McGuireWoods

Maximizing Property and Business Interruption Insurance for Losses From the 2025 Southern California Wildfires

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I. INTRODUCTION

Our hearts go out to those in our Southern California communities who have lost friends and loved ones, homes, schools, and businesses in the January 2025 wildfires — which include the Palisades, Eaton, Kenneth, Hurst, Lidia, and Sunset fires, among others throughout Los Angeles, Riverside, San Bernardino, and Ventura Counties. These fires, several of which began on January 7, 2025, after a red-flag warning issued by the National Weather Service, have decimated entire communities, forcing more than 200,000 people to flee their homes, businesses, and schools. As a result of the level of destruction and loss of life, the California Department of Forestry and Fire Protection now includes two of the January 2025 Southern California wildfires — the Palisades and Eaton fires — in the top five of its list of the top 20 most destructive California wildfires ever.

As Southern California communities and businesses rebuild and address the effects of these fires, their financial needs will be tremendous. Many have a valuable resource available in the form of property insurance. This insurance may insure not only for physical damage to and loss of property, but also for financial losses arising from an inability to conduct business (either at all or at the same levels as before); the extra expenses incurred in dealing with the effects of these fires, including expenses incurred in advance to prevent or minimize any damage and loss; and the costs incurred in establishing the extent of the loss itself. Furthermore, because the economic impact of these disasters is felt across the country, businesses outside Southern California may suffer income losses and other adverse effects that insurance may cover.

It is critical that insured businesses quickly assess the extent of any losses and the scope of coverage for those losses. While insurance policies may provide valuable financial protection for losses, insurers likely will demand that insureds comply with all conditions and prerequisites to obtaining coverage, including provisions calling for timely notice, submission of proofs of loss, cooperation and, ultimately, that any legal action be filed within contractual limitations periods specified in many policies.[1]

II. COVERAGE UNDER PROPERTY INSURANCE POLICIES

Property policies typically insure for “direct physical loss or damage to property.” They also typically provide a range of so-called time-element coverages. These

[1] An insured can consult with its insurance broker or agent, public adjusters, and lawyers for specifics or advice on disputes. This white paper 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.

coverages typically insure against lost business income following a disaster and related events. For example, when a disaster causes an insured "direct physical loss or damage to property" and the insured loses business income as a result, the economic losses may be insured. Additionally, an insured may be protected against business income losses when a supplier or customer's business is disrupted, when ingress or egress to its property is impaired by a disaster, or when a government authority (civil or military) issues orders that interfere with an insured's ability to conduct business. These coverages, often referred to as time-element coverages, are designed to protect an insured from delays and interruptions of its business when a disaster strikes.

Property insurance policies and common law also typically entitle an insured to recover the expenses and any losses it incurs in trying to protect property from damage.

In short, property policies may provide a broad range of substantial financial protection from the effects of disasters, including fires.

III. THE CALIFORNIA STANDARD FORM FIRE INSURANCE POLICY

California has instituted a standard form fire policy for property and homeowners' policies issued in California. California Insurance Code Section 2070 states:

> All fire policies on subject matter in California shall be on the standard form, and, except as provided by this article shall not contain additions thereto. No part of the standard form shall be omitted therefrom except that any policy providing coverage against the peril of fire only, or in combination with coverage against other perils, need not comply with the provisions of the standard form of fire insurance policy or Section 2080; provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy.

California Insurance Code Section 2071 formally adopts the California Standard Form Fire Insurance Policy as "the standard form of fire insurance policy for this state." As the California Supreme Court explained, "a policy that does not conform to section 2071's standard provisions must provide total fire coverage that is at least 'substantially equivalent' to coverage provided by the standard form." *Century-Nat'l Ins. Co. v. Garcia*, 51 Cal. 4th 564, 567 (2011).

The Standard Form Fire Insurance Policy insures against "all LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY," subject to exclusions provided in the standard form, "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after the loss." Cal. Ins. Code § 2071. Notably, it disclaims liability for loss caused directly or indirectly by (i) civil authority orders other than acts for the purpose of preventing the spread of fire, (ii) "neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises," and (iii), loss by theft. *Id.*

The Standard Form Fire Insurance Policy also imposes several requirements on an insured in the event that loss occurs, notably the requirements to "give written notice to [the insurer] of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed." But it also requires the insurer to notify a claimant that "they may obtain, upon request, copies of claim-related documents," defined as "all documents that relate to the evaluation of damages." *Id.*

In addition to the Standard Form Fire insurance Policy, many insurers provided enhanced or increased coverage beyond what it contains.[2]

IV. "ALL-RISK" AND "NAMED-PERILS" POLICIES

Insurance for losses caused by wildfires and other natural disasters can be provided under several different types of commercial property insurance policies. Many commercial property insurance policies are sold on an all-risk basis, meaning that they cover "*all* risks save for those risks specifically excluded by the policy." *Strubble v. United Servs. Auto. Ass'n*, 35 Cal. App. 3d 498, 504 (1973). Because of the breadth of coverage afforded by an all-risk policy, once an insured shows that it has suffered a loss, the burden of proof shifts to the insurer to show that the loss is not covered. *See, e.g.*, *Moayery v. State Farm Gen. Ins. Co.,* 2023 U.S. Dist. LEXIS 214351, at *13 (C.D. Cal. Nov. 30, 2023) ("To establish the defense of noncoverage, the insurer has 'the

[2] Insurance Code Section 2079 expressly states that clauses may be added to the standard form, including (a) clauses covering subject matter and risks not otherwise covered, (b) clauses assuming greater liability than is otherwise imposed on the insurer, and (c) clauses granting the insured permits and privileges not otherwise provided.

burden of proving that [the insured's] loss was proximately caused by . . . a peril specifically excluded' from the policy.").

Some policies cover losses only if they are caused by specified perils. These are known as named-peril policies. When claiming a loss under a named-perils policy, the burden is on the insured to prove that its loss was caused by one of the perils listed in the policy. *E.g.*, *Citizens Prop. Ins. Corp. v. Kings Creek S. Condo, Inc.*, 300 So. 3d 763, 765 (Fla. App. 2020). Fire is typically one of the specified perils covered under named-perils policies.

A. Coverage for Real Property

"All-risk insurance covers the insured for damage to the subject matter of the policy from all causes except those specifically excluded in the policy." 1 *New Appleman on Insurance Law Library Edition* § 106[4] (2024). These policies traditionally cover damage to tangible property, including buildings, permanently installed machinery or equipment, inventory, and fixtures. They may also cover personal property that the insured owns and uses to service and maintain buildings and premises, such as fire extinguishing equipment. Many decisions throughout the country have also held that the loss of use of insured property constitutes "physical loss or damage" under a first-party property policy. *See, e.g.*, *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515, 529-30 (Vt. 2022) (collecting cases and concluding "physical loss" can include "circumstances in which property is not harmed but may not be used for some reason").

A party seeking to enforce an insurance contract must have an "insurable interest" in the property secured at the time of the covered incident. About 30 states have statutes defining an "insurable interest" as "'any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.'" 1 *New Appleman on Insurance Law Library Edition* § 105 (2024). California defines an insurable interest broadly to include "[e]very interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured . . . ." Cal. Ins. Code § 281.

B. Coverage for Machinery, Stock, and Other Business Personal Property

Most first-party property policies also insure business property, including machinery and stock. It may be difficult to prepare an estimate regarding the cost of lost or damaged personal property after a disaster, so insured businesses facing an oncoming disaster should prepare an inventory or list of their insured personal property, including receipts, photographs, and video recordings. Because of the ease and

ubiquity of digital photography, if an inventory of personal property was not completed before it was lost, insureds should comb through their photographs on phones and computers — and ask colleagues to do the same — to see what documentation of the property might be available to help support a claim.

Even if such steps are not possible or are not otherwise taken, commercial property insurers have a duty to work with insured businesses following a loss to help them ascertain the business property damaged and determine a reasonable valuation. Consultants may also be able to assist insured businesses with this task, particularly with respect to nonstandard equipment tailored for particular businesses that can be difficult to value.

Most commercial property policies also provide at least some coverage for third-party property that is in the insured's custody or control at the time of a loss. It is important for insured businesses to consult their policies to ascertain the full scope of such coverage.

C. Coverage for Damage from Smoke, Ash, and Poor Air Quality

Under most commercial property policies, an insured may also be able to obtain coverage for losses or damage from smoke, ash, and poor air quality occurring as a result of nearby wildfires. This is true even if an insured location otherwise suffers no physical damage from the fires.

For instance, in *Oregon Shakespeare Festival Association v. Great American Insurance Co.*, 2016 WL 3267247 (D. Or. June 7, 2016), the insured, an operator of a Shakespeare festival, was forced to cancel several performances at its open-air, partially enclosed theater as a result of several wildfires in the area. The insured claimed that it suffered loss or damage to property when smoke from those wildfires filled its theater and cancelled four performances due to poor air quality from the surrounding fires.

The insurer denied coverage and argued that the smoke that filled the theater did not cause "direct physical loss or damage to covered property." The court disagreed. It held that the smoke in the facility caused covered damage:

> In this case, it is undisputed that the interior of the building had to be cleaned, the air filters had to be changed multiple times, and smoke in the air within the theater had to dissipate before business could be resumed. While the cleaning of the space took merely a few hours, the

> dissipation of the smoke took several days, during which time the [insured] was forced to suspend operations. [The insurer] claims that this period of time cannot be considered "restoration" because no *structural* repairs were necessary. Once again, the Court can find no such limitation within the terms of the policy.

Id. at *6.

Other courts have similarly held that nontangible impacts that render a property unusable can result in covered direct physical loss or damage to property. *See, e.g.*, *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (2015) (cat urine odor and other "changes that are perceived by the sense of smell and that exist in the absence of structural damage" may cause physical loss to an insured property if the change to the property "rendered the insured property temporarily or permanently unusable or uninhabitable").

In short, the smoke, ash, and unhealthy or dangerous air quality that results from wildfires may fall squarely within the umbrella of direct physical loss or damage to property, particularly when the resulting changes to the property render that property unusable or uninhabitable.

D. Coverage for Losses and Costs Incurred to Prevent Loss

1. Insurance Policy Mitigation Provisions

Property policies typically contain a provision that not only requires an insurer to pay for preventive measures taken by the insured to avoid loss, but that also may require the insured to undertake such measures. This provision historically has been called the "sue and labor" provision (the word "sue" has the now-obsolete meaning of "to go in pursuit of"). It often now is called the "expenses to prevent loss" or "due diligence" provision. It applies whenever the insured spends money to protect otherwise covered property from damage or destruction by a covered peril. It is intended to encourage the insured to protect threatened property to avoid a larger expense to the insurer that could result if such steps were not taken.

The standard required under these clauses generally is that of a prudent uninsured owner — that is, the insured is to act as though it had no insurance at all, acting not only reasonably, but cautiously, to preserve its property. *Young's Mkt. Co. v. Am. Home Assurance Co.*, 4 Cal. 3d 309, 314 (1971).

Courts generally recognize that these provisions obligate the insurer to pay for the insured's costs in attempting to reduce or prevent damage. *See, e.g.*, *ViacomCBS Inc. v. Great Divide Ins. Co.,* 640 F. Supp. 3d 931, 941 (C.D. Cal 2022) ("[N]o reasonable jury could find that developing and implementing the [television production's] COVID-19 safety protocols was other than reasonably practicable to avoid or diminish a loss or claim under the Policy. [The insurer] must indemnify [the insured] pursuant to the Due Diligence Clause for the costs [the insured] incurred to develop and implement COVID-19 safety protocols."); *see also Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1382 (S.D. Fla. 2001) (under loss-prevention clause, insured has duty of preventing threatened insurable loss and mitigating such loss when it does occur; in performing this duty, it avoids or minimizes insurable loss, thus acting for insurer's benefit).

The "expenses to prevent loss" clause typically is regarded as a separate contract of insurance. Therefore, exclusions found in other parts of the policy may not apply to it. For example, in *Witcher Construction Co. v. St. Paul Fire & Marine Insurance Co.,* 550 N.W.2d 1 (Minn. Ct. App. 1996), the court interpreted language in a policy that was similar to an "expenses to prevent loss" clause. The court held that the provision was separate coverage that was not subject to exclusions. *See also Reliance Ins. Co. v. Yacht Escapade*, 280 F.2d 482, 488 n.11 (5th Cir. 1960) ("It is 'separate,' of course, in the sense that the reimbursement to the assured is in addition to, and over and beyond, the amount payable under or the dollar limits of, the named perils coverage.").

That said, some courts have held that loss-prevention provisions require the insurer to pay an insured for its costs incurred to reduce loss only if the insured incurs a covered loss. *See, e.g.*, *AE Mgmt., LLC v. Ill. Union Ins. Co.*, 524 F. Supp. 3d 1340, 1345 (S.D. Fla. 2021) ("Under Florida law, such mitigation losses, under a mitigation provision like this, come into play only if an actual, *covered* loss has occurred." [emphasis added]); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 169 (Fla. 2003) ("the policy's Sue and Labor clause applies only in the case of an actual, covered loss").

2. The Common Law Mitigation Doctrine

The common law also supports an insured's right to recover losses and expenses incurred to prevent or reduce a loss. Indeed, an insured is required to take reasonable efforts to prevent or reduce loss. The success of those efforts does not mean it forfeits its coverage. *See Insurance Co. of N. Am., Inc. v. U.S. Gypsum Co., Inc.*, 870 F.2d 148, 154 (4th Cir. 1989) ("an insured is entitled to recover mitigation costs "whether or not [its] attempts were successful," as long as "the claimed expenditures

were reasonable under the circumstances"). As one court explained, one cannot "conceive as reasonable a rule of law which would encourage an insured property owner" not to take steps to reduce a loss "because his insurance would cover him for the property damage but not for" the costs to prevent that damage. *Globe Indem. Co. v. State*, 43 Cal. App. 3d 745, 751-52 (1974). To quote another court:

> It is folly to argue that if a policy owner does nothing and thereby permits the piling up of mountainous claims at the eventual expense of the insurance carrier, he will be held harmless of all liability, but if he makes a reasonable expenditure and prevents a catastrophe he must do so at his own cost and expense.

Leebov v. U.S. Fid. & Guar. Co., 401 Pa. 477, 481 (1960).

Therefore, under California law, "an insurer is liable . . . [i]f a loss is caused by efforts to rescue the thing insured from a peril insured against." Cal. Ins. Code § 531. This recognizes the reality that when an insured acts to prevent or reduce a threatened loss, it "acts for the benefit of the insurer," giving rise to the insurer's duty "to reimburse the insured for prevention and mitigation expenses." *Southern Cal. Edison Co. v. Harbor Ins. Co.,* 83 Cal. App. 3d 747, 757 (1978); *Winkler v. Great Am. Ins. Co.*, 447 F. Supp. 135, 142 (E.D.N.Y. 1978) (if insured had raised his house to avoid flood damage, insurer would have to pay expenses because "the duty to protect the property from further damage implies a responsibility on the insurer's part to pay for the costs of reasonable protective measures"); *Papa v. Miss. Farm Bureau Cas. Ins. Co.*, 573 So. 2d 761, 763-64 (Miss. 1990) (rejecting notion that insured should wait for injury to occur before attempting to avert it; "[u]nquestionably, mitigation of damages would be consistent with insurers' interests").

V. TIME-ELEMENT COVERAGES

Many property insurance policies also provide time-element coverages — insurance that protects against many types of economic losses.

A. Business Interruption

Business interruption coverage reimburses the insured its lost profits — *i.e.*, the amount of gross earnings minus normal expenses that the insured would have earned but for the interruption of the insured's business. As one court described this coverage,

> [T]he purpose and nature of "business interruption" . . . insurance is to indemnify the insured against losses arising from his inability to continue the normal operation and functions of his business, industry, or other commercial establishment.

Northrop Grumman Corp. v. Factory Mut. Ins. Co., 2013 WL 3946103, at *12 (C.D. Cal. July 31, 2013) (citation omitted). "In other words, the goal is to preserve the continuity of the insured's earnings." *United Air Lines, Inc. v. Ins. Co. of State of Pa.,* 439 F.3d 128, 131 (2d Cir. 2006).

Business interruption coverage provisions typically apply even when an insured is forced to relocate in order to keep its business going or to minimize its overall loss. *See, e.g., American Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.,* 949 F.2d 690, 692-93 (3d Cir. 1991) (insured reopened at an alternate location but earned less than it otherwise would have; insurer obligated to indemnify insured while business continued at less-than-normal level).

1. Coverage Without Physical Damage

Because the fires' impact may be felt across the country, insureds who have suffered no physical damage from the fires still may suffer business losses. While many insurance policies will not respond to such losses, some policies may respond and provide substantial economic recovery.

Several courts have addressed whether business interruption insurance applies to business losses that do not involve actual "physical" damage or destruction. Those courts recognize, in accord with policy language, that coverage may be afforded when the policy does not require such damage under a specific insuring agreement.

Two of the leading cases are *Sloan v. Phoenix of Hartford Insurance Co.*, 207 N.W.2d 434 (Mich. Ct. App. 1973), and *Allen Park Theatre Co., Inc. v. Michigan Millers Mutual Insurance Co.*, 210 N.W.2d 402 (Mich. Ct. App. 1973). The insureds in *Sloan* and *Allen* claimed lost revenues because they were forced to close their movie theaters during a dusk-to-dawn curfew imposed by the government after the 1967 Detroit riots. The *Sloan* and *Allen* courts focused on the insuring language of the business interruption policy to determine whether actual "physical" damage or destruction of property was a prerequisite to coverage for those lost revenues. They held that there was coverage because the insuring agreements in the business interruption policies contained not only the words "damage" and "destruction" but also the word "loss," or

otherwise encompassed an interpretation that did not require "physical" damage or destruction to property. The *Allen* court also focused on the fact that typical business interruption policies are all-risk policies, reasoning that "[i]f the insurer wanted to be sure that the payment of business interruption benefits had to be accompanied by physical damage it was its burden to say so unequivocally." 210 N.W. 2d at 403. *See also Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co.,* 46 Mich. App. 758, 760 (1973) (recognizing that when "the insured businesses were closed by order of a civil authority, physical damage to the insured premises was not a prerequisite to the insurer's obligation to reimburse the insured for the net losses resulting therefrom").

However, the availability of coverage will depend on the policy language. If a covered peril does not trigger a loss, then coverage may not be afforded. *See, e.g.*, *National Child.'s Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 431 (2d Cir. 1960) ("The policy insured the use and occupancy of the premises. There can be no recovery in the absence of some interruption in this use and occupancy by reason of one of the contingencies preventing the 'holding of or continuance of' the exposition."); *Apartment Movers of Am., Inc. v. OneBeacon Lloyd's,* 2005 U.S. Dist. LEXIS 695, at * (N.D. Tex. Jan. 19, 2005) ("A survey of relevant case law demonstrates that the 'necessary suspension of . . . operations' must come, not from a lack of customer demand, but of an inability to meet customer demand. In other words, if [the insureds] are able to fully perform their operations, there is no 'necessary suspension' simply because they do not have as much business as they once did.").

2. Coverage When Insured Property Is Not Damaged

Even if there has been physical injury to tangible property, insurers still may deny coverage if the physical injury was not covered, or if the property did not belong to the insured. But this does not mean that they are right.

In *Burdett Oxygen Co. v. Employers Surplus Lines Insurance Co.*, 419 F.2d 247 (6th Cir. 1969), for example, the insured suffered damage to its property when a machine broke down. The physical injury to the machine was excluded from coverage by a mechanical breakdown exclusion. However, the U.S. Court of Appeals for the Sixth Circuit held that the business interruption and extra expense was covered because there had been physical injury, and that the all-risk policy did not exclude all loss from mechanical breakdown.

In *Archer-Daniels*, the insured suffered $44 million in losses consisting of increased costs of transportation and raw materials occasioned by flood, even though it did not own the damaged property. The policy language included a coverage for "extra

expense" sustained by the insured as a result of direct physical damage caused by the perils insured against. 936 F. Supp. at 537. The insurers denied coverage because the damaged property was owned by suppliers. The insured argued that the policy language required only that there be direct physical damage to "property" and that the damage be caused by covered perils. The court said that both requirements were satisfied. It explained that while other provisions in the policy restricted coverage to property at "scheduled locations," the extra expense provision did not. Therefore, the court held that "the most reasonable construction . . . is to conclude that the parties intended that property damage need not occur at a scheduled location for coverage to exist." *Id.* at 538.

3. Insurance for "Restoration" or "Extended Period of Indemnity"

When an insured ceases business activities and subsequently resumes operations to the extent possible, business interruption insurance ordinarily extends to cover the resumption period until business returns to normal. This insurance often is found in separate provisions for "restoration" or an "extended period of indemnity." But coverage may be found even without a policy provision expressly providing for a recovery period.

For example, in *Lexington Insurance Co. v. Island Recreational Development Corp.*, 706 S.W.2d 754 (Tex. App. 1986), the insured owned a restaurant that was severely damaged in a storm. Once the restaurant reopened, it did not return to the same volume of business for another nine months. The insured sought to recover not only for the time it was closed, but also for the time it took to return to its prior business volume. The court broadly interpreted the policy to protect the reasonable expectations of the insured. Because the insurance policy did not explicitly exclude the period of recovery after resumption of operation, the court held that the insured was entitled to recover for the loss it suffered during its closure and "the period the restaurant was rebuilding its business." *Id.* at 756.

Coverage also should be afforded for the period from when the insured resumes business until its business returns to normal (subject, of course, to any applicable time or dollar limits in the policy). *See, e.g.*, *American Medical Imaging*, 949 F.2d at 692-93. In *American,* fire damage rendered the insured's ultrasound headquarters unusable. The policy covered the "necessary or potential suspension" of operations. It also required the insured to reduce its loss if possible by "resuming operations" and the insurer to indemnify the insured until it returned to "normal business operations." The insured reopened as quickly as possible at an alternate location. As a result, it incurred extra expenses and earned less than it otherwise would have. The district court

concluded that, once the insured had reopened for business, recovery for the further period of operation with reduced earnings was precluded. The U.S. Court of Appeals for the Third Circuit reversed. *Id.* at 692-93. It reasoned that the plain language of the policy requiring the insurer to indemnify the insured until it returned to "normal business operations" necessarily implied that the insurer had to indemnify the insured while business continued. Otherwise, by mitigating the loss, the insured "would have forfeited its right to recover under the policy," which was "an anomalous result [that] was not intended." *Id.* at 693. As the court also said, the insurer's "duty to indemnify [is] consistent with [the insured's] duty to mitigate." *Id.* It also held that the insurer's "obligation to indemnify continues until the resumption of 'normal business operations,'" meaning that "the obligation to indemnify can arise while business continues, albeit at a less than normal level." *Id.*

B. Contingent Business Interruption

Contingent business interruption insurance typically covers two types of business interruption. First, it protects against economic losses caused by a supplier's inability to get its goods to the insured caused by damage to or destruction of its property by an insured peril. For example, if a supplier's property is damaged as a result of wildfires and it prevents them from supplying an insured in another part of the country, that insured may have a contingent business interruption claim.

Second, it protects against economic losses caused by damage to or destruction of a customer's property of the type insured that prevents the acceptance of the insured's products. In the wildfire context, this may include an insured business that is not itself physically damaged but that nonetheless suffers economic losses because its surrounding customers suffer property damage and are no longer available to purchase goods and services.

The potentially broad reach of contingent business interruption coverage creates challenges for larger global organizations to identify income losses caused by the effect of a disaster on entities several steps removed from the insured. Indeed, notice of damage at a supplier's distant location may only reach the insured through slightly higher component costs. Faced with increasing costs, supply chain personnel may decide to secure alternative components without informing the risk management department or even ascribing the increased costs to potentially covered damage.

Similarly, businesses should not assume that contingent business interruption coverage is limited to suppliers of raw materials, because most contingent business interruption provisions also cover lost earnings resulting from damage to any supplier of

services. For example, if a disaster prevents employees from coming to work and thereby reduces an insured's earnings, that event could constitute a contingent business interruption loss because the employees' labor is a service provided to the insured.

One issue that insureds must consider as to contingent business interruption coverage is how a policy defines the third party that must suffer damage to trigger a claim for coverage. For example, some policies require damage to a "dependent property," which may include "contributing locations," "recipient locations," "manufacturing locations" and "leader locations." Other policies require damage to "suppliers," "customers," "contract manufacturers" and "contract service providers." While some policies may define these terms, many policies do not, leading to disputes about which third parties on which the insured relies are included in the insured's contingent business interruption coverage.

This is particularly true given the growing complexity and interdependence of modern supply chains. For example, in *DIRECTV v. Factory Mutual Insurance Co.*, 692 F. App'x 494, 495 (9th Cir. 2017), the U.S. Court of Appeals for the Ninth Circuit interpreted a contingent business interruption provision that insured against business interruptions stemming from certain events at any location "of a direct supplier, contract manufacturer or contract service provider to [DIRECTV]." The critical question before the Ninth Circuit was whether Western Digital, a manufacturer of hard drives used in DIRECTV's set-top boxes, qualified as a direct supplier. The insurer argued that because Western Digital's hard drives were sent to third-party set-top box manufacturers, Western Digital was not a "direct supplier" to DIRECTV. DIRECTV, however, offered extrinsic evidence that in the electronics supply chain industry, Western Digital would reasonably be understood as a "direct supplier" because DIRECTV exerted significant control over and directly managed design, product development, cost, production and quality control with Western Digital. The Ninth Circuit stated, "'[t]he law charges insurance companies with the duty of informing themselves as to the usages of the particular business insured, and a knowledge of such usage on the part of such company will be presumed.'" *Id*. (citation omitted). Accordingly, the court held that "the phrase 'direct supplier' is 'reasonably susceptible' to the meaning urged by [DIRECTV]." *Id*.

These issues also were addressed in *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*, 936 F. Supp. 534 (S.D. Ill. 1996). In *Archer-Daniels*, the insured sought coverage under the contingent business interruption provisions of its policy arising from a flood of the Mississippi River and its tributaries and resulting damage to 20 million acres of farmland. The insured processed farm products for domestic and international

consumption. Much of the insured's raw materials traveled by barge on the Mississippi River and its tributaries. When barge traffic was halted because of the flooding, the insured had to arrange alternate, and more expensive, transportation by rail. It claimed it was covered for a contingent business interruption loss for the increased costs it incurred for transportation and raw materials. It argued farmers and the U.S. government, through the Army Corps of Engineers, which operated and maintained the Mississippi River system, were suppliers. The insurers disagreed.

The court noted that the phrase "any supplier of goods or services" "denotes an unrestricted group of those who furnish what is needed or desired." *Id.* at 541. It concluded that "the Corps is undoubtedly providing a service. As a result, the Corps … are 'suppliers' of 'services' for purposes of" the coverage. *Id.*

The court also rejected the insurers' argument that the Corps was not a supplier because the insured did not have a contract with the Corps and that the principal entity that supplied the insured locations was a subsidiary of the insured. The court agreed with the insured that "the policies do not state that coverage is limited to principal suppliers or suppliers with whom [the insured] has a written contract, rather, they apply to 'any' supplier." *Id.* at 543.

The court then addressed whether the farmers were "suppliers of goods and services" within the coverage. The insurers argued that the farmers were not suppliers because the insured did not contract for the purchase of grain from individual farmers but did so from licensed grain dealers. The court rejected this argument, too. It noted that "the policy language does not limit coverage to those suppliers in direct contractual privity." *Id.* at 544. It stated: "The farmers may be an 'indirect' supplier of the grain, but they are a supplier nonetheless. Had either of the parties wanted to limit the coverage to 'direct' suppliers, they could easily have added language to that effect." *Id.*

Another potential issue is whether the third party must be unrelated to the insured. For example, in *Park Electrochemical Corp. v. Continental Casualty Co.*, 2011 WL 703945 (E.D.N.Y. Feb. 18, 2011), one company, Neltec, could not buy its supply of a vital component because of an explosion at Nelco's facility. Both companies were wholly owned subsidiaries of their parent, Park. Park and Neltec were insured under a policy that covered losses "caused by direct physical damage or destruction to … any real or personal property of direct suppliers which wholly or partially prevents the delivery of materials to the Insured or to others for the account of the Insured." *Id.* at *2. The insurer argued that coverage did not apply because "subsidiaries of the insured, such as Nelco, are not considered 'direct suppliers' under the policy." *Id.* The court noted that the "term 'direct suppliers' is not defined anywhere in the policy" and

concluded that the "language of the policy on this point is vague and ambiguous." *Id*. at *4. The court concluded that the "ambiguity survives the proffers of extrinsic evidence" and ruled for the insured. *Id*. at *6.

C. Civil Authority

Civil authority insurance is also commonly included in commercial property insurance policies. This insurance generally applies whenever the insured loses business income because a government entity issues orders prohibiting or limiting access to its premises because of damage to or destruction of property belonging to others caused by a covered cause of loss.

Many insured businesses in Southern California may have shut down operations when wildfires impacted their vicinity, such as when they are in evacuation zones. Other insureds may have been in areas where access was denied by government orders. For these insureds, civil authority coverage may be available. This coverage often applies whenever the insured loses business income because access to its premises is prohibited as the direct result of damage to or destruction of property belonging to others caused by a covered cause of loss.

One common civil-authority provision requires the insurer to:

> pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> **(1)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> **(2)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the

> damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.[3]

This coverage typically starts at some specified period after the civil action (often, 72 hours) and applies for a designated length of time (often 30 days or less).[4]

A qualifying order of civil authority need not be a formal order or in writing. As one court has explained:

> The Civil Authority Clause does not, however, require a formal order. It does not require a written order. Indeed, the Civil Authority Clause does not mention an order at all, but rather an "action of civil authority."

Narricot Indus., Inc. v. Fireman's Fund Ins. Co., 2002 WL 31247972, at *4 (E.D. Pa. Sept. 30, 2002); *see also Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, LLP v. Nat'l Fire Ins. Co.*, 2007 WL 2489711, at *3 (M.D. La. Aug. 29, 2007) ("The Civil Authority Clause in question does not require a formal order to be issued by civil authorities; thus, the advisories given to remain off of the streets could be considered an 'action of civil authority' that would not have been given but for Hurricane Katrina.").

Furthermore, the "civil authority" typically is not limited to a particular entity or position. As the *Narricot* court explained:

> Words not defined in a contract — as the words "civil authority clause" are not — are construed according to their ordinary English meaning. . . . "[C]ivil authority" encompasses "civil officers in whom a portion of the sovereignty is vested and in whom the enforcement of municipal regulations or the control of the general interest of society is confided . . . ." This definition is in keeping with the ordinary English meaning of the words and our understanding of the two words together. Coming within the ambit of this definition would be police officers, highway patrol officers, and other Town employees the Town manager sends to conduct public affairs.

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[3] Business Income (and Extra Expense) Coverage Form, CP 00 30 10 12, § A.5.a. (ISO Properties, Inc. 2011).

[4] *Id*.

2002 WL 31247972, at *4 (footnotes omitted). *See also Princess Garment Co. v. Fireman's Fund Ins. Co.*, 115 F.2d 380, 382 (6th Cir. 1940) ("The phrase 'civil authority' as used in the policy should be construed to carry out its purpose. It is to the interest of insurers to enlarge the good faith efforts of public agencies to prevent the spread of fires. The phrase includes civil officers in whom a portion of the sovereignty is vested and in whom the enforcement of municipal regulations or the control of the general interest of society is confided for the prevention of destruction by fire. Policemen and firemen are civil authorities within the meaning of the language of the present policy.").

Many courts require that, absent policy language to the contrary, the order of civil authority must deny access to an insured's premises rather than simply make access difficult.[5]

D. Extra Expense

Extra-expense insurance indemnifies the insured for any increased cost of business operations above the norm because of a peril insured against. One example would be the purchase of a generator to continue to operate because of an interruption of power caused by a disaster.

E. Profit and Commission

Profit-and-commission insurance applies when an insured's inventory has been destroyed or damaged and the insured has been deprived of the opportunity to sell that inventory to the public.

F. Utility Service Interruptions

Many commercial property policies extend coverage for the insured's losses resulting from interruption in utility services when utility service providers suffer damage at their locations and are unable to deliver electricity, gas, water, or other utilities to the insured. Coverage is often only available if the insured is without utilities for a specified waiting period, most commonly 24 or 48 hours.

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[5] *See, e.g.*, *Dixson Produce, LLC v. Nat'l Fire Ins. Co.*, 99 P.3d 725, 729 (Okla. Civ. App. 2004) (civil-authority provision did not apply when, following a tornado, some streets in the insured's city were closed because "[e]ven though travel to insured business was not as convenient as it had been before the tornado, civil authority in the [affected city] did not prohibit anyone access to insured business"); *Kean,* 2007 WL 2489711, at *4 (no coverage under civil-authority provision because recommendations by Baton Rouge officials during Hurricane Katrina to stay off the streets did not deny access to the business's premises); *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005) ("generally, coverage under the civil authority section is only available when access is completely prohibited").

G. Ingress or Egress

Insurance may be available under commercial property insurance policies if access to or from an insured's premises has been stopped or made more difficult because of a disaster. Many insurance policies cover losses when "ingress" to or "egress" from insured premises is "prevented" because of a covered peril.

In *National Children's Expositions Corp.*, 279 F.2d at 431, the court held that when "prevent" is used with respect to actions (as in, to prevent actions) rather than with respect to existence (as in, to prevent the existence of), "prevent" may mean "hinder." In insurance policies, the word "prevent" refers to people's actions of ingress to or egress from the premises. Thus, it should be read to mean "hinder."

Fountain Powerboat Industries, Inc. v. Reliance Insurance Co., 119 F. Supp. 2d 552 (E.D.N.C. 2000), provides an example of coverage for hurricane-related interference with ingress and egress. In *Fountain,* a hurricane flooded several roads leading to the insured's premises. One of them was closed for several days. Even so, the insured could transport its employees to and from the facility with large trucks. When production at the facility fell, the insured sought coverage under the ingress/egress clause that ensured "loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented." *Id.* at 556. Although ingress to and egress from the insured's facility were still possible, the flooding of the roads hindered travel to and from the facility. Because usual routes to and from the facility were obstructed and transportation to and from the facility was harder, the court held that there was coverage. *Id.* at 557.

In *Houston Casualty Co. v. Lexington Insurance Co.,* 2006 U.S. Dist. LEXIS 45027 (S.D. Tex. June 15, 2006), the court considered coverage for an insured's economic losses when the insured closed its theme park for one day after Florida's governor declared a state of emergency because of Hurricane Floyd and ordered mandatory evacuations. The insured sought coverage for its loss even though the hurricane changed course, did not make landfall in Florida and did not damage the theme park. The court concluded that the policy's coverage for losses from orders of civil authority and impairment of ingress to or egress from property "extend[ed] coverage to instances where the insured's property was not physically damaged." *Id.* at *19. Otherwise, these coverages "would be rendered meaningless." *Id. See also Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.,* 288 N.C. 122, 144 (1975) (pedestrian, rather than vehicular, access not considered reasonable; "when an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the

absence of access which, given the nature and location of the property, is reasonable access under the circumstances"); *Nat'l Child.'s Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 431 (2d Cir. 1960) (when "prevent" is used as to preventing actions, rather than as to preventing the existence of something, "prevent" may mean "hinder").

Courts have held that, while these duties do not arise if the threatened loss, if it actually happened, would not be covered under the policy, they override policy provisions that otherwise could limit coverage. *See, e.g.*, *Metalmasters, Inc. v. Liberty Mut. Ins. Co.*, 461 N.W.2d 496, 501 (Minn. Ct. App. 1990) (when policy limited business interruption coverage to a period, "[i]f the mitigation efforts take longer than the interruption period, then the business interruption clause cannot limit coverage to that period, since the activity is in the interest of the insurer"). An insured is also entitled to recover mitigation costs "whether or not [its] attempts were successful," as long as the "claimed expenditures were reasonable under the circumstances." *Insurance Co. of N. Am. v. U.S. Gypsum Co.,* 870 F.2d 148, 154 (4th Cir. 1989).

Therefore, even without the express coverage grant in property policies, courts have held that insureds were entitled to reimbursement for expenses incurred to arrest a landslide to prevent it from damaging adjoining property; expenses incurred in protecting chemicals stored in a warehouse from damage because of exposure following the collapse of a wall; fire suppression costs incurred to prevent a fire from spreading to others' property; and the cost of hiring consultants to inspect a construction project for damage following a natural gas explosion several blocks from the site.[6]

H. Event-Cancellation Insurance

Insureds in entertainment and sports often procure event-cancellation, typically through a standalone policy or policies, to cover live events. Event-cancellation policies generally insure the losses sustained by the insured because of the cancellation, abandonment, or nonappearance at events such as professional sporting events, festivals, concerts, conventions, exhibitions, conferences, trade shows, political rallies or even weddings, reunions and graduations.[7] *See* Kirk Pasich, et al. *New Appleman*

[6] *See Leebov,* 401 Pa. at 479-80 (landslide); *Slay*, 471 F.2d at 1367 (collapse of wall); *Globe Indem. Co. v. State*, 43 Cal. App. 3d 745, 748, (1974) (fire suppression costs); *Witcher*, 550 N.W.2d at 7-8 (hiring consultants).

[7] Event cancellation coverage can be found in some property insurance policies, in "package policies," and in stand-alone policies.

Sports and Entertainment insurance Law & Practice Guide § 16.01 (Kirk Pasich and Kelly Pasich, 2024 Update).[8]

These policies may cover a single scheduled event or a series of related events, such as a concert tour, or sporting tournament. The wildfires resulted in the cancellation, postponement, or movement of various events, including college basketball games, the NFL playoff game between the Los Angeles Rams and the Minnesota Vikings, and awards shows.

Event-cancellation policies can cover the costs associated with relocating an event to alternative premises or the damages caused by a mandatory reduction in attendance. Like traditional property policies, event-cancellation policies may provide all-risk coverage, meaning they insure all perils unless specifically excluded. Others cover certain named perils, such as injury, illness or death of a key individual or cover because of a cancellation caused by adverse weather or travel delays. If an order of a civil or military authority prohibits attendance by some or all attendees, many policies will provide coverage if they do not include an applicable exclusion. Unlike business interruption coverage, event-cancellation coverage is seldom tethered to the physical premises where an insured event will take place; instead, the coverage attaches to the event itself. In the performance context, event cancellation insurance often covers losses resulting from a performer's inability to appear at an event as planned.

Event-cancellation policies generally cover the insured's established or ultimate net loss, which is often calculated one of two ways. The insured may recover the expenses spent that cannot be recovered because of the cancellation or postponement, less the gross revenue and any savings because of the insured's mitigation efforts. The second is the shortfall in gross revenue that would have been earned had the event taken place as originally scheduled and planned, less any savings enjoyed by the insured because of the cancellation or postponement.

I. Motion Picture and Television Production Insurance

Motion picture and television studios and networks and production companies typically have production insurance policies. These policies may insure losses for a given picture or television show, for a portfolio of motion picture and television productions, or for a television series. The applicable limits of production insurance policies can be in the millions or even hundreds of millions of dollars. *See* Kirk Pasich,

[8] See *id.* Chapter 16 for a detailed discussion of event-cancellation insurance.

et al. *New Appleman Sports and Entertainment insurance Law & Practice Guide*, Chap. 15 (Kirk Pasich and Kelly Pasich, 2024 Update).

Production insurance typically covers sources of potential loss for a motion picture, television and other media productions. Thus, coverage typically is afforded for the sickness, injuries, death, or nonappearance of cast or other talent, damage to props, sets, and wardrobe, damage to miscellaneous equipment, and damage to negative film and faulty stock. Often, third-party property damage coverage and automobile physical damage coverage can also be provided in production insurance portfolio policies.

Production insurance policies often call for an insured to act with "due diligence" to protect cast from injury, as well as insuring against losses caused by "imminent peril." Such provisions obviously are implicated in the wildfires.

J. Coverage for Mitigation Efforts

As discussed above, the law recognizes that an insured's efforts to mitigate property damage benefit insurers, and for that reason insurers are generally required to reimburse losses stemming from reasonable mitigation efforts to protect property. However, although the mitigation doctrine and case law generally arises in the context of efforts to protect property and avoid or minimize property damage, the same principles are applicable to mitigation efforts designed to avoid or minimize Time Element or other financial losses.

For instance, in *C.J. Segerstrom & Sons v. Lexington Ins. Co.,* 2024 WL 4004985 (C.D. Cal. July 15, 2024), the insured, an owner and operator of a shopping center, was forced to close its shopping mall during the early months of the COVID-19 pandemic. The insured subsequently entered into rent abatement agreements with certain of its tenants in an effort to minimize its overall losses, reasoning that its losses would be minimized if it was able to retain its tenants and help them weather the difficult economic circumstances resulting from the shutdown. The insured sought coverage from its insurer under its commercial property insurance policy, arguing that it was entitled to recover the losses due to the rent abatements as reasonable mitigation expenses under California Insurance Code section 531. As noted above, Section 531 provides that an insurer is liable "[i]f a loss is caused by efforts to rescue the thing insured from a peril insured against." Cal. Ins. Code § 531(b). *Id.* at *7. The court held that the insured was entitled to reimbursement of the losses it suffered "by entering into rent abatement agreements in an effort to minimize its losses from the interference of businesses stemming from the closure of [the shopping mall] under Section 531[.]" *Id.* at *8. The court reasoned that the plain language of California Insurance Code section 531

covers economic mitigation losses, not simply physical property damage, and efforts to "rescue the thing" was properly construed to include the "actual [financial] loss sustained" by interference with the business. *Id.* at *7, *14.

Thus, an insured's reasonable efforts to mitigate Time Element losses or other financial losses should be recoverable. Indeed, many commercial property policies expressly state as much, and California Insurance Code section 531 also supports recovery of such expenses and losses.

VI. ADDITIONAL CONSIDERATIONS BEARING ON COVERAGE

A. Number of Occurrences, Deductibles, and Labels

Another question that may arise involves the number of occurrences. This may determine how much coverage an insured may have. Many insurance policies contain deductibles or self-insured retentions and state that the deductible or retention must be satisfied "per occurrence," "per event," "per loss" or "per claim." *See, e.g., SEACOR Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675, 682 (5th Cir. 2011) (insured "experienced different casualties from Katrina's two perils, wind and rain, but under the policy, those losses arose out of one event — Katrina — and warrant only one deductible"); *see also Pinnacle Entm't, Inc. v. Allianz Glob. Risks US Ins. Co.*, 2008 WL 6874270, at *6 (D. Nev. Mar. 26, 2008) (flood damage associated with a named storm is covered as a separate and distinct peril from "flood" as defined in the policy, and rejecting the insurer's argument that a peril such as Named Windstorm was defined solely for deductible purposes because "it is surrounded by definitions of other Perils, including Flood, Earth Movement, and Explosion").

Many policies also have limits on the coverage stating the maximum amount that the insurer must pay per occurrence, event, loss or claim. Many policies do not define "occurrence," while others have general definitions and some have specific definitions when weather conditions are involved.[9] *See, e.g.*, *ARM Props. Mgmt. Grp. v. RSUI Indem. Co.*, 2008 WL 5973224, at *3-4 (W.D. Tex. Nov. 24, 2008) (Hurricane Katrina was a single occurrence that damaged nine properties when the policy defined "occurrence" as "'any one loss, disaster, casualty, or series of losses, disasters, or casualties arising from one event'" and provided in the case of a hurricane that "'one

[9] Many court decisions on what constitutes an "occurrence" and the number of "occurrences" turn on whether a policy defines "occurrence" and, if so, how "occurrence" is defined. *See Koikos v. Travelers Ins. Co.,* 849 So. 2d 263, 271 (Fla. 2003) ("Mindful of the policy's definition of occurrence in this case, we agree with the Third District's analysis [that] … [i]t is the act that causes the damage … that constitutes the 'occurrence.'"). Therefore, it is important to consider the specific terms of the policy and whether and how "occurrence" is treated under the governing law.

event shall be construed to be all losses arising during a continuous period of 72 hours.'" [citations omitted]).

When there are multiple claims of loss arising from a series of events, California law follows a "cause" test to determine the number of "Occurrences" for insurance purposes. In other words, "occurrence" "mean[s] the underlying cause of the injury, rather than the injury or claim itself . . . ." *Whittaker Corp. v. Allianz Underwriters, Inc.*, 11 Cal. App. 4th 1236, 1241-42 (1992). *See also FMC Corp. v. Plaisted & Cos.*, 61 Cal. App. 4th 1132, 1161 (1998) ("Under California case law, for the purpose of determining the number of occurrences under a liability insurance policy (usually as a means of calculating policy limits) 'occurrence has generally been held to mean the underlying cause of the injury, rather than the injury or claim itself . . . .'") (quoting *Whittaker*), *overruled on other grounds, State v. Continental Ins. Co.*, 55 Cal. 4th 186, 201 (2012); *Caldo Oil Co. v. State Water Resources Control Bd.,* 44 Cal. App. 4th 1821, 1828 (1996) ("When all injuries emanate from a common source or process, there is only a single occurrence for purposes of policy coverage.").

"Conversely, when a cause is interrupted, or when there are several autonomous causes, there are multiple 'occurrences' for purposes of determining policy limits and assessing deductibles." *Safeco Ins. Co. of Am. v. Fireman's Fund Ins. Co.*, 148 Cal. App. 4th 620, 633-34 (2007). Accordingly, for multiple injuries to be considered the result of one "occurrence," they must share "but one proximate, uninterrupted, and continuing cause which resulted in all the injuries and damage." *Caldo Oil,* 44 Cal. App. 4th at 1828 (quoting 3 *California Insurance Law & Practice*, General Liability Policies, § 49.18[3][b]) (1995)).

The seminal case for determining whether there has been one occurrence or multiple occurrences for purposes of an insurer's liability limits is the Court of Appeal's decision in *Whittaker*. *Whittaker* involved a sealant manufacturer that provided sealant to beverage manufacturers that used the sealant to prevent their beverage cans from leaking. 11 Cal. App. 4th at 1239. After Whittaker changed the formula for its sealant, one of the customers complained of leaks. *Id.* Two other customers discovered the defective sealant and complained to Whittaker in a subsequent insurance policy year. *Id.* Accordingly, the lawsuit focused on when the occurrence took place — in the original policy period or in both policy periods. *Id.* at 1241. Although the court's main focus was on the timing of the occurrence, the court also discussed the number of occurrences issue, reviewing secondary sources and decisions from other jurisdictions and stating that the majority of courts use a "cause" test to determine the "*number* of relevant occurrences." *Id.* at 1242.

Whittaker has been cited numerous times by California Courts of Appeal for the "cause"-test approach to establishing the number of occurrences. *See, e.g.*, *London Mkt. Insurers v. Superior Ct.*, 146 Cal. App. 4th 648, 666-67 (2007) (relying on *Whittaker* for proposition that "California cases have held 'occurrence' means the 'cause' (or 'underlying cause') of an injury, not the injury or claim itself"); *Safeco*, 148 Cal. App. 4th at 633-34 (one occurrence when landslide damaged neighboring property, even though property sustained additional damage every time it rained over multiple years); *Caldo Oil*, 44 Cal. App. 4th at 1828 (hundreds of thefts of diesel fuel over the course of a year constituted one occurrence when cause was truck drivers' conspiracy to steal the fuel).

Federal courts applying California law have followed suit. *See, e.g., Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 432-33 (9th Cir. 1994) (plaster pitting at over 24 homes constituted one occurrence, lime manufacturer's failure to warn downstream users that the "lime was unsuitable for indoor use"); *Insurance Co. of the State of PA v. Cnty. of San Bernardino*, 2017 WL 3588244, at *6-*7 (C.D. Cal. July 24, 2017) (sending to the jury the question of "whether the [landfill]'s contaminants leaked into the groundwater at discrete moments in time and for different reasons, or whether the contaminants leaked continuously or repeatedly for substantially the same reasons" before ruling on the number of occurrences); *D.R. Horton Los Angeles Holding Co., Inc. v. Am. Safety Indem. Co.*, 2012 WL 33070, at *12 (S.D. Cal. Jan. 5, 2012) per-occurrence limit had been reached, and coverage exhausted, because the cause of harm in four separate property damage lawsuits stemmed from one occurrence: negligent grading by one subcontractor in developing the subdivision).

However, courts have usually held in disaster situations that there is a single occurrence. As one author has observed:

> As a general rule, when many persons are injured or damaged as the result of an ongoing physical process, the resulting injuries will typically be treated as one "occurrence." Thus, in cases involving natural disasters, such as fires, floods, or multi-vehicle auto accidents, courts have generally found only one "occurrence."

Michael F. Aylward, *Multiple Occurrences — A Divisive Issue*, Coverage 40 (Jan/Feb. 1995); see also *id*. at 44 ("Diverse tort claims may be aggregated where they result from the same physical cause, as in the case of a fire or train crash."). However, distinct losses resulting from different causes (including, potentially, different wildfires) may be treated as separate occurrences depending on the factual circumstances and policy language at issue.

Regardless of the approach taken, a court could rule that there is just one occurrence for determining the number of deductibles or retentions (a lower number typically means a lower dollar amount before the insurer must start paying), but multiple occurrences for determining the number of policy limits applicable on a per occurrence basis (which would increase the total insurance available). Indeed, courts have reached decisions that support such a conclusion.[10] This is consistent with maximizing coverage when there is an ambiguity.

B. Choice of Law

Because the 2025 Southern California wildfires may result in financial losses in multiple jurisdictions, deciding which state's laws should govern the resolution of insurance disputes may become an issue for some insureds. This analysis can have wide-ranging effects on the availability and scope of coverage because of divergent laws across multiple jurisdictions. This includes differing statutes of limitations, as well as common law about causation, mitigation, the enforceability of exclusions, whether coverage adheres to public policy, burdens and standards of proof, and available remedies. An essential threshold part of the coverage analysis is considering which state's law likely will apply in the event of a coverage dispute.

Insurance policies, like many other contracts, can contain a choice-of-law provision, which allows the parties to agree that a specific jurisdiction's set of laws govern disputes involving the contract. If an insurance policy contains a choice-of-law provision, the policy will likely be interpreted under the laws of the chosen jurisdiction no matter where the claimed loss occurred. This can provide clarity and consistency to disputes surrounding the policy. But the specific wording of the provision can affect outcomes in the event of a dispute. Simply providing that a state's substantive law shall govern leaves open which state's procedural law might govern. In the absence of a clear statement to the contrary, the procedural law of the state in which a lawsuit is filed likely will govern proceedings. Accordingly, regardless of the choice-of-law provision, the decision about where to sue can have important ramifications, especially for pleading requirements, discovery rules and standards of review.

If a policy does not have a choice-of-law provision, the court in which suit is filed will determine which jurisdiction's law applies to a coverage dispute. California courts,

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[10] *See Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515, 1528 (D.D.C. 1984) ("[T]he allocation of rights and obligations established by the insurance policies would be undermined if [the insured's] coverage is subject to multiple deductibles."); Aylward, *supra* at 40 ("In seeking to 'maximize' coverage, courts first look to the type of claims presented. Does the insured face hundreds of small claims that will be absorbed by policy deductibles and self-insured retentions? If so, they are far more likely to treat the claims as involving one 'occurrence.' By contrast, courts are more likely to find multiple 'occurrences' where the limits of liability are relatively low compared to the insured's total exposure.").

for instance, apply a statutory choice-of-law test set forth in California Civil Code section 1646, which states:

> A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

However, although section 1646 governs questions of contract interpretation in California coverage litigation, other issues — including the validity and enforceability of a policy — are decided pursuant to the so-called governmental interest test that balances the relative interests of the jurisdictions involved. *See Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1459-60 (2007).

Commercial property insurance policies often insure multiple risks in several jurisdictions. In such cases, courts may heavily weigh the location of the insured property. As the *Restatement (Second) of Conflict of Laws* describes it:

> *Multiple risk policies.* A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk. So, if the house located in state X were damaged by fire, it is thought that the court would determine the rights and obligations of the parties under the policy, at least with respect to most issues, in accordance with the local law of X. In any event, that part of a policy which incorporates the special statutory form of a state would be construed in accordance with the rules of construction of that state.

Restatement (Second) of Conflict of Laws § 193, cmt. f (Am. Law Inst. 1971) (emphasis added). The U.S. Court of Appeals for the Second Circuit explained this approach's underlying rationale, observing:

> In contracts of casualty insurance, if as here the contract does not have a choice-of-law provision, then the principal location of the insured risk is given particular emphasis in determining the choice of the applicable law. This is so because location has an intimate bearing upon the nature of the risk and the parties would naturally expect the local law of the state where the risk is to be principally located to apply. Moreover, the state where the insured risk will be principally located during the term of the policy has an interest in the determination of issues arising under the insurance contract.

Cunninghame v. Equitable Life Assurance Soc'y of U.S., 652 F.2d 306, 308 n.1 (2d Cir. 1981) (citations omitted).

> In a variety of circumstances the particular risks insured or a particular policy will make it clear that the parties do not expect the insured's rights under a policy will be controlled by the location of insured event.

Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc., 14 Cal. App. 4th 637, 648 n.7 (1993) (citing *Restatement (Second) of Conflict of Laws* § 193, cmt. b). Accordingly, many courts will not follow this multistate approach when there is no evidence that the parties intended the insured's rights to be subject to every jurisdiction where it may have an insured risk. *See, e.g.*, *Ameron Int'l Corp. v. Am. Home Assurance Co.*, 2011 WL 2261195, at *8 (C.D. Cal. June 6, 2011) ("the multiple risk approach is not appropriate in all cases where an insured's activities expose it to liability in a variety of states" [citing *Stonewall*, 14 Cal. App. 4th at 648 n.7]); *Frontier*, 153 Cal. App. 4th at 1459-60 (California Civil Code section 1646 governs choice-of-law in contract interpretation, and if the insurance policy does not state a place of performance, then the law of the place where the contract is made governs).

As the above suggests, determining which state's laws could apply is both important and complex. There are many arguments available to insureds that certain jurisdictions' laws should apply to a coverage dispute, and selecting a forum for the dispute can have important ramifications as well. As with all terms in an insurance policy, a choice-of-law clause will be enforced only if it is clear that the parties agreed to a particular state's substantive and procedural laws. If it is unclear, then the ambiguous provision must be enforced in a manner maximizing coverage, consistent with the insured's reasonable expectations. Furthermore, a choice-of-law provision may not be

enforced if it compels a result contrary to fundamental public policy in a jurisdiction. *See, e.g., Pitzer Coll. v. Indian Harbor Ins. Co*., 8 Cal. 5th 93 (2019) ("the parties' choice of law generally governs unless (1) it conflicts with a state's fundamental public policy, and (2) that state has a materially greater interest in the determination of the issue than the contractually chosen state"; California rule that insurer cannot rely on late-notice defense unless it showed actual prejudice from delay "is a fundamental public policy" of California).

VII. POLICY CONDITIONS

A. The Notice Condition

Most insurance policies have conditions calling for an insured to notify the insurer "as soon as possible" or "as soon as practicable" after a loss or other insured event. As part of this notice (which should be in writing), the insured usually must identify itself and explain the time, place and circumstances of the loss. This notice condition is intended to give an insurer a chance to investigate a loss or claim while the evidence is still fresh. It also provides some assurance to the insurer that it can take steps on behalf of the insured to minimize future damage and helps the insurer to assess its obligations and determine whether the policy applies to the particular loss or claim.

Notice provisions usually have been construed by courts to require that an insured provide notice within a reasonable time after an insured event occurs. *See*, *e.g.*, *Provident Life & Accident Ins. Co. v. Bertman*, 151 F.2d 1001 (6th Cir. 1945). If an insured fails to do so, the insurer might be excused from its obligations. Therefore, an insured should do just what the policy calls for it to do — give notice as soon as possible. Still, there may be many legitimate reasons why notice cannot be given immediately after a loss, including the lack of power and telephone services, the lack of insurance information (because, for example, the information was destroyed or kept in an inaccessible location) and the need to concentrate on efforts to protect life or property.

Even so, in California and many other states, a delay in notice precludes coverage only if the insurer was actually and substantially prejudiced by the delay. *See, e.g.*, *Pitzer,* 8 Cal. 5th at 101 ("California's notice-prejudice rule requires an insurer to prove that the insured's late notice of a claim has substantially prejudiced its ability to investigate and negotiate payment for the insured's claim. . . . 'Prejudice is not presumed from delayed notice alone. The insurer must show actual prejudice, not the mere possibility of prejudice.' "); *Shell Oil Co. v. Winterthur Swiss Fire Ins. Co.*, 12 Cal. App. 4th 715, 760-61 (1993) ("California law is settled that a defense based on an insured's failure to give timely notice requires the insurer to prove that it suffered

substantial prejudice. . . .” The insurer “must show actual prejudice, not the mere possibility of prejudice.”); *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 883 n.12 (1978) (“[Prejudice] is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored.”).

B. The Cooperation Condition

Almost all policies contain a cooperation condition calling for the insured to cooperate with the insurer in its investigation of a loss and otherwise. When a policy does not include such a clause, one is usually implied at law. *See First Bank v. Fid. & Deposit Ins. Co.,* 928 P.2d 298, 304 (Okla. 1996) (cooperation condition is both contractual and implied at law). Courts have noted that the purpose of a cooperation clause is to protect the insurer from collusion between the insured and third parties, while making it possible for the insurer to conduct a proper investigation of the claim and determine its own obligations. *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.,* 518 F.2d 671, 674 (2d Cir. 1975).

This cooperation clause calls for the insured to, among other things, provide access to the property, provide access to relevant books and records, provide the insurer with an opportunity to interview witnesses and employees, not commit fraud or perjury, and not release claims against other parties to which the insurer may have a right of subrogation.

An insured’s failure to cooperate could relieve an insurer of its policy obligations. *See, e.g.*, *Philadelphia Indem. Ins. Co. v. Kohne,* 181 F. App’x 888, 891 (11th Cir. 2006). That said, most courts require that the insurer prove that it has been prejudiced by the breach. *See Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305 (1963) (an insurer “may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby”); *Oregon Auto. Ins. Co. v. Salzberg,* 85 Wash. 2d 372, 377 (1975) (“an alleged breach of a cooperation clause may be considered substantial and material and may effect a release of an insurer from its responsibilities only if the insurer was actually prejudiced by the insured’s actions or conduct”); *Continental Cas. Co. v. City of Jacksonville,* 550 F. Supp. 2d 1312, 1339 (M.D. Fla. 2007), *aff’d,* 283 F. App’x 686 (11th Cir. 2008) (“Under Florida law, an insurer is excused from its obligations under the cooperation clause if the insurer demonstrates: (1) the insured failed to cooperate; (2) the lack of cooperation was material; (3) the insurer suffered substantial prejudice as a result of the insured’s failure to cooperate;

and (4) the insurer exercised diligence and good faith in trying to bring about the insured's cooperation.").

Thus, while an insured should seek to satisfy cooperation and other conditions in a policy, an insurer usually cannot prevail on an insured's failure to do so absent suffering actual and substantial prejudice. After all, "[t]he purpose [of a condition in an insurance policy] is 'not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid.'" *Insurance Co. of State of PA v. Associated Int'l Ins. Co.*, 922 F.2d 516, 523 (9th Cir. 1991).

C. Proofs of Loss

Most first-party insurance policies state that an insured is to provide a "proof of loss signed and sworn to by the insured," including statements of the time and origin of the loss; the interest of the insured and others in the property; the actual cash value of the property damaged; all encumbrances on the property; all other contracts of insurance potentially covering any of the property; all changes in the title, use, occupation, location and possession of the property since the policy was issued; by whom and for what purpose any buildings were occupied at the time of the loss; and plans and specifications for all buildings, fixtures and machinery destroyed or damaged. *See Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729, 735-36 (5th Cir. 2010) (when insured complied with policy in submitting proofs of loss, insurer could not require additional documentation when policy created no obligation to do so).

Proofs of loss usually must be submitted within a relatively short time, often within 60 days after the loss incepts or within 60 days after the insurer requests a proof of loss. An insured typically must present sufficient proof to enable the insurer to evaluate its rights and liabilities. *See Martin v. Postal Union Life Ins. Co.*, 31 Cal. App. 2d 329 (1939) (proof of loss is intended to allow insurer to make proper and adequate investigation of facts). In producing the information, the insured should attempt to comply with the requirements stated in the policy. An insured's compliance with a proof of loss provision may be a condition precedent to recovery. *Hickman v. London Assurance Corp.*, 184 Cal. 524, 529 (1920). However, substantial compliance may be sufficient. *McCormick v. Sentinel Life Ins. Co.,* 153 Cal. App. 3d 1030, 1046 (1984). Thus, minor defects should not relieve an insurer from its duty to pay a claim. *Id. Himmel v. Avatar Prop. & Cas. Ins. Co.*, 257 So. 3d 488, 493 (Fla. App. 2018) (a jury must decide whether the information submitted in a proof of loss constitutes cooperation or insufficient enough to rise to a material breach of the policy). And an insurer may

allow a partial proof of loss or may waive the filing of a proof of loss statement altogether. *See, e.g., Lee v. U.S. Fire Ins. Co.*, 55 Cal. App. 391 (1921) (insurer may waive right to object to insured's failure to comply with proof of loss provision).

Furthermore, the California Insurance Code recognizes that a delay in giving notice, or in complying with other policy conditions (such as providing a proof of loss) does not necessarily result in a loss of coverage. California Insurance Code section 553 states:

> All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

California Insurance Code section 554 states:

> Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by an act of his, or if he omits to make objection promptly and specifically upon that ground.

These sections, when read together, indicate that if an insured delays in providing notice or a proof of loss, then the insurer must notify it of any "defect" that the insured might remedy (thus apparently giving the insured a right to "cure" the defect) or otherwise lose the right to object based upon the delay.

California courts have applied these concepts in a wide range of cases. For example, in *Savage v. Norwich Union Fire Insurance Society, Ltd.*, 125 Cal. App. 330 (1932), an insurer denied coverage under a fire insurance policy contending that the insured had failed to provide a proof of loss. The court concluded that the insurer had waived the requirement for a proof of loss because its agent undertook to investigate the loss and indicated that he had all of the information he needed. *Id.* at 335. The court then stated the general rule as follows:

> "Any conduct on the part of the insurer which tends to create a belief in the mind of the claimant under the policy that notice need not be given or that proofs of loss will be unnecessary, operates as a waiver of a policy provision requiring such notice [or] proofs . . . ."

Id. at 335 (quoting 14 Cal. Jur. 576). *See also Prudential–LMI Commercial Ins. v. Superior Ct.*, 51 Cal. 3d 674,690 (1990) (insurer may waive period by agreeing to

extend or be estopped by leading insured "to believe that an amicable adjustment of the claim will be made"); *Elliano v. Assurance Co. of Am.*, 3 Cal. App. 3d 446, 449 (1970) (insurer that accepts handwritten estimate of insured's loss without requesting formal proof of loss waives policy requirement for proof of loss).

Furthermore, when a proof of loss is required, "the insured [typically] is not bound to give such proof as would be necessary in a court of [law]; . . . it is sufficient for him to give the best evidence in his power at the time." Cal. Ins. Code § 552. *See generally Culley v. New York Life Ins. Co.*, 27 Cal. 2d 187, 192-93 (1945) (required proof "will depend upon the circumstances of the particular case"). An incorrect statement in a proof of loss does not bind the insured when the insurer is not prejudiced thereby. *Id.* at 195. A jury also is not bound by statements in a proof of loss because "statements in proofs of loss are not conclusive." *Id.* at 194. But willful misstatements in a proof of loss may prevent recovery on the policy. *Zemelman v. Boston Ins. Co.*, 4 Cal. App. 3d 15, 18-19 (1970) (policy void when insured makes false and fraudulent claim for payments); Cal. Ins. Code § 2071 (policy void "in case of any fraud or false swearing" by insured relating to loss or insurance).

If an insured needs more time to prepare and submit a proof of loss, it should ask for a written extension of time. Most insurance companies will cooperate with such a request.

D. Examinations Under Oath

Most first-party insurance policies also give the insurer the right to conduct, by any person it names (including outside counsel), an examination under oath "as often as may be reasonably required" about any matter relating to the insurance or the loss and require that the insured produce relevant books and records for examination.

Examinations under oath enable an insurer to determine the facts and circumstances surrounding the loss. An "examination under oath" is an examination of the insured by the insurer or its counsel. It includes investigation, questioning, scrutiny, and inquiry. *Globe Indem. Co. v. Superior Ct.*, 6 Cal. App. 4th 725, 730 (1992). It gives the insurer a means of cross-examining the insured for the purpose of obtaining the exact facts before paying a loss. *Hickman v. London Assurance Corp.*, 184 Cal. 524, 529 (1920).

An insurer has "the right to demand compliance . . . 'as often as required.'" *Id.* at 532. An insured must answer questions regarding the loss and the insurance. *See Globe*, 6 Cal. App. 4th at 731 (requiring insured to submit to examination of all proper matters is reasonable as matter of law). An insurer also may have the right to examine

members of the insured's family or an entity's employees under oath. *See West v. State Farm Fire & Cas. Co.*, 868 F.2d 348, 351 (9th Cir. 1989) (request for statements from family reasonable in light of insured's failure to provide information).

Failure to submit to an examination under oath may excuse an insurer from paying for an otherwise-insured loss. *See California Fair Plan Ass'n v. Superior Ct.*, 115 Cal. App. 4th 158 (2004) (insured's claim barred when he failed to submit to examination under oath; examination is "a condition precedent to suit under the policy"). However, courts will examine the circumstances giving rise to the failure, and an insurer must exercise its rights to an examination in a reasonable manner. *See Hickman*, 184 Cal. at 533.

An insured that agrees to an examination under oath must keep in mind that the right to object to questions or refuse to answer or provide documents on the basis of a privilege or other reason may be limited. *See id.* at 534-35 (privilege against self-incrimination does not excuse insured from duty to submit to examination under oath). However, an insured has the right to be represented by counsel during an examination. *See* Cal. Ins. Code § 2071.1(a)(4).

An insured also has a right to "assert any objection that can be made in a deposition under state or federal law. However, if as a result of asserting an objection, an insured fails to provide an answer to a material question, and that failure prevents the insurer from being able to determine the extent of loss and validity of the claim, the rights of the insured under the contract may be affected." *Id.* § 2071.1(a)(6).

E. Contractual Limitations Periods

Many fire insurance policies contain a contractual limitations period (that is, a contractual statute of limitations). A standard contractual limitations provision states:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal. Ins. Code § 2071. "The purpose behind the shortened limitations period required by section 2071 is to relieve insurance companies of the burden imposed by defending old, stale claims." *Aliberti v. Allstate Ins. Co.*, 74 Cal. App. 4th 138, 145 (1999). These provisions are enforceable. *See William L. Lyon & Assocs., Inc. v. Superior Ct.*, 204 Cal. App. 4th 1294, 1307 (2012) ("'Under California law parties may agree to a provision

shortening the statute of limitations, "qualified, however, by the requirement that the period fixed is not in itself unreasonable or is not so unreasonable as to show imposition or undue advantage."""). Therefore, insureds must be careful to timely commence suit (or obtain an agreement with the insurer extending the period within which to sue).

The limitations period typically commences running on the "inception of the loss," which has been defined as "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that the notification duty under the policy has been triggered." *Prudential-LMI*, 51 Cal. 3d at 686. However, the insured is required to be diligent. This means that "[t]he more substantial or unusual the nature of the damage discovered by the insured, … the greater the insured's duty to notify his insurer of the loss promptly and diligently. Furthermore, the contractual limitations period "begins to run when the insured is aware of appreciable damage to his or her property." *Sullivan v. State Farm Ins. Co.*, 964 F. Supp. 1407, 1411 (C.D. Cal. 1997). But the running of the limitations period generally is tolled from the date that the insured gives notice until the insurer communicates its coverage position "clearly and unequivocally in writing." *Aliberti*, 74 Cal. App. 4th at 146. But it is important that an insured make it a point to consider the timing question.

Insureds should carefully review their policy language, assess their circumstances, consider when they must file suit to ensure that they do not lose their coverage, and take all necessary steps to timely sue or get an agreement extending their time to do so. Otherwise, being even a day late could result in a total loss of coverage.

F. Lost or Destroyed Insurance Policies

Given the nature of catastrophic fire damage, some insured businesses may find that copies of their policies have been lost or destroyed. Fortunately, most insureds and their brokers now maintain digital copies of insurance policies, and insurance companies are generally required to maintain copies of current and recent policies. But even if these sources are not availing, there are other ways to locate or identify policies and their terms. Insureds should consult any records related to prior claim submissions, which may identify relevant policies and coverages. Billing or accounting records also can establish the payment of premiums, as well as provide information about the insurer and the policy number. Another promising source of insurance information is certificates of insurance or other proof of insurance provided to third parties in connection with leases or other commercial transactions.

If there is doubt as to what policies were in effect, it may behoove the insured to make claims to all possible insurers while files are being located. Not only can this help preserve the insured's rights if there are notice requirements, it may also assist the search for policy-related materials, as insurance companies can confirm or deny coverage.

VIII. EXCLUSIONS

Insurance policies contain many exclusions, typically found in an "exclusions" section, but often buried in other policy provisions and in endorsements.

The question of what exclusions apply to what losses will depend in part on the wording of the exclusions. There are a range of exclusions that insurers might argue apply to losses from fires. Four common ones — the "enforcement of law or ordinance" exclusion; exclusions for delay, loss-of-use, and loss-of-market; the pollution exclusion; and the exclusion for "civil commotion" — often will not apply.

A. Law or Ordinance Exclusions

The law or ordinance exclusion typically purports to bar coverage for losses that arise directly or indirectly from the enforcement of a law or ordinance. Insurers in the past have argued that even if the initial event (e.g., a hurricane) is covered, losses from enforcement of laws or ordinances applied because of that event are not covered. But courts have rejected that argument. For example, in *Throgs Neck Bagels, Inc. v. GA Insurance Co.*, 671 N.Y.S.2d 66 (App. Div. 1998), the court addressed a situation in which a fire took place, damaging three stores located in the building containing a bagel shop. The bagel shop itself was not damaged by the fire, smoke or water. However, the Department of Buildings issued a vacate order. Then the landlord canceled the bagel shop's lease. The bagel shop sought coverage for its losses under its fire insurance policy. The insurer denied coverage on the grounds of an exclusion that applied to loss or damage caused "directly or indirectly" by the enforcement of any ordinance or law. The court rejected the insurer's argument:

> In reality, the order served merely as a confirmation of the circumstances regarding the actual cause of the loss, i.e., the fact that the premises had been rendered structurally unsound and unfit for continued use as a result of the fire. … It cannot logically be claimed that [the bagel shop] would not have vacated a building rendered structurally unsound but for an order from the Department of Buildings. On the contrary, when the order was served, the need to vacate the

> premises and all the immediate and consequential losses stemming from the fire and explosion, both direct and indirect, had already been "caused."

Id. at 69-70. As the court further explained:

> To construe the exclusion in the manner urged by defendant insurer would be to render the underlying coverage nugatory in a host of cases where it would reasonably be expected to apply. The Department of Buildings or other governmental agency could be expected to frequently issue various orders and decrees in response to the consequences of any catastrophic event affecting public safety, and an insurer could avoid coverage by simply claiming that such an order was one of the "causes" of the loss. Indeed, to apply defendant's interpretation here would mean that even if plaintiff's store had been one of those that had been completely destroyed by the fire, defendant could have declined coverage on the identical ground that the issuance of the vacate order was a concurrent "cause" of the loss. To hold that the … exclusion applies under circumstances such as here present would be an unreasonable construction that would frustrate the underlying purpose of the policy.

Id. at 70.

B. Delay, Loss-of-Use, and Loss-of-Market Exclusions

Standard commercial property policies may exclude "loss or damage caused by . . . delay, loss of use or loss of market." ISO Form CP 10 30 09 17 § B.2.b. Insurers often contend this exclusion bars coverage for time-element and other financial losses attributable to any changes to the insured's business market or customer base after a disaster. For example, insurers have taken the position that the loss-of-market exclusion applies if a disaster reduces customer demand or the number of available customers in a location willing to purchase the insured's goods or services. However, a plain reading of the exclusion supports limiting its scope to losses created by external market forces *distinct* from a covered peril such as a fire. In other words, the exclusion should not apply if the insured's losses can be linked to the Southern California wildfires.

Courts generally have sided with insureds and construed the exclusion narrowly in analogous contexts. For instance, in *Boyd Motors, Inc. v. Employers Ins. of Wausau*,

880 F. 2d 270 (10th Cir. 1989), the Tenth Circuit held that a car dealer's vehicles damaged by hail was covered notwithstanding the loss-of-market exclusion. *Id.* at 274. The court reasoned that the exclusion would only apply if there were "changes in consumer habits" or the dealer's cars were "no longer in demand with its intended purchasers" without a connection to the property damage caused by hail. *Id.* at 273. Instead, the insured suffered "depreciation due to physical alteration" to its inventory resulting in a "loss of market value." *Id.* Such loss directly related to the hailstorm and not external conditions in the marketplace that previously existed.

Courts also have rejected an insurer's denial of coverage based on the loss-of-market exclusion when the insured could not sell products because a disaster destroyed the insured's business and the entire surrounding neighborhood. The insurer in *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235 (S.D.N.Y. 2003), argued the September 11 terrorist attack, which destroyed the insured's retail business and neighboring marketplace, invoked the loss-of-market exclusion and prevented coverage for business interruption losses. *Id.* at 239. The court disagreed, determining the exclusion "relates to losses resulting from economic changes occasioned by, *e.g.,* competition, shifts in demand, or the like," but "it does not bar recovery for loss of ordinary business caused by a physical destruction or other covered peril." *Id.* at 240.

The 2025 Southern California Wildfires resulted in catastrophic property damage to commercial businesses and the residential neighborhoods that supplied customers and consumer demand to those businesses. Insurers should not be able to rely on the loss-of-market exclusion to deny coverage for losses attributable to property damage at the insured's location or the broader Southern California region.

C. Pollution Exclusions

Standard form commercial property insurance policies also may exclude loss or damage resulting from the "[d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants'" but, notably, include an exception if any "discharge, dispersal, seepage, migration, release or escape is itself caused" by a covered loss. *See, e.g.*, ISO Form CP 10 30 09 17 § B.2.l. Because fires constitute covered causes of loss under standard commercial property policies, pollution exclusions generally will not present a bar to coverage. Accordingly, to the extent insurers seek to rely on pollution exclusions in the wake of the Southern California wildfires, their positions should be closely scrutinized.

D. Civil Commotion Exclusions

Some insurers may argue events following disasters, such as vandalism and looting, are not covered. But many policies do not have exclusions that specifically address these kinds of events. Instead, insurers will point to civil commotion or civil disturbance exclusions. Such exclusions also should not apply to bar coverage. "Civil commotion" generally is construed to mean "occasional local or temporary outbreaks of unlawful violence." 10 Russ & Segalla, *Couch on Insurance* § 152:6 (J. Plitt, et al., 2024 Update). "In order for a disturbance to qualify as civil commotion, 'the agents causing the disorder must gather together and cause a disturbance and tumult.'" *Id.* It seems unlikely that insurers would be able to prove that looting following a disaster would satisfy this definition.

IX. PROVING THE AMOUNT OF LOSS

Generally, it is the insured's burden to prove that the loss it suffered falls within the scope of the policy's coverage grants. An insured should review all potentially applicable policies to determine whether the *cause* of loss — for example, flood, rain or wind — may be covered and whether the *type* of loss suffered — for example, damage to real or personal property or losses from business interruption — may be covered. If one or more policies appears to cover the losses, an insured should also determine whether any policy exclusions bar coverage.

It may be wise to engage attorneys early on to evaluate the scope of available coverage and forensic accountants to help assess and document the extent of the losses. The costs of such hires are covered under many policies as loss adjustment or claim preparation expenses, sometimes even beyond the limits of the policy. However, many commercial property policies include a sublimit for such expenses.

As soon as reasonably possible after the loss, an insured should begin evaluating and documenting its losses, including:

1. inventorying all damaged property;
2. photographing and recording the damage in situ;
3. determining what property can be repaired (and what cannot);
4. determining the salvage value of property beyond repair; and
5. keeping a record of all repair and cleanup expenses, including invoices and receipts.

It is important to document the loss as thoroughly as possible should any disputes arise as to the nature or extent of the loss.

Insurance policies generally contain provisions stating how business interruption losses are to be calculated. They often address the issue in terms of the "actual loss sustained," which is typically measured in terms of (a) the reduction in gross earnings minus noncontinuing expenses or (b) net profits lost plus continuing expenses. Policies often will dictate how reduced earnings or profits should be calculated — comparing against past performance, comparing against budget, specifying a formula or through some other method.

When a policy indicates that the relevant comparison is between actual earnings or profits and, in essence, what otherwise would be expected, insureds often measure their loss by comparing the income they would have generated without a fire to the income they generated. This can result in a lower insurance recovery than the law permits. An insured should instead consider measuring its loss not based on what it would have made if there had been no fire, but based on what it would have made had its facilities and operations not been affected by the fire if others were. Generally, wildfires cause major supply disruptions and shortages that increase demand and decrease supply. The actual business environment can and should be considered in calculating business interruption losses. *See Levitz Furniture Corp. v. Houston Cas. Co.*, 1997 WL 218256, at *3 (E.D. La. Apr. 28, 1997) ("[B]usiness interruption loss earnings may include sales [the insured] would have made in the aftermath of the [peril] had it been open for business during that period.").

If the insurer and the insured disagree about the amount of loss, most policies provide for an appraisal procedure. Generally, appraisal provisions will provide that, upon either party's written demand, each appoints an appraiser. These two appraisers then select a third impartial umpire. If the appraisers can agree on an amount, that amount is established as the amount of loss. If the appraisers cannot agree within a reasonable time, each submits an appraisal to the umpire, and a written agreement signed by any two of the three establishes the amount of loss. However, appraisals are usually limited to the amount of loss and do not resolve causation or coverage issues. *See, e.g.*, *De La Cruz v. Bankers Ins. Co.*, 237 F. Supp. 2d 1370, 1374 (S.D. Fla. 2002) ("a dispute over what was damaged or in what way it was damaged . . . falls outside the appraisal clause").

X. INSURER'S UNILATERAL CHANGES UPON RENEWAL

As wildfires continue to occur and increase in both frequency and severity, the financial protection afforded by insurance will become even more critical. Insurers historically have responded to disasters by restricting the coverage available in future

policies by increasing deductibles or retentions, adding co-insurance provisions, reducing limits and adding exclusions.[11]

But an insured may not be bound by those changes unless its insurer appropriately tells the insured that it does not intend to renew coverage or intends to add new exclusions or limitations upon renewal. For example, the California Insurance Code states:

> An insurer, at least 60 days, but not more than 120 days, in advance of the end of the policy period, shall give notice of nonrenewal, and the reasons for the nonrenewal, if the insurer intends not to renew the policy, or to condition renewal upon reduction of limits, elimination of coverages, increase in deductibles, or increase of more than 25 percent in the rate upon which the premium is based.

Cal. Ins. Code § 678.1(c).

Many courts have also required insurers to highlight any reductions in coverage when renewing policies. For instance, in 1949, the California Supreme Court confirmed that when an insurer agrees to renew an expiring policy, "no change may be made in the terms of the renewal policy without notice to the insured." *Industrial Indem. Co. v. Indus. Accident Comm'n*, 34 Cal. 2d 500, 506 (1949). *See also Zito v. Fireman's Ins. Co.*, 36 Cal. App. 3d 277, 282 (1973) ("an insurer, when renewing a policy, may not change the terms of the policy without first notifying the insured"). Thus, whenever an insurer incorporates an exclusion into a renewal policy, it is obligated at that time to notify its insured of the change and of any reduction in coverage. Such notice, as with all notices from insurers, must be "conspicuous, plain, and clear." *Allstate Ins. Co. v. Fibus*, 855 F.2d 660, 663 (9th Cir. 1988).

In this regard, many courts have held renewing insurers to high standards when evaluating the adequacy of notice to their insureds. As these courts have confirmed, the notices must clearly, conspicuously and plainly highlight the specific changes and reductions in coverage. *See Davis v. United Servs. Auto. Ass'n*, 223 Cal. App. 3d 1322, 1332 (1990) (the law "requires notice of the *specific* reduction in coverage"); *Sorensen v. Farmers Ins. Exch.,* 56 Cal. App. 3d 328, 334 (1976) (when insurer reduces coverage in a renewal policy, insured may reasonably expect "some form of specific notice

[11] *See, e.g.*, Kelly Pasich, et al., *The Insurance Industry and American Disasters (1870-2005),* Mealey's Litigation Report: Insurance Insolvency, Vol. 22, No. 3 (July 2010).

(probably separate from the policy) that would direct his attention to or acquaint him with the change"). General admonitions to "read the policy for changes" are insufficient. *See Casey v. Metro. Life Ins. Co.*, 688 F. Supp. 2d 1086, 1095-96 (E.D. Cal. 2010) (warning to insured to "read your entire policy carefully" is not effective notice of changes in renewal policy).

When an insurer fails to highlight and sufficiently explain reductions in coverage in renewal policies, the changes are void and unenforceable. As one court put it, "[i]t is a long-standing general principle applicable to insurance policies that an insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage." *Fields v. Blue Shield*, 163 Cal. App. 3d 570, 579 (1985).

Although other states may not have a statute such as California's Insurance Code section 678.1, their courts may enforce the same principle through the doctrine of promissory estoppel. *See, e.g., Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 662 (Fla. 1987) ("promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice"). An insurer's failure to notify its insured of more restrictive provisions in a renewal property is exemplary of such "fraud or other injustice." For example, in *JN Auto Collection, Corp. v. U.S. Security Insurance Co.*, a used car dealer — whose business was repairing and selling damaged vehicles, some of which had state-issued certificates for destruction — had purchased insurance from U.S. Security for three consecutive years. 59 So. 3d 256, 257 (Fla. Dist. Ct. App. 2011). A car with a destruction certificate was stolen from his lot a day after he renewed the policy by telephone. *Id.* When the paper copy of the renewal policy arrived a few months later, it contained a new endorsement that had not been included on any of the prior three years' policies, purporting to exclude coverage for cars with destruction certificates. *Id.* At trial, the car dealer testified that he had not been informed of the new endorsement when renewing the policy and that he would not have purchased the policy with such an endorsement. *Id.* U.S. Security did not rebut this testimony. *Id.* Overruling the jury's verdict for the dealer, the trial court issued a directed verdict, finding the endorsement applied and barred coverage for the theft. *Id.* The intermediate appellate court reversed, reasoning that the three years of prior coverage without the endorsement's exclusion supported the dealer's reasonable reliance that the renewed policy he purchased would provide the same coverage as before unless he had been told otherwise. *Id.* at 258. Thus, the appeals court reversed the trial court and reinstated the jury's verdict for the dealer.

As these cases illustrate, when pursuing coverage for losses resulting from wildfires, insureds should not automatically presume that limitations and exclusions in

their policies, whether just added or added earlier, are valid and enforceable. Such limitations and exclusions may have been introduced into renewal policies years ago by insurers that, contrary to governing statutory and case law, failed to highlight the changes and adequately explain them. If that is the case, then the limitations and exclusions may be unenforceable.

XI. CONCLUSION

When facing damage and losses resulting from wildfires, insured businesses should take immediate steps to ensure that they maximize coverage under existing policies. Their policies may provide broad financial relief.

Firm Overview

McGuireWoods is a leading international law firm with 1,100 lawyers in 21 offices worldwide. It repeatedly ranks among the top law firms in the *Financial Times*' prestigious North America Innovative Lawyers report. The firm has been recognized 18 times on BTI Consulting's "Client Service A-Team" — elite firms singled out for client service excellence based on unprompted feedback from clients in major companies. Many of its insurance recovery lawyers are recognized nationally and internationally as being among the best, having helped their clients recover more than $15 billion. The firm's full-service public affairs arm, McGuireWoods Consulting, offers infrastructure and economic development, strategic communications and grassroots advocacy, and government relations solutions. For more information, visit www.mcguirewoods.com.

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