

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 23 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CMS SECURITY, INC., a California
corporation; EVERAL THOMPSON, an
individual,

Plaintiffs - Appellants,

v.

THE BURLINGTON INSURANCE
COMPANY, an unkown entity,

Defendant - Appellee.

No. 10-15672

D.C. No. 3:09-cv-02216-MMC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, Senior District Judge, Presiding

Submitted May 13, 2011**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: W. FLETCHER and N.R. SMITH, Circuit Judges, and MILLS, Senior District Judge.***

CMS Security, Inc. (CMS) appeals the district court's order granting summary judgment for The Burlington Insurance Company (TBIC). CMS challenges the enforceability of a policy exclusion in its TBIC-issued commercial general liability policy under California law. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

CMS's general liability policy includes an exclusion for claims arising out of intentional acts of assault or battery. This exclusion was conspicuous, because it was (1) identified by name in the listing of forms and endorsements at the beginning of the policy, (2) set forth on its own separate page, (3) placed among other policy exclusions "where one would expect an insured to look to determine the policy limits," and (4) labeled in boldfaced and enlarged lettering "so that it [would] attract the reader's attention." *Haynes v. Farmers Ins. Exch.*, 89 P.3d 381, 385, 387 (Cal. 2004). The exclusion is also plain and clear, because it states "precisely and understandably, in words that are part of the working vocabulary of the average layperson," that it changes the policy to exclude coverage for claims

*** The Honorable Richard Mills, Senior District Judge for the U.S. District Court for Central Illinois, Springfield, sitting by designation.

arising out of assault or battery. *Id* at 385. The exclusion is therefore enforceable under California law.

AFFIRMED.