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Medical monitoring costs could constitute 'damages', according to the New Jersey district court's decision in the *Baughman* case

## *Baughman* says monitoring costs can be 'damages'

A NEW JERSEY district court has held court-imposed medical monitoring costs constitute "damages" under a general liability policy, thereby obligating the insurer to pay such costs. Deanna Cook and Angus Rodger, of Step-toe & Johnson, say this decision will significantly affect insurance companies in suits involving contamination or toxic exposure.

In *Baughman v US Liability Insurance Co*, a daycare centre owner brought an action against her general liability insurer, seeking a declaratory judgment that the insurer was obligated to provide coverage and defend the insured in liability suits arising from children's exposure to mercury on the daycare site. Several suits against the daycare owner sought payment for medical monitoring of children exposed to mercury, but who had not yet shown any symptoms of illness.

The daycare centre owner's general liability policy states the insurance company must pay "those sums the insured becomes legally obligated to pay as damages because of 'bodily injury or property damage'".

The policy left the word "damages" undefined. At issue in the case was whether medical monitoring costs constitute "damages" under the policy, thereby obligating the insurer to pay.

The defendant insurer argued the underlying liability suits did not seek damages, but rather equitable relief in the form of medical monitoring and therefore the insurer had no obligation to provide coverage.

The insured argued "damages" should not be construed so narrowly as to exclude all equitable relief, and the costs of court-imposed medical monitoring are "damages" because the insured is required to pay such costs out of pocket.

Applying the reasoning from *Morton International Inc v Gen Accident Ins Co*, the court held medical monitoring costs constitute "damages" under the policy and therefore the insurer was obligated to provide coverage.

In *Morton*, the New Jersey Supreme Court held the word "damages" should be given its plain meaning and should not be limited to traditional money damages, but could also include equitable relief.

The *Morton* court noted that to most people "damages" plainly means money, and if an insured is required to pay money he will naturally consider it payment of "damages" regardless of whether it could be classified as an equitable remedy.

This decision is a notable departure from the general rule in insurance coverage disputes that "damages" does not include equitable remedies, even where the defendant is required to pay money as part of that equitable relief.

This rule derived from the concept that damages are "substitutional" compensation for an injury, while equitable remedies are generally designed to restore a party to their original state or prevent further injury in the future.

Since equitable relief does not substitute for an injury suffered, the general consensus until now has been that such remedies fall outside the coverage of liability policies.

The broadened definition of "damages" set forth in *Baughman* has the potential to open the door for claims against insurance companies seeking payment for equitable remedies imposed on policyholders.

The potential cost in medical monitoring cases is especially high, since monitoring can persist for years even when no symptoms of illness are present in those exposed to harmful substances.

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