IN THE SUPREME COURT OF TEXAS

NO. 06-1030

ZURICH AMERICAN INSURANCE COMPANY,
FEDERAL INSURANCE COMPANY, AND
NATIONAL UNION FIRE INSURANCE CO., PETITIONERS,

v.

NOKIA, INCORPORATED, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUSTICE HECHT, joined by JUSTICE BRISTER, dissenting.

When construing pleadings under the eight-corners rule to determine whether they state a claim an insurer must defend, we are to be liberal.[1] Liberal does not mean naïve; it does not mean blind. The pleadings in the five putative class actions at issue here all allege that cellphone radiation causes bodily injury, although they never use that phrase. They call it "biological injury". Since the human body is totally biological[2] (as opposed to a human *being*), the two phrases would seem to mean the same thing.[3] But American caselaw rarely refers to injuries to the human body as "biological injuries". Westlaw's computer databases identify maybe half a dozen such cases in the

[1] *National Union Fire Ins. Co. of Pittsburgh v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) ("When applying the eight corners rule, we give the allegations in the petition a liberal interpretation.").

[2] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 218 (1981) (defining biological as "of or relating to biology or to life and living things: belonging to or characteristic of the processes of life").

[3] The law does not afford damages for all bodily injuries. *See*, *e.g.*, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432-436 (1997) (holding that a worker cannot recover under FELA for the injury of exposure to asbestos if he is disease and symptom free); *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 92-93 (Tex. 1999) (holding that a person exposed to asbestos cannot claim mental anguish damages for fear of contracting an asbestos-related disease if bodily injury is "latent and any eventual consequences uncertain"). The issue here, however, is not whether cellphone purchasers have actually suffered bodily injury, but whether class counsel have alleged they have.

history of American jurisprudence, not counting the cases before us and a few others like them. Westlaw quits counting cases using the phrase "bodily injury" at 10,000. A pervasive, timeless consensus has formed around the use of "bodily injury". Why, then, all of a sudden, change to "biological injury" in pleading a handful of cellphone radiation cases?

There is an obvious answer. The cases are putative class actions. None of the named plaintiffs claims damages for personal injuries caused by cellphone radiation. Their damage claims are for not having been furnished headsets with their phones, at most a few dollars, certainly not worth the freight of the litigation. None of the cases has any value unless a class is certified aggregating millions of claims for headsets. A class cannot be certified if questions common to the class members do not predominate.[4] Questions common to class members cannot predominate if class members claim individualized bodily injuries.[5] If the cases are to have any value, the pleadings must never breathe the words "bodily injury". They never do.

Nokia's insurers argue that this omission establishes that they have no duty to defend the claims, but it doesn't. The insurance policies obligate them to defend claims for "damages because of bodily injury", and "biological injury" is close enough. But the insurers also argue that none of the damages sought are *because of* bodily injury, and on this point they are clearly right. None of the class action pleadings claims any specific damages other than for headsets that Nokia did not supply with the phones. Want of a cellphone headset is neither a bodily nor a biological injury. It is true, as the Court notes, that several of the damage claims are not specific — the pleadings claim unspecified "monetary damages", "compensatory damages", "actual damages", "legal and equitable relief", etc. — but none is inconsistent with the pleadings' meticulous avoidance of any claims for

---

[4] *E.g.*, FED. R. CIV. P. 23(b)(3); TEX. R. CIV. P. 42(b)(3).

[5] *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 436 (Tex. 2000) ("Personal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve. *See generally* [*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)]. Thus, the class action will rarely be an appropriate device for resolving them.").

personal injuries. It is also true that the pleadings weasel that class members' damages are "including but not limited to", and "consisting, among other things, of" headsets and their value, but again, though the pleadings do not affirmatively exclude the possibility of other damages, neither do they ever identify any other actual damages. The Court makes the positive statement that the class action plaintiffs "seek damages based on their physical exposure to radiation."[6] This is simply incorrect. There are claims for headsets and their value, and claims for other unspecified damages. There are no claims for personal injury damages. The Court cites no example, and there is none.

Construing pleadings liberally, we must consider whether they state *potential* claims for damages because of bodily injury, even if they are ambiguous or inartful.[7] Under this very generous standard, the pleadings before us here do not. Suppose that a plaintiff sued the manufacturer of his car, alleging that its brakes were defectively designed and unreasonably dangerous, and claiming damages required for repairs. That would clearly not be a claim for damages because of bodily injury. If the plaintiff added that brakes had been known to fail, resulting in accidents, would that transform the case into one for bodily injury damages? Surely not. If the plaintiff asserted that he had himself been injured, but still claimed only repair damages, would that change the nature of the case? No. That is all we have in the present case. Class counsel allege very carefully that using cellphones without headsets can cause bodily injury, and therefore they want headsets or their value. This is not a claim for damages because of bodily injury.

This conclusion is unassailable for two reasons. One is that a person need only have purchased (or leased) a cellphone to be a member of the class claiming damages. He need not ever have actually used the phone. He could have bought it as a gift or lost it. His damages are completely unrelated to any possible personal injury, bodily or biological. He is like the plaintiff

---

[6] *Ante* at ___.

[7] *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006) ("A plaintiff's factual allegations that potentially support a covered claim is all that is needed to invoke the insurer's duty to defend . . . .").

suing for defective brakes before an accident has happened. The other reason is that, as I have already said, damages because of bodily injury necessarily depend on whose body in particular has been injured, an individual inquiry that prevents predominance of common issues, precludes class certification, and destroys the value of the lawsuits. We should not consider that class counsel's pleadings potentially state a claim that would destroy the case altogether.

In any event, class counsel have removed all doubt as to their intentions. Several complaints assert: "No individual issues of injury exist". This can be true only if class members do not claim personal injuries. The Court's response to this statement is that "[a]lleging that there are no individual *issues* of injury . . . is not the same as stating that no individuals have been injured."[8] That is certainly true, but the insurers' duty to defend turns not on whether individuals may have been injured, but whether they *claim* injury. 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. Class counsel stated in the MDL proceeding: "Plaintiffs are not seeking compensation for any personal injury suffered as a result of the use of cell phones." The Court's response is that class certification is not the issue.[9] That, too, is true. But surely we must take counsel at their word as to what their claims are.

The Court cites an unpublished opinion of the Fourth Circuit and an unpublished opinion of the Ninth Circuit, each concluding that the cellphone radiation plaintiffs claim damages because of bodily injury. But neither adds anything to this Court's opinion. Specifically, neither quotes a single example of such a claim from class counsel's pleadings. Moreover, the courts that issued those opinions do not allow them to be treated as authoritative in any federal court in their respective circuits.[10] If the opinions are not binding even on their authors, it is not clear why this Court should

---

[8] *Ante* at ___.

[9] *Ante* at ___.

[10] 4th Cir. Local R. 32.1 (citation of unpublished dispositions) ("Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."); 9th Cir.

rely on them for anything. The Court suggests that our decision on the insurers' duty to defend should not be out of step with other courts that have addressed the same issue, but courts have gone both ways.[11] We cannot help but be in step with some and out of step with others.

The most unfortunate aspect of today's decision in my view is that it handles the eight-corners rule in a way that rewards cute and clever pleading that strains credulity. The only difference between the five cases at issue is that in one, *Naquin*, class counsel was forthcoming, affirmatively disclaiming the personal injury damage claims that would destroy the lawsuit.[12] The Court concludes that the insurers need not defend that case.

The pleadings in the cellphone radiation class actions do not actually claim damages because of bodily injury, and they do not potentially include such claims because the claims would defeat the actions. The insurers should not be required to defend them.

Accordingly, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 29, 2008

R. 36-3(a) (citation of unpublished dispositions or orders) ("Not Precedent: Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").

[11] *Compare Zurich-American Ins. Co. v. Audiovox Corp.*, 741 N.Y.S.2d 692, 692 (N.Y. App. Div. 2002) (no duty to defend), *with Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co.*, 423 F. Supp. 2d 587, 594 (N.D. Tex. 2006) (duty to defend), *Motorola, Inc. v. Associated Indem. Corp.,* 878 So. 2d 824 (La. App. 1 Cir. 2004), *writ denied*, 888 So. 2d 206 (La. 2004), *and writ denied*, 888 So. 2d 211 (La. 2004), *and writ denied*, 888 So. 2d 212 (La. 2004) (duty to defend), *and Motorola, Inc. v. Associated Indem. Corp.*, 878 So. 2d 838 (La. App. 1 Cir. 2004), *writ denied*, 888 So. 2d 206 (La. 2004), *and writ denied*, 888 So. 2d 211 (La. 2004), *and writ denied*, 888 So. 2d 212 (La. 2004) (duty to defend).

[12] *Naquin et al. v. Nokia Mobile Phones, Inc.*, MDL No. 1421, No. 01-MD-1421 (D. Md.) (second amended complaint) (E.D. La. Cause No. 00-2023).