17 A.L.R.5th 327 (Originally published in 1994)

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ALR5th
Allan L. Schwartz, J.D.

Recovery of damages for expense of medical monitoring to detect or prevent future disease or condition

Tort law traditionally developed so that people could obtain civil redress for individualized immediate wrongs. But where there is a significant time lag between the wrong and the manifestation of any injury, a new compensatory system is needed. And at the front of this wave is the new concept of cost recovery for medical monitoring to detect future injury. Thus, it was held in Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 17 ALR5th 997, that a cause of action for medical monitoring is cognizable in Pennsylvania to pay for the cost of periodic medical examinations needed to detect latent diseases brought about by exposure to polychlorinated biphenyls (PCBs) which can damage the immune system. Cases determining the right to recover damages for the expense of medical monitoring to detect or prevent future diseases or conditions have been collected and analyzed in this annotation.

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I. Preliminary Matters

§ 1[a] Introduction—Scope

This annotation collects and analyzes those cases in which the courts have determined whether and under what circumstances there can be recovery of damages for the expense of medical monitoring to detect or prevent a future disease or condition.

For purposes of this annotation, the terms "medical monitoring" and "medical surveillance" are used, as the courts have used them, interchangeably as expressing a common concern with the detection of a future disease or condition. This is to be

distinguished from the concept of medical screening which is concerned with public health issues generally.[1] Medical screening cases are excluded from the scope of this annotation as presenting unique substantive and procedural issues.

Also excluded from the scope of this annotation for similar reasons are cases dealing with the concept of the recovery of damages for immediate medical diagnostic testing to determine if those involved in an accident were presently suffering medical problems as a result of such accident,[2] and cases dealing with the concept of recoverability of damages for the possibility of the occurrence of a future disease or condition itself, the so–called enhanced risk cases.[3]

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cited Statutes and Cases.

§ 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Summary and comment—Generally

Where manifestation of harm is latent or not immediately apparent, as is often the case with the consequences of environmental or toxic torts, the traditional tort system has sometimes struggled to achieve the traditional goals of compensation, deterrence, and rehabilitative justice.[4] To help achieve these goals in this context, the tort common law has recognized a cause of action for a future medical testing to facilitate early detection of diseases caused by toxic substances.[5]

"Medical monitoring," as this cause of action has come to be known, has been defined as an action seeking to recover the quantifiable costs of periodic future medical examinations to detect the onset of physical harm (§ 3), as distinguished from an enhanced risk claim which seeks compensation for the anticipated harm itself or for increased apprehension of such harm.[6]

By allowing the recovery of medical monitoring costs, the courts satisfy a number of sound policy concerns including: (1) public health interest in encouraging and fostering access to early medical testing for those exposed to hazardous substances; (2) possible economic savings realized by the early detection and treatment of the disease; (3) deterrents of polluters; and (4) elemental justice (§ 7).

As to the concern of some that recognition of medical monitoring claims will open the floodgates to a multitude of lawsuits in that the general public is regularly exposed to all sorts of unhealthy contaminants in the environment,[7] it has been noted that recognition of medical monitoring claims does not dispense with the burden that plaintiffs prove that medical monitoring is reasonably certain to be required; that is, plaintiffs may recover "medical monitoring" costs only if the evidence establishes the necessity, as a direct consequence of the exposure in issue, for a specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight. More specifically, it has been held that a medical monitoring cause of action must be established by proving that: (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of such exposure, plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that increased risk made periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures existed which made the early detection and treatment of the disease possible and beneficial (§ 6).

Once a medical monitoring cause of action has been recognized, issues of the matter of payment arise. In this regard, it has been held that medical monitoring costs are not "recovery costs" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9607, popularly known as the Superfund Act (§ 10), that a court–administered fund for these costs is preferable to a lump–sum payment (§ 9), and that class action certification issues will often be involved if only to properly identify those who will share in the cost award (§ 8).

Procedural concerns raised by future medical monitoring claims include the form of pleading, single cause of action preclusion rules, various aspects of admissibility of evidence by expert witnesses, and the possible pooling of the medical data acquired by medical monitoring tests (§ 2[b]).

Although there is some authority that a present physical injury is required in order to sustain a medical monitoring claim (§ 4[a]), and although the Pennsylvania cases differ in this regard (§ 4[c]), the more representative view is that a medical monitoring claim may be established or supportable in the absence of any present physical injury (§ 4[b]), and certainly in the absence of any need for a concurrent pleading relating to such injury (§ 5).

While it has been recently stated that the "circumstances that spawn [medical monitoring] cases keep expanding,"[8] and while there is dictum that future medical monitoring costs might be allowed in the context of injuries from an automobile accident (§ 12), the much more common application of medical monitoring awards is in the field of environmental or toxic torts (§§ 11-18), with medical monitoring claims having been specifically recognized or upheld where the latent manifestation of diseases which the monitoring is designed to identify and detect arising from such varied agencies and contexts as asbestos (§ 11[a]), insecticides such as termiticides (§ 14), landfill toxins (§ 15), petroleum products (§ 17), radioactive emissions (§ 18), groundwater contamination (§ 13[a]), and such organic chemicals as PCBs (§ 16[a]).

However, it is also to be pointed out that some medical monitoring claims have also been denied or rejected in cases involving asbestos (§ 11[b]), groundwater contamination (§ 13[b]), and PCBs (§ 16[b]), with a federal court, sitting in diversity, expressing its reluctance to create a "nontraditional" state common–law cause of action for medical monitoring where state courts and/or state legislatures have not yet acted.[9]

§ 2[b] Summary and comment—Practice pointers

Counsel's manner of pleading a medical monitoring cause of action has received attention by courts in several jurisdictions. Thus it was held by a Federal District Court, sitting in diversity and applying Colorado law, that where plaintiff sought medical monitoring and surveillance services "in the form of injunctive relief," the injunctive relief prayer stated a valid claim as a request for a court–administered fund.[10] And a Pennsylvania trial court held that a claim for the creation of a fund to pay for future medical examinations was in essence a claim for damages which could not be transformed into an equitable action by asking for an injunction that ordered the payment of money.[11] Also as to manner of pleading, it is to be noted that a New York trial court denied summary judgment on a public nuisance claim where the court found that plaintiff employees had sufficiently alleged peculiar injuries beyond that of the general public in that the employees sought continued medical monitoring.[12]

In addition to pleading matters, counsel involved with a medical monitoring claim, whether presenting the claim or defending against it, can reasonably foresee that expert medical witnesses will be involved. Indeed, it has been recognized that a medical monitoring claim is "ultimately dependent" on reliable expert testimony.[13] Thus it has been held that medical evidence relating to an increased risk of cancer resulting from alleged exposure to pump oil was relevant to the issue of recovery of costs for medical monitoring, with the court, finding that the probative value of this evidence was not outweighed by the danger of any unfair prejudice, denying a motion to exclude this medical evidence by two expert witnesses, one an MD and one a PhD.[14]

The experts, as one case typifies, may run the gamut from the anticipated medical doctor to a toxicologist to a geohydrologist.[15] And the experts can be expected to testify on such issues as: (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of exposure, plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.[16] Indeed, where plaintiffs requested a trial court ruling on the admissibility of medical expert opinion evidence as to the "need" for periodic future medical monitoring, it was held that such evidence was admissible, as was defendants' evidence of other experts stating a contrary opinion, the court concluding that it was for the jury to decide whether it was more probable than not that the plaintiffs should submit to such future medical monitoring.[17]

Yet another matter of practical concern to counsel considering the presentation of a medical monitoring claim is the so–called "single–action claim–preclusion" rule under which a plaintiff who secured a medical monitoring cost award might be foreclosed from recovering damages in a second suit filed when the disease actually developed, years or perhaps decades after the initial exposure, on the ground that a cause of action cannot be "split."[18] It has been suggested that an "acceptable solution" to this problem may be simply holding that the single–action claim–preclusion rule does not apply "in these types of circumstances."[19] It has also been suggested that this could be a matter for possible state[20] or even federal[21] legislative action.

And finally, counsel presenting a medical monitoring claim should be aware that relief cognizable in such an action may include pooling the results of the data derived from the medical monitoring examinations of individuals, such pooling of data having been recognized as a "reasonable complement" to any testing to assure the early detection of a latent disease.[22]

II. General Principles

A. In General

§ 3. Medical monitoring claim, defined

[Cumulative Supplement]

In the following cases, the courts defined a medical monitoring claim as a claim for the costs of periodic medical examinations to detect latent diseases or disorders caused by a defendant's culpable conduct, the object of which is to facilitate early diagnosis and treatment of such diseases or disorders.

In Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 2d 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941, a federal appellate court, sitting in diversity and applying the law of Pennsylvania, noted that medical monitoring was one of a growing number of nontraditional torts that were developing in the common law to compensate plaintiffs who had been exposed to various toxic substances. All of these torts, held the court, involve "fundamentally different kinds of injury and compensation." As to compensation, explained the court, an action for medical monitoring seeks to recover only the quantifiable costs of periodic examinations necessary to detect the onset of physical harm, whereas an enhanced risk claim seeks compensation for the anticipated harm itself, proportionately reduced to reflect the chance that it will not occur. And as to injury, further explained the court, the injury in an enhanced risk claim is the anticipated harm itself, whereas the injury in a medical monitoring claim is the cost of medical care that will detect that injury. The court added that the former is "inherently speculative" because courts are forced to anticipate the probability of future injury, whereas the latter is "much less speculative" because the issue for the jury is whether the plaintiff needs medical surveillance. And, in the latter regard, the court added that any concern about the degree of certainty required could "easily" be accommodated by requiring that a jury be able reasonably to determine that medical monitoring is probably, not just possibly, necessary.

In Ball v Joy Technologies, Inc. (1991, CA4 W Va) 958 F2d 36, a federal appellate court, sitting in diversity and applying the law of both West Virginia and Virginia (both were sites of the defendant's manufacturing plants which used and emitted

toxic chemicals), noted that plaintiffs, in their claim for medical surveillance costs, sought to recover the costs of periodic medical examinations designed to monitor their health and facilitate early detection of disease caused by their exposure to toxic chemicals. The court stated that a claim for medical surveillance costs "is simply a claim for future damage."

In Bocook v Ashland Oil, Inc. (1993, SD W Va) 819 F Supp 530, a Federal District Court, sitting in diversity and applying Kentucky law, stated that a claim for medical surveillance seeks specific monetary damages measured by the cost of periodic medical examinations, as distinguished from an enhanced risk claim. The latter claim, explained the court, seeks damages for an unquantified injury to health and life. The court concluded that an award for future medical monitoring is essentially an award for medical costs which will be incurred in an effort for early detection of latent diseases which a plaintiff has an enhanced risk of suffering.

In Cook v Rockwell Int'l Corp. (1991, DC Colo) 755 F Supp 1468, claim dismissed (DC Colo) 778 F Supp 512, motion gr, motion den, remanded (DC Colo) 147 FRD 237, a Federal District Court, sitting in diversity and applying the Colorado common law, stated that an action for medical monitoring sought to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm, distinguishing this from an enhanced risk claim which seeks damages for the anticipated harm itself. The court explained that the theory behind a claim for medical monitoring was that, when a plaintiff was exposed to a hazardous substance, it was often sound medical practice to seek periodic medical monitoring to ascertain whether the plaintiff had contracted a disease. Where the need for seeking such periodic medical monitoring was caused by a defendant's tortious acts or omissions, further explained the court, the defendant may be required to pay the cost of such monitoring. However, the court added that a claim for "generalized scientific studies of adverse health effects" is not cognizable under a medical monitoring cause of action.

In Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532, a California intermediate appellate court stated that medical monitoring damages compensated a person for the reasonable certainty that he or she would be required to pay for prospective medical testing and evaluation by providing the reasonable costs, at present dollar value, of future medical examinations designed to achieve this testing and evaluation. A medical monitoring claim, further stated the court, is distinguishable from, and not equivalent to, a claim for the increased risk of future harm such as the development of a disease. An increased risk claim, explained the court, seeks present compensation for a possible injury to the plaintiff's general well–being even though there is no evidence of present harm, whereas, by contrast, medical monitoring damages reimburse a plaintiff for the specific cost of periodic medical testing which is proved by a reasonable medical certainty to be necessary.

In Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, the New Jersey Supreme Court stated that a claim for medical surveillance expenses seeks to recover the cost of periodic medical examinations intended to monitor plaintiffs' health and facilitate early diagnosis and treatment of disease caused by plaintiffs' exposure to toxic pollutants. The court emphasized that the claim for medical surveillance expenses "stands on a different footing" from a claim based on enhanced risk of disease, adding that medical surveillance claims and enhanced risk claims each seeks redress for the invasion of distinct and different interests. The court explained that the enhanced risk claim seeks a damage award, not because of any expenditure of funds, but because plaintiffs contend that an unquantified injury to their health and life expectancy should be presently compensable. By contrast, the court further explained, the claim for medical surveillance does not seek compensation for an unquantifiable injury, but rather seeks specific monetary damages measured by the cost of periodic medical examinations. The court added that the wrong for which redress is sought by those claiming medical surveillance costs is the fact that these claimants have been advised to spend money for medical tests, a cost which they would not have incurred absent their exposure to toxic pollutants. Thus, concluded the court, a medical surveillance claim seeks reimbursement for the specific cost of periodic examinations that are medically necessary, notwithstanding the fact that the extent of plaintiffs' impaired health is unquantified.

CUMULATIVE SUPPLEMENT

Cases:

Under Massachusetts law, the elements of a cause of action for medical monitoring include the requirement that the plaintiff was exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury. Genereux v. Hardric Laboratories, Inc., 950 F. Supp. 2d 329, Prod. Liab. Rep. (CCH) P 19147 (D. Mass. 2013) applying state law.

"Medical monitoring" is a remedy granted after exposure to a toxic substance that provides testing used for early detection of the signs of disease, which in turn allows for earlier and more effective treatment. Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233 (N.D. N.Y. 2017).

The elements necessary to state a claim under Pennsylvania law for medical monitoring are: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by defendants' negligence; (4) as a proximate result of the exposure, plaintiffs have a significantly increased risk of contracting a serious latent disease; (5) a monitoring program procedure exists that makes the early detection of the disease possible: (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Slemmer v. McGlaughlin Spray Foam Insulation, Inc., 955 F. Supp. 2d 452 (E.D. Pa. 2013).

Plaintiff who asserts common law claim for medical monitoring costs generally must prove that (1) he was significantly exposed to a proven hazardous substance through the negligent actions of the defendant, (2) as a proximate result of exposure, he suffers a significantly increased risk of contracting a serious latent disease, (3) increased risk makes periodic diagnostic medical examinations reasonably necessary, and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. In re Marine Asbestos Cases, 265 F.3d 861 (9th Cir. 2001).

In the context of a "toxic exposure" action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances. Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045, Prod. Liab. Rep. (CCH) P 19569 (N.D. Cal. 2015).

State does not recognize a cause of action for medical monitoring. Southern Bakeries, Inc. v. Knipp, 852 So. 2d 712 (Ala. 2002).

Criteria on which a court can base an award of the reasonable cost of medical monitoring as an item of damages under Civil Code include: (1) significant exposure to a proven hazardous substance; (2) as a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease; (4) a monitoring procedure exists that makes the early detection of the disease possible; (5) the monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) there is some demonstrated clinical value in the early detection and diagnosis of the disease. LSA–C.C. art. 2315(1). Lester v. Exxon Mobil Corp., 120 So. 3d 767 (La. Ct. App. 4th Cir. 2013).

Claim for "medical monitoring" is claim for medical expenses incurred by tort victim due to tortious exposure; it is cause of action based on significant exposure to proven hazardous substance that creates risk of contracting serious latent disease. Bourgeois v. A.P. Green Industries, 841 So. 2d 902 (La. Ct. App. 5th Cir. 2003).

An action for medical monitoring seeks to recover the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm. Crooks v. Metropolitan Life Ins. Co., 779 So. 2d 966 (La. Ct. App. 3d Cir. 2001).

In determining whether to award compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from exposure to toxic substances resulting from tortious conduct, a court must consider whether the plaintiff has shown: (1) that the plaintiff was exposed significantly to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. Exxon Mobil Corp. v. Ford, 433 Md. 426, 71 A.3d 105 (2013), as supplemented on denial

of reconsideration, 433 Md. 493, 71 A.3d 144 (2013).

To sustain an award for recovery of damages for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct, a plaintiff must show that reasonable medical costs are necessary due to a reasonably certain and significant increased risk of developing a latent disease as a result of exposure to a toxic substance. Exxon Mobil Corp. v. Albright, 433 Md. 303, 71 A.3d 30 (2013), on reconsideration in part, 433 Md. 502, 71 A.3d 150 (2013).

A "medical monitoring" claim seeks to recover the costs of future reasonably necessary diagnostic testing to detect latent injuries or diseases that may develop as a result of exposure to toxic substances. Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007).

Goal of a medical monitoring claim is to require the defendant to pay for the costs of long-term diagnostic testing to aid in early detection of latent diseases that may have been caused by the defendant's tortious conduct. Sadler v. PacifiCare of Nev., 340 P.3d 1264, 130 Nev. Adv. Op. No. 98 (Nev. 2014).

A claim for medical monitoring seeks to recover the anticipated costs of long–term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances. Badillo v. American Brands, Inc., 16 P.3d 435 (Nev. 2001).

Under Pennsylvania law, a medical monitoring claim consists of the following elements: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Blanyar v. Genova Products Inc., 861 F.3d 426 (3d Cir. 2017)(applying Pennsylvania law).

Under Pennsylvania law, elements of medical monitoring claim are: (1) exposure greater than normal background levels; (2) to proven hazardous substance; (3) caused by defendant's negligence; (4) as proximate result of the exposure, plaintiff has significantly increased risk of contracting serious latent disease; (5) monitoring procedure exists that makes early detection of disease possible; (6) prescribed monitoring regime is different from that normally recommended in absence of exposure; and (7) prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Gates v. Rohm and Haas Co., 265 F.R.D. 208 (E.D. Pa. 2010) (applying Pennsylvania law).

Pennsylvania law recognizes medical monitoring as separate and distinct cause of action, not only as compensable item of damages. Arch v. American Tobacco Co., Inc., 175 F.R.D. 469 (E.D. Pa. 1997) (applying Pennsylvania law).

To state Pennsylvania medical monitoring claim, a plaintiff must establish: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by defendants' negligence; (4) as a proximate result of the exposure, plaintiffs have a significantly increased risk of contracting a serious latent disease; (5) a monitoring program procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Baker v. Deutschland GmbH, 240 F. Supp. 3d 341 (M.D. Pa. 2016)(applying Pennsylvania law).

In order to sustain an action for medical monitoring under Pennsylvania law, the plaintiff must establish the follow requirements: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Wall v. Sunoco, Inc., 211 F.R.D. 272 (M.D. Pa. 2002) (applying Pennsylvania law).

To sustain a claim for medical monitoring expenses under West Virginia law, a plaintiff must prove that he or she has been significantly exposed to a proven hazardous substance through the tortious conduct of the defendant and that, as a result, the plaintiff has suffered a substantially increased risk of contracting a serious latent disease, which makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; further, medical monitoring procedures must exist that make early detection of a disease possible. Rhodes v. E.I. du Pont de Nemours and Co., 636 F.3d 88 (4th Cir. 2011) (applying West Virginia law).

West Virginia does not recognize cause of action for medical monitoring. Walker v. Liggett Group, Inc., 175 F.R.D. 226, 38 Fed. R. Serv. 3d (LCP) 377 (S.D. W. Va. 1997) (applying West Virginia law).

A cause of action for medical monitoring lies in tort. State of West Virginia ex rel. Chemtall Inc. v. Madden, 607 S.E.2d 772 (W. Va. 2004).

A claim for medical monitoring expenses seeks to recover the anticipated costs of long–term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances. Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

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[END OF SUPPLEMENT]

§ 3.5. Action encompassed by product liability act

[Cumulative Supplement]

The following authority considered whether an action to recover the costs of medical monitoring to detect or prevent a future disease or condition was encompassed by a product liability act.

CUMULATIVE SUPPLEMENT

Cases:

Action by users of prescription drug who sought to recover the costs of medical monitoring from drug manufacturer, after drug was voluntarily withdrawn from the market due to an increased risk of serious cardiovascular events, was encompassed by the Product Liability Act. N.J.S.A. 2A:58C–1(b)(3). Sinclair v. Merck & Co., Inc., 948 A.2d 587, Prod. Liab. Rep. (CCH) P 18011 (N.J. 2008).

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[END OF SUPPLEMENT]

§ 3.7. As independent cause of action

[Cumulative Supplement]

The following authority held or recognized an independent cause of action for medical monitoring.

CUMULATIVE SUPPLEMENT

Cases:

Under California law, recognition that a defendant's conduct has created the need for future medical monitoring does not create a new tort; rather, it is simply a compensable item of damages when liability is established under traditional tort theories of recovery. Mehr v. Federation Internationale de Football Association, 115 F. Supp. 3d 1035 (N.D. Cal. 2015), appeal dismissed, (9thCirc; 15-16622)(Sept. 22, 2015) (applying California law).

Plaintiff seeking future damages for medical monitoring following exposure to hazardous substance must prove: (1) defendant's negligence (2) caused (3) plaintiff to become exposed to hazardous substance that produced, at least, subcellular changes that substantially increased risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) that the early detection, combined with prompt and effective treatment, will significantly decrease risk of death or severity of disease, illness or injury, (6) that such diagnostic medical examinations are reasonably and periodically necessary, conformably with the standard of care, and (7) present value of reasonable cost of such tests and care, as of the date complaint was filed. Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 914 N.E.2d 891 (2009).

Under New York law, a plaintiff may obtain the remedy of medical monitoring as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action. In re World Trade Center Lower Manhattan Disaster Site Litigation, 758 F.3d 202 (2d Cir. 2014) (applying New York law).

Independent cause of action for medical monitoring, asserted by former tenants against a landlord and its affiliates after tenants were allegedly exposed to toxic mold while residing in apartment complex, was cognizable under New York law, despite claim that it could only be asserted in the form of a remedy. Sorrentino v. ASN Roosevelt Center LLC, 579 F. Supp. 2d 387 (E.D. N.Y. 2008) (applying New York law).

To prevail on a medical monitoring claim under Pennsylvania law, plaintiffs must prove: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Gates v. Rohm and Haas Co., 655 F.3d 255 (3d Cir. 2011) (applying Pennsylvania law).

Under Pennsylvania law, medical monitoring claims are distinct from other tort claims involving actual physical injury. Baker v. Deutschland GmbH, 240 F. Supp. 3d 341 (M.D. Pa. 2016)(applying Pennsylvania law).

Washington law does not recognize a standalone claim for medical monitoring. DuRocher v. Riddell, Inc., 97 F. Supp. 3d 1006, Prod. Liab. Rep. (CCH) P 19593 (S.D. Ind. 2015) (applying Washington law).

A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct. State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 717 S.E.2d 909 (W. Va. 2011).

The need to undergo medical monitoring examinations in the future due to exposure to a dangerous substance is not an actual injury giving rise to a tort claim. Alsteen v. Wauleco, Inc., 2011 WI App 105, 802 N.W.2d 212 (Wis. Ct. App. 2011).

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[END OF SUPPLEMENT]

§ 3.9. **Effect of economic loss doctrine**

[Cumulative Supplement]

The following authority addressed the effect of the economic loss doctrine on a claim for medical monitoring.

CUMULATIVE SUPPLEMENT

Cases:

Economic loss doctrine did not bar patients' negligence claims against health care facilities, which were based on patients' need to undergo ongoing medical monitoring as a result of the unsafe injection practices at facilities, since patients did not allege purely economic losses; while their claims for medical monitoring were based in part on the expense of undergoing such testing, the complaint also alleged that facilities' actions exposed patients to unsafe injection practices, putting them at risk for contracting serious blood-borne diseases, and this exposure and increased risk were noneconomic detrimental changes in circumstances that patients alleged they would not have experienced but for the negligence of facilities. Sadler v. PacifiCare of Nev., 340 P.3d 1264, 130 Nev. Adv. Op. No. 98 (Nev. 2014).

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[END OF SUPPLEMENT]

§ 4[a] **Present physical injury requirement—Present physical injury required**

[Cumulative Supplement]

In the following case, the court expressly recognized the rule that medical monitoring claims can be maintained only where there is proof of some present physical injury.

In Ball v Joy Technologies, Inc. (1991, CA4 W Va) 958 F2d 36, a federal appellate court sitting in diversity concluded that plaintiffs had not demonstrated that they were suffering from a present physical injury so as to entitle them to recover medical surveillance costs under West Virginia or Virginia law. Although noting that plaintiffs had propounded several public policy arguments for allowing individuals to recover the costs of medical monitoring where there was no manifestation of physical injury, the federal appellate court agreed with the Federal District Court that such considerations were "better left to the respective legislatures and highest courts of West Virginia and Virginia."

For Pennsylvania cases, see § 4[c].

CUMULATIVE SUPPLEMENT

Cases:

Symptoms are sufficient basis for damages for future medical costs that can be proven by preponderance of evidence and for pain and suffering, to include fear of disease or illness. Martin v. Shell Oil Co., 180 F. Supp. 2d 313 (D. Conn. 2002).

Local residents who sued chemical plant and manager, stemming from hazardous cloud of hydrochloric acid that escaped from plant as result of fire, failed to present any medical evidence of manifest physical or mental injury or disease, as required to maintain medical monitoring claim under Louisiana law. LSA–C.C. art. 2315. Atkins v. Ferro Corp., 534 F. Supp. 2d 662 (M.D. La. 2008).

Although district court properly had subject matter jurisdiction over plaintiffs' claims for medical monitoring for diseases allegedly attributable to plutonium producers' radioiodine (I–131) emissions, under Price-Anderson Act (PAA) providing exclusive means of compensating victims for claims arising out of nuclear incidents, medical monitoring claims were not compensable under PAA as claims for bodily injury, sickness, disease, or death, and thus district court did not have power to grant requested relief because the plaintiffs had not suffered any physical injury. Price–Anderson Act, § 3(q), 42 U.S.C.A. § 2014(q). In re Hanford Nuclear Reservation Litigation, 534 F.3d 986 (9th Cir. 2008), petition for cert. filed (U.S. Aug. 15, 2008).

Persons who had been exposed to radiation released from nuclear power plant, but who did not suffer from any known physical injury, did not have cause of action for medical monitoring because of future risk of disease, since claim, absent present physical injury, did not meet jurisdictional requirements of Price–Anderson Act. Atomic Energy Act of 1954, § 11(q), as amended, 42 U.S.C.A. § 2014(q). In re Berg Litigation, 293 F.3d 1127 (9th Cir. 2002).

Plaintiffs' allegations of subcellular, subclinical, and cellular damage from exposure to beryllium were insufficient to state a current physical injury, as was required to recover medical monitoring costs, in products liability action against manufacturers, sellers, and distributors of aircraft or aircraft components. Parker v. Wellman, 230 Fed. Appx. 878, Prod. Liab. Rep. (CCH) P 17729 (11th Cir. 2007).

Georgia law did not permit the establishment of a medical monitoring fund in products liability action with respect to persons who had not endured a cognizable tort injury as result to their alleged exposure to beryllium contained in manufacturers' aircraft-related products. Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290 (N.D. Ga. 2005).

Person exposed to a known hazardous substance but not claiming a present physical injury or illness as a result may not recover as damages the costs of medical monitoring. Houston County Health Care Authority v. Williams, 961 So. 2d 795 (Ala. 2006).

Under California law, to demonstrate proximate causation on a claim for medical monitoring due to toxic exposure, the plaintiff must show the significance of her exposure to the toxic chemical; in other words, the plaintiff must demonstrate

sufficient severity of exposure, i.e., its significance and extent, and that the need for future monitoring is a reasonably certain consequence of the toxic exposure. Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045, Prod. Liab. Rep. (CCH) P 19569 (N.D. Cal. 2015) (applying California law).

Under Illinois law, an action to recover the cost of medical monitoring is distinct from an action for compensation for an increased risk of future harm; the former does not require a present physical injury while the latter does. Gates v. Rohm and Haas Co., 618 F. Supp. 2d 362 (E.D. Pa. 2007) (applying Illinois law).

Cause of action for medical monitoring damages following negligent exposure to a potentially dangerous substance required a showing of actual physical injury, and thus consumer who ingested appetite–suppressing diet drug later determined to be potentially toxic could not state claim absent proof of present injury. Wood v. Wyeth-Ayerst Laboratories, Div. of American Home Products, 82 S.W.3d 849, Prod. Liab. Rep. (CCH) ¶ 16426 (Ky. 2002).

Increased epidemiological risk of illness caused by exposure to hazardous substance, unaccompanied by some subcellular or other physiological change, is insufficient, under existing Massachusetts law as recognized by the Supreme Judicial Court, to permit recovery in tort action for medical monitoring. Genereux v. Raytheon Co., 754 F.3d 51, Prod. Liab. Rep. (CCH) P 19405 (1st Cir. 2014) (applying Massachusetts law).

There is no cause of action for medical monitoring, based on negligence, under Michigan law, absent an allegation of present physical injury, regardless of whether such claim is characterized as equitable or legal in nature. Henry v. Dow Chemical Co., 473 Mich. 63, 701 N.W.2d 684 (2005).

Under Mississippi law, a cause of action did not exist for a medical monitoring trust fund, which was brought by workers against manufacturers and sellers of beryllium containing products alleging they were exposed to the beryllium containing products, where workers alleged only prospective physical and economic harm. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A. Paz v. Brush Engineered Materials, Inc., 351 F. Supp. 2d 580 (S.D. Miss. 2005) (applying Mississippi law).

Mississippi law does not recognize a claim for medical monitoring allowing a plaintiff to recover medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure. Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1 (Miss. 2007).

Plaintiffs who were allegedly exposed to toxic substances due to contamination of ground water by defendant's activities could not recover future costs of medical monitoring where plaintiffs failed to prove actual present injury and increased risk of future harm; physician's opinion that monitoring would be "excellent idea" was insufficient. Thomas v FAG Bearings Corp. (1994, WD Mo) 846 F Supp 1400, 24 ELR 21143 (applying Mo law).

Users of prescription drug who sought to recover the costs of medical monitoring from drug manufacturer, after drug was voluntarily withdrawn from the market due to an increased risk of serious cardiovascular events, but who did not allege a personal physical injury, could not satisfy the definition of "harm" to state a product liability claim under the Product Liability Act. N.J.S.A. 2A:58C–1(b)(2, 3). Sinclair v. Merck & Co., Inc., 948 A.2d 587, Prod. Liab. Rep. (CCH) P 18011 (N.J. 2008).

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[END OF SUPPLEMENT]

§ 4[b] **Present physical injury requirement—Present physical injury not required**

[Cumulative Supplement]

In the following cases, the courts expressly recognized or upheld a medical monitoring claim, despite the absence of any present physical injury sustained by those seeking such monitoring.

In Bocook v Ashland Oil, Inc. (1993, SD W Va) 819 F Supp 530, a Federal District Court, applying the law of Kentucky (the site of the defendant's allegedly polluting oil refinery), in a case of first impression, when faced with the issue of whether plaintiff must allege a present physical injury before he or she may seek to recover medical monitoring costs, held that there was no Kentucky law which stood for the proposition that the term "injury" always meant "present demonstrable physical injury." Although concluding that Kentucky does not always require a plaintiff to prove a present physical "injury" in order to recover damages, the court noted that Kentucky did require proof of "some present physical harm, however slight" before a plaintiff may recover compensation. The court suggested that such proof could likely be made by showing that, as a proximate result of pollutant exposure, plaintiff had suffered "a significantly increased risk of contracting a serious latent disease."

In Burns v Jaquays Mining Corp. (1987, App) 156 Ariz 375, 752 P2d 28, review dismd 162 Ariz 186, 781 P2d 1373, the court held that, despite the absence of physical manifestation of any disease, plaintiffs should be entitled to medical surveillance in light of medical testimony that plaintiffs were at medical risk. The medical testimony described the type of medical surveillance that should be available which included physical exams, blood and urine laboratory workup, electrocardiograms, periodic chest X–rays, CT scanning techniques and/or magnetic resonance imaging and pulmonary function testing. The medical testimony added that, for individuals over 40 years of age and/or individuals who were 20 years from their initial toxic exposures, periodic rectal examinations and gastrointestinal consultation was required, as well as additional testing when respiratory disease was apparent. The medical testimony recommended that the medical testing be conducted approximately every other year, with the frequency increased as time progresses since the probability of disease increases directly as the latency period increases. And finally, the medical testimony suggested that radiologic chest assessments, if utilized, should occur every 5 years.

In Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532, a California appellate court held that a medical monitoring cause of action to detect the onset of diseases or conditions caused by exposure to pollutants could be maintained without any evidence of present physical injury. The court held that an expenditure for prospective medical testing and evaluation, which would have been unnecessary if the particular plaintiff had not been wrongly exposed to pollutants, was a "detriment" within California Civ Code § 3333 (Deering), which set forth the applicable measure of damages as the amount which will compensate for "all the detriment" proximately caused by the defendant's tortious act. The court concluded that it had found no authority which limited this statute to those situations where present physical injury is evident. Consistent with this conclusion, added the court, is the Restatement's analysis (Restatement (Second), Torts § 7, subd. 2) that a plaintiff is entitled to recover from a tortfeasor for all proximately caused "harm" which is not limited to "physical harm."

For Pennsylvania cases, see § 4[c].

CUMULATIVE SUPPLEMENT

Cases:

While not easy to prevail on claim for medical monitoring in the absence of a present injury, the clinically demonstrable presence of a toxic substance in the plaintiff's body is not a sine qua non of such a claim. Patton v. General Signal Corp., 984 F. Supp. 666, 45 Env't. Rep. Cas. (BNA) 2007 (W.D.N.Y. 1997).

See Potter v Firestone Tire & Rubber Co. (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily

Journal DAR 16566, § 15.

Under Illinois law, as predicted by a federal district court, a claimant alleging exposure to a hazardous substance may obtain recovery for the reasonable costs of medical monitoring, without being required to plead and prove either a present physical injury or a reasonable certainty of contracting a disease in the future. Carey v. Kerr-McGee Chemical Corp., 999 F. Supp. 1109 (N.D. Ill. 1998) (applying Illinois law).

Jones Act seamen who were occupationally exposed to asbestos during their employment could maintain action for future medical monitoring, even absent physical manifestation of disease at time of suit. Jones Act, 46 U.S.C.A. Appx. § 688. Dragon v. Cooper/T. Smith Stevedoring Co., Inc., 726 So. 2d 1006, 1999 A.M.C. 814 (La. Ct. App. 4th Cir. 1999).

Smokers who brought negligence action against cigarette manufacturer for future expenses of medical monitoring to detect lung cancer were not required to prove physical harm manifested by objective symptomology in order to address any concern over false claims, where smokers proffered evidence of physiological changes caused by smoking, as well as expert medical testimony that, because of those physiological changes, they were at a substantially greater risk of cancer due to manufacturer's alleged negligence. Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 914 N.E.2d 891 (2009).

Injury for which medical monitoring compensation is sought is not a present physical injury; instead, medical monitoring damages compensate the plaintiff for the quantifiable costs of periodic medical examinations reasonably necessary for the early detection and treatment of latent injuries caused by the plaintiff's exposure to toxic substances. Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007).

Plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury. Sadler v. PacifiCare of Nev., 340 P.3d 1264, 130 Nev. Adv. Op. No. 98 (Nev. 2014).

Under New York law, to recover medical monitoring costs following exposure to a toxic substance, a plaintiff must establish both that he or she was in fact exposed to the disease-causing agent and that there is a rational basis for his or her fear of contracting the disease. Sorrentino v. ASN Roosevelt Center LLC, 579 F. Supp. 2d 387 (E.D. N.Y. 2008) (applying New York law).

New York law would recognize cause of action for medical monitoring, established by proving: (1) exposure greater than normal background levels; (2) to proven hazardous substance; (3) caused by defendant's tortious conduct; (4) as proximate result of exposure, plaintiff has significantly increased risk of contracting serious latent disease; (5) monitoring procedure exists that makes early detection of disease possible; (6) prescribed monitoring regime is different from that normally recommended in absence of exposure; and (7) prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524 (S.D. N.Y. 2007) (applying New York law).

Under Ohio law, a plaintiff is not required to demonstrate physical injuries in order to obtain medical monitoring relief, but must show by expert medical testimony that plaintiffs have increased risk of disease which would warrant a reasonable physician to order monitoring; therefore, if the plaintiffs can establish liability and an increased risk of disease, they may be entitled to medical monitoring as a remedy. Elmer v. S.H. Bell Co., 127 F. Supp. 3d 812 (N.D. Ohio 2015) (applying Ohio law).

Under West Virginia law, a plaintiff asserting a claim for medical monitoring costs is not required to prove present physical harm resulting from tortious exposure to toxic substances; instead, the "injury" requirement is satisfied by a negligent invasion of the plaintiff's interest in avoiding expensive diagnostic examinations. Rhodes v. E.I. du Pont de Nemours and Co., 657 F. Supp. 2d 751 (S.D. W. Va. 2009) (applying West Virginia law).

In order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that: (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6)

monitoring procedures exist that make the early detection of a disease possible. Stern v. Chemtall Inc., 217 W. Va. 329, 617 S.E.2d 876 (2005).

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[END OF SUPPLEMENT]

§ 4[c] Present physical injury requirement—Cases applying Pennsylvania law

[Cumulative Supplement]

Cases applying Pennsylvania law appear to be in conflict on the question whether present physical injury is required to support a claim for medical monitoring. In the following cases, the courts held that physical injury is required to support a medical monitoring claim.

In Villari v Terminix International, Inc. (1987, ED Pa) 677 F Supp 330, later proceeding (ED Pa) 692 F Supp 568, 26 Fed Rules Evid Serv 864, 101 A.L.R. Fed. 867 (disagreed with as to the need to demonstrate some physical injury by Merry v Westinghouse Electric Corp. (MD Pa) 684 F Supp 847, 27 Envt Rep Cas 1585, 18 ELR 21218, later proceeding (MD Pa) 684 F Supp 852, 27 Envt Rep Cas 1787, 18 ELR 21220, this subsection), a Federal District Court sitting in diversity held that, under applicable Pennsylvania law, a plaintiff seeking costs of medical surveillance as an element of damages must demonstrate that he or she has suffered some physical injury. However, added the court, "we do not understand Pennsylvania law to require that a plaintiff exhibit symptoms of the particular disease for which the medical surveillance is sought." In this case, the court found that there was sufficient medical evidence on the record to permit a jury to conclude that the plaintiff had suffered physical injury from the plaintiff's toxic exposure in the month following a toxic spill. The court concluded that this same evidence supported a claim for the costs of future medical surveillance.

In Peterman v Techalloy Co. (1982) 29 Pa D & C3d 104, a Pennsylvania trial court granted judgment on the pleadings to a defendant contaminator, holding that plaintiff had not "alleged any legally cognizable claim" where plaintiff had not alleged, and readily admitted at argument that the defendant had not caused, any present injury or damage. This was an action in which the plaintiff had sought, on behalf of himself and others allegedly similarly situated, medical services for the next 25 years with regard to any illness or disease that might develop because of ingestion or use of allegedly contaminated well water.

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The courts in the following cases have held that present physical injury is not required to support a claim for medical monitoring.

In Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 2d 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment

gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941, a federal appellate court, sitting in diversity and applying pennsylvania law, although recognizing that "traditionally" injury needed to be manifest before it could be compensable, held that, in the "nontraditional" area of medical monitoring, claimants could obtain relief "even absent present manifestations of physical injury." Thus, the court concluded that a medical monitoring action could be premised upon proof of exposure to hazardous substances resulting in the potential for injury and the need for early detection and treatment, rather than upon the need for proof of a present manifestation of physical injury.

In Merry v Westinghouse Electric Corp. (1988, MD Pa) 684 F Supp 847, 27 Envt Rep Cas 1585, 18 ELR 21218, later proceeding (MD Pa) 684 F Supp 852, 27 Envt Rep Cas 1787, 18 ELR 21220, a Federal District Court, sitting in diversity and applying Pennsylvania law, after noting an "apparent split of authority," held that Pennsylvania law does not require "physical injury" before a claim for future medical monitoring can be maintained. Although expressly noting its disagreement in this regard with Villari v Terminix International, Inc. (1987, ED Pa) 677 F Supp 330, later proceeding (ED Pa) 692 F Supp 568, 26 Fed Rules Evid Serv 864, 101 ALR Fed 867, the court noted, by way of footnote, that even if it were "to follow Villari and find that a physical injury is a prerequisite to a claim for future medical monitoring," the result in this case would be the same, in that the court found that there was sufficient evidence in the record to create a genuine issue of fact as to whether plaintiffs suffered physical injuries from their exposure to contaminated well water.

CUMULATIVE SUPPLEMENT

Cases:

Under Pennsylvania law, smoker either knew or should have known that smoking caused him to be at increased risk of contracting serious latent disease, so that medical monitoring claim against cigarette manufacturers had accrued under discovery rule, by the mid-1980's; physician who saw smoker during that period warned him against smoking and threw away smoker's cigarettes every time he saw smoker, and smoker stated that he knew at time of visits that smoking was "no good" for persons with lung disease, and that warnings on cigarettes did not give information he did not already possess. 42 Pa. C.S.A. § 5524. Barnes v. American Tobacco Co. Inc., 984 F. Supp. 842, Prod. Liab. Rep. (CCH) ¶ 15100 (E.D. Pa. 1997), judgment aff'd, 1998 WL 783960 (3d Cir. 1998).

Fact that patients who underwent open heart surgeries lacked physical injuries did not bar their putative class asserting a medical monitoring claim and seeking declaration that manufacturer's medical devices used to regulate their blood temperature during surgeries were defective products; patients asserted Pennsylvania medical monitoring claim, which depended on negligence of device manufacturers, rather than strict liability claim for which physical injury was a necessary element, against the manufacturer. Baker v. Deutschland GmbH, 240 F. Supp. 3d 341 (M.D. Pa. 2016)(applying Pennsylvania law).

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[END OF SUPPLEMENT]

§ 4.5. Article III standing

[Cumulative Supplement]

The following authority addressed whether plaintiffs seeking medical monitoring had Article III standing.

CUMULATIVE SUPPLEMENT

Cases:

Patients seeking medical monitoring suffered injury-in-fact sufficient to confer Article III standing in putative class action that was removed from state court by defendant medical-device manufacturer, where patients had been implanted with manufacturer's inferior vena cava (IVC) filters that allegedly were at risk of fracturing in patients' bodies due to manufacturer's negligence. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 1441(a). Brown v. C.R. Bard, Inc., 942 F. Supp. 2d 549 (E.D. Pa. 2013).

Proposed class representatives lacked standing to seek medical monitoring as remedy on claims against soft drink manufacturer for negligence and strict liability based on defective design and failure to warn about unsafe levels of carcinogen contained in two of its beverage products, which allegedly increased risk of bronchioloalveolar cancer, where neither representative who consumed beverages alleged that they suffered injury-in-fact by contracting disease, and representatives failed to demonstrate that risk of cancer from consuming beverage was anything but speculative, rather than credible and substantial. Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045, Prod. Liab. Rep. (CCH) P 19569 (N.D. Cal. 2015).

[Top of Section]

[END OF SUPPLEMENT]

§ 5. Concurrent pleading requirement

In the following case, the court rejected the contention that a claim for future medical monitoring costs was cognizable only where there was a concurrent claim for compensation for present physical injuries.

In Bocook v Ashland Oil, Inc. (1993, SD W Va) 819 F Supp 530, the court rejected the defendant's contention that each plaintiff seeking to recover the costs of future medical monitoring must be currently prosecuting a claim for compensation for present injuries in that there could not be an award for future damages without a concomitant award of damages for present injuries. The court stated that it had not found any Kentucky law (the applicable law in this case because it was the site of the allegedly polluting oil refinery) establishing any such requirement. The court noted that Kentucky allowed recovery for enhanced risk of future injury and the future medical expenses which a plaintiff with such an increased risk might occur, indicating that allowing these claims showed that the state courts apparently did not consider such claims "too speculative." Given the level of proof that the court had predicted that Kentucky courts would require in order to establish harm from toxic exposure and the enhanced risk thereby created and to establish the necessity of future medical examinations, the court felt that it could not discern the purpose for requiring a plaintiff to also be seeking compensation for present physical injuries. The court explained that the very essence of toxic exposure cases was the contention that physical injuries therefrom were presently indiscernable with latent effects, concluding from this that to require a plaintiff to assert a potentially nonvaluable claim in order to recover for such presently indiscernable injuries in order to be able to assert a claim for future medical monitoring would amount to elevating form over substance.

§ 6. Evidentiary elements of proof

[Cumulative Supplement]

In the following cases, the courts have set forth the evidentiary elements of proof which are required to support an award of medical monitoring costs.

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Redland Soccer Club v Department of the Army (1995, CA3 Pa) 55 F3d 827, 25 ELR 21026, petition for certiorari filed (Oct 10, 1995) (applying Pa law)

In Re Paoli Railroad Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 2d 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941, a federal appellate court predicted that the Supreme Court of Pennsylvania would follow the weight of authority and recognize a cause of action for medical monitoring established by proving that: (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of exposure, plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. These factors would, of course, added the court, have to be proven by competent expert testimony.

In Merry v Westinghouse Electric Corp. (1988, MD Pa) 684 F Supp 847, 27 Envt Rep Cas 1585, 18 ELR 21218, later proceeding (MD Pa) 684 F Supp 852, 27 Envt Rep Cas 1787, 18 ELR 21220, a Federal District Court, sitting in diversity and applying Pennsylvania law, held that in order to recover medical surveillance costs, a plaintiff must prove: (1) exposure to hazardous substances; (2) the potential for injury; and (3) the need for early detection and treatment. As to (1), it was found that the jury had already determined that the plaintiffs' wells had been contaminated with hazardous substances and from that it would be reasonable to infer exposure to those chemicals. As to (3), the court noted that there was not a serious question of the value of early detection and treatment of cancer. However as to (2), the court was presented with a "more difficult question" in that the plaintiffs' experts were unable to quantify the chances of contracting cancer, even though a toxicologist had explained his assessment of the various chemicals discovered in plaintiffs' wells, the roots of exposure to those chemicals, and the toxologic, mutagenic, and carcinogenic effects of those chemicals on humans and animals. The court concluded that, though they may not convince a jury, the plaintiffs, through their experts' reports, had created an issue of fact as to the probability of contracting a serious illness as a result of exposure to the hazardous substances in their wells, such that it would be reasonable for a jury to conclude that the plaintiffs have a significantly although unquantifiably enhanced risk of serious disease, and that such enhanced risk of disease justified periodic medical examinations.

In Bocook v Ashland Oil, Inc. (1993, SD W Va) 819 F Supp 530, a Federal District Court stated that just because Kentucky does not always require a plaintiff to prove a demonstrable physical injury in order to recover damages did not mean that Kentucky would allow recovery of medical monitoring costs on proof of exposure alone. Proof of the need for future medical monitoring, further explained the court, was needed and could likely be made by showing that: (1) plaintiff was significantly exposed to a proven hazardous substance through the actions of the defendant; (2) as a proximate result of exposure plaintiff suffered a significantly increased risk of contracting a series latent disease; (3) that increased risk makes periodic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. The court explained that such proof should remove the questions of the existence of an injury and the need for medical testing from the realm of speculation and also limit the availability of the remedy to a determinable universe of plaintiffs. By way of footnote the court added that "in principle" it generally agreed with the authorities which did not permit recovery of damages for medical monitoring rather than with those which do so; however, the court felt itself "well–nigh ineluctably constrained to predict" that the Kentucky Supreme Court would permit recovery of such damages if that court was called upon to decide this issue raised herein.

In Mateer v U. S. Aluminum (1989, F ED Pa) 1989 US Dist LEXIS 6323, the court agreed with Merry v Westinghouse Electric Corp. (1988, MD Pa) 684 F Supp 847, 27 Envt Rep Cas 1585, 18 ELR 21218, later proceeding (MD Pa) 684 F Supp 852, 27 Envt Rep Cas 1787, 18 ELR 21220 (this section), which had concluded that in order to recover medical surveillance costs a plaintiff must show "(1) exposure to hazardous substances; (2) the potential for injury; and (3) the need for early detection and treatment." Because the plaintiffs had not shown a "potential for injury," the court granted summary judgment for defendants on plaintiffs' claim for medical monitoring damages.

In Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532, a California intermediate appellate court stated that a toxic–tort plaintiff who seeks money damages for future medical surveillance is required to prove that the need for medical monitoring is a reasonably certain consequence of the exposure. At least five factors appeared to the court to bear on this issue: (1) the significance and extent of a plaintiff's exposure to chemicals; (2) the relative toxicity of the chemicals; (3) the seriousness of the diseases for which the plaintiff is at an increased risk; (4) the relative increase in the plaintiff's chances of developing a disease as a result of the exposure when compared to (a) plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of members of the public at large of developing the disease; and (5) the clinical value of early detection and diagnosis. However, cautioned the court, a plaintiff should not be required to prove, in order to recover medical monitoring costs, that it is reasonably certain that he or she will actually contract a particular disease or suffer some definite future affliction. As to fears that allowing claims for medical monitoring would open the "flood gates" of litigation, the court explained that a toxic–tort plaintiff may not recover for preventative medical care and checkups to which members of the public at large should prudently submit, but that he or she may recover only if the evidence established the necessity, as a direct consequence of the exposure in issue, for specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight.

CUMULATIVE SUPPLEMENT

Cases:

Plaintiffs, who alleged that their consumption of drug increased their risk of developing serious latent diseases and conditions including breast cancer, strokes, heart attacks, ovarian cancer, Alzheimer's disease, dementia, and blood clots, had standing to bring suit for consumer fraud, unfair competition, unjust enrichment, and medical monitoring against manufacturer of drug authorized for post-menopausal women; plaintiffs asserted that the increased risks of certain latent diseases and conditions were attributable to the drug, and that the injury could be redressed by a favorable court decision creating a medical monitoring program and disgorgement of manufacturer's profits. U.S.C.A. Const. Art. 3, § 2, cl. 1. In re Prempro, 230 F.R.D. 555 (E.D. Ark. 2005).

Under California law, to establish entitlement to recovery for medical monitoring costs as compensable item of damages, plaintiff in toxic tort action must show that future monitoring is reasonable and necessary according to following factors: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. O'Connor v. Boeing North American, Inc., 180 F.R.D. 359 (C.D. Cal. 1997) (applying California law).

Because the burden on a defendant to fund medical screening for thousands, potentially millions, of people exposed to a toxic substance is so substantial, the factors under *Potter v. Firestone Tire and Rubber Co.*, 25 Cal.Rptr.2d 550, governing a claim for medical monitoring due to toxic exposure serve a critical gatekeeping function, regulating a potential flood of costly litigation, and require a higher level of proof of health risk than that required for inclusion of a substance on the Proposition 65 list of substances known to be human or animal carcinogens. Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045, Prod. Liab. Rep. (CCH) P 19569 (N.D. Cal. 2015) (applying California law).

In California, a plaintiff may be entitled to medical monitoring damages only if the plaintiff can show, through reliable medical expert testimony, that the need for future medical monitoring is a reasonably foreseeable consequence of exposure to toxic chemicals and that the recommended monitoring is reasonable. In re Baycol Products Litigation, 218 F.R.D. 197 (D. Minn. 2003) (applying California law).

Residents seeking medical monitoring for conditions caused by consumption of polluted groundwater needed to demonstrate that the need for future monitoring was a reasonably certain consequence of the toxic exposure, i.e., that they faced a significant, but not necessarily likely, risk of serious disease. (Per Werdegar with one justice concurring and three justices concurring in the result.) Lockheed Martin Corp. v. Superior Court, 29 Cal. 4th 1096, 131 Cal. Rptr. 2d 1, 63 P.3d 913 (2003).

See Potter v Firestone Tire & Rubber Co. (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily Journal DAR 16566, [§ 15].

Asbestos supplier was prejudiced, in toxic exposure case by cement plant worker resulting in award of $37,240 in economic damages, by improper refusal of instruction that supplier was only liable for medical monitoring that was different from or in addition to that already required because of worker's smoking history and tuberculosis; while supplier's counsel was permitted to make that argument to jury without objection at that time, worker's counsel subsequently argued in rebuttal that supplier's theory was "irrelevant," not approved by any instruction, and therefore outside applicable law. Gutierrez v. Cassiar Min. Corp., 64 Cal. App. 4th 148, 75 Cal. Rptr. 2d 132 (1st Dist. 1998), reh'g denied, (June 12, 1998).

In order to prevail on a medical monitoring claim under Florida law, a plaintiff must demonstrate: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Perez v. Metabolife Intern., Inc., 218 F.R.D. 262 (S.D. Fla. 2003) (applying Florida law).

Under Louisiana law, plaintiff asserting products liability claim may recover for medical monitoring after proving: (1) exposure greater than normal background levels; (2) to proven hazardous substance; (3) caused by defendant's negligence; (4) as proximate result of exposure, plaintiff has significantly increased risk of contracting serious latent disease; (5) monitoring procedure exists that makes early detection of disease possible; (6) prescribed monitoring regime is different from that normally recommended in absence of exposure; (7) prescribed monitoring regime is reasonably necessary according to contemporary scientific principles; and (8) medical monitoring is directly related to manifest physical or mental injury or disease. LSA–C.C. art. 2315. In re Fosamax Products Liability Litigation, 248 F.R.D. 389 (S.D. N.Y. 2008) (applying Louisiana law).

Reasonable cost of medical monitoring is a compensable item of damage under statutory provision pertaining to liability for acts causing damages, provided that a plaintiff satisfies the following criteria: (1) significant exposure to a proven hazardous substance; (2) as a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease; (4) a monitoring procedure exists that makes the early detection of the disease possible; (5) the monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) there is some demonstrated clinical value in the early detection and diagnosis of the disease. LSA-C.C. art. 2315. Bourgeois v. A.P. Green Industries, Inc., 716 So. 2d 355, Prod. Liab. Rep. (CCH) ¶ 15349 (La. 1998), reh'g denied, (Sept. 4, 1998).

To sustain an award for recovery of compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from exposure to toxic substances resulting from tortious conduct, a plaintiff must show that such costs are necessary due to a reasonably certain and significantly increased risk of developing a latent disease as a result of exposure to a toxic chemical. Exxon Mobil Corp. v. Ford, 433 Md. 426, 71 A.3d 105 (2013), as supplemented on denial of reconsideration, 433 Md. 493, 71 A.3d 144 (2013).

Requirement, that, in order to recover damages for medical monitoring costs arising form exposure to a toxic substance, a plaintiff must prove by quantifiable reliable indicia that defendant's actions have significantly increased plaintiff's risk of developing a disease, helps to achieve the objective of medical monitoring, that a defendant must compensate a plaintiff for past or present injuries caused by the defendant, and inhibits damages awards for speculative, and thus unreliable, opinions as to a plaintiff's potential risk of developing a future disease. Exxon Mobil Corp. v. Albright, 433 Md. 303, 71 A.3d 30 (2013), on reconsideration in part, 433 Md. 502, 71 A.3d 150 (2013).

In determining whether to award damages for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct, a court must consider whether the plaintiff has shown: (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. Exxon Mobil Corp. v. Albright, 67 A.3d 1100 (Md. 2013), on reconsideration in part, 67 A.3d 1181 (Md. 2013).

In determining whether to award compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from exposure to toxic substances resulting from tortious conduct, a court must consider whether the plaintiff has shown: (1) that the plaintiff was exposed significantly to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. Exxon Mobil Corp. v. Ford, 67 A.3d 1061 (Md. 2013), as supplemented on denial of reconsideration, 67 A.3d 1175 (Md. 2013).

Claim for future expenses of medical monitoring for early detection of disease, illness, or injury allegedly caused by exposure to hazardous substance usually will require competent expert testimony on each element of claim. Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 914 N.E.2d 891 (2009).

Compensation for medical monitoring costs does not require courts to speculate about the probability of future injury; it merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007).

To establish damages for medical monitoring claim, a plaintiff must show that he or she incurred costs as a result of the defendant's actions, and to satisfy this element, it is necessary for the plaintiff to demonstrate that the medical monitoring at issue is something greater than would be recommended as a matter of general health care for the public at large. Sadler v. PacifiCare of Nev., 340 P.3d 1264, 130 Nev. Adv. Op. No. 98 (Nev. 2014).

Under New York law, to recover medical monitoring costs following exposure to a toxic substance, a plaintiff must establish both that he or she was in fact exposed to the disease-causing agent and that there is a rational basis for his or her fear of contracting the disease. Caudle v. Towers, Perrin, Forster & Crosby, Inc., 580 F. Supp. 2d 273 (S.D. N.Y. 2008) (applying New York law).

Plaintiff must prove each of the following factors to sustain a medical monitoring claim: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Pohl v. NGK Metals Corp., 2007 PA Super 306, 936 A.2d 43 (2007).

See Brown v Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.) (1994, CA3 Pa) 35 F3d 717, 40 Fed Rules Evid Serv 379 (applying Pa law), § 16[a].

Under Pennsylvania and Florida law, plaintiff asserting products liability claim may recover for medical monitoring after

proving seven elements: (1) exposure greater than normal background levels; (2) to proven hazardous substance; (3) caused by defendant's negligence; (4) as proximate result of exposure, plaintiff has significantly increased risk of contracting serious latent disease; (5) monitoring procedure exists that makes early detection of disease possible; (6) prescribed monitoring regime is different from that normally recommended in absence of exposure; and (7) prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. In re Fosamax Products Liability Litigation, 248 F.R.D. 389 (S.D. N.Y. 2008) (applying Pennsylvania and Florida law).

To sustain a medical monitoring claim under Pennsylvania common law, a plaintiff must prove (1) exposure greater than normal background levels; (2) to a proven hazardous substance;(3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Anthony v. Small Tube Mfg. Corp., 580 F. Supp. 2d 409 (E.D. Pa. 2008) (applying Pennsylvania law).

Under Pennsylvania law, to prevail on common law claim for medical monitoring, plaintiff must prove, through expert testimony, (1) exposure greater than normal background levels (2) to proven hazardous substance which is (3) caused by defendant's negligence, (4) that as proximate result of exposure plaintiff has significantly increased risk of contracting serious latent disease, (5) that monitoring procedure exists that makes early detection of disease possible, (6) that prescribed monitoring regime is different from that normally recommended in absence of exposure, and (7) that prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Barnes v. American Tobacco Co. Inc., 984 F. Supp. 842, Prod. Liab. Rep. (CCH) ¶ 15100 (E.D. Pa. 1997), judgment aff'd, 161 F.3d 127, Prod. Liab. Rep. (CCH) ¶ 15407 (3d Cir. 1998).

For purposes of borough residents' medical monitoring claim under Pennsylvania law against owner of battery crushing and lead processing plant, evidence regarding blood lead testing was sufficient to find that a monitoring procedure did in fact exist that would make early detection of lead poisoning possible; set standards had been developed for such testing, and it was recommended and endorsed by both doctors and agencies as a reliable method of determining lead exposure. 35 P.S. § 6020.702(a). Dombrowski v. Gould Electronics, Inc., 31 F. Supp. 2d 436 (M.D. Pa. 1998).

Although it has not expressly done so, Pennsylvania Supreme Court could be expected to recognize cause of action for medical monitoring; plaintiff would be required to prove (1) significant exposure to proven hazardous substance due to defendant's negligence, (2) significantly increased risk of contracting serious latent disease as proximate result of exposure, (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary, and (4) that monitoring and testing procedures exist that make early detection and treatment of disease possible and beneficial. O'Neal v Department of the Army (1994, MD Pa) 852 F Supp 327 (applying Pa law).

Testimony of pediatrician who was pioneer in childhood lead poisoning, as to recommended medical monitoring program, that clearly delineated specific tests that were meant for victims of lead poisoning and were not recommended for all people, regardless of whether they had exposure to lead or elevated blood lead levels, supported awarding damages for medical monitoring to minor resident who ingested lead–based paint in public housing rental property in negligence action against city housing authority. Ford ex rel. Pringle v. Philadelphia Housing Authority, 848 A.2d 1038 (Pa. Commw. Ct. 2004).

See Hansen v Mountain Fuel Supply Co. (1993, Utah) 858 P2d 970, 218 Utah Adv Rep 54, § 11[a].

In order to prevail on medical monitoring claim under West Virginia law, plaintiff must prove that: (1) he has, relative to general population, been significantly exposed; (2) to proven hazardous substance; (3) through tortious conduct of defendant; (4) as proximate result of exposure, plaintiff has suffered increased risk of contracting serious latent disease; (5) increased risk of disease makes it reasonably necessary for plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in absence of exposure; and (6) monitoring procedures exist that make early detection of disease possible. Rhodes v. E.I. du Pont de Nemours and Co., 253 F.R.D. 365 (S.D. W. Va. 2008) (applying West Virginia law).

To sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious

conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible. In re Tobacco Litigation, 600 S.E.2d 188 (W. Va. 2004).

For a plaintiff to recover medical monitoring costs for exposure to proven hazardous substance, the plaintiff must only show that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure; once that has been proven, the plaintiff must then show that medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease even if the disease it is intended to diagnose is not reasonably certain to occur. In re West Virginia Rezulin Litigation, 585 S.E.2d 52 (W. Va. 2003).

In order to sustain a claim for medical monitoring expenses, the plaintiff must prove that: (1) he or she has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible. Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

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[END OF SUPPLEMENT]

§ 6.5. Accrual of claim

[Cumulative Supplement]

The court in the following case held that a medical monitoring claim accrues when the plaintiff is placed at a significantly increased risk of contracting a serious latent disease.

CUMULATIVE SUPPLEMENT

Cases:

Under Pennsylvania law, medical monitoring claim asserted by smoker against cigarette manufacturers accrued for limitations purposes when smoker was placed at significantly increased risk of contracting serious latent disease. 42 Pa. C.S.A. § 5524. Barnes v. American Tobacco Co. Inc., 984 F. Supp. 842, Prod. Liab. Rep. (CCH) ¶ 15100 (E.D. Pa. 1997), judgment aff'd, 1998 WL 783960 (3d Cir. 1998).

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[END OF SUPPLEMENT]

§ 7. Policy considerations

[Cumulative Supplement]

In the following cases, the courts have set forth various policy considerations in support of an award of medical monitoring costs, emphasizing the medical benefits from early detection and diagnosis of various diseases.

In Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 2d 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941, a federal appellate court, applying Pennsylvania law in a diversity case, stated that policy reasons for recognizing the tort of medical monitoring were "obvious." The court stated that medical monitoring claims acknowledged that, in a toxic age, significant harm could be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Moreover, further explained the court, recognizing this tort did not require courts' speculation about the probability of future injury but merely required ascertaining the probability that the far less costly remedy of medical supervision was appropriate. Allowing plaintiffs to recover the cost of this care deterred irresponsible discharge of toxic chemicals by defendants, further explained the court, and encouraged plaintiffs to detect and treat their injuries as soon as possible. The court concluded that these are "conventional goals of the tort system as it has long existed in Pennsylvania."

In Burns v Jaquays Mining Corp. (1987, App) 156 Ariz 375, 752 P2d 28, review dismd 162 Ariz 186, 781 P2d 1373, an Arizona appellate court recognized as "cogent" those policy considerations why the court in Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, recognized presymptom claims for medical surveillance. These policy considerations, noted the court, included deterring polluters, mitigating costs of serious future illnesses, and preventing an inequitable allocation for medical intervention.

In Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532, a California intermediate appellate court stated that medical monitoring damages are intended to facilitate early diagnosis and treatment of disease or illness caused by a plaintiff's exposure to toxic substances as a result of a defendant's culpable conduct. Noting that it was common knowledge that early diagnosis of many serious conditions promoted enhanced cure and survival rates, the court explained that science may well counsel medical intervention with respect to a known health risk long before it reaches the point where the law would regard its occurrence as "reasonably certain." Thus, further explained the court, a plaintiff's relative increased risk of future disease is an important factor in assessing the reasonable certainty of the need for medical monitoring but this is not the sole determining factor. The court concluded that, by allowing the recovery of medical monitoring costs in a proper case, it satisfied a number of sound policy concerns: (1) public health interest in encouraging and fostering access to early medical testing for those exposed to hazardous substances; (2) possible economic savings realized by the early detection and treatment of disease; (3) deterrence of polluters; and (4) elemental justice.

In Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, New Jersey's highest appellate court held that an application of tort law that allows postinjury recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with public interest in early detection and treatment of disease

in that: (1) the value of early diagnosis and treatment for cancer patients is well documented, and (2) although some individuals exposed to hazardous chemicals may seek regular medical surveillance whether the cost is reimbursed, the lack of reimbursement will undoubtedly deter others from doing so. Other important public interests, further explained the court, included deterring polluters, reducing overall costs to responsible parties, and avoiding the inequitable solution that individuals wrongfully exposed to dangerous toxic chemicals but unable to prove that any disease is likely would have to pay their own expenses when medical intervention is clearly reasonable and necessary.

In Askey v Occidental Chemical Corp. (1984, 4th Dept) 102 App Div 2d 130, 477 NYS2d 242, an intermediate New York appellate court stated that there was no doubt that the remedy of medical monitoring costs would permit the early detection and treatment of maladies. Therefore the court concluded that, as a matter of public policy, the tortfeasor should bear its cost.

In Gerardi v Nuclear Utility Services, Inc. (1991) 149 Misc 2d 657, 566 NYS2d 1002, a New York trial court stated that it was bound to follow the precedent of Askey v Occidental Chemical Corp. (1984, 4th Dept) 102 App Div 2d 130, 477 NYS2d 242, which court "made it clear" that the allowance of damages for medical monitoring expenses due to negligent exposure to toxic substances would be granted on the basis that such a remedy would permit the early detection and treatment of maladies and that as a matter of public policy the tortfeasor should bear its cost.

CUMULATIVE SUPPLEMENT

Cases:

Medical monitoring claims arising out of toxic exposure acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045, Prod. Liab. Rep. (CCH) P 19569 (N.D. Cal. 2015).

Recovery for future medical monitoring is allowed under California law. In re Mattel, Inc., 588 F. Supp. 2d 1111 (C.D. Cal. 2008) (applying California law).

Maryland recognizes a remedy of recovery of compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from sufficient exposure to toxic substances resulting from defendant's tortious conduct. Exxon Mobil Corp. v. Ford, 433 Md. 426, 71 A.3d 105 (2013), as supplemented on denial of reconsideration, 433 Md. 493, 71 A.3d 144 (2013).

Maryland recognizes a remedy of recovery of damages for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct. Exxon Mobil Corp. v. Albright, 433 Md. 303, 71 A.3d 30 (2013), on reconsideration in part, 433 Md. 502, 71 A.3d 150 (2013).

West Virginia recognizes cause of action for medical monitoring expenses where it can be proven that such expenses are necessary and reasonably certain to be incurred as proximate result of defendant's tortious conduct. Rhodes v. E.I. du Pont de Nemours and Co., 253 F.R.D. 365 (S.D. W. Va. 2008) (applying West Virginia law).

Although plaintiff's, exposed to toxic chemicals emitted from corporation's facility that was on fire, stated cause of action against corporation for intentional infliction of emotional distress where fire allegedly resulted from failure of corporation to do certain types of maintenance that reasonable person who was primarily concerned with safety would have done, they could not maintain separate cause of action for medical monitoring. McClenathan v Rhone-Poulenc, Inc. (1996, SD W Va) 926 F Supp 1272, class certif gr (SD W Va) 44 Envt Rep Cas 1394, motion gr, motion den, stay gr sub nom Black v Rhone-Poulenc, Inc. (SD W Va) 172 FRD 188 (applying W Va law).

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[END OF SUPPLEMENT]

B. Payment–Related Matters

§ 8. Class action certification

In the following cases, the courts have recognized or upheld class action certification as appropriate for those seeking future medical monitoring costs.

In Re Three Mile Island Litigation (1980, MD Pa) 87 FRD 433, 14 Envt Rep Cas 1834, 30 FR Serv 2d 708, later proceeding (MD Pa) 557 F Supp 96, later proceeding (MD Pa) 596 F Supp 1274, a Federal District Court granted class action certification under Federal Rule of Civil Procedure 23(a, b) as a "superior method" of deciding whether there was any basis of granting damages for medical detection services to monitor for future manifestations of injury caused by exposure to radioactive emissions. The court gave the following reasons for upholding the class action certification request: joinder of potentially tens of thousands of plaintiffs was impracticable; numerous common factual issues including the kinds and amounts of substances emitted; the likely pattern of emissions under prevailing meteorological conditions, and what future physical effect the exposed population might expect; and the same legal issues concerning liability based on exposure to these emissions and whether such exposure warranted an award of damages for medical monitoring.

In Boggs v Divested Atomic Corp. (1991, SD Ohio) 141 FRD 58, a Federal District Court granted class action certification to residents who lived within 6 miles of a radioactive–emitting plant, so that such residents could present, on a class–wide basis, various claims, including a claim for future medical monitoring for early cancer detection (the other claims presented were for emotional stress, dimunition in value of real property, and injunctive relief against further unlawful emission of hazardous substances from the plant). More specifically, the court held that each of the prerequisites for class action certification under Federal Rule of Civil Procedure 23(a) (that is, numerosity, commonality, typicality, and adequacy of representation) had been met, and that class certification under Federal Rule of Civil Procedure 23(b)(1) was "appropriate."

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In the following case, class action certification was denied to those seeking future medical monitoring costs.

In Askey v Occidental Chemical Corp. (1984, 4th Dept) 102 App Div 2d 130, 477 NYS2d 242, an intermediate New York appellate court held that class action certification was properly denied to persons alleging a need for future medical monitoring, because those persons had not satisfied their burden of showing a factual basis for identifying a genuine class under New York Civ Prac L & R §§ 901 and 902 (Consol) which requires that class action claimants must show factually that the purported class exists and can be described with certainty. The court explained that a map showing the geographical area impacted or affected by the landfill in question was relevant to indicate those persons who may have been exposed to airborne particles emanating from the landfill, but that the map did not identify with any degree of specificity those persons within that area whose bodies had been invaded by a toxic substance and who as a result needed medical monitoring. Further, explained the court, the affidavit of the class action claimants' medical doctor conceded that it was "hard to say with precision" who were members of the proposed class and admitted that identification of the class was dependent not only on geographic considerations but also on other factors which he acknowledged were "not fully known" at the present time but which included invisible genetic damage which could lead to a variety of adverse health effects at future times, possibly as late as 20 years later.

§ 9. Court–administered fund

[Cumulative Supplement]

In the following cases, the courts have favored a court–administered fund, rather than a lump–sum award, as a means of making payment of medical monitoring costs.

In Barth v Firestone Tire & Rubber Co. (1987, ND Cal) 661 F Supp 193, later proceeding (ND Cal) 673 F Supp 1466 (applying California law), a Federal District Court upheld an employee's request for "equitable relief" seeking creation of a medical monitoring fund which would gather and forward to treating physicians information relating to the diagnosis of diseases which might result from the plaintiff's exposure to toxins while employed at the defendant's tire manufacturing facility. The court explained, in sustaining this claim for equitable relief, that were it not for the creation of a fund that would locate exposed workers and aid in the early diagnosis of any resulting diseases, most employees would never know that they had been exposed to toxins.

In Burns v Jaquays Mining Corp. (1987, App) 156 Ariz 375, 752 P2d 28, review dismd 162 Ariz 186, 781 P2d 1373, an Arizona intermediate appellate court found as "proper" a court–supervised fund for medical surveillance costs rather than a lump–sum award. The court noted the "significant advantages" to the court–supervised fund approach, as stated in Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, discussed in this section, including accuracy of the amount awarded and assurance that the amount awarded would be spent only for medical examinations and tests.

In Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, the New Jersey Supreme Court, although recognizing that a fund mechanism for payment of medical surveillance costs was "inappropriate" in light of the fact that this case was now at a very "late stage of litigation that has already been protracted and extensive," nonetheless recognized that, despite administrative and procedural uncertainties in its establishment and operation, such a fund to administer medical surveillance claims should, as a general rule, prevail over lump–sum awards, especially in cases involving public entity defendants, basically for two reasons: (1) a fund would ensure that in a future mass–exposure litigation against public entities, medical surveillance damages would be paid only to compensate for medical examinations and tests actually administered, and would encourage plaintiffs to safeguard their health by not allowing them the option of spending the money for other purposes; and (2) the fund mechanism would also foster the objective of limiting the liability of public entities and facilitating the deduction from damage awards of collateral–source benefits.

In Habitants against Landfill Toxicants v York (1985, Pa CP) 15 ELR 20937, a Pennsylvania equity chancellor held that plaintiffs had sufficiently pled their request for a constructive medical trust fund of $1 million to assure proper medical monitoring and detection. The court noted that the defendants, who were operators of a landfill from which toxic substances emanated, had demurred to the demand based on two contentions: (1) that no duty existed which would justify the creation of a constructive medical trust fund, and (2) that the plaintiffs had an adequate remedy at law thus barring the creation of a constructive trust. The equity court rejected both these contentions and denied the defendants' demurrer. As to the first allegation, the court stated that plaintiffs had alleged how each defendant was involved in the ownership and operation of the landfill, that toxic and hazardous waste was dumped at the site, that during the time defendants were in control certain chemicals were allowed to leak into surrounding properties, and that this has created a hazardous health situation to all plaintiffs, further explaining that duty in tort law was predicated on the relationship between the parties in which one party became responsible for harm caused to another. As to the second allegation, the court simply disagreed that there was a complete and adequate remedy at law, explaining that it was "conscious of the difficult legal barriers" that plaintiffs would have to overcome if medical problems were diagnosed in the future and if they were forced to bring a legal action at that time.

CUMULATIVE SUPPLEMENT

Cases:

See Hansen v Mountain Fuel Supply Co. (1993, Utah) 858 P2d 970, 218 Utah Adv Rep 54, § 11[a].

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[END OF SUPPLEMENT]

§ 10. "Response cost" recovery

In the following cases, the court rejected the contention that a claim for medical monitoring costs was a "recoverable cost" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9607, popularly known as the Superfund Act.

In Coburn v Sun Chemical Corp. (1988, F ED Pa) 28 Envt Rep Cas 1665, 19 ELR 20256, supp op (ED Pa) 1989 US Dist LEXIS 8421, a Federal District Court held that future medical monitoring costs were not "response costs" under CERCLA, in an action brought by plaintiffs who were a purported class consisting of all persons who were exposed to well water contaminated with TCE and other hazardous substances released from a hazardous waste site. The court explained that during the legislative process Congress had considered including medical monitoring costs in CERCLA, but had deleted it from the final law.

In Ambrogi v Gould, Inc. (1990, MD Pa) 750 F Supp 1233, 21 ELR 20415, later proceeding (MD Pa) 764 F Supp 985, 33 Envt Rep Cas 1324 (disagreed with on other grounds by Pottstown Industrial Complex v P. T. I. Services, Inc. (ED Pa) 1992 US Dist LEXIS 3256), a Federal District Court held that medical surveillance costs were not recoverable response costs under CERCLA in an action brought by neighbors of a landfill which was part of a battery crushing and lead processing facility made up of an estimated 65,600 cubic yards of contaminated soil, broken battery casings, and crushed drums. The court advanced two reasons for this holding: (1) traditional state remedies were available to address the health concerns of adjacent populations at a particular site, and (2) the purpose of CERCLA was the removal of hazardous waste from the environment.

In Werlein v United States (1990, DC Minn) 746 F Supp 887, 21 ELR 20277, vacated, claim dismissed on other grounds (DC Minn) 793 F Supp 898, a Federal District Court dismissed plaintiff's claim to recover medical monitoring expenses as "response costs" under CERCLA. The court held that the statutory language, purposes and legislative history of CERCLA and the applicable case law, all dictated the conclusion that medical monitoring for early signs of cancer and other diseases which was essentially treatment for the injury that plaintiffs had suffered, as distinguished from medical monitoring to help mitigate the adverse public health effects of toxic releases, could not be recovered under CERCLA.

In Cook v Rockwell Int'l Corp. (1991, DC Colo) 755 F Supp 1468, claim dismissed (DC Colo) 778 F Supp 512, motion gr, motion den, remanded (DC Colo) 147 FRD 237, where the plaintiffs sought to recover medical monitoring costs as "response costs" under CERCLA, a Federal District Court held that the portion of plaintiffs' CERCLA claim that sought to recover costs of medical testing to monitor the "health" effects of the defendants' alleged releases of hazardous substances failed to state a claim upon which relief might be granted, but also held that the portion of plaintiffs' CERCLA claim that sought to recover costs of medical testing necessary to monitor the "environmental" effects of defendants' alleged releases was cognizable. The court explained that CERCLA's definitions of "response" and "remedy and remedial action" contained no references whatsoever to medical expenses of any kind, adding that CERCLA was designed to facilitate the cleanup of toxic substances from the environment.

III. Particular Circumstances

§ 11[a] Asbestos—Claim established or supportable

[Cumulative Supplement]

In the following cases involving asbestos exposure, the courts have upheld or recognized a claim for medical monitoring to detect various asbestos–related diseases or conditions.

In Johnson v Armstrong Cork Co. (1986, WD La) 645 F Supp 764, CCH Prod Liab Rep ¶ 11289, a Federal District Court, sitting in diversity and applying Louisiana law, held that medical expenses, past and future, which plaintiff incurred to monitor the development of a possible cancerous condition in asbestos cases was a recoverable element of damages. The court confined its discussion on this point to its quotation from Hagerty v L & L Marine Services, Inc. (1986, CA5 La) 788 F2d 315, reconsideration den, en banc (CA5 La) 797 F2d 256, § 16[a], that plaintiff "testified that he undergoes the checkups at the advice of his physician to ensure early detection and treatment of a possible cancerous condition. We agree that the reasonable costs of these checkups may be included in a damage award to the extent that, in the past, they were medically advisable and, in the future, will probably remain so."

In Burns v Jaquays Mining Corp. (1987, App) 156 Ariz 375, 752 P2d 28, review dismd 162 Ariz 186, 781 P2d 1373, residents of land adjacent to an asbestos–producing mill were deemed entitled to an award against the mill owner for medical surveillance costs. More specifically, the asbestos mill and its tailings pile blew asbestos fiber onto a adjacent residential trailer park. Although none of the trailer park residents showed any physical impairment or harm caused by their exposure to substantial and cumulative quantities of asbestos fiber, a medical expert witness for the residents testified that their cumulative exposure was comparable and greater than the exposure experienced by workers in asbestos mines, milling and manufacturing industries; that all the residents had asbestos fibers in their lungs which were causing changes in the lung tissue; that sooner or later some of the residents, if they lived long enough, would suffer from asbestosis and other asbestos–related diseases; and that some of the exposed children would die of asbestos–related diseases and some would become seriously handicapped. The Arizona intermediate appellate court "agree[d] with" Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, § 13[a], that medical surveillance cost is a compensable item of damages when the evidence shows, through reliable expert testimony, that such surveillance is reasonable and necessary to monitor the effects of exposure to toxic materials. The court concluded that plaintiffs should be entitled to such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles applied by physicians experienced in the diagnosis and treatment of asbestos–type injuries. Therefore, as to the plaintiff residents' medical surveillance claim, the court reversed the judgment below which had granted summary judgment to the defendant mill owner.

The New Jersey Supreme Court, in Mauro v Raymark Industries, Inc. (1989) 116 NJ 126, 561 A2d 257, 14 BNA OSHC 1161, CCH Prod Liab Rep ¶ 12234, upheld a claim for medical surveillance damages to a plumber–steamfitter who used and was exposed to materials containing asbestos, including pipecovering and asbestos cement. More specifically, the exposure occurred when the repairman was ripping out old insulation material and installing new insulation. Relying on Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, § 13[a], the court noted that, by contrast to an enhanced risk claim, the claim for medical surveillance did not seek compensation for an unquantifiable injury but rather sought specific monetary damages measured by the cost of periodic medical examinations. Therefore the court affirmed the intermediate appellate court's decision which had in turn affirmed the trial court's decision which had allowed jury consideration of the repairman's medical surveillance claim.

In Gerardi v Nuclear Utility Services, Inc. (1991) 149 Misc 2d 657, 566 NYS2d 1002, a cause of action was recognized for future medical monitoring on behalf of two employees whose work included the dismantling of pipe work and the removal and replacement of pipe gaskets, both the pipe insulation and the gaskets being composed, in substantial part, of asbestos material. During the course of the dismantling process, a large cloud of dust containing asbestos was raised enveloping the workers, each of whom inhaled and ingested or probably inhaled or ingested asbestos fibers. The workers contended that they were exposed to the risk of future asbestos–related disease or injury and must undergo continuing lifetime medical surveillance and monitoring for which they sought damages. A New York trial court recognized such a claim and denied a motion to dismiss this cause of action. The court stated that it was bound to follow the precedent of Askey v Occidental Chemical Corp. (1984, 4th Dept) 102 App Div 2d 130, 477 NYS2d 242, § 15, which held that if a plaintiff sought future medical expenses as an element of consequential damages, he must establish with a degree of reasonable medical certainty through expert testimony that such expenses would be incurred. In denying the motion to dismiss, the court explained that

this statement was a statement of the burden of proof and not a pleading requirement. In this regard the court specifically noted that the instant plaintiffs had alleged that as a result of defendants' conduct they must undergo periodic medical testing as a medical necessity. Accordingly, the court denied a motion to dismiss the alleged cause of action for future medical monitoring.

In Acevedo v Consolidated Edison Co. (1991) 151 Misc 2d 347, 572 NYS2d 1015, affd, mod (1st Dept) 189 App Div 2d 497, 596 NYS2d 68, a New York trial court held that employees who had been ordered to clean up the site of a pipe explosion which had spewed debris containing toxic friable asbestos stated a common–law cause of action for future medical monitoring costs. The court explained that the need for medical monitoring was not a compensable injury under New York Work Comp Law § 10 (Consol) since there was no present disability, and therefore such a cause of action was not barred by the exclusive remedy of New York Work Comp Law § 11 (Consol). However, at common law, the court recognized that, provided proper proof was adduced at trial supporting the need for such recovery, continuous medical monitoring costs allowing for early detection and treatment for asbestos–related disease may be sought by plaintiff employees. Accordingly, as to the medical monitoring claim, the court denied the defendant employer's motion for summary judgment.

CUMULATIVE SUPPLEMENT

Cases:

Evidence supported proposed instruction, in toxic exposure case brought by cement plant worker, that asbestos supplier was only liable for medical monitoring that was different from or in addition to the monitoring already required because of preexisting conditions, where worker's pulmonary specialist conceded that she would follow worker closely even absent any asbestos exposure because of his smoking history and a lung abnormality attributed to tuberculosis, and supplier's pulmonary specialist testified to similar findings. Gutierrez v. Cassiar Min. Corp., 64 Cal. App. 4th 148, 75 Cal. Rptr. 2d 132 (1st Dist. 1998), reh'g denied, (June 12, 1998).

Retroactive application of article which states that "damages" do not include costs for future medical treatment, services, surveillance, or procedures, unless they are directly related to a manifest physical or mental injury or disease, would divest asymptomatic plaintiffs of vested right to assert causes of action for medical monitoring of asbestos exposure and violated due process; the cause of action existed and accrued prior to the effective date of the statute. U.S.C.A. Const. Amend. 14; LSA–Const. Art. 1, § 2; LSA–C.C. art. 2315. Bourgeois v. A.P. Green Indus., Inc., 783 So. 2d 1251, Prod. Liab. Rep. (CCH) ¶ 16050 (La. 2001).

Asymptomatic employees, who had significant occupational exposure to asbestos and had to bear the expense of periodic medical examinations to monitor the effects of that exposure, suffered "damage," and therefore could bring action to collect cost of medical monitoring. Bourgeois v. A.P. Green Industries, Inc., 716 So. 2d 355, Prod. Liab. Rep. (CCH) ¶ 15349 (La. 1998), reh'g denied, (Sept. 4, 1998).

Jones Act seamen who were occupationally exposed to asbestos during their employment could maintain action for future medical monitoring, even absent physical manifestation of disease at time of suit. Jones Act, 46 U.S.C.A. Appx. § 688. Dragon v. Cooper/T. Smith Stevedoring Co., Inc., 726 So. 2d 1006, 1999 A.M.C. 814 (La. Ct. App. 4th Cir. 1999).

Renovation workers stated cause of action for medical monitoring, even though workers failed to adequately demonstrate medical advisability element, in light of unsettled state of law on medical monitoring in Utah, and test for recovery would be that plaintiff must prove (1) exposure, (2) to toxic substance, (3) which exposure was caused by defendant's negligence, (4) resulting in increased risk (5) of serious disease, illness, or injury (6) for which medical test for early detection exists (7) and for which early detection is beneficial, meaning that treatment exists that can alter course of illness, (8) and which test has been prescribed by qualified physician according to contemporary scientific principles. Further, court–supervised fund was suggested to administer medical surveillance payments, or, alternatively, defendant might be ordered to pay for insurance to fund plaintiff's future medical monitoring needs. Hansen v Mountain Fuel Supply Co. (1993, Utah) 858 P2d 970, 218 Utah Adv Rep 54.

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[END OF SUPPLEMENT]

§ 11[b] **Asbestos—Claim not established or supportable**

[Cumulative Supplement]

In the following cases involving asbestos exposure, the court denied a claim for the costs of medical monitoring to detect various asbestos–related diseases or conditions.

In Catasauqua Area School Dist. v Eagle-Picher Industries, Inc. (1988, F ED Pa) 1988 US Dist LEXIS 11316, a school district unsuccessfully sought creation of a fund to cover costs of medical monitoring of its employees to aid in the early detection of asbestos–related illnesses, in essence seeking this relief in the belief that it risked liability in the future if it did not provide such monitoring. Sitting in diversity, a Federal District Court noted that, under the current state of Pennsylvania law, victims of exposure to toxic substances could not seek medical monitoring absent some present manifestation of a disease or some reasonable likelihood of contracting such a disease. The court concluded that since employees at plaintiff's schools could not even seek such medical monitoring relief directly from the manufacturers of asbestos themselves, it was difficult to see what basis there would be for holding the plaintiff school district itself liable. In this case, related the court, despite the alleged presence of asbestos in the plaintiff's school buildings for at least 25 years, as of yet no one had suffered any asbestos–related illness and, moreover, there was no evidence demonstrating a "reasonable or substantial likelihood" that anyone would in fact get asbestosis or a similar illness in the future. The court also noted that plaintiff school district had not alleged that there were any outstanding claims arising out of the presence of asbestos in the schools. Therefore, as to the medical monitoring claim, the court granted summary judgment of dismissal to the defendant asbestos manufacturer.

In De Stories v Phoenix (1987, App) 154 Ariz 604, 744 P2d 705, a group of employees who were exposed to airborne asbestos dust while working on the demolition phase of renovation work on an airport lobby terminal were denied a medical surveillance claim. The employees alleged that their exposure to asbestos created an increased risk that they would contract fatal lung disease in the future, and sought costs for medical surveillance. An Arizona intermediate appellate court concluded that the employees had failed to adduce evidence that such medical surveillance costs would be reasonably necessary. The employees' medical doctor's affidavit opined that persons who are exposed to asbestos have an "increased probability" of contracting mesothelioma, which remains latent for 10 to 35 years, and which "spreads rapidly and uncontrollably and eventually causes death" once it manifests itself. The court stated that the doctor's affidavit did not suggest that persons exposed to asbestos required increased medical surveillance. The court noted that it could not agree with the employees that it was a "reasonable inference" from the doctor's affidavit that the asserted increased risk of lung disease entailed any particular increase in the frequency, cost, or intensity of the employees' need for periodic medical examinations over what would normally have been prudent for them based on their individual circumstances. The court added that the employees had presented no other admissible evidence tending to establish any such increase in frequency, cost, or intensity of need. Therefore, as to the claim for medical surveillance costs, the court concluded that the trial court had not erred in granting defendant employer's motion for summary judgment.

CUMULATIVE SUPPLEMENT

Cases:

Firefighters exposed to asbestos at training facility were not entitled to award for medical monitoring during latency period of asbestos-related diseases, although firefighters' expert recommended regular chest X-rays and pulmonary studies, as he also testified that increase in risk of asbestos-related disease would be slight, and medical monitoring damages required significantly increased risk. Lilley v. Board of Sup'rs of Louisiana State University, 735 So. 2d 696 (La. Ct. App. 3d Cir. 1999), writ denied, 744 So. 2d 629 (La. 1999).

Wife of deceased worker, who was heavy smoker, and who was allegedly exposed to asbestos through laundering husband's clothes was only indirectly exposed and did not suffer injury or condition clearly related to asbestos exposure, and was therefore not entitled to medical surveillance damages. Theer v Philip Carey Co. (1993) 133 NJ 610, 628 A2d 724, CCH Prod Liab Rep ¶ 13721.

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[END OF SUPPLEMENT]

§ 12. Automobile accident injuries

In the following case, the court, by way of dictum, indicated that, were it faced with the situation of latent injuries from an automobile accident, it would recognize a claim for the costs of future medical monitoring.

In Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532, a California intermediate appellate court, by way of dictum in a toxic tort case, stated that a plaintiff who was involved in an automobile accident and suffered no observable physical injury, but who nevertheless underwent medically necessary tests to determine whether internal injuries existed, was no doubt entitled to recover the costs of this medical examination. The court further stated that if accepted medical practice also deemed it necessary to perform such tests in the future, in order to detect the onset of any subsequently developing injury caused by the accident, the costs of the continued testing would be recoverable under California Civ Code § 3333 (Deering). Addressing the matter at issue, the court concluded that the outcome should be the same when the operative incident is toxic exposure rather than collision, and when the potential future harm is disease rather than physical impairment.

§ 13[a] Groundwater contamination—Claim established or supportable

[Cumulative Supplement]

In the following cases involving groundwater contamination, the courts have upheld or recognized a claim for the costs of medical monitoring to detect various diseases from such contamination.

In Merry v Westinghouse Electric Corp. (1988, MD Pa) 684 F Supp 847, 27 Envt Rep Cas 1585, 18 ELR 21218, later proceeding (MD Pa) 684 F Supp 852, 27 Envt Rep Cas 1787, 18 ELR 21220, where a claim for future medical monitoring costs was brought by several property owners whose well water was contaminated by "demonstrable exposure" to carcinogens and other toxic chemicals, a Federal District Court, applying Pennsylvania law, denied a motion for partial summary judgment brought by defendant contaminating company, holding that a fact issue existed as to whether the property owners could recover costs of future medical monitoring. In support of its conclusion that the plaintiff property owners had

proffered sufficient evidence to defeat the defendant contaminating company's summary judgment motion, the court noted that plaintiffs' toxicologist had explained his assessment of the various chemicals discovered in plaintiffs' wells, the routes of exposure to those chemicals, and the toxicologic, mutagenic, and carcinogenic effects of those chemicals. The court concluded that, though they may not convince a jury, the plaintiffs had, through their expert's reports, created an issue of fact as to the probability of contracting a serious illness as a result of exposure to the hazardous substances in their wells.

In Werlein v United States (1990, DC Minn) 746 F Supp 887, 21 ELR 20277, vacated, claim dismissed on other grounds (DC Minn) 793 F Supp 898, a Federal District Court sitting in diversity and applying the common law of Minnesota held that persons claiming that they were exposed to trichloroethylene (TCE) as a result of toxic discharges into their water supply were entitled to recover the cost of future medical monitoring as tort damages. The plaintiffs were citizens who resided near to ammunition plant sites which discharged chemicals into the groundwater supply, the plaintiffs relying on these water supplies which were allegedly polluted by the defendants. It was defendants' primary contention that the court should dismiss the common–law medical monitoring claim because plaintiffs had no legally sufficient proof that the toxic substances which they ingested were capable of harming humans, adding that essentially the defendants argued that there was nothing to monitor. The court found this argument "unavailing" in light of its prior ruling regarding the harmfulness of trichloroethylene (TCE) and other substances to which plaintiffs had been exposed in using water allegedly contaminated by defendants. The court concluded that there was "ample authority" for the proposition that "under proper proof" injured plaintiffs might recover damages for medical monitoring. The court stated that medical appropriate monitoring is simply a future medical cost "which is certainly recoverable," assuming that a given plaintiff could prove that he has present injuries that increase his risk of future harm, the court noting by way of footnote that increased risk of future disease was a "condition that presently exists."

In Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532, a California intermediate appellate court awarded medical monitoring damages to more than 100 students and adults who, at a public school for almost 20 years, drank water contaminated with a pesticide (DBCP) which had been used by farmers who had applied it in the soil and on various crops, but which pesticide migrated into the ground water supply of the school in concentrations exceeding state health standards. It was alleged that DBCP was a potent carcinogen in animal testing and caused chromosome damage and testicular atrophy in humans. Therefore, as to the plaintiff's medical monitoring claim, the court reversed a summary judgment of dismissal which had been granted to defendant pesticide manufacturer.

In Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571, the New Jersey Supreme Court reinstated a jury verdict of $8.2 million, approximately $500 per year of life expectancy for each of 339 people, on behalf of residents who alleged that the actions of a municipality resulted in chemical contamination of the residents' water supply. The court related that in order to use water for drinking, cooking, washing, or bathing, these residents had to endure for many years a home delivery water supply system, using water from barrels to meet varying needs of their households. The court also related that a toxicologist had testified that of the 12 identified chemicals that had infiltrated various wells used by the residents as a water source, four were known carcinogens, the potential effects of which were identified as including liver and kidney damage, mutations and alterations in genetic material, damage to blood and reproductive systems, neurological damage, and skin irritations. The court explained that the claim for medical surveillance costs did not seek compensation for an unquantifiable injury, but rather sought specific monetary damages measured by the cost of periodic medical examinations, adding that the invasion for which redress was sought was the fact that the plaintiffs would need to spend money for medical tests, a cost they would not have incurred absent their exposure to toxic chemicals. And finally, the court rejected the contention that the claim for medical surveillance damages could not be sustained as a matter of law, if the plaintiffs' enhanced risk of injury claim was not sufficiently probable as to be compensable. Holding that the proofs demonstrated that such surveillance to monitor the effect of exposure to toxic chemicals was reasonable and necessary, the court related that the plaintiffs' experts included a medical doctor, a toxicologist, and a geohydrologist (geohydrology, explained the court, deals with the occurrence, flow, behavior, and production of underground water).

CUMULATIVE SUPPLEMENT

Cases:

See Potter v Firestone Tire & Rubber Co. (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily Journal DAR 16566, § 15.

Village residents stated claim, under New York law, for medical monitoring damages, in action against operators of manufacturing facilities within village, arising from contamination of groundwater in village with perfluorooctanoic acid (PFOA), where they sufficiently alleged claims against operators for negligence and other torts concerning their real property, and they alleged that they ingested PFOA-laced water as result of contamination, several residents had elevated levels of PFOA in their blood, PFOA was associated with increased risk of cancer and other diseases, and funding for biomonitoring program was reasonably tailored to exposure risks posed by PFOA. Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233 (N.D. N.Y. 2017)(applying New York law).

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[END OF SUPPLEMENT]

§ 13[b] **Groundwater contamination—Claim not established or supportable**

[Cumulative Supplement]

In the following cases involving groundwater contamination, the courts have denied or rejected a claim for the costs of medical monitoring to detect various diseases from such contamination.

In Mateer v U. S. Aluminum (1989, F ED Pa) 1989 US Dist LEXIS 6323, a Federal District Court, sitting in diversity and applying Pennsylvania law, held that victims of exposure to allegedly contaminated groundwater were not entitled to medical monitoring costs, where the plaintiffs had not controverted the defendants' evidence that the duration and level of the plaintiffs' exposure to the allegedly contaminated groundwater was insufficient to create a significant health risk. Concluding that the plaintiffs had not shown a "potential for injury," the court granted summary judgment for the defendants on the plaintiffs' claim for medical monitoring damages.

In Carroll v Litton Systems, Inc. (1990, F WD NC) 1993 US Dist LEXIS 16833, where property owners alleged that, as a result of exposure to toxic chemicals which emanated from defendant's industrial plant into the groundwater used for water supply by the owners of properties surrounding the defendant's plant, they would need long–term medical monitoring to detect the onset of any symptoms of diseases caused by the chemicals, including but not limited to nervous system damage, gastrointestinal disorders, liver disease, skin disorders, and immune system damage, a Federal District Court, applying North Carolina law, held that it would not recognize a common–law claim for the costs of medical monitoring in the absence of clear direction from the North Carolina courts or legislature recognizing such a claim. The court went on to explain that if a North Carolina court were faced with the question whether to create a tort for medical monitoring costs, it would decline to create such a tort, but instead would look to the legislature for guidance. Even if it were to hold that North Carolina would recognize a claim for medical monitoring in some circumstances, further explained the court, no such relief could be obtained by plaintiffs here, given both the lack of admissible evidence that plaintiffs' alleged medical problems were caused by the alleged exposure to the chemicals at issue and the lack of evidence that plaintiffs were more likely than not to contract any disease in the future. The court concluded that plaintiffs had failed to adduce evidence that their alleged exposure was significant in any respect and accordingly concluded that plaintiffs had not carried their burden of showing that medical monitoring, beyond that which anyone in the general population should undergo as part of good health practice, is reasonable and necessary as a matter of law.

In Potter v Firestone Tire & Rubber Co. (1990, 6th Dist) 225 Cal App 3d 213, 274 Cal Rptr 885, review gr (Cal) 278 Cal Rptr 836, 806 P2d 308 and reprinted for tracking pending review (6th Dist) 232 Cal App 3d 1114 and reprinted for tracking pending review (6th Dist) 3 Cal App 4th 994, reprinted for tracking pending review (6th Dist) 9 Cal App 4th 881, reprinted for tracking pending review (6th Dist) 15 Cal App 4th 490, a California intermediate appellate court reversed a damage award of $142,975 for costs of future medical monitoring to property owners who allegedly drank contaminated water from domestic water wells. The drinking water contained chemicals that were the same or derivative chemicals as those dumped at an adjoining landfill, including benzene and vinyl chloride, both known to be human carcinogens, and many other substances which were strongly suspected to be carcinogens. However, the court held that the evidence failed to establish that cancer was reasonably certain to occur or that there was a reasonable medical probability of it occurring, precluding any recovery. More specifically, despite recognition of the trial court's finding that there was convincing evidence of an increased risk of developing cancer, and despite the trial court's reasoning that "this enhanced susceptibility is a presently existing physical condition," the appellate court expressly concluded that "failure to establish that the cancer is reasonably certain to occur precludes.… medical monitoring costs."

CUMULATIVE SUPPLEMENT

Cases:

Residents whose wells were actually or potentially exposed to groundwater contamination could not recover, from source of contamination, under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), medical monitoring expenses directed solely towards assessing and safeguarding their own health; monitoring expenses were allowable only to determine existence or extent of release of hazardous substances or efficacy of removal or remedial action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(23–25), 42 U.S.C.A. § 9601(23–25). Bernbach v. Timex Corp., 989 F. Supp. 403 (D. Conn. 1996).

Residents' exposure to vinyl chloride manufactured by defendant in their groundwater was not of sufficient magnitude and duration to cause any of the known adverse health effects attributable to vinyl chloride, precluding residents' claims for increased risk of future disease, mental anguish, medical monitoring and punitive damages. Anderson v. Dow Chemical Co., 255 Fed. Appx. 1 (5th Cir. 2007).

Medical monitoring of residents living near crude oil refinery that leaked a plume of toxic chemicals that allegedly contaminated the groundwater and soil under residents' properties was not warranted, where residents did not identify the diseases the chemicals in the plume allegedly caused, there was no individualized proof that each of the 118 residents were exposed to chemicals from the plume in sufficient quantities to cause an increased risk of disease, and community-wide cancer study did not conclude that the higher than expected number of cases was due to the plume. Baker v. Chevron U.S.A. Inc., 533 Fed. Appx. 509 (6th Cir. 2013).

Private medical monitoring costs are not recoverable response costs in CERCLA private cost recovery action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), 42 U.S.C.A. § 9607(a)(4)(B). In re Burbank Environmental Litigation, 42 F. Supp. 2d 976, 47 Env't. Rep. Cas. (BNA) 1615 (C.D. Cal. 1998).

Homeowners were not entitled to recover compensatory damages for future costs of medical monitoring due to enhanced risk of contracting a latent disease, in action against gas station owner arising from underground spill of gasoline containing contaminants, methyl tertiary-butyl ether (MTBE) and benzene, which had been detected in some homeowners' potable wells; levels of contaminants detected in wells were mostly below safe exposure levels set by Maryland Department of the Environment (MDE), and no evidence was presented showing that homeowners faced a particularized and significantly increased risk as a result of the leak in relation to the public at large. Exxon Mobil Corp. v. Ford, 433 Md. 426, 71 A.3d 105 (2013), as supplemented on denial of reconsideration, 433 Md. 493, 71 A.3d 144 (2013).

Property owners were not entitled to damages for future costs of medical monitoring due to enhanced risk of contracting a latent disease, in action against gas station owner arising from underground spill of gasoline containing contaminants, methyl

tertiary-butyl ether (MTBE) and benzene, which had been detected in some property owners' potable wells, since property owners failed to show that they had suffered a significantly increased risk of developing a latent disease; levels of contaminants detected in wells were mostly below safe exposure levels set by Maryland Department of the Environment (MDE), and no expert testimony was presented showing a particularized and significantly increased risk as a result of the leak in relation to the public at large. Exxon Mobil Corp. v. Albright, 433 Md. 303, 71 A.3d 30 (2013), on reconsideration in part, 433 Md. 502, 71 A.3d 150 (2013).

See Thomas v FAG Bearings Corp. (1994, WD Mo) 846 F Supp 1400, 24 ELR 21143 (applying Mo law), § 4[a].

Under Oklahoma law, as predicted by the district court, residents who were not currently diagnosed with disease or injury could not recover medical monitoring expenses from operators of manufacturing facility that had allegedly contaminated groundwater to which they had been exposed. McCormick v. Halliburton Co., 895 F. Supp. 2d 1152 (W.D. Okla. 2012) (applying Oklahoma law).

See Redland Soccer Club v Department of Army (1993, MD Pa) 835 F Supp 803, judgment entered sub nom O'Neal v Department of the Army (MD Pa) 852 F Supp 327, 24 ELR 21424 (applying Pa law), § 15.

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[END OF SUPPLEMENT]

§ 13[c] Groundwater contamination—Claim barred by statute of limitations

[Cumulative Supplement]

It has been held that while theoretically recoverable, damages for the medical monitoring of groundwater contamination victims could not be recovered when the basic tort claim under CERCLA was time barred by the statute of limitations.

CUMULATIVE SUPPLEMENT

Cases:

Under California law, plaintiff is entitled to medical monitoring as damages where specific monitoring beyond that which ordinary individual should pursue is necessary as direct consequence of plaintiff's exposure to environmental contamination caused by defendant, but liability for such damages could not be imposed where the underlying action was time barred. In re Burbank Environmental Litigation, 42 F. Supp. 2d 976, 47 Env't. Rep. Cas. (BNA) 1615 (C.D. Cal. 1998).

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[END OF SUPPLEMENT]

§ 14. Insecticides

In the following case involving a spilled insecticide used for termite control, the court upheld a claim for future medical monitoring costs to detect various spill–related disorders.

In Villari v Terminix International, Inc. (1987, ED Pa) 677 F Supp 330, later proceeding (ED Pa) 692 F Supp 568, 26 Fed Rules Evid Serv 864, 101 ALR Fed 867, where plaintiff homeowners sought future medical monitoring damages, alleging that their home was contaminated with a hazardous termiticide (Aldrin, a chlorinated hydrocarbon used for termite control) which was accidentally spilled in the homeowner's basement by an exterminator's employee, a Federal District Court, applying Pennsylvania law, noting that there was sufficient medical evidence on the record to permit a jury to find that the plaintiff homeowners suffered physical injury from exposure to the termiticide in the month following the spill, concluded that the same evidence supported a claim for the costs of future medical surveillance. By way of footnote, the court noted that at trial the plaintiffs would also have to demonstrate the probability that the treatment would be performed as well as the fact of injury itself, but the court added in the same footnote that it was not prepared to take as conclusive against the plaintiffs that they had not yet established a program of medical monitoring. Therefore, as to the medical surveillance claim, the court denied defendant's motion for summary judgment.

§ 15. Landfill toxins

[Cumulative Supplement]

In the following cases involving exposure to toxins from a landfill, the courts have upheld or recognized a claim for the costs of future medical monitoring to detect the various diseases from the landfill–released toxins.

In Askey v Occidental Chemical Corp. (1984, 4th Dept) 102 App Div 2d 130, 477 NYS2d 242, where area residents alleged that ground seepage and air dispersion of toxic substances from the Love Canal industrial chemical and waste disposal landfill had exposed them to more than 70 different illnesses and maladies, and sought to recover all "reasonably anticipated" consequential damages, a New York intermediate appellate court stated that the future expense of medical monitoring could be a recoverable consequential damage provided that plaintiff could establish with a reasonable degree of medical certainty that such expenditures were "reasonably anticipated" to be incurred by reason of their exposure. However, added the court, the fact that the future expense of medical monitoring may be recovered as an element of consequential damage did not mean that class certification should necessarily be allowed, the court affirming an order denying class certification in the instant case.

In Habitants against Landfill Toxicants v York (1985, Pa CP) 15 ELR 20937, a Pennsylvania equity chancellor ruled that people alleging injuries from toxic chemicals leaking into their property from a neighboring landfill could bring an action for a $1 million medical surveillance trust fund, where there were allegations that waste products disposed of in the landfill were toxic and hazardous and capable of causing serious personal injuries, disease, or death to persons coming in contact with them, and further allegations that those exposed to the landfill were put at an increased risk of future medical injuries which would cause them to incur future medical expenses. Holding that the neighbors of a landfill had sufficiently alleged facts to support a constructive trust for medical monitoring, and denying defendants' demurrer to this allegation, the court added that plaintiffs still had the burden at trial to prove these allegations with sufficient testimony, in that they must show the potential for severe and latent injuries, as well as the need for early detection and treatment.

CUMULATIVE SUPPLEMENT

Cases:

In action by nearby residents against iron works company in connection with defendant's disposal of industrial waste in landfill, plaintiffs were not entitled to recover medical monitoring costs as response costs under CERCLA; such costs do not relate to preventing public contact with released contaminants, which is type of action set forth in definitions of "removal" or "remedial" action. Murray v Bath Iron Works Corp. (1994, DC Me) 867 F Supp 33, 39 Envt Rep Cas 1997.

Even assuming that city was liable person under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), firefighter allegedly injured when exposed to trace elements of hazardous chemicals in barrels which city had buried at airport could not recover medical monitoring costs as costs of response under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 104(i), 107(a), 42 U.S.C.A. §§ 9604(i), 9607(a). Struhar v. City of Cleveland, 7 F. Supp. 2d 948, 46 Env't. Rep. Cas. (BNA) 2019, 28 Envtl. L. Rep. 21572 (N.D. Ohio 1998).

In action by residents living near landfill against tire company that disposed of toxic materials at landfill, resulting in contamination of plaintiffs' water supply, issue to be decided was whether evidence established necessity, as direct consequence of exposure, for specific monitoring beyond that which individual should pursue as matter of preventive medical care and checkups to which members of public at large should prudently submit. Recovery should not depend on showing that particular disease is reasonably certain to occur, but rather, following factors are relevant: (1) significance and extent of exposure to chemicals; (2) toxicity of chemicals; (3) relative increase in chance of onset of disease as result of exposure, when compared to plaintiff's chances of developing disease had he or she not been exposed, and chances of public at large developing disease; (4) seriousness of disease for which plaintiff is at risk; and (5) clinical value of early detection and diagnosis. Potter v Firestone Tire & Rubber Co. (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily Journal DAR 16566.

Plaintiffs alleging exposure to toxic wastes in connection with soccer field built over what had been U.S. Army landfill failed to state cause of action against Army for medical monitoring where there was no expert testimony that plaintiff had suffered undue exposure to toxins, and plaintiffs also failed to offer evidence that their exposure required different medical monitoring regimen than would normally be recommended for them absent exposure. Redland Soccer Club v Department of the Army (1995, CA3 Pa) 55 F3d 827, 25 ELR 21026, petition for certiorari filed (Oct 10, 1995) (applying Pa law).

Members of soccer club, township employees, and neighbors of park failed to state cause of action against United States for medical monitoring following alleged exposure to toxins buried by army in landfill, where plaintiffs' expert never reported that anyone had actual contact with contaminants, and there was no evidence that toxins listed in report actually were at surface of field, or that toxins actually invaded bodies of plaintiffs. Redland Soccer Club v Department of Army (1993, MD Pa) 835 F Supp 803, judgment entered sub nom O'Neal v Department of the Army (MD Pa) 852 F Supp 327, 24 ELR 21424 (applying Pa law).

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[END OF SUPPLEMENT]

§ 16[a] **PCBs and related organic chemicals—Claim established or supportable**

[Cumulative Supplement]

In the following cases involving exposure to polychlorinated biphenyls (PCBs) and related organic chemicals, the courts have upheld or recognized a claim for the costs of future medical monitoring to detect various diseases from such chemicals.

In Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 2d 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941, a federal appellate court sitting in diversity predicted that the Pennsylvania Supreme Court would recognize a claim for medical monitoring under the substantive law of Pennsylvania in an action by 38 persons who lived in or worked adjacent to an electric railcar maintenance facility, and who sought to recover the costs of periodic medical examinations that they contended were medically necessary to protect against the exacerbation of latent diseases brought about by exposure to polychlorinated biphenyls, better known as PCBs, which as a result of use in railcar transformers were found in extremely high concentrations at the railyard and in the ambient air and soil. The court noted testimony by an expert toxicologist that PCBs may be absorbed into the body by oral ingestion, through the skin, or by inhalation, and that PCBs were transported through the body in blood, eventually redistributed to fat and organs containing fat, so as to become a substantial factor in causing particular injuries, including elevations in triglyceride and cholesterol levels, immune system injuries, and disorders of the liver, gall bladder, and biliary tract. Therefore, as to the medical monitoring claim, the court reversed a summary judgment in favor of the multiple defendants who were involved in the ownership and operation of the railyard which had engaged in decades of PCB use in its railcar transformers.

In Hagerty v L & L Marine Services, Inc. (1986, CA5 La) 788 F2d 315, reconsideration den, en banc (CA5 La) 797 F2d 256, a Jones Act seaman, who was serving as a barge tankerman loading chemicals when he was completely drenched with dripolene, a chemical containing benzene, toluene, and xyolene, was held by a Federal District Court to be entitled to recover the continuing expense of periodic medical checkups which the seaman testified that he underwent at the advice of his physician to insure early detection and treatment of a possible cancerous condition. The court concluded that the reasonable cost of such checkups may be included in a damage award to the extent that "in the past, they were medically advisable and, in the future, will probably remain so." By way of footnote the court noted that, although the question did not arise, it would look favorably on applying the "ancient generous" maritime doctrine of maintenance and cure to also allow recovery of the periodic medical checkup costs.

CUMULATIVE SUPPLEMENT

Cases:

In action by various persons who had been exposed to PCBs, plaintiffs stated cause of action for medical monitoring, where (1) plaintiffs were significantly exposed to proven hazardous substance through negligent actions of defendant, (2) plaintiffs suffered significantly increased risk of contracting serious latent disease as proximate result of exposure, (3) increased risk made periodic diagnostic medical examinations reasonably necessary, and (4) monitoring and testing procedures existed that made early detection and treatment of disease possible and beneficial. Brown v Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.) (1994, CA3 Pa) 35 F3d 717, 40 Fed Rules Evid Serv 379 (applying Pa law).

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[END OF SUPPLEMENT]

§ 16[b] **PCBs and related organic chemicals—Claim not established or supportable**

[Cumulative Supplement]

In the following case involving exposure to polychlorinated biphenyls (PCBs) and related organic chemicals, the court denied a claim for the costs of future medical monitoring to detect various diseases from such chemicals.

In Ball v Joy Technologies, Inc. (1991, CA4 W Va) 958 F2d 36, a federal appellate court sitting in diversity affirmed denial of medical surveillance costs, under West Virginia and Virginia law, in the absence of any present physical injury, to those employees who alleged that they had been wrongfully exposed to and absorbed various toxic chemicals including polychlorinated biphenyls (PCBs) which were used as coolants in underground mining equipment on which the employees worked. The employees alleged that their absorption of the PCBs and other toxic chemicals exposed them to future development of cancer and other diseases. Although recognizing that the employees had proffered several public policy arguments for allowing individuals to recover the cost of medical monitoring, the federal appellate court agreed with the Federal District Court that such considerations were better left to the respective legislatures and highest courts of West Virginia and Virginia, which had not yet recognized exposure to toxic substances as a physical injury.

CUMULATIVE SUPPLEMENT

Cases:

Alabama law does not recognize a distinct cause of action for medical monitoring arising from alleged exposure to hazardous contamination and pollution, in absence of a manifest physical injury or illness. (Per Stuart, J., with three Justices concurring and five Justices concurring in result.) Hinton ex rel. Hinton v. Monsanto Co., 813 So. 2d 827, 53 Env't. Rep. Cas. (BNA) 1284, Prod. Liab. Rep. (CCH) ¶ 16162 (Ala. 2001).

Workers allegedly exposed to PCBs and other toxic chemicals during accident or cleanup following rupture of electrical transformer box could not recover for medical monitoring where, although experts concluded that monitoring was required in order to detect early signs of PCB–induced illnesses, neither expert attempted to show how "significant" increased risk was for any individual, either in abstract or as compared to other members of class, thus failing to meet significance standard. Abuan v General Elec. Co. (1993, CA9 Guam) 3 F3d 329, 93 CDOS 6360, 93 Daily Journal DAR 10953, CCH Prod Liab Rep ¶ 13632, cert den (US) 127 L Ed 2d 383, 114 S Ct 1064 (applying Guam law).

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[END OF SUPPLEMENT]

§ 17. **Petroleum–product emissions**

[Cumulative Supplement]

In the following case involving exposure to petroleum–product emissions, the court has upheld a claim for the costs of future medical monitoring to detect various diseases and conditions from these emissions.

In Bocook v Ashland Oil, Inc. (1993, DC SD W Va) 819 F Supp 530, where plaintiffs asserted that they required special medical monitoring in order to detect the early onset of latent diseases which they purportedly had an increased risk of incurring because of defendant oil company's activities in releasing petroleum–product emissions into the air, water, and ground in the vicinity of the oil company's Kentucky refinery, a Federal District Court, applying the law of Kentucky as the site of the refinery, held, in this case of first impression, that Kentucky would recognize a claim for recovery of the costs of future medical testing to detect possible diseases caused by toxins. In denying the defendant oil company's motion to dismiss the medical monitoring claim, the court stated that, since the Kentucky Supreme Court had taken the "broader" step of allowing recovery of damages in enhanced risk claims, it was far easier to predict that that court would take the "lesser" step of allowing recovery in so–called medical monitoring claims.

CUMULATIVE SUPPLEMENT

Cases:

Property owners were not entitled to damages for future costs of medical monitoring due to enhanced risk of contracting a latent disease, in action against gas station owner arising from underground spill of gasoline containing contaminants, methyl tertiary-butyl ether (MTBE) and benzene, which had been detected in some property owners' potable wells, since property owners failed to show that they had suffered a significantly increased risk of developing a latent disease; levels of contaminants detected in wells were mostly below safe exposure levels set by Maryland Department of the Environment (MDE), and no expert testimony was presented showing a particularized and significantly increased risk as a result of the leak in relation to the public at large. Exxon Mobil Corp. v. Albright, 67 A.3d 1100 (Md. 2013), on reconsideration in part, 67 A.3d 1181 (Md. 2013).

Homeowners were not entitled to recover compensatory damages for future costs of medical monitoring due to enhanced risk of contracting a latent disease, in action against gas station owner arising from underground spill of gasoline containing contaminants, methyl tertiary-butyl ether (MTBE) and benzene, which had been detected in some homeowners' potable wells; levels of contaminants detected in wells were mostly below safe exposure levels set by Maryland Department of the Environment (MDE), and no evidence was presented showing that homeowners faced a particularized and significantly increased risk as a result of the leak in relation to the public at large. Exxon Mobil Corp. v. Ford, 67 A.3d 1061 (Md. 2013), as supplemented on denial of reconsideration, 67 A.3d 1175 (Md. 2013).

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[END OF SUPPLEMENT]

§ 18. Radioactive emissions

[Cumulative Supplement]

In the following case involving exposure to radioactive emissions, the court recognized a claim for medical monitoring to detect diseases from such emissions.

In Cook v Rockwell Int'l Corp. (1991, DC Colo) 755 F Supp 1468, claim dismissed (DC Colo) 778 F Supp 512, motion gr, motion den, remanded (DC Colo) 147 FRD 237, where the plaintiffs, who were individuals and businessmen who owned land near a nuclear weapons plant, sought medical monitoring costs for damages allegedly caused by radioactive releases or threatened releases from the nuclear weapons plant, a Federal District Court, although noting that Colorado had "yet to do so," concluded that the Colorado Supreme Court would "probably recognize, in an appropriate case," a tort claim for medical monitoring. In this case, the court granted plaintiffs a 20–day leave to amend their complaint so as to correct a pleading deficiency involving the essential allegation of exposure to a hazardous substance.

CUMULATIVE SUPPLEMENT

Cases:

Although district court properly had subject matter jurisdiction over plaintiffs' claims for medical monitoring for diseases allegedly attributable to plutonium producers' radioiodine (I–131) emissions, under Price-Anderson Act (PAA) providing exclusive means of compensating victims for claims arising out of nuclear incidents, medical monitoring claims were not compensable under PAA as claims for bodily injury, sickness, disease, or death, and thus district court did not have power to grant requested relief because the plaintiffs had not suffered any physical injury. Price–Anderson Act, § 3(q), 42 U.S.C.A. § 2014(q). In re Hanford Nuclear Reservation Litigation, 534 F.3d 986 (9th Cir. 2008), petition for cert. filed (U.S. Aug. 15, 2008).

Although district court properly had subject matter jurisdiction over plaintiffs' claims for medical monitoring for diseases allegedly attributable to plutonium producers' radioiodine (I–131) emissions, under Price-Anderson Act (PAA) providing exclusive means of compensating victims for claims arising out of nuclear incidents, medical monitoring claims were not compensable under PAA as claims for bodily injury, sickness, disease, or death, and thus district court did not have power to grant requested relief because the plaintiffs had not suffered any physical injury. Price–Anderson Act, § 3(q), 42 U.S.C.A. § 2014(q). In re Hanford Nuclear Reservation Litigation, 521 F.3d 1028 (9th Cir. 2008).

Although district court properly had subject matter jurisdiction over plaintiffs' claims for medical monitoring for diseases allegedly attributable to plutonium producers' radioiodine (I–131) emissions, under Price-Anderson Act (PAA) providing exclusive means of compensating victims for claims arising out of nuclear incidents, medical monitoring claims were not compensable under PAA as claims for bodily injury, sickness, disease, or death, and thus district court did not have power to grant requested relief. Price–Anderson Atomic Energy Act, § 11(q), 42 U.S.C.A. § 2014(q). In re Hanford Nuclear Reservation Litigation, 497 F.3d 1005, Prod. Liab. Rep. (CCH) P 17808 (9th Cir. 2007).

Pipe cleaners, who brought personal injury action against oil company for damages stemming from their exposure to naturally occurring radioactive material (NORM), were not entitled to damages for medical monitoring. Lester v. Exxon Mobil Corp., 102 So. 3d 148 (La. Ct. App. 5th Cir. 2012).

In class action by employees and others against manufacturer of nuclear weapons components based on exposure to radiation, plaintiffs would have right to diagnostic testing and case review by competent medical professionals if plaintiffs could prove that defendant exposed them as class to excessive radiation. Such monitoring would be directed toward disease for which plaintiffs were at risk and would only include procedures that are medically prudent in light of that risk (as opposed to measures aimed at general health). Day v NLO (1994, SD Ohio) 851 F Supp 869 (applying Ohio law).

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[END OF SUPPLEMENT]

§ 19. Cigarettes

[Cumulative Supplement]

The court in the following case held that a smoker was not entitled to a court–supervised program of medical monitoring.

CUMULATIVE SUPPLEMENT

Cases:

Allegations by smokers, that they had sustained a present injury in form of objectively observable and identifiable damage to their lung tissues resulting in substantially increased risk of cancer, and that their injury was caused by manufacturer's negligent design of cigarettes, stated claim against manufacturer for future expenses of medical monitoring to detect lung cancer. Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 914 N.E.2d 891 (2009).

Under New York law, heavy smokers or former smokers who lacked symptoms of smoking-related disease did not have independent equitable cause of action against cigarette manufacturer for medical monitoring for such a disease. Caronia v. Philip Morris USA, Inc., 2014 WL 1408458 (2d Cir. 2014) (applying New York law).

Under New York law, heavy smokers or former smokers who lacked symptoms of smoking-related disease did not have independent equitable cause of action against cigarette manufacturer for medical monitoring for such a disease. Caronia v. Philip Morris USA, Inc., 748 F.3d 454 (2d Cir. 2014) (applying New York law).

New York law does not recognize an independent equitable cause of action for medical monitoring for smoking-related diseases such as cancer, by a current or former longtime heavy smoker who has not been diagnosed with smoking-related disease and who is not under investigation by a physician for such a suspected disease. Caronia v. Philip Morris USA, Inc., 22 N.Y.3d 439, 982 N.Y.S.2d 40, 5 N.E.3d 11, Prod. Liab. Rep. (CCH) P 19295 (2013).

New York law does not recognize an independent equitable cause of action for medical monitoring for smoking-related diseases such as cancer, by a current or former longtime heavy smoker who has not been diagnosed with smoking-related disease and who is not under investigation by a physician for such a suspected disease. Caronia v. Philip Morris USA, Inc., 22 N.Y.3d 439, 982 N.Y.S.2d 40, 5 N.E.3d 11, Prod. Liab. Rep. (CCH) P 19295 (2013).

In action by cigarette smoker against tobacco companies, smoker's allegation that her accumulated exposure to cigarette smoke required her to undergo periodic medical monitoring was insufficient to give rise to a negligence claim under Oregon law; smoker failed to allege any injury to her person or property, nor did she identify any duty that companies owned her beyond the common-law duty to exercise reasonable care. Lowe v. Philip Morris USA, Inc., 344 Or. 403, 183 P.3d 181 (2008).

Under Pennsylvania law, smoker was not entitled to court–supervised program of medical monitoring, where two tests she sought, cardiovascular risk assessment and annual physical examinations, would have been recommended for her even if she did not smoke. Barnes v. American Tobacco Co., 161 F.3d 127, Prod. Liab. Rep. (CCH) ¶ 15407 (3d Cir. 1998), cert. denied, 119 S. Ct. 1760 (U.S. 1999).

Under Washington law as predicted by federal district court, flight attendant had no stand–alone "medical monitoring" cause of action against airline based on her exposure to second–hand smoke on international flights; however, flight attendant could pursue medical monitoring costs as remedy for airline's alleged negligence in permitting smoking on those flights, based on alleged existing personal injuries including irritated eyes, sinus and breathing problems, and sore throats. Duncan v.

Northwest Airlines, Inc., 203 F.R.D. 601 (W.D. Wash. 2001) (applying Washington law).

Evidence supported jury's finding that present and former smokers' exposure to manufacturers' tobacco–containing cigarettes did not make it reasonably necessary for the smokers to undergo periodic medical examinations different from what would be prescribed in the absence of exposure, so as to justify denial of smokers' claim for medical monitoring expenses; manufacturers' experts testified that CT scans had no advantage over a simple x–ray in making a lung cancer diagnosis and that there was no scientific basis for the monitoring regimen recommended by smokers' experts. In re Tobacco Litigation, 600 S.E.2d 188 (W. Va. 2004).

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[END OF SUPPLEMENT]

§ 20. Other or unspecified pollutants or hazardous waste

[Cumulative Supplement]

The following authority considered whether plaintiffs were entitled to recovery of damages for the expense of medical monitoring to detect or prevent future disease or conditions arising out of the discharge of pollutants or other hazardous waste not specifically listed in the preceding sections or not specified in the court's opinion.

CUMULATIVE SUPPLEMENT

Cases:

Even assuming that Delaware Supreme Court might recognize medical monitoring as independent cause of action under general state of law, patient could not recover against manufacturer of adulterated heart stent for medical monitoring based on claim that she had developed protein losing enteropathy and plastic bronchitis; stent was not hazardous or toxic substance, patient was not at risk of contracting serious latent disease but risked need for future care, and future care was not to monitor risk of disease but to perform routine oversight. M.G. ex rel. K.G. v. A.I. Dupont Hosp. for Children, 393 Fed. Appx. 884 (3d Cir. 2010).

That homeowners allegedly suffered actual physical injuries, including eye irritation and coughing, from exposure to spray-foam insulation did not preclude homeowners from asserting claims under Pennsylvania law for medical monitoring; homeowners were permitted to plead in the alternative. Fed.Rules Civ.Proc.Rule 8(d)(3), 28 U.S.C.A. Slemmer v. McGlaughlin Spray Foam Insulation, Inc., 955 F. Supp. 2d 452 (E.D. Pa. 2013).

Property owners sufficiently stated common-law claim under Pennsylvania law for medical monitoring against natural gas producers; owners alleged that producers negligently drilled wells and engaged in hydraulic fracturing that used "fracking fluid", the composition of which included hazardous chemicals that were carcinogenic and toxic, that producers utilized other materials, such as diesel fuel, lubricating agents, and defoaming agents that likewise consisting of hazardous chemicals, that such operations were performed within close proximity to their homes, thus exposing them to those hazardous substances, and that they have manifested neurological, gastrointestinal, and dermatological symptoms and blood study results consistent with toxic exposure. Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506 (M.D. Pa. 2010).

Property owners had standing to bring action against current and former owners and operators of an oil refinery for negligence, trespass, public nuisance, private nuisance, unjust enrichment, and medical monitoring causes of action, based on allegation that defendants caused or allowed hazardous petroleum by-products to contaminate their property, although other sources of contamination may have existed and owners could have difficulty proving damages, where owners' harm was traceable to oil byproduct emissions from the refinery, which processed 306,000 barrels of crude oil per day. U.S.C.A. Const. Art. 3, § 2, cl. 1. Parko v. Shell Oil Co., 295 F.R.D. 279 (S.D. Ill. 2013), rev'd, 739 F.3d 1083 (7th Cir. 2014).

Consumers' allegations concerning toxicity of lead, seriousness of diseases caused by exposure to lead, and clinical value of early detection and diagnosis of lead poisoning were sufficient to allege injury in seeking recovery for medical monitoring under California law in action against toy manufacturers and retailers alleging production and sale of toys containing unsafe levels of lead paint, even if consumers did not allege that any children actually ingested lead; because children cannot reasonably be expected to state reliably whether they ingested lead paint, medical monitoring was only way to know whether exposure to lead poisoning was real. In re Mattel, Inc., 588 F. Supp. 2d 1111 (C.D. Cal. 2008) (applying California law).

Allegations of proposed representatives of consumer class that caramel additive contained in two of soft drink manufacturer's beverages was carcinogen known to cause lung tumors in laboratory mice, that one consumer representative drank beverage two to three times per week, that other consumer drank three to four cans of beverage per day, or nearly 30 cans per week, that consumption placed consumers at increased risk of contracting bronchioloalveolar cancer, and that benefits of early medical monitoring were significant, did not adequately allege sufficiency and extent of exposure to additive based on consumption of beverage that created increased risk of contracting that specific type of cancer, as required to state claim against manufacturer under California law for medical monitoring due to toxic exposure; cited study stated that amounts of additive provided to mice were equivalent to average daily dose of 4,000, 80,000, and 170,000 micrograms per kilogram of body weight, while person weighing 60 kilograms who consumed bottle of beverage ingested only 3.3 micrograms of additive per kilogram of body weight, and representatives did not allege what level of exposure created increased risk of cancer. Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045, Prod. Liab. Rep. (CCH) P 19569 (N.D. Cal. 2015) (applying California law).

As predicted by federal district court, Delaware law would permit claim for medical monitoring of patient whose future health was unknown as a result of medical device that was not Food and Drug Administration (FDA) approved being implanted in her heart by medical defendants during controversial procedure to correct patient's congenital heart defect, in light of the medical device being a Class III device subject to premarket approval under the Federal Food, Drug, and Cosmetic Act, the device not having premarket approval, and the patient having direct contact with the device. Federal Food, Drug, and Cosmetic Act, § 513(a)(1)(C), 21 U.S.C.A. § 360c(a)(1)(C). Guinan v. A.I. duPont Hosp. for Children, 597 F. Supp. 2d 517 (E.D. Pa. 2009) (applying Delaware law).

In the absence of a present physical injury, patients, who had so far tested negative for blood-borne diseases, including hepatitis B, hepatitis C, and HIV, or who had not yet been tested, stated claim for negligence against health care facilities, that had used unsafe injection practices, based on the need to undergo ongoing medical monitoring as a result of the unsafe injection practices at facilities; patients sought medical monitoring as a remedy for negligence, and the injury that they alleged was the exposure to the unsafe conditions that caused them to need to undergo medical testing that they would not have needed in the absence of facilities' purported negligence. Sadler v. PacifiCare of Nev., 340 P.3d 1264, 130 Nev. Adv. Op. No. 98 (Nev. 2014).

Former tenants alleged an actionable toxic exposure sufficient to state a claim for medical monitoring under New York law; they alleged that mold caused by water-infiltration was detected in and around the occupied spaces in their apartment complex and that at least some of those exposed to the conditions at the complex had developed exposure-related health conditions. Sorrentino v. ASN Roosevelt Center LLC, 579 F. Supp. 2d 387 (E.D. N.Y. 2008) (applying New York law).

Indian plaintiffs, who sought recovery from United States parent of Indian subsidiary for injuries stemming from pollution resulting from subsidiary's general plant operations, were not entitled to recovery on claims for medical monitoring and remediation under New York law where parent had voluntarily built a hospital in India to satisfy any obligations to plaintiffs, and parent no longer had any connection with the plant. Sahu v. Union Carbide Corp., 418 F. Supp. 2d 407 (S.D. N.Y. 2005) (applying New York law).

Former operator of industrial plant, moving for summary judgment in action by property owners for negligence, public nuisance, and trespass due to discharge of toxic chemicals into ground, failed to establish its entitlement to judgment as matter of law on those portions of owners' claims seeking medical monitoring costs, absent any evidence from operator establishing to reasonable degree of medical certainty that costs of future medical monitoring were not reasonably likely to be incurred as a result of owners' exposure to tricholorethylene (TCE), which was used to clean metal parts at plant and was disposed of by being placed in unlined earthen evaporation pits. Baity v. General Elec. Co., 86 A.D.3d 948, 927 N.Y.S.2d 492 (4th Dep't 2011).

Residents living near beryllium processing plant failed to demonstrate that they had a significantly increased risk of contracting Chronic Beryllium Disease (CBD), a latent disease, and thus were not entitled to recover medical monitoring costs from plant; medical expert testified that beryllium sensitization was a necessary precursor to developing CBD, residents had tested negative for beryllium sensitivity, and there was no evidence that residents were otherwise susceptible to beryllium. Pohl v. NGK Metals Corp., 2007 PA Super 306, 936 A.2d 43 (2007).

Under Pennsylvania law, as predicted by Court of Appeals, community resident who was allegedly exposed to airborne beryllium due to proximity of his residence to facility that extracted beryllium hydroxide and manufactured products containing beryllium could not show that, as a proximate result of his exposure, he had been "sensitized" to beryllium, as required to establish he had significantly increased risk of contracting chronic beryllium disease (CBD) for purposes of medical monitoring claim against facility, absent proof he had developed an abnormal immunologic response to beryllium, namely "beryllium sensitization" (BeS). Sheridan v. NGK Metals Corp., 609 F.3d 239 (3d Cir. 2010) (applying Pennsylvania law).

Under Pennsylvania law, a community resident exposed to beryllium from defendants' plant could not show that he had been "sensitized" to beryllium, so as to establish the "significantly increased risk" of contracting chronic beryllium disease (CBD) required to prevail on a medical monitoring claim, absent proof that he had developed an abnormal immunologic response to beryllium known as "beryllium sensitization" (BeS); exposure alone did not create the requisite "significantly increased risk." Sheridan v. NGK Metals Corp., 614 F. Supp. 2d 536 (E.D. Pa. 2008) (applying Pennsylvania law).

Under Pennsylvania law, as predicted by district court, employee could not show that as a proximate result of his exposure to beryllium, he had a significantly increased risk of contracting chronic beryllium disease, as required to sustain a medical monitoring claim against employer and others, where tests showed that employee had not been sensitized to beryllium. Anthony v. Small Tube Mfg. Corp., 580 F. Supp. 2d 409 (E.D. Pa. 2008) (applying Pennsylvania law).

Patients sufficiently stated Pennsylvania medical monitoring claim against manufacturer of system used to regulate patients' blood temperature during open heart surgeries; patients alleged exposure to nontuberculous mycobacterium greater than normal background levels during the surgeries, that the system aerosolized the bacteria into the operating room, that it was plausible that they were exposed to the bacteria, that the bacteria was a proven hazardous substance, that exposure caused significant risk of contracting a serious latent disease in that exposure to the bacteria commonly resulted in pulmonary or cardiovascular disease and that five individuals who had been exposed to the bacteria after open hear surgeries had died from it, and that a monitoring program would make early detection of the disease possible. Baker v. Deutschland GmbH, 240 F. Supp. 3d 341 (M.D. Pa. 2016)(applying Pennsylvania law).

Former owner of site of public elementary school, which site previously had been used as a dump for residential and commercial waste, was not liable to current and former students and staff of elementary school for medical monitoring, in absence of evidence that students and staff had been exposed to a proven hazardous substance. Acord v. Colane Co., 719 S.E.2d 761 (W. Va. 2011).

Medical-monitoring plan awarded to residents who prevailed on their medical-monitoring claim against owner of zinc smelter facility, in their negligence action arising from environmental contamination caused by the facility's operations, properly included CT scans, though facility owner set forth evidence that CT scans presented more of a cancer risk to the residents than their exposure to arsenic, cadmium, and lead from the smelter. Perrine v. E.I. du Pont de Nemours and Co., 225 W. Va. 482, 694 S.E.2d 815 (2010).

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[END OF SUPPLEMENT]

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Footnotes

1 As to public health remedies generally, see Am. Jur. 2d, Health § 50.

2 See 46 A.L.R.4th 1151.

3 See 50 A.L.R.4th 13.

4 Note, "The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation," 35 Stanford Law Review 575 (1983).

5 Note, "Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims," 63 Indiana Law Journal 849 (1988).

6 For an annotation discussing future disease or condition, or the anxiety relating thereto, as an element of recovery, see 50 A.L.R.4th 13.

7 Gara, "Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards," 12 Harvard Environmental Law Review 265 (1988).

8 See Pollock, "Claims Increase for a No–Injury Medical Testing," The Wall Street Journal, p. B1 (May 12, 1993).

9 See, for example, Carroll v Litton Systems, Inc. (1990, F WD NC) 1993 US Dist LEXIS 16833, § 13[b].

10 See Cook v Rockwell Int'l Corp. (1991, DC Colo) 778 F Supp 512, motion gr, motion den, remanded (DC Colo) 147 FRD 237.

11 See Peterman v Techalloy Co. (1982) 29 Pa D & C3d 104.

12 See Acevedo v Consolidated Edison Co. (1991) 151 Misc 2d 347, 572 NYS2d 1015, affd, mod (1st Dept) 189 App Div 2d 497, 596 NYS2d 68.

[13] See Burns v Jaquays Mining Corp. (1987, App) 156 Ariz 375, 752 P2d 28, review dismd 162 Ariz 186, 781 P2d 1373.

[14] See Stead v F. E. Myers Co., Div. of McNeil Corp. (1990, DC Vt) 785 F Supp 56.

[15] See Ayers v Jackson (1987) 106 NJ 557, 525 A2d 287, 25 Envt Rep Cas 1953, 17 ELR 20858, 76 ALR4th 571.

[16] See Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941.

[17] See City of North Glenn v Chevron U. S. A. Inc. (1982, F DC Colo) Slip Op, Civil Action No. 81–c–44 (available on LEXIS(R)).

[18] See Re Paoli R. Yard PCB Litigation (1990, CA3 Pa) 916 F2d 829, 31 Fed Rules Evid Serv 486, 21 ELR 20184, 17 ALR5th 997, cert den (US) 113 L Ed 649, 111 S Ct 1584, later proceeding (ED Pa) 790 F Supp 94, 35 Envt Rep Cas 1070, 22 ELR 21517, affd without op (CA3 Pa) 980 F2d 724, later proceeding (ED Pa) 1992 US Dist LEXIS 16287, later proceeding (ED Pa) 1992 US Dist LEXIS 18427, later proceeding (ED Pa) 1992 US Dist LEXIS 18428, later proceeding (ED Pa) 1992 US Dist LEXIS 18429, later proceeding (ED Pa) 1992 US Dist LEXIS 18430, later proceeding (ED Pa) 1992 US Dist LEXIS 18431, later proceeding (ED Pa) 1992 US Dist LEXIS 18432, later proceeding (ED Pa) 1992 US Dist LEXIS 18433, later proceeding (ED Pa) 1992 US Dist LEXIS 18434, later proceeding (ED Pa) 1992 US Dist LEXIS 18435, summary judgment gr (ED Pa) 1992 US Dist LEXIS 18436, later proceeding (ED Pa) 1992 US Dist LEXIS 18437, summary judgment gr (ED Pa) 811 F Supp 1071, 23 ELR 20941, where the problem was recognized but the court "intimated no view" thereon.

[19] See Potter v Firestone Tire & Rubber Co. (1990, 6th Dist) 225 Cal App 3d 213, 274 Cal Rptr 885, review gr (Cal) 278 Cal Rptr 836, 806 P2d 308 and reprinted for tracking pending review (6th Dist) 232 Cal App 3d 1114 and reprinted for tracking pending review (6th Dist) 3 Cal App 4th 994, reprinted for tracking pending review (6th Dist) 9 Cal App 4th 881, reprinted for tracking pending review (6th Dist) 15 Cal App 4th 490.

[20] See Miranda v Shell Oil Co. (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532.

[21] See Hagerty v L & L Marine Services, Inc. (1986, CA5 La) 788 F2d 315, reconsideration den, en banc (CA5 La) 797 F2d 256, where a federal appellate court recognized that the single cause of action rule "does not work well" in a medical monitoring case brought under the Jones Act.

[22] See Cook v Rockwell Int'l Corp. (1991, DC Colo) 778 F Supp 512, motion gr, motion den, remanded (DC Colo) 147 FRD 237.

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