

**MEDICAL MONITORING AND GENERAL LIABILITY INSURANCE:
AN UNCERTAIN PROGNOSIS FOR COVERAGE**

BRYCE L. FRIEDMAN¹
SIMPSON THACHER & BARTLETT LLP

SEPTEMBER 30, 2010

Much has been written about the widespread effects of the April 2010 BP oil spill. Experts in countless fields have weighed in on the ecological, financial and industrial consequences of the disaster. Hundreds of individual and class action lawsuits have already been filed, setting the stage for a host of insurance coverage disputes between defendants named in these suits and their insurers. Legal practitioners predict that several specific insurance issues are likely to arise in many such disputes, including application of pollution and other exclusions to bar coverage for oil spill-related claims, the nature and scope of insurable business interruption costs, and interpretation of “additional insured” provisions in the context of multi-defendant lawsuits. What some might not see coming, however, is the high stakes question of whether and to what extent claims for medical monitoring fall within general liability insurance coverage. With thousands or perhaps millions of individuals working or residing in close proximity to the oil spill, and a heightened awareness of the potential toxicity of both the released oil and the dispersant products used in cleanup efforts, the potential for multi-million dollar health-based coverage litigation is significant.

A shot was fired in this potentially long term battle on July 20, 2010 by a Louisiana fisherman, who alleged that he was exposed to toxic substances in connection with his participation in cleanup efforts in the Gulf of Mexico. In *Wunstell v. BP, PLC*, No. 2010-7437 (La. Civ. Ct. filed July 20, 2010), the plaintiff alleged that BP and other defendants failed to provide necessary safety equipment and detoxification procedures to protect the health of the individuals participating in a remediation plan instituted by BP.² As a result, plaintiff allegedly suffers from various recurring illnesses, for which he seeks monetary damages as well as a court-supervised medical monitoring program for himself and a class of other volunteers and workers (numbering in the hundreds or

¹ Mr. Friedman, a partner at Simpson Thacher & Bartlett LLP, is grateful to Karen S. Cestari and Hema Sheno for their assistance in this publication. The views expressed herein are strictly his own.

² *Wunstell* was removed to federal court. See *Wunstell v. BP, PLC*, 2:10-CV-02543 (E.D. La. filed Aug. 6, 2010) (Barbieri, J.).

possibly thousands). If allowed to proceed, the *Wunstell* complaint, and others that may follow, will require courts to address the potentially complex issue of whether medical monitoring claims fall within the scope of general liability insurance coverage.

A Brief Introduction to Medical Monitoring

An individual is exposed to high levels of a harmful substance known to increase the likelihood of future illness. Although the individual neither manifests symptoms nor suffers any discernable current injury, he seeks to recover the costs of medical testing to detect and prevent the onset of a possible future illness. Is he entitled to recover the costs of such “medical monitoring” from the responsible party? And if so, is the responsible party entitled to reimbursement for those payments from its general liability insurer? The answer to both of these questions appears to depend on many factors, including the nature of the allegations in the underlying complaint, the precise relief sought, and the jurisdiction in which the dispute is litigated.

The circumstances under which an individual can assert a claim for medical monitoring has been addressed by dozens of courts over the past few decades without a judicial consensus.³ Courts across jurisdictions (and even within jurisdictions) disagree as to whether claims for medical monitoring should be recognized at all,⁴ and if so, whether they are appropriately classified as an independent cause of action, or as a remedy

³ See *In re Prempro Prod. Liab. Litig.*, 230 F.R.D. 555, 569 (E.D. Ark. 2005) (noting that “[s]tates differ greatly on their approach to medical monitoring” and summarizing the conflicting laws of several states).

⁴ See *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1, 5, n.5 (Miss. 2007) (“Mississippi law does not recognize a claim for medical monitoring based on increase risk of future disease.”) (citing cases “illustrative of the refusal of various states to recognize a medical monitoring cause of action”); *Henry v. Dow Chemical Co.*, 473 Mich. 63, 701 N.W.2d 684 (Mich. 2005) (plaintiffs seeking court-supervised medical monitoring program for future illnesses do not state a claim for relief under Michigan law); *Wood v. Wyeth-Ayerst Laboratories, Division of American Home Products*, 82 S.W.3d 849 (Ky. 2002) (rejecting medical monitoring claim based on mere contact with harmful substances); *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001) (Alabama law does not recognize cause of action for medical monitoring); *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000) (Nebraska does not recognize medical monitoring claims), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546 (2005); *Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951, 954 (7th Cir. 1995) (Indiana district court rejected damage claim based on future medical monitoring); See generally D. Scott Aberson, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted With the Issue*, 32 WM. MITCHELL L. REV. 1095, at 1129-1143 (2006) (providing state-by-state survey on the law of medical monitoring). Although the United States Supreme Court has not directly ruled on the issue, it declined to recognize medical monitoring as a “full-blown, traditional tort case of action” in a suit brought pursuant to the Federal Employers’ Liability Act. See *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).

(legal or equitable).⁵ Further, among the jurisdictions that do recognize a claim for medical monitoring, there is no universal standard as to the requirements for stating such a claim. Some courts have required a present physical injury in order to pursue a medical monitoring claim.⁶ Other courts have concluded that exposure to a harmful substance, in conjunction with increased likelihood of undergoing expensive medical testing and/or contracting future illness is sufficient.⁷

Notwithstanding uncertainty about the viability of medical monitoring claims, individual and class action suits seek medical monitoring with increasing frequency, in a wide range of contexts. Recent medical monitoring claims have arisen in response to exposure to lead paint-coated toys, tobacco use, implantation of medical devices and use of pharmaceuticals. Emerging litigation over the potential harmful effects of BPA in plastic bottles, of sulfuric emissions from Chinese drywall, of radiation emitted from cellular phones, and from cleanup efforts in the wake of the September 11, 2001 terrorist attack and the April 2010 BP oil spill disaster, also implicate claims for medical monitoring. As scientists and medical experts weigh in on the potential link between exposure to a growing list of suspected toxins and likelihood of future illness, new insurance claims related to medical monitoring suits are all but inevitable.

A central question for insurers is whether such claims will fall within the coverage provided by general liability policies. To date, only a handful of courts have directly addressed the issue. And while those decisions provide some insight as to the insurance implications of medical monitoring claims, the result in any particular case concerning whether a medical monitoring claim may initially implicate commercial general liability (“CGL”) defense or indemnity obligations will hinge primarily upon the following three issues: (i) Does the medical monitoring claim at issue allege “bodily injury” within the scope of CGL coverage? (ii) Did injury occur “during the policy period”? (iii) Is the form of relief sought “damages” that the policyholder is legally obligated to pay? Where the answer to one or more of these questions is “no,” CGL insurers should not be required to defend or indemnify medical monitoring claims.

⁵ See *Caronia v. Philip Morris USA, Inc.*, No. 06-CV-224, 2010 WL 520558, at *8 (E.D.N.Y. Feb. 22, 2010) (it is uncertain whether New York recognizes medical monitoring as an independent cause of action or as a remedy for an existing tort).

⁶ See *June v. Union Carbide Corp.*, 577 F.3d 1234, 1249 n.11 (10th Cir. 2009) (citing cases requiring a present physical injury).

⁷ *Id.* at 1249 n. 10 (citing cases holding that medical monitoring claim may survive absent physical symptoms).

1. Do Medical Monitoring Claims Allege “Bodily Injury”?

Standard CGL policy language provides coverage for sums that the insured is legally obligated to pay as damages because of “bodily injury” which occurs during the policy period. “Bodily injury” is commonly defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” Given that medical monitoring claims, by definition, seek compensation for expenses incurred in connection with the diagnosis or prevention of a potential future illness, it stands to reason that a cause of action for medical monitoring (absent allegations of present physical injury) would not satisfy the plain meaning of bodily injury as defined by a CGL policy.

As it turns out however, courts that have specifically addressed this issue have ruled that allegations of exposure to a harmful substance known to increase the risk of future illness are sufficient to trigger an insurer’s duty to defend. These courts seem to assume that a physiological change, however miniscule, occurs upon exposure to a potentially harmful substance – an assumption that risks a “slippery slope” problem given that nearly every person is exposed to a large number of arguably harmful substances each day. *See Techalloy Co. v. Reliance Ins. Co.*, 338 PA Super. 1, 12, 487 A.2d 820, 826 (Pa. Super. Ct. 1984) (underlying class action seeking establishment of fund for payment of future medical expenses sufficiently alleged “bodily injury” so as to trigger duty to defend); *USF&G v. Korman Corp.*, 693 F. Supp. 253, 260 (E.D. Pa. 1988) (underlying class action seeking damages for costs of medical monitoring alleged “bodily injury” sufficient to trigger duty to defend); *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp.2d 596, 638 (W.D.N.Y. 2001) (underlying claims seeking fund for future medical testing and surveillance sufficiently alleged “bodily injury” so as to trigger duty to defend); *Ace American Ins. Co. v. RC2 Corp.*, 568 F. Supp.2d 946, 956 (N.D. Ill. 2008) (medical monitoring claim arising out of lead exposure constituted a claim for “bodily injury” triggering insurer’s defense obligations), *rev’d on other grounds*, 600 F.3d 763 (7th Cir. 2010); *see also Motorola v. Assoc. Indem. Corp.*, 878 So.2d 824, 834 (La. Ct. App. 2004) (underlying claims alleging radiation exposure as a result of cellular phone usage alleged “bodily injury” sufficient to trigger duty to defend; although medical monitoring claim was eliminated in amended complaint, court notes that factual basis for medical monitoring cause of action is “personal bodily integrity” which constitutes a claim for “bodily injury”).

While these decisions may be explained in part by the more forgiving standard that governs an insurer’s defense (as opposed to indemnity) obligations, at least one court has recently held that a medical monitoring claim triggers a general liability insurer’s duty to indemnify. In *Baughman v. United States Liability Ins. Co.*, 662 F. Supp.2d 386 (D.N.J. 2009), the court held that allegations of exposure to mercury, resulting in an increased risk of illness, satisfy the “bodily injury” requirement under a CGL policy. In

reaching its decision, the court observed that in the asbestos and lead contexts, New Jersey courts have implicitly held that exposure to harmful substances may constitute “bodily injury,” even when that exposure is not immediately accompanied by physical symptoms. See *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 458, 650 A.2d 974, 984-85 (N.J. 1994); *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 179 N.J. 87, 104, 843 A.2d 1094, 1104-05 (N.J. 2004). Similarly, in *Bradley v. SWVA, Inc.*, No. 02-C-0587, 2005 WL 5220882 (W. Va. Cir. Ct. Dec. 14, 2005), the court denied insurers’ motions for summary judgment on the issue of coverage for medical monitoring claims. There, the underlying class action complaint alleged that plaintiffs were exposed to solvents at a manufacturing plant and had a higher risk of developing neurotoxic disease. The insurers denied coverage, arguing that the class action suit did not assert a claim for “bodily injury” as defined in the general liability policies. Relying on the holding in *Techalloy*, the court concluded that the medical monitoring claims were “reasonably susceptible of an interpretation” that raised the possibility of coverage under the insurance policies. *Id.* at 6.

A number of courts have recently addressed the “bodily injury” requirement in the context of claims alleging radio frequency radiation exposure as a result of wireless cellular phone usage. These cases shed additional light onto the question of what amount of alleged physiological change is sufficient to constitute “bodily injury” for the purposes of triggering CGL defense obligations. For the most part, courts that have considered this issue have concluded that allegations of harm at a biological or cellular level satisfy the “bodily injury” requirement so as to implicate CGL defense obligations. In general, these courts have reasoned that allegations of “adverse cellular reactions and/or cellular dysfunction” potentially allege a present actual injury. *VoiceStream Wireless Corp. v. Federal Ins. Co.*, No. 03-35158, 2004 WL 2285720, at *1 (9th Cir. Sept. 14, 2004). The *VoiceStream* court acknowledged that the underlying complaint was ambiguous and at times inconsistent as to whether it alleged present biological changes, or cellular changes that caused a “future health risk.” *Id.* at *1. Ultimately, the court resolved this ambiguity in favor of the policyholder for purposes of the duty to defend. The court also squarely confronted the first impression issue of whether injury to human cells constitutes “bodily injury” as that term is meant to apply in CGL policies. Relying on the absence of any policy language to the contrary, the court concluded that cellular-level harm can constitute “bodily injury” for purposes of general liability coverage. *Id.* at *2 (“there is no provision in any of the policies that requires the alleged injury to be capable of diagnosis, or that imposes a manifestation requirement”). Employing similar analyses, other courts have likewise held that allegations of cellular or biological harm from wireless phone-related radiation exposure constitute “bodily injury” sufficient to trigger a general liability insurer’s defense obligations. See *Zurich American Ins. Co. v. Nokia, Inc.*, 2698 S.W.3d 487, 492-93 (Tex. 2008); *Trinity Universal Ins. Co. v. Cellular One Grp.*, No. 05-04-0161-CV, 2007 WL 49667, at *2-*3 (Tex. App. Jan. 9,

2007), *aff'd*, 268 S.W.3d 505 (Tex. 2008); *Samsung Electronics America, Inc. v. Federal Ins. Co.*, 202 S.W.3d 372, 379-80 (Tex. App. 2006); *Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co.*, 423 F. Supp.2d 587, 593 (N.D. Tex. 2006); *Motorola, Inc. v. Assoc. Indem. Corp.*, 878 So. 2d 824 (La. Ct. App. 2004); *Northern Ins. Co. of New York v. Baltimore Business Communications, Inc.*, No. 02-1358, 2003 WL 21404703, at *4 (4th Cir. June 19, 2003).

However, not all claims seeking medical monitoring as the result of exposure to a harmful substance will allege “bodily injury” sufficient to trigger CGL coverage. Where the thrust of an underlying complaint is that a company violated a standard of care in the manufacture or distribution of its product rather than caused personal injury to the claimant, courts have held that there is no “bodily injury” for insurance purposes. In *HPF, L.L.C. v. General Star Indem. Co.*, 338 Ill. App.3d 912, 788 N.E.2d 753 (Ill App. Ct. 2003), the court denied coverage for an action seeking medical monitoring in connection with the policyholder’s distribution of an herbal medicinal product. Noting that that the underlying allegations centered on the policyholder’s improper marketing and distribution of the product, the court concluded that the complaint did not allege “bodily injury” within the meaning of a CGL policy. Employing a similar analysis, the Seventh Circuit reached the same conclusion in *Medmarc Cas. Ins. Co. v. Avent America, Inc.*, No. 09-3390, 2010 WL 2780190 (7th Cir. July 15, 2010). There, the underlying complaint alleged that the policyholder’s product, plastic baby bottles, were no longer fit for use because they contained BPA, a harmful substance known to increase the risk of future illness. The complaint did not, however, specifically allege present bodily injury or an increased risk of future injury. Instead, the complaint primarily sought economic compensation for the loss of use of the product. Allegations that the company was aware of scientific research that BPA exposure could cause physical harm were peripheral to the central economic cause of action and were insufficient to state a claim for “bodily injury” under the insurance policies, the court held. *See also Steadfast Ins. Co. v. Purdue Federick Co.*, No. X08CV020191697S, 2006 WL 1149202, at *3 (Conn. Super. Ct. Apr. 10, 2006) (putative class action against manufacturer of pharmaceutical product does not allege “bodily injury” for purposes of CGL coverage because essence of complaint is improper marketing).⁸ Ironically, class action complaints, such as those in *HPF* and *Medmarc*, may be intentionally drafted in a manner that all but eliminates a policyholder argument that the claims arise from “bodily injury.” As the *Steadfast* court aptly noted, putative class action complaints, by design, frequently exclude from class membership any person making claims for personal injuries because such claims necessarily entail individualized inquiry that is often fatal to class certification. 2006 WL 1149202, at *2 n.1. *See also Motorola*, 878 So.2d at 834. Accordingly, the omission of

⁸ Although *Medmarc* and *Steadfast* did not involve claims for medical monitoring, the courts’ analyses regarding the “bodily injury” requirement in these cases are illustrative.

allegations relating to physical injury in a medical monitoring class action suit may be grounds for a denial of defense or indemnity of those claims.

The Tenth Circuit's analysis in *June v. Union Carbide Corp.*, 577 F.3d 1234 (10th Cir. 2009), where it reasoned that a claim for medical monitoring based on exposure to radiation did not constitute "bodily injury," is instructive. Although *June* involved interpretation of "bodily injury" under the Price-Anderson Act rather than a general liability policy, the definition of "bodily injury" under the Act is virtually identical to that in a CGL policy ("bodily injury, sickness, disease or death"). *Id.* at 1248. The court rejected the notion that "DNA damage and cell death" caused by radiation exposure, together with the enhanced the risk of developing future disease, constituted "bodily injury." *Id.* at 1248-52.

Plantronics, Inc. v. American Home Assurance Co., No. C 07-6038, 2008 WL 4665983 (N.D. Cal. Oct. 20, 2008) seems to stand alone in its "bodily injury" analysis. There, the court employed somewhat strained reasoning to conclude that a putative class action complaint, which alleged claims of defective design, unfair marketing and breach of warranty, at least arguably satisfied the bodily injury requirement for purposes of denying an insurer's motion to dismiss. The underlying complaints alleged that Bluetooth headsets were defectively designed and failed to contain warnings regarding the potential for noise-induced hearing loss. The complaint did not, however, seek damages for physical injury, and instead sought a refund of the purchase price of the product. Nonetheless, because potential bodily injury was necessary for the tort and warranty claims, the court found that the "bodily injury" requirement was met. Alternatively, the court reasoned that the underlying complaints could be amended at any time to allege actual hearing loss, and that this possibility foreclosed the insurer's request for dismissal of the coverage dispute.

2. Did Injury Occur During the Policy Period?

Courts presiding over medical monitoring coverage disputes must address the complex issue of when injury occurs. The question is paramount, because without injury "during the policy period," general liability coverage is unavailable. In traditional bodily injury contexts, courts have endorsed a number of different trigger theories to determine when bodily injury occurs, and thus which policy is triggered:

- Under an *exposure theory*, a policy on the risk during the period in which the claimant is exposed to the allegedly harmful substance is triggered.⁹

⁹ *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980).

- Under a *manifestation theory*, the policy on the risk during the date upon which bodily injury becomes reasonably capable of medical diagnosis is triggered.¹⁰
- Under a *continuous trigger theory*, every policy on the risk during the entire disease process, from exposure through manifestation or diagnosis, is triggered.¹¹
- Under an *injury-in-fact theory*, the policy on the risk when the claimant incurred actual tangible injury, based on the particular facts of the case and available medical evidence, is triggered.¹²

Given the differences among these trigger theories, the outcome of a medical monitoring coverage dispute may ultimately depend on the applicable trigger law governing the coverage dispute. Furthermore, traditional trigger analyses may be altogether inadequate to address the question of “when does an injury occur?” in the context of an illness that has not yet (and may never) actually materialize. In novel tort contexts arising out of substances whose long-term effects are not well known, the question of when, if ever, injury occurs will likely necessitate a fact-specific inquiry based on scientific and medical evidence.

3. Does Medical Monitoring Relief Constitute “Damages” That the Policyholder is Legally Obligated to Pay?

Even if a policyholder is able to overcome the “bodily injury” hurdle, medical monitoring claims may fall outside the scope of CGL coverage by virtue of the legally obligated to pay as “damages” requirement. Because general liability policies do not typically define the term “damages,” coverage disputes have centered on the question of whether “damages” refers only to legal damages, or whether it encompasses equitable relief as well.

Courts that have directly ruled upon the issue of whether a demand for a fund to establish and maintain a medical monitoring program constitutes “damages” under a CGL policy have answered this question in the affirmative. In *Baughman v. United States Liability Ins. Co.*, 662 F. Supp.2d 386, 393 (D.N.J. 2009), the court held that medical monitoring costs constitute “damages.” In reaching its decision, the court relied on precedent holding that response costs imposed to remediate environmental damage

¹⁰ *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982).

¹¹ *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981).

¹² *American Home Products Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2^d Cir. 1984).

constitute “damages” under a CGL policy. See *Morton Int’l, Inc. v. Gen. Accident Ins. Co.*, 134 N.J. 1, 629 A.2d 831, 846 (1993). The *Baughman* court explained: “Regardless of whether such relief is considered traditional compensatory damages or equitable relief, it still requires the defendant to pay money to cover the costs of medical monitoring. . . . [M]ost people would consider this court-ordered money to be ‘damages.’” *Id.* at 394 (quoting *Morton*). Similarly, in *Ace American Ins. Co. v. RC2 Corp., Inc.*, 568 F. Supp.2d 946 (N.D. Ill. 2008), the court ruled that a request for medical monitoring of individuals exposed to lead falls within the scope of “damages” under a general liability policy. The court observed that “Illinois law accords ‘damages’ a “broad, nontechnical meaning that is not limited to compensatory damages and can include equitable relief.” *Id.* at 955.

Whether other courts will follow the rulings in *Baughman* and *RC2* (the latter of which was reversed on other grounds) is uncertain. In other contexts, courts have reaching divergent conclusions as to whether the term “damages” encompasses only legal damages, or extends to equitable relief as well. Compare *Cinergy Corp. v. Assoc. Elec. & Gas Ins. Svs. Ltd.*, 865 N.E.2d 571, 582 (Ind. 2007) (lawsuit seeking injunctive relief in order to prevent future harm does not seek “damage” covered by liability policy) and *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (CGL “damages” includes only legal damages) with *Johnson Controls, Inc. v. Employers Ins. Of Wausau*, 665 N.W.2d 257, 274 (Wis. 2003) (equitable remedies qualify as “damages” within the meaning of a CGL policy), *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508-09 (Mo. 1997) (the term “damages” in insurance policy includes claims for equitable relief); *Lindsay Manuf. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1271 (8th Cir. 1997) (“we interpret the term “as damages” to include both legal damages and equitable relief”) and *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1032-33 (Md. 1993) (“as damages” encompasses both legal damages and equitable relief).

Resolution of this issue may ultimately require a case-by-case analysis, dependent upon the specific nature of the medical monitoring relief sought. See *Donovan v. Philip Morris USA, Inc.*, No. 06-cv 12234-NG, 2010 WL 2532650, at *22 (D. Mass. June 24, 2010) (“Courts have classified medical monitoring as both monetary and equitable, depending on the contours of the requested relief.”); *Arch v. American Tobacco Co., Inc.*, 175 F.R.D. 469, 483 (E.D. Pa. 1997) (rejecting *per se* rule as to whether medical monitoring constitutes monetary damages or equitable relief; the dispositive factor is the type of relief that plaintiffs seek); see also *Wilson v. Brush Wellman, Inc.*, No. 8985, 2002 WL 31320323 (Ohio App. Oct. 17, 2002) (noting that courts are “split on whether medical monitoring relief is primarily compensatory or injunctive” and citing cases) (citations omitted), *rev’d*, 103 Ohio St.3d 538, 817 N.E.2d 50 (Ohio 2004). Where a medical monitoring action seeks primarily legal damages (such as a lump sum payment) a court may be more likely to find the “damages” requirement satisfied for insurance purposes. See *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1196 (9th

Cir. 2001) (noting that whether medical monitoring is a form of legal damages or equitable relief depends upon nature of relief sought, and concluding that although plaintiffs sought some injunctive relief, plaintiffs primarily sought monetary damages); *Thompson v. American Tobacco Co., Inc.*, 189 F.R.D. 544, 553 (D. Minn. 1999) (although medical monitoring relief sought by plaintiffs appears to be injunctive “at first glance,” a closer look reveals that proposed relief is actually compensatory damages). In contrast, where a medical monitoring claim seeks equitable relief in the form of court-administered fund, a policyholder may be hard pressed to argue that the claim is one for “damages.” See *Cook v. Rockwell Int’l Corp.*, 778 F. Supp. 512, 515 (D. Colo. 1991) (court-administered medical monitoring fund is equitable in nature); *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992) (payments for medical monitoring expenses are legal damages, whereas a court-supervised medical monitoring program is equitable relief).

An Uncertain Prognosis for Medical Monitoring Coverage Disputes

What impact will the small handful of decisions that have been issued in this arena have on future medical monitoring coverage disputes between policyholders and their insurers? Minimal, perhaps - for several important reasons. First, to the extent that decisions (such as *Techalloy*, *Korman*, *Burt Rigid Box* and *RC2*) involved an insurer’s duty to defend, these holdings are of limited value to policyholders seeking a declaration of coverage under CGL policies. The standard that guides an insurer’s duty to defend has little bearing on a court’s ultimate ruling as to coverage while facts of the underlying case develop. This may be particularly true with respect to a policyholder’s burden of establishing “bodily injury” for the purposes of obtaining indemnification of medical monitoring costs. While a duty to defend analysis may only require a possibility of coverage in light of the allegations pled in the underlying complaint, a coverage analysis in the medical monitoring context will likely entail, among other things, a scientific and medical-based inquiry regarding the precise effects of the allegedly harmful substance at issue.

Second, because medical monitoring cases inherently involve exposure to allegedly toxic substances, it may often be the case that a CGL pollution or other specific exclusion will bar coverage in any event. This was precisely the case in both *Techalloy* and *Korman*. In those cases, the policyholders’ early victories on the “bodily injury” issue in the context of the duty to defend were ultimately negated by a ruling that the policies’ pollution exclusions barred coverage for the underlying claims. This too, may be the fate of coverage claims for medical monitoring in the other emerging tort contexts. In coverage litigation arising out of Chinese drywall, one court has already ruled that a pollution exclusion bars coverage for underlying claims alleging, among other things, possible harmful health effects. *Travco Ins. Co. v. Ward*, No. 2:10 cv 14, 2010 WL 222255, at *15-*18 (E.D. Va. June 3, 2010). And application of a pollution exclusion

has already come into play in coverage litigation arising out of the clean up efforts at the World Trade Center site and the Gulf of Mexico oil spill. See *Ocean Partners, LLC v. North River Ins. Co.*, 546 F. Supp. 2d 101, 114-15 (S.D.N.Y. 2008) (unclear if pollution exclusion applies in context of particulates disbursed in collapse of World Trade Center; summary judgment motions denied); *Certain Underwriters at Lloyd's London v. BP PLC.*, No. 4:10-cv-01823 (S.D. Tex. filed May 21, 2010) (insurers seek declaration that coverage under policies is limited to above-surface pollution). And even where a pollution exclusion is inapplicable, other policy exclusions may operate to bar coverage for medical monitoring claims. For example, in *Ace American Ins. Co. v. RC2 Corp.*, 568 F. Supp.2d 946 (N.D. Ill. 2008), the district court ruled that the insurers were obligated to defend medical monitoring claims arising out of plaintiffs' exposure to lead paint. However, the Seventh Circuit reversed, finding that the policy's territory exclusion unambiguously barred coverage for the claims as a matter of law. 600 F.3d 763 (7th Cir. 2010). Exclusions relating to known loss, as well, may come into play where a policyholder has been exposed to a known toxin prior to the inception date of a policy period.

Finally, where an underlying complaint alleges future harm from substances whose health risks are uncertain, courts may be less likely to find that a medical monitoring claim satisfies the "bodily injury" requirement of a CGL policy. With increasing public awareness of the potentially harmful effects of an endless list of environmental and man-made substances, courts may be forced to draw fine lines between substances that warrant the remedy of medical monitoring in the first place and those whose harmful effects are insufficiently known. Satisfaction of the "bodily injury" requirement in borderline cases may create insurmountable causation problems for policyholders seeking a final judgment of CGL coverage.