

Property Coverage For Riot-Related Claims Is Not Automatic

By **Scott Seaman, Judith Selby and Matthew Ferlazzo**

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In the days following the death of George Floyd while in the custody of Minneapolis police officers, many Americans took to the streets to protest. The peaceful protests have been marred — and in some instances overshadowed — by extensive rioting, looting and vandalism, resulting in injuries to individuals and damage to the property of individuals and businesses in various areas of the country.

Curfews have been imposed in some cities in an attempt to limit further violence. There has been a downturn in some of the violent activity as of the time this article was prepared, but the nation watches as events continue to unfold.

It is clear that losses arising from these events will be significant. For the first time in its history, the property claims services unit of the Insurance Services Office Inc., on June 1, designated the recent riots and civil commotion as a catastrophe event in more than 20 states, meaning that insured losses for each event are predicted to exceed \$25 million.

For context, according to the Insurance Information Institute, insurers paid \$775 million for losses arising from the 1992 Los Angeles riots. Adjusted for inflation, that translates into \$1.4 billion in 2020 dollars for losses in a single city.

Some media pundits may be getting out over their skis in categorically declaring that riot claims are automatically covered. Riots, civil commotion, vandalism and fire often are insured perils under many business owner and property policies, and may be covered to some extent under all-risk commercial property policies, absent applicable exclusion or limitation.

As with all claims, riot-related coverage determinations depend upon application of the policy language to the claim-specific facts under controlling law.

The reality is that some claims will be honored, some claims may be properly denied and still others may be payable in part. To the extent that policies contain extensions for civil authority and business interruption coverage, claims for



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business income losses should be expected to be presented. When evaluating coverage for riot claims under these various policy provisions, insurers should carefully consider a number of key issues, including the following.

Number of Occurrences

The issue of number of so-called occurrences could have a significant impact on the amount of coverage potentially available for property insurance claims because many deductibles and policy limits may apply on a per-occurrence basis.

Insureds may have suffered multiple losses at a single location (such as when a store is vandalized or looted on successive days), losses at multiple locations in the same city, losses at locations in different cities throughout the country or some combination of the foregoing. Each of these scenarios, and others, may present the question of whether the loss is a single or multiple occurrences.

The determination of number of occurrences will turn on the policy language, applicable law, and the facts and circumstances of the losses. For example, some policies provide that additional losses occurring within a certain period of hours — 72 and 48 hours are common time periods — of an insured's first loss will be considered part of one occurrence. Other policies may define an occurrence as the total of all loss or damage "arising out of or caused by one discrete event of physical loss." Still others may contain language that tie together losses directly or indirectly attributable to a cause or series of a similar causes.[1]

In the *World Trade Center Properties LLC v. Hartford Fire Insurance Co.*, the policy binders and incorporated forms at issue defined occurrence as:

[A]ll losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

The U.S. Court of Appeals for the Second Circuit held that "the intentional crashes into the WTC of two hijacked airplanes sixteen minutes apart as a result of a single, coordinated plan of attack was, at the least, a 'series of similar causes'" and thus "constitute a single occurrence as a matter of law." [2]

In many jurisdictions, if the policy does not define occurrence, the number of occurrences issue may turn on whether the losses are characterized as "all due to the same cause or related cause." [3]

In other jurisdictions, the number of occurrences may be determined by considering whether the alleged losses can each be considered a separate event.[4] Applying the policy language and law requires a careful analysis of the facts and circumstances of each loss, which may include: (1) whether the losses were part of a common scheme (e.g., some news reports indicate that the rioting, looting and vandalism has been coordinated nationwide and locally); (2) whether the losses are directly or indirectly attributable to a cause or series of similar causes; and (3) where and when the losses occurred in relation to each other.

Aggregates and Aggregation

In many instances, occurrence determinations may be less important. Not all deductibles or self-insured retentions are occurrence-based. Further, under many policies, there are aggregate limits or sublimits that may apply and provisions that may require or permit aggregation of losses or damages by location, coverage type, peril or otherwise.

Exclusions and Limitations

Several exclusions and limitations may preclude or limit coverage. We briefly identify some below.

Vacancy

Policies providing coverage for property damage typically contain a vacancy provision, which limits coverage when buildings have been vacant for a designated period of time — 60 days is a common period. Such exclusions may apply to only some enumerated covered causes of loss.

Because the cause of any specific loss may be unclear or subject to dispute — i.e., did the loss result from vandalism or from arson — the specific terms of the policy must be closely analyzed. Some policies also may restrict coverage in the event of an unoccupied building. In light of the widespread issuance of COVID-19 business shutdown orders, these policy provisions, as well as any vacancy permit endorsements, may be particularly relevant when considering coverage for riot claims.

Insurrection Clause

There has been some discussion of potential invocation of the Insurrection Act of 1807, a federal law that empowers the president to deploy military troops within the U.S. in certain circumstances. The act perhaps was most famously invoked in recent times by President Eisenhower in 1957 to enforce school desegregation in Little Rock and by President George H.W. Bush during the 1992 riots that followed the acquittal of four police officers in the Rodney King case.

Property insurance policies often contain exclusions that apply to various war risks, including insurrection. In the event that an insurrection is declared in connection with today's riots, insurers should consider the potential applicability of the insurrection clause.

Terrorism

Terrorism exclusions may bar coverage for the acts of violence against property by rioters. Although the language of the exclusion may vary from policy-to-policy, those exclusions typically bar coverage for the use or threatened use of force or violence against persons or property undertaken to intimidate or coerce a government or the civilian population.[5]

There is some evidence that recent acts of violence connected to the riots may qualify as terrorism. For example, the Federal Bureau of Investigation's Joint Terrorism Task Force was responsible for the investigation and arrest of two lawyers who threw a Molotov cocktail at a New York City Police Department vehicle.

Insurers should examine closely the facts of each claim to consider whether the acts of violence fall within the scope of terrorism exclusions, but avoid denying coverage absent confidence an adequate factual basis exists to support denial based upon a terrorism exclusion.

Waiting Periods and Income Loss Calculations

Business income loss coverage is typically not implicated until the expiration of a defined waiting period, and coverage usually terminates after a specified amount of time — commonly the end of the

restoration period — or until the order or curfew is lifted, in the case of civil authority coverage.

When calculating business income losses, specific policy requirements should be carefully reviewed. In many cases, the quantification of income losses will have to account for the impact of COVID-19 on the policyholder's business operations. Revenue benchmarks for many loss calculations likely may reflect virus-related business downturns.

Where multiple causes of loss are potentially at issue — as may be the case for businesses impacted by COVID-19 shutdown orders, as well as rioting, looting and vandalism — the burden of proof concerning the amount of loss attributable to a covered cause of loss may depend on a number of factors, including whether the policy is all-risk or named peril, whether the issue is one of coverage or application of policy exclusions, the applicable law, and the facts of the claim at issue.

Civil Authority Coverage Limitations

In addition to the requirement of an order by a governmental entity, civil authority coverage requires the existence of property damage within a defined geographic radius, often one mile, surrounding the insured's premises. The insured must be able to establish a causal connection between the civil authority order and the physical damage to the nearby property.

In addition, although some civil authority provisions apply when access to the insured premises is impaired, most provisions require that access must be denied or prohibited due to the actions of a civil authority.

Compliance with the requirements of civil authority provisions routinely has been upheld by courts.[6]

Examination of Elements of Claimed Loss/Damage

Examination of the particular items of alleged loss or damage may reveal that some items are not covered absent being scheduled or endorsed or are subject to sublimits. For example, some commercial policies cover glass breakage, while others require that glass coverage, such as plate glass insurance, be added by endorsement for an additional premium.

Regulatory Developments Concerning Claims Handling

Insurers must keep apprised of regulatory developments that may warrant consideration in the adjustment of riot claims. As with COVID-19, the regulatory activity related to riot claims has been taking place at a fast pace.

For example, on June 5, the New York State Department of Financial Services issued an emergency regulation requiring accelerated resolution and payment of looting claims. The Department of Financial Services amended Insurance Regulation 64, Unfair Claims Settlement Practices and Claim Cost Control Measures, to mandate prompt processing and investigation of claims, to allow policyholders to make immediate repairs to damaged property if necessary to protect health or safety, and to submit claims with reasonable proof, such as photographs or video recordings.

The emergency regulation also provides a mechanism for individual and small business, defined as 100 employees or fewer, policyholders to mediate disputed claims. The costs of the mediation must be paid by the insurer.

On June 8, the Illinois Department of Insurance issued a company bulletin titled "Coverage Related to Business and Property Damage Losses, Including but not Limited to Those Arising Out of Vandalism and Looting," in which the "Department hereby requests" that insurers immediately implement the following protective measures when handling claims arising out of recent riot events:

- "Insurers should apply claims best practices consistent with the categorization of this event as a catastrophic event, including expedited claims handling, advance claim payments, and fair treatment of all policyholders, regardless of size."
- "Insurers should implement a moratorium on the cancellation or non-renewal of impacted policyholders for a period of 60 days from the date of this Company Bulletin."
- "Insurers should err on the side of the policyholder when paying claims as a result of riots, civil commotion, or vandalism from commercial policyholders who were unable to make full premium payments during the period following the Governor's Executive Order 2020-10, dated March 20, 2020."
- "To the extent business interruption provisions are included and operative under a policy, insurers should base payouts on business activity levels that eliminate the impact of COVID-19."
- "Insurers should err on the side of the policyholder when considering the use of exclusions that may or may not be applicable."

Further, on June 8, Illinois Gov. J.B. Pritzker stated, It is my expectation and the expectation of the Illinois Department of Insurance that insurance companies will do everything in their power to give their customers the resources they need to rebuild and get back on their feet as soon as possible. Help can't wait.

The governor further stated that his administration "has been in consultation with major insurance companies on the quick and robust support they should provide Illinois business owners who have experienced property damage, including but not limited to riots, vandalism and looting."

The city of Chicago reportedly is also "directly engaging" with insurers to "eliminate red tape and speed payment of business claims."

It is likely that other insurance regulators and elected officials will take similar or other actions related to riot coverage. Accordingly, insurers are advised to monitor regulatory activity and developments closely both on the claims and underwriting sides.

Fraudulent Claims

Unfortunately, the current economic crisis coupled with relaxed claims reporting requirements may increase the likelihood of fraudulent insurance claims and exaggerated damage submissions. Insurers are advised to be aware of indicia of fraud, including the absence of physical damage to an insured location that alleged was looted, delays in filing police reports and tendering insurance claims and the absence of video evidence for businesses that utilize closed circuit video systems.

Insurers, however, must also consider circumstances that may present legitimate proof problems to

insureds and circumstances justifying delays.

Failure to mitigate and other issues and coverage defenses may be presented with respect to particular claims. The resources of many insurers will be taxed in view of the COVID-19 pandemic that preceded the riots and the impending tropical storm season. Nonetheless, insurers will respond promptly and fairly to riot-related claims.

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[1] See, e.g., *World Trade Ctr. Props. LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003).

[2] See also *All Metals Inc. v. Liberty Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 77658 (N.D. Tex. July 29, 2010) (holding insured's damage to its furnace during three different periods of time over the course of a month constituted one "occurrence" because all of the damage was indirectly tied to the cause of the damage during the first period of time).

[3] See, e.g., *EOTT Energy Corp. v. Storebrand Int'l Ins. Co.*, 45 Cal. App. 4th 565, 575, 578 (Ct. App. 1996) (determining whether 653 thefts of the insured's petroleum products over an 11-month period constituted one "occurrence" depends on whether the insured could "establish that there was a systematic and organized scheme to steal").

[4] See *Basler Turbo Conversions LLC v. HCC Ins. Co.*, 601 F. Supp. 2d 1082, 1089 (E.D. Wis. 2009) (ruling theft of the insured's property on as many as 33 days in a six-month period constituted multiple occurrences "[e]ach theft would, to a reasonable insured, be considered a separate event, incident, or episode resulting in a separate loss that, if discovered, would permit a separate claim subject to a separate deductible and, likewise, a separate per occurrence limit").

[5] See *Johnson v. PPI Tech. Servs. L.P.*, 2013 U.S. Dist. LEXIS 176748 (E.D. La. Dec. 17, 2013).

[6] See, e.g., *Kelaher, Connell & Conner P.C. v. Auto-Owners Ins. Co.*, No. 4:19-cv-00693-SAL, 2020 U.S. Dist. LEXIS 31081 (D.S.C. Feb. 24, 2020) (holding civil authority coverage was not triggered because there was no evidence the civil authority order was issued "because of damage or destruction" to property other than the insured property); *United Air Lines, Inc. v. Ins. Co. of State of Pennsylvania*, 439 F.3d 128 (2d Cir. 2006) (holding civil authority coverage was not triggered because the FAA airport closure order was issued before the 9/11 attack on the Pentagon and not "as a direct result of damage" to adjacent property); *730 Bienville Ptnrs Ltd. v. Assurance Co. of Am.*, 2002 WL 31996014 (E.D. La. 2002) (ruling civil authority provision did not apply to a Louisiana hotel whose business was affected by the FAA 9/11 airport closure order because access to the hotel was not "prohibited" by any order). We note that, although a Michigan court found that a civil authority provision provided coverage for rioting losses following the death of Dr. Martin Luther King, Jr. in *Allen Park Theatre Co. Inc. v. Michigan Millers Mutual Insurance Co.*, 48 Mich. App. 199, 210 N.W.2d 402 (Mich. Ct. App. 1973), the policy at issue in that case required only that the civil order be issued as a direct result of an insured peril, i.e., rioting. It did not require a link between the order and the damage or destruction to adjacent property.