

Tips For Plaintiffs Attorneys Ahead Of Expanded Fire Season

By **Gerald Singleton** (March 27, 2023)

Once a California-centric phenomenon, wildfire season now affects the entire nation. As land continues to dry out from ongoing droughts and climate change, fires are likely to become more common and more intense — burning longer, spreading faster and consuming more homes and forests.

National Interagency Fire Center statistics support these projections, showing that 66,255 fires in the United States had burned a total of 7,534,403 acres in 2022. These figures are higher than the 10-year average of 59,733 fires and 7,333,776 acres.



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Because of the drought plaguing most of the western United States, fire conditions typically seen primarily in the fall — usually September and October — now occur virtually year-round.

While California continues to experience the most wildfires, other states with dry summers also find themselves in peril: Colorado, Texas, Idaho, Oregon and New Mexico have all suffered tremendously in recent years.

With the expansion of fire season — both in length of time and geography — plaintiffs lawyers can expect fire-related litigation to increase this coming year.

In this article, we will explore some strategies for lawyers who may be approached by people whose lives, homes and businesses were damaged by wildfire.

Establishing Defendants and the Right Action

Lawyers who accept wildfire litigation claims must be ready for the long haul. They also must prepare their clients — many of whom will have lost homes, businesses and loved ones — for what could be a yearslong process.

That process of preparation must begin with education, as they must be sure to explain to clients the difference between a class action and mass tort.

They should know that class actions group multiple plaintiffs into one lawsuit against a defendant, while mass tort lawsuits are individual suits filed against the same defendant(s).

Defendants in wildfire cases are typically electric utilities or communication companies whose lines run on the utility companies' overhead power poles, but they can also include construction companies and private or governmental entities engaging in prescribed, or controlled, burns.

The majority of California and Oregon fires have involved utility and/or communication companies, while the recent New Mexico fires were caused by two prescribed burns stated by the U.S. Forest Service that escaped containment.

Once the defendant is established, attorneys must then select the correct type of action to bring. The two main options are class actions and mass torts.

Class Action

While disfavored in California courts, class actions in fire cases currently are pending in both Colorado and Oregon.

Because California allows for the recovery of noneconomic damages without physical injury, and since these damages vary dramatically, class actions do not work in California.

However, in venues in which noneconomic damages are not recoverable or are severely limited, class actions may be a legitimate way of handling fire cases.

Mass Tort

Unlike class actions, mass torts involve multiple individual actions, rather than a single action in which all victims belong to a class. The cases are coordinated for purposes of pretrial discovery and assigned to a single judge, who determines how the case will proceed.

In cases involving massive damages in which the types of losses — structure losses, tree losses, erosion damages, personal property losses and noneconomic damages — vary greatly, mass torts are much more effective at obtaining full compensation for each individual client.

Once the client understands whether they will file a tort or as part of a class, attorneys need to understand their role in representing them.

Lawyers must work to align their case with those of their co-counsel and be prepared to associate in, or refer out, all or part of their case to firms that specialize in complex fire litigation.

If they cannot invest the time or resources, or are not the type of lawyer who plays well with others, they must be honest with their client and offer them alternative methods for seeking justice.

Properly representing fire victims requires three things: (1) knowledge of the law covering fire litigation, (2) significant amounts of money to hire the appropriate experts and conduct the litigation and (3) a large staff.

In addition to hiring between 5-10 liability experts, depending upon the circumstances of the fire, each case must be worked up individually, which means lawyers will need to hire the appropriate individual damages experts and have attorneys and paralegals available to work up the damages.

Money Matters

The ultimate goal in holding an entity liable for catastrophic damage is to secure compensation for clients in an effort to help make them whole.

Though incredibly challenging, naming a utility in a lawsuit is still less daunting than pursuing a government agency, in large part because government entities rarely settle.

Because they are well funded and typically well staffed, government entities can afford to

wait through years of litigation, which can wear down the resolve of plaintiffs in desperate need of funds to repair and rebuild.

Insurance Matters

The insurance claims that result from catastrophes and disasters are extremely challenging. Despite their catchy marketing, insurance companies are not always on the client's side.

That was certainly the case following the California wildfires in 2019, which led to more than \$80 billion in property and casualty damages.

More than 350,000 homeowners filed insurance claims, but less than 10% received payouts from their insurers. Those who did receive payouts could not renew their policies because they were deemed a wildfire risk.

Since then, the state's insurance department has updated insurance protections, which went into effect in 2021 for the summer wildfire season.

These updates increased the payouts and evacuation benefits for wildfire survivors. This change has improved the situation in California, but concerns are growing over insurance availability and affordability, especially in areas that have experienced severe wildfires.

Denials and bad faith still occur in every state. Insurance tactics to watch for include:

Issues With Investigations

A poor investigation into the cause of the fire or a misleading report might result in the victim not being compensated for the damages they suffer.

Some insurance companies fail to even carry out an investigation — either because they are inundated with claims or to save themselves money and effort.

Wrongful Denial

Many insurance companies tend to also look for loopholes in the policy that would allow them to avoid paying for the damages.

Sometimes insurance companies fail to correct their clients' misunderstanding regarding the terms of their policy to avoid paying the full claim amount.

Delaying Compensation

Insurers sometimes deliberately delay the compensation process, exploiting a victim's inability to follow up on claims.

Insurance companies will sometimes create shortcuts and present untrue or misleading facts about a claim or about their investigation to avoid compensating policyholders.

Although states are catching on to these tactics, legislation may not be all-encompassing, so plaintiffs lawyers need to be fully informed on the law and the client's communications with the insurer.

Prepare For the Inevitable

The National Centers for Environmental Information estimate that the three largest wildfires in the U.S. caused \$33.4 billion in losses — and claimed 71 lives — between 2020 and 2022.

Credible predictive analysis indicates that the fire season will no longer be relegated to California and that in 2023, wildfires in the U.S. will likely be just as devastating as in recent years.

Whether due to accidents, negligence or climate change, wildfires — and subsequent litigation — will likely become increasingly common.

Ahead of such tragedy, plaintiffs lawyers need to prepare themselves and their clients for claims that are complex, time-consuming and costly.

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