

Journal of Reinsurance 2021



Volume 28
Number 2



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Introduction

BY JERRY WALLIS, IRUA EXECUTIVE DIRECTOR



The year is flying by and time for another edition of the *Journal of Reinsurance*. This time around we have three excellent articles that provide good food for thought as well as detailed technical information that has been the hallmark of the publication for over 27 years.

Our first article is written by Rod Thaler and reflects his passion for the subject of residential catastrophe loss mitigation. His paper entitled ***(Re)Insurers as Catalysts Mitigating the Impact of Climate Change Now*** thoughtfully propels the reader through the personal and societal benefits of promoting loss mitigation arising from natural catastrophes. He makes the case well that, with the (almost) undisputed climate changes taking place leading to more frequent and extreme weather affecting the planet, the reinsurance/insurance industry is uniquely positioned to help society manage catastrophe risk in an efficient and beneficial manner. Rod is the Founder of RT Mitigation having retired in 2020 following a near-45 year career as a reinsurance broker, much of which was spent managing catastrophe risk and providing technical solutions for client companies globally.

Staying with catastrophe losses, article two is an excellent thesis by Thomas Johansmeyer of PCS, a Verisk business, entitled: ***Could Political Risk Become the Next Source of Cat Loss Inflation?*** Tom kindly presented a webinar for the IRUA in June this year, and his article is a thought provoking thesis on the political, regulatory and institutional actions following a major loss event that can, and has, impacted insurer/reinsurer losses. Mr. Johansmeyer has had strong exposure to the reinsurance industry through stints at Guy Carpenter and Deloitte and has led PCS from a North American focused business to one of significance in Latin America, Asia Pacific and Turkey. As a side issue, he has also joined the IRUA Industry Advisory Panel of the *Journal* so we can expect more input (and output) from him in the future.

Our third and final article is again by a repeat author and good friend of the IRUA, Vincent Vitkowsky. Mr. Vitkowsky is a well-known attorney and prolific author and is a Partner in Gfeller Laurie LLP in New York. This paper was co-authored with, now former, colleague Stacey Samuel who has moved to a leading insurer. This exhaustive work entitled: ***A Legal Guide to Insurance Coverage for Violent Protests, Terrorism, Insurrection, and Revolution*** takes a detailed look at the coverage the issues arising from these all-too frequent occurrences and legal decisions arising from such coverage disputes. This excellent reference tool should be of great assistance to claims

professionals and continues Vince's scholarly works over many years.

IRUA News

2021 has been an extremely active year as respects educational events and by the time you read this we will have held 10 excellent virtual events covering a multitude of subjects. These events can be found on our "Schedule of Events" listed in the back of this issue or on our website at www.irua.org.

In 2021, we began an new and innovative series covering a 24-month period called the ***Reinsurance Basic Syllabus Program***. This will total 12 one hour events to provide a good grounding in reinsurance basics and best practices. Thus far, we have offered ***Reinsurance Casualty Underwriting Audits; Reinsurance Property Underwriting Audits***, and ***All About Reinsurance Structures***. Coming up in October we have ***Actuarial Principles for the Non-Actuary***. In 2022, we have more in the planning stage – including an ***Introduction to Reinsurance; Contracts; Cat Modeling for Underwriters & Brokers; Reinsurance Markets; Property Underwriting for Non-Property Professionals*** and a similar session on ***Casualty Underwriting for Non-Casualty Professionals***. We have several people enrolled in this Program and they will receive suitable recognition and a certificate upon meeting the requirement of participating in 10 of the 12 sessions.

Our Conference Committee is well into planning our next marquee event – the ***2022 Annual Meeting & Conference*** scheduled for ***April 25 – 27, 2022*** at the same location – the ***Marriott Harbor Beach Resort in Fort Lauderdale, Florida***. We are very excited to announce that this will be a ***Joint Conference with Demotech, Inc.*** so expect some new, relevant and exciting conference topics to make this even more of a must attend event.

Registration is already open on our website so plan on attending the expanded and enhanced event which is open to both members and non-members.

If you are not receiving our e-mails and ***IRUA Newsletter***, please let us know and we will add you to our free subscription list.

As always, we remind you that all member company persons, individual members and *Journal* subscribers can access, free of charge, all articles published since 1993 by following the JOR Archive link on the website homepage at www.irua.org.

Best regards,

Jerry Wallis

IRUA Executive Director and the JOR Team

A Legal Guide to Insurance Coverage for Violent Protests, Terrorism, Insurrection, and Revolution

BY VINCENT J. VITKOWSKY AND STACEY L. SAMUEL

About the Authors

Vince Vitkowsky is a partner in Gfeller Laurie LLP. Vince assists insurers and reinsurers in product development, and in all aspects of coverage evaluation and dispute resolution in many lines of business, including cyber, CGL, property, and professional liability. He is a Visiting Fellow at the George Mason Law School National Security Institute, and has been an Adjunct Fellow at the Center for Law and Counterterrorism.

Stacey Samuel has represented insurers in coverage counseling in both property and general liability litigation, as well as in all aspects of associated coverage litigation, including bad faith claims. At the time this paper was written, Stacey was an associate at Gfeller Laurie LLP. She now works at a leading insurance company.

Abstract

In 2020, protests transforming into violent episodes were widespread and frequent. They are expected to recur in 2021. This threat has been compounded by another. As the Office of the Director of National Intelligence reported in March 2021, Domestic Violent Extremists “who are motivated by a range of ideologies and galvanized by recent political and societal events in the United States pose an elevated threat to the Homeland in 2021.”¹

This Paper addresses insurance coverage for four types of violent perils. First, there are protests that transform into riots or civil commotion. Sometimes they are aggravated by participants behind the scenes, elevating the level of violence by supplying, say, Molotov cocktails or other weapons, or using social media to organize flash riots. Next, terrorist or terroristic groups or individuals can bring death and destruction. Third, individuals, groups or movements with a range of political motivations and aspirations can become violent (“militant activists”). Finally, the most violent end of the spectrum includes revolution, civil war and coup d’état.²

The lines between these perils can be blurred. Motives and causation can be difficult to determine. But in evaluating applicable insurance coverage, the distinctions are important. As specific cases arise, full analysis of the facts and the applicable state and federal laws is essential.

PROTESTS TRANSFORMING INTO RIOTS OR CIVIL COMMOTION

Peaceful protests or demonstrations can turn violent. When this happens, coverage, if it exists, comes from commercial property and casualty insurance for riots, civil commotion, vandalism and malicious mischief. These perils can be identified specifically as covered causes of loss, or otherwise are covered because the policy does not exclude them.³ When policies affirmatively cover these perils and define them, the definitions are key. But often, they are undefined. Then, various sources help supply definitions. Some case law provides definitions specifically in the context of insurance coverage. Other cases and statutes provide definitions under criminal law. Other definitions come from general usage and understandings. All of these need to be considered.

RIOTS

Insurance coverage is a matter of state law, so definitions may vary from jurisdiction to jurisdiction. With respect to riots, one leading case has held that they have four common elements: “1) unlawful assembly of three or more people (or lawful assembly that due to its violence and tumult becomes unlawful), 2) acts of violence, and 3) intent to mutually assist against lawful authority [...] [and] some degree of 4) public terror.”⁴

An alternative formulation provides that “[w]henver three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.”⁵



More simply put, another court has said that “[a] riot is a disturbance of the peace by three or more persons unlawfully assembled together and acting in a violent and tumultuous manner.”⁶

One court has required that the violent acts be performed in public. In it, students broke into school campuses, ransacked, and set fire to them. The policy provided that losses within a 72-hour time frame and stemming from “riots” constituted a single loss. In determining whether the students’ actions constituted a riot, the court found that vandalism, arson or other such acts, destructive as they may be, do not constitute a riot if they are conducted away from public view with the intent they remain unobserved.⁷ As noted, some cases require a riot to include an element of public terror. In one, a landlord’s dwelling suffered damage due to drug dealers causing trouble in a “loud and boisterous” manner. The landlord’s insurer sought a declaratory judgment, requesting that the court find that the loss was not caused by a riot or civil commotion, which was covered in the policy. In determining whether the “loud and boisterous” drug dealers caused a riot, the court included “public terror” in its definition. It further stated that “[w]ithout the element of public terror, any minor public disturbance could legally be a riot.” The court ultimately found that the damage was a result of vandalism and malicious mischief, not riot and civil commotion, and therefore there was no coverage under the policy at issue.⁸

A leading legal encyclopedia has synthesized these rules and defined the term riot as “a tumultuous disturbance of the peace by several persons, assembled and acting with a common intent, either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner.”⁹

CIVIL COMMOTION

Civil commotions are similar to riots, but the term is generally construed to require a more serious disturbance, or a series of disturbances. For example, one court has defined civil commotion as a “temporary, primarily civilian disturbance, of a degree greater than a riot, but less than armed insurrection, wherein the civil peace is disrupted by violence and/or acts of civil disorder.” The case concerned looting losses in Panama, occurring during a period in which the Panamanian National Assembly had declared a state of war between the US and Panama following the 1989 US invasion to capture the de facto leader Manuel Noriega. Although the policy had a War Exclusion, it also had a buy-back endorsement providing coverage for “civil commotion assuming the proportions of or amounting to a public uprising.” The court rejected the argument that the term “public uprising” connoted an element of internal political revolt. Instead, the court construed the term “public uprising” to refer only to the extent or magnitude of the civil commotion, not its nature, and found that coverage existed.¹⁰

VANDALISM AND MALICIOUS MISCHIEF

These perils are more common, so most jurisdictions have developed their own definitions, which can vary widely. Most simply, vandalism consists of damage or destruction of property solely for the sake of causing damage. Examples of more elaborate definitions include “[w]illful or malicious destruction or defacement of things of beauty or of public or private property,¹¹ and “ignorant destruction of property [...] in conscious or intentional disregard of the rights of another.”¹² Malicious mischief is most commonly defined as acts that result in damage or destruction that might not have been intended, or some similar formulation.

TRIA requires the act of terrorism be certified as such by the Secretary of the Treasury in consultation with the Secretary of the Department of Homeland Security and the Attorney General. The attack must be in the US or against certain US property abroad (things like air carriers, vessels, or the premises of US Missions). There’s been an important recent change -- the terrorists can be either foreign or domestic.¹⁹

LOSSES COVERED

Where coverage exists, it can extend to property that is destroyed, damaged, burned, or looted, as well as graffiti damage and debris removal. There can also be lost income, and costs incurred to protect against future, imminent harm or continued damage. Some policies provide coverage even in the absence of physical loss or damage. For example, in one case coverage existed for business interruption of a movie theater after a governor imposed a curfew following a riot.¹³

NUMBER OF EVENTS OR OCCURRENCES

A key issue of interpretation is the number of occurrences, which affects deductibles, limits and sublimits. A business could have several losses at a single location, or losses at multiple locations, in the same city, or in different cities, at the same time, or different times. How many occurrences are there? In Spring 2021, Nordstrom sued its insurers in connection with the disturbances following the death of George Floyd. It alleges it had losses in all 350 stores in the US and Canada, including not only those that were physically damaged, but those that had to be boarded up and closed. Nordstrom says it suffered at least \$25 million in damages. According to Nordstrom, this is all one occurrence, so there is a single, \$1 million,

deductible. The action was pending at the time of publication.

Case law provides little guidance. One court took up the question of whether a workers' strike was an "event" under the policy, and if so, whether acts of vandalism or sabotage occurring on different dates were a "series of losses" arising from the strike, and therefore treated as a "single loss." The court held that the evidence did not show that the workers strike caused the 228 separate acts of vandalism, and further found that neither the insured nor the insurer intended that a strike would constitute an "event" capable of triggering the single deductible clause.¹⁴

Policies can sometimes limit the period of time to aggregate losses, or limit the applicable geographic scope, or both. One common limitation is that different losses can be combined into a single occurrence if they took place within a 72-hour period.

A factor that may be important is whether and how the Insurance Services Office's Property Claims Services ("PCS") characterizes events. For example, the PCS has characterized losses from the disturbances following the death of George Floyd as a single event, applying to losses over a 14-day period. The losses took place in many states, and for the first time in its history, PCS expanded its designation to include losses in multiple cities and states. However, insurers are not required to follow the PCS designation in making their own occurrence determinations.

WAR EXCLUSION CONSIDERATIONS

Commercial property and casualty policies have "War Exclusions," which typically exclude many related perils, including insurrection, rebellion, and revolution. A common understanding of rebellion that it consists of organized violent resistance to the state with the purpose of supplanting the state's power, in whole or in part. An insurrection is commonly understood to be a limited rebellion or a rebellion having less organization than a rebellion.

In some legal decisions, a finding that certain perils caused a loss has defeated coverage for rioting and civil commotion. For example, in one case an insured sought coverage for the loss of 1,990 dozen pairs of pajamas which Nicaraguan rioters looted from an insured's warehouse in San Marcos following a civil war. The court held that where the loss of the insured goods occurred as a direct consequence of an excluded peril, such as the civil war, revolution, rebellion, insurrection or civil strife, there was no coverage for looting.¹⁵

In another case, eight men robbed a telecommunications business following the US invasion of Panama. The court found the losses were specifically excluded because they were "enabled" by military hostilities between Panama and United States. The loss was thus excluded under the War Exclusion, whether it was caused by the forces of the Panamanian government or alternatively, by an outside band of looters.¹⁶

A third case followed a period of violent internal conflict for control of Liberia, which was generally referred to as a civil war. The question was whether the political turbulence in Liberia rose to the level of "insurrection" as defined in the War Exclusion. As an initial matter, the court found a one-year suit limitation clause was void, as the insured was not able to file suit due to the court closures. The court further found that the War Exclusion applied because the violence in Liberia qualified as an "insurrection," and because the insurrection was the "efficient cause" of the looting and damage.¹⁷

TERRORISM

The Domestic Violent Extremists referred to by the Director of National Intelligence can include terrorists or militant activists. The line between the two is often unclear.

Terrorism is often excluded in commercial policies (although not in most personal lines policies). If a commercial insured wants it, coverage is available in several ways, including the construct created by the Terrorism Risk Insurance Act and its successors (collectively, "TRIA").

Where the source is TRIA, there is coverage for an "act of terrorism," defined as a violent or dangerous act committed as part of an effort to coerce the US civilian population or to influence the policy or affect the conduct of the US government by coercion.¹⁸ TRIA requires the act of terrorism be certified as such by the Secretary of the Treasury in consultation with the Secretary of the Department of Homeland Security and the Attorney General. The attack must be in the US or against certain US property abroad (things like air carriers, vessels, or the premises of US Missions). There's been an important recent change -- the terrorists can be either foreign or domestic.¹⁹

The key point is that the US Government has never certified anything as act of terrorism. And certainly, in the present polarized political environment, it would be extremely hard to make a designation in the context of domestic terrorism, because whether the terrorists were thought to be from the right or left could warp the analysis.

Many insureds conclude that TRIA is not the best available coverage for terrorism, and that standalone terrorism policies are. Those are addressed below.

MILITANT ACTIVISM, INSURRECTION OR REBELLION

Politically-motivated acts of violence may become increasingly common. This means there could be gaps of potentially uncovered risks between, for example, traditional riots and civil commotion, terrorism as defined by TRIA or otherwise, and other militant activisms. Militant activists may or may not have specific intent to coerce or influence civilians or the government.

This is a gray area, full of different actors. Some are motivated by a sense of outrage inspired by a specific governmental action or inaction. Some have political ideologies, on either side of the spectrum, that they want to advance. Some attempt to supplant the government's power. Some want to bring down the government. Or some may simply like to break things. Several types of coverages may apply.

The first is standalone terrorism insurance. These are specialty policies, developed entirely in the private market. They can be individually-crafted to address an insured's crucial exposures within a broader range of risks. Terms, conditions, limits and deductibles are individually negotiated. They are not subject to the certification requirement of TRIA. So terrorism can be defined broadly, for example, as any act or acts committed for political, religious or ideological purposes. Other types of perils can also be covered. For example, coverage can apply to vandalism, or malicious damage (which in these policies is generally defined as physical loss or damage resulting from a malicious political act committed during a public disturbance). Or it may apply to sabotage, which generally consists of a subversive act causing willful physical damage committed for political, religious or ideological purposes.

Standalone terrorism policies can also be designed to provide coverage for strikes, politically-motivated riots and civil commotion, insurrection, rebellion, and revolution. Arguably, some attacks in the US by militant activists might fall into these categories. A few legal decisions used a restricted conception, holding that an insurrection or rebellion must be part of a movement "specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof."²⁰

However, common understandings of rebellion and insurrection do not require an intent to overthrow the government. They merely require an intent to supplant its power, in part. Some militant activists have actually achieved this, at least temporarily, by creating “autonomous zones” in cities. And even violent acts which disrupt law and order in a given location – e.g., we’re gonna shut down this city – could be construed as attempts to supplant the government’s power. Beyond these, some militant activists have an actual full-blown intent to overthrow the government.

What if despite their intent, there is no chance a group or movement will succeed? There is authority that the intent does not have to be realistic. “An insurrection aimed to accomplish the overthrow of the constituted government is no less an insurrection because the chances of success are forlorn.”²¹

REVOLUTION, CIVIL WAR AND COUP D’ÉTAT

Businesses and their supply chains are increasingly multinational, giving rise to uniquely violent international risks, especially in potential flashpoint countries.

Multinational businesses often address this through Political Violence or Political Risk Insurance. These have existed for many years, but grew after the Arab Spring anti-government protests in 2010 and 2011. This insurance is specifically designed to provide coverage along the entire range of escalation, from riots on up. Thus it covers many of the same perils as standalone terrorism insurance, plus others. For example, it covers not

only sabotage, insurrection and rebellion, but also revolution, coup d’état (which is a sudden violent and illegal overthrow by members of a legally armed force), civil war, war and counterinsurgency.

Here again, there can be extensions for denial of access, i.e., when businesses are shuttered because authorities have closed the area, even without physical damage to property. There can be another extension for loss of attraction – closed businesses cannot attract business. The loss may be triggered by a specific nearby act of violence, or it may result from general unrest in the country.

Finally, another type of relevant policy is sometimes referred to as Strike, Riot and Civil Commotion Insurance. It started as a niche product, but is spreading. It was originally a response to the War Exclusion, or a Warranty Exclusion for political violence risks in marine policies. An endorsement was developed to provide coverage for many of those risks on all-risk cargo policies. In its original form, it covered physical loss or damage directly caused by strikers, locked-out workers, labor disruption, various types of riots, vandalism and sabotage. It can be extended to include terrorism and other politically and ideologically-motivated acts. Recently, it has migrated to appear in endorsements or extensions in other lines of business.

CONCLUSION

The world is an increasingly dangerous place, with flashpoints everywhere. This Paper was written to help navigate through it. ■

Footnotes

1 Office of the Director on National Intelligence, (U) Domestic Violent Extremism Poses Heightened Threat in 2021, 01 March 2021), <https://www.dhs.gov/publication/domestic-violent-extremism-poses-heightened-threat-2021>

2 These perils co-exist with and can overlap with mass shootings, which can result from any of them, or none of them, or from no comprehensible reason at all. The most direct insurance coverage available is a specialty product commonly known as Active Shooter Insurance. It typically covers victim lawsuits, building repairs, legal fees, medical expenses and trauma counselling. Reuters reports that the demand is increasing among buyers, especially from the healthcare sector, where deaths or other incidents concerning COVID-19 may trigger violent responses. Noor Zainab Hussain and Carolyn Cohn, Mass shooting insurance in high demand as U.S. emerges from lockdown, May 13, 2021, <https://www.reuters.com/article/us-usa-shooting-insurance-focus-idCAKBN2CU1NO>

3 Some policies, especially in the surplus lines market, affirmatively exclude riots and civil commotion.

4 *Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 299 (Miss. 1999) (relying primarily on *Walter v. N. Ins. Co. of New York*, 370 Ill. 283, 287, 18 N.E.2d 906, 908 (1938) and *Greenleaf on Evidence*, 16th ed., § 216).

5 *Feinstein v. City of New York*, 157 Misc. 157, 160, 283 N.Y.S. 335, 338–39 (Mun. Ct. 1935) (revising the definition found in Birdseye’s Edition of the Revised Statutes, 1890, vol. 2, ‘Mobs and Riots,’ and the General Penal Code provisions thereto annexed).

6 *State v. Lustig*, 13 N.J. Super. 149, 152, 80 A.2d 309, 310 (App. Div. 1951) (noting the definition stated another way in 1 Hawkins, Pleas of the Crown, c. 65, s 1; 4 Blackstone Commentaries 146; Russell on Crimes (1910 ed.), 409; Wharton on Criminal Law (1932 ed.), s 1862).

7 *N. Bay Sch. Ins. Auth. v. Indus. Indem. Co.*, 6 Cal. App. 4th 1741, 1746, 10 Cal. Rptr. 2d 88, 90 (1992).

8 *Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 299 (Miss. 1999).

9 77 C.J.S. Riot § 1.

10 *Sherwin-Williams Co. v. Ins. Co. of State of Pennsylvania*, 863 F. Supp. 542, 547 (N.D. Ohio 1994), aff’d and adopted sub nom. *Sherwin-Williams Co. v. Ins. Co. of Pennsylvania*, 105 F.3d 258 (6th Cir. 1997).

11 *Costable v. Metro. Prop. & Cas. Ins. Co.*, 193 F. Supp 465, 477 (D. Conn 2002).

12 *Montgomery v. United Servs. Auto, Ass’n*, 1994-NMCA -140, par. 6, 118 N.M. 742, 744, 886 P.2d 982, 983, citing *Roselli v. Royal Ins. Co. of America*, 142 Misc. 2d 857, 857, 538 N.Y.S.2d 898,899 (Sup. Ct. 1989).

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

14 *Puerto Rico Elec. Power Auth. v. Philipps*, 645 F. Supp. 770, 771 (D.P.R. 1986).

15 *Wilker Bros. Co. v. Lumbermans Mut. Cas. Co.*, 529 F. Supp. 113, 117 (S.D.N.Y. 1981).

16 *TRT/FTC Commc’ns, Inc. v. Ins. Co. of State of Pennsylvania*, 847 F. Supp. 28, 30 (D. Del.), aff’d, 9 F.3d 1541 (3d Cir. 1993).

17 *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 899 F. Supp. 1385 (E.D. Pa. 1995), aff’d sub nom. *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 91 F.3d 13 (3d Cir. 1996).

18 18 U.S.C.A. § 2331.

19 There are other limitations and requirements that affect whether the US government backstop reimbursing a portion of the losses applies, not relevant to this discussion.

20 *Home Ins. Co. of New York v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) (quoting the district court and also citing Appleman, Insurance Law and Practice § 3111 (1941)).

21 Davila, supra at 736