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C T H & G Quarterly

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WELCOME TO THE FALL EDITION OF THE C T H & G QUARTERLY!

In this edition of the *CTH&G Quarterly*, we spotlight recent decisions concerning insurance coverage and personal injury litigation. If we have overlooked an area that may be of particular interest to you, please inform us! We welcome any comments, suggestions or questions that you might have regarding the newsletter.

BIOLOGICAL INJURIES CAUSE INSURANCE COMPANIES A LOT OF PAIN.
Zurich American Ins. Co. v. Nokia, Inc., 51 Tex. Sup. J. 1340 (Tex. 2008).

The suit between Zurich American Insurance Company (Zurich) and Nokia Incorporated (Nokia) stems from several third-party suits against Nokia. The class action lawsuits allege that radiation emitted by cell phones caused biological injury. Zurich sued Nokia in an effort to receive a court declaration that Zurich was not under a duty to defend Nokia in the multiple third party lawsuits.

Twice, the trial court granted Zurich's summary judgment motions and found Zurich had no duty to defend or indemnify Nokia. The court of appeals reversed five of the six cases because (1) the complaints alleged, and sought damages for, "bodily injury", and (2) no "business risk" exclusion applied; thus, the insurers had a duty to defend.

The duty to defend arises from the covered risks in commercial general liability (CGL) policies that Nokia purchased from Zurich. The bottom line is that the duty to defend is a very easy burden to show, and it arises where the third-party plaintiff's factual allegations potentially fall within a covered risk. The Texas Supreme Court sought to determine whether (1) biological injuries fell within the insurance policy's "bodily injuries" provision, and (2) whether the plaintiff has sought damages as required by the policy.

Holding: The Court found that "biological injuries" were "bodily injuries", and that the third party plaintiffs were seeking "damages because of bodily injury…"; therefore, Zurich had the duty to defend Nokia in the original suits.

The Court acknowledged that the plaintiffs' pleadings alleged "biological injury" or "biological effects", rather than "bodily injury." However, it reasoned that since "'bodily injury'… unambiguously requires an injury to the physical structure of the human body, the 'biological injuries' complained of by the plaintiffs' were covered."

Additionally, the Court pointed out that each plaintiff argued varying theories for damages, which included: monetary damages, legal fees, equitable relief, compensatory damages, and punitive damages. Thus, the plaintiffs' claims fell within the insurance policy's coverage provisions and the Court found the insurers had the duty to defend Nokia.

Waiver and Estoppel Expand Coverage Only if Insured Proves Prejudice.

Ulico Casualty Co. v. Allied Pilots Assoc., 51 Tex. Sup. J. 1320 (Tex. 2008).

Insurer, Ulico Casualty Company (Ulico), issued a claims made liability policy to Allied Pilots Association (Allied). The policy specified the policy was effective August 28, 1998 through August 28, 1999 and provided coverage for "all loss which such Insured shall be come legally obligated to pay on account of any claim made against the Insured during the Policy Period." The policy required that, as a condition precedent to Allied's rights under the policy, Allied must "give to Ulico written notice during the Policy Period...of a claim made against Allied for a Wrongful Act." The policy was amended to extend coverage, but twenty -one days before policy coverage expired, Allied was served with a lawsuit. Ulico was notified of the suit against Allied ten days after the policy coverage had expired.

Ulico filed suit against Allied seeking a declaration that it did not owe Allied a defense. However, the trial court found that under the doctrines of waiver and estoppel, Ulico owed Allied a defense and was responsible for $600,000 in attorney's fees. Ulico appealed, yet the court of appeals affirmed the trial court's ruling under principles of waiver and estoppel. The Texas Supreme Court sought to determine whether Ulico's policy coverage was expanded by the doctrines of waiver and estoppel.

Holding: The court found that the policy coverage under the contract could not be expanded by either doctrine; unless Allied could prove that Ulico's failure to reserve rights when Allied's claim was filed, somehow prejudiced Allied.

In making this determination, the court reviewed the rule set out in *Wilkinson*, that an insurer "waived" or was "estopped" from asserting the policy provisions did not cover a particular act when the insurer agreed to defend the insured without reservation. The court noted both parties to the policy essentially entered into a binding contract and the doctrines of waiver and estoppel could not be later utilized to re-write a valid contract.

Be Careful About What You Contract For: Insurance Policy's Words Dictate When an Injury Occurs.

Don's Building Supply, Inc. v. OneBeacon Ins. Co., 51 Tex. Sup. J. 1367 (Tex. 2008).

Don's Building Supply, Incorporated (Don's) appealed to the Fifth Circuit Court of Appeals seeking enforcement of OneBeacon Insurance Company's (OneBeacon) duty to defend against several homeowners. The homeowners alleged Don's Exterior Insulation and Finish System, or stucco, was faulty and moisture became trapped between the stucco and the framing of the homes.

OneBeacon initially represented Don's in the suits, but then filed and received a declaratory judgment that it had no duty to defend Don's in the suits. In reviewing the case, The Fifth Circuit required clarification from Texas Supreme Court. Thus, the court certified the following questions: (1) when an insurance policy fails to specify a rule to determine the time at which property damage occurs, what is the proper rule?; and (2) under the rule identified in (1) does the insurer have a duty to defend and indemnify the insured?

Holding: The Texas Supreme Court found that under the language in this specific policy OneBeacon assigned itself to the "actual injury" or "injury-in-fact" rule of law, and therefore had a duty to defend Don's.

The court reviewed the policy, settling any ambiguities in favor of the insured, and determined that because the policy contained language asking, "when did the damage happen," the "actual injury" rule should apply. Under this rule, the "insurer must defend any claim of physical property damage that occurred during the policy term."

Additionally, the court found the plaintiffs' allegations claiming that the damage occurred within 6-months to 1-year after installation fell within OneBeacon's coverage period. The court used the 8-corners doctrine, reviewing the plaintiffs' pleadings and the insurance policy, and determined the policy covered these particular injuries.

TEXAS SUPREME COURT STANDS BEHIND DECISION THAT THE EMPLOYMENT OF STAFF LEGAL COUNSEL BY INSURANCE COMPANIES DOES NOT CONSTITUTE UNAUTHORIZED PRACTICE OF LAW

Unauthorized Practice of Law Committee v. Nationwide Mutual Insurance Company et al., 51 Tex. Sup. J. 1415 (Tex. 2008).

Nationwide Mutual Insurance Co. and its managing trial attorney sued the Unauthorized Practice of Law Committee for a 'declaration that the employment of duly licensed staff legal counsel by Nationwide to represent the interest of its insured, where the insurance company has a contractual obligation to defend and indemnify the insured, does not constitute the unauthorized practice of law under any Texas Law. The trial court granted summary judgment for the plaintiffs specifically granting the declaration sought, and the court of appeals affirmed. In the initial opinion given by the Texas Supreme Court, they held that "an insurer may use staff attorneys to defend a claim against an insured if the insurer's interest and the insured's interest are congruent, but not otherwise. Their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured."

After the Texas Supreme Court issued their opinion, the Unauthorized Practice of Law Committee filed a petition for review, which the Texas Supreme Court denied.

Holding: In their petition, the Committee argued that even if the insurer may employ staff counsel to represent its own insureds, it cannot represent its affiliates' insureds. This issue was not addressed at the trial court, so the Supreme Court refused to consider it on appeal.

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