

Tensions: Pleading for Liability and Pleading for Coverage

By Lyndon F. Bittle and Dena DeNooyer Stroh¹

**Published in Dallas Bar Association Headnotes
December 1, 2008**

Plaintiffs' attorneys generally consider a defendant's potential insurance coverage at the beginning of a lawsuit. For instance, even if facts support a claim for an intentional tort, plaintiffs also plead negligence if an insurance policy is available.

Pleading at least one claim that is potentially covered under the defendant's liability policy generally triggers the insurer's duty to defend the entire case, and gives the plaintiff a possible "deep pocket" to satisfy a judgment or negotiate a settlement. Indeed, this is one reason that Texas Rule of Civil Procedure 192 provides for discovery of indemnity and insurance agreements as part of requests for disclosure, and Federal Rule of Civil Procedure 26(a)(1)(iv) provides for production of insurance agreements as part of initial disclosures.

However, there are occasionally tensions between "liability" allegations and "coverage" allegations. Two recent opinions by the Texas Supreme Court highlight the tension that can arise when the same pleading is reviewed for two different purposes: (1) to determine whether the pleading states a viable claim for damages or other relief, either as an individual claim or a class action, and (2) to determine whether the pleading states a claim that is covered under the defendant's insurance policies.

Insurance coverage under the "eight corners rule" was the immediate issue in both *Don's Building Supply v. OneBeacon Ins. Co.* and *Zurich Am. Ins. Co. v. Nokia, Inc.* Under the

eight corners rule, an insurer's duty to defend its insured is determined by the underlying plaintiff's petition, without regard to the truth or falsity of the allegations, considered in light of the policy provisions. However, in both *OneBeacon* and *Nokia*, coverage disputes arose from pleadings carefully drafted to avoid pitfalls that could have derailed the lawsuits altogether.

In *OneBeacon*, the underlying plaintiffs faced a potential statute of limitations problem. In lawsuits filed from 2003 to 2005, homeowners alleged that synthetic stucco exterior sold by defendant Don's Building Supply, and installed on various homes from December 1993 to December 1996 allowed moisture to seep into the wall cavities behind the siding, causing damage. To avoid the statute of limitations, plaintiffs pleaded the discovery rule, alleging that the home damage was hidden and not discoverable until after the policy period.

OneBeacon, the insurer, sought a declaratory judgment in federal court that it had no duty to defend or indemnify Don's Building Supply, arguing that coverage under the commercial general liability policy was triggered only if the damage "manifested" itself, *i.e.*, became identifiable, within the policy period. Thus, because the underlying plaintiffs did not identify the damage until after the policy period, there was no covered "occurrence" under the policy. In response to certified questions from the Fifth Circuit, the Texas Supreme Court ultimately concluded that coverage was triggered when actual physical damage to the property occurred, which was within the policy period, even if the damage was not "manifest" until later.

In *Nokia*, plaintiff class representatives avoided allegations of individual bodily injury that could have rendered class certification untenable. The Texas Supreme Court considered whether Zurich had a duty to defend Nokia in five different multi-district litigation cases, none of which were pending in Texas.

The multi-district litigation counsel carefully pleaded that class members experienced "biological injury" due to cell phone radiation, and insisted there were "no individual issues of injury." This wording was apparently intended to avoid denial of class certification on the grounds that questions common to class members cannot predominate if there are

individualized bodily injuries. Nokia’s insurers denied coverage and a duty to defend the class actions, arguing that the class plaintiffs did not allege “damages because of bodily injury.”

The Texas Supreme Court concluded that biological injuries potentially state a claim for bodily injuries under the policies and that a demand for “damages consisting, among other things, of the cost of headsets” was sufficient to constitute a claim for “damages because of” such injury. Noting that “damages because of bodily injury necessarily depend on whose body in particular has been injured,” dissenting Justice Nathan Hecht criticized the majority for using the eight corners rule to reward “cute and clever pleading that strains credulity.”

In both of these cases, the Court found coverage and overruled the insurers’ objections that the liability pleadings eliminated any basis for triggering coverage under the applicable policies. But the tension between liability allegations and coverage allegations, as reflected in these two recent cases, requires attorneys for all of the interested parties — the underlying plaintiff, the defendant, and the defendant’s insurer — to carefully review the pertinent policy language and factual allegations to determine whether this tension benefits or hinders their clients’ divergent interests.

¹ Lyndon F. Bittle is a business litigation partner and chair of the Insurance Practice Group with Carrington, Coleman, Sloman & Blumenthal, L.L.P. Dena DeNooyer Stroh is a business litigation partner and a member of the Insurance Practice Group with Carrington, Coleman, Sloman & Blumenthal, L.L.P.

For further information concerning insurance law, please contact:

Lyndon Bittle
214.855.3096
lbittle@ccsb.com

Dena DeNooyer Stroh
214.855.3017
dstroh@ccsb.com

[Carrington Coleman’s insurance practice group handles insurance issues in both litigation and non-litigation contexts, including coverage questions, premium disputes, and a range of industry matters involving insurance companies, brokers, and agents.](#)

This bulletin provides only general information and is not intended as legal advice.
To subscribe or unsubscribe to this publication, please contact us at ccsb@ccsb.com.