

HEAR YE, HEAR YE:

The Northern District of California Concludes that Complaint Potentially Covers Hearing Loss Caused by Use of Bluetooth Headsets, Even Though the Complaint Did Not Seek Damages Because of Bodily Injury

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The United States District Court for the Northern District of California recently denied an insurer's motion to dismiss, reasoning that class action claimants potentially sought damages because of bodily injury, despite the fact that the claimants' complaints . . . did not seek damages for physical injury." *Plantronics, Inc. v. American Home Assurance Co.*, No. C 07-6038 PVT, 2008 U.S. Dist. LEXIS 88921 at * 4 (N.D. Cal. Oct. 20, 2008).

In the underlying actions, the class action claimants' allegations arose out of "Plantronics' marketing, manufacture, and distribution of 'Bluetooth Headsets.'" *Plantronics*, 2008 U.S. Dist. LEXIS 88921 at *4. Specifically, the claimants asserted that the Bluetooth Headsets were defectively designed and unfairly marketed, constituting a breach of warranty. *Id.* The claimants sought to recover their Bluetooth Headsets' purchase price. *Id.*

Although the claimants contended that Bluetooth Headsets can cause noise-induced hearing loss ("NIHL"), and that the packaging lacked any warning of such, they did not seek damages because of physical injury. *Id.* Accordingly, American Home Assurance Company ("American Home") filed a Motion to Dismiss Plantronics, Inc.'s ("Plantronics") suit for a declaration of coverage under a commercial general liability policy American Home issued to Plantronics. *See id.* at *2-5.

Under California law, facts extrinsic to those alleged in the complaint can both verify and overcome an insurer's duty to defend. *Id.* at *3. Even though the claimants expressly alleged that use of Bluetooth Headsets can cause NIHL, their complaints were devoid of allegations that any of them actually suffered NIHL. *Id.* at *5-6.

Reasoning that NIHL "easily fits within the [p]olicy's definition of 'bodily injury,'" the court concluded that American Home was required to defend Plantronics against the underlying class action suits because any of the claimants could easily "amend his or her complaint at any time to allege that he or she has suffered damages due to having suffered [NIHL] as a result of using the Bluetooth Headsets they purchased." *Id.* at *6-7.

In reaching its conclusion, the court rationalized that because an insurer's duty to defend can be triggered by extrinsic facts, the underlying class action complaints alone were insufficient to "form the basis for a finding of *no* duty to defend in the context of a motion to dismiss." *Id.* at *7 (emphasis in original). Plantronics was not required to submit extrinsic evidence in response to a motion to dismiss. *Id.* at *8. The court found that the absence of such extrinsic evidence did not create a presumption it did not exist at all. Thus, the court concluded that the underlying class action complaints potentially sought damages because of physical injury, and denied American Home's motion to dismiss. *Id.*

The recent *Plantronics* decision is significant because it expands an insurer's duty to defend to include any allegation that claimants could potentially make based on the facts set forth in their complaint, even if the claimants do not seek to recover the kind of damages actually covered.

Moreover, this case is also significant in light of the recent trilogy of decisions rendered by the Texas Supreme Court addressing duty to defend issues in the context of alleged "biological injury" or "biological effects" arising from the use of cell phones. *See Federal Ins. Co. v. Samsung Electronics America*, No. 06-1040,

2008 WL 4000812 (Tex. Aug. 29, 2008); *Trinity Universal Ins. Co. v. Cellular One Group*, No. 07-0140, 2008 WL 4000811 (Tex. Aug. 29, 2008); *Zurich American Ins. Co. v. Nokia, Inc.*, No. 06-1030, 2008 WL 3991183 (Tex. Aug. 29, 2008). Cozen O'Connor continues to monitor this issue nationally and advise clients accordingly.

For a further analysis of the latest bodily injury claims insurers currently encounter, including those resulting from use of modern technology and exposure to such products, please contact Joe Bermudez, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office.