Northern Insurance: Coverage for Preventative Measures in Cell Phone Case

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When the plaintiffs in a products liability or mass tort case seek monetary damages for their injuries, the claim is within the scope of the defendant’s comprehensive general liability coverage for “bodily injury” and “property damage.” If the plaintiffs instead seek injunctive relief requiring the defendant to implement, for instance, medical monitoring, consumer education programs, the removal of a product from the market, a recall or modification of products already sold, or remediation of contaminated real or personal property, the defendant’s insurer may deny coverage, reasoning that the relief requested does not constitute a claim for bodily injury or property damage, but rather is purely preventative in nature or relates to harms that have not yet occurred.

In *Northern Insurance Co. of New York v. Baltimore Business Communications, Inc.*, No. 02-1358, 2003 WL 21404703 (4th Cir. June 19, 2003), the United States Court of Appeals for the Fourth Circuit rejected such arguments and ordered an insurer to pay defense costs for a case in which the plaintiffs alleged they were exposed to dangerous levels of radiation emitted by cell phones. The Fourth Circuit rejected the insurance company’s assertion that the requested relief—the cost of purchasing headsets for each class members—sought merely to prevent future injuries, placing the claim outside the scope of bodily injury coverage. The court’s decision was based on the finding that the plaintiffs’ exposure to radiation caused bodily injury at the “cellular level.”

*Northern Insurance*’s determinations with respect to bodily injury are consistent with recent cases which broadly define the scope of liability coverage for bodily injury and property damage, such as *American Alliance Insurance Co. v. Jencraft Corp.*, 21 F. Supp. 2d 485 (D.N.J. 1998). *Northern Insurance* and these earlier cases provide support to those seeking coverage...
for complaints demanding injunctive relief, at least in the context of the duty to defend.

I. BODILY INJURY AT THE CELLULAR LEVEL—NORTHERN INSURANCE

The plaintiffs in the class action Pinney v. Nokia, Inc. alleged that cell phones manufactured and distributed by the defendants emitted dangerous levels of radiation. The Pinney complaint alleged causes of action for failure to warn, breach of implied warranties, negligence, fraud, and civil conspiracy. See Northern Insurance, 2003 WL 21404703, at *1. On each cause of action, the plaintiffs requested relief in the form of “compensatory damages including but not limited to amounts necessary to purchase a [cell phone] headset . . . for each class member Id. (alterations in original).

Defendant Baltimore Business Communications requested that its liability carrier, Northern, pay defense and indemnity costs in the suit. Northern denied the request and filed a declaratory judgment action seeking a determination that it was not obliged to pay Baltimore Business’ costs. The district court adopted Northern’s position, finding that the Northern policies only covered actions for “damages because of bodily injury,” and that no such injury was alleged in Pinney “because the Complaint merely sought cell phone headsets to prevent future injuries.” Id. (emphasis added).

On appeal, the Fourth Circuit confirmed that Northern was obligated only to “pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury,’” and to defend suits seeking those damages. Id. at *3 (emphasis in original). Unlike the district court, however, the appeals court found that the Pinney plaintiffs’ complaint alleged damages within the scope of the policy.

First, the plaintiffs identified present bodily injury by specifically alleging that the defendants “manufactured, supplied, promoted, sold, leased, and provided service for [cell phones] when they knew or should have known that their products generate and emit radio frequency radiation . . . that causes an adverse cellular reaction and/or cellular dysfunction through its adverse health effect[s] on the body.” Those changes,
according to the court, were “bodily injury” in the scope of the Northern policies:

[I]n alleging that persons using cell phones without headsets suffer from the radiation emitted by such phones, the Complaint alleges a “bodily injury.” The Maryland courts have uniformly held that bodily injuries include those that occur at the minute, cellular level. See, e.g., Chantel Assoc. v. Mt. Vernon Fire Ins. Co., 656 A.2d 779, 884 (Md. 1995) (concluding that lead exposure causing direct and indirect damage to cells, tissues, and organs constitutes “bodily injury”); see also Lloyd E. Mitchell, Inc. v. Md. Cas. Co., 595 A.2d 469, 476-78 (Md. 1991) (holding that allegation involving cellular-level bodily changes occurring after asbestos exposure constitutes “bodily injury”). In sum, in claiming that the Pinney plaintiffs suffered harm from radiation, the complaint alleges a “bodily injury,” as contemplated by the Policy. Id. at *4.

Next, the court found that the request for headsets constituted “damages because of” bodily injury, explaining as follows:

On the face of the Complaint, the Pinney plaintiffs are seeking unspecified compensatory damages flowing from their bodily injuries, i.e., harm suffered from radiation. Baltimore Business could therefore be potentially liable to the Pinney plaintiffs for any and all compensatory damages recoverable under Maryland law, including damages for already existing bodily injuries. Id.

Finally, the court found that extrinsic evidence offered by the insurer failed to demonstrate the plaintiffs wanted headsets only to cure an alleged product defect. A legal memorandum submitted by the plaintiffs indicated they were “not seeking compensation for any personal injury suffered as a result of the use of cell phones,” but rather wanted to recover for “pecuniary injuries . . . limited to the defective product itself.” Id. at *5. The document was not, however, a binding judicial admission. Furthermore, a different portion of the memorandum stated that the plaintiffs wanted headsets “designed to eliminate the present and existing biological injury to which the defendants have exposed users of their products and services,” reasserting the complaint’s allegations of personal injury. Id.

Northern Insurance, by recognizing minor biological changes as bodily injury, broadly defines the scope of coverage available with comprehensive general liability policies. The court’s analysis allowed it to find a duty to defend in a case seeking injunctive relief that could instead have been
viewed as purely preventative in nature. The finding of coverage in *Northern Insurance* is consistent with recent cases involving injunctive relief in the property damage context.

II. JENCRAFT

*American Alliance Insurance Co. v. Jencraft Corp.*, 21 F. Supp. 2d 485 (D.N.J. 1998), is another example of an expansive reading of the scope of coverage for property damage and bodily injury in the context of the duty to defend. The *Jencraft* court ordered insurers to pay defense costs in several suits against a manufacturer of window blinds, finding that the mere suggestion that remediation or abatement costs would be incurred in the future was sufficient to support the duty to defend.

In some of the suits, covered property damage was clearly present because the plaintiffs sought reimbursement for remediation costs and property devaluation attributable to the escape of lead from the blinds, contaminating furniture and other items inside the plaintiffs' homes. The insurers obviously had a duty to defend in these cases, because similar cases involving lead paint and asbestos insulation found coverage available under those circumstances.

In the remaining cases, the plaintiffs primarily requested injunctive relief in the form of an order removing lead-containing window blinds from the market, and requiring the manufacturer to reimburse the purchasers of the blinds that had already been sold. The plaintiffs did not mention lead decontamination costs as a measure of damages. They did, however, request “restitution” and “such other relief as the court deems just and proper.” Therefore, the court found that it was likely that remediation costs would become an issue in the future, and as a result, ordered Jencraft's insurer to defend the company.

III. OTHER PROPERTY DAMAGE CASES

*Jencraft* is one of the more expansive cases considering the scope of coverage for property damage, but courts have identified property damage in other situations where the relief requested by the plaintiffs was injunctive or declaratory. These cases, relying on analogy to the body of case law which holds that coverage is available for the cost of environmental cleanup work, identify property damage where hazardous substances like lead and
asbestos escape from materials such as paint and insulation, contaminating a room, a building, or personal property. Some courts also recognize the cost of preventing a release, or removing the material at issue, as costs for damage to property, even when no bodily injury has occurred. The extent of remediation costs or property devaluation attributable to the presence of the substance may be a measure of damages, regardless of the form the request for relief takes.

A. Release of Contaminants

When hazardous substances such as lead or asbestos are released from materials that contain them, such as paint or insulation, in a way that creates a health risk, the costs associated with addressing or preventing the problem are then covered costs for property damage. See, e.g., *Town of Hooksett v. W.R. Grace & Co.*, 617 F. Supp. 125 (D.N.H. 1984) (holding, in a tort case, that an injury to property actionable in negligence or strict liability occurred when asbestos fibers escaped from insulation, contaminating curtains, walls, and carpets in schools and creating a safety hazard); *Lac d'Amiante du Quebec v. Amer. Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1995) (relying on *Hooksett* for the proposition that asbestos causes continuous and progressive property damage); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 615 N.W. 2d 819 (Minn. 2000) (holding that direct physical property damage covered by a property policy was present where asbestos fibers were released into the air inside apartment buildings).

Covered property damage may be present even if the concentration of contaminants does not reach regulated or unreasonably dangerous levels. See, e.g., Celotex Corp. v. AIU Ins. Co., 196 B.R. 973, 1008 (M.D. Fla. 1996); United States Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226 (Ill. Ct. App. 1995). Contra. Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002) (denying recovery of asbestos removal costs under a first-party property insurance policy, where the asbestos had not been released to an extent that made the insured buildings unusable).

Some courts have stated that, at least arguably, the mere presence of asbestos-containing materials that may be released in the future constitutes property damage within the scope of comprehensive general liability coverage. See Mayor & Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070, 1099 (Md. Ct. App. 2002); United States Gypsum, 643 N.E.2d at 1239. Other courts, however, explain that the existence of nonfriable asbestos or intact lead paint is not property damage, at least under first-party property insurance policies. See, e.g., Yale Univ. v. Cigna Ins. Co., 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (property policy); Great N. Ins. Co. v. Benjamin Franklin Fed. Savings & Loan Ass'n, 793 F. Supp. 259 (D. Or. 1990) (denying recovery under a property policy of the cost of removing nonfriable asbestos from a building); Pirie v. Fed. Ins. Co., 696 N.E.2d 553 (Mass. Ct. App. 1998) (denying homeowners’ coverage for lead paint remediation ordered by a local health department, where the lead was not escaping from the paint).

It is sometimes suggested that government laws, regulations, and orders requiring removal, containment, or other preventative measures, even in the absence of a present threat to human health, helps to support a finding of property damage. See, e.g., Celotex, 196 B.R. at 1009; United States Gypsum, 643 N.E.2d at 1236, 1255. In Owens-Illinois, Inc. v. United Insurance Co., 650 A.2d 974, 995 (N.J. 1994), however, the New Jersey Supreme Court noted that application of the continuous trigger theory in property damage cases is more problematic than in bodily injury cases, because “the ‘property damage’ may be attributable only to third-party intervention, as in the form of a government order to rip out material previously thought not to be defective.” Some courts therefore find that a legal requirement that, for example, asbestos must be removed, is not property damage unless it is accompanied by a physical release of the substance or a present health threat. See, e.g., Stonewall Ins. Co. v. Asbestos
B. Remediation Costs

In asbestos property damage and lead paint cases, remediation and abatement costs are recognized as covered claims stemming from property damage. These costs, or the extent of property devaluation attributable to the presence of those materials, are a measure of injury even where no bodily injury has yet occurred.

For example, the United States District Court for the District of New Jersey, in NL Industries, Inc. v. Certain Underwriters at Lloyd’s, 926 F. Supp. 446 (D.N.J. 1996), found that lead paint abatement costs constituted covered property damage sufficient to support a duty to defend on the part of a paint manufacturer’s insurer. The insurer asserted unsuccessfully that there was no coverage for one of the underlying suits, brought by schools and local governments, because “the presence of lead based paint in the various school buildings owned by petitioner represents a potential hazard to the children who are students at these schools” and therefore sought “the reimbursement or payment for abatement expenses taken or to be taken to prevent injury or damage that has yet to occur.”

The court found that it was unnecessary to interpret the term “bodily injury” as including potential injuries, because the abatement costs associated with the removal of the lead paint constituted property damage under the policies. The court explained “The lead paint covering the schools in Orleans Parish is like graffiti: Both reduce the value of the property by their mere existence and require an expenditure to be removed. Just as graffiti undoubtedly qualifies as property damage, so must the lead paint damage at issue here.”

Similarly, in Sherwin Williams Co. v. Certain Underwriters at Lloyd’s, 813 F. Supp. 576, 586-87 (N.D. Ohio 1993), the United States District Court for the Northern District of Ohio held that a paint manufacturers’ insurers had a duty to defend it from claims for recovery of lead paint abatement costs, even where no personal injury to the building occupants was alleged. Relying on several cases involving environmental remediation costs, the court found that property damage encompasses harm that necessitates remedial steps for the safety of the public.
In *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 627 (2d Cir. 1993), the Second Circuit found that property damage occurred when asbestos was installed in buildings. Although the extent of property damage is a measure of damages, not an injury in itself, the court rejected the insurer’s argument that the devaluation did not relate to a physical change in the property, explaining,

> Not only common sense but the underlying lawsuits belie these specious arguments. Building owners seek to remedy conditions directly concerning their structures either by removing or encapsulating asbestos. In making such changes, the owners will affect the buildings’ market values. The damage that building owners are seeking to ‘undo’ is not the fact that they discovered asbestos, but the fact of its incorporation in their buildings.

It should be stressed, however, that although diminution in property value is a measure of damage, it is not in itself property damage. See, e.g., *Stonewall*, 73 F.3d at 1178; *United States Gypsum*, 643 N.E.2d at 1254-55; *Leafland Group II v. Montgomery Towers Ltd. P’ship*, 881 P.2d 26 (N.M. 1994) (property policy). The same is sometimes said of remediation costs. See *Stonewall*, 73 F.3d at 1208-09.

### C. Monitoring Costs

In *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1208-09 (2d Cir. 1995), the underlying plaintiffs sought injunctive relief requiring monitoring of asbestos levels in buildings, restitution of monitoring and remediation costs, and a declaratory judgment awarding future monitoring costs. The Second Circuit found that these were covered costs for property damage resulting from the deterioration and release of asbestos fibers from materials installed in the plaintiffs’ buildings. The court rejected the proposition that the costs related solely to potential future injuries or government-imposed orders.

### IV. NO ALLEGATION OF MONETARY DAMAGES

Although the cases mentioned above take an expansive view of the availability of coverage, a court may still deny coverage when the underlying plaintiffs do not request monetary damages. In *Admiral Insurance*
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Co. v. North American Arms, Inc., No. E032304, 2003 WL 2158826 (Cal. Ct. App. July 11, 2003), a California appeals court found that an insurer did not have a duty to defend gun manufacturers and distributors from complaints of public nuisance, deceptive advertising, and unlawful business practices, seeking injunctive and declaratory relief requiring the defendants to conduct business in a way that would better serve the public interest.

The court found first, that there was no potential for covered damages, that is, a monetary loss due to bodily injury or property damage. Although the plaintiffs could have alleged an action in negligence for damages they did not. It would be mere speculation to assume they would pursue such a claim in the future.

Second, although the County of Los Angeles, one of the underlying plaintiffs, sued on its own behalf, it did not specify an amount of damages or even say that it sought them at all. Nor did the county allege any of its own property, as opposed to that of citizens, was damaged. In contrast, the United States District Court for the District of New Hampshire, in SIG Arms Inc. v. Employers Insurance of Wausau, 122 F. Supp. 2d 255 (D.N.H. 2000) found a duty to defend in a similar case in which municipalities alleged they incurred extra police and other costs due to the defendants’ conduct.

V. CONCLUSION

Northern Insurance demonstrates that courts are increasingly willing to find that complaints for injunctive relief still allege damages for bodily injury, placing the cases within the scope of the duty to defend under a liability policy. This determination is in keeping with cases like Jen- craft, which recognize even potential remedial costs as property damage, expanding on the line of environmental, asbestos, and lead paint cases recognizing coverage for remediation and monitoring costs. Both lines of cases may be helpful to those faced with requests for implementation of potentially costly reimbursements, recalls, educational programs, monitoring, remediation, and otherwise.