A Blow to the Face Arises From Assault and Battery for Purposes of Determining an Insurer's Duty to Defend, Even if the Complaint Alleges Negligence.

The Court Also Holds That an Employee is an "Insured," But Not the "Named Insured," and Therefore is Not Entitled to Assault and Battery Coverage Applicable to Only the Named Insured.

In the world of insurance coverage litigation, a lot can depend on a single word. A recent Massachusetts Federal District Court case, *Cohne* v. *Navigators Specialty Ins. Co,* reminds us that although there are few circumstances when a court will look behind a complaint to find that conduct described as "negligent" is intentional as a matter of law, there are a few. The case also reminds us that all "insureds" are not equal: an "Insured" and the "Named Insured" may have different levels of coverage. Finally, the case raises interesting questions concerning the use of extrinsic evidence to negate a duty to defend.

A bouncer for a nightclub sued the nightclub's insurer seeking a defense and indemnification for two lawsuits brought by patrons. Each suit alleged that the bouncer had struck the patron, and each include a count describing the conduct as negligent. In the first suit, the patron was deposed and stated that the bouncer struck him in the face; the second suit alleged in the negligence count that the bouncer struck him with a metal baton.

The policy included an "assault and battery limitation" endorsement stating that coverage did not apply to bodily injury arising from assault or battery committed by any person, except that the policy would cover – subject to a sublimit – amounts "you" become obligated to pay because of claims alleging assault or battery. The Court first determined that the act of striking someone in the face, as alleged in the first case, necessarily entailed an intent to cause harm, could not be "negligent" as a matter of law, and arose from assault and battery. The Court also found that the second case alleged an assault and battery and that, because there were no facts alleged independent of the assault and battery that would support a negligence claim, all of the claims against the bouncer arose from assault and battery.

Notably, the Court considered extrinsic evidence outside of the four corners of the complaint in reaching its holding in the first case, over the insurer's objections, including the patron's deposition testimony and the bouncer's interrogatory answers. The Court stated that while extrinsic facts may not be independent factual predicates for a duty to defend, they may be used to aid interpretation of the complaint. The bouncer apparently offered the evidence in support of an argument that, because he was responding to provocation by the patron, the "reasonable force" exception to the policy's exclusion for bodily injury "expected or intended from the standpoint of the insured" applied, and the Court's discussion focuses on the use of extrinsic evidence to establish a duty to defend. However, the Court held that the assault and battery limitation (which excluded coverage for any act "connected directly or indirectly with the prevention or suppression of an assault" but restored coverage for the Named Insured only, subject to the sublimit) rendered the reasonable force exception meaningless in this case, but not in all conceivable cases.

Although the evidence of provocation by the patron did not help the bouncer, the Court relied on the patron's deposition testimony that the bouncer struck him in the face in determining that there was no duty to defend. Might the outcome have been different had the bouncer confined his arguments to the allegations in the complaint? And does the bouncer's reliance on extrinsic evidence in support of a duty to defend justify the Court's reliance on extrinsic evidence to negate the duty to defend?

Finally, the Court considered the exception to the assault and battery exclusion restoring coverage, subject to the sublimit, for amounts "you" become obligated to pay for assault or battery. However, the policy defined "you" to mean the "Named Insured," that is, the nightclub. Although as an employee of the nightclub the bouncer was an "Insured", he was not the "Named Insured." Therefore, the exception to the assault and battery exclusion did not apply to the bouncer.

The case is *Cohne* v. *Navigators Specialty Ins. Co*., United States District Court for the District of Massachusetts No. 1:17-cv-12540-WGY (February 19, 2019 Memorandum and Order).