

Property Insurance Coverage Can Hinge On 'Riot' Or 'Protest'

By **Alycen Moss and Elliot Kerzner** (June 28, 2022)

Whether to characterize a gathering of people as a protest or a riot is more than a political question; it is a legal question that can determine whether insurance coverage exists for property damaged by the gathering's members.

This legal question is particularly relevant as protests erupt across the U.S. in response to the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade* and holding that the U.S. Constitution does not confer a right to abortion.[1]

Even before this decision, a prominent insurer, Allianz Global Corporate & Specialty SE, recently urged businesses to prepare for a rise in civil unrest as the cost-of-living crisis trails the COVID-19 pandemic.[2]

Only two years ago, the level of property damage inflicted by the civil unrest that followed the murder of George Floyd made it the costliest civil disorder in U.S. history, according to data compiled by the property claim services unit of Verisk Analytics, a data analytics company.[3] For the first time in its history of data tracking, Verisk designated the May 2020 civil unrest a multistate catastrophe, ultimately including 20 states in the catastrophe event.

Many commercial property policies provide coverage for riots and civil commotions. Other policies have riot or civil commotion exclusions. Therefore, to determine whether coverage exists for damage resulting from the protests, the first step is to identify whether they were riots, civil commotions or simply protests.

Riot, Civil Commotion or Just a Protest?

What is a 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. However, a few consistent themes appear throughout the states in which the 2020 protests occurred.

The 2020 protests originated in Minnesota, where the death of George Floyd occurred.

One of the early Minnesota cases defining the term "riot" was *State v. Winkels*, in the Supreme Court of Minnesota in 1939. In *Winkels*, a crowd assembled in front of a store and forced its way into the building over the protests of police officers.[4] The participants looted and vandalized the store.[5]



Alycen Moss



Elliot Kerzner

The court held that, under Minnesota law, the essential elements of a riot are: (1) an assemblage of three or more persons for any purpose; (2) 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 (3) a resulting disturbance of the public peace.[6]

The court defined "public peace" as "that tranquility enjoyed by a community when good order reigns amongst its members." [7] The court held that the facts of this case satisfied the elements of a riot under Minnesota law.[8]

California's definition of "riot" includes similar elements. In *North Bay Schools Insurance Authority v. Industrial Indemnity Co.* in the Court of Appeal of California, First District, Division Three, in 1992, the insured school was vandalized several times within the course of several hours.[9]

The school argued that the loss was caused by a riot and involved only one occurrence, and the insurer argued that the loss was caused by vandalism and involved several occurrences.[10]

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.[11]

In defining the term "riot," the court pointed out that public disturbance or tumult is an essential element of being a riot.[12] In contrast, vandalism or arson that is conducted "away from public view with the intent they remain unobserved" does not constitute a riot.[13] Based on this definition, the court held that no riot occurred because all the acts of violence were committed out of public view and were not intended to be public.[14]

New York also requires a public tumult, but limits the definition of "riot" to domestic disturbances.

In 1970, a flight from Brussels to New York was hijacked in the sky over London by two members of a Palestinian terror group.[15] The terrorists forced the crew of the aircraft to fly to Beirut, where a demolitions expert and explosives were put on board, and then to Egypt, where they evacuated the passengers and destroyed the aircraft.[16] The American airline brought an action to recover against its insurers for the loss of its aircraft.[17]

The policy contained an exclusion for loss caused by riots or civil commotion.[18] After considering multiple alternative definitions of the term, the court determined that "a riot occurs when some multitude of individuals gathers and creates a tumult." [19]

Under this definition, the court held that, for there to be a riot, three or more actors must gather in the same place.[20] The court further observed that "riot" and "civil commotion" denote purely domestic disturbances, and must be accompanied by a tumult or commotion.[21] Under this definition, the court held that the exclusion did not apply because there was no riot or civil commotion.[22]

Pennsylvania defines riot as an unlawful assemblage of three or more persons combined together to perpetrate an outrageous and violent crime.[23] When a group of three or more men committed arson in middle of the night, the Supreme Court of Pennsylvania held they were guilty of rioting because arson was an outrageous and violent crime.[24]

Some states provide statutory definitions of "riot."

For example, a Georgia statute 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." [25]

The Supreme Court of Georgia applied this definition more than a century ago in *Fisher v. State* in 1886, and held that a man who, "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." [26]

In contrast, when there was no evidence that two defendants were acting in concert or that either of them acted violently or intended to provoke violence, the court held that their noise-making and tumultuous behavior alone did not constitute a riot. [27]

In the context of an insurance policy that excluded coverage for loss caused by riot, the Court of Appeals of Georgia held there was no riot when no evidence existed that more than one person participated in placing dynamite which exploded and caused property damage. [28]

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.

What is a 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. [29]

Comparing the two terms, in 1994 the U.S. District Court for the Northern District of Ohio found in *Sherwin-Williams v. Insurance Company of State of Pennsylvania* 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." [30]

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." [31]

In 1924, the U.S. Court of Appeals for the Fourth Circuit offered the following definition of "civil commotion" in *Hartford Fire Insurance Co. v. War Eagle Coal Co.*:

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. [32]

In *North Bay Schools*, the court explained that "'[c]ivil commotion' denotes a broader, more

prolonged disturbance than 'riot.'"[33]

In holding that the hijacking of an aircraft midair by two terrorists was not a civil commotion, the U.S. Court of Appeals for the Second Circuit explained in *Pan American World Airways Inc. v. Aetna Casualty & Surety Co.* in 1974 that a civil commotion requires people to gather together and cause a disturbance and tumult that is domestic in nature.[34] If a protest satisfies these conditions, it would qualify as a civil commotion.

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 exclusions and preclude coverage for damage to property that has been vacant for the amount of time specified in the policy.[35]

Many vacancy exclusions apply only when the property is not being used for "customary operations." This term is unambiguous, and the word "customary" means "commonly practiced, used, or observed." [36] Moreover, for the vacancy clause to apply, the customary operations must occur on the insured premises.[37]

Examining this term in the context of a not-for-profit charitable ministry, the U.S. District Court for the Northern District of Texas held in *Bedford Internet Office Space LLC v. Travelers Casualty Insurance Co.*, in 2014 that an owner who was in the process of transitioning his business out of the property and continued to use the property for storage, mail and occasional visits was not conducting customary operations.[38]

The court explained that mere access to or incidental use does not constitute customary operations, especially given the lack of electricity or water service at the property, which would make it impossible to properly conduct business there.[39] Accordingly, the court held the vacancy clause applied.

What is customary, however, depends on the nature of the business.

In *Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Philadelphia Indemnity Insurance Co.* in 2011, a building described by an insurance policy as a high school was not considered to be used for customary operations when it was used primarily for storage of school supplies, furniture and computers, even though it also housed infrequent staff meetings and teacher training sessions.[40]

The U.S. District Court for the Eastern District of New York 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.[41]

Similarly, in *Saiz v. Charter Oak Fire Insurance Co.* in 2007, the U.S. District Court for the District of Colorado held that a building classified by a policy as a family-style restaurant was not being used for customary operations when it was being used as an office while the insured tried to sell it.[42]

As an alternative to vacancy clauses, some policies include in their definitions of covered premises or named insureds terms that require occupancy of the insured.

For example, in *Grange Mutual Casualty Co. v. DeMoonie* in the Court of Appeals of Georgia

in 1997, a homeowners' policy which defined the "insured premises" as the property at which the insured resides did not provide coverage for property damaged by acts of vandalism when the property had been vacant for more than 30 days before the damage occurred.[43]

In the summer of 2020, some businesses were closed due to COVID-19 when they sustained property damage as a result of riots, vandalism or 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.

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 A. Moss is a partner and co-chair of the property insurance group at Cozen O'Connor.

Elliot Kerzner is an associate at Cozen O'Connor.

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[1] See *Dobbs v. Jackson Women's Health Organization*, Slip Op., No. 19-1392 (U.S. Jun. 24, 2022).

[2] See <https://businessday.ng/news/article/businesses-urged-to-prepare-for-rise-in-social-unrest/> (accessed June 26, 2022).

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

[4] 204 Minn. at 467-68, 283 N.W. at 764.

[5] *Id.*, 204 Minn. at 471-72, 283 N.W. at 765-66.

[6] *Id.*, 204 Minn. at 466, 283 N.W. at 763.

[7] *Id.*, 204 Minn. at 468, 283 N.W. at 764.

[8] *Id.*, 204 Minn. at 473, 283 N.W. at 766.

[9] 6 Cal. App. 4th at 1743.

[10] *Id.*

[11] *Id.* at 1746.

[12] *Id.* at 1747.

[13] *Id.* at 1746.

[14] *Id.* at 1748.

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

[16] *Id.*

[17] *Id.*

[18] *Id.* at 994, 1005.

[19] *Id.* at 1021.

[20] *Id.* at 1022.

[21] *Id.* at 1019, 1021.

[22] *Id.* at 1022.

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

[24] *Lycoming Fire Ins. Co. v. Schwenk*, 95 Pa. 89, 95-97 (1880).

[25] O.C.G.A. §16-11-30(a).

[26] *Fisher v. State*, 78 Ga. 258, 259 (1886).

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

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

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

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

[31] *Id.*

[32] *Hartford Fire Ins. Co. v. War Eagle Coal Co.*, 295 F. 663, 665 (4th Cir. 1924).

[33] *N. Bay Schools Ins. Authority v. Industrial Indemnity Co.*, 6 Cal. App. 4th 1741, 1747 (1992).

[34] *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1020 (2d Cir. 1974); 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)..

[35] 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).

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

[37] *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).

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

[39] *Id.*

[40] *Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Philadelphia Indem. Ins. Co.*, 2011 WL 891347, at *1-2, 4 (E.D.N.Y. Mar. 11, 2011).

[41] *Id.*

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

[43] *Grange Mutual Casualty Co. v. DeMoonie*, 277 Ga. App. 812, 490 S.E.2d 451 (1997).