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Smoke damage from wildfires is real; it deserves real resolution

Recent court rulings have complicated smoke damage recovery for wildfire survivors. Rather than pursuing years of costly litigation against insurers, homeowners facing toxic contamination should consider mediation as a faster, more practical solution.

By Tricia A. Bigelow

Los Angeles may never fully recover from the Palisades and Eaton fires. Thousands of people lost homes and businesses; thousands more have struggled with the challenges of moving back into homes that are still standing. An apparent stroke of luck spared their homes, but many have had a difficult time dealing with insurance companies that refuse to cover smoke damage claims.

Their challenges have been compounded by recent court decisions on smoke damage coverage. It's a complicated issue. When a house has been consumed by fire, the damage is obvious; insurance policies will cover the loss and the new build. When a house has survived a fire, the damage is often not as obvious. For this reason, some carriers seek to wash their hands of the matter.

Smoke damage is pervasive and invisible. Houses that survive fires are potential death traps, replete with carcinogens that can cause cancer and other severe health consequences. The New York Times reports that these toxic chemicals can even show up in structures not in the immediate fire area. Although comprehensive testing can identify such carcinogens and help determine appropriate remediation, most insurance companies will not cover the costs.

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The *Gharibian* Case

Smack in the middle of fire recovery, California's 2nd Appellate District issued a ruling that appeared to splash cold water on the smoke damage recovery picture. In *Gharibian v. Wawanesa General Insurance Company* (2025) 108 Cal.App.5th 730, the appellate court ruled that homeowners whose house had survived a 2019 wildfire could not assert a claim for smoke damage. The debris, it said, was "easily cleaned or removed" and did not constitute "direct physical loss to property."

In affirming a lower court ruling that there was no evidence of "physical loss" within the meaning of the applicable insurance policy, the 2nd District cited the California Supreme Court's decision in *Another Planet Entertainment, LLC v. Vigilant Insurance Company* (2024) 15 Cal.5th 1106. In that case, claims for property damage from the COVID virus were held to be outside the scope of an insurance policy because "[u]nder California law, direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property."

It is important to note, however, that *Another Planet* included this important caveat: "The physical alteration of property need not be visible to the naked eye, nor must it be structural, but it must result in some injury to or impairment of the property as property." (*Another Planet*, supra at pg. 1117)

There may be room for another appellate court to decide the same issue in the opposite way: Carcinogens in the air that land on soft surfaces such as couches and bedding may not be visible to the eye, but they are compensable by insurance because of their potential to poison those who continue to use furnishings that were not replaced and that show no physical proof of damage from flames.

On April 30, the California Supreme Court denied review of the Gharibian decision, declining to depublish it and thus giving insurers license to cite that decision as binding authority in future litigation arising out of wildfires. This leaves most policy holders who have smoke damage claims in an almost untenable position. In order to be covered by their insurance policies, the smoke damage must be demonstrable and physical, even as it does not need to be visible or structural. How will residents whose homes survived the flames recover the costs of mattresses, couches, clothes and other materials that look no different post-fire than before the fire? How will they prove "physical alteration" without extensive - and expensive - testing?

The DOI weighs in

In the aftermath of *Gharibian*, on March 7 the California Department of Insurance issued Bulletin No. 2025-7: "Insurance Coverage for Smoke Damage and Guidance for Proper Handling of Smoke Damage Claims for Properties Located in or near California Wildfire Areas." Citing "recent cases interpreting 'direct physical loss of or damage to' property, or similar insuring language, in the context of claims for

smoke damage," the DOI said that such cases "do not support the position that smoke damage is never covered as a matter of law."

Gharibian, according to the DOI, was based on the specific facts at issue in that case and should not be relied upon by insurance companies reviewing smoke damage claims from the L.A. wildfires. "Whether a particular claim for smoke damage is covered depends on the specific policy language and the unique facts of each claim."

"[F]ire debris and ash from wildfires may contain asbestos, heavy metals, chemicals, and other hazardous substances," the DOI noted. Insurers must conduct full and fair investigation of smoke damage claims; they are obligated to "act reasonably and promptly, and to adopt and implement reasonable standards for the prompt investigation and processing of the claim." In addition, FEMA recommended that smoke victims throw away their mattresses.

The import of the DOI bulletin is questionable. Will it be no more than helpful guidance for an industry predetermined to ignore smoke damage claims? Unless a law explicitly requires them to cover costs and losses associated with smoke damage, insurance carriers have considerable latitude to handle matters in the way that best suits their interests. A decision involving the California FAIR Plan may, however, shift that burden.

On June 24, a Los Angeles County judge ruled that the FAIR Plan's smoke damage policy was illegal. California's insurer of last resort, the court said, had changed the definition of "direct physical loss" to the detriment of claimants who had suffered smoke damage. As redefined, such coverage fell below the statutory minimum required by Insurance Code Section 2701. In *Jay Aliff v. California FAIR Plan Association*, Judge Stuart M. Rice ruled that smoke damage should be treated no less favorably than other kinds of damage. New FAIR requirements that such damage be evidenced by permanent physical changes to the unaided human eye or detectable by the unaided human nose were inconsistent with California law, as well as the decision in *Another Planet*.

Now what?

Dozens of lawsuits have already been filed against the FAIR Plan for its handling of smoke damage claims from the L.A. fires; dozens more are in the works. Private insurers are or will soon be in the crosshairs of additional lawsuits alleging bad faith and seeking smoke damage coverage.

The litigation picture may just be starting to come into focus, but we can expect to see multiple class-action lawsuits against carriers who have denied smoke damage claims and refused to pay for comprehensive testing of structures. As residents sift through the ashes and try to reconstruct their lives, they could be facing years of legal jousting with little recovery in the end.

Couches, beds, tablecloths and shirts that have weathered wildfires are toxic and may need to be destroyed. It is hard to imagine that homeowners whose structures managed to survive the Palisades and Eaton fires will happily run through the lawsuit gauntlet. Would insurers' funds be better spent on remediating losses rather than on countless, costly environmental tests?

Mediation is ultimately the best solution. Carriers and claimants should now be sitting down with knowledgeable mediators to hash out solutions. The costs of new furniture and other affected household materials should be an easily calculated sum. If the applicable policy includes the appropriate language, it should not require rocket science for parties to agree on a smoke damage settlement amount and move on.

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