

September 29, 2023

Federal Court Finds No Coverage for Nightclub Assault

BY: Craig Rokuson

In the recent case of *Clear Blue Specialty Ins. Co. v. TFS NY, Inc.*, 2023 U.S. Dist. LEXIS 157665 (E.D.N.Y. Sept. 6, 2023), the Federal Court for the Eastern District of New York held that a Third Party or Contracted Security exclusion applied to bar coverage, despite the fact that the insurance policy at issue contained a Sublimited Assault or Battery endorsement, which would have otherwise provided a defense for the claim at issue. The underlying complaint initially alleged that the underlying plaintiff was assaulted in the insured TFS' nightclub and that TFS' employees assaulted and battered him. In the amended underlying complaint, the underlying plaintiff alleged that Castillo Security Services—which provided security services to the insured—was also involved in the incident.

The Third Party or Contracted Security exclusion in the Clear Blue policy issued to TFS barred coverage for any claim or suit “directly or indirectly based on, attributable to, arising out of, involving, resulting from or any way related to the acts, omissions or operations of any third party or contracted security services provider.” The insured agreed that the insurer had no duty to provide coverage for claims involving Castillo, but that because there were claims against the insured and its employees, Clear Blue had a duty to defend the entire action.

The court disagreed and held that the terms of the exclusion are clear, in that they specifically state that there is no coverage for any lawsuit alleging any causal connection between the injury and an outside security company.

TFS also argued that the exclusion should not be enforced because coverage under the Sublimited Assault or Battery endorsement would be illusory. TFS noted that nightclubs in New York almost always have to hire outside security, meaning that nightclubs would always have to shoulder the cost of defending against a personal injury lawsuit. The court acknowledged that New York disfavors exclusions that render a policy illusory, but stated that the endorsement would still offer some coverage if the insured did not hire outside security or if the insured's employee singlehandedly assaulted a patron. The court also noted that nightclubs have good reason to purchase narrow policies like the Clear Blue policy, which is simply to fill the gaps between the coverage that would be provided by the outside security company to the nightclub.

Finally, the court held that Clear Blue's duty to indemnify could not be determined, because if the underlying court determined that Castillo paid no part in the underlying plaintiff's assault, the case could be reopened.

The case is a good illustration of the broad reading of the terms “arising out of” when used in an exclusion. Even though exclusions are generally narrowly read, and the insurer has the burden of proof, when “arising out of” is utilized, courts will only look for a loose causal connection between the state of affairs and the accident.