

Commentary

Insurance Coverage For Medical Monitoring Claims: A Comparative Look At Where We Stand

By
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It is Christmas time and Playmore¹ Corporation's Ronnie the Racecar is proving very popular with more than six hundred thousand units sold. Playmore's management and product development teams are pleased, until the Consumer Products Safety Commission informs the company that Ronnie has tested positive for Cobalt-60, a radioactive isotope. An independent laboratory engaged by the company quickly confirms that certain component parts of Ronnie were coated with paint dyed with Cobalt Blue, a compound commonly used to produce blue paint. The laboratory concludes that the dye used to produce the batch of paint in this instance was tainted with the radioactive isotope at the source. Playmore immediately begins a recall of all Ronnie the Racecar toys, including the two hundred thousand units sold since the holidays, and puts its Commercial General Liability ("CGL") carrier on notice.

A few weeks following the recall Jane Doe files a lawsuit in federal district court and seeks class certification. Doe alleges that exposure to Cobalt-60 is a "suspected human carcinogen, causing internal cellular damage that renders exposed children susceptible to a high risk of developing cancer."

Individually and as class representative Doe seeks compensatory damages for the cost of the toy and of safe disposal, as well as establishment of a fund for the medical monitoring of exposed children. Playmore tenders the Doe action to its CGL carrier for a defense.

Should Playmore expect to be covered by its liability insurance for the medical monitoring claim?

A number of jurisdictions now recognize claims for medical monitoring funds in one form or another.² Less than a handful of courts, however, have addressed the difficult issues of insurance coverage for such claims. Such funds may be required to provide for expensive long-term medical examinations for tens or hundreds of thousands of exposed persons.³ Policyholders and general liability insurers have clashed already over whether such claims are covered and, if so, the scope of any such coverage. Given the stakes involved, policyholders and insurers certainly can expect a widening dispute in the future.

This article explores the current state of that dispute, examining first the coverage arguments made by both policyholders and insurers, and then summarizing the court decisions addressing those arguments. This article will then attempt to draw some conclusions from the limited precedent, as to which arguments have had the most impact with the courts. Finally, this article will conclude by commenting on what the future may hold with respect to coverage for medical monitoring claims.

The Early Decisions

From the beginning the dispute between policyholders and insurers centered largely on the question of whether claims to establish medical monitoring funds on the basis of a potential, future injury satisfy the CGL policy requirement of bodily injury. The insuring agreement of the current ISO form of the CGL policy states:

- a. We will pay those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply.

[. . .]

- b. This insurance applies to "bodily injury" and "property damage" only if:
 - (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
 - (2) The "bodily injury" or "property damage" occurs during the policy period; and
 - (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II — Who is an Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

The current ISO form defines the terms 'bodily injury' and 'occurrence' as:

'Bodily injury' means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

In Techalloy Company v. Reliance Insurance Company, the policyholder operated a steel cutting and stripping business in which the chemical trichloroethylene was an integral component.⁴ The claimants in a class action lawsuit against Techalloy alleged that the company had recklessly dumped and stored the chemical, resulting in an exposure "that may have caused serious injury, including neurological, pulmonary, hepatic and renal damage with possible mutagenic, teratogenic and carcinogenic results."⁵ The complaint alleged, moreover, that "the plaintiff class suffered an increased risk of serious illness or death due to actual ingestion and/or use of contaminated water and suffered from high anxiety because of the awareness of this risk."⁶ The class demanded, *inter alia*, the establishment of a trust fund for the payment of future medical expenses.

Seizing upon the equivocal language in the complaint, Techalloy's CGL carrier denied coverage on the grounds that the complaint failed to allege a present bodily injury as required by the policy. Techalloy retained private counsel to defend the underlying action, and thereafter brought a declaratory action against the insurer.

Although the court's opinion is more instructive as to the insurer's position, presumably Techalloy argued that the allegations in the complaint sufficiently met the policy definition of bodily injury to entitle it to a defense in the underlying action.⁷ The insurer countered with its previously expressed view that the allegations of possible injury that may cause illness or death in the future did not allege a present bodily injury. In addition, the insurer argued that, in any event, the pollution exclusion of the policy precluded any coverage.

The Techalloy court, emphasizing that “an insurer must defend any suit in which from the face of the complaint there exists actual or *potential* coverage,” found that the definition of bodily injury in the Reliance policy was sufficiently pliable to encompass a possibility of injury even if it may only to be realized in the future.⁸ In this regard the court stated:

[i]t is apparent that the policy before us is thus susceptible to the following two interpretations: (1) personal injury means physical injury caused by external violence, as advanced by Reliance; and (2) at a minimum, personal injury encompasses allegations of exposure to a hazardous substance, increased risk of injury, anxiety, various internal disorders and tissue damage, as advanced by Techalloy. This compels us to liberally construe the term in Techalloy's favor. In this manner we will not defeat, without a clear necessity, the claim to coverage which was Techalloy's objective in securing the policy.⁹

The court implied, but did not explicitly hold, that the definition of bodily injury was ambiguous in the context of the claim for medical monitoring, and mentioned in passing Techalloy's reasonable expectations when purchasing the policy. Indeed, the central consideration for the Techalloy court appeared to have been the fact that Reliance issued a general liability policy to a company that it knew was in the business of handling dangerous chemicals and that it was reasonable, for purposes of the duty to defend, to expect coverage for exposures to that chemical.¹⁰

A few years later the United States District Court for the Eastern District of Pennsylvania heard similar arguments. In USF&G v. The Korman Corporation, the residents and past residents of a subdivision development sued the developer, claiming that it knowingly or recklessly built and sold homes adjacent to or, in some cases, actually within a landfill contaminated with decades worth of toxic waste.¹¹ Divided into a number of classes, the plaintiffs alleged a variety of fraud and breach of contract claims. Among the demands, two classes of plaintiffs sought damages for the costs of medical monitoring “made necessary by their exposure to the health and safety risks concealed by defendants.”¹²

Korman tendered its defense to its various CGL carriers that had issued it policies for an eight year period. One of the insurers brought an action seeking a declaration that it, and the other carriers, had no obligation to defend Korman on the grounds that the complaint did not allege any bodily injury or property damage caused by an occurrence. The insurer further contended that a number of policy exclusions applied, including the pollution exclusion.

The Korman court cited to the Techalloy decision to reach the same result, finding that the underlying complaint “includes allegations of what could arguably be considered bodily injury.”¹³ Indeed, the court stated:

“[i]n Count Nine the *Smalls* plaintiffs seek damages for costs of medical monitoring made necessary by their exposure to the health and safety risks concealed by defendants and for emotional distress. While the allegations of emotional distress certainly do not rise to the level of bodily injury, the allegation of exposure to health and safety risks may rise to that level. See *Techalloy Co. v. Reliance Insurance Co.*, 338 Pa. Super. 1, 487 A.2d 820 (Pa. Super. 1984).”¹⁴

Unfortunately for the policyholders in both the Techalloy and Korman cases, however, both courts found that the pollution exclusion barred coverage.

The Recent Decisions

Some years after these early decisions the dispute over coverage for medical monitoring claims was advanced even further in Burt Rigid Box, Inc. v. Travelers Property Casualty Corp.¹⁵ In Burt Rigid Box the parties raised for the first time the contention that a claim seeking the establishment of a medical monitoring fund did not constitute ‘damages’ as required by the CGL policy. The underlying actions involved allegations of the policyholder's liability as a generator of hazardous waste contamination at a number of landfill sites in western New York.¹⁶ In addition to a number of remediation actions against Burt Rigid Box, numerous individuals brought personal injury and wrongful death claims against the company.¹⁷

The Burt Rigid Box Court summarized each party's contentions as follows:

Aetna maintains that as the *Moore* plaintiffs seek only injunctive relief for the establishment of a fund for future medical testing and surveillance based upon exposure to the Pfohl landfill, the *Moore* action does not seek damages for "bodily injury" within the meaning of the Aetna CGL policies. Burt argues in opposition that insofar as the *Moore* action seeks compensatory damages for money already expended by the plaintiffs for medical examinations, it alleged "damages because of bodily injury, sickness or disease" within the meaning of the Aetna policies. Neither party cites any authority in support of its position and the court's research reveals no case on point.¹⁸

The *Burt Rigid Box* court, again relying on the liberal construction rules to be applied to the duty to defend, found that the underlying complaint "can be said to allege claims for bodily injury or property damage [. . .] it does not strain credulity to construe the *Moore* 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."¹⁹ The court found, therefore, "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."²⁰

Finally, in *HPF, L.L.C. v. General Star Indemnity Company*, the parties essentially reiterated the arguments from *Burt Rigid Box*, with the policyholder requesting coverage for an action seeking medical monitoring and the insurer countering that the underlying action did not allege damages arising out of bodily injury.²¹ In the underlying action, the plaintiffs alleged that HPF violated a number of California statutes by the unlawful labeling, distribution and marketing of an herbal product described by the company as a natural alternative to Fen-Phen.²²

The *HPF, Inc.* Court summed up the dispute as follows:

General Star contends that the *Day* complaint did not allege a covered "bodily injury" as that term is defined in the policy so that

the claim does not fall within the coverage of the CGL. Moreover, General Star asserts that the California statutes under which Day sued does not provide a remedy for bodily injury.

HPF contends that the *Day* complaint seeks damages for bodily injury because it seeks the establishment of a fund for medical monitoring of all persons who used HPF's Herbal Fen-Phen products. HPF relies upon two cases from foreign jurisdictions, *Techalloy Company v. Reliance Insurance Co.*, 338 Pa. Super. 1, 487 A.2d 820 (Sup. Ct. Pa. 1985), and *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596 (W.D.N.Y. 2001) (*affm in part, rev'd in part*, 302 F.3d 83 (2nd Cir. 2002)) for support of its position.

To this point all of the courts addressing the issue of CGL coverage for medical monitoring claims have held that the complaints in the underlying actions sufficiently alleged bodily injury to at least implicate the duty to defend. The *HPF, Inc.* court, however, found that the complaint failed to even allege a bodily injury for the purposes of the duty to defend.²³ The policyholder referred the court to the *Techalloy* and *Burt Rigid Box* decisions in support of its contention that because the underlying action sought damages to establish a medical monitoring fund, then it must allege bodily injury.²⁴ But the court distinguished both cases as involving, at least, claims of potential injury such as increased risk of cancer from the alleged exposure to hazardous chemicals.²⁵ The plaintiffs in the underlying action against HPF alleged only that the company marketed and distributed its herbal Fen-Phen product without proof of its safety, as required by California law.²⁶ The court held that such allegations did not seek damages for bodily injury:

As stated above the core of Day's claim is that HPF misled the public that its Herbal Fen-Phen products were proven safe and effective for the treatment of obesity, when in fact, those product were not approved [by the FDA]. The *Day* complaint does not seek damages for any sickness or injury caused by ingesting HPF's herbal products; it seeks injunctive remedies for the misrepresentation of the quality and effectiveness of the products. Moreover, the establishment of a medi-

cal monitoring fund cited by the trial court as an allegation of bodily injury is nothing of the sort. The request for such a fund was in the prayer for relief and was not an allegation of bodily injury having been sustained. Further, medical monitoring of persons who used HPF's products seeks to monitor the products' effects. We cannot presume, and Day did not allege that the products cause bodily injury.²⁷

Where Do We Stand?

To this point policyholders have secured, at least initially, a defense to the underlying claim for medical monitoring expenses in three out of four cases. In each of these three cases the courts held that an allegation of exposure to substances known to have potential long-term health impacts, coupled with a claim for medical monitoring expenses, were sufficient to constitute an allegation of 'bodily injury' for the purposes of the duty to defend. Given what appears to be a growing trend toward allowing medical monitoring claims to proceed in some form, policyholders would seem to be in a strong position.

There are issues, however, with the manner in which the medical monitoring coverage dispute has developed that suggest the policyholder advantage thus far is largely illusory. In both the Techalloy and Korman cases the courts held that the pollution exclusion barred coverage entirely, and in the Burt Rigid Box decision the court was precluded from considering the possible ramifications of a pollution exclusion only because the insurer failed to prove that its policy contained such an exclusion.²⁸ There is no logical or legal reason why an otherwise enforceable exclusion would not apply, and therefore the policyholders may be winning Pyrrhic victories where an applicable exclusion exists. In each of these three cases, moreover, the courts' analysis focused on the duty to defend, measured by a lower standard than the duty to indemnify, and therefore may be of little to no value as precedent for coverage.

The context of the underlying claims and even the precise wording of allegations have proved also important in the development of the dispute. No case illustrates this point better than HPE, Inc. There the court held that the underlying complaint failed to allege bodily injury. Based upon a variety of California

statutes regulating the advertisement and labeling of consumer products, the complaint alleged that the company distributed and marketed its herbal products as safe for human consumption when that claim had not been clinically proven. Such a claim is quite different from an allegation that the products actually were harmful, coupled with an alleged exposure. In the three cases where the courts found sufficient allegation of bodily injury, moreover, the substances to which the underlying claimants were exposed were known to be harmful, but it is not certain what those same courts would have concluded had the substances only been suspected of causing sickness or disease in humans.

The question of whether a medical monitoring fund constitutes 'damages' represents another significant issue in the developing dispute. As already noted, the early arguments focused on the question of whether allegations of exposure without a present physical injury satisfied the CGL policy requirement of bodily injury. But the policy language premises the insurer's obligations either on the obligation to pay damages because of bodily injury or the filing of a suit against the policyholder seeking such damages. None of the existing decisions explicitly addresses this issue. Indeed, the 'damages' question throws the precedential value of all four decisions into doubt because coverage under the CGL policy requires both bodily injury or property damage and 'damages'. Because the standard policy does not define damages, however, each court reaching the issue will necessarily impose its own interpretation.

Although the previous three decisions either did not reach the damages question or appeared to conflate the concepts of damages and bodily injury²⁹, the HPE, Inc. court came closest to an analysis of the issue. There the court noted that the trial court mistakenly equated the demand for a medical monitoring fund in the prayer for relief with an allegation of bodily injury. "The Day complaint," the court stated, "does not seek damages for any sickness or injury caused by ingesting HPF's herbal products; it seeks injunctive remedies for the misrepresentation of the quality and effectiveness of the products."³⁰ Already having ruled that the complaint failed to allege bodily injury, this statement by the court was clearly dicta. Holding what something is not, moreover, is not the same as ruling what it is. Whether a demand for funds to

create and maintain a medical monitoring program satisfies the policy requirement of damages, therefore, remains an unanswered question.

One commentator suggests that the term damages, as used in the CGL policy in the context of medical monitoring claims, should be construed against the insurer because it is ambiguous.³¹ Failing that, in something of a circular reasoning, the commentator argues that the term should be construed to accord with the policyholder's reasonable expectations of coverage.³² Neither of these contentions, however, is adequately supported. With respect to ambiguity, the commentator simply refers to the doctrine of *contra proferentum*, wherein an ambiguity in a contract is construed against the drafting party, and then asserts that the term damages is ambiguous because it is not specifically defined.³³ Merely because a policy term is undefined, though, generally does not render it ambiguous.³⁴ With respect to the doctrine of reasonable expectations, the commentator neglects to concede that many jurisdictions apply the doctrine only after an ambiguity is found, and among the remaining jurisdictions the doctrine does not provide *carte blanche* to rewrite a policy in favor of coverage.³⁵ Either way, the commentator misses an important step that most courts will be bound to follow: determining the plain and ordinary meaning of the term. Only if that meaning is ambiguous will the doctrines raised in the comment come into play. The conclusory argument that the term damages should be construed in favor of coverage because it is ambiguous, therefore, fails to resolve the issue.

There is, finally, a subtle bias built into the first four decisions. Each case, including *HPE, Inc.*, was decided in a jurisdiction where claims for medical monitoring were recognized, with certain conditions, but with no requirement of a present physical injury.³⁶ In those jurisdictions that do not permit medical monitoring claims altogether, obviously, the issue of coverage is a foregone conclusion. But in the much larger group of jurisdictions that may recognize medical monitoring claims where a present physical injury is alleged, the influence of this precedent is questionable. In such jurisdictions the underlying complaint must allege a present physical injury to survive a motion to dismiss. Where such allegations are missing it is likely that the courts would find there is no allegation of bodily injury, and therefore no duty to defend.

What Will The Future Bring?

Plaintiffs will continue to file claims and suits seeking medical monitoring, and so the coverage disputes over such claims will continue to arise. The threshold question of whether such claims allege bodily injury remains largely undecided. This issue, in fact, may prove much more complicated than any of the four existing authorities foresaw. How certain must the eventual harm be to support a finding of present bodily injury? Not every exposure to some harmful substance will manifest into an actual disease. To what degree must the purported connection between the substance and the potential harm be supported by scientific evidence? Some materials and chemicals are known to be human carcinogens, while many others are only suspected of such a causal connection. Must the exposure satisfy some time-and-proximity rule, or should any exposure, however fleeting or distant, suffice to allege bodily injury? These questions remain unanswered by any of the existing authorities.

The trigger of coverage will present a key point of contention, as the CGL policy requires bodily injury or property damage to occur during the policy period for coverage to attach. But when does such injury occur in the context of a disease or a condition that may never develop? The occurrence-based CGL policy provides coverage for accidents, including exposure to harmful conditions, during its own period, and not for contingent or potential claims. This issue, of course, is closely related to the problem of bodily injury, and will likewise prove much more complicated than the present authority suggests. But one response that policyholders might make, to resolve such issues, is to carry a program of claims made policies, in which the trigger of coverage is a claim made during the policy period and not an occurrence.

At some point the courts must address directly the damages issue, and indemnification itself will inevitably move to the center of the dispute. Bodily injury may be given a different connotation in the context of indemnification, because the existing precedent focused on the alleged *possibility* of injury to find a duty to defend.³⁷ Other issues, such as occurrence, known loss, and expected or intended injury will arise where a policyholder seeks coverage under CGL policies written after the underlying exposure. The bodily injury coverage of the CGL policy, for example, does not apply to bodily injury that was known by the

insured to have occurred prior to the inception of the policy even if the bodily injury continues during the policy period.

Returning to our hypothetical, Playmore Corporation faces a litigation nightmare, and its first concern is to secure at least a defense to the explosion of lawsuits that followed on the heels of the Doe action. The pollution exclusion and the standard 'toxic' exclusions of asbestos, lead and silica seem not to apply. Likewise, the standard Nuclear Energy Liability Exclusion does not apply because Playmore is not entitled to indemnity under a nuclear energy policy or by the United States government.³⁸ The carrier, however, files a declaratory judgment action to determine whether it must defend or indemnify Playmore for any sums awarded, including the establishment of a medical monitoring fund, on the grounds that the underlying complaint alleges neither bodily injury nor damages as contemplated in the policy. The jurisdiction at issue does not oblige a claimant to allege a present physical injury, but does require that the necessity for monitoring be supported by evidence to a reasonable degree of medical certainty that the claimant is at a high risk of developing a consequent disease. Following discovery on this issue each side prepares and files a motion for summary judgment, and now awaits the court's decision.

Endnotes

1. Playmore Corporation and Ronnie the Racecar are wholly fictional and any resemblance to any real entity or product is entirely coincidental.
 2. Some courts recognize medical monitoring claims as either a cause of action or an element of damages without the necessity for present physical injuries, but impose specific preconditions on recovery. Martin v. Shell, 180 F. Supp. 2d 313 (D. Conn. 2002) (predicting Connecticut law); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468 (D. Colo. 1991) (predicting Colorado law); Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109 (N.D. Ill. 1998) (predicting Illinois law); Stead v. F.E. Myers Co., 785 F. Supp. 56 (D. Vt. 1990) (predicting Vermont law); Petito v. A.H. Robins Co., 750 So.2d 103 (Fla. Dist. Ct. App. 2000); Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 522 S.E.2d 424 (1999); Redland Soccer Club, Inc. v. Dep't of the Army, 548 Pa. 178, 696 A.2d 137 (1997); Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 863 P.2d 795 (Cal. 1993); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993); Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287 (1987); Burns v. Jaquays Mining Corp., 156 Ariz. 375, 752 P.2d 28 (Ariz. Ct. App. 1987); Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984).
- Still more jurisdictions recognize, or at least did not reject when given the opportunity, medical monitoring funds as a form of damages under more traditional theories of tort recovery for proven, present injuries. Parker v. Brush Wellman, 230 Fed. Appx. 878 (11th Cir. 2007) (predicting Georgia law); Trimble v. Asarco Inc., 232 F.3d 946 (8th Cir. 2000) (predicting Nebraska law); Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991) (predicting West Virginia and Virginia law); In re: Methyl Tertiary Butyl Ether Products Liability Litigation, 457 F. Supp. 2d 298 (S.D.N.Y. 2006) (predicting Maryland law); Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601 (W.D. Wash. 2001) (predicting Washington law); Jones v. Brush Wellman, 2000 U.S. Dist. LEXIS 21897 (N.D. Oh. 2000) (predicting Tennessee law); Thompson v. Am. Tobacco Co., Inc., 189 F.R.D. 544 (D. Minn. 1999) (predicting Minnesota law); Bryson v. The Pillsbury Company, 573 N.W.2d 718 (Minn. App. 1998); Witherspoon v. Philip Morris, Inc., 964 F. Supp. 455 (D.D.C. 1997) (predicting District of Columbia law); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995) (predicting Kansas law); Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994) (predicting Ohio law); Meyer v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007); Paz v. Brush Engineered Materials, Inc., 949 So.2d 1 (Miss. 2007); Lowe v. Phillip Morris USA, Inc., 142 P.2d 1079, 207 Ore. App. 532 (Or. Ct. App. 2006); Henry v. Dow Chemical Company, 473 Mich. 63, 701 N.W.2d 684 (2005); Wood v. Wyeth-Ayerst Labs, 82 S.W.3d 849 (Ky. 2002); Badillo v. Am. Brands, Inc., 117 Nev. 34, 16 P.3d 435 (2001); Hinton v. Monsanto Co., 813 So.2d 827 (Ala. 2001); Lamping v. American Home Products, DV-97-85786 (Mont. 4th Dist. 2000); Mergenthaler v. Asbestos Corp., 480 A.2d 647 (Del. 1984).

- Only a few jurisdictions may have or appear to have rejected medical monitoring claims altogether. See, Metro-North Commuter R.R. Co. v. Buckley, 512 U.S. 424, 117 S. Ct. 2113, 138 L.Ed.2d 560 (1997) (declining to recognize claims for damages to establish a medical monitoring fund under the Federal Employers' Liability Act in the absence of a present physical injury); and, Norwood v. Raytheon Company, 414 F.Supp.2d 659, 666 (W.D. Tx. 2006) (“[L]ike the *Metro-North* Court, the Texas Supreme Court appears disposed to rely on the same policy considerations in rejecting medical monitoring claims that it relied on in rejecting mental anguish claims in the absence of a present physical injury). Louisiana enacted a statute in 2006 providing that “[d]amages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.” La. C.C. Art. 2315 (2006).
3. In the hypothetical, Playmore sold nearly 900,000 Ronnie the Racecar units. Households with two or more children represented roughly three-quarters of those sales, resulting in over 1.7 million potentially exposed children.
 4. 338 Pa. Super. 1, 487 A.2d 820 (1984).
 5. Id. at 5, 822.
 6. Id.
 7. The Superior Court, the intermediate appellate court of Pennsylvania, in fact expressed some doubt as to the sufficiency of the underlying allegations to state a cause of action in tort for personal injury, but distinguished between the level of pleading necessary to maintain an action and that supporting a policyholder's contractual right to a defense to the action. Id., at 8, 824.
 8. Id.
 9. Id. at 9, 824-25.
 10. Throughout its opinion the Techalloy court appeared to conflate the policy language referencing bodily injury with what it termed personal injury. It should be noted, moreover, that Pennsylvania follows the doctrine of reasonable expectations. E.g., Collister v. Nationwide Life Insurance Company, 479 Pa. 579, 388 A.2d 1346 (1978).
 11. 693 F. Supp. 253 (E.D. Pa. 1988).
 12. Id. at 259.
 13. 693 F. Supp. at 258-59.
 14. Id.
 15. 126 F. Supp.2d 596 (W.D. NY 2001).
 16. Id. at 603-06.
 17. Id. at 605-06.
 18. Id. at 637 (internal citations omitted).
 19. 126 F. Supp.2d at 638.
 20. Id.
 21. 338 Ill. App. 3d, 788 N.E.2d 753 (2003).
 22. Id. at 913-14, 754-55.
 23. 338 Ill.App.3d 912, 788 N.E.2d 753.
 24. Id. at 916, 756.
 25. Id. at 916-17, 756-57.
 26. Id. at 917, 757 (“[i]n the case at bar however, there are no allegations of bodily injury in the underlying complaint. Despite HPF's characterization that the *Day* complaint generally alleges that Herbal Fen-Phen and Herbal Fen-Phen Stage 2 were not safe, our 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. In fact, the *Day* complaint carefully alleges that HPF's herbal products have not been proven safe and glaringly omits any allegation that the herbal products are unsafe or may be unsafe”).
 27. Id. at 918, 758.

28. See, Techalloy, 487 A.2d at 827 (“although the allegations of personal injury in the Peterman complaint state a claim to which coverage potentially applies, we find that Reliance was not under a duty to defend Techalloy in the Peterman action because of the existence of the [pollution] exclusion”); and, Korman, 693 F. Supp. at 259 (“[a]lthough in Count Nine the *Smalls* plaintiffs may allege an ‘occurrence’ and arguably allege ‘property damage’ or ‘bodily injury,’ these allegations are not covered because they undoubtedly fall within the ambit of [the pollution] exclusion”); and Burt Rigid Box, 126 F. Supp. 2d at 624 (“[o]n this record, the court finds that, as a matter of law, Aetna has failed to submit anything demonstrating a genuine issue of material fact as to whether any of the insurance policies issued to Moore and also insuring Burt were endorsed by a pollution exclusion”).
29. The Techalloy decision focused solely on whether the complaint alleged bodily injury, with the court making no mention of the separate issue of damages. The closest that this decision comes to an analysis of the damages issue is the statement that, “it is hardly speculative to say that Techalloy reasonably expected, by purchasing the policy, to be insured against *financial obligations* stemming from charges such as those raised by Peterman.” 487 A.2d at 824 (emphasis added). The Korman court acknowledged that the underlying plaintiffs were “seek[ing] damages for costs of medical monitoring made necessary for their exposure,” but again ruled only on the issue of bodily injury, not whether a medical monitoring fund constituted damages. 693 F. Supp. at 259. In neither of these cases was it apparent that the litigants raised the damages question as a separate issue. To the contrary, in the Burt Rigid Box case the contentions of the parties centered on whether the allegations of the complaint alleged “damages for bodily injury within the meaning of the Aetna CGL policies.” 126 F. Supp. 2d at 637. The court, however, merely ruled that the complaint “alleges claims for bodily injury within the meaning of the CGL policies.” Id. at 638.
30. 788 N.E.2d at 758.
31. Gwen M. Rogers, Note, *Medical Monitoring, Trigger of Coverage Analysis, and the Duty to Defend*, 13 GEO. MASON L. REV. 869, 898 (2006).
32. Id.
33. Id., (stating that “[t]he 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”).
34. See, ERIC MILLS HOLMES, ET AL., HOLMES’S APPLEMAN ON INSURANCE, 2D, Vol. 2 § 5.3 (2007) (“Where the coverage question centers around the meaning of words which are not defined, the court will not accord them a technical meaning but rather will use the plain and ordinary meaning a reasonable person would assign to those words. [...] The mere fact that policies contain words and phrases that have settled legal meanings but are not defined does not mean that the policy is ambiguous. In such a situation, the ordinary meaning of the terms will be used”).
35. See, BARRY R. OSTRAGER AND THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, 13TH ED., VOL. 1, § 1.03[b].
36. See, Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984) (recognizing a cause of action for all consequential damages that are reasonably certain to arise from exposure to a harmful substance); Redland Soccer Club, Inc. v. Dep’t of the Army, 548 Pa. 178, 696 A.2d 137 (1997) (recognizing a common law claim for medical monitoring where there is an increased risk of contracting a serious latent disease); Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 863 P.2d 795 (1993) (recognizing medical monitoring claims where the need for observation is a reasonably certain consequence of the exposure).
37. See, e.g., Techalloy v. Reliance Ins. Co., 338 Pa. Super. 1, 8-9, 487 A.2d 820, 824 (“In the original Peterman action, the trial judge held for Techalloy on the basis that ‘[e]ven if plaintiff’s allegation at paragraph 4 of his complaint that he *may* possibly have sustained some injury is read to allege that he *may* have a present injury, such a claim is palpably insufficient to meet the requirement of present injury.’ (emphasis in original). As we understand this, Peterman alleged insufficient present injury upon which to sustain his cause of action. This assessment is proper when the cause of action is negligence. It should not be the standard, however, for determining the rights

and duties of parties to an insurance contract. Such a strict construction of personal injury would result in the insured's being denied coverage when he would most reasonably expect it and would defeat in total the purpose of the policy. It would also equate the duty to defend with the duty to indemnify, which is contrary to the law in cases such as the present in

which the insurer contracted to defend even 'groundless, false or fraudulent' accusations").

38. Although there is an ISO form exclusion for claims arising out of radioactive matter that can be attached to a CGL policy by endorsement, none of the policies issued to Playmore contained this exclusion. ■