

Assault and Battery Exclusion Upheld

Insurance Law Update

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In *Face, Festivals and Concert Events, Inc. v. Scottsdale Ins. Co.*, 632 F.3d 417 (8th Cir. (Minn.) February 14, 2011), the Eighth Circuit Court of Appeals held that the assault and battery exclusion in a commercial general liability (CGL) policy excluded coverage for claims against the insured, a festival and concert promoter, arising out of the alleged sexual assault of a festival patron by a security worker hired by the insured.

The patron sued the insured promoter and the security company for negligent hiring, negligent supervision, negligent retention, respondeat superior, emotional distress, and landowner's negligence. Scottsdale Insurance Company, the promoter's CGL carrier, denied the promoter's tender on the basis of the policy's assault and battery exclusion. The patron was awarded \$750,000 in damages, with 42 percent of the fault apportioned to the promoter. The promoter then sued Scottsdale, seeking recovery of the defense costs it incurred in the underlying action. The district court entered summary judgment for Scottsdale, agreeing with Scottsdale that the assault and battery exclusion applied to bar coverage.

On appeal, the promoter argued that the assault and battery exclusion was inapplicable because the exclusion only applies to injuries arising from assault and/or battery *committed by* any insured, employee of any insured, or any other person, and that Scottsdale had reason to believe that the security worker did not commit an assault on the patron. The Eighth Circuit rejected this argument because the facts did not create a potential for coverage. The court explained that if the security worker did not commit an assault, then there was no potential for coverage. Conversely, if the security worker did commit an assault, then the assault and battery exclusion would bar coverage.

The Eighth Circuit also rejected the promoter's argument that Scottsdale's settlement of a separate claim involving a different alleged assault by one of the promoter's employees constituted an "admission against interest." In the other claim, the promoter's employee allegedly assaulted a

patron but claimed that he acted in self-defense. The adjuster's claim notes regarding the separate claim also stated that the assault and battery exclusion would not apply because of the self-defense claim. The court, however, disregarded the merits of this previous claim, and held that extrinsic evidence, such as an adjuster's claim notes from another claim, could not override the unambiguous terms of the policy. Thus, the court affirmed the summary judgment for Scottsdale.

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