

WILDFIRE LIABILITY FROM A US PERSPECTIVE

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Last year, we produced a report on wildfires that considered the cause and effects from a predominantly UK perspective. In the UK, wildfires are an emerging risk - a risk that, as yet, has limited data to evaluate, but is likely to increase in frequency and financial burden in the not-too-distant future. In comparison, for many years in the US, wildfires have been a constant presence on the risk landscape. This has resulted in extensive knowledge and understanding about the risk itself, including the areas of impact and how best to mitigate the potential exposure.

As our previous report covered the various sources and factors contributing to the escalation of this risk in the UK, we now focus on the effect and consequences of this risk in the US.

IMPACTS AND OUTCOMES

In the US, litigation is often focused on securing liability against a defendant with deep pockets. In light of this, and as a way to fund the exposure presented by wildfires, it is common for plaintiffs' counsel to try and pin liability on larger companies that have abundant finances and large insurance programs.



Such plaintiffs can include:

- Homeowners
- Evacuees
- Farmers
- Businesses
- Automobile owners
- Governmental entities (for clean-up costs and damage to public lands)
- Disaster relief organizations.

Additionally, the insurers of several of these categories of potential plaintiffs can bring subrogation claims if there is a third party that was potentially involved with the ignition of the fire.

The various allegations of liability against such companies for wildfires can be quite expansive in the US. In addition to claims of negligence - and depending on the particular jurisdiction involved - plaintiffs can make claims of, among other things:

- Trespass (in that the wrongdoer allowed the fire to invade the plaintiffs' property)
- Nuisance
- Intentional or negligent infliction of emotional distress
- Wrongful death
- Unlawful or unfair business practices
- Business interruption.

Furthermore, many states have statutes, codes, and ordinances governing claims for liability arising out of a wildfire. Indeed, previous findings of liability or violations by a particular state and/or agency could potentially serve as a basis to assist in establishing a claim of negligence in a US court.

In addition to this, if the defendant is a public or quasi-public company that has some power of eminent domain (such as utility companies or in some instances, railroads), the plaintiffs might also allege a claim of inverse condemnation. Depending on the particular US jurisdiction, under such a theory, a utility company could be held liable for damages if its activities ignited the wildfire regardless of the existence of negligence. Given the potential application of strict liability in these situations, inverse condemnation claims against utility companies that are potentially involved with wildfires are more common in jurisdictions that apply the theory of liability in this manner (such as California).

Thus, and despite the fact that human activity (including arson) is a major cause of wildfires in the US, as discussed below, various types of public and private companies are often at risk of claims alleging liability arising from wildfires.

Utility/energy companies

Companies at potential risk of wildfire claims include power/electric, oil, and gas companies, as these commonly have facilities, equipment, and power lines in grassy or wooded areas that could serve as potential ignition sources for wildfires. Potential ignition sources include:

- Power lines starting fires by electrical transformer malfunctions
- Hot materials being dropped from transmission lines to the ground below
- Animals biting the lines and causing short circuits
- High winds causing lines to arc, touch, and cause sparks
- Trees falling on lines and grounding them
- Lightning strikes.

Wildfire cases against power companies have resulted in payment of significant damages.



CASE STUDIES

In 1997, the plaintiffs were awarded a total of US\$2.2 million in damages stemming from a fire caused by Southern California Edison's (SCE) power lines. The fire destroyed over 25,100 acres in Riverside County. The plaintiffs included approximately 30 individuals, three insurance companies, and the State of California. The jury awarded the State of California US\$900,000 and the remaining plaintiffs were awarded US\$1.3 million.

In 2002, Pacific Gas & Electric (PG&E) settled a claim brought by three Sonoma county plaintiffs as a result of a fire caused by its power lines. The fire destroyed 185 acres of forested lands belonging to the plaintiffs. It was alleged that the fire caused serious erosion problems, damage to waterways, tree losses, and damage to homes under construction. PG&E admitted negligence in causing the fire, as it had contracted with a tree trimming company to clear certain trees surrounding the powerlines. The tree trimming company failed to clear the trees, and its insurer accepted PG&E's request for indemnity. The case settled for US\$4 million.

In 2006, a claim was brought against PG&E by the California Department of Forestry and Fire Protection (Cal Fire) (an emergency response and resource protection department in California) and 130 homeowners for damages resulting from a wildfire. The fire began after a tree fell on a power line, causing sparking in the conductors. The fire engulfed 8,333 acres of private property that included 54 homes. Fifty of those homes were destroyed. The fire occurred in a rural area in Northern California and burned for over six days. PG&E ultimately settled the case for US\$15.9 million, with approximately US\$10 million going to Cal Fire for fire suppression costs, and US\$5.9 million collectively to the plaintiffs.

In October 2007 a series of wildfires in southern California caused extensive property damage to the surrounding area. As a result, claims were brought against San Diego Gas & Electric Co. (SDG&E) by homeowners, business owners, and insurers alleging damages in excess of US\$2 billion. In the summer of 2009, SDG&E settled some of the exposure presented by the 2007 wildfires with several homeowners' insurance companies for approximately US\$686 million. SDG&E also reportedly agreed to pay US\$27 million to the city of San Diego and US\$24.5 million to the county of San Diego, among others, relating to the 2007 wildfires. In addition, SDG&E agreed to accept settlements from Cox Communications, Davey tree-trimming company, and an electrical contractor in relation to their potential roles in the wildfires.

In 2017, multiple significant wildfires ravaged California and caused extensive damage and property loss. In particular, the October 2017 fires that impacted northern California's wine country reportedly caused more than US\$9 billion in property losses, thousands of evacuations, and dozens of reported deaths. While it is not yet clear what caused the October 2017 fires in northern California, press reports suggest that heavy winds may have toppled trees across power lines close to where the fires started, though the investigations are still ongoing. Cal Fire has ranked two of these fires (the "Tubbs" and "Nuns" fires) as the first and sixth most destructive fires in California history, respectively.

In addition, in December 2017, the "Thomas fire" caused significant damage to southern California. According to reports, the fire burned in excess of 280,000 acres, which is the largest surface area impacted by a wildfire in California's recent history. Despite the fact that the fire largely impacted wooded and mountainous areas, Cal Fire ranked the Thomas fire as the seventh most destructive wildfire in California history as of 21 December 2017, when the fire was not yet fully contained. To

date, three lawsuits have already reportedly been filed in Ventura County Superior Court alleging that SCE negligently started the Thomas fire. One of the lawsuits alleges that SCE's construction activities may have caused the fire to ignite at a construction site. Interestingly, the lawsuit also names the local municipalities' water district as a defendant on the grounds that there was insufficient water pressure in the fire hydrants to adequately combat the fire. The second and third lawsuits allege that SCE's electrical lines and/or equipment was the cause of the Thomas fire.

Cable and telecommunications companies

Other companies at risk of claims alleging wildfire liability in the US include cable and telecommunication companies, which often share electric lines with utility companies. When this happens, the two companies commonly enter into "pole sharing agreements", which can raise a whole host of potential cross-claims depending on the circumstances and how often the agreements are updated. For example, cable and telecommunication facilities can be implicated in the ignition of a fire if the company in question did not install and/or maintain its lines properly, and/or if its lines interfered with the electrical lines.

Railroad companies

Railroads are another type of company that may be subject to wildfire liability. Trains emit sparks, heat, and hot materials that can ignite nearby fuels such as dry grass or wooded areas. Possible sources of flame and/or heat include exhaust fumes, hot brake metal, and overhead wheel bearings. Railroad crews cutting, grinding, and welding track can also be the source of potential wildfires.

In the case of *U.S. v. Union Pacific Railroad Co.* [2006], the plaintiff alleged a forest fire that ultimately burnt more than 52,000 acres of federal forest land was ignited by a railroad crew's work activities on railroad tracks. The plaintiff was awarded US\$102 million in that case.

Another wildfire case involving a railroad is *Kansas City Southern Railroad Co. v. Beaty* [1965], in which a railroad was found liable for damages to forest land and personal property that ignited after a train had passed. The railroad purportedly failed to clear cut vegetation from the area where the fire started and the un-cleared vegetation allowed the fire to spread more quickly than had the area been cleared.



Service companies

As can be expected, companies performing contract work for utilities and railroads may also be at risk for potential claims of liability. Such companies include those performing electric utility pole installation and those servicing the poles, wires, or track.

Environmental services companies performing tree cutting, tree trimming, and brush clearing also can be exposed to wildfire liability. Specifically, if these types of companies were contracted by a utility, railroad, or cable-company to provide tree and brush clearing services and such services were not adequately performed, the environmental service companies could become a target with respect to alleged wildfire liability.

MITIGATING THE RISK'S IMPACT

From a US perspective, there are various methods which can increase protection for both the insurer and the insured and, therefore, mitigate the financial impact of wildfires.

- Insurers can insist that insureds comply with public resources' codes and statutory obligations, and regularly check-up on such compliance.
- Insureds should ensure that there are adequate contractual protections in place with third parties, including reviewing and making sure the aforementioned pole-sharing-agreements are up to date, as well as reviewing other types of agreements to make sure they contain adequate indemnity and additional insured provisions.
- Given that there may be multiple fires in a single year, insurers can consider attempting to limit coverage to one limit for all wildfires in a given policy period.
- It would also behoove insurers to inspect the insureds' maintenance protocols and loss history, and to make sure the insureds are proactively maintaining their property, as opposed to simply engaging in "run to failure" maintenance strategies.

It should also be noted that some reports have suggested that the destruction wildfires cause to vegetation and root systems, especially in hilly and more mountainous areas, make those areas more susceptible to landslides. This threat has the potential to be especially costly in areas with high real estate values, such as southern California. In this regard, and while the causation argument may be tenuous, the subsequent risk of landslides in areas impacted by wildfires is something to consider when trying to evaluate the full potential exposure presented by wildfires.

COMMENT

While some may argue about the global impact of climate change, it would appear that in the US, the size and frequency of wildfires is increasing.

Correspondingly, the estimated damages caused by these fires have risen exponentially. In this regard, the risk mitigation points outlined above should help limit the potential financial consequences US insurers and insureds may face from these exposures. They also may assist those considering the potential for wildfire exposure in countries where it remains an emerging risk, like the UK.

Compared to the UK, the US appears to be a more plaintiff-friendly jurisdiction. Plaintiffs that bring lawsuits in the US may also have a wider variety of liability theories at their disposal. Most concerning for public and quasi-public entities in the US is the theory of inverse condemnation, though the application of that theory can vary depending on the jurisdiction in which the claim is brought.

In California, where wildfire risk appears quite frequently in light of the optimal conditions for fires, the courts take a broader approach than courts in other states, which is something insurers should take into account when considering risks with California contacts that could be the subject of such claims. Even outside of California, in light of the apparent increased frequency and severity of wildfires, insurers should carefully consider the potential for their insureds to be subject to claims for liability arising from wildfires to the extent the insured could be considered a potential "deep pocket" from which plaintiffs might try to recover.

Likewise, with the history of plaintiffs attempting such recoveries in the US and the apparent increased frequency and severity of wildfires, it is foreseeable that claimants in other emerging risk markets eventually could face similar claims.

FURTHER INFORMATION

To find out more about our services and expertise, and key contacts, go to: kennedyslaw.com

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