

Comparison of Medical Monitoring Elements

- On December 17, 2021, Judge Crawford approved a settlement agreement in the case of *Sullivan v. San Gobain Performance Plastics*. The settlement included a requirement that San Gobain establish and pay for a medical monitoring program for classes of exposed citizens.
- It is not clear from the settlement agreement what specific test that Judge Crawford used in approving medical monitoring.
- However, in 2019 in *Sullivan v. San Gobain* (D. Vt Dec. 27, 2019), Judge Crawford addressed whether Vermont law permits the remedy of medical monitoring, including whether a plaintiff must first suffer physical injury or illness before seeking medical monitoring as a remedy.
- “The court follows the *Bower* [West Virginia] and *Paoli* [Pennsylvania] line of decisions in identifying six elements” for determining if medical monitoring should be awarded as a remedy, but “[i]t is premature to define the exact requirements.” *Sullivan v Saint Gobain*, p.30.
- The list of factors [below] provides a clear guide to the plaintiffs’ burden of proof.” Id. at 31.
- “The choice between permitting and excluding a medical monitoring remedy for potential future illness is a choice between competing values. . . jurisdictions that do not permit the remedy do so on the basis of concerns about unforeseen economic consequences to the defendant . . . jurisdictions that allow the remedy value the potential saving of lives that may be achieved through early detection and treatment.” Id. at 29.
- The court rejected the argument that medical monitoring is unavailable to asymptomatic individuals. Id. at 33.

Elements Plaintiffs Must Demonstrate for the Remedy of Medical Monitoring	
Sullivan, et al. v Saint-Gobain Performance Plastics Corp.	S.113. As Introduced in the Senate
Exposure to a proven hazardous substance.	Exposure to a proven toxic substance.
As the result of tortious conduct of the defendant.	As a result of tortious conduct of the defendant.
Exposure at a rate significantly greater than the general population.	Exposure at a rate significantly greater than the general population
As a proximate result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease.	As a result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease.
The increased risk makes it medically necessary for the plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of the exposure.	The increased risk makes it medically necessary for the plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of exposure
Monitoring procedures exist which are reasonable in cost and safe for use.	Monitoring procedures exist that are reasonable in cost and safe for use.

A. Key Differences in Elements for Demonstration: S. 113 vs. Crawford Decision

1. Hazardous Substance vs. Toxic Substance

- The decision requires exposure to a proven hazardous substance, but does not define “hazardous substance,” which is consistent with court decisions in other jurisdictions.
 - Consequently, whether the substance is hazardous becomes an issue in litigation.
- S.113 requires exposure to a “toxic substance,” and defines what is a “toxic substance” by referencing existing lists of substances.
 - The S.113 definition of “toxic substance” does include a category of substances where “exposure to the substance is shown by expert testimony to increase the risk of developing a latent disease.”
- The S.113 definition of “toxic substance” also excludes: 1) pesticides application according to good practices and conformity with the law; 2) and ammunition and its components. The decision does not provide for either exclusion.

2. Exposure by Any Defendant vs. Exposure by Owner or Operator of a Large Facility

- The decision provides that medical monitoring may be sought from any person/defendant who exposed the plaintiff to the hazardous substance.
- S.113 provides that medical monitoring may be sought under the statute only against the owner or operator of a large facility from which the toxic substance was released.
 - “Large facility” means a facility: (A) where an activity within a Standard Industrial Classification code of 10 through 14, 20 through 39, 40 through 42, 44 through 46, or 49 is conducted or was conducted; and (B)(i) where 10 or more full-time employees have been employed at any one time; or (ii) that is owned or operated by a person who, when all facilities or establishments that the person owns or controls are aggregated, has employed 500 employees at any one time.
 - The S.113 definition of “facility” excludes municipally owned properties. The decision does not.

B. Controlling Nature or Weight of Decision

- Generally, federal district court decisions addressing State law are not binding on State courts. “It is axiomatic that the decision of the federal district court is not binding precedent upon [the Vermont Supreme Court.]” *State v. Austin*, 165 Vt 389, 394 (1996).
- “Nonetheless, a state court for prudential and policy reasons, should give due respect to the decisions of lower federal courts, particularly on questions involving the U.S. Constitution.” *Id.*
- The General Assembly, the Vermont Supreme Court, and the lower Vermont courts have not previously addressed medical monitoring damages as a form of relief for asymptomatic plaintiffs.
- Consequently, Vermont courts could issue a decision in conflict, in whole or in part, with the decision and settlement in *Sullivan v. Saint Gobain*. Similarly, the General Assembly can legislate in a manner consistent with the decision.