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Medical Monitoring in West Virginia and the Surrounding State

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Although West Virginia is only the 38th most populous state, a simple Westlaw search reveals that it has the sixth most reported cases for the phrase "medical monitoring."[1] Moreover, when controlling for West Virginia's lack of an intermediate appellate court by comparing only courts of last resort, West Virginia is matched only by Louisiana. Clearly, medical monitoring has an outsized presence in the West Virginia courts. Why is this the case? In an attempt to answer that question, this article compares and contrasts the law of medical monitoring in West Virginia with those of the surrounding states, at least one of which – the Commonwealth of Pennsylvania – has a well-developed medical monitoring jurisprudence of its own.

I. Medical Monitoring Jurisprudence

A. Medical Monitoring in the Mountain State (West Virginia)

1. Bower ushers in a claim for medical monitoring.

In *Bower v. Westinghouse Elec. Corp.*, the Supreme Court of Appeals of West Virginia recognized a claim for medical monitoring, which it defined as requiring proof of the following six elements:

> (1) he or she has, relative to the general population, been significantly exposed;
> (2) to a proven hazardous substance;
> (3) through the tortious conduct of the defendant;
> (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease;
> (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and
> (6) monitoring procedures exist that make the early detection of a disease possible.

Syl. Pt. 3, in part, 206 W. Va. 133, 522 S.E.2d 424 (1999).

Just as interesting as the elements of proof that the *Bower* court required, however, are those that it did not.

First, and most notably, the *Bower* court did not require proof of a *present* injury, concluding that "the exposure itself and the concomitant need for medical testing constitute the injury." *Id.* at 139, 522 S.E.2d at 430 (citing *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993)).

[1] This search was performed across all State databases on April 17, 2017.

Second, the *Bower* court held that a plaintiff seeking medical monitoring is not required to demonstrate "the probable likelihood that a serious disease will result from the exposure." *Id.* at 140, 522 S.E.2d at 431. Indeed, the plaintiff "is not required to show that a particular disease is certain or even likely to occur as a result of exposure." *Id.* at 142, 522 S.E.2d at 433. Thus, although the *Bower* test requires proof of a "significant exposure," there is "[n]o particular level of quantification … necessary to meet this requirement." *Id.* (citing *Hansen*, 858 P.2d at 979) (alteration in original).

Third, the in determining whether diagnostic medical examinations are "reasonably necessary," no significant weight is to be given either to financial cost or frequency of the testing. *Id.* In fact, a determination of reasonable necessity may be based, "at least in part, upon the subjective desires of a plaintiff for information concerning the state of his or her health." *Id.*

Fourth, the *Bower* court did not limit medical monitoring to diseases for which treatment is presently available. *Id.* at 142-43, 522 S.E.2d at 433-34. The *Bower* court was persuaded not only that such a limitation would be inadvisable in light of continued medical advancements but also that knowledge of an illness presents its own inherent benefits. *Id.* at 143, 522 S.E.2d at 434.

Fifth and finally, the *Bower* court determined that it would not preclude medical monitoring awards from being distributed as lump-sum payments. *Id.*

2. Post-Bower, the Supreme Court of Appeals fills in the gaps

In the nearly twenty years since *Bower* was decided, the Supreme Court of Appeals has had multiple occasions on which to discuss and refine its holding.

In two of the earlier cases, *Carter v. Monsanto Co.*, 212 W. Va. 732, 575 S.E.2d 732 (2002), and *State ex rel. E. I. du Pont de Nemours and Co. v. Hill*, 214 W. Va. 760, 591 S.E.2d 318 (2003), the Supreme Court of Appeals considered *Bower* in the context of proof of exposure. In *Carter*, the court declined to extend *Bower* to require a defendant to pay to determine whether a plaintiff's property had been exposed to hazardous substances, holding that the plaintiff bears the burden of proof and "must first prove at his expense that his property has in fact been injured." 212 W. Va. at 736, 575 S.E.2d at 346. Similarly, in *Hill*, the court held that the trial court erred where it required the defendant to pay for the plaintiffs to obtain blood testing to determine whether they had been exposed to perfluorooctanoic acid ("C-8"). 214 W. Va. at 768-69, 591 S.E.2d at 326-27. The *Hill* court declined to shift the cost burden of discovering whether a medical monitoring claim exists to a defendant, holding that "[t]he plaintiffs must bear the cost of proving, at their own expense, that they have been exposed to C-8 and that exposure has injured them." *Id.* at 769, 591 S.E.2d at 327.

In *In re Tobacco Litigation*, the plaintiffs appealed an adverse verdict on, among other things, the reasonable necessity of medical monitoring for smokers. 215 W. Va. 476, 600 S.E.2d 188 (2004). The plaintiffs assigned as error the trial court's refusal to instruct the jury that, in determining reasonable necessity, ""factors such as financial cost and the frequency of testing should not be given significant weight." *Id.* at 481, 600 S.E.2d at 193. The *In re Tobacco Litigation* court, however, held that this refusal was not an abuse of discretion in light of both

parties' failure to focus on the cost or burdensomeness of testing. *Id.* at 482, 600 S.E.2d at 194. The Supreme Court of Appeals accordingly declined to reverse the jury verdict.

The most significant case to discuss *Bower*, however, is that of *Perrine v. E. I. du Pont de Nemours and Co.*, in which the Supreme Court of Appeals considered an appeal from a jury verdict awarding damages for property remediation and medical monitoring allegedly attributable to a former zinc smelter. 225 W. Va. 482, 694 S.E.2d 815 (2010). The defendant argued on appeal that the "increased risk" element could not be satisfied where (1) blood lead testing suggested that exposures to one constituent of concern were not at hazardous level and (2) the increased risk was equal to that from smoking a single pack of cigarettes over a lifetime. *Id.* at 541, 694 S.E.2d at 874. Inherent in the defendant's argument was the question of whether the Supreme Court of Appeals would accept exceedances of screening levels as sufficient evidence of increased risk.

Rather than further define the evidence necessary to sustain a plaintiff's burden of proof on the "increased risk" element, the *Perrine* court affirmed the medical monitoring verdict on the basis that "the evidence was controverted" and the Court was "bound to view the evidence in the light most favorable to the Plaintiffs as the prevailing parties." *Id.* at 542, 694 S.E.2d at 875. This conclusion does not foreclose future challenges to the use of screening levels to prove increased risk, but it strongly suggests that even a minimal increase in risk may be sufficient to support medical monitoring.

The *Perrine* court also used a footnote to expand upon the definition of "reasonably necessary" medical examinations. The defendant had argued on appeal that CT scans were not reasonably necessary because they would present a greater cancer risk to the plaintiffs than what was attributable to their exposure to the constituents of concern. *Id.* at 542 n. 66, 694 S.E.2d at 875 n. 66. In summarily dismissing this assignment of error, however, the *Perrine* court returned to its statement in *Bower* that the reasonable necessity of medical examinations may be based "upon the subjective desires of a plaintiff for information concerning the state of his or her health." *Id.* The *Perrine* court also suggested that, by not presenting an alternative medical monitoring remedy to CT scans, the defendant had waived any objections. *Id.*

Where *Perrine* had its greatest significance, however, was holding that "punitive damages may not be awarded on a cause of action for medical monitoring."[2] *Id.* at 548, 694 S.E.2d 815. In reaching this conclusion, the *Perrine* court was influenced by Justice Benjamin's dissent in the case of *State ex rel. Chemtall Inc. v. Madden*, 221 W. Va. 415, 655 S.E.2d 161 (2007), in which he argued that punitive damages violate constitutional due process when assessed only on the basis of increased risk. The *Perrine* court accordingly adopted Justice Benjamin's reasoning which concluded that, because medical monitoring awards are not based upon actual compensatory damages, any punitive damages award for medical monitoring would be entirely arbitrary and unconstitutional. *Chemtall*, 221 W. Va. at 425, 655 S.E.2d at 171.

[2] Although West Virginia jurisprudence speaks of medical monitoring as a cause of action, "[l]iability … is predicated upon the defendant being legally responsible for exposing the plaintiff to a particular hazardous substance." *Bower*, 206 W. Va. at 142, 522 S.E.2d at 433. That is, medical monitoring requires proof of an underlying tort.

B. *Medical Monitoring in the Keystone State (Pennsylvania)*

The Supreme Court of Pennsylvania recognized a claim for medical monitoring in *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996), although the Third Circuit Court of Appeals had predicted it would do so several years earlier in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d. Cir. 1990). It was not until a year after *Simmons*, however, that the Supreme Court of Pennsylvania defined the following elements of a medical monitoring claim:

> (1) exposure greater than normal background levels;
> (2) to a proven hazardous substance;
> (3) caused by the defendant's negligence;
> (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease;
> (5) a monitoring procedure exists that makes 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.

Redland Soccer Club., Inc. v. Dep't of the Army and Dep't of Defense of the U.S., 548 Pa. 178, 195-96, 696 A.2d 137, 145-46 (1997).

A comparison of the *Redland* test to the *Bower* test reveals that, minor differences in terminology and numbering aside, the tests are quite similar. Moreover, like West Virginia, Pennsylvania does not require a plaintiff to demonstrate the existence of treatment which would make early detection of the disease beneficial. *Id.* at 196 n. 8, 696 A.2d at 146 n. 8.

Nevertheless, the *Redland* test embraces scientific principles where the *Bower* test does not. In *Bower*, the Supreme Court of West Virginia took pains to note that a plaintiff's own subjective desire for medical testing might, of itself, constitute medical necessity. 206 W. Va. at 142, 522 S.E.2d at 433. In *Redland*, by contrast, the Supreme Court of Pennsylvania required that the monitoring regime be "reasonably necessary according to contemporary scientific principles" and expressly noted that "[p]roof of these elements will naturally require expert testimony." 548 Pa. at 196, 696 A.2d at 146.

Subsequent decisions from the Commonwealth of Pennsylvania's lower courts, as well as the federal courts interpreting Pennsylvania law, have expanded upon the *Redland* factors.

In *Walter v. Magee-Womens Hospital of UPMC Health System*, the Superior Court of Pennsylvania enforced the "significantly increased risk" requirement to deny a medical monitoring claim. 2005 PA Super 131, 876 A.2d 400 (2005). The *Walter* plaintiffs, as representatives of a putative class, alleged that the Magee-Womens Hospital had issued pap smear reports bearing physicians' names that had not, in fact, been reviewed by a physician. *Id.* at ¶ 1, 876 A.2d at 402-03. The plaintiffs alleged that they were therefore at greater risk of medical error in the form of undetected cancers and conditions and demanded medical

monitoring in the form of, among other things, additional pap smears. *Id.* at ¶ 1, 876 A.2d at 403. The *Walter* court held that these allegations failed to state a claim for medical monitoring because, among other things, "there was no exposure or event caused by Defendants' negligence that resulted in a significantly greater risk that Plaintiffs will suffer from a serious medical condition." *Id.* at ¶ 11, 876 A.2d at 405.

Once again in the context of significantly increased risk, the Superior Court in *Pohl v. NGK Metals Corp.* gave teeth to the expert testimony requirement. 2007 PA Super 306, 936 A.2d 43 (2007). In *Pohl*, summary judgment was entered against the plaintiffs for failure to demonstrate a significantly increased risk. 2007 PA Super at ¶ 24, 936 A.2d at 51-52. Although the plaintiffs sought medical monitoring for chronic beryllium disease, they could not or would not demonstrate beryllium sensitivity, which is a necessary precondition to developing the disease for which they sought monitoring. *Id.* at ¶¶ 2 & 23-24, 936 A.2d at 45 & 51-52.

In *Fiorentino v. Cabot Oil & Gas Corp.*, the United States District Court for the Middle District of Pennsylvania addressed the requirement that the prescribed monitoring regime be different from that normally recommended. No. 3:09-cv-2284, 2011 WL 5239068, at *3 (M.D. Pa. Nov. 1, 2011). At issue was whether the prescribed monitoring must be different than that recommended for the *general public* (as argued by the plaintiffs) or for the specific plaintiff (as argued by the defendants). Although an issue of first impression, the *Fiorentino* court read Pennsylvania law as focusing on an individualized injury to the plaintiff and therefore concluded that "establishing a medical monitoring claim requires each plaintiff to demonstrate that the medical monitoring regimen he had been or would have been prescribed, taking into account individualized and personal factors such as genetics, medical history, etc., has changed due to the exposure." *Id.* at *7.

Finally, in a recent, albeit unpublished, decision, the Superior Court of Pennsylvania affirmed a trial court decision that interpreted *Walter* as standing for the principle that "it is the existence of a diagnosed condition which creates the need for special monitoring." *Melnick v. Exxon Mobil Corp.*, No. 1607 MDA 2013, 2014 WL 10916974, at *7 (Pa. Super. Ct. June 9, 2014). This interpretation of *Walter* would seem to constitute a *de facto* "present injury" requirement, and its adoption or rejection by other Pennsylvania courts accordingly bears monitoring.[3]

Notwithstanding the similarities between the *Redland* and *Bower* tests, the gloss given to *Redland* by the Pennsylvania courts suggests a stronger emphasis on expert testimony and a more rigorous application of the elements of proof than found in West Virginia. Like West Virginia, however, Pennsylvania has an active medical monitoring jurisprudence with 55 decisions containing the phrase, fewer only than California and Louisiana.

[3] The *Redland* court cited approvingly to *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 850 (3d. Cir. 1990), which held that medical monitoring is an economic injury not requiring "present manifestations of physical injury." 548 Pa. at 192, 696 A.2d at 144. Nevertheless, unlike the *Bower* court, the *Redland* court did not expressly reject a present physical injury requirement.

C. *Medical Monitoring in the Bluegrass State (Kentucky)*

In *Wood v. Wyeth-Ayerst Laboratories, Div. of Am. Home Products*, the Supreme Court of Kentucky was urged to recognize a claim for medical monitoring in the context of litigation over potential health effects attributable to the use of the diet drug combination "fen-phen." 82 S.W.3d 849, 851-52 (Ky. 2002). The *Wood* court declined to do so, holding that Kentucky "has consistently held that a cause of action in tort requires a present *physical* injury to the plaintiff." *Id.* at 852 (emphasis added). Thus, the *Wood* court declined to accept the argument found so persuasive by the *Bower* court, that is, that the need for medical monitoring was itself sufficient injury to support the claim. As the *Wood* court reasoned, "[i]t is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." *Id.* at 855.

Wood appears to have had wider effects within Kentucky. In *Rockwell Intern. Corp. v. Wilhite*, for example, the Court of Appeals of Kentucky held that, although the plaintiffs' properties had been exposed to polychlorinated biphenyls ("PCBs"), the plaintiffs' claims for negligent trespass failed because the presence of PCBs was insufficient to constitute a health hazard and, hence, an injury. 143 S.W.3d 604, 618-23 (Ky. Ct. App. 2003). In reaching its conclusion, the *Rockwell* court relied heavily on *Wood* for its discussion of public policy, and its analysis provides a stark contrast to that of *Bower*:

> Were we to accept the landowners' argument that such evidence is sufficient, the implication for future cases would be that in any negligent trespass case, the mere deposit of a potentially toxic substance on property in an amount not detectable by unassisted human senses would satisfy the element of actual injury to the property. Such a decision would open the proverbial floodgates of litigation, allowing a suit to proceed any time a landowner can show the presence, however minute, of a substance known to be harmful in greater concentrations. Given that there was testimony presented that PCBs are present in miniscule amounts on nearly every piece of property wherever located, and that after a century and a half of industrialization there is most likely no land in the continental United States that is completely free from one or more potentially toxic or harmful substances, the landowners would have us authorize a suit by any landowner in the Commonwealth against any individual or enterprise which has ever emitted a potentially harmful substance that can be detected on real property in any amount.
>
> …
>
> Unfortunate as it may be, the harsh reality of life in the present day is that thousands, if not millions of people, have been exposed to and/or ingested potentially harmful or toxic substances. The Court was concerned about the seemingly limitless litigation that would ensue if it allowed such recovery, concluding that it "is not prepared to part ways with the system of remedies in favor of cash advances as proposed by [Wood]." Likewise, given the widespread potential contamination of land in the Commonwealth and throughout the nation, we are similarly unwilling to abandon the established system of remedies in favor of cash advances as proposed by the landowners.

Id. at 621 & 623.

Kentucky jurisprudence thus stands in opposition to that of West Virginia. Indeed, the public policy considerations underpinning *Wood* – the economic consequences of potentially unlimited liability – are the reverse of those underpinning *Bower* – the health consequences of potentially unlimited exposure. Given these contrasts, it is unsurprising Kentucky has only eight cases that use the phrase "medical monitoring" and that only one (*Wood*) does so in a similar context to *Bower*.

D. *Medical Monitoring in the Buckeye State (Ohio)*

Although the Supreme Court of Ohio has recognized medical monitoring as a viable claim for damages, *see Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 817 N.E.2d 59 (2004), the elements of proof were established by the United States District Court for the Southern District of Ohio in *Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994). Among several claims, the *Day* court considered claims for medical monitoring based upon the plaintiffs' alleged exposure to radiation emitted during the manufacturer of components for nuclear weapons and concomitant increased dear of cancer. 851 F. Supp. at 874. In considering whether such a claim was recognized under Ohio law, the *Day* court recognized that Ohio traditionally prohibited recovery for the increased risk of disease. *Id.* at 879. The *Day* court, however, treated the plaintiffs' claim as one for "compensation for reasonable medical procedures incurred in an attempt to establish whether a plaintiff has been injured, even when those procedures prove that the plaintiff has not in fact been injured." *Id.* As the *Day* court concluded, "[r]esponsibility for procedures required to discover whether an injury has occurred are a reasonable consequence of tort liability." *Id.*

Having recognized a claim for medical monitoring, the *Day* court held that to meet their burden of proof, plaintiffs must "show by expert medical testimony that they have increased risk of disease which would warrant a reasonable physician to order monitoring." *Id.* at 881. As a limitation, however, "[t]he monitoring must be directed toward the disease for which the tort victim is at risk, and will only include procedures which are medically prudent in light of that risk as opposed to measures aimed at general health." *Id.* Because medical monitoring is an element of damages rather than an independent cause of action, liability must be established first under "traditional tort theories of recovery." *Id.* at 880.

Given that the *Bower* test does not require any "particular level of quantification" to demonstrate increased risk, *id.* at 142, 522 S.E.2d at 433, the United States District Court for the Northern District of Ohio's treatment of increased risk provides an interesting contrast. In *Mann v. CSX Transp., Inc.*, the court rejected the plaintiffs' attempts to rely on regulatory soil cleanup levels to establish risk. No. , 2009 WL 3766056, at *5 (N.D. Ohio Nov. 10, 2009). The *Mann* court held that cleanup levels "represent[] a threshold for the cleanup of contaminated soil, not a danger point above which individuals require medical monitoring" and that "a conservative soil cleanup level should not be sued in place of a medically-based risk assessment or evidence of the actual dose level at which dioxin truly causes cancer." *Id.* The *Mann* court further reasoned that

the 1 x 10^6 risk factor assumed for cleanup levels was insufficient, as a matter of law, to support medical monitoring. *Id.*[4]

The elements of medical monitoring in Ohio are less well-defined that West Virginia, although the facial distinctions appear minimal at best. The application of those elements, however, leaves significant room for distinctions to appear. In particular, to the extent that the state and federal courts in Ohio follow the *Mann* court and apply traditional tort-based (as opposed to regulatory-based) concepts to the definition of increased risk, Ohio law will require more substantial proof of risk than in West Virginia.

E. *Medical Monitoring in Old Dominion (Virginia)*

Neither the Virginia courts nor the federal courts sitting in Virginia have recognized a claim for medical monitoring. *See In re All Pending Chinese Drywall Cases*, 80 Va. Cir. 69, 2010 WL 7378659, at *9-10 (2010) (noting that Virginia has not recognized a claim for medical monitoring and that the circuit court cannot fashion such a remedy absent authorization or guidance from the Virginia General Assembly).

F. *Medical Monitoring in the Free State (Maryland)*

Maryland joined the states recognizing a claim for medical monitoring in 2013. In *Exxon Mobil Corp. v. Albright*, the Court of Appeals of Maryland held that proof of medical monitoring requires that a plaintiff "show that reasonable medical costs are necessary due to a reasonably certain and significant increased risk of developing a latent disease as a result of exposure to a toxic substance." 433 Md. 303, 388, 71 A.3d 80, 81 (2013), modified on other grounds, 433 Md. 502, 71 A.3d 150 (2013). Proof of a significant increased risk should be through "quantifiable and reliable medical expert testimony that indicates the plaintiff's chances of developing the disease had he or she not been exposed, compared to the chances of the members of the public at large of developing the disease." *Id.* at 388-89, 71 A.3d at 82. In considering a claim for medical monitoring, a Maryland court must also consider the following four factors:

> (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct;
> (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease;
> (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and
> (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Id. at 388, 71 A.3d at 81-82.

Like *Bower* and *Redland*, the *Albright* court expressly noted that "evidence of physical injury is not required to support costs for medical surveillance." *Id.* at 385, 71 A.3d at 80. For

[4] A 1 x 10^6 risk factor assumes that an additional one person in one million would develop cancer as a result of her exposure.

purposes of medical monitoring, the compensable injury is a plaintiff's legally-protectable interest in avoiding expensive diagnostic examinations or other medical surveillance costs. *Id.* at 386, 71 A.3d at 80.

In addition, like *Redland*, the *Albright* court held that the question of whether monitoring is "reasonably necessary" "requires, necessarily, medical testimony by a plaintiff's expert(s)." *Id.* at 382, 71 A.3d at 78. Of significant concern to the *Albright* court was that medical monitoring not rest on "tenuous proof or risk of disease *attributable* to the type of exposure" but rather on "quantifiable and reliable" proof "particularized to a plaintiff, and demonstrating a reasonable link to toxic exposure." *Id.* at 384-85, 71 A.3d at 79 (emphasis in original).

The Court of Appeals of Maryland appears intent to enforce those requirements. In a companion case to *Albright*, the court held that plaintiffs claiming MTBE (methyl tertiary butyl ether) exposure to their properties *below* the 20 ppb action level established by the Maryland Department of the Environment were "no more at risk of developing a latent disease than the rest of the population" and could not state a viable claim for medical monitoring. *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 474, 71 A.3d 105, 133 (2013).

Finally, and unique to the jurisdictions discussed here, the *Albright* court held that courts awarding medical monitoring costs generally should do so "by establishing equitably a fund, administered by a trustee, at the expense of the defendant." *Id.* at 389, 71 A.3d at 82. The *Albright* court noted that this was the trend among courts awarding medical monitoring and "helps ensure that the medical surveillance funds will be used for their intended purpose." *Id.* at 386-87, 71 A.3d at 80.

As is the case with Pennsylvania and Ohio law, Maryland law of medical monitoring is similar to that of West Virginia on its face. Nonetheless, the *Albright* test's requirement of "quantifiable and reliable" proof "particularized to a plaintiff and demonstrating a reasonable link to toxic exposure" suggests a more strenuous causation analysis than that required under *Bower*. Given the recency of medical monitoring as a claim for damages in Maryland, however, it may take several more years before the requirement of "quantifiable and reliable" is fully developed.

II. The outsize presence of medical monitoring in West Virginia

That medical monitoring has a presence in West Virginia jurisprudence out of proportion to the state's population is beyond dispute. Why, though, is that the case? One possible argument is that West Virginia's long histories with the chemical and extractive industries have created a wide pool of plaintiffs with potential claims. Just as likely, however, is the argument that West Virginia's medical monitoring jurisprudence is particularly favorable to plaintiffs and encourages the filing of medical monitoring claims. By comparison to its immediate neighbors, West Virginia offers medical monitoring plaintiffs the following advantages:

First, West Virginia does not require a medical monitoring plaintiff to demonstrate a present physical injury. Lack of such a present physical injury would form a complete bar to a

medical monitoring claim in Kentucky, and there is some suggestion in Pennsylvania that a plaintiff must at least demonstrate a diagnosed condition.

Second, West Virginia does not require that the increased risk from exposure be substantial. In fact, the *Bower* court held that development of a disease need not even be likely and that no particular quantification is necessary. Pennsylvania and Maryland, by contrast, both require a *significantly* increased risk, and Ohio has the potential to go even further by rejecting the use of screening levels to demonstrate this element.

Third, West Virginia has interpreted the "reasonable necessity" of medical examinations so as to give significant weight to a plaintiff's own subjective desires without consideration of cost. Pennsylvania, Ohio and Maryland, by contrast, focus on medical necessity as demonstrated by competent expert testimony.

Fourth, West Virginia does not require that a treatment by presently available for the disease for which medical monitoring is awarded. Maryland, however, requires as an element of proof that detection and treatment of the disease be possible and beneficial.

Fifth, West Virginia permits a lump sum award of medical monitoring damages whereas other states, such as Maryland, disfavor or prohibit such an award.

West Virginia is not unique in adopting any one of these five elements as part of its medical monitoring jurisprudence, but it is unique among its neighbors in offering all of them to plaintiffs. Common sense therefore suggests that, more than a theoretically hyper-exposed populace, it is this combination of advantages that has given West Virginia an outsized presence in medical monitoring jurisprudence and will continue to do so as long as these advantages endure.