses ways to proceed with an insurance claim, steps to take to best ensure the full recovery available under insurance policies, and procedural and timing requirements commonly found in insurance policies.

II. TYPES OF POLICIES THAT MAY INSURE FIRE LOSSES

Insurance policies generally fall into two categories: first-party insurance and third-party insurance. First-party insurance protects an insured from losses that it may suffer, including for damage to or destruction of property and frequently for the loss of business income. Common first-party policies include property, business interruption, and crime policies. Property insurance may be written on an “all-risk” or “named-perils” basis. All-risk policies typically insure all causes of loss not expressly excluded. By contract, named-perils (or specified-perils) policies only insure those perils expressly listed. Typical named perils include fire, lightning, windstorm, and hail.

Third-party insurance protects an insured from various claims and lawsuits by others, and for liabilities to others. Common third-party policies include general liability, directors and officers, and errors and omissions policies.

Many policies provide both first-party and third-party protections. For example, homeowners, business package policies, and automobile policies typically insure not only against the loss of or damage to an insured’s own property (e.g., business premises, personal property, automobiles), but also for claims by third parties (e.g., loss of or damage to a third party’s property, libel, slander, negligence).

Because property insurance is the insurance most directly relevant for the fire losses, we focus on it in this guide.

¹ An insured can consult with its insurance broker or agent, public adjusters, and lawyers for specifics or advice on disputes. This guide does not address all the insurance issues that insureds may face. It also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and an insured's particular situation. This guide may be considered to be advertising in some states.

III. THE SCOPE OF PROPERTY INSURANCE COVERAGE

A. Insurance for Physical Loss of, Damage to, or Destruction of Property

Property insurance policies typically insure against “direct physical loss or damage to property.” The property insured usually includes real property (including buildings and other permanent structures) and personal property (such as equipment, supplies, and inventory).

1. Coverage for Real Property

Property insurance policies usually insure locations stated in the policy. Some insure all buildings at the location, while others insure the structures that are listed on a schedule. Many will also insure locations and property acquired after the start of the policy period, but often with specific notice requirements and other limitations.

2. Coverage for Business Personal Property

Most property insurance policies also insure business personal property that is “usual or incidental to the occupancy of the premises” or “used by an insured while on the described premises” (often described as “unscheduled personal property”). However, property that is easily movable may be covered only under “floater” (meaning additional) policies or endorsements to the property policy. These policies or endorsements will cover business personal property, including furniture, machinery, and stock, at least to the extent that these items are found within a specified distance of the insured premises.

3. Coverage for Costs Incurred to Prevent Loss

Property policies typically include a provision that covers preventative measures taken by the insured to avoid loss. The policies may even require such measures. The provision historically was referred to as a “sue-and-labor” provision (with “sue” meaning of “to go in pursuit of”). These provisions now are more commonly referred to under headings such as “expenses to prevent loss” or “mitigation” provisions.

These provisions typically cover the costs that an insured reasonably incurs to prevent a loss or to minimize a loss that has started. With fire losses, these provisions can cover the costs of removing property to protect it from a fire and costs incurred to protect a business when a fire is threatened. However, there typically is something akin to an immediacy requirement. For example, installing a sprinkler system to prevent or contain future fires is not usually covered under loss-prevention provisions. However, the costs incurred in taking steps to prevent or reduce loss from an approaching fire typically are covered.

Insureds also may be able to rely on the common law of mitigation of damages to recover costs they incur to avoid losses. Under this doctrine, an injured party has a duty

to mitigate its loss or damages. When it does so, its insurer then may be obligated to pay the reasonable costs incurred in such a mitigation effort. This obligation may arise irrespective of limitations in the policy's loss-prevention provision.

Finally, in California, the Insurance Code requires insurers to reimburse insureds for expenses reasonably incurred to mitigate covered loss or damage.

B. Time-Element Coverages

Many property policies also provide several types of "time-element" insurance. This insurance protects a business against various types of economic losses when a fire occurs — sometimes even if insured property is not damaged from a fire. These time-element forms of insurance include: "business interruption," "contingent business interruption," "civil authority," "extra expense," "ingress/egress," "profit and commission" and "utility service interruption." These coverages may be vital to helping a business recover after a fire because, separate and apart from physical loss or damage, a business may suffer long-term economic losses. As examples:

- Businesses may be closed for long periods because of damage to or destruction of business premises.
- Businesses may be closed because of orders from government entities, such as evacuation orders and curfews.
- Key personnel may be unavailable.
- Offices may need to be closed.
- Access to a business location may be interruption by road closures or other limitations on access.
- Businesses may not be able to get necessary supplies, goods, and services.
- Businesses may lose customers because of widespread damage in their area.

1. Business Interruption Coverage

"Business interruption" insurance pays an insured for its lost business calculated as specified in the policy. One common measure of insured loss is lost profits, calculated as the amount of gross earnings minus normal expenses that the business would have earned but for the interruption of its business.

2. Contingent Business Interruption Insurance

"Contingent Business Interruption" insurance protects an insured from economic losses that it suffers when customers or suppliers suffer direct physical loss or damage from

covered perils, such as fires. For example, if the fires prevent a supplier from delivering goods or services necessary to an insured's business, the insured may be covered for its resulting economic losses. Likewise, if customers cannot buy goods or services from an insured, then the insured may be covered for its resulting economic losses.

While this insurance is subject to specific terms and limitations, it can be invaluable. Indeed, it can protect businesses located far away from the fires if its losses can be traced to customers or suppliers in the fire-damage areas.

3. Civil Authority Insurance

“Civil authority” insurance applies when a business suffers economic losses because of an order of federal, state, county or legal authorities limiting access to a business. There usually is a geographical limit on the scope of this insurance — often orders affecting property within one mile of the insured's location. And the insurance typically is limited to a specified number of days, often 30 days or less. Furthermore, the insurance may be subject to a “waiting period” — that is, not provide coverage until after the passage of a specified period, often 24 hours.

4. Extra Expense Insurance

“Extra Expense” insurance typically insures a business for the increased costs of operating during the insured period. These can include costs incurred for a generator when power is otherwise interrupted, for expediting delivery of goods and supplies, replacement equipment, and relocation expenses when warranted to return to normal business as soon as reasonably possible.

5. Ingress/Egress Insurance

“Ingress/Egress” insurance protects a business from economic losses when ingress to or egress from an insured's premises is stopped or made more difficult because of a fire or other insured peril. While access being “inconvenient” typically is not enough to trigger this coverage, fire damage to roads or damage from fire suppression or mitigation efforts that make access impractical may suffice.

This insurance is not the same as insurance for losses caused by orders of civil authority. But, together, the two provide a broad range of protection — ingress/egress insurance when access is physically prevented or made impractical, and civil authority insurance when access physically is possible but an order prevents access.

6. Profit and Commission Insurance

“Profit and Commission” insurance applies when an insured's inventory is destroyed or damaged, meaning that the insured cannot sell the inventory.

7. Utility Service Interruptions

This coverage applies when utility service providers suffer damage at their locations and are unable to deliver electricity, gas, water, or other utilities to the insured for a period of time.

C. Potential Policy Exclusions and Conditions

Insurance policies typically contain many exclusions and other provisions that limit the scope of amount of coverage. These exclusions and limiting provisions often are found in sections labeled “exclusions” or “conditions.” But they may be found (or buried in) other sections of the policy. Furthermore, endorsements to policies typically change many provisions found in the basic policy form. They should be carefully reviewed to determine their effect on coverage.

Policies also contain a number of provisions — often designated as “Conditions” — stating what an insured should do to obtain coverage. Insurance policies typically require that the insured do certain things, often immediately after a loss. Most insurance policies require that an insured notify the insurer “as soon as practicable” after a loss. However, under California law, an insurer can use a delay in notice as a defense to coverage only if it proves that it suffered actual and substantial prejudice from the delay.

Most property insurance policies also require that an insured provide a “proof of loss, signed and sworn to by the insured,” including statements of the time and origin of the loss of the interest of the insured and others in the property and the actual cash value of the property damaged. Proofs of loss usually must be submitted relatively quickly, often within 30 to 60 days after the fire or after the insurer requests a proof of loss. However, if an insured does not comply fully, it still may be entitled to coverage if it substantially complied with the requirement.

Most property insurance policies also give the insurer the right to conduct an examination under oath “as often as may be reasonably required” about any matter relating to the insurance or the loss and the right to require that the insured produce relevant books and records for examination. This examination is akin to a deposition where the insured is examined and provides statements under oath. The insurer’s right to conduct such an examination is not limited to one examination and often extends to the employees and owners of a business. But the insurer’s request must be reasonable, and the insured typically has the right to be represented by counsel in an examination. However, if an insured unreasonably refuses to engage in an examination under oath, it may lose its coverage.

Finally, most property insurance policies have a “contractual limitations” provision. This provision states a time limit by which an insured must sue or otherwise commence a legal action against its insurer. One- and two-year limitations periods are common. While these periods frequently are extended by law (for example, the “clock” usually does not run during the time between the insured notifying the insurer and the insurer providing its coverage position), these periods should not be ignored. If a suit or legal

action is not commenced within the applicable period, the insured may lose its right to sue.

IV. POST-FIRE STEPS TO HELP RECOVER INSURANCE BENEFITS

A. Locate Insurance Policies.

If insurance policies are not destroyed or lost during the disaster, they should be kept and reviewed to determine the potential coverage available.

However, if policies are lost, an insured should ask its insurance broker or agent for copies. If, for some reason, the broker or agent does not have a copy, they (or the insured) can ask the insurer for a copy. If need be, there is a process available under the California Insurance Code to file a formal application with an insurer, stating that the policy is lost or missing and asking the insurer to certify the terms of the missing policy. Generally speaking, such a formal process is not necessary, and insurers can provide the “standard” forms of their policies.

B. Consider All Possible Insurance Policies.

While property insurance is often the first place for a business to seek coverage, other forms of policies may apply. For example, automobiles typically are insured under business automobile policies, or in a separate section of a package policy.

C. Provide Written Notice to All Potential Insurers.

Insurance policies usually provide information on how and to whom notice is to be given. There are various options — notice by mail, by telephone, and/or by email. Notice should be given as specified in the policy. Insureds should keep copies of all notices and responses, including recording any messages left or received via voicemail.

Notice also often may be given through an insurance broker or agent. In any event, brokers and agents should be promptly advised of any loss so that they may assist in the processing of a claim.

D. Take Photographs and Videos to Document Property Damage or Loss.

Insureds should, to the extent possible, take photographs and videos of property damage. “Before and after” photographs and videos can be helpful, even if not required. Consider searching for photos and video, perhaps in the possession of employees, landlords, or property management, that depict property destroyed by the disaster.

E. Prepare an Inventory of Damaged or Lost Personal Property.

Insureds should prepare an inventory of damaged or lost personal property, such as goods, supplies, inventory, and equipment. An insurance broker or agent usually can provide appropriate forms for submission to an insurer. An insured should keep copies

of receipts and estimates. As part of this process, an insured should assess what property can be repaired.

Because insurers usually will ask for some form of “proof” that the insured owned the property involved, an insured should locate receipts, invoices, and other evidence of the price of the property, including bank records. If property is insured for its “replacement” value, statements or estimates from a supplier or the results of an inventory search may suffice.

Most insurance policies call for any disputes over the amount of a loss, including the value of loss or destroyed property, to be resolved by an “appraisal” — in essence, an arbitration in which three people (one appointed by the insured, one appointed by the insurer, and the third appointed by those two appointees) determine the amount of the loss.

F. Keep Receipts for All Expenses to Protect or Repair Your Property and for Any Extra Expenses.

An insured should obtain and retain receipts for all costs incurred to protect or repair property and for any additional or extra expenses. This holds true for even the lowest amounts, which, over time can add up to be more substantial than initially anticipated.

G. Provide the Insurer With Cost Information and Determine Whether the Insurer’s Consent Is Necessary.

Many policies state that the insured should not “voluntarily” incur costs or liabilities and call for the insurer to approve all such costs and liabilities — before they are incurred. Of course, in a situation such as presented by the fires, getting advance approval might not have been possible or practical. In such a circumstance, the consent provision might be excused. However, to the extent reasonably possible, an insured should notify the insurer requesting approval (or at least “no objection”) to avoid later second-guessing battles.

H. Review Your Policy for Procedural Requirements and Time Traps.

As noted above, insurance policies typically have various conditions calling for the insured to do certain things in order to obtain coverage. An insured should carefully review the policy, note all such provisions and comply to the extent possible (or get the insurer’s agreement that it need not comply, at least at that time).

I. Request Partial or Advance Payments.

Even if a policy does not state that an insurer must pay advances before a loss is finally determined, insurers typically will make such advance payments against what ultimately might be owed under a policy. Indeed, insurers already have begun making such payments for losses suffered from the Southern California fires. Insureds should request such advances as soon as they need them.

J. Review Checks, Payments, and Other Written Communications to Determine If There Is Any Language Releasing or Giving Up Any Claims.

Insureds should carefully review checks, wire transfer and ACH payment documents, letter, emails, and other written communications from insurers to see if there is any language purporting to have the insured release or give up any claim, including claims for additional payments under a policy. While the enforceability of such language might be challenged, it is better to avoid a fight. The language could be found almost anywhere, including above the place for endorsing a check. Questionable language includes a statement that a payment is a “full payment,” “payment in full,” or “in full satisfaction of.” It also is important to check for language that describes the nature or extent of the damage or loss to ensure that it is accurate.

This is not to suggest that an insurer will try to “trick” an insured into giving up rights — but it is better to be “safe than sorry,” even if the language is a simple mistake.

K. Insist on Timely Communications From Your Insurer.

California regulations, known as the Fair Claims Settlement Practices Regulations, require insurers to (i) timely acknowledge receipt of claims (immediately, but no later than 15 days), (ii) timely provide necessary forms (immediately, but no later than 15 days), and (iii) provide a coverage position stating any bases for denials or limitations on coverage (within 40 days of notice). An insurer’s failure to do so may be evidence that it has breached the implied covenant of good faith and fair dealing implied in insurance contracts — that is, the insurer’s implied duty to give at least as much consideration to the welfare of its insured as it gives to its own interests.

L. Seek Advice as Appropriate.

Insureds have several options for seeking advice as they navigate the insurance claims process. A starting point often is the insurance broker or agent that procured the policy. Public adjusters also may assist (typically for a fee based on a percentage of any recovery). And attorneys experienced in insurance matters may be retained (whether on a contingency-fee basis, hourly, or some other fee basis). An attorney may be needed to analyze how the resolution of these issues will impact your insurance recovery, and to help you describe your claim in a way that will maximize your protection under the insurance policies in light of the coverage issues.

V. CONCLUSION

Although insurance policies have specific and sometimes overly technical requirements, businesses that have suffered losses because of the recent fires should, in most cases, find that their insurance policies provide substantial protection. It is important, though, that an insured take appropriate steps to maximize its recovery.

Firm Overview

McGuireWoods is a leading international law firm with 1,100 lawyers in 21 offices worldwide. Its insurance recovery lawyers have represented insureds for decades in pursuing their insurance rights.

Insurance Recovery Group Contacts

As impacted small businesses begin to engage with their insurers, attorneys in McGuireWoods' Insurance Recovery Group are prepared to provide pro bono advice on the claims process. If you would like to schedule a call with one of the firm's attorneys, please contact:

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