

# “California FAIR Plan Losing Attempts Not to Pay Soot, Ash Claims,” *Bloomberg Law*

## Publications

August 7, 2025

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- California residents whose homes were damaged by side effects of wildfires, such as soot, ash, and smoke, have face challenges with their coverage claims.
- The state’s “insurer of last resort” has massive potential liabilities and has tried to redefine terms to avoid paying claims for indirect damage caused by fires.
- California courts have split on coverage requirements, but recent cases are providing clarity.

When wildfires tore through California’s communities earlier this year, individuals and businesses suffered property damage on a massive scale. In the wake of these disasters, some insurance companies have refused to cover property damage caused by smoke, soot, and ash on the grounds that such harms are outside the scope of policyholders’ insurance.

These narrow interpretations of insurance policies, which have taken root in some California caselaw, are legally incorrect and detrimental to policyholders seeking to mitigate serious harm. But courts are now pushing back and reminding insurers of their obligation to cover damage caused by smoke, soot, and ash.

Insurance policyholders should be aware of recent developments in this space, including cases out of California that risk imposing serious financial burdens on policyholders seeking to recover costs. And policyholders should be mindful of new authorities, including the California Superior Court’s recent decision in *Aliff v. Cal. Fair Plan Ass’n*, affirming proper interpretations of insurance policies supporting coverage.

Individuals and companies should also be aware of resources available to ensure that wildfire-associated property damage won’t impose an insurmountable obstacle to the resumption of community life and business operations after a fire occurs.

## Viable Claims

Given the wide range of effects that wildfires can have on properties based on the extent of damage suffered, courts have increasingly been tasked with assessing competing interpretations of the phrase “direct physical loss or damage” proffered by policyholders and insurance companies. These disputes have profound implications for policyholders’ ability to remediate post-wildfire damage.

Although some insurance companies have been hesitant to cover damage attributable to wildfire smoke, soot, and ash, policyholders haven’t been universally prevented from seeking recourse in such cases. Several recent interpretations by the judiciary and state regulators have correctly reaffirmed the principle that smoke, soot, and ash can cause actionable damage covered by insurance.

In *Aliff*, the California Superior Court held unlawful several aspects of the California FAIR Plan’s policies pertaining to coverage for property damage caused by smoke, soot, and ash. The FAIR Plan, established in 1968, is California’s “insurer of last resort.”

Homeowners and businesses unable to secure coverage for fire-related damage on the traditional market turn to the FAIR Plan to insure their properties, and the plan’s member companies include “all insurers licensed to conduct property/casualty business in California,” including private insurers.

The FAIR Plan’s sample commercial coverage policy indicates it will cover “direct physical loss or damage” to property “caused by or resulting from any Covered Cause of Loss.”

In *Aliff*, Judge Stuart Rice pointed to a memorandum distributed by the FAIR Plan indicating the insurance policies had curtailed coverage by redefining direct physical loss narrowly to exclusively reach circumstances wherein there have been “permanent physical changes to covered property,” with a prediction that denials would result.

The court contended this definition of “direct physical loss” fell short of the requirements imposed by California’s Insurance Code by “limit[ing] coverage to be less favorable than and not substantially equivalent to” the state’s standard form fire insurance policy.

Relying on the California Supreme Court’s decision in *Another Planet Entertainment v. Vigilant Insurance Co.*, the court also reasoned the FAIR Plan’s requirement that smoke damage be “‘visible to the unaided human eye’ or ‘detected by the unaided human nose of an average person’” was unlawful, and rejected the defendant’s effort to marshal the California Court of Appeal’s decision in *Gharibian v. Wawanesa General Insurance Company* in support of their position. The FAIR Plan appears unlikely to appeal Rice’s decision, and indicated that a revision of its policy is underway.

California federal courts also support coverage for smoke, soot, and ash claims.

In *Bottega LLC v. National Surety Corp.*, the Northern District of California earlier this year interpreted an insurance policy covering “direct physical loss of or damage to property” as

extending to damage caused by smoke, soot, and ash. Judge Jacqueline Corley pointed to the insurance company's admissions that wildfires had "caused smoke, soot, and/or ash damage" to the property and "caused direct physical damage" and loss, holding that the company's admissions "conclusively establish physical loss and damage."

Even putting those admissions aside, the court relied on state and federal caselaw holding that "[c]ontamination of a structure that seriously impairs or destroys its function may qualify as direct physical loss." The court rebuffed the insurance company's reliance on Covid-19 cases, given that smoke and ash were "substances and fumes that physically alter property." Accordingly, the court rejected the insurance company's effort to assert that wildfires hadn't caused "physical loss or damage" within the terms of its policy.

### **Damage Coverage Refusals**

*Aliff* declined to follow the reasoning of the California Court of Appeal's decision in *Gharibian* earlier this year, restricting coverage for damage caused by smoke, soot, and ash.

In *Gharibian*, the court affirmed a trial court's holding that a policyholder's insurance policy didn't cover damage attributable to wildfire debris. The policy at issue extended to "direct physical loss to property."

Plaintiffs alleged their insurer had breached the insurance policy, as well as their duty of good faith and fair dealing, in refusing to cover costs associated with damage from a nearby wildfire that had left debris, but no burn damage, on the plaintiffs' property.

The trial court considered the plaintiffs to have alleged insufficient "physical loss" to warrant coverage under the policy. The appellate court affirmed, relying on the California Supreme Court's decision in *Another Planet* that with respect to the Covid-19 virus, "direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property" that "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."

The *Gharibian* court reasoned that because "[t]he wildfire debris did not 'alter the property itself in a lasting and persistent manner'" and "was 'easily cleaned or removed from the property,'" the alleged harm didn't fall within the ambit of recoverable "direct physical loss to property."

In March 2025, United Policyholders and the Consumer Federation of America requested the California Supreme Court depublish the *Gharibian* opinion "to prevent its misinterpretation by insurers," noting the potential for the opinion's fact-specific outcome to create "confusion among the lower courts."

The facts giving rise to the *Gharibian* case aren't the only instance of coverage denial in these types of cases. A recently filed lawsuit alleges that the FAIR Plan's repeated refusal to cover smoke, soot,

and ash damage stems from a systemic and unlawful institutional policy.

In April 2025, individual policyholders sued the FAIR Plan and several commercial insurance companies in California's Superior Court. The suit contended the FAIR Plan's administrators requested, and received, permission to revise their policy such that coverage for "direct physical loss" would be construed as applying only to "actual loss or physical damage, evidenced by permanent physical changes" to a property.

The plaintiffs allege that shortly after this policy change went into effect, the FAIR plan engaged in a systemic pattern of denying coverage in instances wherein damage failed to meet the heightened bar imposed by the revised interpretation of coverage for "direct physical loss." The plaintiffs argue that this practice violates state law mandating that all fire insurance policies cover "all loss by fire," including smoke damage.

The validity of the plaintiffs' assertions has yet to be determined, but regardless of the ultimate outcome, the trajectory of this litigation has the potential to affect the landscape of recovery for smoke, soot, and ash damage under the FAIR Plan's fire insurance policies.

### **Policyholders Pressing Claims**

Policyholders can take comfort in a recent reaffirmation of their ability to seek coverage published by the California Department of Insurance.

On March 7, the department released a bulletin expressing the agency's position that smoke damage claims are still viable. The department stated that recent cases addressing claims for smoke damage, including *Gharibian*, "do not support the position that smoke damage is never covered as a matter of law." Rather, the California Supreme Court's recent foray into this debate "confirms that smoke damage can be covered where a policy insures against 'direct physical loss of or damage to' property, or substantially similar terms."

The department informed readers that "[w]hether a particular claim for smoke damage is covered depends on the specific policy language and the unique facts of each claim," disclaiming an interpretation of *Gharibian* that would establish a categorical bar on coverage for soot and ash damage. The agency affirmed that "[t]he Department will safeguard consumers by requiring insurers"—including the California FAIR Plan—"to handle smoke damage claims in compliance with all applicable laws, regulations, and best practices for remediation of smoke damage."

The bulletin also provides insurers with instructions to facilitate the appropriate disposition of smoke damage claims and includes resources for policyholders seeking assistance.

With the *Aliff* case also strongly supporting coverage, policyholders can press claims for coverage for wildfire smoke, soot, and ash damage.

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