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Supreme Court of Texas.
Zurich American Insurance Company, Federal Insurance Company, and
National
Union Fire Insurance Company, Petitioners,
v.
Nokia, Incorporated, et al., Respondents.
No. 06-1030.

February 6, 2008

Appearances:

Joseph R. Knight, Baker Botts, LLP, Austin, Texas, for petitioner.
Kirk Chamberlin, Charleston, Revich, & Chamberlin, LLP, Los
Angeles, CA, for petitioner.

Russell H. McMains, Law Offices of Russell H. McMains, Corpus
Christi, Texas, for petitioner.

Eric J. Mayer, Susman Godfrey, LLP, Houston, Texas, for
respondent, Nokia.

Finley Harckham, Anderson, Kill & Okick, PC, New York, NY, for
respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet
O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W.
Green, Phil Johnson, and Don R. Willett, Supreme Court Justices, en
banc.

CONTENTS

ORAL ARGUMENT OF JOSEPH R. KNIGHT ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF ERIC J. MAYER ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF RUSSELL H. MCMAINS ON BEHALF OF PETITIONER

CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument
in the consolidated cases 06-1030, 06-1040, and 07-0140.

THE COURT MARSHAL: May it please the Court. Mr. Knight, Mr.
McMains, and Mr. Chamberlin will present argument for the petitioners.
Petitioners have reserved 10 minutes for rebuttal. Mr. Knight and Mr.
Chamberlin will present the first 20 minutes. Mr. McMains and Mr.
Knight will present the rebuttal.

ORAL ARGUMENT OF JOSEPH R. KNIGHT ON BEHALF OF THE PETITIONER

MR. KNIGHT: May it please the Court. This cases involved the duty
to defend five class-action lawsuits in which the plaintiffs are trying
to make these manufacturers provide a pre-accessory to improve the
safety of their own product going forward. The main question is whether

those complaints allege damages because of bodily injury.

JUSTICE O'NEILL: And why do they, they want that pre-accessory? Why do they want that pre-accessory?

MR. KNIGHT: To avoid-- what they claim is the exposure going forward in the future.

JUSTICE O'NEILL: So it's to avoid damage at the cellular level?

MR. KNIGHT: Well, they claim that, that the radiation from the cell phones can cause damage at the cellular level and the only that headsets can do is to mitigate that risk or that exposure going forward in the future.

JUSTICE O'NEILL: But, but for mitigating the, the, the physical harm, they wouldn't want the headsets. Right?

MR. KNIGHT: And that's what they say. Yes. Except -

JUSTICE BRISTER: They say there's no physical harm?

MR. KNIGHT: They do say there's no physical harm and -

JUSTICE BRISTER: So what did you do in coverage when the persons-- if as an insurer, they say, "I've had property damage but I haven't had property damage."

MR. KNIGHT: I don't think that's -

JUSTICE BRISTER: Do you have to-- do you have to cover somebody if they say, "I've had this" which sounds like property damages but in fact, I do specifically, judicially admit, I've had no property damage or is that covered or not?

MR. KNIGHT: I, I don't think-- you can answer the question based on that because, because what they say they have or haven't have, I don't think it's determined to factor. What's determinative is whether they seek it or they-- they can, they can say, "I had bodily injury. I have property damages. I have-- whatever." But if they're not seeking damages because of that injury, then, it's not covered. And in this case, I think if you examine the complaints in context, it is crystal clear that they are not seeking whether they have bodily injury or not, they are not seeking damages because of bodily injury.

JUSTICE O'NEILL: But they-- here's where I get confused because they're seeking headsets to prevent bodily injury.

MR. KNIGHT: Yes, yes.

JUSTICE O'NEILL: So why wouldn't that be a potential health or - or bodily injury claim?

MR. KNIGHT: It probably -

JUSTICE O'NEILL: Why don't get the headsets bodily injury? If they do get the headsets, bodily injury is prevented. So it's not like they're claiming the phones are defective for some reason like a, a breach of warranty or anything. I mean, it does seem that the reason for the headsets is to stop bodily injury.

MR. KNIGHT: Not stop, prevent it from happening in the future and I think the key is you have to look at the, the dispositive phrase here all together, "Damages because of bodily injury." For a hundred years, damages has meant compensation for a legal wrong, for a legal injury and people who don't have bodily injury can't be compensated for their bodily injury. And that brings us to the importance of, of appreciating the fact that these are class actions and I think that was the Court of Appeals. They guessed in this fundamental -

CHIEF JUSTICE JEFFERSON: Well, do the, do the pleadings say though that there is bodily injury at the cellular level? Maybe it's not manifest but it is occurring presently.

MR. KNIGHT: Here, here's what, here's what the pleading said, there, there is one place in the pleadings where something very close to that is alleged, your Honor, and that's in the battery cap which

for a whole variety of separate reasons, we say cannot possibly implicate the duty to the defend and cover. Other than that count, I don't think you will find in these complaints anywhere where plaintiffs say, "I have an injury whether you call it bodily injury or biological injury or cellular injury or anything," or you see a lot of allegations that say, "Radiation from these phones causes all kinds to cellular problems."

CHIEF JUSTICE JEFFERSON: They don't say that they have suffered an adverse cellular reaction or biological injury. I thought the pleadings had said that.

MR. KNIGHT: I don't think they say that I, the plaintiff, have, in fact, suffered that. I think they say that the "Radiation causes it" much like somebody might say, "Smoking causes cancer" or something like that, and then they say, "I'm exposed to that every time I use the phone presently," but again, they're presently exposed to that. The ones who use it, yes, but here we go-- back to the, the point of the class action and this is, this is the key point. I think everybody agrees. Everybody should work [inaudible] agrees that, that the, the plaintiffs were represented by able counsel who really went out of their way to try to plead this case in a way it can be certified as a class. Accordingly, in every class, membership is based only on purchased release of a phone not on use. If, if you buy a cell phone and leave it in the box, never take it out, you're in the class. If you buy and you give it as a gift to your mother, you're not-- you're in the class even though you've never used it. Likewise, ...

JUSTICE MEDINA: It seems, like-- it seems like an effort to make sure the class are certified and perhaps, plead themselves out of coverage.

MR. KNIGHT: Yes, your Honor. Yes, exactly because in addition to the-- to not requiring use to be in a class, all of the cases the classes involved, include future purchasers and I think we can all agree that those who've never used their phone.

JUSTICE O'NEILL: But does it matter? I mean, as long as one person in the class has used their phone, then you're within the eight [inaudible] school. Aren't you?

MR. KNIGHT: No, because-- and, and this is really the key. The plaintiffs allege that the claims that the named plaintiffs are asserting and every class members is asserting are identical in every respect. The only way that all of these plaintiffs, including the named plaintiffs, you say they have used their phone, could be asserting claims that are identical in every respect to class members who have never used the phone is if they are not seeking damages because of bodily injury and it all fits together there. Future purchasers and others who haven't used their phone are still have this-- theoretical risk of, of being exposed in the future if they don't have the cell-- the, the headphones and that's why it makes sense for the plaintiffs to say, "My claim, that the main claimant say, 'My claim is the same as everybody else's claim even the ones who haven't even bought their phones yet because what, what we're worried about and what we want a remedy for is the risk going forward.'"

JUSTICE WAINWRIGHT: What is it-- mean when the-- in light of the or in context of the finding bodily injury and whether it has been plead here when the pleadings say "Defendants failed to adequately disclose to the consuming public fact, that WHHPs, emit radiation that that causes biological injury creating a risk user's health? That's not an allegation of bodily injury?"

MR. KNIGHT: I, I-- what I heard you read, your Honor, was exposure

and risk not actual occurrence of injury. But again, the, the, the, main point I want to emphasize is I think these plaintiffs could have alleged all day that they actually had injury.

JUSTICE WAINWRIGHT: How do you -

MR. KNIGHT: They are not -

JUSTICE WAINWRIGHT: Does he ...

MR. KNIGHT: I'm sorry.

JUSTICE WAINWRIGHT: How do you interpret biological injury?

MR. KNIGHT: I don 't know what biological injury is. I mean-- we, we've made; we've made two arguments in, in our briefs. We, we have alleged that what the plaintiffs have described as biological injury is really an allegation of, of, of enhanced risk. It's not an allegation of, of real injury and to the extent, the plaintiffs have said, "Well, I've got microscopic sub clinical injuries to my brain cells." We say, that's really and [inaudible] no different from the metal anguish that was-- had issued in the [inaudible].

CHIEF JUSTICE JEFFERSON: Is there a coverage for exposure to inhalation of asbestos for there is no current injury and perhaps, never will be but how do we hold that, that's a, a covered finding?

MR. KNIGHT: I, I don't know if you have held that that is a covered claim, your Honor, but it would-- but I, I would say that it would depend almost entirely on the relief being requested. Coming back to answer both your question and Justice Wainwright's question, whether somebody is alleging that they have a, a change in their-- in, in a brain cell caused by radiation from a phone or a single asbestos fiber in their lung is really beside the point if they don't ask for damages because of the bodily injury and in the asbestos case is-- I don't think the Court knew-- this Court on the Fifth Circuit or any of the Court that have faced it have ever confirmed to the situation where the, the, the request for damages, the request for relief was not traditional personal injury damages. You -

JUSTICE O'NEILL: Well, but, but here's, again, where I get confused. It's, it's the, the reason to request the headset is to prevent the damage to the body and so that's where I, I keep struggling with that. You, you said the damages is different because it, sort of an economic measure, but, but for stopping the bodily injury, they wouldn't want that particular form of relief.

MR. KNIGHT: Let me try to answer in two different ways. The first [inaudible] said before that-- and so maybe you are now persuaded by it but I think damages have to be compensatory. Neither side has cited--I mean, in all of the briefs that the Court is receiving these, three consolidated cases, I don't think anybody's brought the Court a case that says, "The purpose of general liability insurance is to fund preventative measures to avoid future injuries." It's just never-- it's the total-- that's totally foreign to the concept of ensuring general liabilities and, and, and the forms of the concept of damages because of bodily injury. Otherwise, they could have all seen implications. If a manufacturer like-- if, if it's true what, what the plaintiff says that these cell phone manufacturers knew at the time they were putting it out on the market. But if they didn't include a headphone with their headsets that, that, that-- they were defective and they were going to expose people to harmful radiation. The, the last thing I think we want as a policy perspective is to, is to encourage the manufacturers to go ahead and put it out that way. Knowing that, as soon as somebody calls it to their attention, their insurance company will fund the, the remedy that will fund the, the, the provision of the accessory to the product that is necessary to make it safe. And it's -

JUSTICE JOHNSON: The, the-- that's an, that's an indemnity not, not defense.

MR. KNIGHT: Right, but if that's the only -

JUSTICE JOHNSON: We're talking defense here -

MR. KNIGHT: Yes, your Honor.

JUSTICE JOHNSON: And don't they claim-- you can just plead generally for compensatory damages.

MR. KNIGHT: There, there is a phrase in the, in the complaints alleging compensatory damages. But -

JUSTICE JOHNSON: Is there a phrase in the complaints alleging biological injury?

MR. KNIGHT: Certainly, you'll find those words in the, in the, in the complaints. Yes, your Honor, but the, the, the general phrase we don't think changes the analysis at all.

JUSTICE JOHNSON: Read the policy it says, "The company shall have the right and duty to defend any suit against insured seeking damages." This was seeking and they, and they claimed compensatory damages, they don't specify. They say "compensatory damages." And then they, they talked about other types on account of such injury. So they claim-- seems, seems like the pleadings say biologically injury and then say compensatory damages and if we interpret those on the defense, on the duty to defend, seems like they might get there on that?

MR. KNIGHT: Two answers to that, your Honor. First of all, even if, even if invoking the word compensatory damages -

JUSTICE JOHNSON: Okay.

MR. KNIGHT: - added some meaning to the-- to this analysis which I will come back to because I don't think it does but even if it did, your Honor, they're still not seeking of those compensatory damages because of the bodily injury. How do we know that?

JUSTICE JOHNSON: Well, did they say that?

MR. KNIGHT: No, they don't and here's why. Because their claims, all of their claims are identical in every respect to the claims of people who have never used the cellular telephone. Future purchasers-- purchasers who bought them as gift, purchasers who bought them and left them in the box, all of those people are in a class and they all are asserting claims that are identical in every respect. So we know whatever damages they're seeking. We know what is not because of a bodily injury. It's because of something else. Coming back now to the, the, the, the question of the significance of, of merely pleading generally for compensatory damages, I don't think that gets in there. I, I think the Court-- this Court in a Merchants case and the Cowan case says, "Yeah, we've got to find some specific allegation that affirmatively brings it within the coverage." And in Merchants in particular cited with approval, the Clemons case out of Houston which is, is-- that was the argument there. And so where there's a general prayer for all the damages that they're entitled to recover. And the Court of Appeals in that case said, "Well, that's not good enough to allege damages because of bodily injury," and it's just not specific and, and we're not supposed to imagine facts in situations that they could have pleaded but didn't. And this Court said in, in Merchants, "That's right. That's the right analysis of a general prayer for relief like that." So I don't think, I don't think that prayer for compensatory damages generally helps in anyway and neither do the Court of Appeals by the way. The Court of Appeals very specifically said that "The relief the plaintiffs are requesting is the headset" and it went on to hold what I think it logically that a headset is damages because of bodily injury.

JUSTICE O'NEILL: Do you agree that the Fourth Circuit, the Ninth Circuit, the Louisiana Court of Appeals, and the Northern District of Texas have ruled the other way?

MR. KNIGHT: Yes.

JUSTICE O'NEILL: Then-- and don't we have some interest in making our law uniform so that this isn't the only insured that's not covered?

MR. KNIGHT: Well, it wouldn't be the only -

JUSTICE O'NEILL: - insurer that's not covered?

MR. KNIGHT: They wouldn't be the only insured that's not covered and I don't think we can achieve any remedy. I think-- but this is a very important point. The, the first Court to rule in this what the-- and the only other State Court besides Louisiana was the Court in New York and it held just the plaintiffs' day, the, the, the relief saw here is a headset and that's not damages because of bodily injury and there's not duty to defend. And so audio box doesn't have coverage for these cases. And then the Louisiana Court, it was the--like I said the only other State Court which has issued its decision over a dissent. So we all are going to break the tie on the States and here, the first Supreme-- State Supreme Court to address the issue. And now, if, if you look back at the, at the line of Federal cases, it's very important to look at the first one of those, the, the Baltimore Business case because I'll submit, if you take a look at that, the, the rules of construction that that Court imposed for Maryland are just diametrically opposed to the rules that this Court has, has issued for determining the duty to defend in Texas. And, and in particular, they went off-- on, on that notion that where they seek compensatory damages that could mean anything, and then, and then the Court, there said specifically, "We can't rule out the potential that there're might be a covered claim here. Therefore, there's a duty to defend." That's the standard this Court rejected in Merchants and rejected in Cowan. And so I don't think Judge Wallace is consistent with the federal line of cases and all the ones since that just followed that personally. Mr. Chamberlin has, has indicated that he would-- to save the rest of a-- the, the time that he was going to argue to me. So I will continue with the remaining four minutes if that's all right with the Court.

JUSTICE MEDINA: You made some reference in your comments earlier about traditional bodily injury damages. What, what do you specifically mean by that?

MR. KNIGHT: I'm sorry, your Honor. I didn't -

JUSTICE MEDINA: All see-- I thought you said that the policy only provides for so-called traditional bodily injury damages and not the type of damages that are sought here.

MR. KNIGHT: Well, I, I, I would submit that, that what's, what sought here is not damages and if it is, it's not damages because of bodily injury because it-- the, the request is on behalf of people who, who never even used their cell phones or couldn't possibly have bodily injury. But the point I was, I was trying to make there I think is, you know, these policies could have been written to say that that "We, the insurance companies will pay all sums that the insured becomes obligated to pay because of-- because of bodily injury. And that might have been a supported a little bit better the kind of, argument." I mean, if I-- you're saying, Judge O'Neill that, well, the reason they're asking for this preventative relief is to avoid future bodily injuries. I can list you the argument better then, but the-- policy doesn't say that. It says it-- that we'll pay the sums that the insured becomes obligated to pay better damages because of bodily injury and I think you've got to use that whole phrase together because damages is

always meant a compensation for a legal injury.

CHIEF JUSTICE JEFFERSON: Let me ask you this. Even if the pleadings-- let's assume they say, "I and all members of the class suffered a bodily injury-- a direct bodily injury from use not from leaving it in the trunk of the car but from use of these cell phones." But the damages claimed are the-- only a headset, you would say that there is no coverage under those circumstances because of the relief sought. Is that -

MR. KNIGHT: Yes.

CHIEF JUSTICE JEFFERSON: - correct?

MR. KNIGHT: Yes. Now, of course, I think it's much clearer here given the class allegations, but, but yes, I would definitely say that.

JUSTICE JOHNSON: You agree that part of the claims recovered, then you owe a defense?

MR. KNIGHT: Yes. Yes.

JUSTICE HECHT: But on that issue, you know, class action is a little different because you have the individual claims which frequently are different from what open they get to be the class claims. So how does that work in determining whether there's going to be a defense if the individual claimants may claim personal injury and all sorts of things? So when it comes time they're certifying the class, they restrict those claims to get the class [inaudible].

MR. KNIGHT: Well, I think in that scenario, it, it may be that that there wasn't a duty to defend and there wasn't potential coverage at the beginning and if the, if the claims get amended or change as it goes, the, that may have to be reevaluated. But from where we are now, I, you know, there is no, there is no case that any-- anybody has cited in this Court that I'm aware of that says, "Where you're doing your eight corners analysis, then you're-- then you're trying to determine whether the allegations in the complaint fall within the coverage of the insurance policy. You only suppose to consider certain allegations and not others." So don't consider the class action allegations. There's just no concept out there and it's critical in this instance to understand the ultimate question what is the relief being sought? Is it damages because of bodily injury to know that the, that the named plaintiff are saying, "My claims are identical in all respects to all these people in the class including the ones who haven't used it." And, and it's important and of course, you know, they, they excluded not only this claimed individualized physical injuries and, and other things that, that would indicate if they were seeking bodily injury. But remember they also excluded from their class the people who actually have bodily injury or, or claiming it. People who claimed to have cancer of the eyes as result of, of the radiation or brain tumor, those people are all on their own suits individually and the insurance companies are providing a defense in those cases. And those people are excluded from this case because they are the ones who want to assert that they have damages because of bodily injury.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Mr. Knight. The Court is now ready to hear argument from the respondents.

THE COURT MARSHAL: May it please the Court. Mr. Mayer, Mr. Harckham, and Mr. Perry, will present argument to the respondents. Each of them will present 10 minutes of argument.

ORAL ARGUMENT OF ERIC J. MAYER ON BEHALF OF THE RESPONDENT

MR. MAYER: I don't think that's correct. I think I'm going to go ahead and present 20 minutes of argument. I asked that I get a yellow light with three minutes remaining so I can see if it's done. I think-- may it please the Court. I think it's very important to focus on what we are here and we ask to decide and what we're not being asked to decide. First of all, we, Nokia, firmly believe the claims are without merit. The question for this Court is on whose behalf are those arguments going to be made. This is not an indemnity case as your Honor pointed out and that is crucial to the Court's determination of the issues here. This is not a case where Nokia has settled these class actions for \$10 million in is turning to its insurers asking them to pay an indemnity. The only issue in this case is based on the pleadings that exist. The law of the state of Texas, the law declared in other jurisdictions where these underlying cases are, in fact, pending whether those, looking at the eight corners rules potentially state a claim that would give us coverage under our policies. That's the only issue. If it does, the law in Texas requires a defense. We agree that these claims are weak. In fact, what happened here is originally we tendered these complaints. Nokia tendered the complaints. The insurers agreed to defend with the reservation of right saying, "We're not prejudging indemnity but we're going to defend you." Like a good insured, Nokia invited representatives of these insurance companies to its office to discuss strategy on how we're going to defend the case. One of the things we told the insurance was we've looked at these claims. We think there's preemption problem. We also think there is a problem that they don't claim an actual injury in a way that would be recognized under a state law. Instead of joining us in asserting that defense on our basis against people suing us, shortly thereafter, these insurance companies took that information, filed the declaratory judgment action against us at the very same time we're defending these bogus class actions.

JUSTICE: Well, would you respond--

JUSTICE HECHT: We've encouraged early resolution of coverage issues.

MR. MAYER: Your Honor, only resolution of coverage does make sense but there are three policy reasons why this Court has repeatedly held that the duty to defend as a broader duty than the duty to indemnify -

JUSTICE HECHT: But -

MR. MAYER: - and one of those reasons is -

JUSTICE HECHT: Yes.

MR. MAYER: - to prevent inconsistent litigation where we are at the same time telling the plaintiffs in this underlying class actions, "You're not injured," but we have to then say to the insurance companies in a, in a declaratory judgments action that's been filed against us arguing that there maybe a claim that triggers coverage.

JUSTICE HECHT: Well, I'm -

MR. MAYER: There maybe complaint -

JUSTICE HECHT: I understand that causes problems but how else do you get the coverage resolved?

MR. MAYER: Well, your Honor, the, the way you get the coverage resolved is by having clear-cut rules at the inception of a case that delineate the obligations of an insurer and an insured. Let me give you a perfect example. I've-- I provided each one of you the exact same exhibit that I provided the Dallas Court of Appeals when we argued this below. And this is the exhibit. This is the amended Pinney complaint-- an excerpt of it and if your Honors were to look at it, you can see

that the nature of the case paragraph one, these defendants have manufactured cell phones. Third line, when they knew or should have known, these products generate a radio frequency radiation that and it's not future. This is not that causes in adverse cellular reaction and cellular dysfunction. They go on define this as a term at the bottom of this first page. They defined it as health risk. The new or should have known is crucial. That's negligence. If you turn the page to a force of conduct, paragraph two, defendants acting individually and collectively have failed to disclose that the cell phones causes biological injury. That's not a future. That's not-- it says, "It causes it." Action number 4, this action is brought for monetary damages, declaratory and equitable relief.

JUSTICE BRISTER: Where is the part about we're not suing for physical injuries?

MR. MAYER: It doesn't exist. The portion that the insurers would like you to believe says that is contained in paragraph 50. I put it in the excerpt so you could see the so-called "disclaimer." The so-called disclaimer says, "Class members and minor children of-- minor class members are identically united in the risk of injury doesn't say they have the same injury." Remember, class action is typicality, not identical to which they are exposed. No individual issues of injury exist. Let alone predominant. Okay? No individual issues exist and they don't predominate but let's turn the page. Top of page 50 intentionally failing to warn. Paragraph 164 -

JUSTICE O'NEILL: But let's, let's go back to that language because it says no individual issues of injury exist because membership is premised only on purchase or release of a headset.

MR. MAYER: Right. Two responses to that. First of all, none of these actions was ever certified. The law in this state is until the claim is certified. There is no class action so what do we have? We have an individual claim. And I will show you in the remaining paragraph, your Honor, that the individual plaintiffs say in plain English, they have been injured and they seek damages. If you turn to page -

JUSTICE HECHT: So, so does that mean-- let me start with there. Does that mean that if individual plaintiffs make broader claims, then they know they can get certified or that they even asked to be certified, the insurer's duty to defend may change depending on what claim is actually go forward.

MR. MAYER: That's a duty to indemnify. Okay. That would be an indemnity question because on the, the question of the duty to defend, your Honor, if a single claim is subject to, to coverage, the insurer has to defend us from the entire suit.

JUSTICE BRISTER: But, but if you, if, if you have-- hypothetically, assume I have different property and bodily injury carriers and I have filed a claim against somebody or I'm sorry, the defendants have different property in bodily injury carriers and I filed a claim but then it said, "I've been injured bodily in property. But I'm only suing for property damage." Well, that can't. There is no potential - there is in - in an-- in a philosophical sense a potential bodily injury claim. I set up and bodily injured but I've also expressly said this suit doesn't include. Now, you wouldn't-- the bodily injured people carry or wouldn't have to cover that then. Would they?

MR. MAYER: If, if you under the eight corners doctrine, your Honor, if it's not been plead, it wouldn't be subject to the eight corners' rule and there'd be no obligation of the defendant. I mean,

the, the, the issue that's difficult and it's one that in the [inaudible] out of the Fifth Circuit that held that "Sub clinical injury is, in fact, is, in fact, is a matter of law." It is ambiguous in the progressive disease context and then, therefore, triggers a duty to defend under, under -

JUSTICE BRISTER: All, all -

MR. MAYER: - Texas Law.

JUSTICE BRISTER: - the Sections you've highlight, then there appear to be numerous here where they say, "Bodily injured, bodily injured, we've had bodily injury. We've been injured." If, in fact, paragraph 50 says-- if we were to construe paragraph 50 to say, "But we're not suing for any of that bodily injury," then, there would be no coverage and you would, you would lose.

MR. MAYER: No. I would not agree with that and the reason is under Texas Law, if the complaint is ambiguous, if it doesn't appear they're-- they're alleging some injury and in some places, it's not clear, the law is if any potential claim allege in the petition -

JUSTICE BRISTER: I agree, but my-- in my hypothetical which is they say, "Over and over, we've been bodily-- we've had bodily injury, bodily and bodily injured," but then if paragraph 50 says, "but this suit does not include any claim for bodily injury, that wouldn't be ambiguous."

MR. MAYER: Well, I, I, I think it would depend on what the allegations are that are disclaimed. I, I would have to -

JUSTICE BRISTER: Assume with, assume with me, my hypothetical that its paragraph 50 says, "We are not suing for bodily injury."

MR. MAYER: But it doesn't say that in this case.

JUSTICE BRISTER: I'm asking you-- is a hypothetical.

MR. MAYER: Okay.

JUSTICE BRISTER: If it said that, then there would be no coverage because if wouldn't, there would be no ambiguity in that. Yes, you're saying had one but you're specifically saying you're not suing.

MR. MAYER: I couldn't agree to it, unless I actually saw the allegations because the reason you have a duty to defend is so that you don't engage in collateral litigation with your insurer at the very time you're trying to defend the claims. Now, let me -

JUSTICE MEDINA: What's yours-- what's your response to the comment that an eight corner analysis is critical to understand that the ultimate question which is what is the relief being sought here?

MR. MAYER: I, I, I agree with that and I think in the, in the Section I've provided to you, if we take a look at paragraph 161 on page 50 as a direct and proximate result of defendants' concealment, now the next word is crucial plaintiffs. The plaintiffs in this lawsuit, if you look at the very first page, are three individuals. That means three individuals are saying in paragraph 161, plaintiffs were exposed to health risk and sustained bodily injuries. Paragraph 161 could not be clear. That tells you that Mr. Penny, Richard Colonel, and Linda Burrel say that they have been injured and they sustained bodily injuries in paragraph 161 under the, the law in this State and the law and virtually every State that sufficient to trigger a duty to defend. I'm not saying indemnified but to defend the case.

JUSTICE WAINWRIGHT: Is the petition used the term "bodily injury" any where in it?

MR. MAYER: Yes. He uses it again in paragraph.

JUSTICE WAINWRIGHT: No, no. Counsel, bodily injury.

MR. MAYER: Bodily injury with a "y?"

JUSTICE WAINWRIGHT: Or injuries.

CHIEF JUSTICE JEFFERSON: As opposed to biological and the sentence that you just read from page 50 -

JUSTICE WAINWRIGHT: And it -

CHIEF JUSTICE JEFFERSON: That's biological.

JUSTICE WAINWRIGHT: You've said biological.

MR. MAYER: Yes, your Honor. I misunderstood.

JUSTICE WAINWRIGHT: And I see you haven't given as the whole petition but I only see biological injuries. Thus two questions, does the petition use the term "bodily injury" or "bodily injuries" anywhere in it?

MR. MAYER: I don't have all of them in front of me. My recollection is that used of variety of terms to indicate injuries, biological health risk, DNA breakage, single and double failure of the blood brain barrier, but they don't use the words bodily injury but under the law obviously.

JUSTICE WAINWRIGHT: Next question. What is a biological injury?

MR. MAYER: A biological injury is among the things that are identified on paragraph 1.

JUSTICE MEDINA: So like you should say it's a bodily injury.

MR. MAYER: Well, I mean, we think the claims are bogus to-- from the get-go and, and as a matter of fact, obviously, we attached in our brief to your Honors that these claims have been resolved primarily with dismissals. So we have successfully defended against these claims.

JUSTICE MEDINA: Can we, can we interpret what a bodily injury is if it is not specifically plead in the complaint?

MR. MAYER: Yes.

JUSTICE MEDINA: [inaudible] offense that you described certainly appeared -

MR. MAYER: [inaudible].

JUSTICE MEDINA: - to be vital.

MR. MAYER: Yeah, under the well-developed rules of, of policy interpretation, the, the rules are that we got to the policies themselves and see what they say is covered. Bodily injury, disease, sickness. All the courts I have looked at this and analyzed it-- the Ninth Circuit, the Fourth Circuit, the Louisiana Courts, Judge Kincaid up in the Northern District of Texas, have all determined, that, using the rules of Texas interpretation, potential covered, these claims stated because the injury to a human cell is in its essence, the fundamental component of the body and in the Cowan case this Court was very clear. Pure emotional distress does not qualify. What does? The Court said, "It has to be an injury or damage to the structure of the human body -

JUSTICE: [inaudible] -

MR. MAYER: - structure of the body ..."

JUSTICE BRISTER: If I were to sue you saying, "Mr. Mayer's argument has turned my hair gray," that would be covered under a duty to defend because it's-- might be, somebody might make think its bodily case.

MR. MAYER: Well, I, I don't know about your hair turning gray because I don't think there's-

JUSTICE BRISTER: Cellular change-

MR. MAYER: A body, but there is a-

JUSTICE BRISTER: Biological change-

MR. MAYER: But there is a fair amount of material that's in the complaint that damaged to the cell itself is an injury to the person. Okay. The cellular dysfunction, the breaking of the chromosomes, the, the complaints are replete with information that this will and do cause

damage to the human being--cancer itself is a, is a-- it's -

JUSTICE BRISTER: Let me ask you--

MR. MAYER: - a cell that is going - what I think is happening is, you're confusing the indemnity issue. We don't know, we don't know whether nearly breaking your DNA is going to lead to a disease.

CHIEF JUSTICE JEFFERSON: Right.

MR. MAYER: We, Nokia, believe it doesn't and we think this claims are frivolous. But that's a way to prove at trial, okay. We are at the point now where there is no proof, there's no record. For example, their big argument is, you know what, these claims aren't covered because all they asked for is headsets, well, that's not -

JUSTICE BRISTER: I'm trying to think, ho-- how far is this going to go with-- the claim was just "I've been scared." You know, using "I'm just scared", I don't say it's changed any cells at all but I'm, I'm just been hearing the plaintiff's attorney saying all this on the television and "I'm just scared to use a cell phone." Well, I mean that going to - is going to cause some biological changes, because fear does that.

MR. MAYER: Well, and

JUSTICE BRISTER: And so is that a bodily injury claim?

MR. MAYER: And-- that's not our case because I think-

JUSTICE BRISTER: - I know, I know -

MR. MAYER: - Okay -

JUSTICE BRISTER: But, but if we're going to say, biological injury is in or out, then the next case is going to be--well, how about mental language this-

MR. MAYER: This ...

JUSTICE BRISTER: - this bade a difference in my hormones and adrenalin and other responses. They were as a physical response to, is that a bodily-

MR. MAYER: But-

JUSTICE BRISTER: - injury too?

MR. MAYER: - but, but let me, let me respond this way. To affirm the Dallas Court of Appeals on this duty to defend case, you do not need to declare under Texas law, that an injury to cell is an indemnified action under the bodily injury portion of the policy. That's what they're trying to get you to say, but that's, you don't need to go there. The only question is-

JUSTICE BRISTER: But if we say it's covered under the duty to defend-

MR. MAYER: It's intentionally covered as what this Court would say, okay.

JUSTICE BRISTER: And that means everything -

MR. MAYER: Well, you'd -

JUSTICE BRISTER: - that means everything -

MR. MAYER: No, you don't know -

JUSTICE: [inaudible]

MR. MAYER: - until proof is adduced at trial. Because what would happen is, in a case like this, not in a collateral action in a cupboard in a case like this, experts would come in and testify. If you look at the, the way these decisions come down in the indemnity contacts, those Courts are ruling on fully developed records. Of experts' testimony on when injury occurs, when the cell is compromised-

JUSTICE O'NEILL: Okay, but what about the argument that if they were seeking compensation for these injuries, that'd be one thing, but to seek preventative measures, indicates that it's not compensatory.

MR. MAYER: Well, first of all, the notion that they're seeking

preventative, is not, is not what the complaints says. Let's look at the damages. Okay. Paragraph 161, is a direct and proximate result defense concealment plaintiff's has sustained biological injuries [inaudible] -

JUSTICE: But were [inaudible] go back to-

MR. MAYER: - what for they asked -

CHIEF JUSTICE JEFFERSON: Would you go back to paragraph 50 and the pleading says, "This is only an economic injury class." Period.

MR. MAYER: No, I don't agree that, that's what is says.

CHIEF JUSTICE JEFFERSON: No individual issue of injury exists. Because membership is premised only upon purchase or lease of the phone without a headset.

MR. MAYER: That's the class allegation, which was not certified and never has been so, ...

JUSTICE O'NEILL: But the next sentence says, "In all respects, individual litigation would identically mirror the class action litigation."

MR. MAYER: Because that's one of the tenants of class certification is that there is, a, there needs to be an, an economy of scale to have this resolved in one proceeding. My point is, is not that the language doesn't exist I admit it does. My point is, you have to read the complaint as a whole. And in this duty to defend case, if there are other claims in this lawsuit. That state-

JUSTICE HECHT: What they are saying -

MR. MAYER: "I, plaintiff have been injured and ..."

JUSTICE HECHT: - they are saying that no matter what else this says, this is all we're asking for, this is all we're claiming.

MR. MAYER: But is doesn't say that. There is no statement that we are not seeking damages. Look at paragraph-

JUSTICE HECHT: But when do individual issues of injury exist? Let alone predominant.

MR. MAYER: Individual-

JUSTICE HECHT: It's a -

MR. MAYER: - issues.

JUSTICE HECHT: - it's premised entirely on purchase, purchase does not harm your brain.

MR. MAYER: Your Honor, if you looked at the remaining provisions of the lawsuit, they are inconsistent. And that's exactly what the Fourth Circuit found and that's exactly what the Ninth Circuit found. That these complaints are inconsistent, in some places they speak of risks, in some places they speak of actual damage. The question is, is there a claim that's asserted that potentially covers, that would potentially be covered and it is. If you look at the battery claim, paragraph 177-178, Defendant's conduct, act and omissions, they've have inflec- inflicted non-consensual touching, exposing them to RFR, which could cause biological injury. Paragraph 180, as a direct and proximate result of the A4, said intentional conduct and omissions because that's a negligence standard, the plaintiffs have sustained repeated biological injuries or harm. They prayed for the following relief. Compensatory damages including, but not limited, to amounts necessary for purchase of a headset, reimbursement, punitive damages, attorney's fees, these are all well-recognized components of cause . Let's look at the headset argument [inaudible] what-

JUSTICE HECHT: If they-- [inaudible] seeking damages for, economic damages for the headset and the other language is not there, would that be [inaudible]?

MR. MAYER: I'm sorry, you Honor, I missed the last part of your

question.

JUSTICE HECHT: And the other language was not there. They were only seeking those damages, would that be, do you think they have a duty to defend that?

MR. MAYER: I, I do, because as, I think, Justice O'Neill. They're seeking damages because they're using the cell phone and they are being injured. That's why they are seeking. This is not a claim were they say, "This cell phone doesn't worked as it's intended. Give me a new one." That's not what this lawsuit's about. Let me say on the headsets, because they've made a big argument that say, "You know what, the best way we can show you that this shouldn't be covered is because all they is seek is headsets." First of all, that's not all they seek and that's clearly belied by the pleadings. But the second point is, they say, "Well, headsets can only mitigate damage", I heard it, I wrote it down as they said it. How did they know that? Has there been any evidence in the record? By anyone that says, the provisions of the headsets can only mitigate damage? That would come out in an indemnity issue. A trial law indemnity. Okay. At this stage, the insurers are telling you, "Headsets can only mitigate damages, therefore, there's no coverage." That's not what the potential of coverage under Texas law means. That means, we wait and see what's developed at trial. Then we make a decision about whether we are going to indemnify this or not. There's been not a writ of evidence submitted any where to say that headsets are only preventative, other than the lawyers standing up here and saying that? And the-

JUSTICE: -[inaudible]-

MR. MAYER: - petitioners themselves don't limit the relief to only headsets.

CHIEF JUSTICE JEFFERSON: There's an MDL proceeding in these cases, what is, what impact does that have on this case [inaudible].

MR. MAYER: Extremely significant and let me explain why. The lawsuit says as your Honors know where MDL up in the end of the Fourth Circuit. The Fourth Circuit in a unanimous decision has spoken on the pending case. The Fourth Circuit said, "We read this complaint under our law, we're the governing Court, we believe it's not perfectly pled but we believe under Maryland law and under the law that would apply, we believe that this states a claim for damages because of bodily injury." The next point that needs to be addressed is, these same insurers were up there making the arguments they're making here. They have, they have lost. When we were in the trial court trying this to Judge David Evans, I can assure you, in the motion that they filed with Judge Evans, they argued at the time they have a positive ruling, from the Fourth Circuit, the District Judge up there, that this ought to be persuasive. They did that with Motorola and they did that with VoiceStream. I apologize, they didn't do it with the Fourth Circuit decision. But the, the governing Court, that is in charge of this proceedings in the Louisiana, because [inaudible] is a Louisiana case obviously. And in the Fourth Circuit have held that under the law that they've been applied to them, they believe there is a duty to defend.

JUSTICE BRISTER: Is that going to be the law applied when the cases are tried in Texas?

MR. MAYER: It would be the law applied when the cases are tried in the jurisdictions where they are because are no cases being tried in Texas. [inaudible]

CHIEF JUSTICE JEFFERSON: Counsel, I believe your time has expired. So we'll hear from you co-Counsel. Thank you.

MR. MAYER: I'm fine.

MR. PERRY: Good morning, your Honors, on behalf of Samsung Electronics, I just like to start by pointing out that Federal Insurance Company in its reply brief has misstated Samsung's position, by saying that "Samsung agrees that the class actions do not allege bodily injury or seek damages because of bodily injury." That's the exact opposite of Samsung's position. Samsung's position is entirely consistent with what Mr. Mayer has argued to the Court and what is in our briefs. But I think that it is significant that the insurance companies are playing fast and loose with our position in this case and I think more importantly they are playing fast and loose with the eight corners rule and really trying to re-- ask this Court to re-write the eight corners rule, which of course, says that "Any uncertainty must be resolved in favor of the duty to defend and I think the discussion about paragraph 50 in the Pinney complaint and the civil battery claim in that same complaint highlight that there is uncertainty in these claims." On the one hand, that paragraph 50 certainly does say, "No individual issues of injury." But then on the same complaint has a civil battery claim, which is based-

JUSTICE BRISTER: Yeah but we're really not really uncertain about that. I mean this people who want to bring a class, they - these are not individual suits for headphones, otherwise, they wouldn't have good lawyers like you and Mr. Mayer, that the ones that they have and that - the other folks have to-- they wouldn't hire you and Mr. Mayer to defend them. That is because the individual [inaudible]. This is a class claim. And you can't bring bodily injury class claims under almost any jurisdiction. So really, we're not confused about what they're doing. They've got to allege only something. That's common across everybody. Are there's no fund in bringing the suit?

MR. PERRY: They, that, that is what logic would dictate, your Honor. But these are not Texas' lawsuits and that's not what in fact these complaints allege. The complaint alleges civil battery, it's in there. It's clear as day maybe improper. It maybe that it gets thrown out and maybe that all these cases got thrown out. But we're talking from the perspective of an insured who is sued for civil battery says, "This civil battery is a bodily injury allegation. And you've got to defend." It's just the duty to defend, we're not saying that, these suits are entitled to survive, or if they do, there, there would be coverage indemnity, indemnity coverage. There is uncertainty and there is further uncertainty in terms of the relief that's requested. The insurance company makes a big point of saying, "Well, all of these, you know these classes include future purchasers. Well, the claim for relief seeks compensatory damages of paying money. Obviously that relief cannot apply to future purchases-

CHIEF JUSTICE JEFFERSON: Counsel excuse me, I just want to announce, Justice Wainwright just isn't feeling well but he will participate fully in this argument and, and in the post-submission conference.

MR. PERRY: Thank-- Thank you, your Honor. The point on the damages is, they're saying that, there's, we've got future purchasers in here and everything is identical with the future purchasers. That the class plaintiff's claim. But the class' representatives are seeking compensation in terms of money damages. That obviously can't be awarded or-- of for any future purchaser. So there isn't a total commonality and they're not seeking the same relief. If these complaints are to have any logic to them at all, it's going to be to be that they're seeking money for the people who have been exposed and have suffered this biological injury on the one hand, and they want to make sure that

the future purchasers are given an actual headset. And we're not saying that giving a future purchaser a headset, is bodily, is, is damages because of bodily injury. We're saying that this classes consists primarily as alleged of people who have used the headsets, their allegations that they've actually suffered this injury and they want money compensation for that injury, they're clever.

JUSTICE HECHT: That may be true of some of them but the difficulty that we're having here is, is that, it seems it apply-- to just be based on the purchaser. Whether you used it as the, as the petitioners say, " We took it out of the box or anything. And it's difficult to see how that could be connected to biological injury, bodily injury or anything.

MR. PERRY: But they say it at one point, your Honor. But in another point, they say they have been battered and they are entitled to compensatory damages for the battery. So we're back and we would submit to this problem of-- it's confusing, it's unclear, and under the eight corners rule for the duty to defend only, the policyholder gets the benefit of the doubt. I think I've used up my time.

COUNSEL: Your Honor, I repre-, your Honor, if I represent say it on one-word the third insured in this, this matter. I do want to make one point that it is a little different perhaps with my client from the other insured and that is the insurance company has raised the issue of exclusions in their briefs although that's the way you argued it. Those exclusions were not raised either in pleadings or in the summary judgment response as to say to one group. So if, if that becomes an issue in the case we are perhaps in a slightly different position. However, the book of the case, we are in the exact same positions, the other insured, this is a duty to defend-- not an indemnity case.

JUSTICE HECHT: You mean the business risk exclusions that ?

COUNSEL: If the Court or any other exclusions. None -

JUSTICE: [inaudible]

COUNSEL: - none were raised in our, in our case. And this is an individual-currently an individual action, there has been no class, under Texas law, we treat it as an individual place-- case until the class is certified. A class may never be certified the insurance companies, should be the one defending against the certification. There are claims-

JUSTICE HECHT: What claims the state is of that process?

COUNSEL: Your Honor, in this, it's outside the record but there is one case remaining, it is currently pending and there is a motion to remand that was argued recently and of State Court that is pending.

JUSTICE HECHT: From the MDL?

COUNSEL: Actually, it has been remanded back to the District Court of Pennsylvania, and it's the Federal Judge of Pennsylvania who is currently making that determination.

CHIEF JUSTICE JEFFERSON: Was that Texas District Court case appealed?

COUNSEL: Not to my knowledge, your Honor. Here we have damages that are claimed compensatory damages including but not limited to-- and by the way, they don't ask for headsets, they asked for damages based upon the cost of headsets. They're asking for money they are simply using that as one major, but they are not excluding that, they are not limiting that to the compensatory damages that they are seeking in this case. I also would point out accounts of opposing counsel's reference, the New York case as being the, the first decision. If we look at the New York case it's one paragraph, with no analysis, no citation. The case is that, haven't analyzed the issue. The Louisiana

Court, Fourth Circuit and Ninth Circuit Judge Kincaid have all come to the same conclusion that there is a duty to defend. We can argue on issues of indemnity later. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, counsel.

COUNSEL: Just to quickly close with, one verse quickly.

CHIEF JUSTICE JEFFERSON: Certainly.

COUNSEL: This issue had been looked at by seven justices on a Dallas Court of Appeals and a unanimous three panel unanimous. That a duty to defend exists. We have three federal judges and the Fourth Circuit who are handling this case and overseeing the MDL and we have three Federal Judges in the Ninth Circuit. I would submit to your Honors under the standard in Texas that a reasonable interpretation could be made to provide coverage on a potential claim you provide coverage on a duty to defend, that in itself, 15 judges stated in federal and I have looked at this and determined that coverage exists to [inaudible] of the issue. Thank you.

CHIEF JUSTICE JEFFERSON: Mr. McMains as you're approaching, the civil battery count-

REBUTTAL ARGUMENT OF RUSSELL H. MCMAINS ON BEHALF OF PETITIONER

MR. MCMAINS: Yes, your Honor-

CHIEF JUSTICE JEFFERSON: I've mentioned that briefly, but if that were, let's take out the rest of the allegations and, and look at that alone, wouldn't that be a the cause of action asserted by the plaintiffs for bodily injury from use of this products -

MR. MCMAINS: - I don't believe so, your Honor because I think that the battery by definition, given the nature of the claim and the factual allegation is not an actu-

CHIEF JUSTICE JEFFERSON: It's not an accident?

MR. MCMAINS: It's not an accident. An accident which is required under the policies, which is of course what this, what the, policy language had covered language specifically says that it must be resulting from an occurrence which, I am to include an accident. This Court in Lamar Homes indicated that an accident does not include any kind of intentional [inaudible].

CHIEF JUSTICE JEFFERSON: And this is part of a summary judgment motion?

MR. MCMAINS: I, I think it was raised at, at some point in the summary judgment, that obviously is not what the critical issue was because actually the battery stuff kind of an after the fact anyway, it was not mentioned by the Dallas Court of Appeals either.

JUSTICE O'NEILL: Let me ask you this-

MR. MCMAINS: In terms of

JUSTICE O'NEILL: If, if you have a, a petition, just, just don't look at this one. Let's just say in the abstract. And the petition says, "We are suing for bodily injury or compensatory damages, we want money damages, and then in another paragraph it says, "We disclaim any, any claim or personal injury money damages, I mean in-- for bodily injury."'

MR. MCMAINS: Yes.

JUSTICE O'NEILL: Duty to defend?

MR. MCMAINS: I don't think so, your Honor.

JUSTICE O'NEILL: [inaudible]

MR. MCMAINS: Because I think it-

JUSTICE O'NEILL: [inaudible]-

MR. MCMAINS: I think essentially that is a disclaimer, is in fact an abandonment of any prior allegations. I don't think the notion is that we're, that, the obligation or the way that you construed the eight corners rule means that somehow that you fix something when somebody has pled himself out of Court. Actually, what the other side has really asked for and what the effectively, what the Court of Appeals in Dallas has held, is that the eight corners rule is now being converted to the seven corners rule and that is we leave out the corner of the, of the class certification allegations in the petition which claim that everybody has the identical injury that there are no individual issues of injury, that the injury is economic. All of which are necessary because this is a class action case. The duty to defend is the duty to defend this class action complaint. The argument, argument that if there is any individual potentially in the class that might have a claim for bodily injury even though it's not asserted as a part of the class action, knowing fully well that they couldn't possibly get it certified under the US Supreme Court's decision [inaudible] and under this Court's decision in Southwest versus Bernal and all of the other cases, that basically say personal injury claims are not appropriate for class certification. So you must-

JUSTICE: [inaudible]

MR. MCMAINS: - look at the fact that this is in fact a class certifi-this, it's not a question of whet-- it's been certified but these are punitive class members, you cannot ignore the allegations of the petitioned because the allegations of the petitioned are, every has suffered the identical injury whether they are present, past or future purchasers or lessees of the phone.

JUSTICE JOHNSON: But, but the pleadings here cite, the plaintiffs are exposed, and other similar situa-situated were exposed to health risk and sustained biological injuries. It seems like the argument you're making would go to non-certification, to refusing to certify as opposed to the duty to defend your insurer.

MR. MCMAINS: No, the question is, if-- do we have a duty to defend this class complaint which has in it the allegations that we don't have any individualized injury. In the case-

JUSTICE JOHNSON: Well, but it also has an allegation in there that they have sustained biological injuries and [inaudible] -

MR. MCMAINS: The entire reasoning of the Dallas Court of Appeals was to interpret that the, the cause of damages because of language. In the most strange way, in the sense of saying is this a motivating factor for why they brought the suit. The potential, is the potential for biological injury somehow a motivating fact-- for bringing of the suit and that makes damages [inaudible]

JUSTICE JOHNSON: - and that's [inaudible]

MR. MCMAINS: Motivating factor is not the issue in the [inaudible] language, it never has been. We'll be [inaudible]

JUSTICE: -[inaudible]

MR. MCMAINS: -common sense definition-

JUSTICE JOHNSON: Motivating factor is not there, then why do we want to say the motivating factor in this lawsuit is a class action so we don't want to consider this other allegations-

MR. MCMAINS: [inaudible]

JUSTICE JOHNSON: The motivating factor is that, and we just look at the language does in fact double back in, in a, a [inaudible]-

MR. MCMAINS: When, when you get down to the bottom line of the

language is, we want a headset. Which is, we want some kind of a potentially preventative measure or preventually-- potentially palliative measure. We want some kind of relief. They're not compensatory damages. Under this Court's opinions, in a, in a [inaudible] and case the a, the critical interpretation and actually almost genesis, of the a, of the eight corners rule, the Court, ha- has basically indicated that you must there must be a causal relationship between the damages sought.

CHIEF JUSTICE JEFFERSON: Under what theory would they get, you know, punitive damages for this cause of action for an economic injury?

MR. MCMAINS: They're claiming of course, they have some various allegations that are related to consumer protection claims of fraud claims, fraud-like claims. In terms of misrepresentation claims. Serious question may arise as to whether any of that would be the type of thing whenever be covered in an indemnity context, but the point is that regardless, the only compensatory damages that they seek are the cost of the headset and remember that the people that are in this class include and specifically include not only people who have never used the phone or never purchased the phone at all.

JUSTICE MEDINA: Well, understood-- hold on a-- I understood Mr. Perry, I believe, the Counsel for, for Samsung made a statement that the plaintiff's are seeking money for past damages and the cost [inaudible]-

MR. MCMAINS: They are seeking past damages for instance for people who already have a headset. They want their money back.

JUSTICE GREEN: But they're also asking-

MR. MCMAINS: [inaudible]-

JUSTICE GREEN: -headsets for damages beyond the headset though, are they not? I mean-

MR. MCMAINS: Well, primarily attorney's fees and-

JUSTICE GREEN: I mean it says--

MR. MCMAINS: - cost.

JUSTICE GREEN: - compensatory. They say compensatory damages including but not limited to [inaudible]-

MR. MCMAINS: Yes, your Honor but this Court has consistently held and the lower court had consistently held that you don't get there. And I think that the National Merchant's held you don't get there based on a prayer for general relief or some kind of generalized pleading. If you want claims for personal injury damages, you need to plead them. Those are special damages that need to need to plead. And they 're not pled in this case. And the suggestion that some of the Courts may had looked about-- looked at this issue have held to the contrary or we, we would be holding to the contrary, you know it's a fact that the Audiovox case that we talked about Zurich which basically is a determination that there is no claim for bodily injury in for of this lawsuits that were involved in this case in connection with the Audiovox and we covered litigation there. But the issue of what should be the rule of eight corners in a class action petition for a duty to defend analysis is an issue for the Texas Court and there was never been any suggestion that is any choice of law issues or whatsoever involved in this case. It's a question of Texas Insurance coverage. And we believe that question should be basically be decided the way the trial court decided. Thank you.

JUSTICE O'NEILL: Mr. Knight, if this case goes to trial, on these pleadings, sort of class action, what that trial going to look-like?

MR. KNIGHT: I have no idea.

JUSTICE O'NEILL: Well, ...

MR. MCMAINS: - I mean-

JUSTICE O'NEILL: And that's the point, I mean, really isn't that the point. I mean because it, it could a trial under this pleadings as experts talking about whether there's a bodily injury or not at, at the biological cell level and then what would prevent the plaintiffs from saying, "You know what, we don't want headsets, we really want damages or injury to us?" There's nothing that will preclude them from doing that in the petition since they'd probably alleged contemporary-- compensatory damages.

MR. MCMAINS: Your Honor, that's the Cowan case. That's exactly the argument that the insurer made in Cowan and this Court reject it. The, the argument there was what we pleaded that we have severe mental anguish. And that's clearly a broad enough pleading to allow evidence at trial of physical manifestation of that, damage, which would invoke coverage. But the point that this Court said is, the point is it doesn't matter if, if the allegations in the complaint are broad enough to potentially allow that evidence what matters is what they said. And the complaint in Cowan didn't say there was a physical manifestation so this Court said, "There's no duty to defend that case." That's exactly, that enters, to me exactly that the [inaudible] your Honor.

JUSTICE O'NEILL: Well, it strikes me that it, whether emotional injury physically manifest is a different question from whether cellular injury is bodily injury.

MR. MCMAINS: It may be a different question but procedurally, it's the same issue. The, I understood you just say aren't this allegations broad enough that if a case went to trial that the plaintiffs might get to trial and say-- and put on evidence of, of, of physical injury and ask the jury to quantify that and award damages the cause of some kind of bodily injury.

JUSTICE: [inaudible] -

MR. MCMAINS: Well, that's-

CHIEF JUSTICE JEFFERSON: - in the summary judgment record that on, on the civil battery claim there that you pleaded this was intentional and not an accident and therefore not covered?

MR. MCMAINS: I don't know if we pleaded it, your Honor. I think it is, that is the case as a matter of law and you will see in the summary judgment record that in an effort to invoke the coverage, the manufacturer's [inaudible] how about this bodily-- I mean this battery claim and that we said as we are saying now well, that can't possibly invoke coverage and I think the Court in Lamar Homes made that even clearer. And I know that, my red light is on, but if I could, if I could close with-

CHIEF JUSTICE JEFFERSON: Would you conclude

MR. MCMAINS: - one related to that. That the-- to me the fact that the manufacturers have to resort to the allegations in the battery count. Is, is, is the best evidence of, of the fact that, that rest of the pleading because battery to me is just clearly out on, on duty to defend just read Lamar Homes. I-- is, is evidence to me that they don't have anything else. And, and the argument that well, in one place they, they exclude all physical injuries which I think is pretty clear and the other place they don't and that's battery, the, the idea that that should somehow require us to cover this case and totally inappropriate here if I could just read, there, one sentence, "The plaintiffs themselves in responding to these manufacturer's motions to dismiss the MDL proceedings this very plaintiff's ..."

JUSTICE O'NEILL: Well, we don't look that.

MR. MCMAINS: Well, I think you should, your Honor.

JUSTICE O'NEILL: Well, but we don't. It's clear we don't, we look at the pleading.

MR. MCMAINS: That this is, this is the plaintiffs themselves saying what they're pleading means-

JUSTICE O'NEILL: We don't do that-

MR. MCMAINS: It's not evidence, [inaudible]-

JUSTICE O'NEILL: You'd have to agree. We don't look at that under our law.

MR. MCMAINS: I, I don't agree, your Honor. That's one of the point we raised, the Court of Appeals didn't deal with it at all. But, but, but it, why wouldn't we if we, if, if, if, if we're trying to figure out if, if the question is, "What are the plaintiff's alleging?" Now, what is the real facts? Not all of these pleadings true or not? If the question is, "What are they alleging?" why wouldn't we look to another pleading by the plaintiff's themselves that says, "Here's what we are alleging." If the Court would indulge because you here's what the plaintiffs say. Plaintiffs are not seeking compensation for any personal injury suffered as a result of the use of cell phones, rather their [inaudible] injuries are limited to the defective [inaudible] themselves, that's the plaintiffs own words about what they're alleging, so the idea that we have to defend this case cause they're alleging something else to me is, is remarkable.

CHIEF JUSTICE JEFFERSON: Are there-

JUSTICE JOHNSON: Where, where was that statement that you just read us?

MR. MCMAINS: That, your Honor appeared in the, in the MDL proceedings when the manufacturers moved to dismiss the complaints. They said, they said to the Court, "Here's what the complaints alleged and you should dismiss them." The plaintiffs came in and said, "No, no that's not what we're alleging, let me tell you what we're alleging", and they specifically said, we are not alleged, what I just read.

JUSTICE JOHNSON: So under that theory may be these pleadings are fraudulent or false.

MR. MCMAINS: I, I--

JUSTICE JOHNSON: Doesn't that, but doesn't your policy say even if the pleadings are false or fraudulent, we defend.

MR. MCMAINS: Some of the policy say that but I don't think that what's it means. I think it, it ties everything together, it makes it consistent. I think you can point to a phrase here they are like the Court of Appeals didn't said. Well, may be they're saying they sustained this amorphous concept of biological injury. May be they sustained it. But if you put it all together I think it is crystal clear that they are not seeking damages [inaudible] that whatever that injury may be.

JUSTICE: The statement you read is in our record?

MR. MCMAINS: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsels. And the cause, all three are submitted and the Court, will take a brief recess.

THE COURT MARSHAL: Rise

2008 WL 2746479 (Tex.)