

Duty to Defend, Assault and Battery Exclusion Coverage Update

May 16, 2022

Duty to Defend – Ninth Circuit (California Law)

Glasswerks LC, Inc. v. Liberty Ins. Co.

No. 21-55303, 2022 WL 1439124 (9th Cir. May 6, 2022)

The U.S. Court of Appeals for the Ninth Circuit affirmed the federal district court's decision to dismiss plaintiff Glasswerks LA, Inc.'s (Glasswerks) breach of contract, breach of implied covenant of good faith and fair dealing, and declaratory judgment claims against defendant, Liberty Insurance Company (Liberty).

Glasswerks is a premium fabricator of various glass products. It sold 180 panels of large, specialized reflective glass to a customer. The panels developed a polarization defect which required multiple replacements. The customer was a subcontractor on a construction project, and it, along with the general contractor of that project, made claims that they were allegedly damaged as a result of the defective glass. However, no lawsuit was ever filed against Glasswerks. Glasswerks tendered the claims to Liberty and asked it to acknowledge Liberty would defend Glasswerks against the claims. After investigating the claims, Liberty denied coverage to Glasswerks.

Shortly after, Glasswerks filed a lawsuit against Liberty. The federal district court dismissed the complaint, concluding that, pursuant to the express terms of the policy, Liberty only owed a duty to defend and indemnify Glasswerks against "suits," not claims. A suit was defined in the policy as a "civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged." Glasswerks conceded that a "suit" had not been filed that would trigger coverage under the policy. Because the filing of a "suit" was a condition precedent to coverage, the district court dismissed the claims. On appeal, the appellate court affirmed the lower court and held that Glasswerks did not cite case law that would excuse the requirement of a suit. The appellate court further held that because benefits were appropriately withheld, Glasswerks' claim for breach of the implied covenant of good faith and fair dealing and claim for declaratory judgment were also properly dismissed.

By: Joshua LaBar

Assault and Battery Exclusion – Eighth Circuit (Missouri Law)

Great Lakes Ins. SE v. Andrews

--- F.4th ---, No. 21-1725, 2022 WL 1463614 (8th Cir. May 10, 2022)

The U.S. Court of Appeals for the Eighth Circuit upheld the federal district court's grant of summary judgment in favor of Great Lakes Insurance (Great Lakes) against its insured, RAJJ Entertainment d/b/a Tool Shed Lounge (RAJJ Entertainment), which operates a bar in Missouri. Specifically, the appellate court ruled that indemnity coverage was not afforded for a personal injury suit brought by a patron who was assaulted by an employee of RAJJ Entertainment because of the application of the assault and battery exclusion.

In the underlying matter, a patron was in the parking lot of the bar when he was approached by a bar employee who proceeded to yell and attack him, causing him bodily injuries. In the ensuing tort action, there was evidence that the employee assaulted the patron "out of the blue," and that RAJJ Entertainment knew or should have known of the employee's propensity for violence, given the employee's history of prior bad acts. The jury found that RAJJ Entertainment and the individual owner were negligent.

After judgment in the tort suit, Great Lakes brought an action seeking a declaration that the assault and battery exclusion applied to preclude coverage. The appellate court agreed with Great Lakes, noting that the bar employee's "conduct was a textbook assault and battery, and the incident was clearly a physical altercation." While the insured argued that its negligence was a separate and covered cause under the concurrent-proximate cause rule, the appellate court rejected such argument, explaining that the concurrent-proximate cause rule did not apply because the insured's negligence was not "truly independent and distinct," that is "wholly separate" from the assault and battery.