

# Impact of Social Movements on the Insurance Industry

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## Overview

Social movements undoubtedly ignite an increased awareness of inequality and inequity, as well as progressive outcomes. Yet, these movements also spawn increased property damage claims resulting from civil unrest and litigation resulting from workplace violations. These increased claims cause uncertainty in the insurance industry as insurers strategize on how to best approach coverage for such claims and how to respond to social movements more generally, and policyholders agonize over the scope of coverage for such claims.

## Social Movements Background

Social movements are organized efforts by a large group of people seeking to achieve a particular goal of preventing or implementing a change in society's structure, values, and laws. "Social movement," Britannica, <https://www.britannica.com/topic/social-movement>. Throughout history there have been various social movements, including but not limited to the Women's Suffrage Movement (spanning from 1848 to 1920) and the Civil Rights Movement (spanning from 1954 to 1968).

Focusing on modern-day social movements within the last ten years, there has been a wave of movements that led the way to societal changes, values, and laws. Many of the modern-day social move-

ments started and rapidly grew on social media through the mechanism of hashtag phrases. In 2013, we witnessed an uprising of the #BlackLivesMatter movement after the acquittal of George Zimmerman in the shooting death of Trayvon Martin in 2012. The #BlackLivesMatter movement focuses on fighting racism and anti-Black violence, especially in the form of police brutality. "Black Lives Matter," Britannica, <https://www.britannica.com/topic/Black-Lives-Matter>. After the Supreme Court of the United States decided that same-sex marriage bans were illegal, the Human Rights Campaign utilized the hashtag #LoveWins, to elevate the conversation around marriage equality. HRC's #LoveWins Hashtag Goes Viral; Celebrates Marriage Equality Victory," Shorty Awards, <https://shortyawards.com/8th/hrcs-love-wins-hashtag-goes-viral-celebrates-marriage-equality-victory>.

In 2006, Tarana Burke created the #MeToo hashtag movement as a means of raising awareness of sexual violence and other systemic issues that disproportionately impact marginalized people. "me too," <https://metoomvmt.org/get-to-know-us/tarana-burke-founder/>. Approximately eleven years later, after the exposure of high-profile sexual harassment claims in 2017, the #MeToo hashtag movement revitalized and expanded to



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address the awareness of sexual harassment and end sexual violence. #MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — And How They're Alike, TIME, March 22, 2018. The #MeToo movement also subsequently prompted the 2018 #TimesUp Movement, which focused on solutions for safety and equity in the workplace. *Id.* In direct response to the lack of focus on race in these social movements, the 2018 #UsToo movement developed to address race discrimination and stereotypes in the workplace. A #UsToo Movement? 3 Reasons Why #MeToo Needs To Go Further, Forbes, May 30, 2018, <https://www.forbes.com/sites/bonniechiu/2018/05/30/a-ustoo-movement-3-reasons-why-metoo-needs-to-go-further/#283c068572a5>.

### Trends in the Aftermath of Social Movements Claim Trends

Social movements not only create awareness and societal change; They also spark an increase of claims as individuals are encouraged by the collective action of support from these groups. According to a survey prepared by NAVEX Global, companies reported an increase of written and verbal complaints in the workplace after the 2017 #MeToo movement. #MeToo: From Hashtag to Movement to New Normal, Navex Global, March 15, 2019, <https://www.navexglobal.com/blog/article/metoo-from-hashtag-to-movement-to-new-normal/>. In 2019, the Equal Employment Opportunity Commission ("EEOC") filed 50% more sexual harassment lawsuits

on behalf of claimants as compared to the same period in 2018. *Id.* The EEOC also collected nearly 70 million dollars for sexual harassment claimants, which is a drastic increase from the 48.5 million dollars collected in 2018. The EEOC also enacted requirements for their EEO-1 reports that mandate employers to submit pay-equity data categorically by race/ethnicity, gender, and job category. Fact Sheet for EEO-1 Survey Filers, U.S. Equal Employment Opportunity Commission.

In 2019, organizations including Time's Up Legal Defense Fund, American Civil Liberties Union, and Fight for \$15 filed sexual harassment claims in court and with the EEOC on behalf of litigants in high-profile harassment and retaliation cases against entities like the Federal Bureau of

Investigation and McDonald's. In November 2019, Time's Up Legal Defense Fund reported that it received 4,915 requests for assistance, raised \$24 million, committed \$10 million to fund 174 cases, and recruited 743 attorneys as referral partners that offer free consultants. Time's Up Legal Defense Fund Fact Sheet, *National Women's Law Center*, October 9, 2018, <https://nwlc.org/resources/times-up-legal-defense-fund-stats-numbers/>.

These social movements have also generated securities and derivative lawsuits against companies like Signet Jewelers, CBS, and Papa John's. In these lawsuits, claimants generally allege that companies have misled investors about the existence and vitality of their anti-harassment and discrimination policies while knowing of, or recklessly disregarding, harassment in their organizations.

### Legislative Trends

In the aftermath of these social movements, legislatures have enacted federal, state, and local laws in response to the public demand for a more inclusive, safe, and equal workplace. Many states have enacted unique harassment and discrimination training requirements. These states include California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Philadelphia, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Washington, D.C.

The scope of the training requirements varies by state. In states like New York, sexual harassment training is required annually for all employers; in contrast, Louisiana requires sexual harassment training for only public employers, and Illinois requires sexual harassment training for all licensed professionals. Some states, like Colorado, expressly permit online training, while others, like California, mandate more stringent demands such as requiring training that is "interactive" and presented by trainers with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.

Legislatures have also prohibited certain agreements related to sexual harass-

ment, such as mandatory arbitration and non-disclosure agreements. Similar to the training requirements, the limitations on these laws vary by state. For example, in Arizona, an employer is prohibited from requiring an employee from responding to law enforcement or to make statements in a criminal proceeding. In New York, however, employers are prohibited from entering into agreements of which the factual foundation involves discrimination, and agreements that prevent disclosure of the underlying claims unless the condition of confidentiality is the complainant's preference.

In 2019, state lawmakers in New York, California, and New Jersey also implemented race discrimination hair laws. These laws generally prohibit discrimination due to hair texture and protective hair styles like braids, twists, and locks.

### Corporate Response

Several corporations implemented policies to mitigate and eliminate harassment and discrimination and create a more inclusive workplace environment. In December 2017, Microsoft eliminated mandatory arbitration of sexual harassment claims. Microsoft Won't Make Women Settle Sexual Harassment Cases Privately Anymore. Here's Why That Matters, *TIME*, December 19, 2017, <https://time.com/5071726/microsoft-sexual-harassment-forced-arbitration>. Similarly, Uber abandoned its mandatory arbitration of sexual harassment claims in May 2018. Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims, *The Wall Street Journal*, May 15, 2018, <https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400>. In November 2018, more than 20,000 Google employees protested the company's handling of sexual harassment claims and demanded representation on the corporate board. Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment, *The New York Times*, November 1, 2018, <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html>.

Subsequently, in February 2018, Google eliminated its mandatory arbitration policy for all workplace disputes, centralized

reporting channels to one website with live support and services, committed to a more transparent investigation process, and added employee representatives to their corporate board. Google Ends Forced Arbitration for All Employee Disputes, *The New York Times*, February 22, 2019, <https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html>.

Entities have also revamped and expanded their internal training requirements by focusing on mitigating workplace violence, unconscious bias, anti-bullying, and micro-aggressions.

Corporations generally recognize that they will benefit from minimizing inappropriate conduct even if such conduct is not per se a violation of law. Overall, addressing workplace diversity mitigates work interferences, increases employee morale and client relations, and minimizes bad publicity and legal exposure.

### Civil Unrest

As it is often stated, "history repeats itself." Although social movements include peaceful demonstrations and positive results such as progressive legislation, there are often incidents of disruptive riots and demonstrations caused by social and political tensions and social discord. These riots and demonstrations often led to property damage, violence, anti-riot police response, and sometimes personal injury and death.

### Analyzing First Party Property Claims arising from Civil Unrest

Despite the largely peaceful nature of the civil rights protests during the summer of 2020, looting and vandalism did take place, resulting in millions of dollars of property

damage and, in turn, claims to insurers for first-party property insurance benefits. The standard insurance policy forms published by the Insurance Services Office (ISO) provide first-party property coverages specific to these kinds of claims.

Basic Policy Provisions

This article focuses on the provisions contained in standard ISO forms. Of course, it is most important to consider the specific insurance policy provisions included in the pertinent policy at issue when analyzing coverage for any particular claim or incident.

The current ISO Building and Personal Property Coverage Form for commercial property coverage (CP 00 10 10 12) states:

Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

In turn, the current ISO Causes of Loss – Basic Form (CP 10 10 10 12) lists the various causes of loss that are covered, including:

- 7. 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.
8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

We will not pay for loss or damage caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.

Accordingly, under the plain language of these provisions, claims that covered property suffered direct physical loss or damage caused by or resulting from (1) a riot or civil commotion, including looting, or (2) vandalism will be covered under the standard ISO forms subject to all other terms, conditions, exclusions, etc. in the particular policy at issue.

Riot or Civil Commotion

In order to fit within the policy’s coverage, a particular protest would have to be considered a “riot or civil commotion.” A federal district court in Texas has explained:

Under the canon of interpretation noscitur a sociis, “words grouped in a list should be given related meaning.” Plaintiff’s Policy lists “riot or civil commotion” together. Thus, one should interpret civil commotion in light of the meaning of riot.

Grailleys, Inc. v. Sentinel Ins. Co., Ltd., No. 3:20-CV-01181-M, 2021 WL 3524032, at \*3 (N.D. Tex. Aug. 9, 2021) (quoting Third Nat. Bank in Nashville v. Impac Ltd., Inc., 432 U.S. 312, 322 (1977)) (footnote omitted). The Mississippi Supreme Court formulated the following definition for use in interpreting property coverage for damage caused by riot or civil commotion:

... we recognize at least four necessary 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. The common law clearly indicates that lawful authority is not limited to official law enforcement, but extends to those whose rights are or may be injured and who seek to protect those rights. In addition, there must be some degree of 4) public terror.

Blackledge v. Omega Ins. Co., 740 So. 2d 295, 299 (Miss. 1999). “Civil commotion” has also been described to “import[] occasional local or temporary outbreaks of unlawful violence.” 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., 105 F.3d 258 (6th Cir. 1997) (quoting Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1019 (2d Cir. 1974)).

Note that theft is not covered under the basic coverage, but looting that occurs during a riot or civil commotion is covered. The term “looting” is not defined in the policy forms, but the word “loot” is defined in the dictionary as “(a) (1) to plunder or sack in war (2) to rob especially on a large scale and usually by violence or corruption (b) to seize and carry away by force especially in war.” (Merriam-Webster Unabridged Dictionary). Thanks to the proliferation of security video, cell phone video, and even news media coverage, property owners are more likely to be

able to present video evidence of looting on their premises to support their claims for loss due to looting.

Vandalism Claims

As set forth above, the ISO Causes of Loss form includes vandalism as a covered cause of loss. The policy describes vandalism as “the willful and malicious damage to, or destruction of, the described property.” The policy specifically explains that theft is not covered as “vandalism,” except when the thieves cause building damage when they break in or exit the covered premises.

Of course, as with any claim, the particular facts and circumstances should be examined with care, but in general, the outbreaks of looting and vandalism that occurred during the 2020 summer protests would likely satisfy the meaning of the term “riot or civil commotion” and/or “vandalism” based on previous interpretations of these terms by courts and the plain meaning of these policy terms.

Claims for Lost Business Income

Not only did property owners face vandalism and looting, but some businesses had so much damage that they were forced to close until repairs could be made. Others were required to close by government shut down orders due to advance warning of protests scheduled in certain cities or due to ongoing protests that occurred over time. Policyholders seeking insurance coverage for these losses have brought claims under their policies’ business income and extra expense coverage.

The ISO Business Income (and Extra Expense) Coverage Form (CP 00 30 10 12) provides the following with respect to claims for lost business income:

Business Income (and Extra Expense) Coverage Form

\* \* \*

A. Coverage

1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
b. Continuing normal operating expenses incurred, including payroll.

\* \* \*

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

\* \* \*  
**2. Extra Expense**  
 \* \* \*

**b.** Extra Expense means necessary expenses you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the “suspension” of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the “suspension” of business if you cannot continue “operations”.

\* \* \*

**F. Definitions**

\* \* \*

- 2. “Operations” means:
  - a.** Your business activities occurring at the described premises; and
  - b.** The tenantability of the described premises, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

3. “Period of restoration” means the period of time that:

- a.** Begins:
  - (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or
  - (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

- b.** Ends the earlier of:
  - (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
  - (2) The date when business is resumed at a new permanent location.

\* \* \*

- 6. “Suspension” means:
  - a.** The slowdown or cessation of your business activities; or
  - b.** That a part or all of the described premises is rendered untenable, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

These policy provisions state that the insurer will pay for actual loss of business income sustained by the named insured due to the necessary suspension of the named insured’s operations. Extra expenses are covered for those costs that are incurred because of the suspension of operations. For both Business Income coverage and Extra Expense coverage, the loss or expense must be caused by direct physical loss of or damage to property at the covered location.

Accordingly, claims for lost business income are covered only if the insured’s business operations are suspended because of physical loss or damage to property. Under these terms, the temporary shutdown of a business as a precaution because of the fear or apprehension of looting or vandalism is thus generally not sufficient for coverage. Similarly, claims for lost business income due to a government order to close during protests is similarly not covered. There must be actual damage or loss

to property sufficient to cause the business to have to cease operations temporarily.

**Additional Coverage for Business Income Loss – Civil Authority**

Certain other business income losses may be covered by the policy’s “Civil Authority” additional coverage, which is a rather unique coverage that provides on ISO’s Business Income (and Extra Expense) Coverage Form (CP 00 30 10 12) as follows:

**5. Additional Coverages**

**a. Civil Authority**

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- (1) Four consecutive weeks after the date of that action; or
- (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

This coverage reimburses the policyholder for lost income resulting from the prohibition by civil authority of access to the insured's covered premises within a mile of other damaged property. Access to the property must be completely prohibited, not just limited. This coverage is limited to these circumstances and would not cover, for example, lost income resulting from the imposition of a curfew or shutdowns that are ordered in anticipation of future property damage. However, for example, if neighboring property was damaged, resulting in the government shutting down the nearby area, this coverage may apply to the insured's lost business income. This coverage is somewhat unique because it applies even when there is no property damage to the insured's covered property, but rather when damage takes place to neighboring property nearby.

### Regulations and Regulatory Guidance Implemented in the Wake of the Protests

In the wake of the protests and as a result of the many resulting claims for property damage, several states implemented new regulations or guidance for those in need of assistance. This regulatory guidance provides an interesting perspective on the role of government in large catastrophic claims, particularly when they are incurred in such a large scale, as we saw during the civil unrest that took place during the summer of 2020.

On June 5, 2020, the New York State Department of Financial Services (DFS) issued an emergency regulation, amending PART 216, Unfair Claims Settlement Practices and Claim Cost Control Measures, 11 NYCRR 216 (Regulation 640). This amendment requires insurers to commence an investigation and provide the insured with notice of all items, statements, and forms that will be required from the claimant within six business days of receiving notice of a claim. Certain other requirements to reduce the amount of time to process a claim and to require communications about the status of the claim are also included. Also, individuals and small

businesses with 100 or fewer employees are given the right to mediation if a claim is denied in whole or in part. The regulation applies to claims made to insurers on or after May 30, 2020, for loss or damage to real or personal property resulting from a riot or civil commotion in New York State. ([https://4d7dwndq5eq103jrqlajiqwh-wpengine.netdna-ssl.com/wp-content/uploads/2020/06/reg64\\_amend17\\_em\\_text.pdf](https://4d7dwndq5eq103jrqlajiqwh-wpengine.netdna-ssl.com/wp-content/uploads/2020/06/reg64_amend17_em_text.pdf)).

On June 8, 2020, the Illinois Department of Insurance issued Company Bulletin 2020-15, requesting insurers to expedite claims from Illinois businesses that experienced damage resulting from vandalism and looting. Director Robert Muriel of the Illinois Department of Insurance requested insurers to "apply claims best practices consistent with the categorization of this event as a catastrophic event, including expedited claims handling, advance claim payments, and fair treatment of all policyholders, regardless of size." The Bulletin requested that insurers "err on the side of the policyholder when paying claims as a result of riots, civil commotion, or vandalism from commercial policyholders who were unable to make full premium payments during" Illinois' lockdown order on March 20, 2020. These provisions were listed as "requests" to insurers. The Bulletin concluded with the following:

The Department understands the importance of the insurance industry in the recovery during times of great loss and thanks insurers in advance for handling claims in a fair and timely way. We encourage insurers to assist in whatever additional ways they can and trust the insurance industry stands ready to be a critical participant in recovery.

(<https://www2.illinois.gov/sites/Insurance/Companies/CompanyBulletins/CB2020-15.pdf>).

Also in the wake of the protests, Pennsylvania's Insurance Department issued guidance on its website, titled "Insurance Coverage during Civil Unrest." The guidance lists various coverages that businesses may carry and what those coverages may provide for damages suffered as a result of riots and looting. (<https://www.insurance.pa.gov/Coverage/Business/Pages/Civil-Unrest.aspx>).

These examples reflect the magnitude of these property insurance claims and the expectations that state governments have for insurers in handling the claims.

### Changes in the Insurance Industry

Social movements have also led to changes in focus and practices within the insurance industry.

#### National Association of Insurance Commissioners (NAIC)

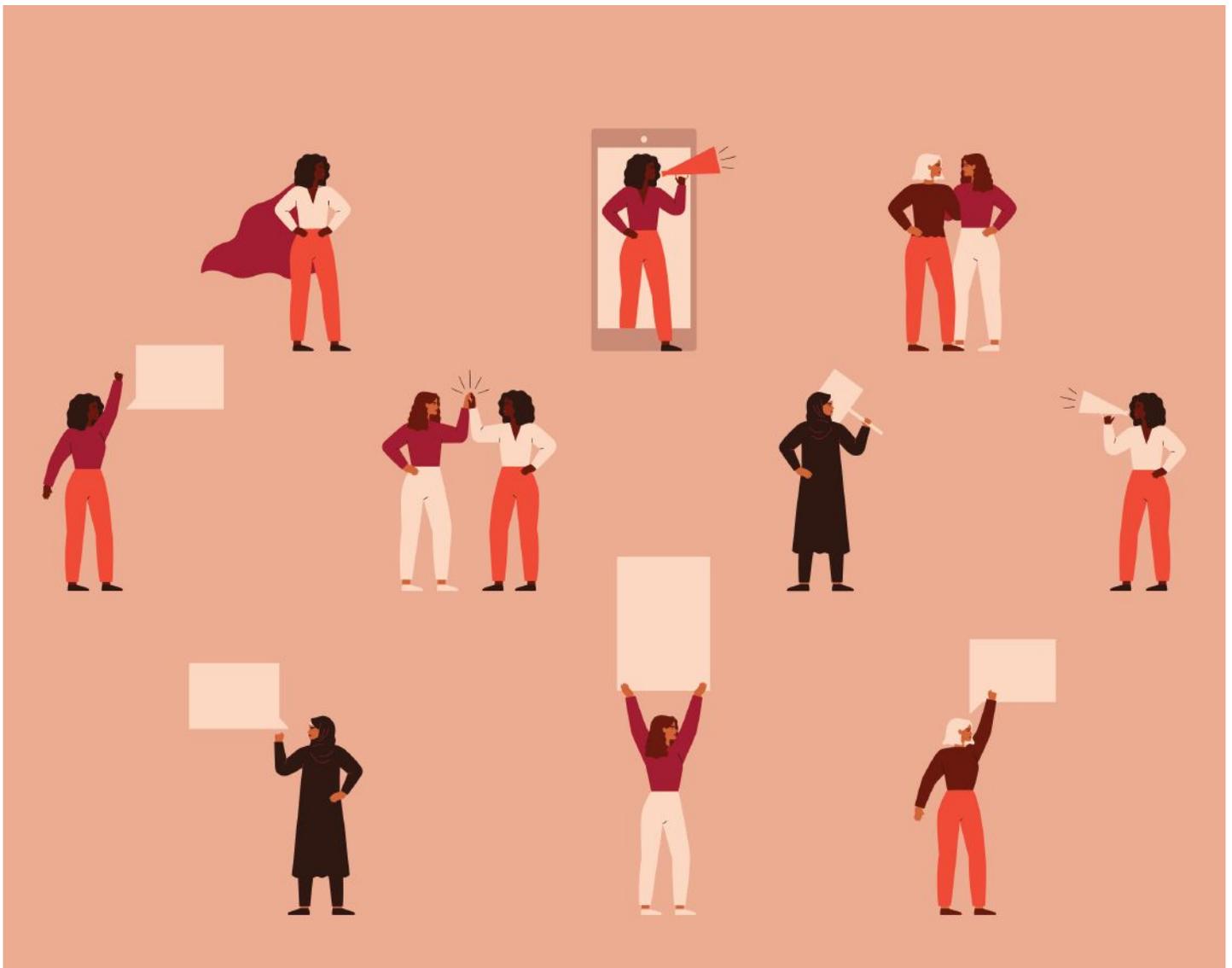
In July 2020 the NAIC created a Special Committee on Race and Insurance to examine issues affecting diversity and inclusion within the insurance sector as well as practices within the insurance sector that harm or potentially disadvantage people of color and/or historically underrepresented groups. In April 2021 the Committee recommended further research and analysis in four major areas:

- the affordability of auto and homeowners' insurance,
- availability of producer licensing exams in foreign languages,
- steps vendors have taken to mitigate cultural bias, and
- number and locations of producers (by company) compared to demographics in the same area.

It also recommended that the NAIC work to develop tools to assist regulators in addressing unfair discrimination and conduct research and analysis of artificial intelligence, pricing algorithms, and risk modeling with a focus on how race is impacted. Finally, the Committee recommended that the NAIC monitor and support DEI (Diversity, Equity, Inclusion) efforts within the industry.

#### Use of Insurance Scores in Pricing Insurance

Insurance scoring, a form of credit-based analysis, is used by insurers to set rates for insurance in most states. Currently it is only prohibited by statute in seven states, including California, Hawaii, Maryland, Michigan, Massachusetts, Oregon, and Utah. Most recently, the Washington Insurance Commissioner, Mike Kreider, issued an emergency order on March 22, 2021, prohibiting the use of credit in insurance premium rating. Although the emergency order was blocked by the court on October 10, 2021, Commissioner Kreider is continuing to push for a ban on use



of credit under the regular administrative rule making process. If successful, use of credit scores in personal auto and homeowner's insurance pricing would be barred for at least three years in Washington state.

Commissioner Kreider justified his position by pointing to the COVID-19 pandemic. The emergency order states:

There is evidence that the negative economic impacts of the pandemic have disproportionately fallen on people of color. Therefore, when the CARES Act protections are eliminated, and negative credit information can be fully reported again, credit histories for people of color will have been disproportionately eroded by the pandemic.

Commissioner Kreider is not alone. In a growing number of states the potential for disproportionately adverse economic impacts on people of color arising due to insurance scoring is becoming more prevalent. In 2021, bills that would ban the use of credit-based insurance scores in insurance pricing were introduced by legislators in Illinois, Louisiana, Maryland, Oklahoma, and West Virginia. Although no state passed legislation in 2021, the new legislative season of 2022 is now upon us.

Insurance scores have been used for decades by insurers who contend that the scores are reliable predictors of risk. Despite their value in rating risk, consumer groups are increasingly voicing concerns that use of credit-based insurance scoring to establish insurance rates is inher-

ently discriminatory. In particular, people of color have experienced ongoing discrimination for decades that has resulted in less economic opportunity frequently leading to low credit scores. As such, they argue that insurers reinforce this discrimination and further these disparities by using insurance scoring that penalizes this same group.

#### ***Gender in Premium Rating***

Until very recently, gender has been considered a basic building block of auto insurance pricing. Only a handful of states (California, Hawaii, Massachusetts, Michigan, Montana, North Carolina, and Pennsylvania) either don't allow gender to be a factor at all or require that pricing must be gender neutral.

With the growing recognition of gender identification as something different than biological sex at birth, insurers now have to consider whether and how gender should be a part of their pricing model. The choice of Male (M) or Female (F) on the insurance application no longer works for an increasing number of consumers. While several states allow non-binary or X (neutral) gender identification for driver's licenses, the insurance industry—both companies and state regulators—has been much slower to respond.

Only two states, Oregon and California, have used a non-binary gender identification for insurance applications; however, California totally rejected gender as a rating factor in 2019.

On July 6, 2021, Colorado went a step further and enacted SB21-169, which prohibits any discrimination based on gender identity or gender expression in any insurance practice. This new law prohibits insurers from:

- Unfairly discriminating based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression in any insurance practice; or
- Pursuant to rules adopted by the commissioner of insurance (commissioner), using any external consumer data and information source, algorithm, or predictive model (external data source) with regard to any insurance practice that unfairly discriminates against an individual based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.

The new law also requires the Colorado Insurance Commissioner to adopt rules to require insurers to test their algorithms, predictive models, and information sources to measure their performance and ensure that they do not unfairly discriminate against protected classes beginning as early as January 1, 2023.

#### **Proxy Discrimination**

Proxy discrimination has also been described as disparate impact; that is, the action or criteria is facially neutral but results in a disproportionately negative impact on a particular group. Insurance

underwriting use of zip code and level of education as pricing factors are cited as discrimination by proxy. Under this theory, it is asserted that when insurance priced by zip code or level of education is used as a positive rating factor, poor and minority communities experience higher insurance rates as a group than whites because they tend to live in less desirable zip codes and have less opportunity to attend school and pay for higher education.

Because of the concerns that even facially neutral factors can result in potentially discriminatory outcomes, insurance companies are being pressed more and more to only rate on strictly driving-related activities.

#### **Technology/Artificial Intelligence**

Insurers are always looking for new ways to price and sell insurance products. Since the onset of the pandemic, insurers have leveraged technology and easier access to data to enhance insurance product options and pricing. Unfortunately, there are growing concerns about risks of potential bias in artificial intelligence/machine learning and the underlying data sets used that can lead to claims of discrimination.

The Connecticut Insurance Department reminded insurers in May 2021 that they are expected to ensure that their use of Big Data and artificial intelligence is not discriminatory, and that insurers must be proactive and “take steps to avoid proxy discrimination” against protected classes. The department urged insurers to be aware of how Big Data is used as a “precursor to or as a part of algorithms, predictive models, and analytic processes” and that they are monitoring to ensure compliance with Federal and State anti-discrimination laws and governing their data in a “responsible and secure” manner.

In addition, consumers are not always comfortable with the use of new and evolving technologies. On July 15, 2021, a class action suit was filed in Cook County, IL (*Jones, et al. v. Lemonade Inc.*) alleging that Lemonade violated the Illinois Biometric Information Privacy Act (BIPA) by collecting scans of residents' facial geometries as part of its claims process without first providing required disclosures and obtaining their express consent to do so.

On August 20, 2021, Lemonade was hit with a separate privacy class action lawsuit (*Pruden v. Lemonade, Inc., et al.*) in the New York Southern District Court over its alleged collection and use of biometric data. The suit claims that Lemonade collects and stores customers' retina scans, voice prints, and face scans without their knowledge or consent when they upload videos during the claim submission process. During this process, Lemonade's AI chatbot analyzes the submitted videos for fraud to “pick up non-verbal cues that traditional insurers can't.”

<https://www.propertycasualty360.com/2021/08/25/lemonade-hit-with-class-action-alleging-privacy-violations/>

Insurers should be free to embrace technology and use Big Data to effectively price and sell their products. But they must do so in a thoughtful and deliberate manner so as to avoid charges of discrimination and other unfair treatment by consumers.

#### **Social Inflation**

Social inflation generally refers to all the ways in which insurers' claims costs rise over and above general economic inflation.

Recent social unrest has helped to fuel social inflation as insurers are perceived to be faceless, uncaring corporations with deep pockets. Growing distrust of the industry has caused attorneys to “push the envelope” with new legal theories; claimants to hold out for bigger settlements; and jurors to “go nuclear” when presented with the opportunity to render a verdict. Social justice movements are resulting in new exposures, new questions, and new sales challenges that increase costs and uncertainty for the industry.

#### **Conclusion**

The insurance industry must continue to assess these impacts that social movements have on various aspects of the economy. As society continues to advocate for change and we operate in the “new normal” as a result of the COVID-19 pandemic, the insurance industry will have to adapt to the impacts that such change causes, including but not limited to those in the legislature and regulatory agencies.

