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## **The Meaning of “Legally Obligated To Pay As Damages”**

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## The Meaning of “Legally Obligated To Pay As Damages”

Liability insurance policies generally provide that the insurer will pay on behalf of the insured “all sums” which the insured shall become “legally obligated to pay as damages” because of bodily injury or property damage to which the insurance applies. Many courts have interpreted the term “damages” as “payment made to compensate a party for injuries suffered.”<sup>1</sup> The dictionary definition of “damages” is “the estimated reparation in money for detriment or injury sustained.”<sup>2</sup>

With advances in modern technology and science, plaintiff’s claims are often testing the bounds of tort law. For instance, many plaintiffs now assert claims for medical monitoring, although the majority of courts have refused to recognize those claims absent a physical injury.<sup>3</sup> One of the recent recalls of toys has already resulted in a lawsuit being filed.<sup>4</sup> Numerous

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<sup>1</sup> *Jaffe v. Cranford Ins. Co.*, 168 Cal. App.3d 930, 935 (Cal. App. 1985) (doctor sued by Attorney General for fraudulent receipt of medical payments not covered; the return of overpayments is more properly characterized as restitutionary rather than compensatory in nature); *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 836 (Cal. App. 1990) (same); *O’Neill Investigations v. Ill. Emp. Ins.*, 636 P.2d 1170, 1173-77 (Alaska 1981) (debt collector’s professional liability insurance did not cover a claim under unfair trade practices act for restoration of money acquired from consumers through unfair collection practices); *Central Dauphin School v. American Cas. Co.*, 426 A.2d 94, 95-97 (Pa. 1981) (school district’s liability policy did not cover a claim by taxpayers for the return of unlawfully collected taxes); *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F.Supp. 435, 439-42 (D. Md. 1977) (professional liability policy did not cover Security Exchange Commission’s action against law firm for disgorgement of attorney’s fees); *Seaboard Sur. Co. v. Ralph Williams’ N.W. Chrys. P., Inc.*, 504 P.2d 1139, 1140-43 (Wash. 1973) (automobile dealer sued under unfair or deceptive acts statute for injunctive relief and disgorgement not covered under liability policy); *State Farm Fire & Cas. Co. v. National Research Center for College and University Admissions*, 445 F.3d 1100, 1103-04 (8<sup>th</sup> Cir. 2006) (under Missouri law, relief sought by FTC, an order that the insured stop making misrepresentations and to make clear and conspicuous disclosures, was not designed to compensate anyone and, therefore, did not constitute a claim for “damages”).

<sup>2</sup> *Webster’s Third New Int’l Dictionary of the English Language*, p. 571 (1989).

<sup>3</sup> *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424, 443-444 (1997) (mental anguish and medical monitoring claims not allowed under Federal Employer’s Liability Act (“FELA”) absent physical injury); *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 832 (Ala. 2001); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984); *Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951, 955 (7th Cir. 1995); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1523 (D. Kan. 1995); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 859 (Ky. 2002); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 689 (Mich. 2005); *Paz v. Brush Engineered Materials, Inc.*, No. 2006-FC-00771-SCT, \*21 (Miss. Jan 4, 2007) (answering certified question from the Fifth Circuit); *Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 720-721 (Minn. Ct. App. 1998); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000), *abrogated on procedural grounds by Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 559 (2005); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440 (Nev. 2001); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, \*51 (W.D. N.C. Oct. 29, 1990); *Rosmer v. Pfizer, Inc.*, No. CIV. A. 9:99-2280-18RB, 2001 WL 34010613, \*5 (D. S.C. Mar. 20, 2001); *Norwood v. Raytheon Co.*, No. EP-04-CA-127-PRM, 2006 WL 267335, \*3, 7 (W.D. Tex. Jan. 17, 2006); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); *Purjet v. Hess Oil Virgin Islands Corp.*, Civ. No. 1985/284, 1986 WL 1200, \*4 (V.S. Jan. 8, 1996); *Duncan v. New. Airlines, Inc.*, 203 F.R.D. 601, 606 (W.D. Wash. 2001); *see also* La. Civ. Code Ann. art. 2315 (West Supp. 2004).

<sup>4</sup> *See Deke v. RC2 Corp.*, No. 07CV3609, In the United States District Court for the Northern District of Illinois, Eastern Division (class action asserting claims for equitable, injunctive and declaratory relief, including

lawsuits stemming from a recall of pet food products have also been recently filed.<sup>5</sup> In 2007 alone, there have been nationwide recalls of toys, pet food, peanut butter and ground beef.<sup>6</sup> As the types of claims asserted against insureds change over time, courts often struggle to determine if the claims fall within the insuring agreement of general liability policies.

This article focuses on whether there is coverage for: (1) punitive damages; (2) civil fines and penalties; (3) equitable relief; (4) internal costs and preventative expenditures; (5) environmental remediation; and (6) medical monitoring.

## I. Punitive Damages

Texas courts, though split, have held that insuring punitive or exemplary damages is against public policy.<sup>7</sup> This issue is currently pending before the Texas Supreme Court.<sup>8</sup>

Judge Wisdom succinctly explained the reasoning for not allowing insurance for punitive damages:

Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.<sup>9</sup>

In 1994, the Texas Supreme Court, in the *Moriel* decision, clarified that the purpose of punitive damages is to ensure that defendants who deserve punishment receive it at the appropriate level.<sup>10</sup> The *Moriel* holding codified during the 1995 legislative session and

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medical monitoring, against defendants which allegedly designed, produced, marketed and distributed the recalled Thomas & Friends<sup>TM</sup> Wooden Railway Toys).

<sup>5</sup> *In Re: Pet Food Products Liability Litigation*, MDL Docket Number 1850, Master Docket No. 1:07cv2867.

<sup>6</sup> In February 2007, ConAgra recalled peanut butter suspected to contain salmonella. In March 2007, Menu Foods recalled 60 million cans of dog and cat pet food. In August, Mattel recalled 7.2 million toys suspected of possibly containing lead paint. Just last month, on September 29, 2007, Topps Meat Co. recalled 21.7 million pounds of ground beef which has been described as one of the largest meat recalls in U.S. history.

<sup>7</sup> *Hartford Cas. Ins. Co. v. Powell*, 19 F. Supp. 2d 678, 684 (N.D. Tex. 1998) (McBryde, J.) (insuring punitive damages violates Texas' public policy); *Fairfield Ins. Co. v. Stephens Martin Paving*, Cause No. 04-0728 (Tex. Sup. Ct.) (certified question from the Fifth Circuit on whether Texas public policy prohibits insuring punitive damages imposed because of an insured's gross negligence); *but see Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004) (on rehearing en banc) (pet. pending) (holding that insuring punitive damages did not violate Texas' public policy).

<sup>8</sup> *Id.*

<sup>9</sup> *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432, 440-01 (5<sup>th</sup> Cir. 1962).

<sup>10</sup> *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 15 (Tex. 1994).

“exemplary damages” were thereafter defined as damages awarded as a penalty or by way of punishment.<sup>11</sup>

In *Safway*, a Texas state appellate court affirmed two separate lower court rulings that had been consolidated on appeal to address the question of insurability of punitive damages.<sup>12</sup> The court found that punitive damages were insurable as “damages” under a liability policy in the absence of an endorsement or other express exclusion.<sup>13</sup> “We hold that under Texas law it was not contrary to public policy for Rawlings and Safway to shift the punitive damages awards to their liability insurance carriers, and that, under the terms of the insurance contracts between the parties, punitive damages were within the scope of coverage.”<sup>14</sup>

The court in *Safway* also concluded that the law of the state that imposed the punitive damage in the first place should apply in resolving both policy construction issues and public policy issues regarding coverage for punitive damages.<sup>15</sup> The court explained:

The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well [as] nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.

A federal trial court, however, found that punitive damages were not insurable and predicted that the Texas Supreme Court would agree. In *Powell*, the court, in an automobile insurance context, found that recent legislative action defining “exemplary damages” and statements by the state’s supreme court led to the conclusion that, as a matter of policy, punitive damages were not insurable.<sup>16</sup> Other courts have held that the case authority involving

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<sup>11</sup> Tex. Civ. Prac. & Rem. Code § 41.005(5) (exemplary damages are awarded as penalty or punishment).

<sup>12</sup> *American Home Assur. Co., et al. v. Safway Steel Products Co., Inc.*, 743 S.W.2d 693, 702 (Tex. App.—Austin 1987, writ denied) (punitive damages are insurable); *see also Dairyland Cty. Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341 (Tex. App.—Fort Worth 1972, writ ref’d n.r.e.).

<sup>13</sup> 743 S.W. 2d at 702.

<sup>14</sup> *Id.* at 705.

<sup>15</sup> *Id.* at 699.

<sup>16</sup> *Hartford Cas. Ins. Co. v. Powell*, 19 F.Supp.2d 678, 695 (N.D. Tex. 1998) (McBryde, J.); *see also St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.*, No. H-94-4317, 1998 U.S. Dist. LEXIS 22643 (S.D. Tex. April 7, 1998) (entry of final judgment that insurer not liable for payment of punitive damages award in underlying matter); *but see Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 188-89 (Tex. App.—Fort Worth 2003, pet. pending) (punitive damages are insurable under medical malpractice policies); *Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5<sup>th</sup> Cir. 1978) (Texas public policy would not be offended by allowing a liability policy to cover a punitive damage award); *The Philadelphia Indemnity Ins. Co. v. Stebbins Five Companies*, 2004 WL 210636, slip

automobile insurance is distinguishable since the pricing of that coverage is mandated by law, whereas general liability coverage is not, leaving a liability insurer free to charge more premium for covering punitive damages.<sup>17</sup>

Several states have held that insuring punitive damages violates the public policy behind imposing penalties, and, therefore, punitive damages are not covered.<sup>18</sup>

## II. Civil Fines and Penalties

It is generally recognized that liability policies do not provide coverage for civil fines and penalties since they are not damages to compensate an injury.<sup>19</sup> The rationale for this rule was explained by one court as follows:

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op. (N.D. Tex. 2004) (even under the new “gross negligence” or malice standards, coverage existed under a general liability policy for punitive damages) (Lynn, J.).

Further, in the uninsured motorist context, several Texas courts have held that insuring punitive damages violates public policy. *See Milligan v. State Farm Mut. Auto. Ins. Co.*, 940 S.W.2d 228 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1997, writ denied); *State Farm Mut. Auto. Ins. Co. v. Schaffer*, 888 S.W.2d 146 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1994, writ denied); *Vanderlinden v. United Servs. Auto Ass’n Prop. & Cas. Ins. Co.*, 885 S.W.2d 239 (Tex. App.—Texarkana 1994, writ denied).

<sup>17</sup> *Fairfield*, 2003 WL 22005866 at \*9; *Stebbins*, 2004 WL 210636 at \*5.

<sup>18</sup> *See e.g., In re September 11<sup>th</sup> Litigation*, No. 21 MC 97, 2007 WL 1930419 (S.D. N.Y. July 3, 2007) (citing *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 400, 442 N.Y.S.2d 422, 425 N.E.2d 810 (N.Y. 1981)); *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4<sup>th</sup> Cir. 1987) (applying Illinois law); *Lumbermens Mut. Cas. Co. v. S-W Industries, Inc.*, 39 F.3d 1324, 1994 FED App. 360A (6<sup>th</sup> Cir. 1994) (applying Ohio law); *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487 (8<sup>th</sup> Cir. 1990) (applying Minnesota law); *Union L.P. Gas Systems, Inc. v. International Surplus Lines Ins. Co., Inc.*, 869 F.2d 1109 (8<sup>th</sup> Cir. 1989) (applying Missouri law); *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491 (10<sup>th</sup> Cir. 1994); *Dorsey v. Continental Cas. Co.*, 730 F.2d 675 (11<sup>th</sup> Cir. 1984); *State Farm Fire & Cas. Co. v. Superior Court*, 191 Cal. App. 3d 74, 77-78, 236 Cal. Rptr. 216, 219 (4<sup>th</sup> Dist. 1987); *Union Ins. Co. v. Kjeldgaard*, 775 P.2d 55, 56 (Colo. Ct. App. 1988) (policy covering damages arising out of bodily injury or property damage); *U.S. Concrete Pipe Co. v. Boulder*, 437 So.2d 1061, 1064 (Fla. 1983); *Employers Ins. of Wausau v. Lavender*, 506 So. 2d 1166, 1167, 40 Ed. Law Rep. 581 (Fla. Dist. Ct. App. 3d Dist. 1987); *Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.*, 172 N.J. Super. 10, 24, 410 A.2d 696, 703 (App. Div. 1980); *Loigman v. Massachusetts Bay Ins. Co.*, 235 N.J. Super. 67, 68, 561 A.2d 642, 642 (App. Div. 1989); *Johnson & Johnson v. Aetna Cas. and Sur. Co.*, 285 N.J. Super. 575, 577, 667 A.2d 1087, 1088 (App. Div. 1995); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Ambassador Group, Inc.*, 157 A.D.2d 293, 299, 556 N.Y.S.2d 549, 553 (1<sup>st</sup> Dep’t 1990), *appeal dismissed*, 77 N.Y.2d 873, 568 N.Y.S.2d 915, 571 N.E.2d 85 (1991); *Cavin’s Inc. v. Atlantic Mut. Ins. Co.*, 27 N.C. App. 698, 704, 220 S.E.2d 403, 408 (1975); *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 169, 494 A.2d 1088, 1096 (1985) (overruling on other grounds recognized by *Friedman v. F.E. Myers Co.*, 710 F. Supp. 118, 126 (E.D. Pa. 1989)) and (*In re Marks*, 192 B.R. 379, 386 (E.D. Pa. 1996)); *Creed v. Allstate Ins. Co.*, 365 Pa. Super. 136, 142, 529 A.2d 10, 12 (1987) (insurer had no obligation to provide indemnity for punitive damages and no duty to defend punitive damage portion of case or to pay attorney’s fees associated with such defense); *Smith v. Merchants Mutual Bonding Co.*, 211 Kan. 397, 404, 507 P.2d 189 (1973) (it is against the public policy of Kansas to allow a wrongdoer to purchase insurance to cover punitive damages); *See also Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 43 (Mo. Ct. App. W.D. 1991) (liability policy provision stating that insurer would pay all sums which insured would become legally obligated to pay as damages for personal injury, defined to include injury arising out of malicious prosecution, did not cover punitive damages assessed against insured; while policy did cover malicious prosecution, it only covered damages flowing from personal injury sustained as result of malicious prosecution, and did not contemplate sums awarded as punishment).

It is beyond peradventure that damages are distinct from penalties. The term “damages” refers to the loss suffered by an injured party expressed in a dollar amount. *Turcotte v. DeWitt*, 333 Mass. 389, 392, 131 N.E.2d 195 (1956). Unlike damages, penalties are not designed to compensate an injured party, but are designed to deter conduct deemed undesirable by the legislature. *See Mellor v. Berman*, 390 Mass. 275, 281, 454 N.E.2d 907 (1983) (“Where the legislature has indicated its displeasure with described acts, has sought to deter their commission, and has encouraged vindictive lawsuits if wrongdoing is not stemmed, the imposition of multiple fines and penalties for a violation of statutory requirements is appropriate.”) Since the coverage provided by Travelers under the contract is limited to damages, and does not mention penalties, Travelers is not obligated to reimburse WIL and Melvin Rosenfeld, even assuming no other barriers existed to their recovery.<sup>20</sup>

### Judge Harmon in *In re Enron* held:

Moreover this Court acknowledges that some courts have held that D & O liability policies do not cover costs for criminal actions, including attorney's fees, because criminal punishments do not seek damages that “compensate” a party for injuries suffered. *See, e.g., Potomac Electric Power Co. v. California Union Ins. Co.*, 777 F.Supp. 980, 983-84 (D. D.C. 1991) (“fees expended in defending [solely] against possible criminal charges are not recoverable under a liability policy” because “criminal punishments-fines and incarceration-are not ‘damages’ caused to the property of another” and because “allowing fees spent on criminal defense to be recovered under a liability policy would violate public policy.”); *Stein v. International Ins. Co.*, 217 Cal.App.3d 609, 266 Cal.Rptr. 72, 75 (1990). (“It is well established that an insurer is not required to provide a criminal defense to an insured under a liability policy obligating the insurer to pay ‘damages’ for which the insured is found liable.”); *Perzik v. St. Paul Fire & Marine Ins. Co.*, 228 Cal.App.3d 1273, 279 Cal.Rptr. 498 (Cal. App. 1 Dist. 1991) (quoting *Stein*); 1 G. Couch. *Cyclopedia of Insurance Law* 114-15 (2d ed.

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<sup>19</sup> *See e.g., A.Y. McDonald Indus., Inc. v Insurance Co. of N. Am.*, 475 N.W.2d 607 (Iowa 1991) (civil penalties assessed under statute which imposes fines for violations against insured are not “damages” after comparison with CERCLA 5 which imposes liability on parties responsible for response costs); *Independent Petrochemical Corp. v Aetna Cas. & Sur. Co.*, 292 U.S. App. D.C. 19, 944 F.2d 940 (D.C. Cir. 1991) (liability for environmental response costs is similar to compensation placing the individual in the position that he would have been in had the injurious action not occurred; this is how “damages” is ordinarily understood; a fine or penalty, in contrast, is not understood to be dollar-for-dollar recompense, but rather is a pecuniary form of punishment for the commission of an act society finds repugnant and seeks to deter); *State Farm Fire & Cas. Co. v. Martinez*, 995 P.2d 890, 895-96 (Kan. App. 2000) (insured’s civil penalties for violations of Consumer Protection act for alleged unconscionable acts, willful misrepresentations and disparagement of services of another were not “damages” under liability policy; it is contrary to public policy of Kansas to allow insured to insure against civil penalties associated with his own actions); *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 298 (Ind. App. 1997) (“damages” under general liability policy does not include fines and penalties assessed against the insured); *but see e.g., Weeks v. St. Paul Fire & Marine Ins. Co.*, 673 A.2d 772, 775 (N.H. 1996) (even if penalties are punitive in nature, they are covered unless expressly excluded).

<sup>20</sup> *Travelers Ins. Co. v. Waltham Industrial Laboratories Corp.*, 722 F.Supp. 814, 828 (D. Ma. 1988), *aff’d*, 883 F.2d 1092 (1<sup>st</sup> Cir. 1989) (“We agree with and adopt fully that portion of the district court opinion holding that because the amount paid by the defendants in the Commonwealth suit was for ‘civil penalties’ not ‘damages’ the payment was not covered by the insurance policy’s ‘damages’ clause.”); *see also Gloucester Township v. Maryland Cas. Co.*, 668 F. Supp. 394, 405 (D. N.J. 1987) (fines and penalties are not damages within the meaning of an insurance policy providing coverage for property damage).

1984); 6C J. Appleman, *Insurance Law and Practice* 404 (1979). Other courts have distinguished between claims to recover fines and penalties, which are generally recognized as not covered because they are not compensatory and because requiring insurers to reimburse wrongdoers for the damage they have done others would be contrary to public policy, from claims for attorney's fees incurred for an insured's defense. *Polychron*, 916 F.2d 461.<sup>21</sup>

The court also defined “damages” using Black’s Law Dictionary as follows:

“ Damages,” i.e., “ a compensation in money for a loss or damage,” is defined by *Black's Law Dictionary* as “ [a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury ....”<sup>22</sup>

In discussing whether criminal penalties were covered under a director and officer’s liability policy, the court stated:

The Court notes that the general rule is that criminal fines, regardless of whether they are monetary penalties or restitution, are not recoverable from an insurer because “ [u]nlike civil damages, restitution is a criminal sanction. The purpose of restitution is not only to compensate the victim, but also to serve the rehabilitative, deterrent and retributive goals of the criminal justice system.” Michael J. Holland, *Footing the Bill: Paying the Legal Costs of Criminal Proceedings*, 60 Def. Couns. J. 27 at 32-33S (Jan. 2002), quoting *Spivey v. Florida*, 531 So.2d 965, 967 (Fla. 1988). Courts have also held that permitting insurers to pay restitution under a criminal judgment is against public policy. *Id.* (citing as leading case *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E.2d 380, 384 (1983) (Forcing insurer to pay restitution to an insured's victim would be “tantamount to condoning insurance against the results and penalties of one’s own criminal acts. This is against public policy.”)). See also *Jaffe v. Cranford Ins. Co.*, 168 Cal.App.3d 930, 934, 214 Cal.Rptr. 567, 570 (Cal. App. 4 Dist. 1985) (“[N]either imprisonment nor a fine constitutes ‘damages’ for insurance purposes.” ); *Potomac Electric Power Co. v. California Union Ins. Co.*, 777 F.Supp. 980, 983-84 (D. D.C. 1991).<sup>23</sup>

Judge Harmon’s analysis follows the general rule that liability policies are intended to provide coverage only for compensatory damages.

### III. Equitable Relief

Courts have routinely held that claims for equitable relief are not for “damages” within the meaning of liability policies.<sup>24</sup> In *Armco*, the court held:

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<sup>21</sup> *In re Enron*, 391 F. Supp.2d 541, 570-71 (S.D. Tex. 2005).

<sup>22</sup> *Id.* at 571.

<sup>23</sup> *Id.* at 573.

<sup>24</sup> See *Maryland Cas. Co. v. Armco, Inc.*, 643 F.Supp. 430, 432 (D. Md. 1986), *aff'd*, 822 F.2d 1328 (4<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 100 (1988); *Ellett Bros. Inc. v. United States Fidel. & Guar. Co.*, 275 F.3d 384, 387 (4<sup>th</sup> Cir. 2001); *Floyd's Sales & Serv., Inc. v. Universal Underwriters Ins. Co.*, 910 F. Supp. 464, 466-68 (D. Neb.

Black letter insurance law holds that claims for equitable relief are not claims for “damages” under liability insurance contracts. *See, e.g., Haines v. St. Paul Fire & Marine Insurance Co.*, 428 F. Supp. 435 (D. Md. 1977) (Blair, J.); *Aetna Casualty and Surety Co. v. Hanna*, 224 F.2d 499 (5th Cir. 1955); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196 (1954).<sup>25</sup>

Further, courts generally reason that lawsuits seeking injunctive relief are not covered because they do not seek compensatory damages.<sup>26</sup>

In *Mustang Tractor*, the trial court held that damages are “a form of substitutional redress which seek to replace the loss in value with a sum of money. Restitution, conversely, is designed to reimburse a party for restoring the status quo.”<sup>27</sup> The court also recognized that both state and federal courts have held that “claims for restitution and rescission do not qualify as claims for ‘damages’ under similar insurance policies.”<sup>28</sup> The court further held:

Insurance law recognizes the difference between money damages and equitable relief. *See, e.g., Continental Ins. v. Northeastern Pharm.*, 842 F.2d 977, 985-86 (8<sup>th</sup> Cir.), *cert. denied*, 488 U.S. 821 (1988). “In the insurance context the word ‘damages’ is not ambiguous. It means legal damages.” *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 985 (4<sup>th</sup> Cir. 1988).

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Refusing to find requests for equitable relief as “damages” comports with the Fifth Circuit’s admonition that insurance policies are to be construed so that none of the policy’s terms are rendered meaningless. *Nat’l Union Fire Ins. Co. v. Kasler Corp.*, 906 F.2d 196, 198 (5<sup>th</sup> Cir. 1990). Under *Mustang/Eureka*’s construction of the insurance policy, Liberty Mutual would be required to pay “all sums” which *Mustang/Eureka* became legally obligated to pay. If

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1995); *City of Edgerton v. General Cas. Co. of Wisconsin*, 184 Wis.2d 750, 517 N.W.2d 463, 478-79 (1994), *cert. denied*, 514 U.S. 1017 & 515 U.S. 1161 (1995).

<sup>25</sup> *Armco*, 643 F.Supp. at 432.

<sup>26</sup> *See, e.g., Feed Store, Inc. v. Reliance Ins. Co.*, 774 S.W.2d 73, 75 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1989, writ denied) (insurer had no duty to defend lawsuit seeking injunctive relief since it is not a claim for “damages”); *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5<sup>th</sup> Cir. 1955) (applying Florida law) (costs for complying with mandatory injunction ordering the removal of landfill material which had encroached on neighbor’s property not “damages”); *City of Edgerton v. General Cas. Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463, 478-79 (1994), *cert. denied*, 514 U.S. 1017 & 515 U.S. 1161 (1995) (holding that environmental response costs are equitable in nature and, thus, are not covered under a CGL policy); *School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis. 2d 347, 488 N.W.2d 82, 90 (1992) (plaintiffs’ claims seeking declaratory and injunctive relief including remedial education programs to eliminate segregation in school districts were not seeking “damages”).

<sup>27</sup> *Mustang Tractor & Equipment Co. v. Liberty Mut. Ins. Co.*, Civ. A. No. H-91-2523, 1993 WL 566032 at \*7 (S.D. Tex. Oct. 8, 1993), *aff’d on other grounds*, 76 F.3d 89 (5<sup>th</sup> Cir. 1996) (citing *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Quintel Corp. N.V. v. Citibank NA*, 596 F. Supp. 797, 803 (S.D. N.Y. 1984 (“[r]escission and restitution are alternatives to money damages; a plaintiff cannot both rescind a transaction and ask for the benefit of the bargain rescinded”)).

<sup>28</sup> *Id.* (citing *Feed Store, Inc. v. Reliance Ins. Co.*, 774 S.W.2d 73, 74-75 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1989, writ denied); *Nortex Oil & Gas Corp. v. Harbor Ins. Co.*, 456 S.W.2d 489, 494 (Tex. Civ. App.—Dallas 1970, no writ); *Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 n. 2 (5<sup>th</sup> Cir. 1969); *Aetna Cas. and Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5<sup>th</sup> Cir. 1955)).

“damages” is given the broad definition that Mustang/Eureka suggests, “then the term ‘damages’ in the contract . . . would become mere surplusage, because any obligation to pay would be covered.” See [*Maryland Cas. Co. v. Armco*, 822 F.2d 1348, 1352 (4<sup>th</sup> Cir. 1987)].<sup>29</sup>

The court concluded that because the settlement agreement between the insureds and a third party specifically stated that the amount was paid “as restitution,” the insurer was not required to defend or indemnify the insureds.<sup>30</sup>

In *Hanna*, the court reasoned as follows:

Inssofar as coverage is concerned, the obligation is solely “to pay,” not to remove fill dirt, rocks and boulders, under Court order or otherwise. It is equally unreasonable to view the obligation as providing reimbursement to the Insured, for the undertaking is to pay “on behalf of” the Insured whatever he shall become obligated to pay by reason of the liability imposed upon him by law . . . for damages because of injury to or destruction of property . . . .

Clearly, the policy covers only payments to third persons when those persons have a legal claim for damages against the Insured on account of injury to or destruction of property. The obligation of the insurer to pay is limited to “damages” a word which has an accepted technical meaning in law.

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This is a far cry from the cost to unsuccessful litigants of complying with an injunctive decree. It is equally a far cry from the expenses incurred by those litigants in resisting a Chancery suit seeking such a decree.<sup>31</sup>

Equitable remedies, therefore, do not fall within the insuring agreement of liability policies since those claims do seek “damages.”

#### **IV. Internal Costs And Preventative Expenses**

When considering whether internal costs and preventative expenses are covered, one must again consider the requirements of the insuring agreement. Clearly, these costs are not an amount that the insured is “legally obligated” to pay “as damages.”

In *Lennar*, the insured sought indemnification for various costs it incurred in responding to the hundreds of exterior insulation and finish system (“EIFS”) claims including overhead costs, inspection costs, personnel costs and attorney’s fees. In rejecting the insured’s argument, the court held that Lennar ignored the “legally obligated to pay” requirement in the insuring agreement.<sup>32</sup> Giving the phrase its ordinary meaning, the court held it means an obligation

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<sup>29</sup> 1993 WL 566032 at \*7.

<sup>30</sup> *Id.*

<sup>31</sup> *Hanna*, 224 F.2d at 503.

<sup>32</sup> *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651, 680 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2006, pet. filed).

imposed by law, “such as an obligation to pay pursuant to a judgment, settlement, contract or statute.”<sup>33</sup> The court reasoned:<sup>34</sup>

While Lennar may have been legally obligated to pay the third-party EIFS claims by replacing EIFS, making repairs, and/or making cash payments, it was not legally obligated to incur its own overhead costs, inspection costs, personnel costs and attorney’s fees in connection with settling the claims.

\* \* \* \* \*

Lennar’s overhead costs, inspection costs, personnel costs, and attorney’s fees are not components of the homeowner’s damages. Rather, they are Lennar’s own costs incurred in connection with settling the EIFS claims. Therefore, Lennar was not legally obligated to pay these costs as “damages because of . . . property damage.”

Also, it is generally recognized that the cost to prevent future damage is not covered under liability policies.<sup>35</sup> For example, in *Lennar*, the court held that costs to prevent future damage are not covered.<sup>36</sup> Lennar voluntarily removed EIFS from all the homes and replaced it with traditional stucco. Lennar also alleged that it repaired resulting water damage to the homes, although the extent to which homes sustained damage was disputed. Lennar then sought indemnification for all of its replacement and repair costs from its insurers.

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<sup>33</sup> *Id.* (citing *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 189 n. 3 (Tex. App.-Houston [14th Dist.] 2003, pet. denied) (recognizing a judgment is not the only manner by which an insured can become legally obligated to pay because of a legal obligation can also arise out of a settlement); *Tex. Prop. and Cas. Ins. Guar. Ass’n v. Boy Scouts of Am.*, 947 S.W.2d 682, 691 (Tex. App.—Austin 1997, no writ) (same); *see also Pa. Pulp & Paper Co. v. Nationwide Mut. Ins. Co.*, 100 S.W.3d 566, 574 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. denied) (recognizing courts give terms used in an insurance contract their ordinary and generally accepted meaning unless the policy shows the words were meant in a technical or different sense)).

<sup>34</sup> *Lennar*, 200 S.W.3d at 680.

<sup>35</sup> *North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 832-34 (Tex. App.—Houston [1st Dist.] 1996, no writ) (court held that the insured shipbuilder's replacement of initially defective welds did not constitute "physical loss ... or damage" as required for coverage under a builder's risk policy); *see also, e.g., Boeing Co. v. Aetna Cas. and Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507, 87 A.L.R.4th 405 (1990) (safety measures or other preventive costs incurred in advance of any damage to property were not “damages”); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 502 ( Del. 2001) (liability coverage is available for sums spent for remediating property damage, but not for sums spent to prevent further damage); *Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London*, 197 Or. App. 147, 104 P.3d 1162, 1171 (2005) (expenditures to prevent further contamination to groundwater that did not involve remedying existing contamination, were not incurred as a result of “ property damage” within meaning of policies).

<sup>36</sup> *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651, 678-79 (Tex. App.—Houston 14<sup>th</sup> Dist. 2006, pet. filed) (citing *Fid. & Deposit Co. of Md. v. Hartford Cas. Ins. Co.*, 215 F.Supp.2d 1171, 1183 (D. Kan. 2002) (stating that under its plain meaning, "physical injury" in CGL policy unambiguously "connotes ... an alteration in appearance, shape, color or in other material dimension"))).

The *Lennar* court explained the difference between coverage for the cost to repair damaged property and the cost to replace a defective product as a preventative measure as follows:<sup>37</sup>

Even if all the homes experienced water damage, we cannot conclude Lennar's costs to remove and replace all EIFS on the homes are "damages because of ... property damage." To the contrary, the evidence reflects that in early 2000, Lennar implemented a plan to remove EIFS and replace it with a traditional stucco on all the homes regardless of whether the EIFS had caused any damage. During the process of replacing the EIFS, Lennar repaired some water damage on at least some of the homes. Nevertheless, the evidence demonstrates Lennar's intent was to fully remove and replace the EIFS as a preventative measure because it is defective.

\* \* \* \* \*

Similarly, here, Lennar arguably made a good business decision to remove and replace all the EIFS to prevent further damage. Nonetheless, considering the summary judgment evidence, we cannot conclude that it was necessary for Lennar to remove and replace all the EIFS in order to repair the water damage, if any, to each home. Therefore, the costs incurred by Lennar to remove and replace EIFS as a preventative measure are not "damages because of ... property damage." Accordingly, Lennar must apportion the EIFS-related damages between its costs to remove and replace EIFS as a preventative measure and its costs to repair water damage to the homes.

Where an insured incurs costs as a preventative measure before any damage occurs, those costs do not fall within the insuring agreements requirement for "damages because of . . . property damage."<sup>38</sup> Although insureds make a business decision to incur certain expenses, it does not follow that those expenses are within a general liability policy's insuring agreement. Is the amount sought an expense the insured was "legally obligated" to pay "as damages"? If not, then it does not fall within the coverage afforded by the policy.

## V. Environmental Remediation

Courts are divided over whether general liability policies provide coverage for costs incurred in response to governmental claims or actions under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

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<sup>37</sup> *Lennar*, 200 S.W.3d at 679-80.

<sup>38</sup> *Id.* at 677; *see also Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 887 (1990); *Mid-Continent Cas. Co. v. Third Coast Packaging Co., Inc.*, 342 F.Supp.2d 626, 633 (S.D. Tex. 2004) (preventive and containment measures associated with pollution after fire not covered); *but see In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation*, 870 F. Supp. 1293, 1342-44 (E.D. Pa. 1992), *aff'd on other grounds*, 15 F.3d 1249 (3d Cir.), *cert. denied sub nom.*, 115 S. Ct. 291 (1994) (applying Texas law) (cleanup cost covered if they are "significantly related to the cleanup of actual third-party harm or the prevention of future imminent and substantial third-party damage").

Several courts have held that cleanup costs do not constitute “damages” because they are not an obligation to pay ordered by a court.<sup>39</sup> Some courts have also reasoned that environmental cleanup measures are essentially a cost of doing business which should not be covered by general liability policies.<sup>40</sup> Other courts, however, have reached the opposite conclusion and found coverage for cleanup costs.<sup>41</sup>

## VI. Medical Monitoring

The majority of courts that have addressed whether medical monitoring should be recognized as a separate tort have determined that no cause of action exists absent a physical

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<sup>39</sup> See e.g., *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 980 (4<sup>th</sup> Cir. 1988) (government’s equitable claim for restitution from landowner for costs of removing hazardous waste from land not “damages”); *Briggs & Stratton Corp. v. Royal Globe Ins. Co.*, 64 F.Supp.2d 1340, 1342-2343 (M.D. Ga. 1999) (under Wisconsin law, environmental response cleanup costs in response to orders of the Environmental Protection Agency or state agencies do not constitute “damages”); *County of San Diego v. Ace Property & Cas. Ins. Co.*, 131 Cal. Rptr.2d 100, 105 (Cal. App. 4 Dist. 2003, rev. granted) (county’s expenses to comply with an administrative order to remediate groundwater contamination and payments to settle non-litigated claims for property damage and personal injury arising from the contamination were not “damages”); *Floyd’s Sales & Service Inc. v. Universal Underwriters Ins. Co.*, 910 F.Supp. 464, 468 (D. Neb. 1995) (response costs to comply with action under CERCLA not “damages”); *Continental Ins. Companies v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 842 F.2d 977, 979 (8<sup>th</sup> Cir. 1988) (“damages” does not include cleanup costs imposed upon insured for its improper disposal of hazardous waste incurred by federal and state governments under CERCLA).

<sup>40</sup> See *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4<sup>th</sup> Cir. 1986); *Savoy Medical Supply Co. v. F&H Manufacturing Corp.*, 776 F.Supp. 703, 708-09 (E.D. N.Y. 1991) (citing Ostrager & Newman, *Handbook on Insurance Coverage Disputes* §§ 8.03[b], 8.03[c] (3d ed. 1990)).

<sup>41</sup> See e.g., *Insurance Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403, 418-419 (R.I. 2001) (EPA’s oversight costs in connection with cleanup of chemical spill that contaminated groundwater constituted “damages”); *Powerine v. Superior Court*, 104 Cal. App.4<sup>th</sup> 957, 128 Cal. Rptr.2d 827 (Cal. App. 2 Dist. 2002) (costs incurred in remediation or abatement, but not prevention, of environmental pollution in response to a court order are “damages”); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 873, 784 P.2d 507 (1990) (environmental response costs incurred in complying with CERCLA constitute “damages”); *Cessna Aircraft Co. v. Hartford Acc. & Indem. Co.*, 900 F.Supp. 1489, 1497 (D. Kan. 1995) (“damages” includes both equitable and legal relief and covered cost of response to demands by EPA to remediate groundwater contamination); *Minnesota Min. and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 182 (Minn. 1990) (costs incurred in compliance with mandates by Minnesota Pollution Control Agency pursuant to Minnesota Environmental Response and Liability Act were “damages”); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940 (D.C. Cir. 1991) (applying Missouri law) (“damages” includes costs of remediating environmental harm for which insured was legally responsible); *A.Y. McDonald Industries, Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 621 (Iowa 1991) (“damages” includes response costs under CERCLA); *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litigation*, 870 F.Supp. 1293 (E.D. Pa. 1992), *aff’d*, 995 F.2d 219 (3d Cir. 1993) *aff’d in part*, 15 F.3d 1230 (3d Cir. 1994) (under Texas law, civil penalties imposed by Environmental Protection Agency (EPA) can be “damages” covered by comprehensive general liability policies if penalties were imposed primarily to redress harm to third-party property); *Central Illinois Light Co. v. Home Ins. Co.*, 277, Ill. Dec. 45, 795 N.E.2d 412, 429-430 (App. Ct. 2003) (even though no claim or lawsuit was filed against the insured, cleanup costs were “damages” because that word connotes money spent to remedy an injury for which the insured was responsible); *International Ins. Co. v. RSR Corp.*, 426 F.3d 281, 288 (5<sup>th</sup> Cir. 2005) (under Texas law, EPA costs pursuant to CERCLA were within environmental impairment liability insurance policy’s indemnification clause providing coverage for liability arising from environmental impairment).

injury.<sup>42</sup> Additionally, the United States Supreme Court held that there was no such cause of action under the Federal Employer's Liability Act ("FELA"), absent a claim of physical injury.<sup>43</sup> Some courts, however, have recognized a cause of action for medical monitoring without an accompanying physical injury.<sup>44</sup>

The majority position is supported by strong arguments. First, administering a medical monitoring fund would be an enormous burden on the court.<sup>45</sup> Courts would have to spend countless hours ensuring the money was spent properly. Plaintiffs, who are later able to prove an actual injury, may find that the defendant's funds have been depleted by the medical monitoring leaving them with empty pockets.<sup>46</sup> The medical monitoring funds may also be duplicative of other remedies available to plaintiffs, such as health insurance and workers' compensation benefits.<sup>47</sup>

The Texas Supreme Court has held that workers exposed to asbestos could not recover damages based on their fear of developing a disease in the future without showing a present physical manifestation of the disease.<sup>48</sup> *Temple-Inland* involved two employees who sued their employer for mental anguish damages after being negligently exposed to asbestos fibers. Neither

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<sup>42</sup> *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 832 (Ala. 2001); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984); *Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951, 955 (7th Cir. 1995); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1523 (D. Kan. 1995); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 859 (Ky. 2002); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 689 (Mich. 2005); *Paz v. Brush Engineered Materials, Inc.*, No. 2006-FC-00771-SCT, \*21 (Miss. Jan 4, 2007) (answering certified question from the Fifth Circuit); *Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 720-721 (Minn. Ct. App. 1998); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000), *abrogated on procedural grounds by Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 559 (2005); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440 (Nev. 2001); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, \*51 (W.D. N.C. Oct. 29, 1990); *Rosmer v. Pfizer, Inc.*, No. CIV. A. 9:99-2280-18RB, 2001 WL 34010613, \*5 (D. S.C. Mar. 20, 2001); *Norwood v. Raytheon Co.*, 414 F. Supp.2d 659, 664-65 (W.D. Tex. 2006); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); *Purjet v. Hess Oil Virgin Islands Corp.*, Civ. No. 1985/284, 1986 WL 1200, \*4 (V.S. Jan. 8, 1996); *Duncan v. New. Airlines, Inc.*, 203 F.R.D. 601, 606 (W.D. Wash. 2001); *see also* La. Civ. Code Ann. art. 2315 (West Supp. 2004).

<sup>43</sup> *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424, 443-444 (1997).

<sup>44</sup> *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1477 (D. Colo. 1991); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313, 323 (D. Conn. 2002); *Friends of All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 824-825 (D.C. Cir. 1984); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999); *Abuan v. Gen Elec. Co.*, 3 F.3d 329, 335 (9th Cir. 1992) (applying law of Guam), *cert. denied* 510 U.S. 1116 (1994); *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 874 (Ill. App. Ct. 2003); *Lamping v. Am. Home Prods., Inc.*, No. DV-97-85786, \*7 (Mont. 4th Dist. Ct. Feb. 2, 2000); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 313 (N.J. 1987); *Patton v. Gen. Signal Corp.*, 984 F. Supp. 666, 673 (W.D. N.Y. 1997); *Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145-146 (Pa. 1997); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 979, 981 (Utah 1993); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W.Va. 1999).

<sup>45</sup> 521 U.S. at 441.

<sup>46</sup> *Id.* at 442.

<sup>47</sup> *Id.* at 442-443.

<sup>48</sup> *Temple-Inland Forest Products Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999).

employee suffered from any asbestos-related disease, though one plaintiff did show pleural thickening. The court concluded that the *type* of claim – fear of increased risk of disease when no disease is presently manifest – should not be recognized as a cause of action.<sup>49</sup>

The Court set forth three policy considerations in rejecting a claim for mental anguish alleging exposure to asbestos fibers absent a physical injury: (1) mental anguish claims in the absence of present physical injury “make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not”; (2) the difficulty in assessing the seriousness of mental anguish claims in the absence of present physical injury leads to unpredictable liability, “with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether”; and (3) allowing such claims could open the flood gates resulting in suits “caused by exposure that has not resulted in disease [competing] with suits for manifest diseases for the legal system’s limited resources.”<sup>50</sup>

In *Temple-Inland*, the Court limited its holding to claims for exposure to asbestos as follows:

We add this cautionary note. The principles we have used to deny recovery of mental anguish damages for fear of the possibility of developing a disease as a result of an exposure to asbestos may not yield the same result when the exposure is to some other dangerous or toxic element. Exposure to asbestos, a known carcinogen, is never healthy but fortunately does not always result in disease. . . . The substantial uncertainty that exposure to asbestos will ultimately result in disease, even though the risk of disease is significantly increased, and the ordinarily long latency period before disease develops counsel strongly against compensating these types of fears. The consequences of exposure to other toxic materials vary, and while the analysis in other circumstances should be the same as that which we have employed here, the outcomes may be different.<sup>51</sup>

Nonetheless, the arguments against recognizing a “fear of disease” claim should apply equally to cases involving exposure to other toxins and claims for medical monitoring where there has been no physical injury.<sup>52</sup>

In *Norwood*, the trial court found that “[m]edical monitoring claims and the mental anguish claims rejected in *Temple-Inland* are arguably similar in nature.”<sup>53</sup> The court reasoned

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 93.

<sup>51</sup> *Id.* at 95.

<sup>52</sup> The Western District of Texas recently applied the principles of *Temple-Inland* to a claim for increased risk of disease based on exposure to arsenic. In *Martin v. Home Depot U.S.A., Inc.*, 369 F. Supp. 2d 887 (W.D. Tex. 2005), plaintiffs claimed that arsenic leached from the wood used to build their back deck into the soil. The plaintiffs sought damages based on the increased risk of future illness due to their exposure. *Id.* at 891. In dismissing the claim, the court observed that plaintiffs did not allege any actual physical injury and, citing to *Temple-Inland*, held that “Texas law does not recognize a cause of action based solely upon an increased health risk, absent a manifested injury.” *Id.*; see also *Curran v. Massachusetts Turnpike Auth.*, 1994 Mass. Super. LEXIS 546 (Mass. Super. June 6, 1994) (in a case involving alleged exposure to contaminated water supply, the court held that Massachusetts does not allow recovery for emotional distress damages for fear of future injury).

that both types of claims seek to establish liability and damages in the absence of physical injury and rely, at least in part, on the arguably increased risk of suffering an injury in the future.<sup>54</sup>

According to the Texas Supreme Court, a “substantial majority” of courts considering the issue “have held that purely mental injuries . . . do not constitute ‘bodily injury.’”<sup>55</sup> *Cowan* was not a “fear of disease” case, yet the analysis is still instructive.

The plaintiff in *Cowan* brought suit against a camera store clerk for copying and distributing a set of provocative pictures she had brought in to be developed. Plaintiff sued in negligence, claiming she suffered “severe mental pain, . . . loss of privacy, humiliation, embarrassment, fear, frustration, [and] mental anguish.”<sup>56</sup> After winning a verdict at trial, she sued the defendant’s homeowner’s policy to collect on the judgment. The insurer denied coverage, and the court agreed. The liability section of the policy defined “bodily injury” as “bodily harm, sickness or disease.”<sup>57</sup> The court found that “bodily injury” as defined in the policy did not include purely emotional injuries, and required some injury to the body.<sup>58</sup> The court further indicated that if plaintiff had pled some form of physical manifestations as a result of her distress, her claims would have fallen with the policy definition.<sup>59</sup>

Although many states have addressed whether they would recognize a claim for medical monitoring, only a few courts have addressed the related insurance coverage question of whether these costs fall within the definition of “bodily injury.”<sup>60</sup> Medical monitoring is, in essence, a claim for future medical testing and evaluation that would not otherwise be necessary if the plaintiff had not been wrongly exposed to some toxic substance.<sup>61</sup>

*Transamerica* is the only case to squarely address the issue.<sup>62</sup> For guidance on whether exposure to HIV-infected blood is a bodily injury, the court looked to two cases that addressed whether exposure to asbestos, and the concomitant increase in risk of asbestosis or lung cancer, constituted “bodily injury.”<sup>63</sup> In both asbestos cases, the courts held that the insureds had not

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<sup>53</sup> *Norwood v. Raytheon Co.*, 414 F. Supp.2d 659, 664-65 (W.D. Tex. 2006).

<sup>54</sup> *Id.* at 664.

<sup>55</sup> *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997).

<sup>56</sup> *Cowan*, 945 S.W.2d at 821.

<sup>57</sup> *Id.* at 822.

<sup>58</sup> *Id.* at 823.

<sup>59</sup> *Id.* at 825.

<sup>60</sup> *See Burt Rigid Box Inc. v. Travelers Prop. and Cas. Corp.*, 126 F. Supp.2d 596, 637 (W.D. N.Y. 2001) (Claim for injunctive relief for the establishment of a fund for future medical testing based on exposure to a landfill containing toxic substances. The insurer argued that the action did not seek damages for “bodily injury” within the meaning of the comprehensive general liability policy. Initially, the court noted that “neither party cites any authority in support of its position and the court’s research reveals no case on point.”)

<sup>61</sup> *Lockheed Martin v. San Bernardino County*, 29 Cal. 4<sup>th</sup> 1096, 1102 (2003) (discussing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal 4<sup>th</sup> 965 (1993)).

<sup>62</sup> *Transamerica Ins. Co. v. Doe*, 840 P.2d 288, 289 (Ariz. Ct. App. 1992).

<sup>63</sup> *Id.*

suffered a “bodily injury.”<sup>64</sup> Despite the presence of asbestos fibers in the lungs of one of the victims, the courts held that “[t]here can be no claim for damages for the fear of contracting asbestos-related diseases in the future without the manifestation of a bodily injury.”<sup>65</sup> Driving the court’s decision was concern with depleting the limited resources of a finite number of defendants, thereby, leaving those who actually contract an asbestos disease with no relief.<sup>66</sup>

The *Transamerica* court found this reasoning applicable to the dispute before it. Like the victims in the asbestos cases, the insureds in *Transamerica* were exposed to a potentially deadly substance but were unable to offer “competent evidence of any physical impairment or harm caused by this exposure.”<sup>67</sup> The court held that because the insureds had not suffered any physical impairment, harm, injury sickness, or disease, they did not suffer a “bodily injury” within the meaning of the policy when they were exposed to infected blood.<sup>68</sup>

More recently, in *Burt Rigid Box*, the Western District of New York faced a somewhat similar issue wherein plaintiffs sought establishment of a fund for future medical monitoring for their exposure to hazardous waste.<sup>69</sup> Noting the absence of authority on this issue, the court relied on the general rule that the allegations of a complaint are to be construed liberally when determining the existence of a duty to defend.<sup>70</sup> The court held:

In this case, the Moore complaint, liberally construed, can be said to allege claims for bodily injury or property damage. It does not strain credulity to construe the Moore 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 illnesses. The court, therefore, finds that the Moore complaint, liberally construed as it must be, alleges claims for bodily injury within the meaning of the CGL policies, requiring, as a matter of law, Aetna to defend such action.<sup>71</sup>

A somewhat similar result was reached in *Korman*.<sup>72</sup> In this case, the insured was sued by residents of a tract of land situated next to a landfill in Pennsylvania.<sup>73</sup> The residents alleged that the landfill released hazardous waste into the soil and groundwater surrounding it and smoke and gases into the air.<sup>74</sup> The insured constructed homes on the land adjacent to the landfill.<sup>75</sup>

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<sup>64</sup> *Id.* at 291.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Burt Rigid Box*, 126 F. Supp.2d at 637.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 638.

<sup>72</sup> *U.S. Fid. & Guaranty Co. v. The Korman Corp.*, 693 F. Supp. 253, 259 (E.D. Pa. 1988).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 255.

<sup>75</sup> *Id.*

The underlying plaintiffs sought damages for the costs of medical monitoring and for their emotional distress, inconvenience, and inability to enjoy the use of their land.<sup>76</sup> The court held that “while the allegation of emotional distress certainly does not rise to the level of ‘bodily injury,’ the allegation of exposure to health and safety risks may rise to that level.”<sup>77</sup> For support, the court cited to a Pennsylvania Superior Court decision, which held that the underlying complaint alleged “bodily injury” where it alleged exposure to and ingestion of water contaminated with a highly-dangerous chemical.<sup>78</sup>

The better-reasoned analysis, as followed by the court in *Transamerica*, however, is that a claim for medical monitoring is not covered under a general liability policy because it does not involve physical injury, harm, sickness or disease.<sup>79</sup> The insuring agreement only covers an insured’s legal obligation to pay as damages. Damages are an amount to compensate for an injury. If the plaintiff is not physically injured and only requests medical monitoring, the amount an insured pays for medical monitoring is not for “damages.”

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<sup>76</sup> *Id.* at 256.

<sup>77</sup> *Id.* at 259.

<sup>78</sup> *Id.*

<sup>79</sup> *Transamerica*, 840 P.2d at 289.