Summary:

Plaintiffs increasingly are seeking court-ordered medical monitoring as a form of relief in mass torts, but when the defendants turn to their liability insurers for indemnification, the insurers argue that medical monitoring costs are not covered "damages." The term "damages" as used in liability policies is broader than monetary judgments, however, and does include the costs of court-ordered medical monitoring.

Pull quotes:

1.)
Insurers take the position that the defendant policyholder's costs in financing a medical monitoring program are not covered "damages" because those costs constitute restitutionary or equitable relief, rather than legal or monetary relief.

2.)
The policyholders' position is compelled by at least three lines of cases: (1) those that hold that the term "damages" must be given a lay, as opposed to legalistic, reading; (2) those that hold that the term is, at best, ambiguous and therefore must be construed against the insurer; and (3) those that have held, in a variety of contexts, that medical monitoring costs are compensable "damages."

3.)
While the insurance industry may envision the typical policyholder as someone who never leaves home without a 1,900-page *Black's* tucked under one arm and a 1,300-page *Prosser's* under the other, judges do not share that image.

4.)
Some courts have expressly held that medical monitoring costs are tort damages at law, while others have held that such costs are recoverable damages, no matter whether the action lies at law or in equity.

'DAMAGES' MEANS . . . DAMAGES:
INSURER LIABILITY FOR MEDICAL MONITORING COSTS IN MASS TORT CLAIMS

by R. Hugh Lumpkin and Michael F. Huber

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INTRODUCTION

Class-action and mass-tort plaintiffs increasingly are seeking court-ordered medical monitoring as a form of relief in the full panoply of mass torts, including those alleging exposure to asbestos,[1] welding rods,[2] tobacco,[3] pesticides,[4] cement dust,[5] lead paint,[6] mercury amalgam fillings,[7] volatile organic compounds,[8] Fen-Phen,[9] toxic landfills,[10] contaminated water,[11] PCBs,[12] antidepressants,[13] and plutonium.[14]

Atop whatever money damages are awarded, defendants face millions of dollars in costs to establish medical monitoring programs that can last a lifetime. When the defendants turn to their liability insurers for indemnification, the insurers eschew indemnity, arguing that medical monitoring costs are not covered "damages."

Most states have recognized causes of action for medical monitoring.[15] To qualify for medical monitoring, plaintiffs generally must show that they have been exposed to a hazardous substance in such a way as to substantially increase their chances of contracting a serious illness.[16] The plaintiffs also must show that recognized medical tests exist that either will increase the likelihood of effective treatment or, through early detection, will improve their quality of life as they live with the illness.[17] Thus, the key question is whether the plaintiffs have a heightened risk of contracting an illness (typically cancer), and not whether the plaintiffs are actually ill.[18] A plaintiff who already has manifested symptoms would, in fact, no longer need the diagnostic tests that are sought in medical monitoring cases.[19]

Insurers take the position that the defendant policyholder's costs in financing a medical monitoring program are not covered "damages" because those costs constitute restitutionary or equitable relief, rather than legal or monetary relief.[20] For example, a mass-tort defendant recently received a reservation of rights letter from its liability insurer that asserted:

> Coverage applies only to those sums that the insured becomes legally obligated to pay to an injured third party as damages because of bodily injury or property damage. For example (but without limitation) coverage does not apply to costs incurred for compliance with routine regulatory requirements or for preventative or prophylactic measures, to costs incurred in obeying an injunction or an administrative order, to costs incurred in implementing any other form of equitable relief, punitive or

> exemplary awards, or to the payment of any other sums that do not constitute "damages[.]"[21]

The pertinent personal injury, property damage, and bodily injury coverages in a typical comprehensive general liability policy 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 personal injury, property damage, or bodily injury.[22] If the term "damages" is defined in the policy, that definition is generally a tautology: "Damages" are those sums "which are payable because of personal injury arising out of an offense to which this insurance applies."[23]

This article will demonstrate that the term "damages," as used in liability policies, is broader than monetary judgments and includes the costs of court-ordered medical monitoring. That conclusion is compelled by at least three lines of cases: (1) those that hold that the term "damages" must be given a lay, as opposed to legalistic, reading; (2) those that hold that the term is, at best, ambiguous and therefore must be construed against the insurer; and (3) those that have held, in a variety of contexts, that medical monitoring costs are compensable "damages."

ANALYSIS

I. "Damages" are damages

It's black-letter law in most jurisdictions that the words and phrases used

in an insurance policy must be read in the light of the skill and experience of ordinary people.[24] Courts must construe insurance policies so as "to provide a reasonable, practical, and sensible interpretation consistent with the intent of the parties."[25] In short, when a policy provision is not defined, the language must be given its natural, common, and everyday meaning.[26]

To determine the common and ordinary meaning of a term, courts may look to the standard, nonlegal dictionary definition of the word, and in standard dictionaries, the term "damages" is defined broadly.[27] *The Random House College Dictionary,* for example, defines "damages" as "the estimated money equivalent for detriment or injury sustained."[28] *The Random House Dictionary of the English Language* defines "damages" as "the estimated money equivalent for detriment or injury sustained" or as "cost; expense; charge."[29] *Webster's Third New International Dictionary* defines "damages" as "the estimated reparation in money for detriment or injury sustained."[30] Each of these definitions clearly encompasses money paid in response to a court order to fund a medical-monitoring program.

Even insurance-industry dictionaries define the term "damages" broadly. *The Dictionary of Insurance Terms* defines "damages" as "the sum the insurance company is legally obligated to pay an insured for losses incurred."[31] *The Glossary of Insurance Terms* defines "damages" as "the amount required to pay for a loss."[32]

Insurers insist that "damages" be given a "legal" meaning, so it is highly significant, as well as slightly ironic, that even *Black's Law Dictionary* in its fifth edition broadened the "legal" definition of "damages" to include "every loss or diminution of what is [one]'s own, occasioned by the fault of another." Earlier editions had defined "damages" as "compensation in money for a loss or damage."[33]

While the insurance industry may envision the typical policyholder as someone who never leaves home without a 1,900-page *Black's* tucked under one arm and a 1,300-page *Prosser's* under the other, judges do not share that image. As one District Court judge put it:

> The term "damages," in common thought, does not distinguish between equitable and nonequitable relief. Any definition of "damages" which is grounded upon the ancient division between law and equity – such as the definition now proffered by the insurers – would hardly be an "ordinary and accepted meaning" in the eyes of a "reasonably prudent layperson."[34]

Alternatively, if one were to concede that "damages" is susceptible of multiple meanings in everyday speech and writing, the policyholder's position on coverage would still prevail. It is settled beyond the point of truism that, if the language of an insurance contract is unclear, confusing, or ambiguous, that language must be construed against the drafter; i.e., the insurer.[35] Moreover, where the terms of a policy are susceptible of two reasonable constructions, the

court must adopt the interpretation that will sustain coverage for the insured.[36]

Or, as the Supreme Court of North Carolina so eloquently put it:

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.[37]

II. Monitoring costs are "damages"

Courts have shown a reluctance to certify medical-monitoring classes and subclasses, often deciding that they fail to meet the Rule 23[38] commonality,[39] typicality,[40] and adequacy of representation[41] requirements. Consequently, it is not surprising that there is a dearth of reported cases that directly decide the narrow issue of whether a liability insurer must indemnify a policyholder for medical-monitoring costs.[42] In an unreported case, the U.S. District Court for the Western District of Washington ruled that Colonial Penn had a duty to defend an insured defendant in a toxic-landfill case, where the plaintiffs had sought medical monitoring and the insurer had argued, *inter alia*, that such relief was not "damages" under the bodily injury and property damage provisions of the comprehensive liability policy.[43]

While decisions on the narrow issue of insurer liability are rare, there are a host of appellate opinions on the question of whether medical monitoring costs are "damages." Some courts have expressly held that medical monitoring costs are tort damages at law, while others have held that such costs are recoverable damages, no matter whether the action lies at law or in equity.[44]

A. Medical monitoring costs as tort damages at law

A leading decision that clearly and emphatically treats medical monitoring as simply another form of legal damages came in the California case of *Miranda v. Shell Oil Co.*[45] In *Miranda*, students and adults who allegedly drank public-school water contaminated with a toxic pesticide sued the pesticide manufacturer for "medical monitoring damages." The court held that "a plaintiff may collect damages … measured by the reasonable medical and other expenses to be incurred for monitoring,"[46] adding: "We simply recognize such expenditures are a legitimate element of consequential damages which flow from a tortious act."[47]

Among courts holding likewise are the Third[48] and Second[49] Circuits; the supreme courts of California,[50] New Jersey,[51] and Utah;[52] and various state appellate[53] and federal trial[54] courts. The Colorado Supreme Court's opinion is typical of the holdings in these cases: Medical monitoring costs are "a tangible and quantifiable item of damage. Such relief is akin to future medical

expenses."[55] Or, in the words of the Utah Supreme Court: "[T]his measure of damages is entirely consistent with basic tort principles."[56]

B. Medical monitoring costs as equitable "damages"

Other courts have held that the legal vs. equitable distinction is irrelevant; medical monitoring costs are recoverable damages, no matter how they are labeled. The D.C. Circuit in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.,*[57] for example, recognized medical monitoring as an equitable remedy, but then went on to speak of medical monitoring as a cause of action lying in tort. At yet another point in the opinion, the court applied the traditional equitable principles of balance of hardships and public interest as rationales for its decision.

Friends for All Children involved a group of Vietnamese orphans who were injured in a plane crash. They sought medical monitoring to determine whether they had suffered brain damage. The D.C. Circuit's opinion is oft-cited for this extended analogy:

> To aid our analysis of whether tort law should encompass a cause of action for diagnostic examinations without proof of actual injury, it is useful to step back from the complex, multi-party setting of the present case and hypothesize a simple, everyday accident involving two individuals, whom we shall identify simply as Smith and Jones:
>
> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to

> determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.
>
> From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action. A cause of action allowing recovery for the expense of diagnostic examinations recommended by competent physicians will, in theory, deter misconduct, whether it be negligent motorbike riding or negligent aircraft manufacture. The cause of action also accords with commonly shared intuitions of normative justice which underlie the common law of tort. The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services – a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life. Under these principles of tort law, the motorbiker should pay.[58]

Federal District Courts in California[59] and New York[60] similarly have held that, even if medical monitoring is an equitable remedy, the costs of establishing and maintaining such a program constitute compensable damages. In the New York cases, the District Courts held that the anticipated costs of medical monitoring, while an equitable remedy, satisfy the amount-in-controversy requirement for federal diversity jurisdiction.[61]

CONCLUSION

The term "damages," as used in general liability policies, is broader than monetary judgments and includes the costs of court-ordered medical monitoring. Such costs are "damages" from the perspective of an ordinary person, and, therefore, under well-established law, are covered by the insurance contracts. The insurers chose to use this "slippery word," and it is

not the function of the courts to "sprinkle sand upon the ice"[62] by giving it a legalistic meaning never intended by the policyholder.

ENDNOTES

[1] *See, e.g., Metro-North Commuter* R.R. *Co. v. Buckley,* 521 U.S. 424 (U.S. 1997).

[2] *See, e.g., Abney v. Exxon Corp.,* 755 So. 2d 283 (La. App. 1999).

[3] *See, e.g., In re Tobacco Litig. (Medical Monitoring Cases),* 600 S.E.2d 188 (W.Va. 2004); *Badillo v. American Brands, Inc.,* 16 P.3d 435 (Nev. 2001).

[4] *See, e.g., Miranda v. Shell Oil Co.,* 26 Cal Rptr. 655 (Cal. App. 1993).

[5] *See, e.g., Olden v. LaFarge Corp.,* 383 F.3d 495 (2004).

[6] *See, e.g., Elliott v. Chicago Housing Auth., Inc.,* No. 98 C 6307 (N.D. Ill. Feb. 28, 2000).

[7] *See, e.g., Kids Against Pollution v. Calif. Dental Ass'n,* 134 Cal. Rptr. 373 (Cal. App. 2003).

[8] *See, e.g., In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.,* 209 F.R.D. 323 (2002).

[9] *See, e.g., Sawyer v. Indevus Pharm., Inc.,* No. 03-5028-B (Mass. Super. Ct. July 26, 2004).

[10] *See, e.g., Askey v. Occidental Chem. Corp.,* 102 A.D.2d 130 (N.Y. App. Div. 1984).

[11] *See, e.g., Ayers v. Township of Jackson,* 525 A.2d 287 (N.J. 1987).

[12] *See, e.g., In re Paoli* R.R. *Yard PCB Litig.*, 916 F.2d 829 (3rd Cir. 1990).

[13] *See, e.g., Zehel-Miller v. Astrazenaca Pharm., LP*, 223 F.R.D. 659 (M.D. Fla. 2004).

[14] *See, e.g., Cook v. Rockwell Int'l Corp.,* 778 F.Supp. 512 (D. Colo. 1991).

[15] In *In re Telectronics Pacing Sys., Inc.,* 168 F.R.D. 203 (S.D. Ohio 1996), Judge Spiegel of the Southern District of Ohio, with the assistance of Chief Judge Schell of the Eastern District of Texas, surveyed the law and found that, as of 1996, medical monitoring causes of action were recognized in Alabama, Arizona, California, Colorado, Delaware, the District of Columbia, Guam, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Utah, Vermont, the U.S. Virgin Islands, Virginia, Washington, and West Virginia. Since then, at least one more state, Florida, has recognized medical monitoring as a distinct cause of action. *See Petito v. A.H. Robins, Inc.,* 750 So. 2d 103 (Fla. Dist. Ct. App. 1999).

[16] Michael Daneker, *When Two Worlds Collide: Interactions Between Superfund and Medical Monitoring,* 17-SPG NAT. RESOURCES & ENV'T 232 (2003). *See also Petito v. A.H. Robins, Inc.,* 750 So. 2d 103 (Fla. Dist. Ct. App. 1999).

[17] Daneker, 17-SPG NAT. RESOURCES & ENV'T 232, 233.

[18] Daneker, 17-SPG NAT. RESOURCES & ENV'T 232, 233.

[19] Daneker, 17-SPG NAT. RESOURCES & ENV'T 232, 233.

[20] Liability insurers employ the same argument in their attempts to avoid covering the costs of government-ordered environmental cleanup projects.

[21] On file with the authors (emphasis in original).

[22] For example, a CNA policy provides:

> **Coverage P – Personal Injury Liability**
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein called "personal injury") sustained by any person or organization and arising out of one or more of the following offenses….
> **Coverage B – Bodily Injury Liability – Except Automobile**
> [Insurer agrees] [t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.
> **Coverage D – Property Damage Liability – Except Automobile**

[Insurer agrees] [t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

[23] From the "Additional Definition" provision of a Travelers personal injury liability policy.

[24] *See, e.g., Brill v. Indianapolis Life Ins. Co.,* 784 F.2d 1511, 1513 (11th Cir. 1986); *Midwest Mut. Ins. Co. v. Santiesteban,* 287 So. 2d 665 (Fla. 1973).

[25] *Senco of Fla., Inc. v. Continental Cas. Co.,* 440 So. 2d 625, 626 (Fla. Dist. Ct. App. 1983) (citing *U.S. Fire Ins. Co. v. Pruess,* 394 So. 2d 468 (Fla. Dist. Ct. App. 1981)).

[26] *See, e.g., Certain British Underwriters at Lloyds of London v. Jet Charter Servs., Inc.,* 789 F.2d 1534, 1536 (11th Cir. 1986).

[27] *See Government Employees Ins. Co. v. Novak,* 453 So. 2d 1116, 1118 (Fla. 1984); *Aetna Cas. & Sur. Co. v. Cartmel,* 100 So. 802, 802 (Fla. 1924).

[28] RANDOM HOUSE COLLEGE DICTIONARY 336 (1980).

[29] RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 365 (1973).

[30] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1971).

[31] HARVEY W. RUBIN, DICTIONARY OF INSURANCE TERMS 71 (Barron's Business Guides 1987).

[32] THE MERRITT EDITORS, GLOSSARY OF INSURANCE TERMS 47 (1980).

[33] *See Wainscott v. Occidental Bldg. & Loan Ass'n,* 33 P. 88 (Cal. 1893); *Intel Corp. v. Hartford Accident & Indemn. Co.,* 692 F. Supp. 1171, 1189 n.26 (N.D. Cal. 1988).

[34] *U.S. v. Pepper's Steel & Alloys, Inc.*, 823 F. Supp. 1574, 1582 (S.D. Fla. 1993) (internal citations omitted).

[35] *See* RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981); *Goucher v. John Hancock Mut. Life Ins. Co.,* 324 A.2d 657 (R.I. 1974); *Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.,* 757 F.2d 1172, 1174 (11th Cir. 1985) (citing *Landress Auto Wrecking Co. v. U.S. Fid. & Guar. Co.,* 696 F.2d 1290, 1291 (11th Cir. 1983); *Rigel v. National Cas. Ins.,* 76 So. 2d 285, 286 (Fla. 1954)).

[36] *See, e.g., Jonesville Prods., Inc. v. Transamerica Ins. Group,* 402 N.W.2d 46, 47 (Mich. App. 1986); *Pepper's Steel & Alloys, Inc. v. U.S. Fid. & Guar. Co.,* 668 F. Supp. 1541, 1545 (S.D. Fla. 1987).

[37] *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., Inc.,* 388 S.E. 2d 557, 569 (N.C. 1990).

[38] FED. R. CIV. P. 23(a).

[39] *See, e.g., Zehel-Miller v. Astrazenaca Pharm., LP,* 223 F.R.D. 659 (M.D. Fla. 2004); *Perez v. Metabolife Int'l, Inc.,* 218 F.R.D. 262 (S.D. Fla. 2003).

[40] *See, e.g.*, Askey v. Occidental Chem. Corp., 102 A.D.2d 130 (N.Y. App. Div. 1984); *Perez v. Metabolife Int'l, Inc.,* 218 F.R.D. 262 (S.D. Fla. 2003); *Hoyte v. Stauffer Chem. Co.,* No. 98-3024-CI-7 (Fla. Cir. Ct. Nov. 6, 2002).

[41] *See, e.g.*, *Perez v. Metabolife Int'l, Inc.,* 218 F.R.D. 262 (S.D. Fla. 2003); *Hoyte v. Stauffer Chem. Co.,* No. 98-3024-CI-7 (Fla. Cir. Ct. Nov. 6, 2002).

[42] There is, however, a wealth of analogous precedent that environmental response costs, argued by some carriers to be an equitable remedy, are covered damages. *See, e.g., Claussen v. Aetna Cas. & Sur. Co.,* 865 F.2d 1217 (11th Cir. 1989); *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551 (9th Cir. 1991); *Aetna Cas. & Sur. Co. v. Pintlar Corp.,* 948 F.2d 1507 (9th Cir. 1991); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.,* 944 F.2d 940 (D.C. Cir. 1991); *New Castle County v. Hartford Accident & Indem. Co.,* 933 F.2d 1162 (3d Cir. 1991); *Avondale Indus. Inc. v. Travelers Indem. Co.,* 887 F.2d 1200 (2d Cir. 1989); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.,* 868 F. Supp. 1278 (D. Utah 1994); *Metro Wastewater Reclamation Dist. v. Continental Cas. Co.,* 834 F. Supp. 1254 (D. Colo. 1993); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.,* 662 F. Supp. 71 (E.D. Mich. 1987). *Powerine Oil Co., Inc. v. Super. Ct.,* 128 Cal. Rptr. 827 (Cal. App. 2002); *Alabama Plating Co. v. U.S. Fid. & Guar. Co.,* 690 So. 2d 331 (Ala. 1996); *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.,* 625 A.2d 1021 (Md. 1993); *Coakley & Coakley Landfill, Inc. v. Maine Bonding & Cas. Co.,* 618 A.2d 777 (N.H. 1992); *Outboard Marine Corp. v. Liberty Mut.*

Ins. Co., 607 N.E.2d 1204 (Ill. 1992); *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.,* 475 N.W.2d 607 (Iowa 1991); *AIU Ins. Co. v. Super. Ct.,* 799 P.2d 1253 (Cal. 1990); *Atlantic Wood Indus. Inc. v. Lumbermen's Underwriting Alliance,* 396 S.E.2d 541 (Ga. 1990); *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g. Co.,* 388 S.E.2d 557 (N.C. 1990); *Boeing Co. v. Aetna Cas. & Sur. Co.,* 784 P.2d 507 (Wash. 1990); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.,* 457 N.W.2d 175 (Minn.1990); *Hazen Paper Co. v. U.S. Fid. & Guar. Co.,* 555 N.E.2d 576 (Mass. 1990); *Aerojet-General Corp. v. Super. Ct.,* 257 Cal. Rptr. 621 (Cal. App. 1989); *Compass Ins. Co. v. Cravens, Dargan & Co.,* 748 P.2d 724 (Wyo. 1988); *U.S. Fid. & Guar. Co. v. Specialty Coatings Co.,* 535 N.E.2d 1071 (Ill. 1989); *CPS Chem. Co. v. Continental Ins. Co.,* 536 A.2d 311 (N.J. 1988).

[43] *Kitsap County v. Allstate Ins. Co., Inc.,* No. C93-5574R (W.D. Wash. Mar. 28, 1995).

[44] "The courts so far have treated medical monitoring damages as either equitable or legal and the distinction does not appear to result in much difference in outcome." Martha A. Churchill, *Toxic Torts: Proof of Medical Monitoring Damages for Exposure to Toxic Substances,* 25 AM. JUR. PROOF OF FACTS 3D 313 § 30 (2004).

[45] *Miranda v. Shell Oil Co.,* 26 Cal. Rptr. 2d 655 (Cal. App. 1993).

[46] *Miranda,* 26 Cal. Rptr. 2d 655, 658 (*quoting* RESTATEMENT (SECOND) OF TORTS, § 924; *citing Hagerty v. L&L Marine Svcs., Inc.,* 788 F.2d 315, 319 (5th Cir. 1986); *Ayers v. Jackson Tp.,* 525 A.2d 287, 308 (N.J. 1987); *Askey v. Occidental Chem. Corp.,* 477 N.Y.S. 2d 242, 247 (N.Y. 1984)) (internal punctuation adapted).

[47] *Miranda*, 26 Cal. Rptr. 2d 655, 659.

[48] *See In re Paoli R.R. Yard PCB Litig.,* 916 F.2d 829, 849 (3rd Cir. 1990) ("Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances.").

[49] *See Buckley v. Metro-North Commuter R.R.,* 79 F.3d 1337, 1346 (2d Cir. 1996) ("We find that medical monitoring costs are a reasonable basis for an award of damages"); reversed on an issue of statutory application by *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (U.S. 1997).

[50] *See Potter v. Firestone Tire & Rubber Co.,* 25 Cal. Rptr. 2d 550, 579 (1993) ("[W]e hold that the cost of medical monitoring is a compensable item of damages.").

[51] *See Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987) ("[W]e hold that the cost of medical surveillance is a compensable item of damages.").

[52] *See Hansen v. Mountain Fuel Supply Co.,* 858 P.2d 970 (Utah 1993).

[53] *See Petito v. A.H. Robins, Inc.,* 750 So. 2d 103 (Fla. Dist. Ct. App. 1999); *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130 (N.Y. App. Div. 1984). *See also Gerardi v. Nuclear Util. Servs., Inc.*, 149 Misc. 2d 657 (N.Y. Sup. Ct. 1991).

[54] *See Cook v. Rockwell Int'l Corp.,* 778 F. Supp. 512 (D. Colo. 1991).

[55] *Cook,* 778 F. Supp. 512, 514.

[56] *Hansen*, 858 P.2d 970, 981.

[57] *Friends for All Children, Inc. v. Lockheed Aircraft Corp.,* 746 F.2d 816 (D.C. Cir. 1984).

[58] *Friends for All Children,* 746 F.2d 816, 825.

[59] *See Barth v. Firestone Tire & Rubber Co.,* 661 F. Supp. 193 (N.D. Cal. 1987). It may be significant that if the court had not labeled the relief "equitable," all relief for the plaintiffs would have been foreclosed under a worker's compensation statute.

[60] *See Gibbs v. E.I. DuPont de Nemours & Co., Inc.,* 876 F. Supp. 475 (W.D. N.Y. 1995); *In re Rezulin Prod. Liab. Litig.,* 168 F. Supp. 2d 136 (S.D. N.Y. 2001).

[61] *Gibbs,* 876 F. Supp. 475; *In re Rezulin Prod. Liab. Litig.,* 168 F. Supp. 2d 136.

[62] *C.D. Spangler Constr. Co.,* 388 S.E. 2d 557, 569.