

SEVERAL SIGNIFICANT COVERAGE CASES DECIDED BY THE TEXAS SUPREME COURT

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On August 29, 2008, the Texas Supreme Court decided several significant coverage cases, as follows:

Zurich American Insurance Co. v. Nokia, Inc., ___ S.W.3d ___, 2008 WL 3991183 (Tex., Aug. 29, 2008); *Federal Insurance Co. v. Samsung Electronics America*, ___ S.W.3d ___, 2008 WL 4000812 (Tex., Aug. 29, 2008); *Trinity Universal Insurance Co. v. Cellular One Group*, ___ S.W.3d ___, 2008 WL 4000811 (Tex., Aug. 29, 2008). In these companion cases, wireless cell phone manufacturers/providers were sued in a number of putative class actions alleging that radiation emitted by their cell phones caused biological injury, and they turned to their insurers, who had agreed to defend claims seeking damages because of bodily injury. After initially providing a defense, the insurers later sought a declaration that they had no duty to defend on the basis that the lawsuits did not seek damages because of bodily injury, rather the plaintiffs in the lawsuits were asserting claims as a result of the manufacturers/providers not furnishing headsets with their phones, and the plaintiffs were basically seeking to recover the cost of headsets they claimed should have been furnished to minimize any risk of cellphone radiation.

The majority of the Texas Supreme Court held that the insurers owed a defense to their insureds. The Court concluded that most of the underlying lawsuits sought damages because of bodily injury, not merely the cost of the headsets.

However, Justice Hecht (joined by Justice Brister) dissented upon the ground that none of the plaintiffs' claimed damages for bodily injury were based upon cellphone radiation, and instead sought damages for not having been furnished headsets.

Don's Building Supply Inc. v. OneBeacon Insurance Co., ___ S.W.3d ___, 2008 WL 3991187 (Tex., Aug. 29, 2008). This case involved claims of coverage relating to latent EIFS property damage claims. The coverage lawsuit was filed in federal court and was appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit certified questions to the Texas Supreme Court, which questions asked generally when property damage "occurs" under

Texas law for purposes of an occurrence-based commercial general liability insurance policy. Although many other courts applying Texas law had adopted a "manifestation trigger" in similar latent property damage cases, the Texas Supreme Court had not previously dealt with the issue.

Answering the certified questions before it, the Texas Supreme Court applied an "injury-in-fact trigger" to the underlying latent EIFS property damage claims based upon the policy language "which focuses on when damage comes to pass, not when damage comes to light" – "the key date is when injury happens, not when someone happens upon it." The Court held that OneBeacon had a duty to defend the underlying claims to the extent that any amount of physical injury to tangible property occurred during the policy period and was caused by Don's allegedly defective products. The Court also held that the duty to defend was not diminished by "discovery rule" allegations in the underlying lawsuits which alleged that the property damage was undiscoverable, or not readily apparent or "manifest," until after the policy period ended.

Ulico Casualty Company v. Allied Pilots Association, ___ S.W.3d ___, 2008 WL 3991083 (Tex., Aug. 29, 2008). In this case, the Court considered whether an insurer's contractual coverage under a claims-made policy can be expanded by the doctrines of waiver and estoppel to cover a risk not otherwise within the policy coverage: a suit against the insured that was not reported until after the policy expired. The Texas Supreme Court held that, if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered, but the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured.

Chief Justice Jefferson delivered a concurring opinion, in which Justice O'Neill joined.

For a further analysis of the coverage issues raised by these decisions, please contact Gene Creely, II of Cozen O'Connor's Houston, Texas office.