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Texas Supreme Court Finds General Liability Insurer Must Defend Lawsuits Alleging "Biological" Injuries Caused By Wireless Phone Use

The Supreme Court of Texas recently held that a cell phone manufacturer is entitled to a defense in certain class-action lawsuits alleging that radiation emitted by its products causes "biological injury" at the cellular level because the lawsuits allege potential "damages because of 'bodily injury.' " *See Zurich Amer. Ins. Co. et al. v. Nokia, Inc.*, No. 06-130 (Tex. 2008). Although the underlying complaints did not invoke the phrases "bodily injury" or "personal injury," the court nonetheless concluded that alleged damage to cells, whether medically diagnosable or not, could amount to "bodily injury." Additionally, as the demands for relief contained broadening language such as "including but not limited to," the court ruled that the complaints might also allege "damages because of 'bodily injury,' " although the only explicit relief sought was money to purchase cell phone headsets.

Background

The underlying lawsuits arose from studies suggesting that radio frequency radiation ("RFR") emitted by cell phones may contribute to a range of adverse health consequences. The lawsuits alleged that Nokia knew or should have known that RFR was potentially dangerous and sought damages sufficient for the plaintiffs to purchase headsets — to eliminate the need to press cell phones against their ears. Each of Nokia's insurers agreed to provide a defense under a reservation of rights, and Zurich American filed a declaratory judgment suit to resolve the coverage issues.

The trial court granted summary judgment to the insurers, and Nokia appealed to the Court of Appeals for the Fifth District of Texas. The court of appeals reversed, and entered summary judgment in favor of Nokia, declaring that the insurers must defend the underlying lawsuits. The Texas Supreme Court granted the insurer's petition for review, and affirmed the ruling of the court of appeals that the lawsuits allege potentially covered "damages because of 'bodily injury.' "

Texas Supreme Court Decision

The supreme court first reviewed the "eight-corners rule," Texas' standard for determining whether an insurer has a duty to defend. Under this rule, courts are bound to limit their analysis to a comparison of the underlying complaint and the insurance policies at issue, even if extrinsic evidence might require a different outcome. Looking to the complaints, the court noted that the plaintiffs alleged that RFR "causes an adverse cellular reaction and/or cellular dysfunction ("biological injury") through its adverse health effects on: calcium and ion distribution across the cell membrane, melatonin production, [etc.]." The insurers argued that this alleged cellular damage was insufficiently perceptible to amount to "bodily injury," but the court disagreed, explaining that "bodily injury" was merely

"an injury to the physical structure of the human body." *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997). Since the underlying lawsuits alleged that RFR causes injury to cells, which form the physical structure of the human body, cellular damage amounts to "bodily injury." Additionally, drawing a comparison to asbestos, the court observed that the subclinical or medically undetectable harm that takes place upon the inhalation of asbestos fibers has previously been deemed "bodily injury." Thus, the court concluded that allegations of cellular damage were sufficient to trigger the policies' coverage for "bodily injury."

The court next addressed the insurers' argument that, even if cellular damage was "bodily injury," the underlying complaints did not seek "damages *because of* 'bodily injury.' " According to the insurers, the only damages plaintiffs sought were funds to purchase headsets, not relief intended to address or remedy any "bodily injury" they may have sustained. The court again disagreed with the insurers, concluding that the damages sought were broader than the insurers contended because the complaints included language such "[this action seeks] compensatory damages, including but not limited to amounts necessary to purchase a [cell phone] headset." The court reasoned that if the plaintiffs established that they had indeed suffered "bodily injury," a trial court could determine that they were entitled to compensation beyond the cost of a headset. Accordingly, the underlying complaints met the requirement of potentially seeking damages "*because of* 'bodily injury,' " and Nokia was entitled to a defense.

The Dissent

Justices Hecht and Brister dissented sharply from their colleagues. First, while they acknowledged that the "eight-corners rule" should be applied liberally in favor of insureds, they cautioned that "liberal does not mean naïve; it does not mean blind." Further, although they agreed that "biological injury" was "close enough" to "bodily injury" to trigger a duty to defend, they disagreed that the underlying lawsuits sought injury "*because of* 'bodily injury.' " According to the dissent, "[n]one of the class action pleadings claims any specific damages other than for headsets that Nokia did not supply with the phones. Want of a cell phone headset is neither a bodily nor a biological injury." As "the insurers' duty to defend turns not on whether individuals may have been injured but whether they *claim* injury," the dissenting justices concluded that the insurers had no duty to defend. Coloring the dissent was the justices' rejection of what they described as "cute and clever pleading that strains credulity." In their opinion, the class-action lawsuits had been carefully drafted to avoid any claim of personal injury that could threaten class certification because "[q]uestions common to class members cannot predominate if class members claim individualized bodily injuries. If the cases are to have any value, the pleadings must never breathe the words 'bodily injury.' They never do."

Implications

The Texas Supreme Court joins the United States Courts of Appeal for the Fourth and Ninth Circuits in concluding that insurance companies are obligated to defend similar class-action lawsuits arising out of cell phone use. While three decisions from major courts may be indicative of a trend, the more interesting aspects of this case may be the court's internal disagreement on the role of insurance. The majority bluntly admitted that, "[f]ailing to recognize the duty [to defend] here would mean that Nokia and Samsung — two Texas corporations (as well as any other manufacturer sued by its insurer in a Texas court) — would be deprived of a defense to which parties in other jurisdictions are entitled. We conclude that the [ ] cases seek damages because of bodily injury." In contrast, the dissent rejected the majority's reliance on unpublished cases from other jurisdictions, questioning "[i]f the opinions are not binding even on their authors, it is not clear why this Court should rely on them for anything." In the dissenters' opinion, business concerns should not affect issues of contract interpretation and the insurance contracts did not require the insurers to defend the underlying class actions.

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