RESTAURANT, RETAIL & HOSPITALITY

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Insurance Likely Kept Swift Out of the Woods After Vienna

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The cancellation of three Taylor Swift concerts in Vienna in August due to a foiled terror plot was a nightmare for Swifties worldwide, and not a nightmare dressed like a daydream.

While the disruption of the Austrian leg of the Eras Tour was crushing for music lovers, the financial blow to Swift, the Ernst Happel Stadium, the concert promoter Barracuda Music and others involved likely was softened by event cancellation and additional terrorism coverage she is reported to have carried.

Indeed, Swift's loss alone was estimated at $12 million.[1] The Vienna Eras Tour run was set to begin on Aug. 8, and arrests of the suspected would-be terrorists were made right before, on Aug. 6 and 7.

Event Cancellation and Nonappearance Insurance

Event cancellation and nonappearance insurance provides coverage for losses that are the direct result of the cancellation, postponement, relocation or similar alteration of an insured event or inability of a key person to attend or perform for reasons outside the policyholder’s control.

This type of coverage differs from property insurance or business interruption insurance. In some respects, event cancellation and nonappearance insurance is broader because it covers a wide range of risks, but in other respects, it is narrower because it only provides coverage for losses relating to a particular event or series of events, like a concert tour.

For example, this type of insurance would provide coverage for a concert that is postponed because of a singer's vocal issues, like the Bruce Springsteen concerts that were postponed in May,[2] or a major sporting event that is canceled due to severe weather conditions, like the Formula 1 2023 Emilia-Romagna Grand Prix, which was canceled due to extreme flooding.[3]

This coverage applies to reimbursement of purchased tickets, lost ticket sales, the entertainer's fee, extra out-of-pocket expenses, travel costs and more.

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Terrorism Insurance

While many event cancellation insurance policies exclude coverage for losses due to "any act of terrorism or threat or fear thereof," policyholders, including Taylor Swift, often purchase a terrorism coverage extension or a separate terrorism policy to retain coverage for cancellation losses that might be subject to such exclusions.

Terrorism coverage provides coverage for the insured event if it is canceled, etc., "as a direct result of an act or threat of terrorism," provided that the act or threat of terrorism results in an action or order by a government or public safety official that restricts the policyholder's ability to hold the insured event as scheduled.

It is important to note that an insurance company might argue that this coverage may respond only to situations where there is actual terrorist activity, and not just fear of a potential act of terrorism. That clearly was the case with the cancellation of the Taylor Swift concerts in Vienna, given the disruption of an actual terrorist plot targeting the event.

Policyholders may purchase additional coverage for related perils, like civil commotion, cyberrisks, national mourning, and nuclear, biological or chemical terrorism, which could be excluded from standard event cancellation and nonappearance policies.

"Bad Blood" Between Performers and Insurance Companies

These valuable policies cover all sorts of other issues that lead to the cancellation of concerts and other events. Other policyholders should take heed of Foo Fighters' row with Lloyd's of London over event cancellation and terrorism coverage.

In 2015, Foo Fighters canceled a total of 11 performances, which implicated both the "Contingency Non-Appearance and Cancellation Insurance Cancellation, Abandonment, Postponement or Interruption of Events Policy" and "Contingency Non-Appearance and Cancellation Insurance Cancellation, Abandonment, Postponement or Interruption of Events Caused By Terrorism Policy" that the band had purchased to cover its Sonic Highways World Tour.[4]

The band called on its event cancellation policy to provide coverage when it canceled seven concerts after lead singer Dave Grohl broke his leg during a performance in June 2015.[5] Foo Fighters sought coverage under its terrorism policy after canceling four European concerts in the immediate aftermath of the Nov. 13, 2015, Paris terrorist attacks and in response to a terror threat directed at the band.[6]

Disputes arose under both policies, leading Foo Fighters to file an insurance coverage action against its insurance broker and Lloyd's of London in the U.S. District Court for the Central District of California.[7]

Determining whether an event is "canceled," "postponed," or "rescheduled" may appear a pedantic exercise at first blush, but these distinctions are often defined or discussed in the policies and affect the amount of a policyholder's potential recovery. Foo Fighters learned this "all too well" when Lloyd's disputed the amount of coverage for the seven cancellations following Grohl's injury.

Foo Fighters' event cancellation policy provided coverage for "70% of the Gross Guarantees and Overages and Production and Airfare/Charter/Media Contribution (where applicable) should any Insured Performance(s) or Events specified in the Tour Schedule be necessarily canceled, Abandoned, Postponed, or Interrupted."[8]

It also provided coverage for "100% of proven additional costs and charges reasonably and necessarily paid by the Assured to avoid or diminish a loss in respect of the original Insured Performance(s).”[9]
The event cancellation policy defined "Cancellation or canceled" as "the inability to proceed at the Venue with any or all of the Insured Performance(s) or Event(s) prior to commencement"[10] and defined "Postponement or Postponed" as "the unavoidable deferment of any or all of the Insured Performance(s) or Event(s) to another time."[11] Though the event cancellation policy did not define "rescheduled" or "rescheduling costs," it also provided as follows:

> Should any Insured Performance(s) or Event(s) be rescheduled, the insurers will pay:
>
> a) 100% of rescheduling costs and/or
> b) any reduction in box office income resulting in a reduced Guarantee and/or income subject to (a) and (b) above not Production and Airfare/Charter/Freight/Media Contribution (where applicable) for the Insured Performance(s) or Event(s). Insurers agree not to take into account savings made following cancellation of the original Insured Performance(s) or Event(s).[12]


MAIN ENTRANCE
TAYLOR SWIFT
THE ERAS TOUR

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A dispute between Foo Fighters, its broker and Lloyd's of London arose when, according to the band, the broker and Lloyd's began characterizing three canceled UK performances – at Wembley Stadium and BT Murrayfield Stadium – as rescheduled when the band added three new shows to the end of the tour – two at Milton Keynes National Bowl, a smaller venue outside London, and one at BT Murrayfield Stadium.

According to the complaint, Lloyd's refused to pay for the three concerts it characterized as rescheduled. Though Foo Fighters had purchased terrorism coverage, Lloyd's also refused to pay anything for the shows canceled due to the November 2015 Paris terrorist attacks and subsequent terror threat against the band.

It appears that Lloyd’s delayed payment on Foo Fighters' entire terrorism claim because it did not believe that cancellation of the Barcelona performance six days after the attacks bore a sufficient connection to the attacks. The suit was resolved without any public disclosure of a settlement in 2016.

Business managers, event producers, performance venues and others should take note of the distinctions at issue in the claim stemming from Grohl's injury. When faced with changes to a tour schedule, it is important to be mindful of the language used with brokers and insurance companies, review all endorsements, and to consider the bottom line, because, as the Foo Fighters case shows, the addition of performances at or near canceled venues may lead insurance companies to pay less on a claim.

Conclusion

As is the case with all commercial insurance products, the coverage provided depends on the specific terms of the insurance policy purchased.

Policyholders planning large-scale music and sporting events should take note of the various event cancellation insurance coverages offered to ensure they have adequate insurance in place and should weigh whether to purchase terrorism coverage in light of rising tensions globally.

Luckily for Taylor Swift, she purchased this coverage and should expect to recover losses for the three canceled concerts, which, distinct from the facts presented in the Foo Fighters' action, were all at the same venue with the plot only uncovered days before and arrests made on the day before the run was set to begin.

When faced with changes to a tour schedule, it is important to be mindful of the language used with brokers and insurance companies

Footnotes

[1]https://www.insuranceinsider.com/article/2dneg4hqdu4lmmakp1vr4/londonmarket/brit-leads-event-cancellation-cover-for-12mn-taylor-swift-vienna-loss.
[2] https://www.rollingstone.com/music/music-news/bruce-springsteen-postponeseuropean-concerts-vocal-issues-1235028124/.
[3] https://www.formula1.com/en/latest/article/breaking-update-on-the-emilia-romagnagrand-prix-at-imola.14xk8GLh2Lr8wBGdJqhxnO.
[4] Amended Complaint at 2, 5, 1/1-/25, *Foo Fighters LLC v. Certain Underwriters at Lloyd's, London et al.* (C.D. Cal. 2016) (No. 2:16-cv-04208-R-JEM).
[5] Id. at 7.
[6] Id. at 19.
[7] Id.
[8] Id. at 5.
[9] Id. at 6.
[10] Id.
[11] Id.
[12] Id.

Navigating the Legal Future of Pricing: AI-Driven Strategies & Personalized Pricing

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Businesses are increasingly turning to artificial intelligence and other advanced technologies to gain an edge in setting prices. AI-driven pricing models, which leverage sophisticated algorithms to set prices for products and services in real time, promise increased revenue but also raise significant concerns about privacy and market fairness. This shift from traditional pricing methods to more dynamic and personalized approaches presents a host of legal considerations that companies must navigate carefully.

Understanding Algorithmic Pricing

Algorithmic pricing is the practice of setting prices for products or services using computer algorithms that analyze vast amounts of data in real-time. These algorithms take into account various factors such as supply and demand, competitor pricing, market trends, and even customer behavior to determine an "optimal" price point for products or services. By leveraging artificial intelligence and machine learning, algorithmic pricing enables businesses to adjust prices dynamically to maximize revenue (at a much lower cost).

"Dynamic pricing," a subset of algorithmic pricing specifically focuses on the real-time adjustment of prices based on immediate supply and demand conditions. Most consumers are familiar with dynamic pricing through its prevalent use in the airline and hospitality industries. For example, booking a hotel room during peak travel seasons often incurs higher rates due to increased demand. Dynamic pricing is also utilized in various other contexts, such as surge pricing during peak hours. Companies like Airbnb, Uber, and Booking.com all legally utilize dynamic pricing to change prices based on demand.

People became more aware of the spread of "dynamic pricing" to other industries when Wendy's announced its plan in February of 2024 to change its menu prices throughout the day depending on customer flow. Its announcement generated significant backlash amongst customers who were accustomed to stable, "stickier" prices in this sector. In response, Wendy's issued a statement "clarifying" it would not raise prices during busy parts of the day but would rather discount products during slower periods.[1]

Surveillance Pricing: Personalization or Privacy Invasion?

Taking a step beyond dynamic pricing is the concept of "personalized pricing," which some term, "surveillance pricing." This approach uses advanced algorithms, AI, and extensive datasets containing consumers' personal information – such as location, demographics, credit history, and browsing or shopping history – to set targeted prices for individuals. Surveillance pricing raises significant concerns not only about privacy but also antitrust violations and market manipulation.

In July 2024, the FTC ordered several companies to reveal what pricing services they offer, what data they collect to power these services, and who is using their services and what effect that's having on consumer prices.[2]

Personalized pricing has often been discussed as a form of price discrimination whereby the price is set according to what a consumer is willing and able to pay. It differs from dynamic pricing in that, unlike just the location or number of customers willing to pay, surveillance pricing is set by an individual person's characteristics and behavior, which implicates privacy and discrimination concerns more directly and immediately.

Recent Algorithm Litigation

Amazon and "Project Nessie": In September of 2023, the FTC and more than a dozen state attorney generals sued Amazon, alleging that the company operates an illegal monopoly through a program called "Project Nessie."[3] According to the complaint, Amazon used this secret algorithm to identify products for which price increases would be matched by competitors. When Amazon raised prices, other stores would follow suit, allowing Amazon to maintain higher prices without losing sales. This practice purportedly enabled Amazon to generate an additional $1.4 billion in profits over five years, allegedly violating 15 U.S.C. § 45(a) (which prohibits unfair or deceptive acts or practices in or affecting commerce) and Section 2 of the Sherman Act, 15 U.S.C. § 2 (which prohibits monopolization or attempts at monopolizing any aspect of interstate trade or commerce).

The FTC claims Project Nessie manipulated competitors into matching Amazon's price increases

The FTC claims Project Nessie manipulated competitors into matching Amazon's price increases, thereby creating an artificial price floor and stifling competition. Additionally, Amazon allegedly coerced Amazon sellers to use Fulfillment by Amazon if they wanted their products to be eligible for Amazon Prime, even though many sellers would rather use an alternative fulfillment method (as Amazon has allegedly increased its fulfillment fees by approximately 30% between 2020 and 2022). Because of these processes, the FTC argues that: "Although each of these acts is anticompetitive in its own right, these interrelated and independent actions have had a cumulative and synergistic effect that has harmed competition and the competitive process." Amazon recently filed a motion for judgment on the pleadings, which remains pending.

Price Fixing in Rents: In recent years, numerous lawsuits have been filed alleging that companies are licensing software to property managers that allow them to collude on increasing rent prices.

Plaintiffs allege Yardi's pricing algorithms artificially inflate multifamily rental prices

In *Duffy v. Yardi Systems*, a class of plaintiffs allege that Yardi Systems Inc. ("Yardi") and certain property management companies violated Section 1 of the Sherman Act (15 U.S.C. § 1) by unlawfully agreeing to use Yardi's pricing algorithms to artificially inflate multifamily rental prices. Yardi is a property management software company which provides a system called "RENTmaximizer," a revenue management software. RENTmaximizer is an "algorithmic pricing tool" marketed to landlords that is intended to automate the rental pricing process and thus help "multifamily property managers maximize rental income."[4]

How does the system work? Allegedly, Yardi asks landlords to input their data, such as rental rates and occupancy. The system also automatically incorporates market-specific information on "comparative rent" in order to give landlords "accurate and timely information regarding your market." RENTmaximizer then calculates a "rent recommendation" that users can automatically adopt. These prices then update daily. The plaintiffs alleged that: "The result of this scheme is that [landlords] outsource their once-independent pricing and supply decisions to a single decisionmaker, RENTmaximizer, and need not directly disclose their pricing strategies to each other in order to fix rent prices. Instead, [landlords] collectively adopt a coordinated pricing strategy implemented and enforced by Yardi's RENTmaximizer product."

On December 4, 2024, the *Yardi* court denied the defendants' motion to dismiss on the grounds of failure to state a claim.[5] The Court held that "plaintiffs have adequately alleged 'a conscious commitment to a common scheme designed to achieve an unlawful objective' on the part of the [defendants]."

The Court deemed that plaintiffs had reached the "plausibility" standard required in federal court as the plaintiffs had successfully pleaded "[t]he who, what, with whom, where, and when of the scheme." Specifically, (1) the landlords entered into agreements with Yardi to provide commercial sensitive data, (2) knowing Yardi as collecting similar data from other landlords which it would use to (3) generate rental rate recommendations that would result in supracompetitive returns.

The case is now scheduled for trial and stands in direct comparison to a variety of other artificial intelligence cases dismissed from federal court for failure to state a claim, some of which are discussed below.

Similarly, in *In re RealPage, Inc., Rental Software Antitrust Litigation* (No. II), currently in multi-district litigation, class action complaints allege an unlawful agreement to use RealPage software recommendations to "raise multifamily rental housing prices" and "artificially inflate the prices of student housing." The allegations also center around rental price suggestions based on landlords' information submitted to their system.[6]

Plaintiffs could not sufficiently allege that *non-public* information was fed into the algorithm

Dismissal on the Vegas Strip: In *Gibson v. Cendyn Group*, the District of Nevada dismissed a class action, a proposed class of all persons who rented hotel rooms on the Las Vegas Strip, alleging that defendant hotel operators engaged in a price-fixing conspiracy by collectively using a software provider's algorithm (also a defendant) for hotel room pricing recommendations.[7] The court dismissed the case because the hotels signed up for the pricing software service at different times and the allegations insufficiently pled that the hotel defendants exchanged confidential information or agreed to be bound by the software's pricing recommendations.

The *Gibson* court distinguished *Yardi* and *RealPage* cases because the Gibson plaintiffs could not sufficiently allege that *non-public* information was fed into the algorithm. Instead, information may have been received from hotel websites and then "shopped" back to the client after being processed through the algorithm. The court granted leave to file an amended complaint, but the court dismissed the amended complaint (this time with prejudice) in May 2024, finding that the plaintiffs still could not allege that the defendants had plausibly alleged that defendants ever agreed to fix prices, agreed to accept pricing recommendations, or exchanged non-public information.[8]

A similar case was filed in the District of New Jersey, also alleging hotel algorithmic price fixing, in *Cornish-Adebiyi v. Caesars Entertainment, Inc.* The court dismissed this case, relying in large part on the *Gibson* decisions.[9]

Conclusion

AI-driven pricing, whether through algorithmic, dynamic, or personalized methods, offers benefits in terms of efficiency and revenue optimization. However, these practices also pose significant challenges related to transparency, fairness, privacy, and antitrust concerns. Companies must stay informed about the legal risks associated with these strategies to ensure that they do not violate existing laws and rules, as well as any new and pending litigation in numerous states.

Footnotes

[1] See Liz Calvario, *Wendy's New 'Dynamic Pricing' System Won't Raise Prices at Peak Times*, Spokesperson Says, TODAY (last updated Feb. 29, 2024), https://www.today.com/food/restaurants/wendys-surge-pricing-rcna140601.
[2] See Behind the FTC's Inquiry into Surveillance Pricing Practices, Fed. Trade Comm'n: Blog (July 23, 2024), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/07/behind-ftcs-inquiry-surveillance-pricing-practices.
[3] See Amended Complaint at 5-6, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. Mar. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/01712024.03.14RedactedAmendedComplaint%20%28002%29.pdf.
[4] All such information about Yardi's system was available in public promotional materials and formed the basis of the class action complaint. See Amended Complaint ¶¶ 5, 71, 75, Duffy v. Yardi Sys., Inc., No. 2:23-cv-01391-RSL (W.D. Wash. Nov. 3, 2023).
[5] See *Duffy v. Yardi Sys., Inc.*, No. 2:23-cv-01391-RSL, 2024 WL 5049074 (W.D. Wash. Dec. 5, 2024) (order denying motion to dismiss).
[6]*In re RealPage, Inc., Rental Software Antitrust Litigation* (No. II), No. 3:23-md-03071, 2023 WL 9004806 (M.D. Tenn. Dec. 28, 2023).
[7] *Gibson v. MGM Resorts Int'l*, No. 2:23-cv-00140-MMD-DJA, 2023 WL 7025996, at *1 (D. Nev. Oct. 24, 2023).
[8] *Gibson v. Cendyn Group, LLC*, No. 2:23-cv-00140-MMD-DJA, 2024 WL 2060260 (D. Nev. May 8, 2024).
[9] *Cornish-Adebiyi v. Caesars Entertainment, Inc.*, 1:23-cv-02536-KMW-EAP, 2024 WL 4356188 (D.N.J. Sept. 30, 2024) (order granting motion to dismiss).

New York State Enacts Retail Workplace Violence Prevention Act

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On March 4, 2024, New York's Retail Worker Safety Act takes effect. The Act was enacted in response to evidence of increased assaults and shootings in retail stores, particularly those that are open late. The Act an amendment to New York Labor Law that requires retail employers to develop and implement programs to prevent workplace violence. Director of Public Policy of the Retail, Wholesale & Department Store International Union, Josh Kellerman, commented about the Act, "People have to shop in person. This isn't just about protecting workers, it's about creating safe gathering places."

Who is Subject to the Act's Requirements?

The Act applies to retail employers, including "any person, entity, business, corporation, partnership, limited liability company, or association employing at least ten retail employees." Responsible employers include those with employees working in a retail store that sells "consumer commodities" and "is not primarily engaged in the sale of food for consumption on the premises."

Additionally, employers with 500 or more retail employees nationwide will be subject to certain requirements beginning on January 1, 2027.

Relevant Provisions of the Act to Retail Employers

Workplace Violence Prevention Policy: Employers must either adopt the model retail workplace violence prevention policy, which will be published by the New York Department of Labor, or establish their own policy which meets or exceeds the standards set out in the Department of Labor's model policy. Employers must notify retail employees of the policy when they are hired and at annual trainings, which are required pursuant to this Act. The policy must identify situations in the workplace that might place retail workers at increased risk of workplace violence, provide methods that employers can use to prevent workplace violence, include information about federal and state statutory protections and remedies available to victims of violence in the workplace, and clearly outlaw retaliation against employees who complain of workplace violence or related conduct or who testify or assist in any legal proceeding.

- **Employee Information and Training:** Employers must also either adopt the model retail workplace violence prevention training program, which will be published by the New York Department of Labor, or establish their own training program which meets or exceeds the Department of Labor's model program. The Department of Labor's model training program will be interactive and will include, but not be limited to, information on this Act, self-defense techniques, de-escalation tactics, active shooter drills, emergency procedures, and instruction on the use of security alarms, panic buttons, and other related emergency devices. Each employer must also provide a site-specific list of emergency exits and meeting places in case of emergency.

- **Panic Buttons:** Employers with five hundred or more retail employees nationwide to provide employees with access to panic buttons, which, when pressed, dispatch law enforcement. Such panic buttons can be installed on employer-provided equipment or be wearable by employees. However, employers cannot use wearable panic buttons to track the employee's location, except when the panic button is triggered, to ensure employee privacy. Employers must install panic buttons by January 1, 2027.

"This isn't just about protecting workers, it's about creating safe gathering places."

The experienced attorneys in Anderson Kill's Restaurant, Retail and Hospitality Group are monitoring this Act and its potential impact on retail employers operating in New York and larger retailers operating nationwide. Please contact us if you or your business need any assistance or further information regarding your responsibilities under this Act or with your other restaurant, retail, and hospitality-related legal needs.

Overcoming Insurance Policy Exclusions for Vineyards and Wineries: Case Review

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As the fall harvest season closes, reflecting on the past year highlights the numerous challenges grape growers and wineries face. These include the increasingly prevalent threat of extreme weather conditions and temperature fluctuations, as well as wildfires. See, i.e., "Sonoma County fire threatens dozens of wineries in historic region," San Francisco Chronicle, June 17, 2024; "Burgundy Faces Its Most Challenging Harvest in 50 Years," Robb Report, September 29, 2024. As these unforeseeable risks and their devastating consequences increase at an alarming rate, grape growers and wineries must prepare for catastrophe – including by securing insurance coverage (from crop insurance, property insurance, business interruption insurance, and general liability coverage) that can respond in the event of a loss.

Sometimes, though, the expensive premiums a vineyard or winery pays do not guarantee that an insurance company will honor its contractual obligations. When disaster strikes and a policyholder presents a claim to their insurance company, the insurance company might improperly deny coverage. Policyholders should not immediately accept an insurance company's denial; rather, they should have their broker or insurance coverage counsel examine the policy terms, facts and relevant case law to determine whether the insurance company's coverage position lacks merit.

That very scenario played out in the case Kunde Enterprises, Inc. v. Nat'l Sur. Corp., 608 F. Supp. 3d 883 (N.D. Cal. 2022). There, the insurance company denied insurance coverage for wildfire smoke-damaged wines, forcing the policyholder to enforce the insurance company's contractual obligations and its duty of good faith and fair dealing. In Kunde, the policyholder– a family operated winery and vineyard – submitted a claim under its property insurance policy for losses to smoke-damaged wines arising out of the 2017 Napa and Sonoma wildfires. Smoke from the wildfires infiltrated the Kunde family's vineyard and winemaking facilities, causing extensive "smoke taint", rendering the finished wine from two groups of Kunde's wines unmarketable, except for salvage value.

National Surety denied coverage for the damaged wines, in part, based on two exclusions: (i) a "spoilage exclusion"; and (ii) a "growing crops exclusion". Kunde sued National Surety for breach of contract, declaratory relief, and breach of the implied covenant of good faith and fair dealing. Both Kunde and the National Surety moved for summary judgment in the case.

Insurance coverage is interpreted broadly to afford the greatest possible protection to the policyholder

Insurance Coverage Considerations Before a Ransomware Attack

The National Surety insurance policy insured "all risk of direct physical loss or damage" to covered property, "except as excluded or limited elsewhere" in the policy. Kunde, 608 F. Supp. 3d at 895. Because the policy was an "all risk" policy, Kunde only had to show that the damage occurred as a result of a "direct physical loss" to its property. Id. Here, National Surety did not dispute that the wildfires directly caused the property damage. Id. Therefore, the burden shifted to National Surety to demonstrate that either exclusion unequivocally applied. As in most jurisdictions, under California law, insurance coverage is interpreted broadly to afford the greatest possible protection to the policyholder, whereas exclusionary clauses are interpreted narrowly against insurance companies in their capacity as the drafters of the policies. Kunde at 892.

The court first held that the "spoilage exclusion" – which excluded "loss, damage or expense caused by or resulting from… shrinkage, evaporation, leakage of contents, change in flavor or texture or finish, decay or other spoilage" – did not apply. Kunde at 896. National Surety argued that the wildfire smoke caused undesirable tastes and aromas in Kunde's wines, triggering the exclusion as to the smoke taint. Id. Kunde responded that the wildfire damage did not qualify as a "spoilage" loss, because the exclusion applied only to normal changes in the winemaking process. The court held that the "change in flavor" clause was ambiguous. The phrase reasonably could be interpreted to address normal variances in the winemaking process and spoilage that occurs with the passage of time; it did not "conspicuously apply to spoilage that occurs as a result of an extreme chance event such as a wildfire." Id.

The court also looked at other policy provisions in considering the spoilage exclusion's scope. For example, the policy's Perishable Stock form covers spoilage of stock from impurities caused by "foreign substances", defined to mean "wine products not meant to be part of the wine recipe or blend"; therefore, a layperson would consider wildfire smoke to be a foreign substance for which coverage would apply. Kunde at 897.

This supported Kunde's position that "change of flavor" only applies to normal variances in winemaking. Id. Because the court could not say that the exclusion plainly and clearly excluded smoke taint damage from wildfires, it resolved the ambiguity in favor of coverage and granted Kunde's motion for summary judgment on that issue. Id.

The court next considered National Surety's denial based on the "growing crops exclusion", which requires the insurance company to demonstrate that the damage occurred while the grapes were on the vine, rather than after harvest. National Surety submitted circumstantial evidence that the smoke taint occurred while the grapes were still on the vine, not during the wine production process. Id. at 898. Kunde, however, submitted various test results conducted on grape samples during and after harvest showing that the damage occurred after the grapes were harvested and while being processed at the winemaking facilities. Id. Therefore, the court found that an issue of material fact existed regarding whether smoke taint occurred on the vine or after harvest, rendering summary judgment inappropriate. Id. at 897-99. Following the court's summary judgment decision, the parties settled the dispute.

As Grape Grower and Winery policyholders face more frequent and perhaps more financially devastating losses from volatile climate and fire exposures, insurance companies are more likely to look after their own interests and deny coverage with greater regularity. The lesson from Kunde is that policyholders should not take insurance coverage denials lying down; policyholders must aggressively defend their contractual rights under the insurance policies that they purchased to protect their businesses. Don't let insurance coverage die on the vine.

Policyholders should not take insurance coverage denials lying down

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RESTAURANT, RETAIL & HOSPITALITY GROUP
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The restaurant, retail and hospitality industry relies on insurance coverage to protect against an enormous range of risks, from bodily injury claims to devastating property damage, to crime and even dreaded bedbug claims. At Anderson Kill, we combine our firm's expertise in analyzing and obtaining coverage with our specialized knowledge of the restaurant, retail and hospitality industry to maximize coverage for our clients.

Our Restaurant, Retail and Hospitality Industry Group attorneys routinely assist clients with needs relating to real estate and construction, bankruptcy, executive compensation, litigation, finance and a wide range of corporate issues.

We realize the importance of communicating directly with our hospitality clients and friends, and in furtherance of our commitment to keep them abreast of recent developments in the law, Anderson Kill's Restaurant, Retail and Hospitality's publications (including alerts and this newsletter) cover a variety of issues the hospitality industry face.

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