

All Assault or Battery Exclusion, Wage and Hour Violation Coverage Update

October 15, 2024

'All Assault or Battery' Exclusion – Tenth Circuit (Oklahoma Law)

Nautilus Ins. Co. v. Fantasia Hookah Lounge, LLC

No. 23-5129, 2024 WL 4380465 (10th Cir. Oct. 3, 2024)

The U.S. Court of Appeals for the Tenth Circuit, applying Oklahoma law, affirmed the order of the U.S. District Court for the Northern District of Oklahoma granting Nautilus Insurance Company's (Nautilus) motion for summary judgment, finding that the policy's Exclusion – "All Assault or Battery" endorsement applied to preclude defense and indemnification coverage for an underlying lawsuit for injuries sustained during an exchange of gunfire.

This matter arose when a fistfight broke out in the parking lot of Fantasia Hookah Lounge (Fantasia) on June 15, 2019. During the fight, a patron fired several shots into the air. Fantasia security guards then exchanged gunfire with the patron and one of the security guards was shot and killed by the patron. A bystander, Jorge Hernandez (Hernandez), was also shot by either the patron or one of the guards. Hernandez sustained permanent injuries and is now a paraplegic.

Hernandez filed suit in state court in Oklahoma against Fantasia, its owner, and Fantasia's landlord for damages (underlying suit). His claim included a count for negligence, alleging that the Fantasia defendants breached their duty to provide their business invitees reasonably safe business premises by regularly allowing after-hour crowds to gather in the parking lot and consume alcohol, which often led to fights, and by failing to have sufficiently trained and qualified security personnel.

At the time of the shooting, Fantasia was insured under a commercial liability policy issued by Nautilus. The policy contained an Exclusion – All Assault or Battery endorsement. Nautilus defended Fantasia and its owners under a reservation of rights. Nautilus then filed a complaint for declaratory judgment in the U.S. District Court for the Northern District of Oklahoma and moved for summary judgment, arguing that the assault or battery exclusion applied to preclude coverage for the underlying suit. The district court agreed with Nautilus and granted its dispositive motion.

The appellate court, affirming the district court's ruling, disagreed with the appellants' argument that coverage was afforded under the policy per the concurrent proximate cause rule as Hernandez alleged in the underlying suit that the Fantasia defendants were negligent in the operation of their business and

that negligence was the concurrent proximate cause of his injuries. The appellate court noted that neither the concurrent proximate cause rule nor the efficient proximate cause doctrine applied because being shot is an assault or battery under Oklahoma law and Hernandez did not allege that he sustained injuries other than those sustained when he was shot. Because the exclusion applies to preclude coverage for any act or omission in connection with the prevention or suppression of an assault, battery or physical altercation, and precludes coverage for claims arising out of any assault, battery or physical altercation, Nautilus had no duty to defend or indemnify Nautilus in the underlying suit.

By: Amy Diviney

Wage and Hour Violation – Third Circuit (Pennsylvania Law)

Twin City Fire Ins. Co. v. Glenn O. Hawbaker, Inc.

No. 24-1102, 2024 WL 4377660 (3rd Cir. Oct. 4, 2024)

The U.S. Court of Appeals for the Third Circuit upheld the ruling of the U.S. District Court for the Middle District of Pennsylvania, holding that Twin City Fire Insurance Co. (Twin City) had no duty to defend its insured, Glenn O. Hawbaker, Inc. (GOH), for certain claims related to two class actions brought for wage and hour statute violations arising out of a scheme to defraud employees.

The insurance coverage dispute arose when GOH, a construction company that paved for public and private sectors, was accused of violating the Pennsylvania Wage Act (PWA) by the Pennsylvania Office of the Attorney General. Pennsylvania law stated that public works contracts over \$25,000 must be governed by the PWA, requiring contractors to pay their employees the prevailing minimum wage, including base pay and fringe benefits. The attorney general alleged that GOH misappropriated fringe benefits in violation of the PWA by stealing the prevailing wage workers' retirement benefit funds and paying for all GOH's employees', executives', and owners' retirement benefits instead of into the accounts of the workers who earned same. After the attorney general filed its complaint, several of GOH's aggrieved employees filed class actions.

Twin City's policy stated that its duty to defend is not triggered with respect to claims that "involve allegations, in whole or in part, of a Wage and Hour Violation." It further defined "Wage and Hour Violation" as "any actual or alleged violation of the duties and responsibilities that are imposed upon an Insured by any federal, state or local law or regulation anywhere in the world, including but not limited to the Fair Labor Standards Act ["FLSA"] or any similar law (except the Equal Pay Act), which govern wage, hour and payroll practices. Such practices include but are not limited to: (1) the calculation and payment of wages, overtime wages, minimum wages and prevailing wage rates; (2) the calculation and payment[] of benefits; (3) the classification of any person or organization for wage and hour purposes; (4) reimbursing business expenses; (5) the use of child labor; or (6) garnishments, withholdings and other deductions from wages." Further, the policy excluded coverage for a loss "in connection with any

Claim based upon, arising from, or in any way related to any ... Wage and Hour Violation.”

The appellate court was confronted with whether the disputed claims were based upon, arise from, or are in any way related to a wage and hour violation, as defined by the policy. The appellate court determined that the policy’s language “based upon, arising from, or in any way related to” is sweeping in scope; the phrase “arising from” requires only but-for causation (not proximate causation), and the phrase “in any way related to” permitted an even looser connection between a claim and a wage and hour violation. Accordingly, the appellate court found that the underpayment of GOH’s prevailing-wage employees’ wages was related to the untimely disbursement of funds to all GOH employees. The appellate court concluded that this conduct fell within the broad definition of wage and hour violation, and thus was precluded from coverage.

By: Shantinique Brooks