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Insights

SPRING 2022

Coverage Issues Regarding *Riots,* *Civil Commotion* and *Curfews*

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Change Management: An Introduction

Coverage Issues Regarding Riots, Civil Commotion, and Curfews

By Alycen Moss and Elliot Kerzner



Alycen Moss



Elliot Kerzner

Following the death of George Floyd in May 2020, protests and riots broke out in Minneapolis, Minnesota, and spread to another 140 cities throughout the United States. The National Guard was called in to at least 21 states and Washington, D.C. The level of property damage inflicted during the ensuing unrest made it the costliest civil disorder in U.S. history, according to data compiled by the Property Claim Services unit (“PCS”) of Verisk Analytics, a data analytics company.¹

The PCS tracks insurance claims, and classifies insured losses that exceed \$25 million as a “catastrophe” event. According to the PCS, there were only 12 riot and civil disorder catastrophe events from 1950 through 2019. The average loss to the insurance industry from riot and civil disorder catastrophes over those 70 years was around \$90 million. The previous record for civil unrest damages was set in 1992 from rioting that occurred after a jury acquitted police officers who had been videotaped beating Rodney King. The PCS reported that insured losses from that event reached \$775 million. In contrast, business losses resulting from the 2020 riots have exceeded \$2 billion, far exceeding the previous record.² For the first time, the PCS designated the civil unrest a multi-state catastrophe, ultimately including 20 states in the “catastrophe event.”

In the wake of the riots, many cities issued orders restricting access to areas affected by vandalism and looting and/or imposed curfews in anticipation of further

For a protest to constitute a “riot,” most states require multiple people engaged in tumultuous behavior involving either violence or the threat of violence. To constitute a “civil commotion,” most states require a prolonged disturbance of civil order such as widespread acts of looting.

1 See <https://www.iii.org/fact-statistic/facts-statistics-civil-disorders>.

2 Verisk Analytics. PCS will not reveal an exact dollar figure from the violence, but it reveals approximate figures.



unrest. As a result, many businesses lost income and sought coverage under their insurance policies.

Many commercial property policies provide coverage for “riot” and “civil commotion.” Other policies have “riot” or “civil commotion” exclusions. Similarly, many commercial property policies provide coverage for losses incurred while access to a covered location, or a location within a specified distance of a covered location, is denied by an order of civil authority.

To determine the existence and scope of coverage for damage and lost income resulting from the riots, we must consider the following questions: (a) Did a “riot” or “civil commotion” occur? (b) If property damage occurred while businesses were closed, is coverage precluded by vacancy exclusions or occupancy requirements? (c) Did the lost business income resulting from curfew orders qualify for “civil authority” coverage? (d) How many “occurrences” were triggered by the riots? (e) Is there coverage for losses caused by both covered and excluded perils?

A. Did a “Riot” or “Civil Commotion” Occur?

1. “Riot”

While the policy definition of “riot” governs, many policies do not define the term “riot.” Therefore, we generally rely on statutory and common law definitions of the term when evaluating coverage for claims associated with a potential “riot.” Individual states differ in their definitions of “riot,” and the facts of each claim must be measured against the definition of the governing jurisdiction to determine whether a riot occurred. Below, we analyze the law in a few of the jurisdictions in which protests and riots were most prevalent in the summer of 2020.

a. Minnesota's Definition of Riot

Minnesota courts have not addressed the definition of “riot” in the context of insurance coverage, but they have done so in the criminal context. One of the early Minnesota cases defining the term “riot” was *State v. Winkels*, 204 Minn. 466, 468 (1939). In *Winkels*, a crowd assembled in front of a store and forced its way into the building over the protests of police officers.³ The participants looted and vandalized the store.⁴ The court held that, under Minnesota law, the essential elements of a riot are: (a) an assemblage of three or more persons for any purpose; (b) use of force or violence against property or persons, or in the alternative, an attempt or threat to use force or violence or do any other unlawful act coupled with the power of immediate execution; and (c) a resulting disturbance of the public peace.⁵ The court defined “public peace” as “that tranquility enjoyed by a community when good order reigns amongst its members.”⁶ The court held that the facts of this case satisfied the elements of “riot” under Minnesota law.⁷

b. Georgia's Definition of Riot

Although the Georgia Code has not defined “riot” in the civil context, it has done so in the criminal context. Georgia law provides: “Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner commit the offense of riot.”⁸ The Merriam-Webster Dictionary defines “tumultuous” as: “1: marked by tumult: loud, excited, and emotional; 2: tending to or disposed to cause or incite a tumult; [or] 3: marked by violent or overwhelming turbulence or upheaval.”⁹ It defines “tumult” as: “1: a. disorderly agitation or milling about of a crowd usually with uproar and confusion of voices: commotion; b. a turbulent uprising; 2: hubbub, din; [or] 3: a. violent agitation of mind or feelings; [or] b. a violent outburst.”¹⁰

The Supreme Court of Georgia expounded on the definition of “riot” as early as 1886, in *Fisher v. State*, 78 Ga. 258 (1886). There, a police officer arrested a man named Beadles, whereupon a large crowd gathered around the officer and declared that Beadles should not be imprisoned.¹¹ Fisher was prominent in the crowd, using violent, threatening, and profane language.¹² The effort to release Beadles was unsuccessful, and the police took him to jail.¹³ However, Fisher was convicted for the crime of riot.¹⁴ The court held: “Where one with a number of others comes in a violent and tumultuous manner, and, through menaces and threats, endeavors to rescue from the hands of an officer a person he had arrested and held in custody to answer for an offense against the laws of the state, he is guilty of riot.”¹⁵

3 204 Minn. at 467-68, 283 N.W. at 764.

4 *Id.*, 204 Minn. at 471-72, 283 N.W. at 765-66.

5 *Id.*, 204 Minn. at 466, 283 N.W. at 763.

6 *Id.*, 204 Minn. at 468, 283 N.W. at 764.

7 *Id.*, 204 Minn. at 473, 283 N.W. at 766.

8 O.C.G.A. § 16-11-30(a).

9 Merriam-Webster Online Dictionary, as of April 25, 2021.

10 *Id.*

11 *Fisher v. State*, 78 Ga. 258, 258 (1886).

12 *Id.*

13 *Id.*

14 *Id.* at 259.

15 *Id.*

When the factual circumstances have failed to meet all the necessary elements of a “riot,” Georgia courts have held that no riot occurred.¹⁶ In *Smith v. State*, two defendants were convicted of an attempt to commit a riot, but there was no evidence that they were acting in concert or that either of them acted violently or intended to provoke violence.¹⁷ In determining that this failed to satisfy the statutory definition, the court held that the mere making of a noise or behaving tumultuously will not alone constitute a riot, in the absence of any violence.¹⁸

The Court of Appeals of Georgia has applied this definition to an insurance policy that excluded coverage for “loss caused directly or indirectly by . . . riot . . .”¹⁹ The evidence showed that the plaintiff’s house had been considerably damaged by explosions of dynamite, thrown or placed by an unknown person or persons.²⁰ However, the court held that the exclusion did not apply because it was not shown by any evidence that these outrages were committed by more than one person, and, under the law, it required the participation of more than one person to constitute a riot.²¹

Applying these definitions, the vandalism and looting that occurred during the 2020 protests may have occurred in the context of a “riot.” If the acts of vandalism and looting were performed by more than one person acting in a “violent and tumultuous manner,” this will likely constitute a “riot” under Georgia law.

c. California’s Definition of Riot

The seminal case on riots in California is *N. Bay Schools Ins. Authority v. Industrial Indemnity Co.*, 6 Cal. App. 4th 1741, 1746 (1992). In *North Bay*, the insured school was vandalized several times within the course of several hours.²² The school argued that the loss was caused by a “riot” and involved only one “occurrence” for purposes of the policy’s self-insured retention clause, and the insurer argued that the loss was caused by “vandalism” and involved several “occurrences.”²³

The court held that, under California law, “riot” means: (1) a noisy, violent public disorder caused by a group or crowd of persons; or (2) a disturbance of the public peace by three or more persons acting together in a disrupting and tumultuous manner in carrying out their private purposes.²⁴ In defining the term “riot,” the court pointed out that public disturbance or tumult is an essential element of being a “riot.”²⁵ In contrast, vandalism or arson that is conducted “away from public view with the intent they remain unobserved” does not constitute a riot.²⁶ Based on this definition, the court held that no “riot” occurred because all the acts of

16 See, e.g., *Phenix Ins. Co. of Brooklyn v. Jones*, 16 Ga. App. 261, 85 S.E. 206 (1915); *Smith v. State*, 72 Ga. App. 108, 33 S.E.2d 120 (1945).

17 *Smith v. State*, 72 Ga. App. 108, 109, 33 S.E.2d 120, 120 (1945).

18 *Id.*

19 *Phenix Ins. Co. of Brooklyn v. Jones*, 16 Ga. App. 261, 85 S.E. 206 (1915).

20 *Id.*

21 *Id.*

22 6 Cal. App. 4th at 1743.

23 *Id.*

24 *Id.* at 1746.

25 *Id.* at 1747.

26 *Id.* at 1746.

violence were committed out of public view and were not intended to be public.²⁷ The court distinguished the 1992 Los Angeles riots that occurred after the Rodney King trial, which were public disturbances.²⁸

d. New York's Definition of Riot

The Second Circuit addressed New York's interpretation of "riot" in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1021 (2d Cir. 1974). In 1970, Pan American Flight 083, while on a flight from Brussels to New York, was hijacked in the sky over London by two members of a Palestinian terror group, the Popular Front for the Liberation of Palestine.²⁹ The terrorists forced the crew of the aircraft to fly to Beirut, where a demolitions expert and explosives were put on board.³⁰ The terrorists then flew the aircraft to Egypt, where they evacuated the passengers and destroyed the aircraft.³¹ The American airline brought an action to recover against its insurers for the loss of its aircraft.³²

The policy contained an exclusion for loss caused by riots or civil commotion.³³ In considering multiple alternative definitions of the term "riot," the court noted that the formula supported by a "substantial weight of authority" and that "accords to common sense" is that "a riot occurs when some multitude of individuals gathers and creates a tumult."³⁴ Under this definition, the court held that, for there to be a "riot," three or more actors must gather in the same place.³⁵ The court further observed that "riot" and "civil commotion" denote "purely domestic disturbances."³⁶ The court explained that "a riot is a local disturbance, normally by a mob, not a complex, traveling conspiracy of the kind in this case."³⁷ The court further explained that a riot must be accompanied by a tumult or commotion.³⁸ Applying this definition to the facts of the case, the court held that the exclusion did not apply because there was no riot or civil commotion.³⁹

e. Pennsylvania's Definition of Riot

Under Pennsylvania law, a riot is an unlawful assemblage of three or more persons combined together to perpetrate an outrageous and violent crime.⁴⁰ In *Lycoming*, a group of men who committed arson in middle of the night were guilty of "riot."⁴¹ The group consisted of three or more people, and the court held that arson was an outrageous and violent crime.⁴²

27 *Id.* at 1748.

28 *Id.*

29 *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 993 (2d Cir. 1974).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 994, 1005.

34 *Id.* at 1021.

35 *Id.* at 1022.

36 *Id.* at 1019.

37 *Id.* at 1020.

38 *Id.* at 1021.

39 *Id.* at 1022.

40 *Lycoming Fire Ins. Co. v. Schwenk*, 95 Pa. 89, 96 (1880).

41 *Id.* at 89, 95-96.

42 *Id.* at 96-97.

f. Washington's Definition of Riot

Until January 1, 2014, Washington had a statute that read: "A person is guilty of the crime of riot if, acting with three or more other persons, he or she knowingly and unlawfully uses or threatens to use force, or in any way participates in the use of such force, against any other person or against property."⁴³ However, effective January 1, 2014, the word "riot" in the statute was changed to "criminal mischief."⁴⁴ It remains to be seen whether Washington courts will alter their definition of "riot" as a result of this statutory change.

g. Practical Application

While each jurisdiction has different definitions of the word "riot," they appear to share some common characteristics. All of them require more than one person to be involved, and most of them require a "tumult" and either violence or some threat of violence. If a protest contains these elements, it would meet the definition of "riot" in most jurisdictions.

2. *"Civil Commotion"*

Many states have not defined the term "civil commotion." Courts addressing the definition of "civil commotion" generally distinguish it from "riot," since each term in an insurance policy is presumed to have its own meaning.⁴⁵ Comparing the two terms, a federal district court in Ohio found that "civil commotion" refers to "a temporary, primarily civilian disturbance, of a greater degree than a riot but less than armed insurrection, wherein the civil peace is disrupted by violence or acts of civil disorder."⁴⁶ Applying this definition to the facts of the case, the court stated: "The natural, ordinary and commonly accepted meaning of the term 'civil commotion' would encompass widespread acts of looting by civilians occurring over a period of days."⁴⁷

The Fourth Circuit offered the following definition of "civil commotion" in *Hartford Fire Ins. Co. v. War Eagle Coal Co.*, 295 F. 663, 665 (4th Cir. 1924):

An uprising among a mass of people which occasions a serious and prolonged disturbance and an infraction of civil order, not attaining the status of war or an armed insurrection. A civil commotion requires the wild or irregular action of many persons assembled together.

A California appellate court adopted this definition in *N. Bay Schools Ins. Authority v. Industrial Indemnity Co.*, 6 Cal. App. 4th 1741, 1747 (1992), where it defined "civil commotion" as "an uprising among a mass of people which occasions a serious and prolonged disturbance and an infraction of civil order, not attaining the status of war or an armed insurrection." Addressing the distinction between a "civil commotion" and a "riot," the court explained that "[c]ivil commotion' denotes a broader, more prolonged disturbance than 'riot.'"⁴⁸

43 *U.S. v. Lopez-Salas*, 254 Fed. Appx. 621, 624-625 (9th Cir. 2007); *State v. Montejano*, 147 Wash. App. 696, 698, 196 P.3d 1083 (2008).

44 See RCW 9A.84.010(1); *U.S. v. Werle*, 815 F.3d 614, n. 4 (9th Cir. 2016).

45 See, e.g., *Portland School District No. 1J v. Great American Insurance*, 241 Or. App. 161, 171 (2011).

46 See *Sherwin-Williams v. Insurance Company of State of Pennsylvania*, 863 F. Supp. 542, 554 (N.D. Ohio 1994).

47 *Id.*

48 *Id.*



In *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1020 (2d Cir. 1974), the Second Circuit held that the hijacking of an aircraft mid-air by two terrorists was not a “civil commotion,” explaining: “For there to be a civil commotion, the agents causing the disorder must gather together and cause a disturbance and tumult.” According to the Second Circuit, “civil commotion” denotes a domestic disturbance; it “does not comprehend a loss occurring in the skies over two continents.”⁴⁹

Under these definitions, at least some of the 2020 riots likely qualify as “civil commotion.”

B. Vacancy Exclusions and Occupancy Requirements

Commercial property policies that provide coverage for vandalism or other damage caused by riots often exclude coverage when the insured premises are vacant or unoccupied for some specified period, commonly 60 consecutive days. Courts generally uphold these common exclusions and preclude coverage for physical damage to insured property that has been vacant for the amount of time specified in the policy.⁵⁰

Many vacancy exclusions apply only when the property is not being used for “customary business operations.”

49 *Id.*; see also *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460 (S.D.N.Y. 1983) (all risk insurer was required to provide coverage for property damage to Holiday Inn in Lebanon when property was damaged in a series of “civil commotions” as opposed to insurrection, war, or civil war).

50 See, e.g., *Charter Oak Fire Ins. Co. v. Patterson*, 46 F. Supp. 3d 1361 (N.D. Ga. 2014) (holding that, under Georgia law, if an insurance policy requires an insured, as a condition of coverage, to reside at the property and the insured does not reside there, the insured cannot recover under the policy); *Fitzpatrick v. Fire Ins. Exchange*, 2000 WL 567101 (Tex. App. 2000) (holding that, under Texas law, vacancy clause excluded coverage for vandalism to insured premises that occurred more than 60 days after vacancy of premises).



This term is unambiguous, and the word “customary” means “commonly practiced, used, or observed.”⁵¹ The extent to which a property must be used to qualify as “customary business operations,” however, is not always clear.

A federal district court in Texas examined the term “customary operations” in *Bedford Internet Office Space, LLC v. Travelers Cas. Ins. Co.*, 41 F. Supp. 3d 535, 547-48 (N.D. Tex. 2014). There, the insured leased two buildings to a not-for-profit charitable ministry, and the insurance policy on the buildings included the following coverage limitation: “We will not pay for any loss or damage caused by any of the following, even if they are Covered Causes of Loss, if the building where loss or damage occurs has been ‘vacant’ for more than 60 consecutive days before that loss or damage occurs: (1) Vandalism . . . (5) ‘Theft’ or (6) Attempted ‘theft.’”⁵² The policy defined “vacant” as follows: “Such building is vacant unless at least 31% of its total square footage is: (a) Rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; or (b) Used by the building owner to conduct customary operations.”⁵³

The insured owner of the property and the lessee agreed that over the first 90 to 120 days of the lease, the owner would move out of the property, and the lessee would be moving in and “ramping up” its business operations.⁵⁴ During this transition period, a series of break-ins and thefts occurred at the insured buildings.⁵⁵ At the time of the thefts, the owner was transitioning his business out of the property and had a presence at the property to the extent that he used the property for storage, picked up deliveries and mail there, and

51 See *Bedford Internet Office Space, LLC v. Travelers Cas. Ins. Co.*, 41 F. Supp. 3d 535, 547-48 (N.D. Tex. 2014).

52 *Id.* at 541.

53 *Id.* at 541-42.

54 *Id.* at 542.

55 *Id.* at 542-43.

tried to go to the property twice a week.⁵⁶ The lessee was also in the process of “ramping up” his non-profit ministry to operate out of the property.⁵⁷ He and volunteers were at the property numerous times, and he was in the process of moving equipment to the property for use by his business.⁵⁸ However, the court held that mere access to or incidental use does not constitute “customary operations.”⁵⁹ The court also noted that there was no electricity or water service, which would make it seemingly impossible to conduct business activities at the property. Thus, the court concluded that neither the owner nor the lessee was using the insured property to conduct customary operations within 60 days preceding the date of the loss. Accordingly, the court granted summary judgment to the insurer on the basis of the policy’s vacancy clause.

A federal district court in New York conducted a similar analysis of the “customary operations” phrase of the vacancy clause in *Keren Habinyon Hachudosh D’Rabeinu Yoel of Satmar BP v. Philadelphia Indem. Ins. Co.*, 2011 WL 891347 (E.D.N.Y. Mar. 11, 2011). In that case, the insured’s building was added to its insurance policy under the description “High School.”⁶⁰ The policy at issue provided: “If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs . . . [w]e will not pay for” vandalism or theft.⁶¹ The policy further provided: “Such building is vacant unless at least 31% of its total square footage is . . . [u]sed by the building owner to conduct customary operations.”⁶²

The property was initially acquired and used as a school for 7th to 8th grade boys, but, due to parents’ concerns, the insured ceased daily use of the building as a school.⁶³ Following the closure of the school, the property became predominantly used for the storage of school supplies, furniture, and computers. The property did not have electricity or gas, but the insured claimed that it had “infrequent” staff meetings and teacher training sessions there.⁶⁴ The insured also claimed that students sometimes used the building.⁶⁵ However, due to the lack of heating and electricity, teachers and students only visited the building in the daylight and in the warmer months.⁶⁶

The court held that the policy’s vacancy provision was unambiguous and was clearly intended to apply to the customary operations of a school.⁶⁷ The court found that the building was not being used by the insured to conduct customary operations of a school within 60 days of the loss.⁶⁸ Although the school was used for storage and one teacher/student gathering, the court held that such activity could not be reasonably expected to constitute customary operations of a school where there was no regular faculty, student body,

56 *Id.* at 548.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Keren Habinyon Hachudosh D’Rabeinu Yoel of Satmar BP v. Philadelphia Indem. Ins. Co.*, 2011 WL 891347, at *1 (E.D.N.Y. Mar. 11, 2011).

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.* at *1-2.

65 *Id.* at *2.

66 *Id.*

67 *Id.* at *3.

68 *Id.*

or teaching and learning taking place at the building.⁶⁹ Moreover, although the insured claimed that it had plans to use the building as a school again in the near future and made roof repairs to that end, the court held that future events were irrelevant in determining whether the building was vacant, as defined by the contract, 60 days prior to the date of the loss.⁷⁰

In the context of the vandalism clause, the court explained that the purpose of the vacancy provision was to limit the risk of theft and vandalism, which would presumably be deterred by regular activity of a school at the property.⁷¹ The fact that no one ever used the building after dark because there was no electricity, no one used the building in the colder months due to a lack of heat, and that the building was only used a handful of times in the warmer months supported enforcement of the vacancy provision.⁷² The court also found unpersuasive the insured's argument that its sparse visits to the property to move furniture and to perform maintenance would provide the building with an appearance of occupancy so as to sufficiently minimize the risk of vandalism and theft to what would be considered foreseeable for a school, which was what was contracted for by the parties.⁷³ Because the insured was not conducting customary operations of a school at the property within 60 days of the damage, the court held that the vacancy provision barred coverage for the loss.⁷⁴

A federal court in Colorado employed similar reasoning in *Saiz v. Charter Oak Fire Ins. Co.*, 2007 WL 2701398 (D. Colo. Sept. 12, 2007), *affirmed by Saiz v. Charter Oak Fire Ins. Co.*, 299 Fed. Appx. 836 (10th Cir. 2008). In *Saiz*, the insured owner of a family-style restaurant closed the restaurant, but maintained the kitchen equipment, tables, chairs, and dishes in the building that previously housed the restaurant.⁷⁵ The building also contained an office from which the insured tried to sell the building and conducted restaurant business unrelated to the closed restaurant.⁷⁶ A few months after the restaurant closed, the building's sprinkler system activated, resulting in water damage to the building.⁷⁷

The insurer determined that the sprinkler was activated due to "deliberate tampering," and denied the insured's claim based on the policy's vacancy condition.⁷⁸ The insurer's policy contained a limitation stating that it would not pay for loss or damage caused by water or vandalism if the property was vacant for more than 60 consecutive days.⁷⁹ A property was "vacant" unless "at least 31% of its total square footage was: (i) [r]ented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or (ii) [u]sed by the building owner to conduct customary operations."⁸⁰

The district court agreed with the insurer that the policy did not cover the damage at the restaurant.⁸¹ The

69 *Id.*

70 *Id.* at *4.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at *5.

75 *Saiz v. Charter Oak Fire Ins. Co.*, 2007 WL 2701398, at *1 (D. Colo. Sept. 12, 2007).

76 *Id.*

77 *Id.*

78 *Id.* at *2.

79 *Id.* at *5.

80 *Id.* at *1.

81 *Id.* at *5.

court explained that, although the insured continued to conduct some business at the former restaurant's office, this business did not constitute "customary operations." The policy identified the insured's business as a "family-style restaurant."⁸² Because the insured was not conducting the business of a "family-style restaurant" in the office, the building was "vacant" as defined by the policy.⁸³ The court also noted that even if it accepted the insured's argument that he was conducting "customary operations" in the office, the property was still "vacant" because the office space constituted only 10-12% of the building's square footage.⁸⁴

The Court of Appeals of Georgia also determined that similar policy language requires that the insured's customary operations occur on the insured premises to avoid a finding of vacancy.⁸⁵ In *Sorema North American Reinsurance Co. v. Johnson*, 258 Ga. App. 304, 574 S.E.2d 377 (2003), the policy at issue covered a building that the insured obtained through foreclosure from a meat packing business.⁸⁶ After the foreclosure, the insured began selling the inventory and tried to sell the building.⁸⁷ Although some of this activity initially took place at the building, none of the insured's employees or agents worked or visited the building after August 1998.⁸⁸ The building was sold in November 1998, at which time it was discovered that the property had been vandalized.⁸⁹

The insurers denied coverage under the policy's vacancy condition because the property had been vacant for more than 60 consecutive days and the damage was caused by vandalism. The policy stated that a building was "vacant" when "70% or more of its square footage: (i) [i]s not rented; or (ii) [i]s not used to conduct customary operations."⁹⁰ The court determined that the policy was not ambiguous and enforced the plain meaning of its terms.⁹¹ The court found that the property was vacant because there was no evidence that the insured used any portion of the building for any purpose related to its customary operations within the 60 days preceding the loss.⁹² The insured did not conduct any of its lending, asset management, or liquidation operations at that location after August 1998.⁹³ Finally, the court rejected the insured's argument that the building was used as an asset in its customary asset management operations.⁹⁴ The court concluded that, because the vacancy condition is intended to protect the insurer from higher risks attendant with a vacant property, the "customary operations" must occur on the insured premises.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Sorema North American Reinsurance Co. v. Johnson*, 258 Ga. App. 304, 574 S.E.2d 377 (2003); *see also Crum & Forster Ins. Companies v. Mecca & Sons Trucking Corp.*, 2009 WL 2917898 (N.J. Super. App. Div. Sept. 9, 2009) (holding that vacancy provision excluded coverage for damage caused by vandalism when insured was not conducting customary operations at loss location); *but see Gallo v. Travelers Property Cas.*, 21 A.D.3d 1379, 1380, 801 N.Y.S.2d 849, 851 (2005) (finding that the presence of furnishings in three apartments was sufficient to establish the "customary operations" of renting the apartments).

86 *Johnson*, 258 Ga. App. at 305, 574 S.E.2d at 378.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*, 258 Ga. App. at 305, 574 S.E.2d at 379.

91 *Id.*, 258 Ga. App. at 306, 574 S.E.2d at 379.

92 *Id.*

93 *Id.*

94 *Id.*

Similarly, some policies include in their definitions of covered premises or named insureds terms that require occupancy of the insured. For example, in *Grange Mut. Cas. Co. v. DeMoonie*,⁹⁵ a homeowners' policy defined the "insured premises" as the property at which the insured resides. Because the property had been vacant for more than 30 days at the time the property was damaged by acts of vandalism, the court held that no coverage existed for the loss.⁹⁶

In the summer of 2020, some businesses were closed due to Covid-19 when they sustained property damage as a result of riots, vandalism, and looting. If these businesses were not being used for their customary business operations, or were unoccupied, during the period preceding the damage, their property policies may preclude coverage.

C. Did Lost Business Income Resulting From Curfew Orders Qualify for Civil Authority Coverage?

1. Requirement of Direct Physical Loss or Damage to Property

Commercial property policies typically include civil authority coverage, which provides coverage for loss of income that occurs when access to the insured premises has been prohibited by a civil authority, such as a government entity. A city-wide curfew likely qualifies as an order of civil authority as contemplated by civil authority provisions. However, in order to obtain civil authority coverage, the insured must show that an order of civil authority resulted from loss or damage caused by a covered peril.

To trigger civil authority coverage, most policies require physical loss or damage to covered premises or property within a certain distance from covered premises. Therefore, for businesses seeking to recover for loss of income and extra expenses resulting from a curfew imposed because of rioting, no coverage exists absent evidence of physical loss of or damage to covered premises. Similarly, contingent business interruption coverage typically requires physical damage to contingent properties that supply materials for the insured, purchase the insured's goods, or attract customers to the insured's business. Thus, losses based solely on an insured's inability to deliver or accept goods during a city-wide curfew do not trigger coverage under most commercial property policies.

Most courts interpret "direct physical loss or damage" using the common meaning of the words and hold that the terms contemplate "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so."⁹⁷ Therefore, to trigger civil authority coverage, there

95 277 Ga. App. 812, 490 S.E.2d 451 (1997).

96 *Id.*

97 *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 308, 581 S.E.2d 317, 319 (2003) (Georgia law); *Graspa Consulting, Inc. v. United Nat'l Ins. Co.*, No. 1:20-cv-23245 (S.D. Fla. Jan. 20, 2021) (Florida law); *see also Hasan v. AIG Prop. Cas. Co.*, 2018 WL 10335670, *3 (D. Colo. Aug. 2, 2018) (Colorado law) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."); *Steiner Steakhouse LLC v. AMCO Ins.*, No. 1:20-cv-00858 (W.D. Tex. Dec. 30, 2021) (Texas law) (holding that the phrase "direct physical loss of or damage to property" is unambiguous and means "a distinct, demonstrable, physical alteration of the property"); *L.A. Cty. Museum of Nat. Hist. Found. v. Travelers Indem. Co.*, No. 2:21-cv-01497-SVW-JPR, 2021 U.S. Dist. LEXIS 83317 (C.D. Cal. Apr. 15, 2021) (California law) (stating that the meaning of "direct physical loss or damage" was well established under California law:



must be physical damage to covered property or to property within a specified distance of covered property.

However, some civil authority provisions do not require physical loss or damage to property. For example, in *Sloan v. Phoenix of Hartford Ins. Co.*, the insured sought recovery for business losses caused by an eight-

property must undergo a “distinct, demonstrable, physical alteration,” and “some external force must have acted upon the insured property to cause a *physical change* in the condition of the property.”); *Georgetown Dental, LLC v. Cincinnati Ins. Co., et al.*, No. 1:21-cv-00383 (S.D. Ind. May 17, 2021) (Indiana law) (determining that the terms “physical loss” and “physical damage” require actual and demonstrable physical harm to the property); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 99-434-HU, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (Oregon law) (holding that property suffers “direct physical loss” triggering coverage under a first party property policy when the property undergoes a “demonstrable physical change . . . necessitating some remedial action”); *Nguyen v. Travelers Casualty Insurance Company of America*, No. 2:20-cv-00597-RSM (W.D. Wa. May 28, 2021) (Washington law) (holding that “physical loss” requires “tangible, material, discernable, or corporeal dispossession of the covered property”); *Torgerson Props., Inc. v. Continental Cas. Co.*, No. 0:20-cv-02184 (D. Minn. Feb. 17, 2021) (Minnesota law) (asserting that the term “direct physical loss of or damage to property” required “actual, demonstrable loss of or harm to some portion of the premises itself,” and did not encompass “simple deprivation of use”); *System Optics, Inc. d/b/a Novus Clinics v. Twin City Fire Ins. Co.*, 2021 WL 2075501 (N.D. Ohio May 24, 2021) (Ohio law) (holding that “direct physical loss” requires “some actual harm to the structure rendering it uninhabitable or unusable”); *Chief of Staff, LLC v. Hiscox Ins. Co. Inc.*, No. 20-C-3169, 2021 WL 1208969, at *1-*2 (N.D. Ill. Mar. 31, 2021) (Illinois law) (holding that “‘physical loss’ refers to a deprivation caused by a tangible or concrete change in or to the thing that is lost”); *PF Sunset View, LLC v. Atlantic Specialty Ins. Co.*, No. 20-81224-CIV, 2021 WL 1341602, at *2 (S.D. Fla. Apr. 9, 2021) (Florida law) (holding that “the plain meaning of the terms ‘direct physical loss of or damage to property’ unambiguously requires actual, tangible damage to the physical premises itself, not merely economic losses unaccompanied by a demonstrable physical alteration to the premises itself”); *The Brown Jug, Inc. v. Cincinnati Insurance Company*, No. 5:20-cv-13003, 2021 WL 2163604 (E.D. Mich. May 27, 2021) (Michigan law) (holding that, to constitute “direct physical loss or damage,” the insured property must be physically lost, damaged, replaced, or uninhabitable).

day curfew imposed during a period of civil disorder in Detroit.⁹⁸ The insured did not suffer any physical damage to its property.⁹⁹ The policy covered “loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property”¹⁰⁰ The policy also contained a separate provision providing coverage for “actual loss . . . when as a direct result of the peril(s) insured against, access to the premises . . . is prohibited by order of civil authority.”¹⁰¹ In ruling the latter provision did not require damage to the insured’s property, the court treated the civil authority provision as separate from the ordinary business interruption clause, explaining that the civil authority provision did not make any mention of, or reference to, the necessity for physical damage to the premises for coverage to be triggered.¹⁰²

Similarly, in *Southlanes Bowl, Inc. v. Lumbermen’s Mut. Ins. Co.*, the insureds operated bowling alleys, restaurants, taverns, snack bars, cocktail lounges, and motels.¹⁰³ After the assassination of Dr. Martin Luther King, Jr., in April 1968, widespread riots and civil commotion accompanied by burning and looting erupted in and around Detroit.¹⁰⁴ None of the insureds’ businesses were physically damaged.¹⁰⁵ The governor declared a state of emergency, imposed a curfew, and closed all places of amusement.¹⁰⁶ In accordance with the governor’s order, the insureds closed their establishments and, as a result, suffered significant business losses.¹⁰⁷ The court held there was civil authority coverage because physical damage to the insured premises was not a prerequisite to civil authority coverage.¹⁰⁸ However, the court did not describe the civil authority provision at issue in that case. It is thus possible that the language of the civil authority provision did not require direct physical loss or damage to property to trigger civil authority coverage. Accordingly, the particular language of the civil authority provision is critical in evaluating coverage for business losses resulting from curfew orders.

2. *No Coverage for Orders Due to Future Threats*

Generally, the purpose of a curfew order is to prevent future injury or damage, not to repair prior injury or damage. Most jurisdictions have held that there is no coverage for business income losses caused by orders designed to prevent future threats.

The Northern District of Georgia analyzed a typical civil authority coverage provision in *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715 (N.D. Ga. Dec. 15, 2004). There, the insured operated gift shops, newsstands, and retail stores located in airport terminals around the country.¹⁰⁹ Immediately after the September 11 attacks on the World Trade Center, the Federal Aviation Administration

98 *Sloan v. Phoenix of Hartford Ins. Co.*, 46 Mich. App. 46, 207 N.W.2d 434, 435 (Mich. Ct. App. 1973).

99 *Id.*

100 *Id.*

101 *Id.* at 436.

102 *Id.* at 436-37.

103 *Southlanes Bowl, Inc. v. Lumbermen’s Mut. Ins. Co.*, 46 Mich. App. 758, 208 N.W.2d 569 (1973).

104 *Id.*, 46 Mich. App. at 759, 208 N.W.2d at 570.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*, 46 Mich. App. at 760, 208 N.W.2d at 570.

109 *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *1 (N.D. Ga. Dec. 15, 2004).

issued a ground stop order for all flights, which caused the insured to lose business at its airport stores.¹¹⁰ The court noted that, under Georgia law, if a civil authority issues an order “due to the threat of future injury to persons and property and not because of any already existing physical loss or damage,” any damages suffered by the insured are not covered by a civil authority provision.¹¹¹ The court held that there was no civil authority coverage because the destruction of the World Trade Center and damage to the Pentagon building were not the cause of the decision to ground all flights.¹¹² Rather, the court explained, the ground stop order was issued as a result of the threat of *future* terrorist acts involving the nation’s airlines.¹¹³

California courts have reached the same conclusion. In *Syufy Enterprises v. Home Ins. Co. of Indiana*, No. 94-0756, 1995 WL 129229 (N.D. Cal. March 20, 1995), the insured movie theater chain made a civil authority claim after several days of dusk-to-dawn curfews curtailed access in the wake of the Rodney King verdict in 1992. The civil authority provision extended coverage to situations in which access to insured property was “specifically prohibited” by order of civil authority issued “as a direct result of damage to or destruction of property adjacent to the premises herein described by the perils insured against.”¹¹⁴ The court held there was no coverage, stating:

The requisite causal link between the damage to adjacent property and denial of access to a Syufy theater is absent. Syufy opted to close its theaters as a direct result of the city-wide curfews, not as a result of adjacent property damage. In fact, the curfews were imposed to *prevent* “potential” looting, rioting and resulting property damage.¹¹⁵

The Supreme Court of Pennsylvania likewise held that civil authority provisions do not apply to curfew orders designed to preempt potential future property damage. In *Cleland Simpson v. Firemen’s Ins. Co. of Newark*, 392 Pa. 67, 140 A.2d 41 (1958), a civil authority coverage claim arose as a result of Hurricane Diane occurring on August 17-19, 1955. As a result of flooding damage, two-thirds of the city of Scranton was without any water supply for any purpose, including the normal supply to the fire hydrants.¹¹⁶ The mayor of Scranton declared a state of emergency and ordered all stores closed because of a serious fire danger on August 19th, and the plaintiff’s business was shut down from the 19th through the 23rd as a result.¹¹⁷

The policy at issue provided civil authority coverage “when, as a direct result of a peril insured against, access to the premises described is prohibited by order of civil authority.”¹¹⁸ The Pennsylvania Supreme Court held there was no coverage, explaining that “the clear language of the policy restricts the loss to that following a direct invasion of the property by fire or another specified peril and the subsequent prohibition by civil authority of access to the properties.”¹¹⁹ The court reasoned that the state of emergency was not caused by physical loss or damage by an insured peril, but was motivated by the fear of future loss from a

110 *Id.* at *2-3.

111 *Id.* at *6.

112 *Id.* at *7.

113 *Id.*

114 *Syufy Enterprises v. Home Ins. Co. of Indiana*, No. 94-0756, 1995 WL 129229, at *1-2 (N.D. Cal. March 20, 1995).

115 *Id.* at *6 (emphasis in original).

116 *Cleland Simpson v. Firemen’s Ins. Co. of Newark*, 392 Pa. 67, 140 A.2d 41, 42 (1958).

117 *Id.*

118 *Id.* at 43.

119 *Id.* at 44.

new risk instead; as a result, there was no coverage.¹²⁰ The court stated:

Here the specified peril is fire; the risk insured against is loss of profit through business interruption caused directly by fire and extended for a period of time to continued interruption caused by the action of civil authorities in preventing access to the business premises as a direct result of fire.

By no process of logic can we read into the policy that the risk includes prohibition of access because of apprehension of either the possibility or probability of a fire which never occurred.¹²¹

In addition, there must be a nexus between the civil authority order and the physical damage at issue. In *Not Home Alone, Inc. v. Philadelphia Indem. Ins. Co.*, the insured provided at-home services to senior citizens.¹²² In early September 2008, Hurricane Ike threatened the upper Texas coast, and county officials issued evacuation orders.¹²³ The court held there was no civil authority coverage because the evacuation orders were issued before Hurricane Ike had made landfall; at that point, the hurricane had caused no direct physical loss of or damage to other properties.¹²⁴ The court explained that evacuation notices issued by county officials were due to the *anticipated threat* of damage to the counties, not due to property damage that had already occurred in that area as a result of the hurricane.¹²⁵

The D.C. Court of Appeals explicitly addressed civil authority coverage provisions in the context of curfew orders imposed after riots, and held that no coverage was triggered, in *Two Caesars Corp. v. Jefferson Ins. Co.*¹²⁶ Following the assassination of Martin Luther King, Jr. in 1968, Washington, D.C. issued a curfew order, which prohibited access to the insured's restaurant.¹²⁷ The restaurant sought coverage under its policy's civil authority provision, which provided coverage "when, as a direct result of the (perils) insured against," access to the premises was prohibited.¹²⁸ The court held that the restaurant's civil authority coverage claim was properly denied because the order was not motivated by existing property damage but, rather, by a fear that loss might occur in the future were no curfew imposed.¹²⁹

The court explained:

The plain fact is that access to appellant's restaurant during the hours of the curfew was not prohibited because of damage to or destruction of its property by riot or civil commotion, but rather to achieve a compelling and legitimate governmental objective – that of facilitating the movement of police and fire fighting equipment during an actual or anticipated emergency.

120 *Id.*

121 *Id.*

122 *Not Home Alone, Inc. v. Philadelphia Indem. Ins. Co.*, No. 1:10-CV-54, 2011 WL 13214381, at *1 (E.D. Tex. Mar. 30, 2011), *report and recommendation adopted*, 2011 WL 13217067 (Apr. 8, 2011).

123 *Id.* at *2.

124 *Id.* at *6-7.

125 *Id.*

126 *Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A.2d 305 (D.C. Ct. App. 1971).

127 *Id.* at 305.

128 *Id.* at 306, n. 2.

129 *Id.* at 307.

* * *

The inescapable fact is, however, that, by the clear provisions of the policy, the loss is compensable only when the Order of Civil Authority, which prohibits access, is predicated upon damage to or destruction of the business property.¹³⁰

Based on the above precedent, orders issued due to the threat of future damage do not qualify for civil authority coverage under most civil authority coverage provisions. Thus, business losses caused by curfew orders designed to prevent future damage would not trigger civil authority coverage under these provisions.

3. *Civil Authority Orders Must Completely Prohibit Access to Insured Property*

In addition to requiring physical loss or damage to property, civil authority provisions usually apply only while access to the insured property is completely prohibited. When a business remains open and access is merely inconvenient or diminished, or when the civil authority does not expressly and completely prohibit access to the business, civil authority provisions are generally inapplicable.

Numerous jurisdictions have interpreted civil authority coverage provisions to require complete denial of access to the insured property.¹³¹ One example of this principle's practical application is *Goldstein v. Trumbull Ins. Co.*, 2016 WL 1324197 (N.Y. Sup. 2016), which involved an insured New York law firm. On October 26, 2012, New York Governor Andrew Cuomo declared a State of Emergency in New York in preparation for Tropical Storm Sandy, which was forecast to hit New York in the coming days.¹³² The declaration included the suspension of all train service in and out of New York City, including subway service, and closed bridges, tunnels, and roadways.¹³³ Mayor Michael Bloomberg issued a mandatory evacuation order for the area which included the insured law firm.¹³⁴ The Administrative Judges of the Courts of New York shut down

130 *Id.* at 307-308.

131 *See Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. Ct. App. 1970) (holding that although the loss resulted from a curfew and municipal regulations imposed during civil disorder in April of 1968, there was no coverage because these did not prohibit access to the premises because of damage to adjacent property); *Commstop, Inc. v. Travelers Indemn. Co. of Connecticut*, No. 11-1257, 2012 U.S. Dist. LEXIS 69962 (W.D. La. May 17, 2012) ("prohibit" access means "totally and completely prevented - i.e., made impossible"); *Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004) ("prohibits access" means to "formally forbid or prevent"); *Syufy Enterprises*, 1995 U.S. Dist. LEXIS 3771 (N.D. Cal. March 20, 1995) (no coverage because theater access was not specifically foreclosed by dawn-to-dusk curfew); *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, 2010 WL 2696782, *5 (M.D. Pa. 2010) (holding there was no civil authority coverage because closure of main road to ski resort did not completely cut off access to resort); *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at *4 (Minn. Ct. App. Jun. 7, 2005) (holding that civil authority coverage only applies while access is completely prohibited; where a business remains open and access is merely inconvenient or diminished, or where there is some confusion about whether access is prohibited but no civil authority actually exists preventing access, civil authority provisions are inapplicable); *Royal Indem. Co. v. Retail Brand Alliance, Inc.*, 33 A.D.3d 392, 822 N.Y.S.2d 268 (1st Dep't 2006) (the destruction of the World Trade Center had not "prevented" the use of or access to a store after it reopened even though one entrance was closed and there was scaffolding on the building); *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 912 n.6 (W.D. Tenn. 2001) (holding civil authority coverage provision was not applicable where a civil authority denied an insured use of a hotel for business reasons, but did not deny the insured physical access to the premises).

132 *Goldstein v. Trumbull Ins. Co.*, 2016 WL 1324197, at *1 (N.Y. Sup. 2016).

133 *Id.*

134 *Id.* at *2.

the court system, eliminating the ability of the insured’s attorneys to appear in courts and provide their professional services.¹³⁵ On October 29, 2012, Sandy made landfall.¹³⁶

The insured contended that the governor’s and mayor’s declarations restricted access to its building for 72 hours commencing October 29, 2012, and court closures prevented the insured from resuming its business operations through November 4, 2012.¹³⁷ However, the court held there was no civil authority coverage because the civil authority orders did not specifically prohibit access to the insured’s premises; they only made it more difficult to access the premises.¹³⁸ The insured’s “mere difficulty in accessing the premises is not sufficient to constitute a prohibition.”¹³⁹

The curfew orders issued after the 2020 riots generally did not completely prohibit access to specific premises. Therefore, they likely do not trigger coverage under a commercial property policy’s civil authority provision that requires access to the insured premises to be specifically prohibited.

4. *Civil Authority Exclusions*

Many commercial property policies contain an exclusion that precludes coverage for “loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property.” Although courts have not addressed this provision in the context of an order prohibiting use of property, a New York appellate court has implied that this exclusion would preclude coverage for loss or damage due to a civil quarantine order.¹⁴⁰ In *Massi’s Greenhouses*, the insured sought to recover the costs of removal, clean-up, and lost business opportunities associated with the bacterial contamination of geraniums in its greenhouses following a quarantine order of the New York State Department of Agriculture and Markets.¹⁴¹ The court held that there was a question of fact with regard to whether the losses were caused by the quarantine order, but indicated that if it was determined that the losses were caused by the quarantine order, they would be precluded by the civil authority exclusion.¹⁴² Thus, in its ruling, the court indicated that the civil authority exclusion would preclude coverage for loss or damage due to a civil quarantine order.

It is unclear whether this exclusion would apply to business losses resulting from curfew orders. On one hand, it is a “loss caused by order of [a] civil authority.” On the other hand, it does not fit into any of the provision’s specific examples: it is not a seizure, confiscation, destruction, or quarantine of property. This is an open question, and courts have yet to address it.

D. How Many Occurrences?

1. *Policy Definition*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.* at *12.

139 *Id.*

140 See *Massi’s Greenhouses, Inc. v. Farm Family Mut. Ins. Co.*, 233 A.D.2d 844, 844, 649 N.Y.S.2d 307, 308 (4th Dep’t 1996).

141 *Id.* at 844.

142 *Id.*

The amount of the applicable deductible and limits of liability are generally determined by the number of “occurrences.” In determining the number of “occurrences” in a given claim, the policy definition always controls. Some policy definitions have time period limitations, such as 72 hours. Under such definitions, a second loss occurring within 72 hours of the first may be considered one occurrence. Conversely, losses that occur at the same location and involve the same insured may be separate occurrences if they occur more than 72 hours apart.

The issue is: do multiple instances of property damage resulting from the 2020 riots constitute multiple occurrences, or do they constitute only a single occurrence because they originate from one original cause?

2. *The Majority Rule: The Cause Test*

The majority of states determines the number of occurrences by the number of “causes.” Under this test, all instances of property damage resulting from a single, uninterrupted cause would likely be deemed a single occurrence.¹⁴³ The Supreme Court of Georgia, in adopting the cause test, expressed it as follows: “the number of accidents is determined by the number of causes of the injuries, with the court asking if ‘[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.’”¹⁴⁴ In these states, property damage resulting from a single, uninterrupted riot would likely be deemed a single occurrence, unless otherwise defined in the policy.

One example of a court’s application of the cause test is *Travelers Property Cas. Co. of Am. v. Continental Cas. Co.*¹⁴⁵ In *Travelers*, the court held that multiple claims in underlying products liability cases involving plastic bottles manufactured by the insured were caused by a single “occurrence,” even though the bottles were filled by a fuel gel supplier, shipped and sold to various retailers across the country, and used by multiple individual claimants over a five-year period, because the basis for the insured’s alleged liability in each underlying case was its decision to use the bottle to package gel fuel for use in firepots.¹⁴⁶ The fact that there were multiple injuries of different magnitudes extended over a period of time did not mean there were multiple “occurrences.”¹⁴⁷ Accordingly, a single liability limit applied to all 19 underlying products liability cases against the insured.¹⁴⁸ Based on this reasoning, even multiple acts of vandalism or theft against an insured business could constitute a single “occurrence” if they are caused by a single riot.

This conclusion, however, is subject to a couple of caveats. Even in the majority of jurisdictions applying the cause test, injuries or property damage resulting from separate riots would be deemed separate occurrences. For example, even in Georgia, which applies the cause test, a slight gap between two acts could

143 See, e.g., *International Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 46 A.D.3d 224, 228 (1st Dep’t 2007) (“Whether a series of losses or injuries are a result of a single or multiple occurrences is determined by: ‘whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors.’”); *PECO Energy Co. v. Boden*, 64 F.3d 852, 855-856 (3d Cir. 1995) (“If there is only one cause for all of the losses, they are part of a single occurrence.”).

144 *State Auto Prop. & Cas. Co. v. Matty*, 286 Ga. 611, 611, 615, 690 S.E.2d 614 (2010).

145 *Travelers Property Cas. Co. of Am. v. Continental Cas. Co.*, 226 F. Supp. 3d 1359 (N.D. Ga. 2017).

146 *Id.* at 1370.

147 *Id.*

148 *Id.*



render them separate “occurrences.”¹⁴⁹ In *Matty*, a motor vehicle accident occurred in which the insured struck a bicyclist and then struck a second bicyclist.¹⁵⁰ An accident reconstruction expert testified that it would have taken the driver “just over a second” to travel the 95 to 115 feet between the two bicyclists.¹⁵¹ The Georgia Supreme Court remanded the case to the district court to answer whether “there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.”¹⁵² The jury found that there were two “occurrences.”¹⁵³ The insurer filed a motion for new trial, contending that there was no evidence from which a reasonable jury could find that there were two occurrences.¹⁵⁴ The district court denied the motion, finding that a course correction by the driver lasting less than a second could be deemed an intervening cause.¹⁵⁵ On appeal, the Eleventh Circuit affirmed the denial, holding that the course correction could have rendered the second collision a separate “occurrence.”¹⁵⁶ A second caveat is that, if an event does not meet all the elements of the governing jurisdiction’s definition of “riot,” each act of vandalism may constitute a separate “occurrence.”¹⁵⁷

3. *Texas: The Events Test*

In contrast to the majority of states, Texas determines the number of “occurrences” based on the number

149 See *State Auto Prop. & Cas. Co. v. Matty*, 286 Ga. 611, 611, 615, 690 S.E.2d 614 (2010).

150 *Id.*, 286 Ga. at 615.

151 *Id.* at 611-12.

152 *Id.* at 617.

153 *State Auto Property and Cas. Co. v. Matty*, 438 Fed. Appx. 820, 821 (11th Cir. 2011).

154 *Id.*

155 *State Auto Property and Cas. Co. v. Matty*, 719 F. Supp. 2d 1377, 1381 (M.D. Ga. 2010).

156 *State Auto Property and Cas. Co. v. Matty*, 438 Fed. Appx. 820, 822 (11th Cir. 2011).

157 See, e.g., *N. Bay Schools Ins. Authority v. Industrial Indemnity Co.*, 6 Cal. App. 4th 1741 (1992) (holding that insured school that was vandalized several times within the course of several hours involved separate “occurrences” because the acts of vandalism did not qualify as a “riot”).

of events.¹⁵⁸ In *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, the insured imported 110,000 pounds of canary seed from Argentina and sold it to 8 different feed and grain dealers in Texas and Oklahoma.¹⁵⁹ The dealers sold the seed to bird owners.¹⁶⁰ The seed was contaminated with Aldrin, a chemical insecticide toxic to birds, and many birds were killed.¹⁶¹ The court reasoned that, even though the damage to the birds resulted from a single contamination of bird seed, the insured's liability resulted from the event of the insured's sale of the seed.¹⁶² Thus, the court held it was the sale of contaminated seed, not the contamination (the cause), that determined the number of occurrences.¹⁶³ There being eight sales, the court held there were eight separate occurrences, and the insurer had to pay eight separate limits of liability.¹⁶⁴ Under this test, each instance of property damage resulting from a riot may constitute a separate "occurrence."

E. Multiple Causes

Many businesses damaged during the protests had already been losing income because of Covid-related closures. Moreover, some losses involved both covered and excluded perils. For example, in certain instances, rioters both vandalized a store and started a fire, and in some policies, only vandalism or fire is a covered peril, while the other cause is an excluded peril. This raises the question of how scenarios involving concurrent causes should be evaluated for coverage.

While the particular facts and policy language govern, states have taken different approaches to losses involving both covered and excluded causes in the absence of explicit policy provisions.

1. Majority Rule: Efficient Proximate Cause

The majority of jurisdictions follow the efficient proximate cause rule, including the jurisdictions in which many of the 2020 riots occurred. The Minnesota Supreme Court expressed the efficient proximate cause rule in *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280, 290 (1959), stating: "The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause." Thus, coverage exists when a covered peril sets into motion an excluded peril.

Georgia also utilizes the efficient proximate cause doctrine, and follows the cause that "necessarily sets the other causes in operation."¹⁶⁵ In *Burgess*, the insured submitted claims for water damage and mold infestation, and the policy contained an exclusion for mold-related damage.¹⁶⁶ The court examined whether water (a covered cause) was the proximate cause of the entire loss, even though mold (an excluded cause) also contributed to the loss.¹⁶⁷ The court explained that, "[w]hen an insured can identify an insured peril

158 See *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204, 207 (5th Cir. 1971).

159 *Id.* at 205.

160 *Id.*

161 *Id.*

162 *Id.* at 206.

163 *Id.* at 207.

164 *Id.*

165 *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351, 1361 (N.D. Ga. 2003); *Dunbar v. Davis*, 32 Ga. App. 192 (1924).

166 *Burgess*, 334 F. Supp. 2d at 1356-57.

167 *Id.* at 1361.

as the proximate cause, then there is coverage even if subsequent events are specifically excluded from coverage.”¹⁶⁸ Similarly, in *Travelers Indem. Co. v. Wilkes County*,¹⁶⁹ the insured’s courthouse roof was destroyed by fire and a temporary roof was installed. Thereafter, a windstorm caused one of the walls to break above the temporary roof and the wall suffered a partial collapse.¹⁷⁰ The policy covered windstorm losses.¹⁷¹ Applying the efficient proximate cause doctrine to find coverage, the Georgia Court of Appeals found that there was sufficient evidence that the windstorm was the efficient cause of the loss even though other causes, such as the weakening of the wall by the fire, may have preceded and contributed to the loss.¹⁷²

Pennsylvania also recognizes the efficient proximate cause rule as the default standard when considering issues relating to concurrent causation.¹⁷³ Under Pennsylvania law, if a covered peril caused an excluded peril to develop, the covered peril could be considered the proximate cause of the loss.¹⁷⁴

In these jurisdictions, the efficient proximate cause will depend on the nature of the causes at play. A closure due to Covid-19 likely did not “set into operation” the property damage caused by riot. Therefore, Covid-related closures would not be considered the “efficient proximate cause” of the loss. But if rioters set fire to a store, the riot likely “set into operation” the property damage ultimately caused by fire. In that case, the riot, not the fire, may be considered the “efficient proximate cause” of the loss.

2. Variations of Efficient Proximate Cause Rule

Some states follow variations of the efficient proximate cause doctrine. For example, New York follows the rule of “proximate, efficient, and dominant” cause to determine the cause of loss.¹⁷⁵ As a New York appellate court explained: “Under an all-risk property damage policy, where multiple perils work together to cause the same loss, and one or more of those perils is covered under the policy, New York follows the majority rule such that the loss will be covered if the ‘proximate, efficient and dominant cause’ of the loss is covered by the policy.”¹⁷⁶

The Second Department of New York’s Appellate Division applied this doctrine in *Cresthill Industries, Inc. v. Providence Washington Ins. Co.*¹⁷⁷ In that case, the theft of water fixtures from the plaintiff’s property caused it to be flooded, and the plaintiff sought coverage under the vandalism and malicious mischief coverage of its policy.¹⁷⁸ The court required the plaintiff to “show (1) the occurrence of an act of vandalism or malicious mischief within the meaning of the policy, (2) proximate cause resulting in a ‘direct loss’ to his property and (3) the inapplicability of the cited exclusionary clause (actually, the burden of proof on the issue of

168 *Id.* at 1360.

169 *Travelers Indem. Co. v. Wilkes County*, 102 Ga. App. 362, 116 S.E.2d 314 (1960).

170 *Id.*, 102 Ga. App. at 363.

171 *Id.* at 364.

172 *Id.*

173 *Trexler Lumber Co. v. Allemannia Fire Insurance Co.*, 136 A. 856 (1927).

174 *Tatalovich v. Pennsylvania National Mutual Casualty Insurance Co.*, 2003 WL 22844173, at *1 (Pa. Ct. Com. Pl. 2003).

175 *Greenberg v. Privilege Underwriters Reciprocal Exch.*, 169 A.D.3d 878, 880, 93 N.Y.S.3d 686 (2d Dep’t 2019).

176 *Cresthill Industries, Inc. v. Providence Washington Ins. Co.*, 53 A.D.2d 488, 490–91, 385 N.Y.S.2d 797 (2d Dep’t 1976).

177 *Id.*

178 *Id.*, 53 A.D.2d at 490.

‘exclusion’ is on the insurer rather than upon the insured).”¹⁷⁹ The court found all three factors were met in this instance, and in assessing the second factor noted that, in the context of property insurance, “[w] here a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss.”¹⁸⁰ In reaching its conclusion, the court cited with approval a New Jersey case where coverage was found for a car that was stripped of parts by “miscreants” under a policy insuring “loss to an automobile caused by riot, civil commotion, malicious mischief or vandalism.”¹⁸¹

Although the political protests and attendant riots/civil commotion that occurred in the summer of 2020 may have involved other causes of damage, such as fire, New York courts would likely apply the proximate cause analysis to determine the cause. If the fire was ignited in the context of a riot, and riot is a covered cause of loss, the riot will likely be deemed the efficient proximate cause of the loss.

California also follows the efficient proximate cause doctrine, but defines the “efficient proximate cause” as the “predominant” cause of the loss.¹⁸² Under California law, if more than one peril contributes to a loss, the question of which is the efficient proximate cause generally is a factual matter for the jury to resolve.¹⁸³ In *Garvey*, a house addition had begun to pull away from the main structure.¹⁸⁴ The policy contained an earth movement exclusion.¹⁸⁵ The court held the issue of causation was for the jury to decide, explaining: “Coverage should be determined by a jury under an efficient proximate cause analysis. Accordingly, bearing in mind the facts here, we conclude the question of causation is for the jury to decide. If the earth movement was the efficient proximate cause of the loss, then coverage would be denied On the other hand, if negligence was the efficient proximate cause of the loss, then coverage exists”¹⁸⁶ Similarly, Texas courts allocate damages between covered and non-covered losses.¹⁸⁷

6. *Minority Rule: Concurrent Cause Doctrine*

A minority of states allow coverage when there are concurrent causes of a loss and at least one cause is covered under the policy.¹⁸⁸ In these states, it is irrelevant whether the covered cause was the efficient proximate cause of the loss; as long as it partially contributed to the loss, coverage exists under the policy.

7. *Anti-Concurrent Causation Clauses*

179 *Id.* at 496-97.

180 *Id.* at 498-99.

181 *Id.* at 499-500.

182 *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 406 (1989).

183 *Id.* at 413.

184 *Id.* at 400.

185 *Id.* at 399-400.

186 *Id.* at 412-13.

187 *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App. 2003).

188 *See State Capital Ins. Co. Nationwide Mut. Ins. Co.*, 350 S.E.2d 66 (N.C. 1986) (North Carolina law) (holding that, as long as one of the causes of loss is covered, there is coverage for the loss); *Jones v. Federated Nat’l Ins. Co.*, 235 So.3d 936 (Fla. Dist. Ct. App. 2018) (holding that, if efficient proximate cause cannot be identified, concurrent cause doctrine applies and there is coverage).

Some commercial property policies contain anti-concurrent causation clauses, which explicitly preclude coverage for losses caused by a combination of covered and excluded perils. A typical anti-concurrent causation clause reads:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.¹⁸⁹

Most jurisdictions have held that anti-concurrent causation clauses are enforceable.¹⁹⁰ However, anti-concurrent causation clauses are generally not enforceable under California law.¹⁹¹ In *Julian*, a slope failed following heavy rains.¹⁹² The slope failure led to a landslide.¹⁹³ The landslide caused a tree to crash into the insureds' house.¹⁹⁴ The policy excluded landslide, and contained a provision that excluded coverage for losses caused by weather conditions that "contribute in any way with" an excluded cause or event such as a landslide.¹⁹⁵ Despite this anti-concurrent causation provision, the court held that the exclusion was only enforceable to the extent it was consistent with the efficient proximate cause doctrine.¹⁹⁶

F. Conclusion

For a protest to constitute a "riot," most states require multiple people engaged in tumultuous behavior

189 See, e.g., *ABK LLC v. Mid-Century Ins. Co.*, 2019 WL 7046393, at *2 (Idaho Dec. 23, 2019); *North River Ins. Co. v. H.K. Constr. Corp.*, 2021 U.S. App. LEXIS 20663 (9th Cir. July 13, 2021).

190 See *Ken Johnson Properties LLC v. Harleysville Worcester Summary Ins. Co.*, 2013 WL 5487444 (D. Minn. 2013) (Minnesota law) ("When an anti-concurrent loss provision is triggered, therefore, courts need not inquire into which of a covered or excluded loss was the proximate cause of the damage, but simply exclude coverage where any portion of the loss was caused or contributed to by an excluded loss."); *Lantheus Medical Imaging, Inc. v. Zurich American Ins. Co.*, 255 F. Supp. 3d 443, 458-459 (S.D.N.Y. 2015) (New York law) ("If corrosion 'contribute[d] concurrently or in any sequence to the loss or damage' caused by the pressure surge, then the corrosion exclusion forecloses coverage."); *Alamia v. Nationwide Mut. Fire Ins. Co.*, 495 F. Supp. 2d 362, 368 (S.D.N.Y. 2007) ("[A]n 'anti-concurrent' clause . . . excludes coverage for damage caused by an excluded peril even when covered perils also contribute to the damage."); *ABI Asset Corp. v. Twin City Fire Ins. Co.*, 1997 WL 724568, at *2 (S.D.N.Y. Nov. 18, 1997) ("New York courts have interpreted similar clauses to mean that where a loss results from multiple contributing causes, coverage is excluded if the insurer can demonstrate that any of the concurrent or contributing causes of loss are excluded by the policy."); *Colella v. State Farm Fire & Cas. Co.*, 407 F. App'x 616, 622 (3d Cir. 2011) (Pennsylvania law) (holding that the efficient proximate cause rule does not apply where the express policy language requires a different result and upholding district court's rejection of efficient proximate cause rule where "lead-in clause" in policy provided: "We do not insure for such loss regardless of: . . . (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss . . ."); *T.H.E. Ins. Co. v. Charles Boyer Children's Trust*, 455 F. Supp.2d 284 (M.D. Pa. 2006) ("The language of the lead-in clause in the TIC Policy, by stating that any loss caused *directly or indirectly* by an enumerated exclusion is excluded 'regardless of any other cause or event that contributes concurrently or in any sequence to the loss,' by definition negates the efficient proximate cause doctrine.").

191 *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal.4th 747 (2005).

192 *Id.* at 751.

193 *Id.*

194 *Id.*

195 *Id.* at 752.

196 *Id.* at 754.

involving either violence or the threat of violence. To constitute a “civil commotion,” most states require a prolonged disturbance of civil order such as widespread acts of looting. Some of the protests that occurred during the summer of 2020 likely satisfied the definition of either “riot” or “civil commotion” under the law of the states in which they occurred. However, if the insured properties damaged in such riots were not being used for customary business operations, coverage may be precluded by a vacancy exclusion or an occupancy requirement.

Business losses sustained as a result of curfew orders enacted for the purpose of preventing future riots do not trigger coverage under the civil authority provisions contained in most commercial property policies because, in most jurisdictions, such orders are not considered to result from actual physical loss or damage to property. Furthermore, the curfew orders generally did not completely prohibit access to insured properties. Whether coverage for such losses would also be precluded by a civil authority exclusion is currently undetermined.

When multiple instances of property damage to an insured property result from a single riot, most jurisdictions would consider such damage to constitute a single “occurrence” for purposes of the deductible amount and the liability limits of the applicable policy. However, if the instances of property damage result from separate riots, or from acts that do not qualify as riots, they may implicate separate “occurrences.”

If property damage that occurred during the riots was caused by a combination of covered and excluded perils, such as vandalism and fire, most jurisdictions identify the efficient proximate cause of the loss as the primary cause for purposes of coverage. A minority of jurisdictions, however, afford coverage whenever a covered peril contributed to the loss, even if it was not the primary cause.

While these rules are typical of most commercial property insurance policies and most jurisdictions, the existence and scope of coverage for any given loss will depend on the language of the particular policy provisions governing the claim at issue and the particular jurisdiction in which the loss occurred.

Alycen Moss is an FDCC Defense Counsel Member and Chair of the Property Insurance Substantive Law Section. She is also Vice Chair of the Global Insurance Department of Cozen O’Connor and Managing partner of its Atlanta, GA Office. Contact her at: amoss@cozen.com. Elliot Kerzner is an associate in the Global Insurance Department of Cozen O’Connor resident in the Atlanta, GA office. Contact him at: ekerzner@cozen.com.