

MEDICAL MONITORING, TRIGGER OF COVERAGE ANALYSIS, AND THE DUTY TO DEFEND

INTRODUCTION

Jane Doe lives near XYZ Corporation's manufacturing plant. She files a lawsuit against the company alleging that she has been exposed to harmful chemicals used in the company's manufacturing processes. She does not have any present symptoms or disease, but the chemicals are known to cause cancer. Jane's doctor has told her that she needs to undergo regular medical testing to monitor for the development of cancer, because an early diagnosis will increase the likelihood that she will survive. Since she cannot afford to pay for the testing herself, she seeks to recover the costs from XYZ Corporation.

XYZ tenders the lawsuit to its insurance carrier. It has always maintained Commercial General Liability coverage that it believes provides coverage for any accidental bodily injury or property damage to third parties. However, the insurance carrier denies coverage, informing XYZ that a request for medical surveillance and testing does not constitute a claim for "damages because of 'bodily injury'" as required by the insurance policy. The carrier argues that the policy requires a present bodily injury and that the risk of developing cancer is a claim for future bodily injury. It also argues that the term "damages" does not apply to equitable relief such as medical monitoring. Thus, XYZ is forced to retain counsel and defend the suit itself. The suit has been filed in a jurisdiction that allows recovery for medical monitoring with no present injury, and it becomes necessary to hire expensive medical experts to testify about the significance of Jane Doe's exposure, her likelihood of developing cancer, and the necessity of routine medical testing to monitor for cancer. Jane Doe's neighbors hear about her suit and become concerned about their own health, leading them to file their own lawsuits against XYZ. XYZ does not have the financial resources to adequately fund its defense and consequently files for bankruptcy. As a result, Jane Doe and her neighbors are unable to obtain compensation to cover the costs of medical monitoring because XYZ cannot pay for it.

Plaintiffs like Jane Doe who were exposed to toxic substances traditionally had extreme difficulty obtaining any compensation in the tort system. They could not demonstrate a present physical injury or damages, and it was difficult to satisfy strict causation requirements. Therefore, many courts began to allow alternative theories of recovery, one of which was "medical monitoring." In suits for medical monitoring, plaintiffs seek the

cost of periodic medical examinations to monitor for and detect the development of illnesses and diseases caused by their toxic exposure.¹ Although increasing numbers of jurisdictions have allowed plaintiffs to recover for medical monitoring even in the absence of a physical injury, only two courts have considered whether an insurer has a duty to defend such lawsuits on behalf of corporations like XYZ. Thus, there is no clear answer to the question of whether a claim for medical monitoring stemming from an increased risk of cancer is a potentially covered claim that would give rise to an insurer's duty to defend.

This comment argues that insurance companies do have a duty to defend suits seeking medical monitoring, and that the two courts that have addressed the issue have correctly determined that claims for medical monitoring are claims for "bodily injury" as required by a standard general liability policy. It also argues that courts should address the "as damages" issue and hold that the term applies to both legal and equitable relief. Part I of this comment discusses medical monitoring, current law on recovery with no present injury, and insurance coverage. It also examines the two cases that have addressed whether claims for medical monitoring constitute "bodily injury" as required by a standard form liability policy and then provides background material on the "as damages" controversy. Finally, Part I discusses an analogous area of law, cases that address the allegations sufficient to "trigger" coverage under a general liability policy.

Part II argues that courts should determine that there is a duty to defend medical monitoring lawsuits even if the plaintiff does not allege a present physical injury, and that decision should be based on the same rationale used by courts in trigger of coverage cases. Namely, courts should rely on the trigger of coverage cases for the proposition that exposure to a known harmful substance is in itself sufficient to constitute "bodily injury" for purposes of insurance coverage. This approach is not only consistent with an existing body of law, and thus would not require courts to create new law on the issue, but is also consistent with the language in a standard form general liability policy which requires "bodily injury." Part II also argues that courts will need to address the "as damages" issue and that they should hold that the term "damages" encompasses both legal damages and equitable relief. Part II cites policy considerations favoring a duty to defend and concludes by addressing anticipated objections to finding a duty.

¹ Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENVTL. L. 285, 293 (1994).

I. BACKGROUND

A. *Medical Monitoring*

Plaintiffs that have been exposed to toxic substances may not manifest any symptoms of disease until years after their exposure has occurred. Although there can be acute symptoms such as nausea, headaches, and dizziness,² plaintiffs may also have an increased risk of developing cancer, lymphoma, bone marrow depression, and other conditions that may not develop until years after the initial exposure has taken place.³ Thus, these “toxic tort” plaintiffs⁴ have difficulty proving a present injury under traditional tort law.⁵

Because toxic tort plaintiffs are often unable to satisfy tort law’s injury, causation, and damages requirements, courts have developed alternative theories of recovery to provide compensation for victims of toxic exposure.⁶ One of those theories is medical monitoring.⁷ In lawsuits for medical monitoring, plaintiffs seek the cost of periodic medical examinations to monitor for and detect the development of illnesses and diseases caused by their toxic exposure.⁸ Depending on a particular jurisdiction’s case law and the allegations in the complaint, medical monitoring can be an independent tort cause of action, an element of legal damages, or a form of equitable relief.⁹

² Akim F. Czmus, M.D., *Medical Monitoring of Toxic Torts*, 13 TEMP. ENVTL. L. & TECH. J. 35, 35-36 (1994) (discussing common symptoms that initially follow toxic exposure).

³ *Id.* at 36.

⁴ Wells, *supra* note 1, at 287 (explaining that “[a] toxic tort is a tort claim that results from the exposure of the plaintiff to toxic (chemical or radioactive) substances because of the defendant’s actions”).

⁵ Czmus, *supra* note 2, at 35. Although this comment focuses on tort law’s present injury requirement, toxic tort plaintiffs may also be unable to establish other elements of a traditional tort claim. Causation may be problematic. Wells, *supra* note 1, at 285-86 (“Proving that a particular injury is caused by exposure to a small dose of any particular chemical is difficult; proving that a specific level of exposure will cause future injury is even more difficult.”). It may also be difficult to establish compensable tort damages. Czmus, *supra* note 2, at 36.

⁶ Wells, *supra* note 1, at 293.

⁷ *Id.*

⁸ *Id.*

⁹ Wells, *supra* note 1, at 294. *E.g.*, *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999) (“We . . . conclude that a cause of action exists under West Virginia law for the recovery of medical monitoring costs . . .”); *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992) (holding that medical monitoring can be a form of legal damages or equitable relief depending on whether the plaintiff seeks a lump sum/ direct payment of medical expenses or a court-supervised fund).

Medical monitoring became necessary not only because toxic tort plaintiffs could not satisfy traditional tort law requirements, but also because existing avenues of recovery either were not available to them or provided compensation for different types of harm. For example, a claim for future medical expenses can be made successfully under traditional tort law principles.¹⁰ However, toxic tort plaintiffs may have difficulty recovering. Courts will typically award future medical expenses when a plaintiff has suffered some physical impact and seeks compensation for the cost of future medical treatment associated with that impact.¹¹ Medical monitoring plaintiffs may have difficulty establishing a physical impact and do not yet know what future treatment may be necessary. They may not develop a disease until years after their initial exposure to a toxic substance.¹² Some may never develop a disease at all. Instead of seeking future medical expenses that will be necessary to treat a disease, medical monitoring plaintiffs seek the cost of medical examinations that will be necessary to detect the disease itself.¹³

Toxic tort plaintiffs are also unable to secure compensation for the cost of future medical surveillance by presenting claims for enhanced risk of disease. Enhanced risk claims differ from medical monitoring claims in the type of compensation that is awarded.¹⁴ Enhanced risk claims seek compensation for the anticipated harm itself, and damages may be discounted to reflect the fact that the plaintiff may never develop a disease.¹⁵ In contrast, medical monitoring claims seek damages to compensate for the cost of medical examinations necessary to detect the possible harm.¹⁶ For example, in *Bower v. Westinghouse*,¹⁷ plaintiffs alleged that they had been exposed to toxic substances in the defendant's pile of manufacturing debris.¹⁸ They sought "compensation for the cost of future medical testing aimed at diagnosing potential ailments caused by the alleged toxic exposure."¹⁹ Since plaintiffs in enhanced risk cases are awarded damages to compensate for the anticipated disease itself, and not for regular medical testing to determine what that disease might be, toxic tort plaintiffs cannot obtain compensation for medical monitoring by filing claims for enhanced risk of disease.

¹⁰ Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 4 (1998).

¹¹ *Id.*

¹² Czmus, *supra* note 2, at 36.

¹³ Wells, *supra* note 1, at 293.

¹⁴ *See* Wells, *supra* note 1, at 293.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Bower*, 522 S.E.2d at 424.

¹⁸ *Id.* at 426.

¹⁹ *Id.* at 428.

B. *Recovery for Medical Monitoring with No Present Injury*

Many courts have treated medical monitoring as an independent cause of action that does not require a separate compensable injury.²⁰ A number of others have recognized medical monitoring as a compensable form of damages that also does not require proof of a present injury.²¹ One of the

²⁰ Kara L. McCall, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, 66 U. CHI. L. REV. 969, 975 & n.31 (1999). *See, e.g.*, *Paoli R.R. Yard PCB Litig. v. Monsanto Co.*, 916 F.2d 829, 852 (3d Cir. 1990) (holding that the Supreme Court of Pennsylvania would recognize a claim for medical monitoring and listing criteria that did not include a present injury); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998) (holding that the Illinois Supreme Court would recognize cause of action for medical monitoring without requiring present physical injury); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1476-77 (D. Colo. 1991) (holding that Colorado Supreme Court would likely recognize tort claim for medical monitoring and listing criteria as set forth in *Paoli*, which did not require a present injury); *Petito v. A.H. Robins Co.*, 750 So.2d 103, 104 (Fla. Dist. Ct. App. 1999) (holding that Florida recognizes a cause of action for medical monitoring even when plaintiff has no identifiable physical injuries or symptoms); *Acevedo v. Consol. Edison Co. of N.Y.*, 572 N.Y.S.2d 1015, 1016, 1018 (N.Y. Sup. Ct. 1991) (recognizing common-law cause of action for medical monitoring in the absence of any clinical symptoms of disease); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 193, 195-96 (Pa. 1997) (holding that medical monitoring is a viable cause of action under Pennsylvania law and does not require present physical injury); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 978-81 (Utah 1993) (outlining criteria for cause of action for medical monitoring which did not include present injury requirement); *Bower*, 522 S.E.2d at 430-31 (holding that West Virginia law recognizes a cause of action for medical monitoring costs and does not require existence of present physical harm).

²¹ *See, e.g.*, *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522-23 (D. Kan. 1995) (holding that medical monitoring is a component of damages, not a separate claim, and noting that plaintiffs can recover even without a present physical injury); *Day v. NLO*, 851 F. Supp. 869, 879-882 (S.D. Ohio 1994) (characterizing medical monitoring as a remedy and holding that it can be awarded when plaintiffs present medical testimony establishing an increased risk of disease that would reasonably necessitate monitoring); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987) (holding that medical monitoring is a compensable item of damages despite absence of physical manifestation of disease under criteria set forth in *Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987)); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993) (noting that "medical science may necessarily and properly intervene in the absence of physical injury where there is significant but not necessarily likely risk of serious disease" and holding that cost of medical monitoring is a compensable item of damages); *Meyerhoff v. Turner Constr. Co.*, 509 N.W.2d 847, 849-50 (Mich. Ct. App. 1993) (holding that medical monitoring expenses are compensable damages and noting that a plaintiff need not exhibit any symptoms of disease); *Ayers*, 525 A.2d at 311-12 (holding that the cost of pre-symptom medical surveillance is a compensable item of damages).

It is important to note that some courts have refused to allow plaintiffs to recover for medical monitoring as either an independent tort or a remedy, opting instead to treat medical monitoring as a claim for future medical expenses and thus requiring plaintiffs to meet all of the requirements for traditional tort recovery, including the requirement of a present physical injury. Wells, *supra* note 1, at 294-95. *See, e.g.*, *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So.2d 827, 828 (Ala. 2001) (holding that Alabama law does not recognize a cause of action for medical monitoring "in the absence of a manifest

justifications used by the courts allowing recovery for medical monitoring with no present injury is that “mere exposure to hazardous substances, combined with a significantly increased risk of harm,” satisfies the traditional tort law requirement of a physical injury.²² Typically, plaintiffs are required to demonstrate: (1) exposure to a toxic substance; (2) the potential for injury; and (3) the necessity of early detection and treatment.²³

The Supreme Court of New Jersey²⁴ was the first to consider the viability of suits for medical monitoring with no present injury in the toxic tort context.²⁵ In *Ayers v. Township of Jackson*, decided in 1987, plaintiffs alleged that their well water had been contaminated by pollutants contained in the defendant’s landfill.²⁶ None of the plaintiffs claimed to have any present illness or injury; rather, they sought to recover the cost of periodic medical examinations to monitor for early symptoms of disease.²⁷ In holding that New Jersey recognized claims for medical monitoring even in the absence of a present illness or injury, the *Ayers* court first noted that “[c]ompensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles.”²⁸ The court then cited a number of policy considerations in support of its decision. The court first noted that there is an important public health interest in providing access to medical testing for toxic tort plaintiffs.²⁹ It also commented that allowing “pre-symptom claims” is important in deterring polluters.³⁰ Finally, the court stated that it is “inequitable for an individual, wrongfully exposed to dan-

physical injury or illness”); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) (“Entitlement to the costs of future medical monitoring requires plaintiff to prove actual present injury and an increased risk of future harm.”); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002). In jurisdictions that require plaintiffs to present a physical injury, the question of the duty to defend is much simpler. Plaintiffs who do not yet have an injury are unlikely to file suit seeking medical monitoring if they know they cannot recover without a demonstrable injury. Those plaintiffs that do have some present injury may seek medical monitoring, but in those cases, there would be no issue as to whether the plaintiff is making a claim for “bodily injury.” Thus, this comment focuses on those jurisdictions that allow plaintiffs to recover for medical monitoring with no present physical injury, because it is in that context that a more significant insurance coverage question arises.

²² *McCall*, *supra* note 20, at 975 (citing *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984); *Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530, 537 (S.D. W. Va. 1993); *Doe v. City of Stamford*, 699 A.2d 52, 54-57 (Conn. 1997)).

²³ *Czmus*, *supra* note 2, at 38 (quoting requirements as outlined in *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 850 (M.D. Pa. 1988)).

²⁴ *Ayers*, 525 A.2d at 287.

²⁵ *See Wells*, *supra* note 1, at 297.

²⁶ *Ayers*, 525 A.2d at 291.

²⁷ *Id.* at 297.

²⁸ *Id.* at 311.

²⁹ *Id.*

³⁰ *Id.* at 312.

gerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary.”³¹ The court concluded by outlining several factors to be taken into account when considering whether a request for medical monitoring is reasonable: (1) the likelihood of disease; (2) the significance and extent of the plaintiff’s exposure; (3) the toxicity of the chemicals; (4) the seriousness of the diseases for which plaintiffs are at risk; and (5) the value of early diagnosis.³² *Ayers* was followed by other state and federal decisions holding that plaintiffs could recover for medical monitoring with no present injury, including state court decisions in New York, Arizona, and Indiana as well as federal district court decisions in Pennsylvania, Minnesota, and Hawaii.³³

While the *Ayers* case and subsequent cases that followed it considered recovery for medical monitoring in the context of suits under state law, the Supreme Court recently declined to recognize medical monitoring as a “full-blown, traditional tort law cause of action” in a Federal Employers Liability Act case.³⁴ In the 1997 *Metro-North* case, the plaintiff railroad worker sued his employer under the Federal Employers’ Liability Act (“FELA”) for exposing him to asbestos.³⁵ He sought a lump sum award to compensate him for future medical monitoring expenses.³⁶ The Supreme Court denied recovery, declining to create a “new, full-blown, tort law cause of action” for medical monitoring³⁷ and noting that there was insufficient common law support for an “unqualified rule of lump-sum damages recovery.”³⁸ The Court first noted that courts allowing recovery for medical monitoring with no present injury had not recognized it as a traditional tort cause of action, but rather characterized it as harm that could justify a tort remedy.³⁹ The Court also noted that some lower courts had rejected lump-sum damages awards and instead favored an insurance mechanism or court-

³¹ *Id.*

³² *Ayers*, 525 A.2d at 312

³³ *See Wells, supra* note 1, at 302-04 (citing *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (N.Y. App. Div. 1984); *Geradi v. Nuclear Util. Servs.*, 566 N.Y.S.2d 1002, 1004 (N.Y. Sup. Ct. 1991); *Burns v. Jacquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987); *Adams v. Clean Air Sys.*, 586 N.E.2d 940, 942 (Ind. Ct. App. 1992); *Paoli R.R. Yard PCB Litig. v. Monsanto Co.*, 916 F.2d 829, 852 (3d Cir. 1990); *Werlein v. United States*, 746 F. Supp. 887, 904 (D. Minn. 1990); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1573 (D. Haw. 1990)).

³⁴ *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).

³⁵ *Id.* at 426-27.

³⁶ *Id.* at 439.

³⁷ *Id.* at 443.

³⁸ *Id.* at 444.

³⁹ *Id.* at 440-41.

supervised funds to administer payments.⁴⁰ The Court then went on to voice several concerns with respect to a new cause of action for medical monitoring. First, the Court believed that it would be difficult for judges and juries to determine which cancer-related medical costs are truly extra costs, over and above those costs that are otherwise recommended.⁴¹ The Court was concerned about the feasibility of distinguishing between periodic medical examinations that are necessary in an average person's lifetime and additional medical surveillance that may be recommended for victims of toxic exposure.⁴² Further, the Court noted that, since "tens of millions" of people may have suffered some kind of toxic exposure, allowing a cause of action for medical monitoring might flood the judicial system with less important cases.⁴³ Finally, the Court observed that there were other alternative sources of payment that might lead to duplicative awards; plaintiffs might be able to recover under their own health insurance policies or by making workers compensation claims.⁴⁴ The Court did, however, acknowledge the existence of "competing considerations . . . that may have led some courts to provide a form of liability."⁴⁵

It is important to note that *Metro-North* can be limited to its facts on several grounds. First, it held only that medical monitoring could not be established as an independent cause of action in a FELA action—the Court did not rule for or against "medical monitoring claims in general."⁴⁶ Further, *Metro-North* does not apply to state courts applying state law.⁴⁷ Whereas *Metro-North* involved claims under a federal statute, the typical toxic tort case involves questions of state law.⁴⁸ In fact, one federal district court,⁴⁹ one state appellate court,⁵⁰ and one state supreme court⁵¹ have recently allowed plaintiffs to recover for medical monitoring even after the *Metro-North* holding. Finally, the *Metro-North* Court was particularly concerned with the fact that the plaintiff had requested a lump-sum award.⁵² It

⁴⁰ *Metro-North*, 521 U.S. at 441.

⁴¹ *Id.*

⁴² *Id.* at 441-42.

⁴³ *Id.* at 442.

⁴⁴ *See id.* at 442-43.

⁴⁵ *Id.* at 443.

⁴⁶ McCall, *supra* note 20, at 976.

⁴⁷ *See id.* at 977.

⁴⁸ *Id.*

⁴⁹ *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998).

⁵⁰ *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 104 (Fla. Dist. Ct. App. 1999).

⁵¹ *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430-31 (W. Va. 1999).

⁵² *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440-41 (1997) (noting that precedent cases allowing recovery for medical monitoring did not endorse an independent tort action for lump-sum damages, but rather recognized medical monitoring as a tort remedy on which special limitations had to be imposed).

is possible that the Court might have allowed recovery if the plaintiff had sought a more acceptable form of funding, such as the insurance mechanism or the court-supervised fund that the Court cited with approval.⁵³ Justice Ginsburg stated in her dissenting opinion that “[i]f I comprehend the Court’s enigmatic decision correctly, Buckley may replead a claim for relief and recover for medical monitoring, but he must receive that relief in a form other than a lump sum.”⁵⁴ These distinctions may help explain why lower courts have continued to allow plaintiffs to recover for medical monitoring even after *Metro-North*.⁵⁵

The fact that the *Metro-North* decision should be read narrowly to apply only in the FELA context is further demonstrated by the fact that three subsequent tort cases have allowed plaintiffs to recover for medical monitoring with no present injury. An Illinois federal district court, a Florida state appellate court, and the West Virginia Supreme Court have each allowed recovery with no present injury. In *Kerr-McGee Chemical Corporation*, the Northern District of Illinois held that plaintiffs may recover reasonable costs for medical monitoring under Illinois law without demonstrating a present injury.⁵⁶ Plaintiffs alleged that they were exposed to thorium tailings (radioactive byproducts) produced at one of the defendants’ facilities, and they sought the creation of a court-supervised fund to pay for medical monitoring.⁵⁷ The court interpreted state law to uphold a claim for medical monitoring without a present injury or even a reasonable certainty of contracting a disease, noting that there are obvious policy reasons for recognizing a medical monitoring cause of action.⁵⁸ First, a plaintiff may have suffered significant harm even though his or her disease is latent.⁵⁹ Further, allowing recovery for medical monitoring serves to deter the irresponsible discharge of harmful chemicals and encourages the early detection and treatment of disease.⁶⁰ Finally, the court commented that recogniz-

⁵³ *Id.* at 441.

⁵⁴ *Id.* at 455-56 (Ginsburg, J., dissenting).

⁵⁵ There are also cases decided after *Metro-North* that refused to allow recovery for medical monitoring. *See, e.g.,* *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 830-32 (Ala. 2001) (citing *Metro-North* for policy considerations against medical monitoring and holding that Alabama law does not recognize a cause of action for medical monitoring); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440 (Nev. 2001) (The court declined to recognize medical monitoring as a common law cause of action, but left open the possibility that it could be awarded as a remedy if plaintiff identified an underlying cause of action to which it could attach.).

⁵⁶ *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998).

⁵⁷ *Id.* at 1111, 1117.

⁵⁸ *Id.* at 1119.

⁵⁹ *Id.* at 1119 (citing and approving policy considerations as set forth in *Paoli R.R. Yard PCB Litig. v. Monsanto Co.*, 916 F.2d 829, 852 (3d Cir. 1990)).

⁶⁰ *Id.* at 1120.

ing medical monitoring as a tort “does not require courts to speculate about the probability of future injury,” but “merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate.”⁶¹

A Florida appellate court similarly held that Florida allows claims for medical monitoring despite the absence of a present injury in *Petito v. A.H. Robins Co.*⁶² The *Petito* plaintiffs sued for an increased risk of cardiac and circulatory problems after ingesting the defendants’ Fen-Phen weight loss products.⁶³ They sought a court-supervised medical monitoring program.⁶⁴ Holding that Florida does permit medical monitoring claims, the *Petito* court distinguished *Metro-North* by noting that it was limited to claims under FELA.⁶⁵ The *Petito* court further noted that it was only in dicta that the Supreme Court laid out policy considerations against an independent cause of action for medical monitoring, and that the Court had acknowledged that limitations on medical monitoring such as the creation of a court-supervised fund can address some of those policy concerns.⁶⁶

The Supreme Court of Appeals of West Virginia recognized an independent cause of action for medical monitoring with no present injury requirement in *Bower v. Westinghouse Electric Corp.*⁶⁷ *Bower* was a toxic tort suit in which plaintiffs alleged exposure to toxic substances in the defendants’ manufacturing debris.⁶⁸ In holding that West Virginia recognizes medical monitoring as an independent cause of action, the court noted that the “injury” underlying claims for medical monitoring is “the invasion of any legally protected interest.”⁶⁹ It explained that “[i]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury.”⁷⁰ The court concluded by citing a number of policy considerations in support of its decision.⁷¹ First, there is a public health interest in fostering access to medical testing and providing for early diagnosis and treatment.⁷² Second,

⁶¹ *Id.* at 1119-20.

⁶² 750 So.2d 103, 105-08 (Fla. Dist. Ct. App. 1999).

⁶³ *Id.* at 104.

⁶⁴ *Id.* at 104-05.

⁶⁵ *Id.* at 104, 106.

⁶⁶ *Id.* at 106.

⁶⁷ 522 S.E. 2d 424, 430, 434 (W. Va. 1999).

⁶⁸ *Id.* at 426.

⁶⁹ *Id.* at 430 (quoting RESTATEMENT (SECOND) OF TORTS § 7(1) (1964) for the definition of “injury”).

⁷⁰ *Id.* at 430 (quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984)).

⁷¹ *Id.* at 431.

⁷² *Id.* (quoting *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993)).

medical monitoring has an important deterrence value.⁷³ Finally, allowing medical monitoring recovery serves “societal notions of fairness and elemental justice.”⁷⁴

Kerr-McGee, Petito, and Bower indicate courts’ continuing willingness to allow plaintiffs to recover medical monitoring without any present injury. Thus, it is clear that even after the Supreme Court’s decision in *Metro-North*, insurers will still need to address the unique coverage questions that suits for medical monitoring present.

C. *Commercial General Liability Coverage, the Duty to Defend, and Principles of Insurance Policy Construction*

Often, the defendant in a toxic tort suit for medical monitoring is a business or corporation⁷⁵ that is likely insured under a Commercial General Liability (“CGL”) insurance policy. The standard CGL coverage form provides that the insurer will pay “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”⁷⁶ Thus, in order for coverage to apply under a CGL policy, a third party must present claims against the insured for damages because of “bodily injury.”

In the event that the third party files a lawsuit instead of simply filing a claim, the CGL policy contains provisions for the insured’s defense. The coverage form states that the insurer has the “right and duty to defend the insured against any ‘suit’ seeking [damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.]”⁷⁷ Thus, under the standard CGL policy, the insurer has a duty to defend suits alleging “damages because of ‘bodily injury.’” This means that the insurer must either provide an attorney for the insured “or otherwise fund the insured’s defense.”⁷⁸

The insurer’s duty to defend is broader than its duty to indemnify, meaning that it must defend the insured against all allegations in a complaint even if some are clearly not covered by the policy.⁷⁹ Thus, if the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Czmus, *supra* note 2, at 38 (noting that the medical monitoring remedy “deters businesses and corporations from acting irresponsibly”).

⁷⁶ DONALD S. MALECKI & ARTHUR L. FLITNER, COMMERCIAL GENERAL LIABILITY app. H (7th ed. 2001) (2001 occurrence form). “Bodily injury” is defined as “bodily injury, sickness, or disease.” *Id.*

⁷⁷ *Id.*

⁷⁸ D. Alan Rudlin & Michael R. Shebelskie, *Novel Toxic Tort Claims and Insurance Coverage*, in 495 ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND 243, 278 (Practising Law Institute Commercial Law and Practice Course Handbook Series, 1989).

⁷⁹ MALECKI & FLITNER, *supra* note 76, at 16.

complaint contains five counts and only one count is covered by the policy, the insurer must provide a defense for the entire lawsuit.⁸⁰ In addition, the duty to defend does not depend on whether the plaintiff can ultimately prove any of the allegations in the complaint. Instead, in many jurisdictions, the insurer must provide a defense if any of the allegations in the complaint indicate even a potential for coverage.⁸¹ In fact, until 1986, the standard CGL form specifically required the insurer to provide a defense in suits where plaintiffs ultimately could not prove their claims; the coverage form stated that the insurer would defend the insured “even if any of the allegations of the suit [were] groundless, false or fraudulent.”⁸² Thus, the insurer had (and still has) a duty to provide a defense for its insured in any suit alleging covered damages, regardless of whether those allegations are proven to be true.

Since the duty to defend is broader than the duty to indemnify, there may be a duty to defend a lawsuit alleging potentially covered claims even if it is later determined in the course of the litigation that there would be no duty to compensate the plaintiffs for those claims.⁸³ Since the insurer may be obligated to provide a defense, but could ultimately deny indemnity coverage for a variety of reasons, it may be argued that the question of the duty to indemnify in suits for medical monitoring is more important than the question of the duty to defend. The duty to defend, however, is critically important because it affects whether plaintiffs will ultimately be able to recover against the insured.⁸⁴ First, if a settlement demand is less than the cost of defense, the insurer may decide to settle the case.⁸⁵ Second, while providing a defense, the insurer must comply with the “duty to settle” rule imposed by most jurisdictions even if ultimate coverage for the claim is

⁸⁰ See, e.g., *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795-96 (Cal. 1993) (“Once the defense duty attaches, the insurer is obligated to defend against all of the claims involved in the action, both covered and noncovered, until the insurer produces undeniable evidence supporting an allocation of a specific portion of the defense costs to a noncovered claim.”); *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 930 (Ill. 1991) (“[I]f the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy.”); *Dochod v. Cent. Mut. Ins. Co.*, 264 N.W.2d 122, 124 (Mich. Ct. App. 1978) (“[A]n insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy, if there are any theories of recovery that fall within the policy.”).

⁸¹ Susan Randall, *Redefining the Insurer's Duty to Defend*, 2 CONN. INS. L.J. 221, 226 (1997).

⁸² MALECKI & FLITNER, *supra* note 76, at 15.

⁸³ See Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 MD. L. REV. 1, 4 (1999).

⁸⁴ *Id.* at 5 & n.14. Pryor notes that “in complex and often misunderstood ways, the defense question- ‘Must the insurer provide a defense in this case?’- very much affects another question- ‘Will the injured tort plaintiff receive any compensation in this case?’” *Id.* at 5.

⁸⁵ See *id.* at 19.

doubtful.⁸⁶ The “duty to settle” rule typically provides that insurers should settle the lawsuit on behalf of the insured if they receive a demand within the policy limits.⁸⁷ If an insurer does not settle because of coverage concerns, and the case results in a verdict against the insured that exceeds the policy limits, the insurer may be liable for its failure to settle if its coverage position turns out to be incorrect.⁸⁸ Thus, an insurer that has a duty to defend and receives a demand within its policy limits may often decide to settle the claim even though the insurer believes the claim may not be covered.⁸⁹

Courts have held that whether an insurer has a duty to defend is a question of law for the courts’ determination.⁹⁰ There are two rules of construction relevant to interpreting policy language and considering whether claims for medical monitoring constitute “damages because of ‘bodily injury.’” First, ambiguous terms in insurance policies are construed in favor of the insured.⁹¹ Second, some courts will interpret policy terms in accordance with the insured’s reasonable expectations of coverage.⁹²

⁸⁶ See *id.* at 20.

⁸⁷ See *id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, e.g., *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 609 (W.D.N.Y. 2001) (noting that “[w]hether an insurer has an obligation to defend is a question of law for the courts”).

⁹¹ Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996); Nicholas R. Andrea, *Exposure, Manifestation of Loss, Injury-in-Fact, Continuous Trigger: The Insurance Coverage Quagmire*, 21 PEPP. L. REV. 813, 822 (1994); Debi L. Davis, *Insureds Versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena- A Losing Battle for Both Sides*, 43 SW. L.J. 969, 975 (1990). This maxim is known as *contra proferentem*, which provides that ambiguities will be construed “against the drafter.” Abraham, *supra* at 531. See, e.g., *Reserve Ins. Co. v. Pisciotto*, 640 P.2d 764, 768 (Cal. 1982) (“[A]ny ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and . . . if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates.”); *Huntington Mut. Ins. Co. v. Walker*, 392 N.E.2d 1182, 1185 (Ind. Ct. App. 1979) (“[I]t is well-settled that where the language of an insurance contract is so ambiguous as to be susceptible of more than one interpretation, the court will adopt the construction most favorable to the insured.”); *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1383 (Ohio 1988) (“[I]t is well-settled that, where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.”).

⁹² Andrea, *supra* note 91, at 825. See, e.g., *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990) (“[W]e generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured.”); *Foremost Ins. Co. v. Putzier*, 627 P.2d 317, 321 (Idaho 1981) (“[T]he doctrine of probability or reasonableness has long been a rule of construction geared toward ascertaining intent in situations of ambiguity. The standard to be applied is what a reasonable person in the position of the insured would have understood the language to mean.”); *Hendrix v. Fireman’s Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky. Ct. App. 1991) (“Under the ‘doctrine of reason-

D. *Case Law Addressing the Duty to Defend Suits for Medical Monitoring*

Two states, New York and Illinois, have considered whether insurers have a duty to defend suits for medical monitoring. Pennsylvania has considered the duty to defend in a claim for future medical expenses where plaintiffs presented allegations that were very similar to those presented by medical monitoring plaintiffs; namely, that as a result of toxic exposure, they suffered an increased risk of disease.

In *Burt Rigid Box, Inc. v. Travelers Property Casualty Corporation*, the Western District of New York held that allegations of increased risk of future disease do constitute "bodily injury" when liberally construed.⁹³ The insured was sued by plaintiffs who lived or worked near a landfill where the insured had allegedly disposed of hazardous waste.⁹⁴ The plaintiffs sought the establishment of a fund to cover future medical testing and surveillance as a result of their exposure to the hazardous waste.⁹⁵ The insurer denied coverage on the grounds that the allegations did not constitute claims for damages because of bodily injury as required by the commercial general liability policies issued to the insured.⁹⁶ In holding that there was a duty to defend, the court noted that the allegations of a complaint must be liberally construed when evaluating coverage because the duty to defend is

able expectations,' an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the policy."); *W&J Rives, Inc. v. Kemper Ins. Group*, 374 S.E.2d 430, 433 (N.C. Ct. App. 1988) ("[A]n insurance contract should be construed as a reasonable person in the position of the insured would have understood it."); *Atwood v. Hartford Accident & Indem. Co.*, 365 A.2d 744, 746 (N.H. 1976) ("The objectively reasonable expectations of the insured will be honored even though painstaking study of the policy provisions would have negated those expectations."); *Great Am. Ins. Co. v. Lerman Motors, Inc.*, 491 A.2d 729, 733 (N.J. Super. Ct. App. Div. 1984) ("[T]he terms of an insurance contract should be read to accord with the reasonable expectation of the purchaser to the end that coverage is afforded to the full extent that any fair interpretation will allow."); *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649, 650 (Pa. Super. Ct. 1994) ("The proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured. . . . However, . . . an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous."); *State of West Virginia v. Janicki*, 422 S.E.2d 822, 825 (W. Va. 1992) ("The doctrine of reasonable expectations . . . is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."); *Western Cas. & Sur. Co. v. Budrus*, 332 N.W.2d 837, 839 (Wis. Ct. App. 1983) ("The test of coverage is what a reasonable person in the insured's position would have believed to be covered, and the reasonable expectations of coverage of the insured should be honored.") (citations omitted).

⁹³ *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 638 (W.D.N.Y. 2001).

⁹⁴ *Id.* at 603.

⁹⁵ *Id.* at 637.

⁹⁶ *Id.*

broader than the duty to indemnify.⁹⁷ The court then stated that “[i]t does not strain credulity to construe the . . . plaintiffs’ allegations that they are at a higher risk for developing certain cancers as a bodily injury as, if true, such allegation is predicated on the plaintiff’s diminished physical ability to resist such illnesses.”⁹⁸ Thus, the court held that the plaintiffs’ complaint did allege claims for bodily injury when liberally construed and the insurer had a duty to defend the suit.⁹⁹

The Appellate Court of Illinois considered the duty to defend suits for medical monitoring in 2003.¹⁰⁰ The insured, a distributor of herbal dietary supplements, was sued for violating California statutes by illegally labeling, distributing, and promoting Herbal Phen-Fen as a treatment for obesity.¹⁰¹ The lawsuit sought the establishment of a fund to provide for medical monitoring of all persons who had used the Herbal Phen-Fen products.¹⁰² The court found that the insurer had no duty to defend the suit because the complaint contained no allegations of bodily injury.¹⁰³ The court distinguished *Techalloy* and *Burt Rigid Box*, noting that the underlying lawsuits in both of those cases contained factual allegations of bodily injury.¹⁰⁴ The *Techalloy* plaintiffs claimed that exposure to harmful substances may have caused serious injury and that they were at an increased risk of injury or death.¹⁰⁵ Similarly, the *Burt Rigid Box* plaintiffs alleged that they had a higher risk of developing certain cancers.¹⁰⁶ Unlike *Techalloy* and *Burt Rigid Box*, the plaintiffs in *HPF* never presented any allegations of bodily injury.¹⁰⁷ The court reviewed the complaint and noted that it “[did] not make a single allegation that HPF’s herbal products caused bodily injury or even that they *may* cause bodily injury.”¹⁰⁸ There were no allegations that the products were even unsafe or could be unsafe.¹⁰⁹ Even though the plaintiffs had asked for medical monitoring in their prayer for relief, the court noted that the purpose of the medical monitoring was to monitor the products’ effects, and the plaintiffs had not alleged that the effects included bod-

⁹⁷ *Id.* at 637-38.

⁹⁸ *Id.* at 638.

⁹⁹ *Burt Rigid Box*, 126 F. Supp. 2d at 638.

¹⁰⁰ *HPF, L.L.C. v. Gen. Star Indem. Co.*, 788 N.E.2d 753, 755 (Ill. App. Ct. 2003).

¹⁰¹ *Id.* at 754.

¹⁰² *Id.* at 755.

¹⁰³ *Id.* at 758.

¹⁰⁴ *Id.* at 756.

¹⁰⁵ *Id.* at 756-57.

¹⁰⁶ *HPF*, 788 N.E.2d at 757.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

ily injury.¹¹⁰ The request for medical monitoring did not, without further allegations, establish a claim for damages because of bodily injury.¹¹¹ The court ultimately decided that there was no duty to defend¹¹² based upon the deficiencies in the pleadings. However, this case indicates that, had the plaintiffs presented allegations of increased risk of disease to support their medical monitoring request, the court would likely have considered those allegations to be sufficient “bodily injury” to trigger the insurer’s duty to defend.

In 1984, the Pennsylvania Superior Court (the state’s intermediate appellate court) indicated that an insurer has a duty to defend suits that allege increased risk of future disease.¹¹³ Although this point was expressed in dicta, the court clearly indicated that such allegations constitute “bodily injury” for insurance purposes.¹¹⁴ In *Techalloy*, the insured was sued for recklessly dumping or storing trichloroethylene (“TCE”), a toxic chemical.¹¹⁵ The plaintiffs alleged that their exposure to TCE had the potential to cause serious injury with possible cancerous effects and that, as a result of the insured’s negligence, they suffered an increased risk of serious illness or death.¹¹⁶ They asked for the creation of a trust fund to provide for present and future medical expenses.¹¹⁷

Techalloy’s insurer, Reliance, denied coverage for the suit because it did not allege bodily injury, and Techalloy sued Reliance seeking its defense costs after successfully resolving the suit.¹¹⁸ The court found that, even though a pollution exclusion in Techalloy’s policy operated to bar coverage, the plaintiffs presented allegations of bodily injury that would have given rise to Reliance’s duty to defend if there had been no pollution exclusion.¹¹⁹ The court distinguished between the degree of injury necessary to receive compensation under tort law and to trigger the duty to defend.¹²⁰ It explained that “[e]ven if the allegations were not of sufficient particularity to be cognizable and compensable under Pennsylvania tort law, they were sufficient at least in the context of the contractual obligation of ‘bodily injury, sickness or disease’ as defined in the policy.”¹²¹ The court noted

¹¹⁰ *Id.* at 758.

¹¹¹ *See id.* at 758.

¹¹² *HPF*, 788 N.E.2d at 758.

¹¹³ *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820, 826 (Pa. Super. Ct. 1984).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 822.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 822-23.

¹¹⁹ *Techalloy*, 487 A.2d at 826-27.

¹²⁰ *Id.* at 824.

¹²¹ *Id.*

that a strict construction of the definition of “bodily injury,” namely, that it must conform to tort standards, would result in frustrating the insured’s reasonable expectations of coverage under the policy.¹²² It also noted that doing so would equate the duty to defend with the duty to indemnify, violating the policy provision that the insurer will defend even groundless, false or fraudulent suits.¹²³ The court concluded that the term “bodily injury” was ambiguous and therefore had to be liberally construed in the insured’s favor.¹²⁴ Finally, the court examined asbestos cases that considered when injury occurred for purposes of determining which insurers were responsible for defending and/or indemnifying the insured.¹²⁵ The court cited a case from the Court of Appeals for the D.C. Circuit for its holding that asbestos related injury occurred, for insurance purposes, at the time of exposure to a hazardous substance.¹²⁶

Although the *Techalloy* court did not consider a medical monitoring lawsuit, it did consider a lawsuit in which the allegations were identical to those presented in medical monitoring cases like *Burt Rigid Box*. Namely, the *Techalloy* plaintiffs alleged toxic exposure that had resulted in an increased risk of disease. Thus, although the *Techalloy* case was not a medical monitoring decision, it indicates that the court would view medical monitoring allegations of increased risk of disease as “bodily injury” for purposes of determining the duty to defend.¹²⁷

E. *The “As Damages” Question*

Interestingly, the courts that have thus far considered the insurer’s duty to defend in medical monitoring suits or in suits for increased risk of

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 824-25.

¹²⁵ *Techalloy*, 487 A.2d at 825. In latent disease cases where the plaintiff’s disease may have developed over a period of twenty years or more, there are often a number of different insurers that sold policies to the insured during the relevant time period. When these types of cases give rise to coverage litigation between the insured and the insurers, the courts must determine which insurers are obligated to provide a defense and/or indemnity based upon when the plaintiff’s “bodily injury” occurred. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1040, 1042 (D.C. Cir. 1981) (“For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff’s disease. . . . The first step in the analysis of this problem is to determine what events, from the point of exposure to the point of manifestation, trigger coverage under these policies.”).

¹²⁶ *Techalloy*, 487 A.2d at 825 (citing *Keene*, 667 F.2d at 1041).

¹²⁷ Indeed, the insured in *HPF* relied on the *Techalloy* decision in support of its position that the underlying complaint “[sought] damages for bodily injury because it [sought] the establishment of a fund for medical monitoring of all persons who used HPF’s Herbal Phen-Fen products.” *HPF, L.L.C. v. Gen. Star Indem. Co.*, 788 N.E.2d 753, 756 (Ill. App. Ct. 2003).

disease have failed to address whether such claims constitute “damages” as required by the standard form commercial general liability policy. The policy obligates the insurer to pay sums that the insured is legally obligated to pay “as damages because of ‘bodily injury’”¹²⁸ While the *Burt Rigid Box*, *HPF*, and *Techalloy* decisions addressed the question of whether plaintiffs had alleged sufficient “bodily injury” to trigger the insurer’s duty to defend, they did not address the question of whether the claims constituted *damages* because of “bodily injury.”¹²⁹

The term “damages” is not defined in a standard form liability policy.¹³⁰ The insurance industry has taken the position that “damages” refers only to legal damages and not to equitable relief,¹³¹ and some courts have agreed with that interpretation.¹³² In *Cincinnati Insurance Co. v. Milliken and Co.*, the Fourth Circuit held that the term “damages” is unambiguous and means legal damages only.¹³³ In *Milliken*, the United States brought suit against the insured to recover the cost of removing hazardous waste from the insured’s property.¹³⁴ The court noted first that language in an insurance policy should be given its “plain, ordinary, and popular meaning.”¹³⁵ The court then stated that, “[a]s a general rule, comprehensive general liability policies do not extend coverage to claims for equitable relief.”¹³⁶ Finally, the court emphasized that the policy required the insurer to pay “all sums which the insured shall become *legally* obligated to pay as damages” and this language did not apply to sums that the insured was *equitably* obligated to pay.¹³⁷

¹²⁸ MALECKI & FLITNER, *supra* note 76, app. H, at 1 (2001 occurrence form).

¹²⁹ See *Burt Rigid Box Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 637-38 (W.D.N.Y. 2001), *aff’d in part and rev’d in part*, 302 F.3d 83 (2d Cir. 2002); *HPF, L.L.C. v. Gen. Star Indem. Co.*, 788 N.E.2d 753, 756-57 (Ill. App. Ct. 2003); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820, 823-26 (Pa. Super. Ct. 1984).

¹³⁰ MALECKI & FLITNER, *supra* note 76, app. H, at 1 (2001 occurrence form).

¹³¹ MALECKI & FLITNER, *supra* note 76, at 6.

¹³² *Davis*, *supra* note 91, at 977-78. See, e.g., *Ellett Bros., Inc. v. United States Fid. & Guar. Co.*, 275 F.3d 384, 387 (4th Cir. 2001) (holding that, in the absence of evidence demonstrating contrary intent, the term “damages” means legal damages only and does not extend to claims for equitable relief); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (holding that the term “damages” unambiguously means legal damages and, “[a]s a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief”).

¹³³ *Milliken*, 857 F.2d at 981.

¹³⁴ *Id.* at 980.

¹³⁵ *Id.* at 981.

¹³⁶ *Id.*

¹³⁷ *Id.* (emphasis added).

In contrast, other courts have held that “as damages” encompasses both legal damages and equitable relief.¹³⁸ In *Bausch & Lomb, Inc. v. Utica Mutual Insurance Company*, groundwater pollution was discovered on the insured’s industrial site.¹³⁹ The insured began removing contaminated soil even though no third-party suit had been filed against it and it had not received a written administrative order from the government.¹⁴⁰ Its insurer denied coverage in part because there was no claim for “damages.”¹⁴¹ In holding that “damages” encompasses both legal damages and equitable relief, the court first noted that there was no evidence in the policy that the parties meant for the term to have a special or technical meaning.¹⁴² Therefore, the court applied an ordinary meaning test and stated that “damages” means “the reparation in money for a detriment or injury sustained.”¹⁴³ The court explicitly rejected the argument that the term had a distinct legal meaning, and noted that “[t]he reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity.”¹⁴⁴ The court further explained that policyholders would not reasonably expect coverage to depend on the type of relief sought, but rather would understand “damages” to mean “money paid to make good an insured loss.”¹⁴⁵ The court rejected the insurer’s argument that an interpretation of “as damages” that included both legal damages and equitable relief would make the phrase redundant by removing all limitations on the insurer’s obligation to pay.¹⁴⁶ It noted that expenditures such as fines and penalties are “not understood to be dollar-for-dollar recompense for injury, but [are] a pecuniary

¹³⁸ James T. O’Reilly and Caroline B. Buenger, *Insurance Coverage for Hazardous Waste Liabilities*, in RCRA AND SUPERFUND: A PRACTICE GUIDE § 16:24 (Oct. 2004); Davis, *supra* note 90, at 976-90. *See, e.g.*, *Lindsay Mfg. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263 (6th Cir. 1997) (holding that under Nebraska law the term “as damages” is ambiguous and therefore must be interpreted to include both legal damages and equitable relief since that interpretation favors the insured); *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 298 (Ind. Ct. App. 1997) (noting that “damages” is ambiguous and holding that “the ordinary meaning of the term ‘damages’ in a CGL policy includes EPA or state-mandated cleanup and response costs”); *Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551, 560 (D. Del. 1989) (rejecting legal, technical definition of “damages” and noting that “[a]ny definition of ‘damages’ which is grounded upon the ancient division between law and equity . . . would hardly be an ‘ordinary and accepted meaning’ in the eyes of a ‘reasonably prudent layperson.’”).

¹³⁹ 625 A.2d 1021, 1024 (Md. 1993).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1027.

¹⁴² *Id.* at 1032.

¹⁴³ *Id.* at 1032-33.

¹⁴⁴ *Id.* at 1032-33.

¹⁴⁵ *Id.* at 1033.

¹⁴⁶ *Id.*

form of punishment for acts society seeks to deter.”¹⁴⁷ Thus, fines and penalties would still not be covered¹⁴⁸ even if “as damages” were interpreted to include both legal damages and equitable relief, and therefore there would still be a limitation on the insurer’s duty to pay.

Regardless of whether “as damages” is interpreted to mean legal damages only or to include equitable relief, it is also necessary to determine whether a medical monitoring award is legal or equitable in nature. Courts seem to agree that the answer to this question depends on the form of the medical monitoring relief requested.¹⁴⁹ In *Zinser v. Accufix Research Institute*, the plaintiff asked the court to order the defendant to create a medical monitoring fund and to “conduct full and proper research into alternative methodologies for remedying the condition of each patient/ class member.”¹⁵⁰ The Ninth Circuit stated that whether medical monitoring is a form of legal damages or equitable relief depends on the type of relief sought.¹⁵¹ The court then found that the suit was primarily a claim for legal damages, explaining that the requested research, though injunctive in nature, was only incidental to the plaintiff’s primary claim for money damages.¹⁵²

The United States District Court for the District of Colorado has also indicated that whether a request for medical monitoring is legal or equitable depends on the specific type of relief sought.¹⁵³ In *Cook*, the court indicated that a request for a court-administered medical monitoring fund is a request for equitable relief.¹⁵⁴ Plaintiffs had requested medical monitoring in the form of injunctive relief if complete relief was unavailable at law.¹⁵⁵ The defendant argued that a medical monitoring claim is not cognizable as “injunctive relief.”¹⁵⁶ The court responded that

[p]laintiffs’ relief in a medical monitoring claim can take two forms. First, plaintiffs can be awarded a lump sum of money. Second, plaintiffs can be awarded a lump sum which is placed into a fund that is administered by the court. I construe plaintiffs’ Prayer for Relief . .

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195-96 (9th Cir. 2001); *Cook v. Rockwell Int’l Corp.*, 778 F. Supp. 512, 515 (D. Colo. 1991); *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992).

¹⁵⁰ *Zinser*, 253 F.3d at 1194.

¹⁵¹ *Id.* at 1195 (noting that “a request for medical monitoring cannot be categorized as primarily equitable or injunctive per se” and explaining that, since class certification was inappropriate if primary relief sought was monetary, the dispositive question was the type of relief sought).

¹⁵² *Id.* at 1196.

¹⁵³ *See Cook*, 778 F. Supp. at 515.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

. as a request for a court administered fund. Construed as such, plaintiffs state a valid claim for relief.

Cook thus implied that a request for medical monitoring can be either a request for legal damages in the form of a lump sum or a request for equitable relief in the form of a court-administered fund.¹⁵⁷

Other courts have more clearly stated the proposition that a lump sum award is legal in nature and a court-supervised fund is equitable. In *Day v. NLO, Inc.*, the Southern District of Ohio explicitly acknowledged that medical monitoring relief can be legal or equitable in nature.¹⁵⁸ The court noted that plaintiffs could be awarded a lump sum to pay for medical monitoring or defendants could be required to pay plaintiff's medical monitoring expenses directly.¹⁵⁹ The court then explained that neither award would constitute injunctive relief.¹⁶⁰ On the other hand, a court-supervised medical monitoring program is injunctive in nature.¹⁶¹ Thus, it appears that whether medical monitoring relief is legal or equitable depends on the nature of the relief sought. If the plaintiff seeks a lump sum award or direct payment of medical monitoring costs, it is a form of legal damages. If the plaintiff seeks a court-supervised fund, it is equitable in nature.

F. *Case Law on Trigger of Coverage*

Thus far, this article has addressed case law that deals directly with medical monitoring or with allegations that are similar to those presented in medical monitoring cases. "Trigger of coverage" case law does not specifically address claims for medical monitoring, but it is related in that it examines the degree of injury necessary to constitute "bodily injury" under a Commercial General Liability policy. It is helpful to review trigger of coverage cases for additional guidance as to what constitutes "bodily injury."

The phrase "trigger of coverage" refers to events that, under the terms of an insurance policy, determine whether the policy provides coverage for a given claim.¹⁶² The standard general liability coverage form provides that the insurer will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which

¹⁵⁷ *Id.*

¹⁵⁸ *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992).

¹⁵⁹ *Id.* at 335.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 336.

¹⁶² Robert D. Fram, *End Game: Trigger of Coverage in the Third Decade of CGL Latent Injury Litigation*, 454 PRACTISING L. INST. 9, 12 (1993).

this insurance applies.”¹⁶³ The policy also requires that the “bodily injury” or “property damage” occur during the policy period.¹⁶⁴ Thus, a general liability insurance policy is “triggered” by bodily injury that occurs during the policy period.¹⁶⁵

Trigger analysis became important in the context of asbestos litigation,¹⁶⁶ because it is particularly difficult to determine when bodily injury occurs in suits for latent diseases.¹⁶⁷ There may be a long period of time between the initial exposure to a harmful substance and the eventual discovery of an injury.¹⁶⁸ Thus, in asbestos cases where plaintiffs often allege a long period of exposure that ends well before the diagnosis of any disease,¹⁶⁹ courts have had to consider when a plaintiff’s bodily injury occurs in order to determine which insurance policies should respond (or should be “triggered”).¹⁷⁰

The courts have developed at least four theories of when bodily injury occurs for trigger purposes: (1) the continuous trigger theory; (2) the exposure theory; (3) the injury in fact theory; and (4) the manifestation theory.¹⁷¹ The continuous trigger theory holds that the entire disease process, from the first exposure to manifestation of the disease, triggers insurance coverage.¹⁷² Thus, all policies in effect from the time of the initial exposure to the time of manifestation are “triggered” and must respond to the claim. The exposure theory triggers coverage in years during which exposure to the toxic substance occurred.¹⁷³ The injury in fact theory holds that injury occurs when the plaintiff “incurred tangible injury,”¹⁷⁴ and the manifestation theory holds that coverage is triggered when the injury manifests.¹⁷⁵

Courts in recent years have been moving away from the manifestation trigger¹⁷⁶ because of the difficulty in determining what constitutes manifes-

¹⁶³ MALECKI & FLITNER, *supra* note 76, app. H, at 1 (2001 occurrence form).

¹⁶⁴ Fram, *supra* note 162, at 12-13; MALECKI & FLITNER, *supra* note 76, app. H, at 1 (2001 occurrence form).

¹⁶⁵ Fram, *supra* note 162, at 13.

¹⁶⁶ *See id.* at 14; *see also* Andrea, *supra* note 91, at 831.

¹⁶⁷ *See* Fram, *supra* note 162, at 13.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 14-15 (noting that most litigation concerning coverage for latent injuries has occurred in the asbestos context and explaining that courts have identified at least four theories of when bodily injury occurs and therefore triggers coverage).

¹⁷¹ *Id.*

¹⁷² *Id.* at 15.

¹⁷³ Fram, *supra* note 162, at 14.

¹⁷⁴ *Id.* at 14-15.

¹⁷⁵ *Id.* at 15.

¹⁷⁶ *Id.* at 11.

tation of an injury.¹⁷⁷ Most have rejected it as “inherently unworkable.”¹⁷⁸ In addition, few courts have adopted the injury in fact trigger.¹⁷⁹ At the same time, the continuous trigger theory has gained wide acceptance in asbestos litigation.¹⁸⁰ Courts have cited several policy reasons in support of the continuous trigger.¹⁸¹ First, a continuous trigger maximizes coverage;¹⁸² all policies in effect from the first exposure to manifestation must respond.¹⁸³ Second, the Third Circuit has held that the continuous trigger is appropriate in light of the “policy of strict construction of coverage against insurers.”¹⁸⁴ Finally, one state court determined that the term “bodily injury” was too ambiguous to support any other trigger theory.¹⁸⁵ It is important to note that under both the continuous trigger theory and the exposure trigger theory, courts have held that exposure to hazardous substances is itself sufficient “bodily injury” to trigger insurance coverage.

*Keene Corporation v. Insurance Company of North America*¹⁸⁶ is one of the leading cases adopting the continuous trigger theory.¹⁸⁷ In that case, Keene Corporation was sued in connection with asbestos-containing prod-

¹⁷⁷ *Id.* at 18.

¹⁷⁸ *Id.*

¹⁷⁹ Andrea, *supra* note 91, at 841-43. Andrea notes that “courts have refused to give the [injury-in-fact trigger] theory widespread acceptance and commentators rarely mention it.” *Id.* at 843. The United States Court of Appeals for the Fifth Circuit has pointed out that one problem with the injury-in-fact trigger in the asbestos context is that it requires “mini-trials” in each case to determine “at what point the build-up of asbestos in the plaintiff’s lungs resulted in the body’s defenses being overwhelmed.” *Guar. Nat’l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 246 (5th Cir. 2000) (quoting *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1217 (6th Cir. 1980)).

¹⁸⁰ *Fram, supra* note 162, at 15. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (asbestos); *The Skinner Corp. v. Fireman’s Fund Ins. Co.*, No. C95-995WD, 1996 WL 376657, at *1 (W.D. Wash. Apr. 3, 1996) (asbestos); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 703 (Cal. Ct. App. 1996) (asbestos); *Eli Lilly & Co. v. The Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985) (DES); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1127 (Kan. 2003) (noise-induced hearing loss); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994) (asbestos); *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770, 792 (Ohio Misc. 1995) (asbestos); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506-07 (Pa. 1993) (asbestos).

¹⁸¹ Andrea, *supra* note 91, at 844.

¹⁸² *Id.* *See, e.g., Keene*, 667 F.2d at 1045-46 (noting that “[i]f we were to hold that only the manifestation of disease can trigger coverage, the insurance companies would have to bear only a fraction of Keene’s total liability for asbestos-related diseases”).

¹⁸³ Andrea, *supra* note 91, at 844.

¹⁸⁴ *Id.* (citing *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 973 (3d Cir. 1985)).

¹⁸⁵ *Id.* (citing *Vale Chem. Co. v. Hartford Accident & Indem. Co.*, 490 A.2d 896, 901 (Pa. Super. Ct. 1985)).

¹⁸⁶ 667 F.2d 1034 (D.C. Cir. 1981).

¹⁸⁷ *Fram, supra* note 162, at 15.

ucts it had manufactured between 1948 and 1972.¹⁸⁸ Keene then sued its three insurance companies for coverage under comprehensive general liability policies issued from 1961 to 1981.¹⁸⁹ It argued that any stage in the underlying plaintiffs' asbestos related disease process should trigger coverage under its insurance policies, whereas the majority of the insurance carriers argued that only manifestation of an injury should trigger the policies.¹⁹⁰ The court agreed with Keene, holding that "any part of the single injurious process that asbestos-related diseases entail" will trigger coverage under a commercial general liability policy.¹⁹¹ In considering the term "injury," the court noted that the purpose of the insurance policies must inform their construction.¹⁹² Since the insured's purpose in buying coverage was to insure against all future liability, Keene could reasonably have expected coverage for injuries that were latent at the time of purchasing coverage but manifested during the policy period.¹⁹³ However, adopting a manifestation trigger alone would mean the insurers would have to "bear only a fraction of Keene's total liability for asbestos-related diseases."¹⁹⁴ Therefore, the court held that both exposure to asbestos fibers and the exposure in residence period, or the period in which the disease develops,¹⁹⁵ are sufficient to trigger coverage.¹⁹⁶ The court stated that "[r]egardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of an injurious process is enough for it to constitute 'injury' under the policies."¹⁹⁷

A number of other federal and state courts have adopted the exposure trigger theory.¹⁹⁸ This theory is based on the belief that injury occurs simultaneously with exposure.¹⁹⁹ *Insurance Company of North America v. Forty-*

¹⁸⁸ *Keene*, 667 F.2d at 1038.

¹⁸⁹ *Id.* at 1038-1039.

¹⁹⁰ *Id.* at 1039.

¹⁹¹ *Id.* at 1047.

¹⁹² *Id.* at 1044.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1045-46.

¹⁹⁵ *Id.* at 1042.

¹⁹⁶ *Id.* at 1046.

¹⁹⁷ *Id.*

¹⁹⁸ Sheila L. Birnbaum, *Trigger or Coverage in the Toxic Tort Context*, 477 PRACTISING L. INST. 165, 169-71 (1993). *See, e.g.*, *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 249-50 (5th Cir. 2000) (asbestos); *United States Liab. Ins. Co. v. Selman*, 70 F.3d 684, 688-89 (1st Cir. 1995) (lead poisoning); *Commercial Union Ins. Co. v. SEPCO Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) (asbestos); *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437, 1443 (E.D.N.C. 1994) (asbestos); *Cole v. Celotex Corp.*, 599 So.2d 1058, 1076 (La. 1992) (asbestos); *Kremers-Urban Co. v. Am. Employers Ins. Co.*, 351 N.W.2d 156, 167 (Wis. 1984) (DES).

¹⁹⁹ Birnbaum, *supra* note 198, at 168.

*Eight Insulations, Inc.*²⁰⁰ (“*INA*”) is the leading exposure theory case.²⁰¹ In that case the court confronted the same issue presented in *Keene*—namely, when “bodily injury” occurs during the process of an asbestos-related disease.²⁰² The court adopted the exposure trigger theory²⁰³ for several reasons. First, the court noted that the medical evidence presented in the case indicated that tissue injury occurs shortly after the inhalation of asbestos fibers.²⁰⁴ Second, the court explained that in considering the term “bodily injury,” it was necessary to “broadly construe the insurance policies to promote coverage” and to resolve any ambiguities in favor of the insured.²⁰⁵ The court held that the term “bodily injury” is ambiguous in the context of progressive diseases.²⁰⁶ Finally, the court reasoned that the exposure trigger theory is most consistent with the language of the policies, explaining that “bodily injury” is defined as “bodily injury, sickness, *or* disease” and is not limited to “disease.”²⁰⁷

The exposure trigger has also been adopted in the context of lead paint litigation. In *Chantel Associates v. Mount Vernon Fire Insurance Company*, plaintiffs claimed that they were injured by exposure to lead paint.²⁰⁸ The complaint alleged that the plaintiffs were exposed to lead paint from the beginning of the time that they lived at the insured’s property, and that they sustained injury in the form of cellular damage while the exposure was occurring.²⁰⁹ Plaintiffs alleged that they became permanently injured after the expiration of Mount Vernon’s general liability policy in 1986.²¹⁰ Mount Vernon refused to defend the lawsuit.²¹¹ In considering whether Mount Vernon had a duty to defend, the court cited *INA* for its comment that “for insurance purposes, courts have long defined the term ‘bodily injury’ to mean ‘any localized abnormal condition of the living body.’”²¹² Plaintiffs’ medical expert had testified that microscopic or subclinical damage to cells, tissues, or organs constitutes an injury and that lead paint exposure causes such damage to begin immediately or shortly after exposure.²¹³ Thus, the

²⁰⁰ 633 F.2d 1212 (6th Cir. 1980).

²⁰¹ Birnbaum, *supra* note 198, at 168.

²⁰² *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1216 (6th Cir.1980).

²⁰³ *Id.* at 1223.

²⁰⁴ *Id.* at 1218.

²⁰⁵ *Id.* at 1219-20.

²⁰⁶ *Id.* at 1222.

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ *Chantel Assocs. v. Mount Vernon Fire Ins. Co.*, 656 A.2d 779, 781 (Md. 1995).

²⁰⁹ *Id.* at 781.

²¹⁰ *Id.* at 781-82.

²¹¹ *Id.*

²¹² *Id.* at 785.

²¹³ *Id.* at 785.

court found that the complaint was potentially covered under Mount Vernon's policy because the plaintiffs' exposure to lead constituted "bodily injury."²¹⁴

II. ANALYSIS

The two cases addressing the insurer's duty to defend in suits for medical monitoring, *Burt Rigid Box* and *HPF*, held or indicated that there is a duty when the plaintiff alleges a need for medical monitoring because of an increased risk of disease.²¹⁵ However, neither case cited trigger of coverage case law for the proposition that exposure to a hazardous substance can itself constitute "bodily injury" for purposes of insurance coverage. Only the *Techalloy* court cited trigger cases in support of its conclusion that there is a duty to defend a suit for future medical expenses when the plaintiff alleges increased risk of disease.²¹⁶ In contrast, *Burt Rigid Box* and *HPF* relied on a different rationale. *Burt Rigid Box* held that an allegation of increased risk of cancer constitutes "bodily injury" when liberally construed,²¹⁷ and *HPF* indicated that if the plaintiff had alleged bodily injury or even the possibility of future bodily injury, there could have been a duty to defend.²¹⁸

The opinions in *Burt Rigid Box* and *HPF* could have been more persuasive if the courts had relied on trigger of coverage cases. In the *Burt Rigid Box* decision, the court could have avoided an extremely liberal interpretation of the term "bodily injury" that clearly stretches the meaning of the policy language. It is far easier to argue that a plaintiff has sustained

²¹⁴ *Id.* at 785-86.

²¹⁵ *Burt Rigid Box Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 638 (W.D.N.Y. 2001) ("It does not strain credulity to construe the . . . plaintiffs' allegation that they are at a higher risk for developing certain cancers as a bodily injury as, if true, such allegation is predicated on the plaintiff's diminished physical ability to resist such illness. The court . . . finds that the *Moore* complaint . . . alleges claims for bodily injury within the meaning of the CGL policies, requiring, as a matter of law, Aetna to defend such action."); *HPF, L.L.C. v. Gen. Star Indem. Co.*, 788 N.E.2d 753, 756-58 (Ill. App. Ct. 2003) (distinguishing *Techalloy* and *Burt Rigid Box* because plaintiffs in those cases alleged exposure that could cause serious physical injury and increased risk of cancer and concluding that, since the *HPF* plaintiffs failed to include any similar allegations of bodily injury in their complaint, there was no duty to defend).

²¹⁶ *Techalloy Co., Inc. v. Reliance Ins. Co.*, 487 A.2d 820, 825 (Pa. Super. Ct. 1984) (citing *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981) for its holding that, for insurance purposes, injury occurs at the time of exposure to a hazardous substance).

²¹⁷ *Burt Rigid Box*, 126 F. Supp. 2d at 638.

²¹⁸ *HPF*, 788 N.E.2d at 757 ("[O]ur review of the *Day* complaint shows that it does not make a single allegation that *HPF*'s herbal products caused bodily injury or even that they *may* cause bodily injury.").

“bodily injury” because toxic exposure itself is harmful than it is to argue that “bodily injury” encompasses the increased risk of a disease that the plaintiff has not yet developed. The policy clearly requires that the plaintiff present claims for “bodily injury,” not claims for the possibility of future bodily injury, and this language is easily satisfied if the courts recognize that exposure to a toxic substance is an injury. Indeed, some courts have already made note of medical evidence supporting this concept.²¹⁹ Similarly, the *HPF* court should have noted that there is no need to allege a present bodily injury to trigger an insurer’s duty to defend in medical monitoring suits—it is sufficient to allege exposure to a hazardous substance. Requiring a present injury is problematic because it undermines the law in those jurisdictions that have decided to allow plaintiffs to sue for medical monitoring with no present injury. Those jurisdictions have already decided that there are important policy considerations in favor of allowing plaintiffs to sue with no present injury;²²⁰ requiring a present injury in order to trigger an insurer’s duty to defend obviously defeats those policy goals and will prevent many plaintiffs from being able to recover.²²¹

Part A of this section argues that courts have correctly adopted the continuous trigger theory, which includes exposure as a stage in the disease process that will trigger coverage, and that future courts should hold that medical monitoring claims constitute claims for “bodily injury” based on the same rationale used in the trigger cases. Namely, future courts should hold that hazardous exposure itself can constitute bodily injury, and thus, suits for medical monitoring should be considered suits for damages because of “bodily injury.” Part B of this section addresses the “as damages” question, arguing that medical monitoring claims do constitute “damages” regardless of whether the phrase is interpreted to mean legal damages only or to include equitable relief. Part C notes that there are strong policy considerations favoring a duty to defend in medical monitoring suits. Finally, Part D addresses some likely objections to finding a duty to defend in suits for medical monitoring.

²¹⁹ *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1218 (6th Cir. 1980); *Chantel Assocs. v. Mount Vernon Fire Ins. Co.*, 656 A.2d 779, 785 (Md. 1995).

²²⁰ *See, e.g., Paoli R.R. Yard PCB Litig. v. Monsanto Co.*, 916 F.2d 829, 852 (3d Cir. 1990); *Ayers v. Township of Jackson*, 525 A.2d 287, 311-12 (N.J. 1987); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999).

²²¹ *See supra* Part I.C for discussion of how the duty to defend affects the underlying plaintiff’s ability to recover.

A. *The Continuous Trigger Theory and "Bodily Injury"*

1. The Advantages of the Continuous Trigger Theory

Courts should continue to adopt the continuous trigger theory for several reasons. Unlike the manifestation and injury in fact theories, it provides a workable standard. It is also more consistent with the policy language in that it provides coverage when a plaintiff's disease actually manifests. Finally, the continuous trigger theory maximizes coverage and honors an insured's reasonable expectations of coverage.

As some courts have already noted, the continuous trigger theory is superior to the manifestation trigger because it avoids the difficulty in determining when a disease manifested or occurred.²²² It is also preferable to the "injury in fact" trigger, which has been largely ignored by the courts,²²³ for the same reason: it is just as difficult to determine when the plaintiff "incurred tangible injury."²²⁴ What degree of symptoms would constitute manifestation or "tangible injury"? It seems clear that the process resulting in a disease like cancer or asbestosis begins when a plaintiff is initially exposed to a cancer-causing substance or to asbestos, and it also seems logical that the disease process concludes when the plaintiff is diagnosed with the condition. Unlike the date of manifestation or "injury in fact," the dates of first exposure and diagnosis can be easily and objectively determined.

The continuous trigger is also preferable to a strict exposure trigger. Under an exposure trigger theory, the insured is only covered during those years in which a plaintiff was exposed to a hazardous substance. Therefore, the insured is responsible for the non-covered years and may be asked to contribute to defense or indemnity costs on a pro-rata basis. However, this means that coverage does not apply in the years during which the plaintiff begins to develop symptoms or is actually diagnosed with a disease. This approach cannot be reconciled with the policy language, which provides coverage for claims for "bodily injury." Clearly, the plaintiff has a "bodily injury" in the years during which he or she exhibits symptoms or is diagnosed, and coverage should apply during those years.

The continuous trigger also maximizes the coverage available to the insured. Unlike the manifestation, injury in fact, and exposure trigger theories, which only trigger coverage during certain stages of the disease process, the continuous trigger theory provides that all policies in effect during the period of a plaintiff's latent disease process will apply. Of course, this

²²² See *supra* Part I.F for discussion of the various trigger theories.

²²³ See *supra* text accompanying note 179.

²²⁴ See *supra* Part I.F.

assumes that maximization of coverage is desirable. It could certainly be argued that it actually harms the insured because it will result in higher premiums and quicker exhaustion of policy limits. However, at least with respect to the exhaustion problem, it may not have that effect. If all the policies in effect during the plaintiff's latent disease process are triggered, then the pro-rata share allocated to each year will be smaller than if only some of the policies were triggered.

Finally, the continuous trigger is consistent with the idea that the insured's reasonable expectations of coverage should be honored. Imagine that XYZ Corporation has maintained liability coverage since its incorporation. Since it has always maintained coverage, its officers believe the company will be covered for any suits for "damages because of 'bodily injury.'" However, under the manifestation, exposure, or injury in fact trigger theories, XYZ is going to be uninsured for some of the years during which it paid premiums and maintained coverage. This is clearly not consistent with XYZ's expectations of coverage, and those expectations certainly seem reasonable. Admittedly, only some courts have held that policy provisions should be interpreted to comport with the insured's expectations of coverage.²²⁵ However, there are courts that do believe those expectations are relevant in construing policy provisions, and it seems inherently unfair that a company that has always maintained liability coverage would find itself uninsured for many or most of the years comprising the plaintiff's disease process because of a tortured definition of when "bodily injury" occurs. This is especially true in light of the fact that the term "bodily injury" itself is never defined in the policy; its definition is "bodily injury, sickness, or disease."²²⁶

2. The Continuous Trigger and Medical Monitoring Claims

Courts considering the duty to defend suits for medical monitoring should rely on precedent cases adopting the continuous trigger theory for the proposition that exposure to a hazardous substance is "bodily injury." This approach is consistent with law established by the majority of courts, which have adopted the continuous trigger theory. It therefore allows courts considering the medical monitoring question to follow precedent cases rather than developing new law. There is no need to stretch the term "bodily injury" to fit all sorts of allegations of future harm if courts simply rely on the already-established proposition that exposure to a toxic substance

²²⁵ See *supra* note 92 and accompanying text.

²²⁶ See *supra* text accompanying note 76.

can itself be a “bodily injury.” This approach is also consistent with the *Techalloy* decision, where the court cited *Keene* for exactly that holding.

Further, holding that exposure to a hazardous substance is “bodily injury” and thus triggers the duty to defend is consistent with the policy language. The policy requires “bodily injury,” not the possibility of future injury. One of the strongest arguments against the duty to defend in medical monitoring cases is that the policy clearly requires damages because of “bodily injury,” and medical monitoring plaintiffs do not have any such damages because they do not yet have a “bodily injury.” Holding that a medical monitoring plaintiff’s toxic exposure is in itself a “bodily injury” satisfies the policy language and is also consistent with medical evidence.²²⁷ This approach allows courts to avoid stretching the term “bodily injury” far beyond its apparent meaning to include the possibility of future injury. Thus, since courts should adopt an interpretation of “bodily injury” that is the most consistent with the policy language, and since medical evidence has established that exposure to toxic substances can cause immediate cellular damage, courts should hold that there is a duty to defend medical monitoring lawsuits because exposure itself can constitute the requisite “bodily injury.”

B. *The “As Damages” Issue*

It is not enough to determine that claims for medical monitoring constitute claims for “bodily injury” under a commercial general liability policy. In order for coverage to apply, there must be a claim not only for “bodily injury,” but for *damages* because of “bodily injury.” In fact, another argument against the duty to defend in medical monitoring lawsuits is based upon the contention that the term “damages” in a liability policy refers only to legal damages, and not to equitable relief.²²⁸ This section argues that the term should be interpreted to include both, and therefore there is a duty to defend regardless of whether a medical monitoring plaintiff seeks a lump sum payment or a court-supervised fund.

The term “damages” is not defined in a liability policy and, as noted above, in many jurisdictions ambiguous terms in the policy will be construed against the drafter.²²⁹ Further, even if the term is not held to be ambiguous, many courts will interpret insurance policy provisions in light of the insured’s reasonable expectations of coverage.²³⁰ It certainly is not un-

²²⁷ See *supra* notes 204, 213.

²²⁸ See *supra* text accompanying note 138.

²²⁹ See *supra* note 91 and accompanying text.

²³⁰ See *supra* note 92 and accompanying text.

reasonable to believe that claims for medical monitoring, whether the mechanism is a lump sum payment or a court-supervised fund, constitute “damages because of ‘bodily injury.’” In either case, the insured is being asked to pay for the consequences of causing “bodily injury” to a third-party plaintiff in the form of exposure to a harmful substance. From the reasonable insured’s perspective, this appears to be exactly the type of claim to which a standard form liability policy is meant to apply.

It is also difficult to understand why, if coverage would apply to a lump-sum payment, it would *not* apply to a court-supervised fund. In both cases, the insured is being asked to pay for the same thing: periodic medical examinations for the plaintiff. It is only the funding mechanism that is different, a distinction that should not affect the availability of coverage when the ultimate use of the funds remains the same. Coverage should not depend on how funds will ultimately be paid out. Indeed, in the context of environmental litigation, the Maryland Court of Appeals applied a similar rationale to find that environmental response costs are “damages” under a liability policy.²³¹

C. *Policy Considerations Favoring the Duty to Defend*

Because of the impact that the duty to defend has on a plaintiff’s ability to recover, the same policy considerations that support medical monitoring as an independent tort or a remedy also support the duty to defend suits for medical monitoring. Courts have based their decisions to allow recovery for medical monitoring with no present injury in large part on policy goals.²³² They have expressed their desire to foster access to medical testing²³³ so that plaintiffs may take advantage of the value of early diagnosis and treatment.²³⁴ Courts have also noted that allowing recovery for medical monitoring deters the “irresponsible discharge of toxic chemicals”²³⁵ and

²³¹ See *supra* text accompanying note 145.

²³² Amy B. Blumenberg, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 679 (1992). See, e.g., *Paoli R.R. Yard PCB Litig. v. Monsanto Co.*, 916 F.2d 829, 852 (3rd Cir. 1990); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119-20 (N.D. Ill. 1998); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993); *Ayers v. Township of Jackson*, 525 A.2d 287, 311-12 (N.J. 1987); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976-77 (Utah 1993); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999).

²³³ *Potter*, 863 P.2d at 824; *Ayers*, 525 A.2d at 311; *Hansen*, 858 P.2d at 976; *Bower*, 522 S.E.2d at 431.

²³⁴ *Paoli*, 916 F.2d at 852; *Kerr-McGee*, 999 F. Supp. at 1120; *Potter*, 863 P.2d at 824; *Ayers*, 525 A.2d at 311; *Bower*, 522 S.E.2d at 431.

²³⁵ *Paoli*, 916 F.2d at 852; *Kerr-McGee*, 999 F. Supp. at 1120; *Potter*, 863 P.2d at 824; *Ayers*, 525 A.2d at 311-12; *Hansen*, 858 P.2d at 976; *Bower*, 522 S.E.2d at 431. Of course, it could be argued that

reduces the costs to responsible parties by preventing or mitigating future illnesses.²³⁶ Finally, courts have noted that allowing recovery serves “societal notions of fairness and elemental justice,”²³⁷ since people who have been wrongfully exposed to toxic substances as a result of someone else’s negligence should not have to pay for medical monitoring that becomes necessary as a result of that exposure.²³⁸ Legal commentators have also noted that medical monitoring has other benefits, including “the production of information regarding the health consequences of human exposure to particular toxic substances.”²³⁹

The fact that medical monitoring serves important policy considerations provides a further justification for finding a duty to defend in medical monitoring cases. As discussed above, the duty to defend can affect plaintiffs’ ability to recover.²⁴⁰ Certainly, whether insurance coverage is available at the time of settlement affects how much compensation a plaintiff may receive. Thus, the duty to defend can affect the viability of medical monitoring as a cause of action or a remedy, and the same policy considerations that support medical monitoring also support the insurer’s duty to defend.

D. *Objections: Opening the Floodgates and Other Concerns*

Admittedly, medical monitoring is not a perfect solution to the problem of compensating plaintiffs for exposure to toxic and hazardous substances. One of the likely objections to finding a duty to defend is that it will encourage a flood of new lawsuits filed by asymptomatic plaintiffs.²⁴¹ In fact, this was one reason that the Supreme Court gave in support of its decision not to allow medical monitoring as a “full blown, tort cause of action” in the *Metro-North* decision.²⁴² The Court was also concerned that

the availability of insurance coverage for medical monitoring undermines the deterrence value of allowing claims for medical monitoring. Polluters will still have an incentive to avoid litigation, however. Excessive claims or lawsuits will increase an insured’s premium, and any indemnity payments that become necessary will likely erode the limit of liability on available policies.

²³⁶ *Potter*, 863 P.2d at 824; *Bower*, 522 S.E.2d at 431.

²³⁷ *Potter*, 863 P.2d at 824; *Bower*, 522 S.E.2d at 431.

²³⁸ *Potter*, 863 P.2d at 824; *Ayers*, 525 A.2d at 311; *Hansen*, 858 P.2d at 976; *Bower*, 522 S.E.2d at 431.

²³⁹ Blumenberg, *supra* note 232, at 682.

²⁴⁰ See *supra* notes 84-89 and accompanying text.

²⁴¹ Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on this Trend?* 70 DEF. COUNS. J. 315, 321 (2003) (“Another issue recognized by courts is that allowing recovery without a present physical injury opens the door to tens of millions of plaintiffs.”).

²⁴² *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997).

allowing medical monitoring as an independent tort would be problematic for other reasons.²⁴³ The Court commented that it would be difficult for courts to determine which medical monitoring costs were truly above and beyond the costs of testing that would otherwise be recommended even in the absence of toxic exposure.²⁴⁴ Further, the Court was concerned that an independent cause of action for medical monitoring would lead to duplicative awards, since some medical monitoring plaintiffs might be able to recover through workers' compensation claims or under their own health insurance policies.²⁴⁵ However, as the Supreme Court noted in *Metro-North*, there are competing policy considerations that have led some courts to allow recovery for medical monitoring.²⁴⁶ Further, this section will demonstrate that it is possible to address the Court's concerns while still allowing recovery for medical monitoring and finding a duty to defend.

The Court's concern with a flood of litigation is very relevant when considering whether future courts should find a duty to defend in medical monitoring suits. There will be far more encouragement for asymptomatic plaintiffs to file suit seeking medical monitoring if they know there will be potential insurance coverage for their claims. This will of course increase the defense costs that insurers are obligated to pay. However, requiring expert testimony to prove elements of a plaintiff's medical monitoring claim can act as a safeguard to the "opening the floodgates" problem. In *Ayers*, for example, the court required plaintiffs to prove that medical monitoring is reasonable and necessary "through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis"²⁴⁷ Requiring such expert testimony can act to control the number of medical monitoring lawsuits that are filed and thus to control the defense costs for which insurers become responsible, since plaintiffs will be less likely to file suit when they know they will be subject to a higher burden of proof. It also acts to control the indemnity costs that insurers may ultimately have to pay in settlement, since it will be more difficult for plaintiffs to recover.

Requiring expert testimony could also address the Supreme Court's concern with respect to identifying medical monitoring costs that are truly in addition to those that would otherwise be required by a non-exposed

²⁴³ *Id.* at 441-43.

²⁴⁴ *Id.* at 441.

²⁴⁵ *Id.* at 442-43.

²⁴⁶ *See id.* at 443 ("We do not deny competing considerations- of a kind that may have led some courts to provide a form of liability.").

²⁴⁷ *Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987).

person. Specifically, the *Ayers* court's requirement that plaintiffs produce expert testimony on the "relative increase in the chance of onset of disease in those exposed" may be able to address this problem. In order to satisfy the *Ayers* court's requirement, an expert would have to testify as to the risk of disease in the non-exposed population. If that risk were similar to the plaintiff's, then the expert's testimony would suggest that the requested medical monitoring would *not* be an extra cost but actually would be recommended even in a non-exposed person.

Finally, the Supreme Court was also concerned that allowing medical monitoring would lead to duplicative awards; plaintiffs might be able to recover through filing workers' compensation claims or under their own health insurance policies. It seems though that this problem could be addressed through liens and subrogation claims. A worker's compensation carrier would presumably be able to file a subrogation claim to recover its payment if the employer's liability carrier subsequently paid a settlement in a medical monitoring action. Similarly, a plaintiff's health insurance carrier would seemingly have the right to recover any costs that it incurred against the employer's liability carrier.

Thus, although the Supreme Court raised valid concerns in its *Metro-North* decision, there are ways to address each of the Court's objections to allowing recovery for pre-symptom medical monitoring. Requiring expert testimony could ensure that only plaintiffs who would truly benefit from medical monitoring, and whose exposure actually necessitated medical monitoring, will recover. This in turn would control the number of suits filed and the costs to insurer.

CONCLUSION

In summary, future courts should hold that there is a duty to defend suits for pre-symptom, pre-injury medical monitoring suits for two reasons. First, the courts should rely on trigger of coverage case law for the proposition that exposure to a harmful substance can constitute immediate "bodily injury." This satisfies the policy's "bodily injury" requirement and is consistent with medical evidence indicating that toxic exposure can cause immediate cellular damage. Second, future courts should hold that suits for medical monitoring do constitute claims for "damages" because of bodily injury. "Damages" is not defined in the policy, and the split among the courts indicates that the term is certainly susceptible to an interpretation that includes both legal damages and equitable relief. Further, the availability of indemnity coverage should not depend on the form of relief sought; if the harm is covered, then the resulting damages should be covered as well. Thus, regardless of whether a medical monitoring plaintiff seeks a lump-sum payment (legal damages) or a court-supervised fund (equitable relief),

it should be held that medical monitoring suits constitute claims for “damages” within the meaning of a commercial general liability policy.

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