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The Tulsa Race Massacre and Use of "Riot" in Property Insurance Insuring Agreements, Exclusions and Limitations

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On May 31 and June 1, 1921, mobs of White residents, many deputized and given weapons by city officials, attacked Black residents and destroyed homes and businesses of the Greenwood District in Tulsa, the "Black Wall Street." Many Black people were killed and many more were left homeless. Many homes and businesses were looted and destroyed by fire.

This event was examined by the 921 Tulsa Race Riot Commission. "The 1921 Tulsa Race Riot Commission originated in 1997 with House Joint Resolution No. 1035. The act twice since has been amended, first in 1998, and again two years later. The final rewriting passed each legislative chamber in March and became law with Governor Frank Keating's signature on April 6, 2000." Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921. In 2001 the Oklahoma Legislature enacted the 1921 Tulsa Race Riot Reconciliation Act of 2001. 2001 OK. HB 1178, codified at 74 Okl. St. § 8000.1.

Many of the properties were insured under fire policies. More than one hundred persons who lost property filed lawsuits for property damages against the city or their own insurance companies. The insurers denied coverage because of riot exclusions. Those denials were upheld in the courts. Dissatisfaction with this result was one of several reasons that led the community to begin referring to the event as the Tulsa race *massacre*, instead of the Tulsa race *riot*. Greenwood property and business owners suffered at least $1.5 million in losses in 1921 dollars. This is roughly $22 million in today's dollars. There are concerns about underestimates and even lack of insurance for some property owners.

Redfearn v. American Centennial

In *Redfearn v. Am. Cent. Ins. Co*., 1926 OK 22, ¶¶ 1-11, 116 Okla. 137, 137-40, 243 P. 929, 929-31 the Oklahoma Supreme Court considered a claim under fire insurance policies on a theater building and a hotel building located in the Greenwood section of the City of Tulsa. The policy was in force on the date of loss. The insured buildings were totally destroyed by fire. The insurer denied the claim citing this exclusion:

> "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority. * * *"

The trial court directed a verdict for the insurer and entered judgment on the verdict. The court overruled a motion for new trial. The insured appealed. The question on appeal was whether there was sufficient evidence supporting the insured's theory of the case to go to the jury. The Supreme Court affirmed the trial court's ruling.[1]

The insured argued that the buildings caught fire between 10:30 AM on May 31, 2021, to about 12 o'clock on June 1, the second day. Nearby there was a train of railroad cars which caught on fire. The train of railroad cars was located south and west of the insured premises. The wind was blowing east. There were some buildings between those burning railroad cars and the insured premises. One of the insured's theories was that fire spreading from these railroad cars was the cause of the fire loss, and that this was an intervening cause between the disturbance and the loss. No witness knew how the insured's buildings caught fire. The insured argued that the inference that the buildings caught fire by reason of the disturbance was circumstantial in character, and that the case should have been permitted to go to the jury, that proper jury instructions ought to have been given whether the property was destroyed by fire by persons engaged in the disturbance, whether one would call it a riot or merely a disturbance, or whether the fire was caused by officers of the law in seeking to suppress the disturbance; and whether or not the fire may not have been caused by other causes that were wholly disconnected with the disturbance.

The insured argued that there was sufficient evidence to go to the jury under the Kentucky Supreme Court case of *American Central Ins. Co. v. Stearns Lumber Co.*, 145 Ky. 255, 36 L. R. A. (N. S.) 566, 140 S.W. 148. In that case a U.S. marshal, with process from a federal court, was attempting to arrest three men[2] who had taken refuge in a hotel building and resisted arrest. The suspects killed one deputy marshal. The marshal, in order to make the arrest without suffering further loss of life, set fire to and burned the hotel. The insurer of the hotel denied coverage, relying upon an exclusion of losses from riot or military power. The court found that coverage applied and the exclusion did not apply. The court held that the deputy marshal had no authority to set the house on fire and that the loss of the house was not due to the order of any civil authority. "The rioters were in the house; the marshal's posse, acting under his orders, were not rioters." Therefore the loss of the hotel building was not due to the riot carried on by the men within the house. The "riot" within the hotel was the occasion of the deputy's wrongful act, but the loss of the house was not the proximate result of the unlawful acts of the person in the hotel. Instead the loss was the direct result of another intervening unlawful act, that of the marshal in setting fire to the hotel. Therefore the court held the loss was not excluded.

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[1] The opinion provides a detailed narrative of the facts of the Tulsa massacre, many of which are incorporated into the hypothetical for our presentation.

[2] Striking miners.

The Oklahoma Supreme Court held that case did not apply. The court reasoned that many engaged in arresting the Black citizens in Greenwood wore police badges, or deputy sheriff badges or were dressed in soldier's uniforms. But the court reasoned that there was no evidence that any Black citizen resisted arrest, that any fire was started to make an arrest, or that any of these individual were in fact officers or acting in an official capacity.

However, the court's own recitation of the facts – which should be a summary of the evidence most favorable to the party against whom a verdict is directed – stated that "A number of witnesses testified that these groups of white men, many of them wearing police badges and badges indicating that they were deputy sheriffs, after removing the negroes from buildings, went inside the buildings and, after they left, fires broke out inside the buildings."[3] The court did not accept that any of these individuals were or might have been police officers or deputy sheriffs or soldiers. "There was no evidence that the men wearing police badges or sheriff's badges were in fact such officers or acting in an official capacity."[4]

However, the 1921 Tulsa Race Riot Reconciliation Act of 2001 notes: "The documentation assembled by The 1921 Tulsa Race Riot Commission provides evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area; …" 74 Okl. St. § 8000.1, subpart 2. With those facts, the court could not have found that there was insufficient evidence so as to support a directed verdict.

The two distinctions articulated by the court seems off the mark. The court stated that there was no evidence that any Black man ever resisted arrest, or that any fire was started in order to make such arrest; and that any fire started after the arrest or where there had been no arrest. But that was not the point of *American Central v. Stearns Lumber*. The court there was saying that the marshal did not have authority to set fire to the property, even for the purpose of effecting an arrest. There was no authority for any law enforcement personnel to set fire to a structure in Greenwood.[5]

The insured next argued a case involving a fire loss from the San Francisco earthquake. *Pacific Union Club v. Commercial Union Assurance Co.*, 107 P. 728. In that case, the policy excluded loss caused directly or indirectly by earthquake. The fire occurred the day following the earthquake. The insurer argued that the earthquake broke the water pipes in the city so that the fire department was unable to fight the fire, and therefore the earthquake was the indirect cause of the loss. The court disagreed and held that the earthquake was not the cause of the fire because none of the parties contemplated that the earthquake might cut off the water supply.

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[3] *Id*., 243 P. at 929-30.
[4] *Id*., 243 P. at 931.
[5] See *Redfearn surpa,* 243 P. at 931.

The Oklahoma Supreme court found this case inapplicable because the evidence did not establish any intervening cause. That is to say, that assuming there was a "riot", then there was no intervening cause of loss. The insured was apparently contending that fire spreading from the railroad cars as an intervening cause of loss.

The court found that the insurer met the burden of proof to show application of the exclusion, and that this shifted the burden to the insured to prove an intervening cause. The court found that there was no evidence to show that the loss was not caused directly or indirectly by the riot. The court affirmed the trial court order directing a verdict for the insurer.

In *R.I. Ins. Co. v. Glass,* 1928 OK 279, ¶ 16, 131 Okla. 108, 110, 267 P. 840, 841, property located in Sapulpa was destroyed by fire. The fire insurance policy excluded "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power or by order of any civil authority." The insurer denied coverage based on that exclusion. The jury found for the insured and the insurer appealed. The Supreme Court affirmed. "There is testimony that there was considerable excitement in Sapulpa just prior to the fire and that armed men were on the streets. There is also testimony that at the time of the fire no one was in or about the building. A man who lived within a few feet of the building testified that when he saw the fire there was no one in the streets." The court found that there was sufficient evidence to support a jury verdict in favor of the insured.

Arguments Concerning Causation

The court in *Redfearn* discussed the concept of intervening cause in its analysis. The efficient proximate cause doctrine has been applied in Oklahoma. *Nat'l Am. Ins. Co. v. Gerlicher Co., Ltd. Liab. Co.*, 2011 OK CIV APP 94, ¶ 18, 260 P.3d 1279, 1286.[6] The issue of proximate cause in insurance coverage cases is generally a question of fact for the jury.[7]

In *Redfearn* the insured argued that there was evidence of an intervening cause of the fire sufficient to go to the jury.[8] The court rejected that argument.[9] The court apparently discounted the fact that evidence of men with police badges and sheriff badges, and in military uniforms, might actually be police or sheriffs or their deputies, or soldiers. Had the court accepted that inference, or the possibility that a jury would and could make that inference, the case then arguably would have come within the rule in *American Central v. Stearns Lumber.*
In addition, the insured sought to argue that spread of the fire from the upwind railroad cars was an alternative cause of loss.

With evidence described in the 1921 Tulsa Race Riot Commission report there is the issue of whether a particular fire was started by incendiary devices dropped from airplanes. Would such a

[6] This case concerned a general liability policy EIFS exclusion.
[7] *Id.*
[8] *Redfearn, supra,* 243 P. at 930.
[9] *Redfearn, supra*, 243 P. at 931.

cause be considered a "riot"? Most planes of the time likely were biplanes with one or two seats. The definition of riot required the acts of three or more, and so the actions or one or two individuals in an airplane would not constitute a riot.

Finally, the Report also documented refusal to let firefighters suppress fires. This was recited as well in the *Redfearn* opinion. The court noted that armed white men with pointed guns refused to permit the firemen to connect the fire hose, and forced them to return to the fire stations without attempting to extinguish the fires. After several tries to reach the fire the chief of the fire department directed the firefighters to respond to no more calls until morning. This was apparently considered part of the "riot" because the insured did not argue it as an intervening cause and the court did not consider it as such.

Once an insured shows the loss is a covered loss, then the insurer has a burden to show the loss is excluded by the policy. *Okla. Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 16, 457 P.3d 997, 1002. Since there were a number of possible cause of the fires – the disturbance or riot, refusal to let firefighters suppress fires, fire spreading from the railroad cars, fires started by law enforcement or their deputies, and fire started by the dropping of incendiary devices, could an insured argue that an insurer could not meet its burden to prove that the fire loss was caused by a riot, or at least that this was a question of fact to go to the jury.

Arguments about Policy Language - "Riot"

Since riot is the term used in the exclusion, is there any argument that the meaning is ambiguous under the facts of the case.

Riot is generally defined as a tumultuous disturbance of the public peace by three or more persons mutually assisting one another in execution of a common purpose by unlawful use of force and violence resulting in property damage of any kind. Blacks Law Dictionary (7th Ed., West 1999), p. 1327.[10]

Riot is also defined under the law of each particular state.

In Oklahoma law, riot is defined in the criminal law. “Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot” 21 Okl. Stat. § 1311; see *R.I. Ins. Co. v. Glass,* 1928 OK 279, ¶ 15, 131 Okla. 108, 110, 267 P. 840, 841.[11]

[10] The Riot Act was a 1714 English statue that made it a capital offense for 12 or more rioters to continue together for an hour after a magistrate had officially proclaimed that the rioters must disperse. This became part of the language in the sense of the of the slang phrase “reading the riot act“ which originally referred to the official command for the rioters to disperse and now means to reprimand vigorously. Black's Law Dictionary, *supra*.

[11] Under Arizona law "A person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, which disturbs the public peace." Ariz. Rev. Stat. § 13-2903.

With that definition, if the acts were done with authority of law, then the events would arguably not be a riot. Given the "strong evidence that some local municipal and county officials … in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area; …", 74 Okl. St. § 8000.1, subpart 2, would the insurer succeed is establishing that the loss of the insured properties was caused by a "riot".

In *North Bay Sch. Ins. Auth. v. Indus. Indem*. Co., 10 Cal. Rptr. 2d 88 (1992) the issue was "whether acts of vandalism and arson committed by several people out of the public view may collectively be considered a 'riot' for purposes of an insurance policy which employs, but does not define, that term." The Court of Appeal concluded that such acts were not a "riot".

In that case in the afternoon and evening of one day, several young people broke into buildings on two neighboring school campuses (about two blocks apart) in the school district, ransacked them, and set fire to them. The first campus was broken into once, the second was broken into twice.

The policy covered each "loss occurrence" "irrespective of the number and kinds of risks involved" for amounts in excess of the self-insured retention. The policy defined "loss occurrence" as "a single event which causes damage or destruction of insured property by a peril or combination of perils insured against. When the term applies to loss or losses from windstorm, hail, riot, riot attending a strike or civil commotion, it shall be held to include those losses occurring or commencing during a period of 72 consecutive hours."[12] The insurer argued that there were three separate incidents, the insured argued that there was one incident.

The court held that "riot" was not ambiguous and "includes public disturbance or tumult as an essential element. 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."[13] The proffered dictionary definitions all connoted "activity that is done in public and before witnesses; they do not include conduct that is surreptitious."[14] Because these definitions of riot and the common law meaning refer to criminal activity *and* a public disorder, they do not include crimes committed by persons acting out of public view.[15,16]

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[12] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 89.
[13] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 90.
[14] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 90-91.
[15] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 91.
[16] The courts also addressed the coverage for "civil commotion attending a riot": "Civil commotion" denotes a broader, more prolonged disturbance than "riot." "A 'civil commotion' has been defined: [P] '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. …' " (*Hartford Fire Ins. Co. v. War Eagle Coal Co*. (4th Cir. 1924) 295 Fed. 663, 665; see also 5 Appleman, supra, at p. 378.) The distinction is indeed suggested by the policy's reference to a riot "attending" a civil commotion; this phrase implies a continuing commotion as the background for an individual riot. Reasonably understood, the two terms are not synonymous. *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 91-92.

The majority dismissed the dissent's hypothetical question – "what individual acts committed during a riot would be covered or excluded under a clause covering or excluding damage from riot" because it was not even indirectly presented by this case.[17]

The dissent found "riot" to be ambiguous. It noted three definitions that might apply: "1. a noisy, violent public disorder caused by a group or crowd of persons, … 2. Law. 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. 3. violent or wild disorder or confusion." These three definitions provide a somewhat different set of circumstances. While the first two – used by the majority in its opinion -- require the event to occur in public, the dissent felt that the third did not. Therefore, the dissent concluded "the word 'riot' is capable of being understood in two or more possible ways and is ambiguous."[18]

The dissent noted that both parties (albeit with different conclusions), and other courts, have relied on Penal Code definitions and those might not be appropriate. That definition if for the purposes of the criminal law, by the legislature. Here, the dissent argues, the language is that of an insurer and normal rules (not statutory rules) of interpretation should apply.[19]

While coverage or exclusion of "riot" is of historical importance, is there any longer a coverage issue with regard to the term "riot". Are such exclusions still in use? Is the term otherwise used in current insurance coverage forms.

Riot Coverage in Contemporary Insurance Forms

Generally, loss caused by riot is not excluded in current standard policy forms, and sometimes riot is listed as a covered peril. In other cases, the policy provides coverage for direct risk of physical loss or damage, and riot is not excluded. But the term riot is listed in special peril forms as a covered peril. And it is used in certain provisions within some commercial property policies. Beyond that use in standard forms, there are special policy forms that may use the term. It is sometimes used in listing specified perils as part of an exception to a pollution exclusion in some manuscript endorsements.

In the ISO businessowners policy program, the primary property coverage form provides special open perils coverage. BP 00 03. That is, in very general terms, direct physical loss is covered unless an exclusion applies. However, it is possible to change the policy by endorsement to provide named perils coverage using a different form. BP 10 09. This narrows coverage. Under this narrowing endorsement coverage applies to specifically named perils. One of those specifically named perils is a riot or civil commotion.

[17] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 92.
[18] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 93.
[19] *North Bay Schools, supra*, 10 Cal. Rptr. 2d at 93.

In the ISO commercial property forms, there are three covered cause of loss forms. Those are the basic form (CP 10 10) which covers loss caused by named perils, the broad form (CP 10 20) which is also a named perils form but with a longer list of covered perils, and the special form (CP 10 30) which covers any peril not otherwise excluded. This is also called an open perils form. To be clear, all three forms include exclusions of various specific causes of loss.

The basic and broad covered cause of loss forms both include riot or civil commotion as a covered cause of loss. And it a covered cause of loss in the special form because that form covers all perils and does not contain an exclusion for riot or civil commotion.

The specific language used in these ISO forms is:

A. Covered Causes of Loss

When [Basic or Broad] is shown in the Declarations, Covered Causes of Loss means the following:

1. Riot or Civil Commotion, including:
    a. Acts of striking employees while occupying the described premises; and
    b. Looting occurring at the time and place of a riot or civil commotion.

In the covered cause of loss - special form (CP 10 30), "riot" is used in several provisions, either directly or as part of the defined term "specified cause of loss". For example, an extension of coverage for "property in transit" applies if the loss or damage results from, *inter alia*, "riot or civil commotion".[20] And "riot or civil commotion" are included in the definition of "specified causes of loss".[21]

"Specified causes of loss" is then used in other parts of the policy and endorsements. For example, in *Garces v. Sentinel Ins. Co.*, No. 5:21-cv-00189-JWH-SPx, 2021 U.S. Dist. LEXIS 95479, at *4 (C.D. Cal. May 18, 2021) the policy contained an exclusion for "'Fungi', Wet Rot, Dry Rot, Bacteria and Virus". That exclusion contained an exception to the exclusion if the virus resulted in a "specified cause of loss" to Covered Property.

In the ISO Causes of Loss – Special Form the term "specified cause of loss" is used in exceptions to exclusions for: fungus, wear and tear etc., collapse, pollution. The term is used in E. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot and Bacteria. And it is used in "Limitations" to provide that damage to certain listed types of property is not covered unless caused by "specified causes of loss", such as animals, fragile articles, and a builder's machinery, tools or equipment.

[20] ISO form CP 10 30 10 12, page 9 "F. Additional Coverage Extensions, 1. Property in Transit"
[21] ISO form CP 10 30 10 12, page 10 "G. Definitions", 2. "Specified causes of loss".

The Building and Personal Property Coverage Form includes an optional extension for "Outdoor Property" for damage caused by listed causes of loss including "riot or civil commotion". ISO Form CP 00 10 10 12, p. 8. The term "specified cause of loss" is used in connection with additional coverages for electronic data and for valuable papers and records.

The term "riot" is also used in some standard fire policies. Of course, fire losses would be covered by a fire policy and if there was an extension of coverage, then perhaps theft and riot would be covered as well under a basic form such as that. These standard fire policies sometimes are the option for some insureds under programs like the California FAIR Plan[22], and sometimes are the option in areas with very high fire risk.

In California there is a statutory file policy. Cal. Ins. Code 2070. The policy insures against loss by fire, lightning and by removal from premises endangered by the perils insured against in this policy except as hereinafter provided.

An issue under the statutory fire policy is found in Conditions.

> Conditions suspending or restricting insurance:
>
> > Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring … (c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only.

Number of Occurrences / Deductibles

Another issue during the demonstrations and protests in 2020 for some insureds with multiple locations was the number of occurrences, as this affected application of deductibles or self-insured retentions. Does the characterization affect the amount of coverage? e.g. number of occurrences, SIRs, deductibles.

In *North Bay Schools Ins. Authority v. Industrial Indemnity Co.*, 6 Cal. App. 4th 1741, 1743, 10 Cal. Rptr. 2d 88, 88 (1992) several young people committed acts of vandalism and arson, out of the public view, at the insured's school over several hours. The insurers contended the claims involved three separate loss occurrences, thus triggering three separate self-insured retentions of a substantial amount. The school argued the vandalism was the result of one occurrence, a riot.

The trial court granted summary judgment to the insurers. The court of appeal affirmed. It held that the meaning of the word riot is not ambiguous and that acts of vandalism do not constitute a riot when they were conducted away from the public view. The court also noted that the acts of

[22] "The [California] Legislature created FAIR Plan in 1968. FAIR Plan is a joint reinsurance association to give homeowners in high risk areas access to basic property insurance." *Wexler v. Cal. FAIR Plan Ass'n*, 63 Cal. App. 5th 55, 58, 277 Cal. Rptr. 3d 398 (2021). Thirty-two states and Washington, D.C. offer FAIR plan coverage to high risk homeowners.

arson were conducted to cover the identity of the perpetrators. The policy defined "loss occurrence" as follows:

> b. Loss Occurrence shall mean a single event which causes damage or destruction of insured property by a peril or combination of perils insured against. *When the term applies to loss or losses from* windstorm, hail, *riot*, riot attending a strike or civil commotion, *it shall be held to include those losses occurring or commencing during a period of 72 consecutive hours*. When filing proof of loss, the Insured may elect the moment which the 72-hour period shall be deemed to have commenced.

This was the term used to determine the number of occurrences under the self-insured retention. The court applied it here to find three loss occurrences and therefore three self-insured retentions applied.

While "riot" was a significant limitation in many early fire policies, many current policies explicitly or by implication provide coverage for that cause of loss. The term is used in certain provisions of relatively limited scope. This article has discussed ISO forms, but there are many other forms out there, including AAIS forms, and forms developed by individual insurers. So as always, it is important for a coverage practitioner to review the policy language if a riot is or may be considered to be a cause of loss.

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