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JUDICIALLY SANCTIONED ENVIRONMENTAL INJUSTICE: MAKING THE CASE FOR MEDICAL MONITORING

Logan Glasenapp*

ABSTRACT

Across the United States, families are getting ready to start their day. The kids are waking up and brushing their teeth, the toast is being buttered, and the newspaper is being retrieved from the curb. However, in some communities this scene is playing out against the backdrop of a toxic legacy dating back to the American industrial revolution. In the South Valley of Albuquerque, New Mexico, families are waking up to the smell of gasoline and the sound of idling trains. Around the harbor in New Bedford, Massachusetts, families are unable to sit down to a locally-sourced seafood dinner. And in Rockford, Michigan, families are driving to Wal-Mart to purchase yet another case of bottled water because their wells are still unusable. Any of these families, however, wishing to receive regular medical screenings for diseases caused by exposure to toxic or hazardous substances will need to pay for those screenings themselves. Despite a well-articulated and enforced “polluter pays principle,” the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not provide private recovery for preventive medical care. This article explores the federal judicial decisions that have deprived communities of an ability to protect themselves from the long-term, often latent, health effects of toxic exposure; provides a broad survey of various state common law approaches; and suggests possible avenues to address this problem without fundamentally changing the regulatory or enforcement scheme of CERCLA.

I. INTRODUCTION

Joel Stelt died on March 26, 2016, at the age of 61 of liver cancer.¹ Joel's wife, Sandy Wynn-Stelt, received visitors from the Michigan Department of Environmental Quality seventeen months later informing her that a nearby hazardous waste dump had contaminated her groundwater with perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA).² At the time, Ms. Wynn-Stelt's groundwater well was contaminated with 37,800 parts-per-trillion of a combination of PFOS and PFOA, or 540 times what the United States Environmental Protection Agency advises as safe.³ Another neighbor of the Wolverine site recently took her 5-year old daughter to get a blood test, with the results coming back negative for PFOA/PFOS.⁴ But she said "That's today. Do we have to do this once a year from now on? Do we wait five years? How long until we can be comfortable with, 'OK, they are free and clear.' The question will forever be in our heads."⁵ To be fair, the company did provide most families with at least a case of bottled water and gift cards to a local grocery store.⁶ Another neighbor of the Wolverine site was worried for her son, wondering if, "[i]n 30 years, when my son has hypertension . . . every disease under the sun because of this," Wolverine will pay for his healthcare.⁷

The residents of this Michigan community will likely bring legal action against Wolverine for its role in contaminating their wells. This legal action could take the form of a cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁸ Chapter 7 of the Michigan Natural Resources and Environmental Protection Act,⁹ or state common-law. Unfortunately for these residents, CERCLA has been traditionally interpreted to bar medical monitoring as a necessary cost of recovery¹⁰ and their state courts do not recognize medical monitoring as a cause of action absent a present physical injury.¹¹ Concededly, the Michigan Department of Environmental Quality has historically

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1. Garret Ellison, *Cancer, thyroid problems plague Wolverine dump neighbors*, GRAND RAPID NEWS (Oct. 1, 2017), http://www.mlive.com/news/grand-rapids/index.ssf/2017/10/house_street_dump_neighbors.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. 42 U.S.C. §§ 9601–9675 (2012).

9. MICH. COMP. LAWS §§ 324.20101–324.20142 (2017).

10. See *infra* Part IV.

11. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 690 (Mich. 2005).

funded pilot medical monitoring programs.¹² However, these programs are funded through state taxes and not by the responsible polluters.¹³

This article provides the history of environmental injustice created by both legislative and judicial inaction in remedying the toxic footprint of our country's industrial past, present, and future. Part II provides a broad-strokes background of CERCLA, detailing the poor draftsmanship and narrow interpretation of CERCLA's "necessary costs of response" provision. Part III provides a general background of medical monitoring within the hazardous and toxic substance exposure context to introduce the judicial and legislative chasm in hazardous and toxic waste law.¹⁴ Part IV provides an analysis of court opinions whose narrow interpretations of CERCLA have resulted in denying medical monitoring damages to plaintiffs exposed to toxic or hazardous substances. Part V, in turn, analyzes various state common law tort actions that have largely failed to provide adequate remedies to victims of toxic and hazardous exposure, due either to narrow interpretation or the creation of insurmountable burdens of proof for claims for medical monitoring. Finally, Part VI provides a solution to these issues: CERCLA's polluter pays principle must be broadened by Congressional action to include costs of medical monitoring for communities exposed to toxic and hazardous substances.

II. CERCLA BACKGROUND

The Comprehensive Environmental Response, Compensation, and Liability Act, familiarly known as CERCLA, was passed in 1980. Notably, CERCLA has a certain notoriety among courts and litigants for being so poorly drafted as to require courts to often supply their own definitions.¹⁵ In the waning days of the Carter administration, Congress rushed to get a waste cleanup bill to the president's desk.¹⁶ The original Senate bill 1480 contained language providing for recovery of medical costs and damage to personal property.¹⁷ To the chagrin of future medical monitoring plaintiffs, this language was ultimately removed through the Randolph-Stafford amendment that allowed the bill to pass the Senate.¹⁸ The passage of the Randolph-Stafford amendment led Senator Randolph to reflect, "[w]e have deleted the federal

12. *Id.* at 699–701.

13. *Id.* at 714 (dissenting opinion).

14. This topic was heavily discussed following the Superfund Amendments and Reauthorization Act of 1986 (SARA) and the subsequent attempts at damages claims have, since the mid-1990s, fallen mostly silent.

15. See, e.g., *Artesian Water Co. v. Gov't of New Castle Cty.*, 851 F.2d 643, 648 (3rd Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area.")

16. *Id.*

17. A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONG. RESEARCH SERV., LIBRARY OF CONG., FOR THE S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97th Cong., 2d Sess. (Comm. Print 1983) (Hereafter CERCLA LEGISLATIVE HISTORY), 168–70.

18. See J.P. Sean Maloney, *A Legislative History of Liability Under CERCLA*, 16 SETON HALL LEGIS. J. 517, 530 (1992).

cause of action for medical expenses or property or income loss.”¹⁹ As will be remembered *ad nauseam* throughout this article, this seemingly innocent reflection from Senator Randolph is one of the pillars of judicial interpretation finding that medical monitoring is not a “necessary cost of response” under CERCLA.²⁰

Congress passed CERCLA largely in response to the disaster at Love Canal, New York, which caused 240 families to abandon their homes after finding toxic and hazardous sludge seeping into their basements.²¹ The story of Love Canal is most likely familiar to anyone reading this article,²² and it is considered within the ranks of notorious environmental disasters like Chernobyl, Bhopal, and Deepwater Horizon.²³ Realizing the complete lack of response authority and liability under the Resource Conservation and Recovery Act, Congress sprang into action to pass what we know today as CERCLA, or the Superfund law.²⁴

CERCLA has an incredibly broad reach of liability. The statute imposes strict liability, joint and several liability, and retroactive liability.²⁵ CERCLA, in its simplest form, can be boiled down to a single principle: “polluter pays.”²⁶ CERCLA created rights of action for the federal government, state governments, tribal governments and private citizens for cost recovery actions and for potentially responsible parties (PRPs) for either cost recovery or contribution actions.²⁷ This polluter pays concept rings true through most of the regulatory scheme of CERCLA and in its application over the past three decades. Conversely, it falls flat within the realm of community-wide medical monitoring. With very limited exceptions, private citizens exposed to toxic or hazardous substances do not have the ability to make the polluter pay for medical monitoring programs.²⁸

Section 107 of CERCLA establishes the well-known categories of PRPs: (1) owner and operator;²⁹ (2) former owner and operator;³⁰ (3) arranger;³¹ and (4) transporter.³² All four of these categories are liable for “all costs of removal or remedial action incurred by the United States,” or—and most importantly for this

19. Statement of Sen. Jennings Randolph, 126 Cong. Rel. S14964 (daily ed. Nov. 24, 1980); CERCLA Legislative History, *supra* note 17, at 681, 685.

20. *See infra* Part IV.

21. Colin Crawford, *Medical Monitoring and the Future of CERCLA: Reinvigorating the Superfund Law's Consequentialist Purpose*, 28 ARIZ. ST. L.J. 839, 845 (1996).

22. For those not familiar with the story, the author suggests LOIS MARIE GIBBS, LOVE CANAL: AND THE BIRTH OF THE ENVIRONMENTAL HEALTH MOVEMENT (updated ed. 2011).

23. *Id.* at 1.

24. *See generally* Maloney, *supra* note 18.

25. *See id.* at 536–542.

26. Thomas J. Braun, *Cleaning up the Comprehensive Environmental Response, Compensation, and Liability Act*, 58 FED. LAW. 54, 54 (2011).

27. Ronald G. Aronovsky, *Foreward: CERCLA and the Future of Liability-Based Environmental Regulation*, 41 SW. L. REV. 581, 582–83 (2012).

28. *See infra* Parts IV (a vast majority of courts have found that medical monitoring is not recoverable under CERCLA) and V (some state courts have allowed medical monitoring claims to proceed either as a separate cause of action in tort or as a remedy to negligence).

29. 42 U.S.C. § 9607(a)(1) (2012).

30. 42 U.S.C. § 9607(a)(2) (2012).

31. 42 U.S.C. § 9607(a)(3) (2012).

32. 42 U.S.C. § 9607(a)(4) (2012).

article—”any other necessary costs of response incurred by any other person consistent with the national contingency plan.”³³ Congress did not define “necessary costs of response,” however, thereby requiring courts to supply their own definition.³⁴

III. MEDICAL MONITORING

It is important at this juncture to provide a definition of and limitation to “medical monitoring.” Following the lead of the *Brewer* court, discussed below, this article views medical monitoring as a community-wide program used to early diagnose diseases caused by exposure to hazardous or toxic substances.³⁵ Medical monitoring does not mean individual medical treatment for diseases which have already manifested. Further, medical monitoring is similar to, but quite distinct from medical screening or medical surveillance.³⁶ A common thread running through the state court opinions is the issue that diseases caused by exposure to toxic or hazardous substances often have long latency periods and plaintiffs risk running afoul of statutes of limitations or the single-action doctrine if they wait for manifestation of injuries.³⁷ Statutes of limitations and the single-action doctrine illustrate just how complex this question is and why it has been a difficult question to answer for many courts. By narrowly defining medical monitoring to community-wide programs designed to detect diseases earlier but not to provide for treatment of those diseases, this article avoids the issue of having the term confused for “personal medical expenses,” which are clearly not included in CERCLA liability.³⁸

To fall within the definition of “necessary costs of response,” medical monitoring would be available only to communities directly exposed to hazardous or toxic substances. These communities could be within the vicinity of a site on the National Priorities List (NPL), or meet the requirements of “any other person” under CERCLA Section 107.³⁹ These communities, however, would receive the benefits of diagnosing a disease like asbestosis, mesothelioma, or any variety of cancers linked to hazardous substances.⁴⁰ Longer life expectancy, increased likelihood of

33. 42 U.S.C. § 9607(a)(4)(A)–(B) (2012); *see also* 42 U.S.C. § 9607(a)(4)(C)–(D) (2012) (PRPs are also liable for natural resources damages and any costs incurred by the ATSDR in conducting health assessments or a health effects study).

34. *See generally* Joel W. Reese & Michael C. Wright, *Defining “Necessary Costs of Response” under CERCLA*, 29 ST. B. TEX. ENVTL. L.J. 113 (1999).

35. *See* David Vearrier & Michael I. Greenberg, *The implementation of medical monitoring programs following potentially hazardous exposures: a medico-legal perspective*, 55 CLINICAL TOXICOLOGY 956, 957 (2017) (defining medical monitoring as “periodic medical testing to screen people at significant risk for disease.”).

36. *Id.* (“Medical monitoring is distinguished from medical screening and medical surveillance in its intent. Medical monitoring aims to identify indicia of disease in a population at significantly increased risk of disease *due to a past exposure* so as to benefit the individual being screened.” (emphasis added)).

37. *See infra* Part V.

38. This term will become nauseatingly familiar throughout this article, as it has plagued medical monitoring claimants for decades.

39. 42 U.S.C. § 9607(a)(4)(B) (2012).

40. *See, e.g.*, Rachel M. Ostroff, et al., *Early Detection of Malignant Pleural Mesothelioma in Asbestos-Exposed Individuals with a Noninvasive Proteomics-Based Surveillance Tool*, 7 PLOS ONE 1 (2012); Heidi C. Roberts, et al., *Screening for Malignant Pleural Mesothelioma and Lung Cancer in*

recovery, higher qualities of life, mental and emotional health security, the list of benefits goes on.⁴¹

A common complaint lodged against medical monitoring is that it would be unfair to defendants to force them to pay for medical monitoring for everyone exposed to these substances, because they would have undoubtedly provided monitoring to a person who maybe would have never developed the disease.⁴² This complaint carries some of the classic complaints against CERCLA, that it is an unfair statute on the regulated community.⁴³ Some courts have found this a convincing policy argument and have thus corrupted and will continue to corrupt the original intent of CERCLA. CERCLA was enacted in response to an environmental and public health catastrophe unseen in modern United States history and was enacted with the goals of protecting the public health as well as the environment through the “polluter pays” principle.⁴⁴ As a remediation statute, it should be constructed broadly but courts have instead erected obstacles to recovery based on protecting PRPs with possibly clean hands.⁴⁵ The “polluter pays” principle stands anathema to this judicial philosophy and should be wielded as a tool to recover the costs of medical monitoring, regardless of the ultimate health outcomes of those exposed to hazardous or toxic substances.

IV. MEDICAL MONITORING UNDER CERCLA

Pursuant to CERCLA, the Agency for Toxic Substances and Disease Registry (ATSDR) may provide medical monitoring to communities “in cases of public health emergencies caused or believed to be caused by exposure to toxic substances.”⁴⁶ The inclusion of this discretionary function of the ATSDR has led most courts, when faced with the question, to determine that medical monitoring is not a “necessary cost of response.”⁴⁷ The ATSDR, however, does not have a very

Individuals with a History of Asbestos Exposure, 4 J. OF THORACIC ONCOLOGY 620 (2009); see also *Mesothelioma Life Expectancy and Early Detection*, MESOTHELIOMAHHELP.ORG, <https://www.mesotheliomahelp.org/mesothelioma/prognosis/life-expectancy/> (last visited Nov. 11, 2018).

41. See, e.g., Bernard Levin, et al., *Screening and Surveillance for the Early Detection of Colorectal Cancer and Adenomatous Polyps, 2008: A Joint Guideline from the American Cancer Society, the US Multi-Society Task Force on Colorectal Cancer, and the American College of Radiology*, 134 GASTROENTEROLOGY 1570 (2008); Monika Nothacker, et al., *Early detection of breast cancer: benefits and risks of supplemental breast ultrasound in asymptomatic women with mammographically dense breast tissue. A systemic review.*, BMC CANCER 2009, 9:335, (Sept. 20, 2009) at 1–2; see also Richard Mayeux, *Biomarkers: Potential Uses and Limitations*, 1 NEURORX: THE J. OF THE AM. SOC’Y FOR EXPERIMENTAL NEUROTHEAPEUTICS 182 (2004).

42. See *infra* Part V.

43. See Crawford, *supra* note 21.

44. Carmen E. Sessions, *Medical Monitoring Awards Under CERCLA: Statutory Interpretation Versus Fundamental Fairness*, 8 S.C. ENVTL. L.J. 81, 81 (1999).

45. See *infra* Part V.

46. 42 U.S.C. § 9604(i)(1)(D) (2017).

47. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990), *vacated on other grounds*, 793 F. Supp. 898 (D. Minn. 1992); *Coburn v. Sun Chemical Corp.*, No. 88-0120, 1988 U.S. Dist. LEXIS 12548 (E.D. Pa. Nov. 9, 1988) (“Certainly, when Congress wanted to provide for medical care and testing, it knew how to do so in explicit language.”).

long history of providing medical monitoring for communities. The criteria used by ATSDR to determine if medical monitoring is warranted was first published in the Federal Register in 1995, probably in response to the Hanford Nuclear Reservation emergency in Washington state.⁴⁸ ATSDR's determination mechanism has two phases, with seven criteria total.⁴⁹ The availability of medical monitoring under CERCLA Section 104 leads to one of two conclusions for courts. First, Congress knew what it was doing when it left medical expenses out of Section 107.⁵⁰ Second, the policy argument laid out by many plaintiffs for medical monitoring response costs is misplaced because they could be seeking medical monitoring from the ATSDR.⁵¹

The consensus among courts that have addressed the question of whether medical monitoring is a "necessary cost of response" under CERCLA is that these costs are not recoverable.⁵² While most of the cases reaching this conclusion are from federal district courts, the Tenth Circuit put a proverbial lid on CERCLA medical monitoring claims in 1992 with its decision in *Daigle*.⁵³ There are a number of decisions on motions to dismiss or motions for summary judgment that have allowed claims for medical monitoring to proceed without reaching a conclusion on the merits.⁵⁴ One federal court has held that costs of medical monitoring may be recoverable under CERCLA, and it is one of the earliest cases in the line that has

48. ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA, 60 Fed. Reg. 38,840 (Jul. 28, 1995) [hereinafter ATSDR's Final Criteria]. The ATSDR, two years later, released its final decision to create a medical monitoring program for the community around the Hanford site. *Press Release Announcement of ATSDR's Decision on Medical Monitoring for Hanford, CENTERS FOR DISEASE CONTROL AND PREVENTION*, <https://www.cdc.gov/media/pressrel/radiat1.htm> (last visited Nov. 11, 2018).

49. ATSDR's Final Criteria, *supra* note 48. (Phase 1: (1) documented exposure; (2) "well-defined, identifiable target population;" and (3) documented human health research showing association between an exposure and a specific adverse health effect. Phase 2: (4) monitoring should be directed at detecting adverse health effects that are consistent with scientific and medical knowledge; (5) "general requirements for a medical screening program should be satisfied;" (6) a treatment program must exist; and (7) "[t]he logistics of the system must be resolved before the program can be initiated.").

50. *Coburn*, 1988 U.S. Dist. LEXIS 12548 at *12–13.

51. *Daigle*, 972 F.2d at 1536–37.

52. *See, e.g.*, *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992); *Price v. United States Navy*, 818 F. Supp. 1322 (S.D. Cal. 1992); *Woodman v. United States*, 764 F. Supp. 1467 (M.D. Fla. 1991); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990) vacated on other grounds, 793 F. Supp. 898 (D. Minn. 1992); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233 (M.D. Pa. 1990); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413 (M.D. Pa. 1989); *Coburn v. Sun Chemical Corp.*, No. 88-0120, 1988 U.S. Dist. LEXIS 12548 (E.D. Pa. Nov. 9, 1988); *Wehner v. Syntex Corp.*, 681 F. Supp. 651 (N.D. Cal. 1987).

53. 972 F.2d 1527. There have been no real CERCLA medical monitoring claims brought since 1992, and a distinct trend towards plaintiffs seeking medical monitoring cost recovery through state common law actions.

54. *See Williams v. Allied Automotive Autolite Div.*, 704 F. Supp. 782 (N.D. Ohio 1988) (holding that costs of medical monitoring not categorically unrecoverable as long as plaintiff's meet the burden of proving such costs are necessary and consistent with the NCP); *Lykins v. Westinghouse Electric Corp.*, No. 85-508, 1988 U.S. Dist. LEXIS 3609 (E.D. Kan. Feb. 29, 1988) (denying motion to dismiss medical monitoring CERCLA claims); *Adams v. Republic Steel Corp.*, 621 F. Supp. 370 (W.D. Tenn. 1985) (denying motion to dismiss for lack of jurisdiction); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (denying motion to dismiss CERCLA medical monitoring claims).

created the ultimate general rule of refusing recovery for medical monitoring.⁵⁵ The beginning of CERCLA medical monitoring case law feinted a bright future for communities exposed to toxic and hazardous substances, but that idea was quickly squelched by the deluge of cases refusing to grant medical monitoring cost recovery. For all intents and purposes, CERCLA medical monitoring cost recovery has been a fruitless venture since 1992.

A. *Chaplin v. Exxon Corporation*

The earliest case facing the question of medical monitoring cost recovery came out of the Southern Texas District Court in 1986.⁵⁶ While not providing a rich analysis for the purposes of a journal article, this case inspired the court in *Coburn* (discussed below), which led to an overwhelming majority of courts finding that medical monitoring costs are not recoverable under CERCLA. In *Chaplin*, a purported class of plaintiffs brought suit against a list of corporate defendants.⁵⁷ The defendants generated or transported toxic substances to a number of waste sites in the eastern half of Harris County, Texas.⁵⁸ In quick succession and with little discussion, the court reasoned that: (1) early drafts of CERCLA contained a cause of action for medical expenses, but the enacted law did not; (2) Congress created medical cost recovery by creating the Agency for Toxic Substances and Disease Registry; and (3) plaintiffs have not actually incurred any costs to even submit that evidence for recovery.⁵⁹ Following this reasoning, the court granted defendants' motion to dismiss the CERCLA claims, holding that the statute did not contain a cause of action for medical monitoring cost recovery.⁶⁰

A cornerstone of the analysis in this case, and a theme that is consistent among courts rejecting medical monitoring cost recovery claims, is a short quote from the legislative history from former Senator Jennings Randolph.⁶¹ The quote simply says, "[w]e have deleted the federal cause of action for medical expenses or property or income loss."⁶²

B. *Brewer v. Ravan*

This case did not find former Senator Randolph's quote as evidence of a categorical bar to medical monitoring cost recovery, but as a limitation and standard setting statement for plaintiffs in the future seeking medical monitoring. The *Brewer* court's careful analysis and detailed interpretation has not been followed by many courts, but readers may find it the most humanely compelling interpretation of Section 107.

Former employees of a capacitor manufacturing plant in Waynesboro, Tennessee, brought suit against the current and former owners of the property as well

55. *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988).

56. *Chaplin v. Exxon Co.*, No. H-84-2524, 1986 U.S. Dist. LEXIS 24438 (S.D. Tex. June 10, 1986).

57. *Id.* at *1-2.

58. *Id.* at *2.

59. *Id.* at *4-12.

60. *Id.* at *12.

61. *Id.* at *5-6.

62. 126 CONG. REC. S14964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph).

as the United States Environmental Protection Agency (EPA).⁶³ The manufacturing plant is now the Mallory Capacitor Superfund Site.⁶⁴ According to the site's information page, groundwater is contaminated with polychlorinated biphenyls (PCBs), trans-1, 2-dichloroethylene, and trichloroethylene (TCE).⁶⁵ Plaintiffs brought suit alleging violations of CERCLA, the Resource Conservation and Recovery Act (RCRA), the Clean Water Act, and the Toxic Substances Control Act (TSCA).⁶⁶ Invoking CERCLA Sections 107(a)(1)(B) and (a)(2)(B), plaintiffs sought to recover the costs of a medical monitoring program to facilitate early diagnosis of diseases caused by exposure to PCBs and other toxic substances.⁶⁷ Defendants, arguing that plaintiffs had not incurred any recoverable response costs under the statute, moved to dismiss the CERCLA claims.⁶⁸

In his opinion, Chief Judge Wiseman, Jr., took an approach that arguably led to the ultimate rejection of CERCLA medical monitoring claims. By parsing the words of CERCLA, the opinion found that there are different standards for monitoring of soil or groundwater for contamination, community-wide medical monitoring with an eye to public health and welfare, and private individualized medical care.⁶⁹ Although this approach was novel and should have led to more openness for medical monitoring claims, it had the reverse effect of raising the bar for pleadings and ultimately closed the door on recovery at all. The heart of this opinion is the discussion of the differences between medical expenses and medical monitoring. Holding that costs "to assess the effect of the release or discharge on public health or to identify potential health problems presented by the release" are recoverable under CERCLA whereas costs "in the treatment of personal injuries or disease" are not, the court created its own definition of "necessary costs of response."⁷⁰ The court ultimately dismissed plaintiffs' claims to the extent they sought civil or injunctive relief,⁷¹ but held as cognizable claims those seeking recovery for necessary costs of response related to assessing the effect of the release on public health or to identify potential health problems.⁷²

The lack of a clear definition of this phrase is by far the largest obstacle for plaintiffs seeking CERCLA medical monitoring costs. Until Congress amends CERCLA to clarify its intent, plaintiffs will continue to be plagued by shoddy draftsmanship in a rushed piece of legislation.⁷³ The *Brewer* court seemed to

63. *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988).

64. *See Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F. Supp. 549 (M.D. Tenn. 1987) (This is a cost recovery action under CERCLA brought by Emhart as the current owners against Duracell as the former owner. Mallory Capacitor Co. was a subsidiary of Duracell at the time of Duracell's ownership.).

65. *Mallory Capacitor Co. Waynesboro, TN Contaminant List*, EPA, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.contams&id=0403783> (last visited Nov. 9, 2018).

66. *Brewer*, 680 F. Supp. at 1178.

67. *Id.* at 1178–79.

68. *Id.* at 1178.

69. *Id.* at 1178–1180.

70. *Id.* at 1179.

71. *Id.* at 1180.

72. *Id.* at 1179–80.

73. *See Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3rd Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous

approach this question with a sense of humanity and compassion for victims of hazardous and toxic pollution and used Congressional vagueness to find in favor of sound medical science.⁷⁴ The trend in this realm, since the *Brewer* decision, has been to see Congressional vagueness and an off-hand quote from former Senator Jennings Randolph as evidence that Congress did not intend to allow medical monitoring cost recovery under CERCLA.

Because of the next two cases discussed, plaintiffs have been forced to seek medical monitoring through the ultra-expensive, litigious, contentious, and drawn out claim processes of toxic torts. This had led to an imbalance between clearly negligent or intentional polluters and the innocent victims living in the immediate areas around these toxic sites. The way to balance the scales in instances of toxic or hazardous substance exposure is to amend CERCLA to allow medical monitoring cost recovery, but with the gridlock in Washington it seems like the most farfetched possibility raised in this article.

C. Coburn v. Sun Chemical Corporation

This class action consisted of “all persons who were exposed to well water contaminated with TCE and other hazardous substances” released by defendants’ actions.⁷⁵ Along with a CERCLA claim for medical monitoring, the plaintiffs sought groundwater well monitoring under CERCLA.⁷⁶ Following the arc of the legislative history and balancing policy arguments, the court ultimately rejected the claim for medical monitoring but allowed the claim for groundwater monitoring to carry on.⁷⁷ The court stated its task on this question succinctly: “whether costs of medical screening and/or future medical monitoring constitute ‘necessary costs of response’ under CERCLA.”⁷⁸

The court acknowledged that “necessary costs of response” is not a defined term in the statute.⁷⁹ The court then underwent the kind of definitional chain-making and gymnastics for which CERCLA is notorious.⁸⁰ “Response” is defined as “remove, removal, remedy, and remedial action.”⁸¹ “Remove” and “remedy” are both defined in Section 101, as well.⁸² Remedies tend to be thought of as long-term solutions to address the drawn out impacts of hazardous or toxic pollution, whereas removals tend to be thought of as immediate actions taken to stop, slow, or contain the spread of pollution.⁸³ The concept of medical monitoring, logically, seems to

ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act’s use of inadequately defined terms, a difficulty particularly apparent in the response costs area.”)

74. *Brewer*, 680 F. Supp. at 1179.

75. *Coburn v. Sun Chemical Corp.*, No. 88-0120, 1988 U.S. Dist. LEXIS 12548, at *1 (E.D. Penn. Nov. 9, 1988).

76. *Id.* at *3.

77. *Id.* at *38.

78. *Id.* at *6.

79. *Id.*

80. *See id.* at *6–7.

81. 42 U.S.C. § 9601(25) (2012).

82. 42 U.S.C. § 9601(23)–(24) (2012).

83. *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1576 (E.D. Pa. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985).

indicate a long-term solution to address the drawn out impacts of pollution. Despite this, courts have traditionally analyzed CERCLA to determine if medical monitoring costs should be considered within the definition of “remove” or “removal action,” rather than the definition of “remedy” or “remedial action.”⁸⁴ The *Coburn* court did not reach this step in its analysis, opting to rely on the analysis of *Chaplin*.⁸⁵

Following the example set in *Chaplin*, the court looked to the legislative history to determine whether Congress intended medical monitoring costs to be considered a “necessary costs of response.”⁸⁶ The court explained that previous drafts of CERCLA contained provisions for medical cost recovery, but at the eleventh hour of debate those provisions were scrapped in order to strike a compromise and pass the bill.⁸⁷ This intentional deletion of medical cost recovery provisions, according to the court, showed that Congress did not intend for medical costs to be recoverable.⁸⁸ Following the interpretation of previous courts, and setting the foundation for the most common reasoning of future courts, this court leaned heavily upon one specific line in the legislative history to reach its holding that medical monitoring costs are not recoverable under CERCLA.⁸⁹ “[w]e have deleted the federal cause of action for medical expenses or property or income loss.”⁹⁰ This statement has plagued medical monitoring plaintiffs for almost three decades, and will continue to plague them until Congress provides clarity to CERCLA.

Interestingly, the *Coburn* court recognized that resting wholly upon that statement from the legislative history was an unpersuasive position in light of the *Brewer* court’s precise analysis.⁹¹ The *Coburn* court found *Chaplin* more persuasive, ultimately, because of its definitional chain making which concluded that CERCLA contemplates only the removal of toxic substances *from the environment* not from *the population*.⁹² Because the only possible language that could signal monitoring cost recovery is contained within the definition of “remove,” and the larger statutory scheme is for removing toxic substances from the environment, any monitoring contemplated by the definition of “remove” must be for things like soil or groundwater monitoring.⁹³ Finally, *Coburn* followed one more precedent that comes up often in CERCLA medical monitoring cases, the creation of the ATSDR in SARA.⁹⁴ Congress considered medical cost recovery under the statutory scheme and put it within the authorities of ATSDR, not as a cause of action under Section 107, according to the court.⁹⁵ This case has produced a meager progeny which has found

84. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992); *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988).

85. *Coburn*, 1988 U.S. Dist. LEXIS 12548, at *11.

86. *Id.* at *9.

87. *Id.* at *8.

88. *Id.* at *17–18.

89. *Id.* at *18.

90. 126 Cong. Rec. 30932 (statement of Sen. Randolph).

91. See *Coburn*, 1988 U.S. Dist. LEXIS 12548, at *14–16.

92. *Id.* at *16.

93. See *Id.* at *17.

94. See *id.* at *12 (citing *Chaplin v. Exxon Co.*, No. H-84-2524, 1986 U.S. Dist. LEXIS 24438, at *8–9 (S.D. Tex. June 10, 1986)).

95. *Id.*

it sufficient to merely say “[r]ather than add unnecessarily to the length of this [m]emorandum, the court will simply adopt the rationale of the *Coburn* court as its own.”⁹⁶

D. *Daigle v. Shell Oil Company*

For those familiar with the CERCLA Hall of Fame, the legacy of the Rocky Mountain Arsenal is a well-known story. The Arsenal was operated by the United States Army for decades to manufacture chemical agents, products, and incendiary munitions.⁹⁷ This case concerned the Army’s use of Basin F as a hazardous waste surface impoundment.⁹⁸ Shell Oil also used Basin F to impound residual waste from its production of herbicides and pesticides.⁹⁹ The toxic legacy at the Arsenal has been well-documented and litigated.¹⁰⁰ Unlike other litigation concerning the Arsenal, this case was not a dispute over CERCLA liability or responsibility of potential parties, it was a dispute over the airborne odors and pollutants that were stirred up during the cleanup of the site.¹⁰¹ Neighbors of the Arsenal brought suit against Shell and the United States for the combined role in causing noxious fumes and airborne hazardous substances to be stirred up.¹⁰²

Among other claims, the plaintiffs sought the establishment of a judicially-administered medical monitoring fund, to be funded by the defendants.¹⁰³ They asserted that the fund was necessary “to assist plaintiffs . . . in the prevention or early detection and treatment of chronic disease.”¹⁰⁴ This was the first time a United States court of appeals was faced with this question, and the Tenth Circuit followed a familiar line of reasoning to reach its holding.¹⁰⁵ First, the court reminded us all of the confusing mess that is CERCLA.¹⁰⁶ Because Congress did not clearly define “necessary costs of response,” the court was required to look at the other parts of the statute and case law from district courts in determining whether the term included the type of relief sought by plaintiffs.¹⁰⁷ Next, the court established the chain of definitional interpretation necessary to lay some form of foundation for its analysis.¹⁰⁸ While addressing the plaintiffs’ contentions that the definitions of “removal” and “remedial” include language on monitoring and the “public health

96. *E.g.*, *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 418 (M.D. Pa. 1989); *accord.* *Woodman v. United States*, 764 F. Supp. 1467, 1469 (M.D. Fla. 1991) (“Rather than add unnecessarily to the length of this Order, the Court adopts that portion of [*Coburn*] which discusses CERCLA response costs.”).

97. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1531 (10th Cir. 1992).

98. *Id.*

99. *Id.*

100. *See, e.g.*, Rachel E. Salcido, *The Rocky Mountain Arsenal National Wildlife Refuge: On a Rocky Road to Creating a Community Asset*, 47 J. MARSHALL L. REV. 1401 (2014).

101. *Daigle*, 972 F.2d at 1532.

102. *Id.* at 1530, 1532.

103. *Id.* at 1532–33.

104. *Id.* at 1533.

105. *See id.*

106. *Id.* (“In keeping with its notorious lack of clarity . . .”)

107. *Id.* at 1533–34

108. *Id.* (“A ‘response’ is a ‘removal action’ or a ‘remedial action.’” The Court then provided the definitions of “removal action” and “remedial action.”)

and welfare,” the court posited that the *Brewer* court applied too broad of a definition to these concepts.¹⁰⁹

Dismissing the *Brewer* analysis as overly-broad, the court next looked at the analysis used by the court in *Coburn*.¹¹⁰ Ultimately finding *Coburn* more persuasive, the court began its analysis with a close look at the definitions and purposes of “removal action” and “public health and welfare.”¹¹¹ According to the court, the language within the definition of “removal action,” as well as the definition of “remedial action,” clearly shows that Congress contemplated preventing or mitigating releases of toxic or hazardous substances *into the environment*.¹¹² Expecting this line of thought, plaintiffs argued that the definition of “removal action” contained a second clause which should be read broadly to include liability for any kind of monitoring.¹¹³ The contested clause said that the term “removal action” would also include “other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare.”¹¹⁴ Once again the court relied on the limited interpretations of CERCLA which had held that removal and remedial actions meant only those actions directed at preventing or mitigating the spread of substances in the environment.¹¹⁵ Once again referring to Senator Randolph’s now infamous phrase in the legislative history, the court held that medical monitoring “smacks of a cause of action for damages,” and the legislative history clearly shows that Congress had “deleted the Federal cause of action for medical expenses.”¹¹⁶ Finally, the court relied on the creation of the ATSDR as one last reason to grant defendant’s motion to dismiss plaintiffs’ claims for medical monitoring.¹¹⁷

This case rounds up all of the reasons to deny medical monitoring claims under CERCLA and presents them in a neat, succinct opinion. Removal and remedial actions are those actions which address substances in the environment, not in humans.¹¹⁸ Congress chose to remove the individual cause of action for medical expenses in its eleventh hour CERCLA compromise bill.¹¹⁹ The creation of and authority vested within the ATSDR provide a route to remedy for these plaintiffs and show that Congress contemplated medical monitoring under CERCLA and placed it within the scope of responsibilities of the ATSDR rather than in Section 107 liability.¹²⁰

109. *Id.* at 1535.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. 42 U.S.C. § 9601(23) (2012).

115. *Daigle* 972 F.2d at 1535. CERCLA defines “environment” in two ways: “(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.” 42 U.S.C. § 9601(8) (2012) (citation omitted).

116. *Id.* at 1535–36.

117. *Id.* at 1536–37.

118. *See id.* at 1535.

119. *Id.* at 1536.

120. *Id.* at 1536.

Daigle proved persuasive to the Ninth Circuit two years later, when that court similarly held that medical monitoring costs are not response costs under CERCLA.¹²¹ The next year, using its holding in *Price*, the Ninth Circuit determined that CERCLA's Section 113(h) jurisdictional bar¹²² did not apply to plaintiffs seeking medical monitoring recovery through state tort law *because* medical monitoring costs are not response costs.¹²³ This provides an interesting avenue for plaintiffs to seek recovery for medical monitoring from potentially responsible parties. Unfortunately, as will be discussed below, this avenue is cluttered with various obstacles and roadblocks making recovery in many states essentially unreachable.¹²⁴

E. Does the ATSDR Provide the Kind of Care Exposure Victims Need?

i. *Hanford Downwinders Coalition v. Dowdle*

This appeal of the lower court's dismissal asked the Ninth Circuit to consider whether CERCLA's 113(h) jurisdictional bar applied to cases brought against the ATSDR seeking injunctive relief in the form of a medical monitoring program.¹²⁵ The ATSDR had been conducting medical and health studies of the communities near the Hanford Nuclear Reservation in Washington state since 1989, investing over \$23 million in studies to reach a conclusion in 1993 that the Hanford site was "among the Superfund sites posing the most serious threat to public health in the country."¹²⁶ Despite this finding and multiple public hearings on the potential need for medical monitoring, no program had been set up when plaintiffs filed suit in 1993.¹²⁷ The defendants claimed, and the district court agreed, that the ATSDR's actions in conducting these studies constituted removal or remedial activity, and therefore the court lacked subject matter jurisdiction through CERCLA's 113(h) Timing of Review jurisdictional bar.¹²⁸

This case diverges from the jurisprudence surrounding the definition of "removal action" by finding that the ATSDR's health assessment actions around Hanford do fit within the definition.¹²⁹ Despite the *Chaplin*, *Coburn*, and *Daigle* line of cases holding that Congress only contemplated preventing or mitigating damage to the environment in defining removal and remedial actions,¹³⁰ this court held that health assessments and surveillance of the communities near the Hanford site

121. *Price v. U.S. Navy*, 39 F.3d 1011, 1016–17 (9th Cir. 1994).

122. 42 U.S.C. § 9613(h) (2012) ("No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title. . . .").

123. *Durfey v. E.I. DuPont de Nemours Co.*, 59 F.3d 121, 125–26 (9th Cir. 1995).

124. *See infra* Part V.

125. *See generally* *Hanford Downwinders Coal, Inc. v. Dowdle*, 71 F.3d 1469 (9th Cir. 1995).

126. *Id.* at 1472.

127. *See id.* at 1472–73.

128. *Id.* at 1473.

129. *Id.* at 1477.

130. *See generally* *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1531 (10th Cir. 1992); *Coburn v. Sun Chemical Corp.*, No. 88-0120, 1988 U.S. Dist. LEXIS 12548, at *1 (E.D. Penn. Nov. 9, 1988); *Chaplin v. Exxon Co.*, No. H-84-2524, 1986 U.S. Dist. LEXIS 24438 (S.D. Tex. June 10, 1986).

constituted removal actions.¹³¹ While this case could have been a good sign to prospective plaintiffs wanting to bring medical monitoring claims, it ultimately just blocked another avenue to relief. Because the ATSDR actions are considered removal actions, they fit squarely into Section 113(h)'s jurisdictional bar, stripping any court of jurisdiction until the ATSDR has completed its activities.¹³² As *Dowdle* and the next case show, it is incredibly difficult to show that the ATSDR has completed its removal activities once the agency has begun its medical assessments and surveillance. These processes take years, and the activities are not completed even upon reaching the conclusion that medical monitoring should occur.¹³³ Apparently, health screenings and medical monitoring programs are only considered removal actions when the ATSDR is involved, not when plaintiffs bring suit against the responsible parties seeking these programs as relief.

ii. *Pritikin v. United States Department of Energy*

This case closed another door for CERCLA medical monitoring through citizen suits.¹³⁴ In the wake of widespread exposure from the Hanford Nuclear Reservation, the ATSDR determined that a medical monitoring program was necessary.¹³⁵ Although the ATSDR was created specifically to provide such medical monitoring, it ultimately failed to secure funding.¹³⁶ Disappointed by this delay, a member of the affected communities turned to the courts, seeking to compel DOE funding for a medical monitoring program.¹³⁷

The plaintiff in this case brought a citizen suit against the DOE and the ATSDR, seeking declaratory relief and an order compelling the agencies to fund a medical monitoring program.¹³⁸ Citing the decision in *Durfey*, which relied on the decision in *Daigle*, that “necessary costs of response” do not include medical monitoring, the court determined that it lacked subject matter jurisdiction because CERCLA does not include a private cause of action to fund an ATSDR medical monitoring program.¹³⁹ CERCLA Section 107(a)(4)(D) allows only ATSDR to recover costs of medical monitoring from potentially responsible parties, according to the court.¹⁴⁰ This may be a correct reading of the statute, but it is also a clear example of the lack of control and influence victims have in asserting their right to medical monitoring after being exposed to toxic or hazardous substances. Victims must rely on the ATSDR to make a determination, then wait for the ATSDR to implement some form of medical monitoring program, and then hope that they do not get sick and die before funding for that program runs out.

The costs of a medical monitoring program are not recoverable by direct lawsuits because the ATSDR is charged with making medical necessity

131. *Dowdle*, 71 F.3d at 1477.

132. *Id.* at 1479.

133. *See infra* notes 134–146.

134. *Pritikin v. U.S. Dep’t of Energy*, 47 F. Supp. 2d 1225 (E.D. Wash. 1999).

135. *Id.* at 1226

136. *Id.* at 1227

137. *Id.* at 1226.

138. *Id.*

139. *Id.* at 1227, 1228 n.4.

140. *Id.* at 1231.

determinations.¹⁴¹ Even when involved in the cleanup process, the ATSDR can take at least two years to make its determination.¹⁴² Even after making a determination that a medical monitoring program should be implemented at a cleanup site, only the ATSDR can seek cost recovery to fund the program.¹⁴³ There might be the possibility to bring suit against the ATSDR for failing to perform nondiscretionary duties through a reading of Section 104(i)(9),¹⁴⁴ but this option seems foreclosed by numerous holdings that the ATSDR's actions constitute response costs subject to the Section 113(h) jurisdictional bar.¹⁴⁵ The current balance of CERCLA case law is that medical monitoring is not a response cost unless the ATSDR has taken it on.¹⁴⁶ This interpretation of Section 107 abandons the plain reading approach to statutory interpretation since courts have arrived at different conclusions on the scope of "necessary costs of response" while considering the same goal—medical monitoring.¹⁴⁷ These inconsistent conclusions mean that private individuals or community-based coalitions cannot receive compensation for medical monitoring while the federal government can. The silver lining here is that this contradiction left the door open for recovery under state common law.¹⁴⁸

V. STATE LAW APPROACH TO MEDICAL MONITORING

Some plaintiffs, either simultaneously to or in lieu of CERCLA action, have brought actions in state court under common law tort. These actions assert that the injury suffered by plaintiffs is the present need to undergo medical monitoring outside the normal scope of medical care.¹⁴⁹ Unlike most traditional torts, plaintiffs assert an injury absent a present physical manifestation of that injury. Because of this nuance in what most commentators have deemed "toxic torts," courts have struggled to find an equitable solution that provides justice for both innocent victims of toxic substance exposure and the parties potentially responsible for the contamination.¹⁵⁰ In 2005, only thirteen states, the District of Columbia, and Guam recognized medical

141. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1536-37 (10th Cir. 1992);

142. *Pritikin*, 47 F. Supp. 2d at 1226.

143. *Id.* at 1231.

144. 42 U.S.C. § 9604(i)(9) (2012).

145. See *Hanford Downwinders Coal, Inc. v. Dowdle*, 71 F.3d 1469 (9th Cir. 1995); *Env'tl. Waste Control, Inc. v. Agency for Toxic Substances & Disease Registry*, 763 F. Supp. 1576 (N.D.Ga. 1991).

146. See *Reese & Wright*, *supra* note 34 at 118-19.

147. Compare *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1537 (10th Cir. 1992) (holding medical monitoring is not a necessary cost of response) with *Dowdle*, 71 F.3d at 14809 (holding medical monitoring, when conducted or required by the ATSDR, is a necessary cost of response).

148. See *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 709 (D. Ariz. 1993) ("[Section 113(h)] does not bar the plaintiffs' state law claims because plaintiffs seek medical monitoring and medical monitoring does not qualify as 'removal or remedial action.'").

149. Philip Desai, *Donovan v. Philip Morris USA, Inc.: The Best Approach to Satisfying the Injury Requirement in Medical Monitoring Claims*, 38 B.C. ENVTL. AFF. L. REV. 95, 102 (2011).

150. See Kristin Bohlken, *Fitting the Square Peg of Alternative Toxic Tort Remedies into the Round Hole of Traditional Tort Law*, 1 DRAKE J. AGRIC. L. 263 (1996); Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 TUL. ENVTL. L.J. 1 (1989); Allan T. Slagel, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849 (1987).

monitoring absent a present physical injury,¹⁵¹ compared with sixteen states and the Virgin Islands that had explicitly rejected a claim for medical monitoring,¹⁵² four states that had not articulated a test,¹⁵³ and eighteen states that had not been faced with the question.¹⁵⁴ Some states have gone as far as creating their own mini-CERCLAs.¹⁵⁵

A number of states, mostly through state court jurisprudence, have accepted medical monitoring within the realm of common law torts.¹⁵⁶ These states either recognize medical monitoring as a separate cause of action or as an element of damages in a more traditional tort action.¹⁵⁷ There are numerous public policy

151. D. Scott Aberson, Note, *A Fifty-state Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095, 1114-15 (2006).

152. *Id.* at 1115-16.

153. *Id.* at 1116.

154. *Id.* at 1116-17.

155. See e.g. ARIZ. REV. STAT. ANN. § 36-2805 (2010); CAL. HEALTH & SAFETY CODE § 25300-395; COLO. REV. STAT. §§ 25-15-303, -304, 25-15-213, -214 (2000); CONN. GEN. STAT. ANN. § 22a-126 (West 2011); FLA. STAT. ANN. §§ 403.141, .161, .725, .726, 208.001-.005 (West 2000); GA. CODE ANN. §§ 12-8-68, -81 (1979); ILL. ANN. STAT. ch. 111 ½ § 1022.2 (2018); KAN. STAT. ANN. §§ 65-3431(w), -3444 (2018); KY. REV. STAT. ANN. §§ 224.876, .877 (2018); LA. REV. STAT. ANN. § 30:11459 (West 2018); ME. REV. STAT. ANN. Tit. 38 §§ 1319-B to -K (2018); MD. HEALTH & ENVTL. CODE ANN. §§ 7-218 to -221, -265 (2018); MASS. ANN. LAWS ch. 21C, § 7, ch. 21E, §§ 1-13 (2018); MICH. COMP. LAWS SERV. §§ 324.11101-11153 (LexisNexis 2018); MINN. STAT. §§ 115B.02 to .34 (2018); MISS. CODE ANN. § 17-17-53 (2018); MO. REV. STAT. §§ 260.435, .437, .440 to .550 (2018); NEV. REV. STAT. §§ 444.740, .742, .744, .752, .774 (2018); N.H. REV. STAT. ANN. §§ 147-B:1 to :11 (2018); N.J. STAT. ANN. §§ 58:10-23.11 to .11z (West 2018); N.M. STAT. ANN. §§ 74-4-7, -8 (2018); N.Y. FIN. LAW § 97-b (2018); N.Y. ENVTL. CONSERV. LAW §§ 27-0901, -0916, -0923, -1301 to -1319; 71-2723, -2725; N.Y. PUB. HEALTH LAW §§ 1389-a to -d (West 2018); N.C. GEN. STAT. §§ 130-166.18(a)(6), .19A (2018); OHIO REV. CODE ANN. §§ 3734.13 to .28 (2018); OKLA. STAT. ANN. tit. 63, §§ 1-2015 to -2021 (West 2018); OR. REV. STAT. §§ 459.590 to .600, .680, .685 (2018); 35 PA. STAT. AND CONS. STAT. ANN. §§ 6020.101-6020.1305 (West 2018); S.C. CODE ANN. §§ 44-56-160 to -200 (2018); TENN. CODE ANN. § 53-6308(c)(6) (2018); TEX. WATER CODE ANN. §§ 26.302 to .307 (2018); VT. STAT. ANN. tit. 10, §§ 1263(a), 1265(a), (d)(5), (e), 1282, 1283 (2018); VA. CODE ANN. §§ 32.1-178(A)(11-15), (B), 32.1-182 (2018); WASH. REV. CODE ANN. §§ 70.105D.010-70.105D.921 (LexisNexis 2018); WIS. STAT. ANN. § 144.441 (West 2018).

156. See Aberson, *supra* note 151, at 1114-1116.

157. See, e.g., *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984) (applying the law of the District of Columbia to determine that the district would recognize a separate cause of action for medical monitoring); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313 (D.Conn. 2002) (applying Connecticut law to determine that plaintiff's medical monitoring claims should survive summary judgment if "other actionable injuries exist"); *Patton v. General Signal Corp.*, 984 F. Supp. 666 (W.D.N.Y. 1997) (recognizing a claim for medical monitoring as an element of consequential damage); *Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994) (applying Ohio law to determine that medical monitoring is an element of damages once liability has been established under a different cause of action); *Cook v. Rockwell Int'l Corp.*, 778 F. Supp. 512 (D.Colo. 1991) (applying Colorado state law to determine that the Colorado Supreme Court would recognize a medical monitoring cause of action); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987) (medical surveillance damages are recoverable under a nuisance suit); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (allowing recovery of damages for medical monitoring under traditional common law theories of recovery); *Petito v. A.H. Robbins Co.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 1999) (under certain prescribed circumstances Florida recognizes a cause of action for future expenses of medical diagnosis); *Lamping v. American Home Products*, 2000 Mont. Dist. LEXIS 2580 (4th D. Mont. Feb. 2, 2000) (adopting the reasoning in *Petito* to hold that Montana recognizes a separate cause of action for medical monitoring); *Ayers v. Twp. of Jackson*, 525 A.2d 287 (N.J. 1987) (recognizing medical surveillance as a compensable item of damages);

reasons on both sides of this issue,¹⁵⁸ but these states have elected to find preemptive protection of innocent victims of contamination as more persuasive than economic protection of the contaminators. In arriving at this conclusion, many courts struggled with a number of complex and well-entrenched tenets of tort law. Courts have had to grapple with the single controversy rule,¹⁵⁹ the statute of limitations,¹⁶⁰ and the avoidable consequences doctrine.¹⁶¹ By allowing claimants exemptions to the single controversy rule, courts avoided foreclosing a plaintiff's ability to bring a future suit for medical costs of treating a disease once it has manifested, even after being awarded medical monitoring in the present.¹⁶² With the statute of limitations only beginning to run upon a plaintiff's discovery that they are at a greater risk of disease, courts refused to let polluters avoid liability simply by keeping quiet about contamination.¹⁶³ This tolling of the statute of limitations also promotes good corporate citizenship by encouraging polluters to be proactive in their cleanup efforts. Finally, the recognition that the doctrine of avoidable consequences would require plaintiffs to get medical monitoring in order to preserve full recovery of medical expenses if a disease manifests, created a persuasive theory in support of medical monitoring cost recovery.¹⁶⁴

Pursuant to the single controversy doctrine, "a plaintiff or defendant who does not assert all claims or defenses related to the controversy in a legal proceeding[,] is not entitled to assert those claims or defenses in a later

Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137 (Pa. 1997) (recognizing separate cause of action for medical monitoring); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993) (recognizing medical monitoring as an element of damages); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W.Va. 1999) (recognizing separate cause of action for medical monitoring).

158. *Compare Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994) ("First, there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients. Second, there is a deterrence value in recognizing medical surveillance claims . . . Third, 'the availability of a substantial remedy before consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illness and thus reduce the overall costs to the responsible parties.' Finally, societal notions of fairness and elementary justice are better served by allowing recovery of medical monitoring costs. That is, it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary." (quoting *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993)), with Arvin Maskin, Konrad L. Cailteux & Joanne M. McLaren, *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize*, 27 WM. MITCHELL L. REV. 521, 527-31 (2000).

159. *Ayers*, 525 A.2d at 300-01; *Burns*, 752 P.2d at 31 (citing *Ayers*). This is sometimes referred to as the "entire-controversy doctrine," but the cases cited refer to it as the single controversy doctrine.

160. *Ayers*, 525 A.2d at 297-01; *Burns*, 752 P.2d at 31 (citing *Ayers*).

161. *Hansen*, 858 P.2d at 976; *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 319 (5th Cir. 1986). This is sometimes referred to as the "mitigation-of-damages doctrine," but the cases cited refer to it as the avoidable consequences doctrine.

162. *Ayers*, 525 A.2d at 300-301; *Burns*, 752 P.2d at 31 (citing *Ayers*).

163. *Ayers*, 525 A.2d at 299-300 (New Jersey has a discovery rule which dictates that a cause of action does not accrue "until the victim is aware of the injury or disease and of the facts indicating that a third party is or may be responsible"); *Burns*, 752 P.2d at 31 (citing *Ayers*).

164. *Hansen*, 858 P.2d at 976; *Hagerty*, 788 F.2d at 319.

proceeding.”¹⁶⁵ In the realm of medical monitoring jurisprudence, this doctrine would force plaintiffs to choose whether they want to gamble on a medical monitoring claim or wait for a disease to manifest and then try to recover medical expenses from the responsible parties.¹⁶⁶ As the court in *Ayers* pointed out, however, this doctrine should not affect this type of litigation because “the second cause of action does not accrue until the disease is manifested; hence, it could not have been joined with the earlier claims.”¹⁶⁷

The avoidable consequences doctrine “induc[es] a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach.”¹⁶⁸ In recognizing medical monitoring as an element of damages, the *Hansen* court reasoned that the avoidable consequences doctrine would require plaintiffs to shoulder the burden of medical monitoring if and until their disease manifested.¹⁶⁹ The court recognized “the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another’s negligence.”¹⁷⁰ As discussed below, this finding does not mean an open season on medical monitoring claims because the court still required the plaintiffs to prove that the defendant was negligent.¹⁷¹

A. Friends for All Children

Cited in many cases, *Friends for All Children* was one of the earliest cases considering the question of medical monitoring. This case was brought on behalf of a number of Vietnamese orphans, arising out of an airplane malfunction as the United States was exiting South Vietnam.¹⁷² About fifteen minutes after the plane took off during “Operation Babylift,” a locking system on the airplane failed and the cabin pressure dropped precipitously.¹⁷³ As a result of this depressurization, the airplane needed to attempt a crash landing, killing almost all of the passengers in the cargo compartment and several in the troop compartment.¹⁷⁴ This specific decision is but one of many in the “protracted litigation arising out of” this disaster.¹⁷⁵

As a result of the depressurization, many survivors of the plane crash suffered from Minimal Brain Dysfunction (MBD), and it was alleged that they were

165. BLACK’S LAW DICTIONARY 1597 (10th ed. 2014) (directed to “entire-controversy doctrine” at 649).

166. *Ayers*, 525 A.2d at 300 (“[t]he doctrine may bar recovery where, as here, suit is instituted to recover damages to compensate for the immediate consequences of toxic pollution, but the initiation of additional litigation depends upon when, if ever, physical injuries threatened by the pollution are manifested.”).

167. *Id.*

168. BLACK’S LAW DICTIONARY 163 (10th ed. 2014) (directed to “mitigation-of-damages doctrine” at 1154).

169. *Hansen*, 858 P.2d at 976.

170. *Id.*

171. *See infra* Section V(C).

172. *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 819 (D.C. Cir. 1984).

173. *Id.* The court called the drop in pressure “explosive.”

174. *Id.*

175. *Id.*; *see also* *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 838–39 (D.C. Cir. 1981) (complete provision of the facts of this disaster).

at risk of developing neurological disorders in the future.¹⁷⁶ The court's approach to determining liability, specifically as it concerned these future neurological disorders, has become a reliable source of persuasive authority for many plaintiffs. In 1984, there was no clear guidance for how a court, much less a federal court applying state law, should calculate damages for a plaintiff in this situation. Absent present physical injury, plaintiffs generally may not receive redress—and might not even have standing—for common law torts.¹⁷⁷ In this case, the MBD was a cognizable injury that could fit the mold of a traditional action for negligence, but the plaintiffs wanted something more: diagnostic testing.¹⁷⁸

The question of whether diagnostic testing was recoverable was one of “two principal issues before” the court in this case.¹⁷⁹ The defendant's argued that the District of Columbia tort law would not recognize this cause of action,¹⁸⁰ and that case law from other jurisdictions did “not encompass an action for being put ‘at risk.’”¹⁸¹ The court disagreed.¹⁸² In holding that a cause of action exists for diagnostic testing, the court sought to serve two principles: (1) “deterrence of misconduct” and; (2) “just compensation to victims of wrongdoing.”¹⁸³ The court then introduced a hypothetical situation to illustrate its position on this issue:

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.¹⁸⁴

This hypothetical poses two issues, despite being used by numerous courts to find for plaintiffs along similar lines.¹⁸⁵ First, Jones hits his head in the

176. *Friends for All Children*, 746 F.2d at 819; *Schneider*, 658 F.2d at 838.

177. See, e.g., RESTATEMENT (SECOND) OF TORTS § 912 (1979).

178. See *Friends for All Children*, 746 F.2d at 818–19.

179. *Id.* at 819.

180. *Id.* at 824.

181. *Id.*

182. *Id.* at 824–25. (“In light of general principles of tort law, the *Restatement (Second) of Torts*, and the law of other jurisdictions, we believe that the District of Columbia Court of Appeals would recognize such a cause of action.”)

183. *Id.* at 825.

184. *Id.*

185. E.g., *Donovan v. Philip Morris USA, Inc.*, 65 F. Supp. 3d 251, 268 (D.Mass. 2014) (quoting *Friends for All Children*, 756 F.2d at 825); *Allgood v. GMC*, No. 1:02-cv-1077-DFH-TAB, 2005 U.S. Dist. LEXIS 43693, at *16 (S.D. Ind. Sep. 12 2005) (quoting *Friends for All Children*, 756 F.2d at 825); *Day v. NLO*, 851 F. Supp. 869, 880 (S.D. Ohio 1994) (quoting *Friends for All Children*, 756 F.2d at 825); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1477 (D. Colo. 1991) (quoting *Friends for All Children*, 746 F.2d at 825); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823-24 n.26 (Cal. 1993) (quoting *Friends for All Children*, 756 F.2d at 825); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999) (quoting *Friends for All Children*, 756 F.2d at 825); *Bourgeois v. A.P. Green Indus.*, 716 So. 2d 355, 359 (La. 1998) (quoting *Friends for All Children*, 756 F.2d at 825); *Exxon Mobil Corp. v. Ford*, 40 A.3d 514, 553-54 (Md. Ct. Spec. App. 2012) (quoting *Friends for All Children*, 756 F.2d at 825), *aff'd in part, rev'd in part*, 433 A.3d 105 (Md. 2013); *Ayers v. Jackson Twp.*, 525 A.2d 287, 309 (N.J. 1987) (quoting *Friends for All Children*, 746 F.2d at 825); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970,

hypothetical “with some force,” which would likely leave at least some kind of physical evidence of an injury. Plaintiffs seeking medical monitoring for toxic substance exposure would find it incredibly difficult to demonstrate the need for diagnostic/medical testing since they would not have a similar gash or bump on the head.¹⁸⁶ While this hypothetical is convincing when faced with the question of recovery for diagnostic testing, its utility may be limited to cases with a similar fact pattern.

Second, Jones has already received diagnostic treatment and seeks to recover the costs already incurred. This hypothetical carries the presumption that plaintiffs will be in the position to afford this kind of diagnostic testing. Unfortunately, the foundation of America’s toxic legacy is built on environmental racism and socioeconomic elitism.¹⁸⁷ It is important to note that from the beginning of medical monitoring common law recovery, there has been an implicit assumption that plaintiffs could pay for the monitoring, but they should not have to if they can prove a negligence case.

Despite these criticisms, *Friends for All Children* fundamentally changed the way courts define “injury” in cases like this. Rather than there being the identifiable, neck-brace-requiring injury we all read about in cases like *Palsgraff*, the injury in some cases of toxic exposure is the need to receive medical care one would otherwise not need.¹⁸⁸ But for a defendant’s negligence, there would be no need for diagnostic examinations to determine the extent of brain damage. This reinterpretation became useful for courts trying to find equitable solutions when the only identifiable injury was the increased presence of a substance in a human body. In these cases, some detailed below, the injury is not the disease which may develop but the introduction of foreign, most likely harmful, substances caused by another’s negligence or intent.

Friends for All Children also proves problematic because of its discussion of “increased risk.”¹⁸⁹ The court determined that a cause of action existed for the plaintiffs to recover the costs of diagnostic testing, while distinguishing a cause of action for increased risk.¹⁹⁰ Claims for medical monitoring mean seeking the costs of periodic medical testing, as prescribed by a qualified physician, which have been

977-78 (Utah 1993) (quoting *Friends for All Children*, 746 F.2d at 825); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999) (quoting *Friends for All Children*, 756 F.2d at 825).

186. See Gary E. Marchant, *Genetics and Toxic Torts*, 31 SETON HALL L. REV. 949 (2001); Gary E. Marchant, *Genetic Susceptibility and Biomarkers in Toxic Injury Litigation*, 41 JURIMETRICS 67 (2000). Dr. Marchant posits the potential utility of toxicogenomics in showing observable effects of toxic substances at the cellular level. This technology is as yet inadmissible at trial but could serve a very important purpose in the future of toxic torts.

187. See EILEEN MCGURTY, *TRANSFORMING ENVIRONMENTALISM: WARREN COUNTY, PCBs, AND THE ORIGINS OF ENVIRONMENTAL JUSTICE* 130–41 (Rutgers Univ. Press 2009).

188. *Friends for All Children*, 746 F.2d at 825. (“[T]he District Court correctly concluded that the crash proximately caused the need for a comprehensive diagnostic examination. The court found that no diagnostic examinations would be necessary ‘but for the fact that these children endured explosive decompression and hypoxia aboard a plane which subsequently crashed, and that after the crash they received relatively cursory, unspecialized examinations from the Air Force without any systematic follow-up by either defendants.’”).

189. *Id.* at 826. This discussion has simultaneously caused courts to both accept and reject medical monitoring claims, depending on the interpretation.

190. *Id.*

prescribed as a result of a defendant's negligence. In contrast, an increased risk claim is similar to a claim for future pain and suffering. The argument, essentially, is that but for defendant's negligence, the plaintiff would not suffer emotional distress from the possibility of developing a serious disease in the future. Many courts have rejected a claim of this type.¹⁹¹

The defendants in *Friends for All Children* referred to a case that rejected a claim for increased risk as persuasive authority to reject a claim for diagnostic testing, but the court distinguished the claims.¹⁹² In doing so, the court drew an incredibly fine line between the two claims. It referred to a claim for increased risk as "too speculative," while finding a claim for diagnostic testing as fully cognizable based on "competent medical testimony."¹⁹³ This distinction is complicated, however. The court reached what was ultimately an equitable decision—Lockheed needed to fund diagnostic testing for the plaintiffs affected by Lockheed's negligence.¹⁹⁴ However, in distinguishing the enhanced risk case, the court left open certain questions about how far diagnostic testing or medical monitoring claims could go. Despite its Jones hypothetical and its use to show that recovery should be allowed despite lack of a physical injury, the court later said that "[i]n the absence of physical symptoms, emotional distress caused by potential risk may also be thought too speculative to support recovery."¹⁹⁵ This physical injury versus physical symptoms question is not easily answered, especially when dealing with mass exposure to a toxic or hazardous substance.

B. Ayers

The Jackson Township Landfill Superfund site in New Jersey was listed on the National Priorities List in December, 1982,¹⁹⁶ after discovery that poor waste management had contaminated 130 wells in the community.¹⁹⁷ Between 1972 and 1980, the township dumped millions of gallons of human waste into the landfill it operated.¹⁹⁸ As a result of mismanagement, the wells in the vicinity of this landfill were contaminated with volatile organic compounds (VOCs).¹⁹⁹ Three hundred and thirty-nine residents of Jackson Township brought suit against the municipality for a variety of claims, despite a lack of present physical manifestation of their

191. See Aberson, *supra* note 151, at 1115–16.

192. *Friends for All Children*, 746 F.2d at 826 (citing *Mink v. Univ. of Chicago*, 460 F. Supp. 713, 716 n.2 (N.D.Ill. 1978)).

193. *Id.*

194. *Id.*

195. *Id.*

196. U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 2, FOURTH FIVE-YEAR REVIEW REPORT JACKSON TOWNSHIP LANDFILL SUPERFUND SITE, JACKSON TOWNSHIP, OCEAN COUNTY, NEW JERSEY, at 2, 14 tbl.1 (2015).

197. U.S. Env'tl. Prot. Agency, SUPERFUND SITE: JACKSON TOWNSHIP LANDFILL JACKSON TOWNSHIP, NJ, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0200549#bkground> (last visited Nov. 10, 2018).

198. U.S. Env'tl. Prot. Agency, *Background*, SUPERFUND SITE: JACKSON TOWNSHIP LANDFILL JACKSON TOWNSHIP, NJ, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0200549> (last visited Nov. 10, 2018).

199. *Id.*

injuries.²⁰⁰ At the outset of the pertinent section of its analysis, the court phrased the question before it succinctly: “at what stage in the evolution of a toxic injury should tort law intercede by requiring the responsible party to pay damages?”²⁰¹

While opponents of medical monitoring claims may view this kind of opinion as judicial activism,²⁰² the court recognized the lack of administrative or statutory remedies available to the victims of toxic exposures.²⁰³ In reaching its conclusion that New Jersey would recognize medical monitoring as an element of damages, the court established crucial precedent. Not only did the court recognize the need for judicial action on this issue, but it raised and dismissed a number of procedural hurdles along the way.²⁰⁴ The court first addressed the issue of the state’s statute of limitations,²⁰⁵ then the single controversy rule,²⁰⁶ and finally the difficulty of proving causation.²⁰⁷

New Jersey’s statute of limitations for a personal injury claim is two years.²⁰⁸ “The single controversy rule [mandates] that a party include in the action all related claims against an adversary and its failure to do so precludes the maintenance of a second action.”²⁰⁹ Diseases caused by toxic substance exposure often have long latency periods between exposure and manifestation of disease.²¹⁰ This latency period risked spoiling future claims due to both the statute of limitations and the single controversy rule, but the court took an equitable common sense approach to solving these issues.²¹¹ New Jersey’s discovery rule dictated that a cause of action did not actually “accrue until the victim is aware of the injury or disease and of the facts indicating that a third party is or may be responsible.”²¹² Implicitly,

200. *Ayers v. Twp. of Jackson*, 525 A.2d 287, 298 (N.J. 1987).

201. *Id.*

202. See generally William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Jeffrey Trauberman, *Statutory Reform of Toxic Torts: Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177 (1983); David I. W. Hamer, *Medical Monitoring in North America: Does This Horse Have Legs*, 77 DEF. COUNSEL J. 50 (2010); Victor E. Schwartz, Leah Lorber & Emily J. Laird, *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349 (2005).

203. *Ayers*, 525 A.2d at 299 (Discussing the failings of the Superfund Study Group, “[w]ithout a comprehensive governmental response to the problem of compensating victims of toxic exposure, the only available remedy lies within the legal system.”).

204. *Id.* at 299–303. Besides the critical procedural obstacles discussed below, the Court also raised but did not discuss: “. . . the identification of the parties responsible for the environmental damage; the risk that responsible parties are judgment-proof; the expense of compensating expert witnesses in specialized fields such as toxicology and epidemiology; and the strong temptation for premature settlement because of the cost and complexity of protracted multi-party litigation.” (citing Ginsberg & Weiss, *supra* note 202, at 924–28).

205. *Id.* at 299–300.

206. *Id.* at 300.

207. *Id.* at 301–03.

208. N.J. STAT. ANN. § 2A:14-2(a) (West 2004).

209. *Ayers*, 525 A.2d at 300 (quoting *Aetna Ins. Co. v. Gilchrist Bros., Inc.*, 85 N.J. 550, 556–57 (1981)).

210. *Id.*

211. *Id.*

212. *Id.* (citing *Lynch v. Rubacky*, 85 N.J. 65, 70 (1981)).

the court defined “injury” broadly to ultimately find an injury for the mere exposure, and distinguish that injury from a later manifestation of disease.²¹³ The court similarly reasoned its way around the single controversy rule.²¹⁴

The problem with causation proved a more difficult dilemma, but the court nonetheless found an interesting way to provide an equitable solution for all sides.²¹⁵ The court began by acknowledging that a main cause of the causation dilemma is the lack of an “A strikes B” causal connection.²¹⁶ Because of the pathways of exposure, background levels of hazardous substances, and latency of the diseases, it is often incredibly difficult to show that a specific party caused a plaintiff’s exposure.²¹⁷ While the court recognized this dilemma and ultimately overcame it, it did so by citing to the “Jones hypothetical.”²¹⁸ The Jones hypothetical contains a definitive “A strikes B” fact pattern, but the court relied on it to reach its holding that medical monitoring is an element of damages. This has not caused issues with courts relying on the *Ayers* decision, but is important to point out because it shows the inherent complexity of medical monitoring jurisprudence.

C. Hansen

Another common realm for medical monitoring claims is within asbestos litigation. This claim for medical monitoring was brought by plaintiffs after being exposed to asbestos while doing renovation work in Utah.²¹⁹ The court below granted summary judgment to defendants because “no bodily injury has been manifested in any plaintiff.”²²⁰ The Utah Supreme Court, using the decisions in *Friends* and *Ayers*, reversed the trial court and established medical monitoring as a recoverable element of damages in the state of Utah.²²¹

This case is very much the culmination of medical monitoring jurisprudence and provides the clearest analysis used to reach a holding that plaintiffs should be able to recover medical monitoring costs.²²² The plaintiffs’ contentions boiled down to “but for their exposure to asbestos, they would not be obligated to incur [the] additional medical expenses.”²²³ The court addressed this question from the

213. *Id.* at 304 (“The invasion for which redress is sought is the fact that plaintiffs have been advised to spend money for medical tests, a cost they would not have incurred absent their exposure to toxic chemicals.”).

214. *Id.* at 300 (“[T]he single controversy rule . . . cannot sensibly be applied to a toxic-tort claim filed when disease is manifested years after the exposure, merely because the same plaintiff sued previously to recover for property damage or other injuries.”).

215. *Id.* at 300–03, 309–15.

216. *Id.* at 301–02 (citing *Allen v. United States*, 588 F. Supp. 247 (D.Utah 1984)).

217. *Id.*

218. *Id.* at 309–10 (citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984)).

219. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 972 (Utah 1993).

220. *Id.* at 981 (internal quotations omitted).

221. *Id.* at 979.

222. *Id.* at 975–82. A specific claim was brought for medical monitoring as a result of exposure, the court analyzed the arguments for and against, including the avoidable consequences doctrine, and the court determined that it would be more equitable to allow recovery.

223. *Id.* at 976.

perspective of public policy—identifying key underlying principles first—and then weighed the fairness to both parties of a medical monitoring cause of action.²²⁴

The Utah Supreme Court first explained that the avoidable consequences doctrine and the general rule allowing recovery of future medical costs weigh in favor of a medical monitoring cause of action, because to find otherwise would force “an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another’s negligence.”²²⁵ Picking up the thread from *Friends*, the court then stated that the injury in a toxic tort case is the “exposure itself and the concomitant need for medical testing.”²²⁶ Finally, quoting the Jones hypothetical from *Friends*, the court held that a cause of action for medical monitoring exists in Utah.²²⁷ Unlike the decision in *Ayers*, the *Hansen* decision recognized the nuanced nature of physical impact and physical injury and addressed the dilemma by citing a decision from California.²²⁸ In *Miranda v. Shell Oil*, the California Court of Appeals bridged the gap between the Jones hypothetical and toxic tort cases by stating that “[t]he outcome should be the same when the operative incident is toxic exposure rather than collision and the potential future harm is disease rather than physical impairment.”²²⁹ This might seem straightforward, but up to this point no court had made a clear statement addressing the lack of a physical impact on toxic tort plaintiffs. The bridge created by *Miranda* and adopted by *Hansen* made the Jones hypothetical applicable to toxic substance exposure victims.

Despite recognizing a medical monitoring cause of action, the Utah Supreme Court remanded the case back to the trial court.²³⁰ The court created a “Utah Test for Recovery of Medical Monitoring Damages” by cobbling together standards stated in *Ayers* and *Merry v. Westinghouse Electric Corp.*²³¹ Understandably, the plaintiffs had not made sufficient allegations to meet the newly created test.²³² This remand is yet another example of how complex the issue of fairness can be for courts deciding medical monitoring cases. It would have been unjust to preclude plaintiffs’ medical monitoring claim because they failed to meet an unheard-of test, but it would have been similarly unfair for the Utah Supreme Court to play the role of fact finder. In walking the fine line of equity, the court sent the case back to the trial court to allow all parties the time and opportunity to conduct proper discovery and allege sufficient facts to make a factual determination on the medical monitoring claim.²³³

224. *Id.* at 976–78.

225. *Id.* at 976.

226. *Id.* at 977.

227. *Id.* at 978.

228. *Id.* at 977 (citing *Miranda v. Shell Oil Co.*, 17 Cal. App. 4th 1651 (Cal. Ct. App. 1993)).

229. *Id.* (quoting *Miranda v. Shell Oil Co.*, 17 Cal. App. 4th 1651, 1657 (1993)).

230. *Hansen*, 858 P.2d at 981–82.

231. *Id.* at 979 (citing *Ayers v. Twp. of Jackson*, 525 A.2d 287 (N.J. 1987); *Merry v. Westinghouse Electric Corp.*, 684 F. Supp. 847 (M.D.Pa. 1988)).

232. *Id.* at 981–82.

233. *Id.* “[W]e think that in light of the unsettled state of the law on medical monitoring in Utah, the only fair course is to remand this matter to permit plaintiffs to attempt to meet the newly articulated standard. This is especially so since plaintiffs claimed in their final motion before the trial court that discovery was incomplete and represented to the court that further medical consultation was anticipated. If, after a fair opportunity, plaintiffs cannot satisfy the standard we articulate today, their claim should fail.”

D. *Petito*

This case dealt with the physical injury versus physical symptom dilemma, head on.²³⁴ A case of first impression for the Florida court, this case asked “whether or not Florida recognizes a cause of action for medical monitoring when the party seeking relief has yet to develop any identifiable physical injuries or symptoms.”²³⁵ This case also introduces a different nuance into this article, the class action lawsuit.²³⁶ Pursuing recovery as a class spreads the costs of litigation across many potential claimants, making these claims easier to file and litigate. Medical monitoring claims require numerous experts to prove exposure, toxicity, medical implications, likelihood of disease, rate of success of the treatment regime, all on top of the costs of litigating a basic negligence claim.²³⁷ This case is not directly analogous to the medical monitoring cases that came later, but it established important precedent in Florida and has been relied upon by courts in other jurisdictions.²³⁸

The focus of this case was the use of the diet drugs Fenfluramine and Phentermine,²³⁹ colloquially known as “fen-phen.”²⁴⁰ Fen-phen was discovered to cause heart valve damage in patients, and the class in this case was made up of plaintiffs who had taken the diet drugs but did not currently exhibit any physical manifestations of cardiac issues.²⁴¹ Plaintiffs alleged that ingestion of these drugs “placed them at a substantially increased risk of developing serious cardiac and circulatory ailments.”²⁴² Plaintiffs requested an injunction requiring the defendants to “fund a court supervised medical monitoring program” which would provide a number of treatments necessary to diagnose cardiac issues earlier than otherwise discovered.²⁴³

In the defendant’s motion for judgment on the pleadings, it contended that a cause of action cannot exist when plaintiffs have not actually suffered any injury.²⁴⁴ Relying on the hypothetical from the *Friends for All Children* opinion, the court disagreed with the defendant’s argument.²⁴⁵ The court drew an important line between absence of a physical injury and absence of any injury, building upon the *Friends* analysis in an effort to redefine injury in a way to provide an equitable

234. *Petito v. A.H. Robbins Co.*, 750 So.2d 103 (Fla. Dist. Ct. App. 1999).

235. *Id.* at 104.

236. *Id.*

237. *See infra* Section V(E).

238. *See, e.g.*, *Lamping v. Am. Home Prods., Inc.*, 2000 Mont. Dist. LEXIS 2580, at *14 (Mont. 4th Dist. Ct. Feb. 21, 2000) (directly adopting the *Petito* test).

239. *Id.*

240. David J. Morrow, *Fen-Phen Maker to Pay Billions In Settlement of Diet-Injury Cases*, N.Y. TIMES (Oct. 8, 1999), <https://www.nytimes.com/1999/10/08/business/fen-phen-maker-to-pay-billions-in-settlement-of-diet-injury-cases.html>. Between 1996 and October 1999, around “6,500 lawsuits encompassing 11,000 people” were filed.

241. *Petito*, 750 So.2d at 104.

242. *Id.*

243. *Id.* at 105.

244. *Id.*

245. *Id.* The Court directly quoted the hypothetical.

solution to a difficult problem.²⁴⁶ This broadening of “injury” allows recovery for medical monitoring, but it is again premised upon an identifiable incident.²⁴⁷ The fen-phen diet pills were prescribed to these patients whereas many people exposed to toxic or hazardous substances have little way to know about the exposure as it is happening. The length of time between toxic exposure and knowledge can be decades, making it more difficult to point to an identifiable incident directly causing the need for medical monitoring. These issues permeate throughout medical monitoring claims, but courts have had an easier time finding an injury in cases where the initial exposure is clearly identifiable and easily tied to a defendant.

Finally, and as mentioned earlier, the *Petito* decision addressed how to best redress plaintiffs in these cases.²⁴⁸ Among courts that have recognized medical monitoring either as a cause of action or as an element of damages, they face the question of lump sum monitoring damages or a judicially administered monitoring fund. Defendants at all stages of these cases argue that it would not be fair to require them to give money to plaintiffs with no identifiable physical injuries. This argument is compelling enough for many courts to grant motions to dismiss at early stages of the litigation.²⁴⁹ Even when courts recognize medical monitoring, as the *Petito* court did, the fairness argument becomes compelling in determining the amount and form of damages.²⁵⁰ The fairness argument goes against lump sum payments because plaintiffs could take the money and never receive the medical monitoring for which the money was intended.²⁵¹ The *Petito* court foresaw this predicament and proposed a judicially administered fund rather than a lump sum award.²⁵² The court left the specific requirements and processes of these funds up to the trial courts to establish on a case-by-case basis, but did propose minimum guidelines.²⁵³ This judicially

246. *Id.* (“Although it is true that plaintiffs in cases such as these have yet to suffer physical injuries, it is not accurate to say that no injury has arisen at all.”).

247. While this case is quite different from the other hazardous or toxic substance exposure cases discussed in this article, it is critical to the development of medical monitoring recovery case law as the issue before the Court was “whether or not Florida recognizes a cause of action for medical monitoring when the party seeking relief has yet to develop any identifiable physical injuries or symptoms.” *Id.* at 104, 108.

248. *Id.* at 108.

249. See *Aberson*, *supra* note 151, at 1115–16 (charting seventeen states that do not allow medical monitoring absent a present physical injury).

250. *Petito*, 750 So.2d at 105 (“[W]e do not think that Plaintiffs should be able to recover lump sum damages in anticipation of future diagnostic expenses.”).

251. Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 AM. J. L. & M. 251, 268 (1994).

252. *Petito*, 750 So.2d at 105.

253. *Id.* at 107 (“1. Appoint a plan administrator. 2. With the administrator’s advice, approve an advisory panel of persons qualified and knowledgeable in the field to do the following: a) establish a plan where only persons who consumed the medication, or in appropriate cases were exposed to the hazardous substance, may participate; b) establish the minimal area(s) of diagnostic tests or procedures to be performed (including the number as well as the duration of the procedures); c) select a list of highly knowledgeable, skilled, competent, and neutral and detached examining physicians to perform the tests, both for the metropolitan areas as well as the regional areas throughout the state. 3. Establish a notification process generally sufficient to bring the opportunity for monitoring to the attention of persons who have used the medication. 4. Establish a time frame for those eligible to obtain the monitoring. 5. Implement procedures whereby the monitoring physicians submit their reports and findings, together with the statement of their charges, directly to the plan administrator who shall promptly pay the reasonable

administered fund avoids fairness dilemmas moving forward because it ensures plaintiffs indeed receive the medical monitoring for which they originally brought suit.

E. The Test and Limits

The cases discussed above are not the complete jurisprudence of medical monitoring claims,²⁵⁴ but their well-reasoned analyses make this complex realm easily understandable. The *Friends* court created a new cause of action for a tort claim without the manifestation of a present physical injury,²⁵⁵ but this was fundamentally limited to cases in which there had been an identifiable physical impact. The *Ayers* court applied—albeit imperfectly—the Jones hypothetical to a case where the physical impact was much more attenuated, and deftly analyzed its way around significant procedural hurdles.²⁵⁶ The *Hansen* court clearly bridged the gap between physical impact and toxic substance exposure by adopting the *Miranda* analogy.²⁵⁷ Finally, the *Petito* court put all of these pieces in place and provided an example of a beginning-to-end analysis, not only finding a cause of action for medical monitoring but also prescribing the remedy.²⁵⁸ The *Friends* and *Ayers* decisions are valuable for the foundation they established and the public policy arguments contained within the opinions.²⁵⁹ The *Hansen* and *Petito* decisions—along with a number of similar decisions²⁶⁰—are valuable for the clarity of the tests created for medical monitoring claims.²⁶¹ With very little variance, a plaintiff must show: “(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.”²⁶²

amount of their claims. The parties shall have full access to such reports and the reports will be made public except for the names of the examinees, which shall remain confidential.”)

254. See *supra* note 151, at 1114–17 and accompanying text.

255. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825–26. (“[T]he District Court correctly concluded that the crash proximately caused the need for a comprehensive diagnostic examination.”).

256. See *supra* notes 194–216 and accompanying text.

257. See *supra* notes 217–231 and accompanying text.

258. See *supra* notes 232–251 and accompanying text.

259. See, e.g., *Friends*, 746 F.2d at 824–26; *Ayers v. Twp. of Jackson*, 525 A.2d 287, 311–13 (N.J. 1987).

260. See *supra* note 157.

261. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979–81 (Utah 1993); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999).

262. *Petito*, 750 So. 2d at 106–07. *But see Hansen*, 858 P.2d at 979 (Creating an additional requirement that “early detection is beneficial, meaning that a treatment exists that can alter the course of the illness.” See also *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 360–61 (La. 1998); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432–33 (W. Va. 1999).

The tests constructed by courts in these cases are not without their limits, however, and the most familiar limit is one on recovery. A minority of courts have awarded lump sum damages to plaintiffs that can successfully bring a claim for medical monitoring.²⁶³ The vast majority have opted for a judicially administered monitoring fund to limit recovery to monitoring that is actually received. A federal district court in Ohio, in deciding that Ohio state law would recognize a claim for medical monitoring, further limited recovery to monitoring “directed toward the disease for which the tort victim is at risk,” as “established by the evidence and determined by the jury.”²⁶⁴ Building a convincing case for medical monitoring is incredibly difficult, expensive, and time consuming.²⁶⁵

VI. BROADENING THE POLLUTER PAYS PRINCIPLE

A. Amend CERCLA

Proving a toxic torts case for medical monitoring recovery is a difficult task. The costs are high, and the burdens of proving causation are nearly insurmountable because of the latency element.²⁶⁶ CERCLA, on the other hand, places the burden on PRPs to show that they are not liable for damages. The strict, retroactive, and joint and several liability schemes built into CERCLA would ease much of the burden on toxic exposure victims. There are inherent fairness concerns with placing the burden on PRPs, and those concerns will be addressed, but ultimately, the fairness concerns with placing the burden on innocent victims should carry the day.

The demands of a medical monitoring claim since first introduced in *Friends* have increased in light of the stringent standards set out in *Daubert v. Merrell Dow Pharmaceuticals*.²⁶⁷ These obstacles have made the state common law route basically untenable for most people exposed to hazardous or toxic substances. Congress could address the toxic legacy of our country, and the racial and socioeconomic inequalities inherently built into it,²⁶⁸ by amending CERCLA.

The structure of the law has led courts to conclude that when a victim seeks additional medical monitoring these costs are not necessary costs of response. However, when the ATSDR concludes that medical monitoring is necessary, but has not yet funded the regime, plaintiffs cannot seek an injunction to receive medical monitoring sooner because of Section 113(h)'s jurisdictional bar. This conclusion means, necessarily, that when the ATSDR is pursuing a medical monitoring regime,

263. *Gerardi v. Nuclear Util. Servs., Inc.*, 566 N.Y.S.2d 1002, 1003 (N.Y. Sup. Ct. 1991); *Metro-North Commuter R.R., v. Buckley*, 521 U.S. 424, 432–33 (1997) (surveying minority approach).

264. *Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994).

265. See generally Adam P. Joffe, *The Medical Monitoring Remedy: Ongoing Controversy and a Proposed Solution*, 84 CHI.-KENT L. REV. 663 (2009).

266. See Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1446 (2005).

267. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591–95 (1993) (including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community). See also Lin, *supra* note 266 at 1451.

268. See MCGURTY, *supra* note 187.

the costs of medical monitoring are necessary costs of response. This logical incongruity serves as an effective bar to recovery for plaintiffs seeking medical monitoring funding but can be easily addressed. If medical monitoring costs are not necessary costs of response, then Section 113(h)'s jurisdictional bar should not be applied. If, on the other hand, they are necessary costs of response, then they should be necessary costs of response for plaintiffs as well as the ATSDR. This logical congruity would need to be established through judicial action, and it seems unlikely that courts would part with decades of jurisprudence on the subject.

The amendment proposed here would not fundamentally change the nature of the law, nor would it add new liabilities on PRPs. By moving Section 104(i)—authorizing the ATSDR to initiate community health studies and medical monitoring funds²⁶⁹—into Section 107(a), the presumption would be that medical monitoring costs are “necessary costs of response.”²⁷⁰ This solution could also be done by providing a definition of “necessary costs of response,” clarifying that the term does encompass medical monitoring costs.

Legislative action, even with Congressional gridlock, is the most likely avenue to address these issues within CERCLA. Undoubtedly, any possible Congressional action would be met with stout opposition. CERCLA's liability structure places much of the burden on PRPs, and the addition of medical monitoring costs would be seen as an additional liability. This is not the case. PRPs are already liable for medical monitoring costs, if the ATSDR finds that medical monitoring is necessary. The administrative barriers and bureaucratic red tape around the ATSDR's functions, however, have made it effectively a bar to recovery and medical monitoring for plaintiffs. Moving the health surveys and medical monitoring sections of CERCLA into Section 107 would shift the burden onto PRPs to show why they should not pay the costs. This solution would address many of the obstacles faced by toxic substance exposure victims, namely reducing the costs of litigation and getting them the medical monitoring they need much quicker.

B. A Risk-Based Administrative System

This alternative is simultaneously the least likely in this current political climate, and the least attractive. Through the implementation of a tax or sliding-scale internalized cost system, polluters would pay into a fund used to compensate victims of toxic substance exposure.²⁷¹ Functioning similarly to a workers' compensation or social security fund, polluters would pay into this fund based on the amount they pollute or are likely to pollute.²⁷² The proposal removes the hurdle of specific causation, and creates an administratively monitored fund made available to people exposed to a set list of substances.²⁷³ If, for example, Mr. Jones were exposed to Listed Substance A, he would be able to make an administrative claim for money to

269. 42 U.S.C. § 9604(i) (2012).

270. 42 U.S.C. § 9607(a)(4)(B) (2012).

271. See Lin, *supra* note 266, at 1486–87.

272. *Id.* at 1486–88.

273. *Id.* at 1488–90.

fund the medical treatment necessary for exposure to Listed Substance A.²⁷⁴ If, however, Mr. Jones were also exposed to an unlisted substance, he would need to seek damages through the traditional tort route described above.²⁷⁵ This solution is logical on paper, but would likely not address the immediate needs of the communities already suffering from toxic substance exposure, and would certainly not address those needs quickly.

This proposal would potentially normalize harmful business and waste management practices. Landfill operators will have already paid to pollute the soil, water, and air, so what would compel them not to? While internalizing the costs of contamination makes sense, especially when they are currently externalized and placed onto the shoulders of victims, this proposal may go too far. There is already a government agency tasked with providing medical monitoring funds, and the ATSDR takes years to develop the research necessary to make a finding and even longer to actually implement a program, if it ever does. There is no guarantee built into this proposal that victims would ever actually receive support in paying for a medical monitoring regime. Finally, it would likely take a number of years and countless federal funds to develop the list of substances to be included in this risk-based scheme. As the list is built, more communities would be exposed to toxic substances and communities already dealing with the mental and physical anguish of exposure would need to continue to wait. This solution only serves to limit the liability on industry and does not address the broader issues of America's toxic legacy or the continued environmental injustice²⁷⁶ served upon communities of color and impoverished communities through shady industrial siting and zoning.

C. State Legislative Affirmance of the Medical Monitoring Cause of Action

With Congressional gridlock, and the decades of jurisprudence in the way, communities facing issues with toxic and hazardous substance exposure should continue to focus on state-based solutions. Whether those solutions are achieved through state legislatures or courts, the trend has been for states to adopt medical monitoring into their common law systems.²⁷⁷ This trend will likely continue and medical monitoring will be adopted, particularly in those states where the question has not been addressed.

i. *Akins/Petito/Paoli Tests*

The *Petito* court provided the clearest, most succinct test for determining whether medical monitoring is warranted.²⁷⁸ Other courts have produced similar, and just as useful tests in this field. These tests should be used by state courts to address claims for medical monitoring as they consider all sides of the fairness arguments.

274. *Id.* at 1488 (“For example, if an oil refinery’s sulfur dioxide emissions were expected to cause fifty additional cases of lung disease and ten additional deaths per year, the refinery would make a payment to the administrative system reflecting the costs of those injuries.”).

275. *Id.*

276. See ENVTL. PROT. AGENCY, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL 20-YEAR RETROSPECTIVE REPORT (1994–2014) 56 (2016).

277. See *supra* Part V.

278. *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999).

An element sometimes included in medical monitoring tests is a requirement that a treatment exist for the disease.²⁷⁹ This element feels heartless but is ultimately reasonable. If there is no treatment for a specific disease caused by a toxic substance, then there would be no cost recovery for medical treatment associated with that disease.²⁸⁰ It would be ultimately unfair for defendants to pay for medical monitoring when there would be no benefit wrought from early diagnosis of a disease.

Courts have gone to considerable lengths to craft these tests in a way that is equitable to both parties, but only in terms of the ultimate result. These tests, along with the myriad hurdles detailed above, ultimately limit the number of plaintiffs that bring claims for medical monitoring. Without Congressional action on CERCLA, this is unfortunately the system most plaintiffs are going to have to deal with if they wish to receive medical monitoring. There is, however, another route that some states have elected to use.²⁸¹ States have a law that functions similarly to CERCLA, and they have used these laws to spearhead clean up at sites that are not on the National Priorities List.²⁸² The focus of most state programs is on economic development, often referred to as a “brownfields program.”²⁸³ These programs allow re-use of contaminated sites, as well as preservation of untouched, natural land.²⁸⁴

ii. *Joffe’s Test*

Ultimately incredibly helpful, the Jones hypothetical introduced by the *Friends* court created an implicit bias against medical monitoring claims without a cognizable physical impact. This bias was overcome by the *Petito* and *Hansen* courts, to an extent, but those courts still relied on the cognizable event that led to an increased risk of developing a disease.²⁸⁵ What these cases have failed to do is grant recovery in the form of medical monitoring when the plaintiff struggles to point to an identifiable event, when the contamination is old and wide-spread and the consumption of or interaction with the substance has taken place over long periods of time. These cases have failed to address an issue substantially similar to the issue faced by the victims of the Wolverine contamination.

Even well-intentioned commenters on this subject have fallen into the trap of cognizable events as a prerequisite to recovery.²⁸⁶ The most recent articulation of

279. See *supra* Part V; *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990).

280. With many hazardous or toxic substances linked to myriad diseases, this element would likely be implicated quite rarely. For example, if substance X could only be reliably linked to disease Y and disease Y had no current medical treatment, then there would be no cost recovery for medical monitoring to detect disease Y. However, if substance X could be reliably linked to diseases Y, Z, and Q, and diseases Z and Q had current medical treatments then there could be cost recovery for medical monitoring to detect those diseases. This element of the test would also be implicated if the medical monitoring for disease Y were only utilized to detect disease Y. In that case, there would be no cost recovery for that medical monitoring.

281. See *supra* note 155.

282. ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE 7 (2002).

283. *Id.* at 7–9.

284. RES., CMTY, AND ECON. DEV. DIV., U.S. GOV’T ACCOUNTABILITY OFFICE, RCED-99-39, HAZARDOUS WASTE SITES: STATE CLEANUP PRACTICES 5 (1998) (referring to these untouched lands as “greenfields”).

285. See *supra* Sections V(C)–(D).

286. Joffe, *supra* note 265, at 682.

a medical monitoring test, published in 2009, required a “specific and traumatic occurrence.”²⁸⁷ This presumes a fact pattern more similar to Jones at the red light than to the Michiganders around the Wolverine waste site. There is not necessarily a specific and traumatic occurrence for this community; they have been forced to unwittingly suffer countless specific and traumatic occurrences as a result of Wolverine’s negligence.

Whether achieved through state legislative or judicial action, any test for medical monitoring needs to be constructed with an eye towards the kind of issues that have arisen as a result of America’s toxic legacy. The Jones hypothetical is no longer applicable when the contamination is wide spread and occurs over a long period of time. The reliance on a “specific and traumatic occurrence” leaves people like those of this Michigan community without a real avenue to recovery. There are complications in creating the ideal test, one that would accommodate victims of latent toxic substance exposure just as well as it would accommodate victims of a one-time massive exposure.

The ideal approach may not be a traditional “test,” as that phrase is understood and used in tort law. Taking the test provided by Mr. Joffe in his article, and replacing or supplementing the first requirement—a specific and traumatic occurrence—with a set of factors used to determine the factuality, seriousness, and likelihood of disease resulting from toxic exposure would address the inherent gaps in the tests currently used.²⁸⁸ One such set of factors was provided by the Supreme Court of California as it upheld that medical monitoring is a compensable item of damages.²⁸⁹ The factors are:

(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 of 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.²⁹⁰

This revised and broadened standard²⁹¹ would benefit a greater number of people and allow for improved public health results. If there is a clear and specific event that has caused a plaintiff to be at an increased risk of disease, the standard would allow for recovery assuming the other factors can be proved by a

287. *Id.* (“[A] defendant should be liable to provide medical monitoring expenses when: (1) the potential injury results from a specific and traumatic occurrence; (2) scientific evidence suggests that the defendant’s tortious conduct . . . results in a statistically significant increase in likelihood that the plaintiff will develop a specific illness; (3) early detection of the specific illness is possible and can lead to the prevention of death or debilitation; (4) causation can be shown such that the plaintiff would not reasonably require a specific medical examination but for the defendant’s tortious conduct; and (5) the benefits of medical monitoring outweigh the costs.”).

288. *Id.*

289. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824–25 (Cal. 1993).

290. *Id.*

291. Joffe’s test could be revised to say: “(1) the potential injury results from a significant exposure to toxic chemicals.” This would in no way undermine the original test’s emphasis of a specific and traumatic occurrence but would broaden the scope to include those plaintiffs who may have been exposed over time.

preponderance of the evidence. If, however, as so often happens in cases of latent exposure and contamination, it is impossible to identify one singular event, this standard would still allow recovery—again, assuming all other factors can be proved.

This solution is not ideal, but it is the change most likely to be seen in the foreseeable future. Intransigence in Congress and a general distaste for the “regulatory state” make any positive changes to federal or state laws unlikely. Courts can find justice for these plaintiffs by recognizing medical monitoring as either a stand-alone cause of action or as a compensable item of damages. Allowing more communities an avenue to receive the kind of medical care they need as a result of toxic or hazardous substance exposure will lead to positive public health outcomes and will begin to address the rampant environmental injustices heaved upon communities of color and impoverished communities.²⁹²

VII. CONCLUSION

There are no efficient, effective, or realistically accessible solutions for impoverished communities to receive medical monitoring after being exposed to toxic or hazardous substances. There is no longer a question about CERCLA liability for medical monitoring costs. Even if a state has recognized medical monitoring as a cause of action or an element of damages, the costs of litigation are going to preclude the most vulnerable communities from advocating for their health. Finally, very few states have created a state-based mini-CERCLA that goes far enough beyond the federal CERCLA to include medical monitoring as a cost of response.

While it is in no stretch of the imagination an easy feat, the most complete solution to these problems is amending CERCLA. Forcing plaintiffs to shoulder the burden of medical monitoring costs up front *and* the costs of litigation is unjust. Allowing clearly liable responsible parties to avoid paying the costs of medical monitoring is equally unjust. CERCLA’s strength lies in its broad polluter pays principle which forces PRPs to come to the table and either pay their fair share or prove that they were not responsible. This principle needs to be broadened to cover medical monitoring costs. Narrow interpretations of the statute and one unfortunately uttered phrase in the legislative record have robbed these communities of the opportunity to see crippling and fatal diseases coming.

The argument often levied against medical monitoring costs as necessary costs of response is that PRPs will have to pay for medical monitoring of people that will never get sick. This is true, there is no guarantee that toxic or hazardous waste exposure will result in disease. However, what is also true is that but for the negligent, reckless, or intentional actions of PRPs, these communities would not be at a heightened risk of disease. Continuing to allow PRPs to avoid liability for medical monitoring costs results in providing them an indirect economic benefit for their bad actions. Because our environmental laws are founded on the basis of protecting the human health and welfare, we must do more. No polluting company should be allowed to benefit economically even if it means paying for, perhaps, unnecessary medical monitoring.

292. See MCGURTY, *supra* note 187.