PARSONS FARNELL & GREIN, LLP
ATTORNEYS AT LAW

1030 SW Morrison St.
Portland, OR 97205
Tel: (503) 222-1812
Fax: (503) 274-7979

Visit us on our website: http://www.pfglaw.com

Insurance Coverage for Losses Caused by Wildfire Smoke

By Gabriel Le Chevallier and Nicholas Beyer

This year has been historically challenging for businesses in Oregon, Washington, and California. Businesses already suffering because of the coronavirus pandemic recently found themselves confronting the effects of one of the worst wildfire seasons recorded. To adapt to the new reality of social distancing and state-mandated reopening protocols, many businesses increased outdoor accommodations and kept workspaces healthy by increasing airflow. Dangerous wildfire-caused air conditions then added insult to injury by impairing these coronavirus workarounds. Businesses have suffered reduced income and increased operation costs as employees, customers, and service providers took shelter at home. Businesses should be aware, however, that losses resulting from wildfire smoke can be covered under their commercial property insurance policies. Indeed, our firm obtained a favorable ruling for similar losses suffered by the Oregon Shakespeare Festival.

Oregon Shakespeare Festival Association v. Great American Insurance Company

In 2016, the United States District Court for the District of Oregon ruled that the Oregon Shakespeare Festival Association's smoke-related inability to use its outdoor theater constituted covered "direct physical loss or damage" under its property policy. In 2013, smoke from a nearby wildfire filled the Allen Elizabethan Theatre. As a result of unhealthy air conditions, the festival cancelled several performances. When the festival sought coverage for lost revenues under its property policy, the insurer refused and claimed that the policy's coverage for "direct physical loss or damage" to covered property required that there be physical alteration of such property. Our firm argued—and the court agreed—that the words of the policy did not require any physical alteration. Relying on the plain language of the policy and Oregon and non-Oregon cases finding coverage for losses resulting from methamphetamine odors, ammonia contamination, and gasoline vapors, the court held that the festival's policy provided coverage because the presence of wildfire smoke caused the outdoor theater to be "uninhabitable and unusable" for its intended purpose. Please note that the parties agreed to vacate the ruling as part of their settlement, but the principles of policy interpretation, as well as the case law on which the ruling was based, still apply to the wildfire-related conditions that businesses currently face.

Pursuing Coverage for Smoke-related Losses

Below are seven things you should consider in connection with pursuing your claim for coverage under your property policy.

1. Promptly provide notice of a claim and document all loss. Your Insurer has the right and obligation to investigate your claim. Promptly provide notice of loss to give the insurer the opportunity to investigate and to eliminate one basis for a denial of coverage. After making a claim, make sure to document all loss and maintain detailed records of expenses incurred as a result of the smoke. This will include taking pictures of all visible damage. Keep in mind that smoke and ash can cause damage that is invisible to the naked eye. You may want to

have a qualified expert perform inspection and testing. Smoke can easily cause damage to porous materials such as curtains, carpets, fabric, marble, tile, or wood. Such items may need to be cleaned or treated to return them to their pre-loss condition, and in certain instances, such items will need to be replaced.

2. Review your policy to identify the various categories in which your losses may fall. The quintessential coverages of a property policy include: (a) actual damage to your property (e.g., smoke infiltrating your products and making them unsaleable), (b) "extra expenses," which are the increased costs you incur to continue your business operations (e.g., purchasing air purifiers), and (c) loss of business income (e.g., lost revenues from closing outdoor dining accommodations). But there may be additional coverages that are applicable here. For example, some policies cover loss of business income as a result of "physical loss or damage" to the property of other businesses on which you depend. If a supplier has lost income because it cannot send goods to its smoke-impaired customers, like restaurants, then the supplier may have a covered dependent property claim. If a business in a tourist community closes because nearby attractions are closed because of the dangerous air conditions, then such business may have a covered leader property claim.

3. Review your policy to determine whether any exclusions apply, and if so, whether any exceptions to such exclusions apply. Some policies contain pollution exclusions that bar coverage for smoke-related losses. Even then, some of those exclusions are subject to exceptions, such as smoke caused by fire or for "specified causes of loss," which often include "smoke."

4. If the policy covers loss preparation costs, obtain the insurer's consent to retain a forensic accountant. Many policies provide limited coverage for the costs you incur to prepare your claim. Securing the services of a forensic accountant can help you best present your claim in the first instance. This may be particularly salient here because the pandemic-induced recession may complicate the calculation of your loss of business income. But please make sure that you satisfy any conditions necessary to secure coverage for the forensic accountant's fees, including obtaining the insurer's consent.

5. Work with your broker, accountant, and/or attorney to best present your proof of loss. Submitting your proof of loss is an opportunity to present your argument in a way that maximizes coverage for your losses. While the policy may not prevent you from supplementing your proof of loss, creating an artificial ceiling with your initial proof of loss could hamper your ability to timely secure coverage for all your losses.

6. Be mindful of policy-based deadlines. Most policies have deadlines for submitting your proof of claim, e.g., 90-days from the date of loss. If you need additional time, obtain the insurer's written consent for an extension. In addition, most property policies impose a period of time in which to file suit, which may be modified by applicable state law. For example, Oregon law generally provides that the contractual limitations period cannot be less than two years from the date of loss.

7. Do not take the insurer's word for it. The adjuster assigned to your claim is not looking out for your best interests. Even if the insurer generally accepts coverage for smoke-related losses, the adjuster will nickel-and-dime your claim. Do not accept the insurer's view of the loss without consulting insurance professionals.