

employees involved in the dispute. Even if the union's negotiations failed to resolve the matter, it was not clear whether the collective bargaining agreement permitted some of the union members to file their own separate suit.

The court also considered the effect of section VII of the policy, entitled "Notice of Claim," which provides, "A. If, during the Policy Period . . . the Company or the Directors and Officers: (1) shall receive written or oral notice from any party that it is the intention of each [sic] party to hold the Directors and officers, or any of them, responsible for a Wrongful Act; or (2) shall become aware of any occurrence which may subsequently give rise to a claim being made against the Directors and Officers, or any of them, for a Wrongful act; and if the Company or Directors and Officers shall in either case during such period give written notice as soon as practicable to the Insure . . . then any claim which may subsequently be made against the Directors or Officers arising out of such Wrong Act, shall, for the purpose of this policy, be treated as a claim made during the Policy Year."

The court acknowledged the possibility that the letter made the insured aware of an occurrence that may give rise to a claim, thereby triggering the insured's obligation, under Section VII, to provide notice to the insurer "as soon as practicable." It could be argued that the insured violated section VII by failing to notify Reliance of the letter at the inception of the policy period. The defendant, however, was barred from raising this argument, because the defendant failed to make this argument in the underlying proceeding or on appeal.

A dissent argued that the August 1993 letter was a "claim," which precluded coverage because it was made before the Reliance policy took effect. The dissent argued that the letter "could not have been a plainer statement that its subject matter was the claim being made . . ." In the letter, an attorney for the Yale Club's waiters stated that he was representing the waiters in their dispute with the club over wages, tips and bonuses, which they alleged they had been deprived of in an amount that could likely involve millions of dollars. The letter alleged that the deprivation of wages, tips and bonuses constituted violations of RICO, labor laws, as well as fraud and conversion. The letter sought documents and information pursuant to counsel's "obligation to

make a reasonable inquiry into the facts before filing a pleading with the courts." The dissent argued that the letter constituted a claim because it alleged violations of the law that caused financial injury, and it indicated that a suit would be filed after counsel satisfied court rules requiring an investigation before filing a complaint. Moreover, the letter was sent at the time the Yale Club and the union had been unable to resolve the dispute.

The dissent also argued that the letter triggered the insured's obligation to provide notice to Reliance under Section VII(A)(1) on the first day of the policy period, because as a result of the letter, the insured was aware of a potential claim, and thus was required to inform the insurer "as soon as practicable." // Jordan

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## Duty to Defend

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### Liability Insurer Must Defend Suits Seeking Compensation for the Cost of Head Sets from Cell Phone Manufacturers (including class actions)

*If a Liability Policy Insures "Bodily Injury," Then Any Allegation of Any Potentially Injurious Impact upon Any Part of a Plaintiff's Human Body Triggers the Duty Defend, Even If Medically or Common Sensically Recognized Bodily Injury Is Not Pleaded, Except When the Plaintiff's Pleadings Specifically Limit Sought Damages to Economic Losses*

*Zurich American Insurance Company, Federal Insurance Company, and National Union Fire Insurance v. Nokia, Inc., \_\_\_ S.W.3d \_\_\_, 2008 WL 3991183 (Tex. Sup. Ct., August 29, 2008).*

### Case at a Glance

Nokia, Inc., a Texas corporation, and the world's largest manufacturer of wireless telephone handsets, was sued in several states in a number of putative class actions. The plaintiffs were consumers who alleged that the phones emitted radio frequency radiation (RFR) which caused "biological injury," etc. Zurich and the other liability insurers agreed to defend Nokia but reserved rights as to indemnity. Nokia filed a declaratory relief action against the three of them, and

this is an appeal from the judgment in that. The Supreme Court held that insofar as the underlying cases alleged any harm to any physical, biological part of human being—whether cells, nerves, or physical function—a “bodily injury” has been pled, so the duty to defend has been triggered. That proposition is true even if the petition does not explicitly seek damages based upon such physical injuries to a human body, so long as such damages are not expressly excluded in the petition. Such is true even if the proposed class of plaintiffs includes people who have not bought Nokia phones yet, since the duty to defend is triggered if bodily injury is alleged with respect to anyone in the plaintiff group.

### Summary of Decision

*Procedural Background.* The fundamental factual background has already been summarized. Class actions were brought against Nokia for manufacturing wireless phones and not including headsets in the sales package. Lots of people bought Nokia phones and they were not automatically supplied with headsets, which—allegedly—would have protected them from—alleged—injuries caused by RFR. These cases were brought in Maryland, Pennsylvania, New York, Georgia, Louisiana, and the District of Columbia. They were “consolidated” together under in a “Multi-District Litigation” (“MDL”) group. And out of that arose this coverage litigation. Cynics might say that the whole point of the suits was to get small sums for millions of buyers and profit from the results, and this is what the dissenting justices virtually say. This view was supported, to some degree, by the fact that the major themes of the suit concerned not physical injuries but the prices of headsets. Still, in most of the cases, there were references to bodily injury and no explicit exclusion of bodily injury based damages.

*The Insurance Policies.* The insurance policies, with minor, insignificant differences in language, all obligated the insurers to defend and indemnify against “damages . . . because of: bodily injury . . . caused by an occurrence.” The policies defined “bodily injury” as “bodily injury, sickness, disease or, if arising out of the foregoing, mental anguish or mental injury sustained by any person which occurs during the policy period, including death at any time resulting therefrom.” Occurrence was defined as “an event, including continuous or repeated exposure to

conditions which results in bodily injury.”

*Language of the Plaintiffs’ Pleadings Alleging Bodily Injury.* Here is the kind of language found in most in the underlying cases under discussion here, in fact, all but one. It is alleged that the Nokia phones caused:

- “Adverse cellular actions,”
- “Cellular dysfunctions,”
- “Brain changes,”
- Headaches,
- “Heating behind the ears”,
- Sleep problems,
- And/or high levels of “heat shock protein”

The majority held that these constituted allegations of bodily injury, and the dissenting justices did not really disagree. Although under Texas Law, “personally purely emotional injuries are not ‘bodily injuries,’” *Trinity Universal Ins., Co. Collin*, 249 S.W.2d 819-823 (Tex. 1997), the plaintiffs allegations did not involve assertions of purely emotional injuries.” Any alteration of the physical structure of the body, even if not medically diagnosable, constitutes bodily injury within the meaning of the policies. Any doubt about non-bodily injury versus bodily injury is to be resolved in favor of the insured.

*Exceptions to the “Eight Corners Rule.”* In Texas, there are virtually no exceptions under Texas law to the “Complaint-Allegation Rule.” The liability insurance jurisprudence in some states is more flexible, but the Supreme Court has embraced only one. The Texas exception applies when (i) the meaning of the pleading cannot be determined and (ii) “when the extrinsic evidence goes solely to a fundamental issue of coverage [and] which does not overlap the merits of or engage the truth or falsity of any fact alleged in the underlying case.” *Guide One Elite Insurance Co. v Fielder Road Baptist Church*, 197 S.W.3d 305, 308-09 (Tex. 2006). Neither (i) nor (ii) applies in this case. The fact that other states where the underlying suits were filed have embraced a different rule is irrelevant.

*“Damages Because of Bodily Injury.”* Given the

ambiguity in the policies' bodily injury definition and the large body of asbestos case law treating undetectable cellular injury as "bodily injury" within the meaning of a liability policy, the court had little difficulty concluding that the underlying complaints alleged covered bodily injury. The more difficult question was whether the complaints sought "damages because of" bodily injury. The insurers argued that because underlying plaintiffs did not seek compensation for bodily injury, but only the cost of purchasing headsets to avoid bodily injury, the relief sought was not "because of" bodily injury. The supreme court disagreed, albeit on different grounds than the court of appeal. Interpreting the phrase "because of" broadly to mean "by reason of" or "on account of," the court of appeal rejected the insurers' contention that the policies limited coverage to damages the class members would not have incurred "but for" bodily injury. The supreme court saw no need to address whether the headsets qualified as damages "because of" bodily injury because the complaints also sought unspecified compensatory damages flowing directly from bodily injury. This was so, the supreme court reasoned, even though the putative class included future purchasers who could not have suffered damages due to bodily injury. "The duty to defend is not negated by the inclusion of claims that are not covered; rather, it is triggered by the inclusion of claims that might be covered," the court explained. For the same reason, allegations of intentional—as well as negligent—conduct in the underlying complaints did not relieve the insurers of their duty to defend.

The court, however, reached a different result with respect to one complaint—the *Naquin* complaint—which, in the court's view, did not allege damages because of "bodily injury" within the meaning of the policy. The court reasoned that the *Naquin* complaint sought only economic losses related to an allegedly defective. The *Naquin* plaintiffs had amended their pleadings twice. Both of the earlier pleadings alleged a fact of bodily injury and left it open by silence what damages were being sought. In the live complaint under consideration, the plaintiffs has explicitly excluded bodily injury as a source of damages and had restricted its sources of damages to economic losses. This, the majority said, was enough to defeat any comprehensive general liability insurers' duty to defend. If there was no other

reason, the business risk exclusion common to liability policies was triggered.

*Underlying Class Actions.* The insurers had argued that if there were issues about the injuries of some individual members of the classes, and if at least some of those issues involved whether there were bodily injuries, then the duty to defend the entire class should be defeated. The majority rejected this argument. It found that the appropriateness of a class action was not before the court, and even if it were, it would not be relevant to answering this particular question. The court emphasized that "[e]very court that has analyzed in any detail the duty to defend the identical claims in these very cases—including the two federal circuit courts that have reached the issue—has held that [a duty to defend] exists." The majority was concerned that any other rule would be unfair to Texas corporations. "Failing to recognize the duty 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."

*Dissenting Opinion.* Justice Hecht wrote the dissenting opinion, and he was joined by Justice Brister. As usual he is both clever and brilliant. Of course, he says, applications of the Eight Corners Rule "are to be liberal. Liberal does not mean naïve; it does not mean blind." Plaintiff's pleadings do not use the phrase "bodily injury," but what they do say—"biological injury" and the like—is equivalent. "Since the human body is totally biological (as opposed to a human *being*), the two phrases would seem to mean the same thing." But the use of term "biological injury" is extremely rare in tort litigation, whereas the phrase "bodily injury" is common to the opposite extreme. "Why, then," asked Hecht, "all of a sudden, change to 'biological injury' in pleading a handful of cell phone radiation cases?" There has to be a reason.

The reason is clear enough say the dissenting justices. Most of the members of the plaintiff class have not (yet) sustained bodily injuries, as that term is commonly used, and without a common injury, the class could not be certified. Of course, the price of the missing headset would not justify bringing individual law suits; it would be too expensive. Thus, the underlying complaints are for economic loss only. Some of the complaints virtually say this: "No individual issues of injury exist[.]" they assert. This

can be true only if class members do not claim personal injuries, says Hecht. “The insurers must defend claims for damages because of bodily injury, even if the claims prove to be unfounded; by the same token, they are not required to defend claims that have not been asserted, even if they exist somewhere.” Hecht takes as decisive a statement of class counsel in the MLD proceeding: “Plaintiffs are not seeking compensation for any personal injury suffered as a result of the use of cell phones.” Even though this remark is not pleaded in any of the complaints, the court should be able to take them at their word, and on that basis deny that there is a duty to defend.

*Companion Cases.* Two cases completely embracing *Zurich* were issued by the court on the same day *Zurich* was issued. They were *Trinity Universal Ins. Co. v. Cellular One Group*, 2008 WL 4000811 (Tex. 2008) and *Federal Ins. Co. v. Samsung Electronics America*, 2006 WL 4000812 (Tex. 2008). All of the underlying cases involved in *Cellular One* and *Samsung* were also involved in *Zurich*. Hecht and Brister dissented in these two cases for the same reasons already discussed.

**Comments**

1. Like many court opinions, the majority here does not acknowledge that many emotional injuries are said in various places to have physical foundation. Depression is like this. One wonders how to handle this in the future. Given the majority opinion the approach should be simple. Plead depression this way: “The plaintiff has sustained a bodily injury one manifestation of which is depression.” This approach may be used in a variety of mental problems.

2. The majority’s explication of the “Eight Corners Rule” appears to be historically accurate. This case demonstrates that the rule needs to be modified slightly. It’s too strong.

3. Two alternatives spring to mind. The first is that of Justice Hecht. Here is his rule. Factual allegations of bodily injury govern and determine a duty to defend, except when object evidence establishes that the plaintiffs or their legal agents—usually in this context that would be their lawyers—have made it clear that they are not seeking damages of that kind, i.e., for bodily injuries. That second is that of this commentator: Factual allegations of bodily injury do

not govern and determine the duty to defend, although they are a necessary condition for its trigger; damages must also be sought which are physically caused by that bodily injury. The existence of the alleged bodily injury must be more than indicative of some other type of injury; the bodily injury itself be compensable. Quinn’s Modification works better than the Hecht Modification because it preserves the Eight Corners Rule, while Hecht permits trigger-arguments to go outside the substantive live pleading. Thus, the restriction of the Eight Corners Rule should be modified, and carriers should be able to look at damage pleadings as well. // Quinn

**Estoppel**

**Liability Insurer May Be Held Liable Under Estoppel Theory for Cost of Defending Uncovered Claim**

*Insured Must Demonstrate Actual Prejudice*

*Ullico Casualty Company v. Allied Pilots Association*, \_\_ S.W.3d \_\_, 2008 WL 3991083 (Tex. Aug. 29, 2008)

**Case at a Glance**

An insurer that causes actual prejudice to an insured through its handling of a claim under a claims-made liability policy may be held liable for defense costs that are not covered by the policy.

**Summary of Decision**

The insured obtained a claims-made liability insurance policy that covered claims made and reported during the policy period. After the policy expired, the insured purchased two successive one-year extended reporting periods. Three weeks before the second extended reporting period expired, the insured was served with a lawsuit. The insured forwarded suit documents to its insurance broker and to its regular outside counsel, who undertook defense of the suit. However, the broker did not notify the insurer of the suit until ten days after the extended reporting period expired. The following month, the