LEGISLATIVE COMMITTEE MINUTES

SB111

Bill as Introduced

SB 111 - AS INTRODUCED

2021 SESSION

21-0966
08/05

SENATE BILL ***111***

AN ACT relative to claims for medical monitoring.

SPONSORS: Sen. Carson, Dist 14

COMMITTEE: Judiciary

ANALYSIS

This bill establishes the elements of a claim for medical monitoring and the damages that may be awarded.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

21-0966
08/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to claims for medical monitoring.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter; Claims for Medical Monitoring. Amend RSA by inserting after chapter 125-S the following new chapter:

CHAPTER 125-T

CLAIMS FOR MEDICAL MONITORING

125-T:1 Purpose. The general court finds that a claim for medical monitoring following significant exposure to PFAS is consistent with currently existing common law in the state of New Hampshire and other jurisdictions. The purpose of this chapter is to make the remedy of medical monitoring damages more uniform and better address the needs of those exposed.

125-T:2 Definitions. In this chapter:

I. "Exposure" means ingestion, inhalation, contact with skin or eyes, or any other physical contact.

II. "PFAS" means per and polyfluoroalkyl substances and related compounds .

125-T:3 Elements of Claim.

I. In order to prove a claim for medical monitoring damages, the plaintiff must show by a preponderance of the evidence for each of the following that:

(a) The defendant negligently caused significant exposure to PFAS;

(b) The plaintiff provides evidence through an appropriate medical test that shows that the plaintiff suffers from an increased risk of illness, disease, or latent disease based on the latest medical science. The plaintiff does not need to prove that the illness, disease, or latent disease is certain or likely to develop as a result of the exposure;

(c) The increased risk under subparagraph (b) makes the need for diagnostic testing reasonably necessary; and

(d) Medical tests exist to detect the illness, disease, or latent disease.

II. A claim for medical monitoring damages may be made without proof of present physical injury or symptoms.

III. Present or past health status shall not be at issue in a claim for medical monitoring.

125-T:4 Damages.

I. Damages shall be limited to reasonably necessary periodic examinations in accordance with the latest medical science and related costs. The costs and necessity of such examinations shall be proven by expert testimony.

II. If medical monitoring relief is awarded, a court may place the award into a court-

supervised program administered by one or more medical professionals.

III. Upon an award of medical monitoring damages, the court may award to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.

125-T:5 Statute of Limitation. Medical monitoring claims shall be made with 3 years of the effective date of this chapter or discovery of exposure. The date when the PFAS was released is immaterial for purposes of this section.

125-T:6 Severability. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

2 Effective Date. This act shall take effect upon its passage.

Amendments

Sen. Carson, Dist 14
March 10, 2021
2021-0790s
08/05

Amendment to SB 111

Amend the bill by replacing all after the enacting clause with the following:

1 New Chapter; Claims for Medical Monitoring. Amend RSA by inserting after chapter 125-S the following new chapter:

CHAPTER 125-T

CLAIMS FOR MEDICAL MONITORING

125-T:1 Purpose. The general court intends that a claim for medical monitoring following significant exposure to PFAS be consistent with common law in the state of New Hampshire and other jurisdictions. The purpose of this chapter is to make the remedy of medical monitoring damages more uniform and better address the needs of those significantly exposed.

125-T:2 Definitions. In this chapter:

I. "Exposure" means ingestion, inhalation, or contact with skin or eyes.

II. "PFAS" means regulated per and polyfluoroalkyl substances and related compounds .

125-T:3 Elements of Claim.

I. In order to prove a claim for medical monitoring damages, the plaintiff shall show by a preponderance of the evidence for each of the following that:

(a) The defendant negligently caused significant exposure to PFAS;

(b) The plaintiff provides evidence through an appropriate medical test that shows that the plaintiff suffers from a significantly increased risk of illness, disease, or latent disease based on at least one published peer reviewed medical scientific paper. The plaintiff does not need to prove that the illness, disease, or latent disease is certain or likely to develop as a result of the exposure;

(c) The increased risk under subparagraph (b) makes the need for diagnostic testing reasonably necessary and the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and

(d) Medical tests exist that make the early detection of the illness, disease, or latent disease possible and the prescribed monitoring regime for the plaintiff is reasonably necessary according to accepted scientific principles.

II. A claim for medical monitoring damages may be made without proof of present symptoms.

125-T:4 Damages.

I. Damages shall be limited to reasonably necessary periodic examinations and related costs. The costs and necessity of such examinations shall be proven by expert testimony.

II. If medical monitoring relief is awarded, a court may place the award into a court-supervised program administered by one or more medical professionals.

III. Upon an award of medical monitoring damages, the court may award to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.

125-T:5 Statute of Limitation. Medical monitoring claims shall be made with 3 years of the effective date of this chapter or the date the plaintiff knew or reasonably should have known of exposure relevant to the provisions of this chapter.

125-T:6 Severability. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

2 Effective Date. This act shall take effect upon its passage.

Committee Minutes

AMENDED
SENATE CALENDAR NOTICE
Judiciary

Sen Sharon Carson, Chair
Sen Bill Gannon, Vice Chair
Sen Harold French, Member
Sen Rebecca Whitley, Member
Sen Jay Kahn, Member

Date: March 10, 2021

HEARINGS

Tuesday		03/16/2021	
(Day)		(Date)	
Judiciary		REMOTE	1:00 p.m.
(Name of Committee)		(Place)	(Time)

1:00 p.m.	**SB 94**	relative to juvenile diversion programs.
1:20 p.m.	**SB 111**	relative to claims for medical monitoring.
2:00 p.m.	**SB 154**	prohibiting the state from enforcing a Presidential Executive Order that restricts or regulates the right of the people to keep and bear arms.

Committee members will receive secure Zoom invitations via email.

Members of the public may attend using the following links:

1. Link to Zoom Webinar: https://www.zoom.us/j/95044399618
2. To listen via telephone: Dial(for higher quality, dial a number based on your current location): 1-301-715-8592, or 1-312-626-6799 or 1-929-205-6099, or 1-253-215-8782, or 1-346-248-7799, or 1-669-900-6833
3. Or iPhone one-tap: US: +16465588656,,95044399618# or +13017158592,,95044399618#
4. Webinar ID: 950 4439 9618
5. To view/listen to this hearing on YouTube, use this link: https://www.youtube.com/channel/UCjBZdtrjRnQdmg-2MPMiWrA
6. To sign in to speak, register your position on a bill and/or submit testimony, use this link: http://gencourt.state.nh.us/remotecommittee/senate.aspx

The following email will be monitored throughout the meeting by someone who can assist with and alert the committee to any technical issues: remotesenate@leg.state.nh.us or call (603-271-6931).

EXECUTIVE SESSION MAY FOLLOW

Sponsors:
SB 94
Sen. Carson Rep. Belanger
SB 111
Sen. Carson
SB 154

Sen. Bradley
Sen. Avard
Rep. Rice

Sen. Daniels
Sen. Carson

Sen. Gannon
Rep. Weyler

Sen. Giuda
Rep. Osborne

Jennifer Horgan 271-7875

Sharon M Carson
Chairman

Senate Judiciary Committee

Jennifer Horgan 271-7875

SB 111, relative to claims for medical monitoring.

Hearing Date: March 16, 2021

Time Opened: 2:03 p.m. **Time Closed:** 2:41 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

Bill Analysis: This bill establishes the elements of a claim for medical monitoring and the damages that may be awarded.

Sponsors:
Sen. Carson

Who supports the bill: Senator Carson; Rep. Mooney; Kate Coon; Andrew Jones; Patricia Anastasia; Jay Newton; Margaret Keeler; Marie Straiton; Margaret Gordon; Barbara Zaenglei; Marsha Feder; Lucinda Hope; Gail Laker-Phelps; Annie Reteew; Mel Hinebauch; Gale Taylor; Elizabeth Vaughan; Elizabeth-Anne Petruccelli; Charles Petruccelli; Sandra Stonebanks; Marie Nardion; Lauire Gordon; Deborah Jal; Nancy Graham; Ann Garland; Dennis Jakubowski; Richard DeMark; Susan Bruce; Ed Friedrich; Edward Friedrich; Maura Willing; Nicole Fordey; Ruth Larson; Jeanne Torpey; Cheri Falk; Claudia Damon; Ruth Perencevich; Denise Clark; Joanne Casino; Kathy Spielman; Elizabeth Corell; Sandra Blanchard; Barbara Reed; Kent Hackmann; Nancy Harrington; Brigid McNamee; Don Rankin

Who opposes the bill: Christopher Appel, American Tort Reform Association; Greg Smith, Waste Management; Marissa Chase, NHAJ; Alison Cooper, American Property Casualty Insurance Association; Robin Vogt; Judith Hendrick

Who is neutral on the bill: Sherrill Howard

Summary of testimony presented in support:
Senator Carson

- This bill establishes the elements of a claim for medical monitoring and the damages that may be awarded.
- Medical monitoring as a result of exposure to toxic chemicals was a bill (HB1375) that came up last year and was very broad. That bill was vetoed.
- This bill is modeled after an amendment presented last year that limits the scope of medical monitoring to exposure to PFAs.

- The bill requires the show of actual injury on a molecular level and the consideration of past medical history and present health status.
- These changes address the concerns brought forward by the Governor in his veto message.
- Under this bill, NH would be one of a handful of states to have a claim for medical monitoring.
- Provided an amendment 0790s.

Summary of testimony presented in opposition:

Greg Smith (Waste Management)

- Only about five states have medical monitoring as a separate cause of action.
- Anything that would amend this bill to be more like common law in injury cases would be an improvement.
- Thinks amendment 0790s is a far better implementation of public policy.
- Senator Gannon asked how this bill would be implemented.
    - This is different than tort law where ordinarily a person would demonstrate that a defendant is liable for causing some injury, and if that can be proven then it would move to what remedies the person would be entitled to. This bill creates a new cause of action that short circuits that normal trial process. Under the standards outlined in the bill the plaintiff must have evidence that the defendant negligently caused exposure, there has to be sound science determining there is a significant increase of disease and there have to be medical monitoring measures. This bill is a more restrictive take on this matter than what has been proposed in the past.
- Senator Kahn asked what a common timeline is when there is a preponderance of evidence showing there is a case for medical monitoring.
    - Generally, we have a three-year statute of limitations for claims in tort or personal injury cases from when the injury occurred or from when the plaintiff knew/should have known. The 'should have known' part can take years.

Chris Apel (American Tort Reform Association)

- Medical monitoring allows the claimant to recover damages where the individual has no present injury and will likely never develop an injury.
- The existence of an actual injury is the lynch pin in tort law.
- By allowing the unimpaired to seek damages, it depletes the resources available for those who have actually suffered a serious injury, as seen with asbestos litigation.
- Many legal experts have said that PFAs is poised to become the next asbestos.
- This concern has resulted in the US Supreme Court rejecting medical monitoring under federal law and most state high courts have rejected it as well.
- This bill may seem more tailored that other proposals, but there are a number of issues.
- The bill allows any PFAs or PFAs related chemicals exposure to enable a lawsuit. There are thousands of PFAs chemicals in hundreds of products, and the EPA has not even been able to evaluate and regulate them all.

- The EPA has said that most people in America have been exposed to PFAs.
- Under this, a plaintiff only needs to show through an appropriate medical test that a significant exposure to PFAs created an increased risk of illness. There is no threshold for how significant or insignificant that risk must be.
- The bill does not require the plaintiff to prove that illness is certain or likely to occur as a result of the exposure.
- The lack of clarity regarding what the test is, is also concerning as it could be something as simple as talking to a doctor as part of a normal medical examination.
- The only real safeguard in the bill is whether an alleged increased risk makes diagnostic testing reasonably necessary, but there does not even seem to be a requirement that a doctor make that determination.
- The bill makes references to this being based off of the latest medical science, but a lot of that is not developed by doctors.
- There is also not a requirement that the expert testimony must given by a doctor.
- Even if a doctor's testimony was required, all they would need to do is find a doctor who would state something is worth keeping an eye on.
- In his experience, many doctors believe the practice of defensive medicine is a very real thing.
- The amendment does take into consideration past medical history, but if a patient has a genetic pre-disposition to cancer than that information may not be available to be used by a defendant in a case.
- Stripping away that would allow liability to be imposed in an unfair manner.
- The bill allows for the payment of attorneys fees and for damages to be awarded in a lump sum, instead of funds being placed in a court supervised fund.
- This combination provides an opportunity for attorneys to seek out litigation and recover damages on behalf of a group without a requirement that the unimpaired claimants actually use the fund for monitoring purposes.
- There is also nothing that would prohibit a claimant from going out and using the awarded damages to buy a TV.
- The three-year statute of limitations is a purely subjective standard, which is antithetical to the purpose of a statute of limitations.
- This bill would subject many businesses and entities to massive new liability exposure overnight during a time when many are struggling to keep the lights on during the pandemic.
- Senator Whitley asked whether he believes any polluter should have to pay for the damage they cause.
    - Of course, polluters should have to pay for the damage they cause, and tort law exists for that very purpose. If you injure someone you should pay the damages. It is a question of balancing the interests when dealing with medical monitoring. If you allow medical monitoring for unimpaired/asymptomatic plaintiffs, it depletes the pool of resources of those who actually get sick and are dying. It makes better public policy sense to stick with the traditional physical injury requirement, so that

when someone develops a physical injury they can re-coop all the costs of medical monitoring they have incurred.

Neutral Information Presented:
Marissa Chase (NH Association of Justice)

- Neutral on the bill with the amendment
- This is murky area of tort law.
- Under tort law the injured party has to prove they were injured, that the defendant owed a duty of care, and that because of the defendant's negligence that caused the injury to the plaintiff by a preponderance of the evidence.
- Someone exposed to PFAs may not be able to present a physical injury, so requiring proof of an injury is an antithesis to medical monitoring.
- The intent of medical monitoring is an attempt to prevent.
- Many states have adopted medical monitoring through common law.
- There is a case pending in NH in federal court where the issue of medical records has arisen, and the judge did order that medical history be disclosed.
- Concerned about the requirement for an appropriate medical test that shows the plaintiff suffers from a significantly increased risk of illness. Would like to discuss more about what that means.
- It is unclear what test would prove a molecular change or who would pay for that test.
- Senator Kahn asked what qualifies for the start of medical monitoring and is there an alternative to preponderance of evidence.
    - The preponderance of the evidence means more likely than not and it is used commonly. The three-year statute of limitations starts from when the plaintiff knew or should have known of their exposure. By using flexible language like this, the courts have been able to apply these generally accepted standards to unique instances.
- Senator Kahn asked if he lived in a cancer cluster community would he be able to use of his neighbors' medical records in these cases.
    - Does not know the answer to that, but would be happy to provide materials from the Saint Gobain case that may touch on that.

jch
Date Hearing Report completed: March 22, 2021

Speakers

Senate Remote Testify

Judiciary Committee Testify List for Bill SB111 on 2021-03-16

Support: 48 Oppose: 6 Neutral: 1 Total to Testify: 4

Name	Email Address	Phone	Title	Representing	Position	Testifing	Signed Up
Carson, Sharon	deborah.chroniak@leg.state.nh.us	603-271-1403	An Elected Official	Senate District 14 - PRIME SPONSOR	Support	Yes	3/11/2021 1:05 PM
Appel, Christopher	cappel@shb.com	202-662-4858	A Member of the Public	American Tort Reform Association	Oppose	Yes	3/15/2021 10:15 AM
Smith, Greg	greg.smith@mclane.com	Not Given	A Lobbyist	Waste Management	Oppose	Yes	3/16/2021 9:45 AM
Chase, Marissa	mchase@nhaj.org	603.854.9330	A Lobbyist	NHAJ	Oppose	Yes	3/16/2021 12:15 PM
Howard, Sherrill	golfmoms@gmail.com	603.726.7614	A Member of the Public	Myself	Neutral	No	3/16/2021 9:09 AM
Coon, Kate	Not Given	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 9:27 PM
Jones, Andrew	arj11718@yahoo.com	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 11:20 AM
Anastasia, Patricia	patti.anastasia@gmail.com	603.818.9991	A Member of the Public	Myself	Support	No	3/10/2021 7:55 PM
Newton, Jay	Jjnewt@gmail.com	508.254.1286	A Member of the Public	Myself	Support	No	3/15/2021 10:23 AM
Keeler, Margaret	peg5keeler@gmail.com	603-491-4689	A Member of the Public	Myself	Support	No	3/15/2021 11:46 AM
Straiton, Marie	Not Given	Not Given	A Member of the Public	Myself	Support	No	3/15/2021 1:59 PM
Gordon, Margaret	Megordon98@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/15/2021 5:14 PM
Zaenglein, Barbara	Not Given	Not Given	A Member of the Public	Myself	Support	No	3/15/2021 5:44 PM
Cooper, Alison	alison.cooper@apci.org	(518) 462-16	A Lobbyist	American Property Casualty Insurance Association	Oppose	No	3/15/2021 2:34 PM
Feder, Marsha	marshafeder@gmail.com	603.465.2056	A Member of the Public	Myself	Support	No	3/15/2021 2:39 PM
Hope, Lucinda	lmhope46@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/15/2021 2:51 PM
Laker-Phelps, Gail	lpsart@tds.net	603.798.5394	A Member of the Public	Myself	Support	No	3/15/2021 5:58 PM
Rettew, Annie	abrettew@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/15/2021 7:45 PM
Hinebauch, Mel	Not Given	603.224.4866	A Member of the Public	Myself	Support	No	3/15/2021 11:04 PM
Taylor, Gale	galeforcefacilitators@gmail.com	603.321.7160	A Member of the Public	Myself	Support	No	3/15/2021 11:48 PM
Vaughan, Elizabeth	lizfvaughan@hotmail.com	603.921.0444	A Member of the Public	Myself	Support	No	3/16/2021 8:37 AM
Vogt, Robin	robin.w.vogt@gmail.com	603.969.5720	A Member of the Public	Myself	Oppose	No	3/16/2021 8:49 AM
Platt, Elizabeth-Anne	lizanneplatt09@gmail.com	603-715-8191	A Member of the Public	Myself	Support	No	3/16/2021 6:48 AM
Petruccelli, Maxine	maxinepet@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 7:45 AM
Petruccelli, Charles	chasmaxpet@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 7:46 AM
stonebanks, sandra	sandrastonebanks@yahoo.com	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 7:50 AM

Nardino, Marie	mdnardino@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 7:27 AM
Gordon, Laurie	Lmgord23@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/16/2021 8:20 AM
Mooney, Rep. Maureen	Rep.Maureen.Mooney@gmail.com	Not Given	An Elected Official	Myself/Town of Merrimack	Support	No	3/12/2021 7:04 PM
Hendrick, Judith	Not Given	Not Given	A Member of the Public	Myself	Oppose	No	3/14/2021 3:02 PM
Jak, Deborah	Not Given	Not Given	A Member of the Public	Myself	Support	No	3/14/2021 7:11 PM
Graham, Nancy	nancygraham806@gmail.com	425.765.6921	A Member of the Public	Myself	Support	No	3/14/2021 7:18 PM
Garland, Ann	annhgarland@gmail.com	603.678.8143	A Member of the Public	Myself	Support	No	3/14/2021 7:26 PM
jakubowski, dennis	dendeb146@gmail.com	603.496.5749	A Member of the Public	Myself	Support	No	3/14/2021 7:27 PM
DeMark, Richard	demarknh114@gmail.com	603.520.5582	A Member of the Public	Myself	Support	No	3/14/2021 12:42 PM
Bruce, Susan	susanb.red@mac.com	603.730.7078	A Member of the Public	Myself	Support	No	3/14/2021 7:48 PM
FRIEDRICH, ED	erfriedrich@yahoo.com	781.775.9397	A Member of the Public	Myself	Support	No	3/14/2021 7:56 PM
FRIEDRICH, EDWARD	erfriedrich@yahoo.com	781.775.9433	A Member of the Public	Myself	Support	No	3/14/2021 7:57 PM
Willing, Maura	Maura.Willing@Comcast.net	Not Given	A Member of the Public	Myself	Support	No	3/14/2021 8:07 PM
Fordey, Nicole	nikkif610@gmail.com	Not Given	A Member of the Public	Myself	Support	No	3/12/2021 6:26 PM
Larson, Ruth	ruthlarson@msn.com	Not Given	A Member of the Public	Myself	Support	No	3/14/2021 8:14 PM
Torpey, Jeanne	Not Given	Not Given	A Member of the Public	Myself	Support	No	3/14/2021 8:28 PM
Falk, Cheri	Falk.cj@gmail.com	603.654.2777	A Member of the Public	Myself	Support	No	3/14/2021 8:59 PM
Damon, Claudia	cordsdamon@gmail.com	603.226.4561	A Member of the Public	Myself	Support	No	3/14/2021 9:25 PM
Perencevich, Ruth	Not Given	Not Given	A Member of the Public	Myself	Support	No	3/14/2021 9:29 PM
Clark, Denise	denise.m.clark03055@gmail.com	603.213.1692	A Member of the Public	Myself	Support	No	3/14/2021 9:33 PM
Casino, Joanne	joannecasino@comcast.net	603.746.3491	A Member of the Public	Myself	Support	No	3/14/2021 10:12 PM
Spielman, Kathy	jspielman@comcast.net	603.397.7879	A Member of the Public	Myself	Support	No	3/15/2021 8:09 AM
Corell, Elizabeth	Elizabeth.j.corell@gmail.com	603.545.9091	A Member of the Public	Myself	Support	No	3/15/2021 8:20 AM
Blanchard, Sandra	sandyblanchard3@gmail.com	603.724.3768	A Member of the Public	Myself	Support	No	3/15/2021 9:50 AM
Reed, Barbara	moragmcp83@outlook.com	603.352.5015	A Member of the Public	Myself	Support	No	3/15/2021 7:07 AM
Hackmann, Kent	hackmann@uidaho.edu	16039343225	A Member of the Public	Myself	Support	No	3/15/2021 11:38 AM
Harrington, Nancy	nharrington@merrimacknh.gov	603.494.5139	An Elected Official	Myself	Support	No	3/15/2021 11:40 AM
McNamee, Brigid	brigidmcnamee@yahoo.com	603.223.0139	A Member of the Public	Myself	Support	No	3/15/2021 9:03 AM
Rankin, Don	diggindawgsgw@gmail.com	603.732.2783	A Member of the Public	Myself	Support	No	3/15/2021 10:15 AM

Testimony

American Property Casualty Insurance Association℠

INSURING AMERICA apci.org

March 15, 2021

Hon. Sharon Carson, Chair
Senate Judiciary Committee
State House Room 100
Concord, NH

Re: SB 111 – An act relative to claims for medical monitoring

Dear Chair Carson,

On behalf of the American Property Casualty Insurance Association (APCIA)[1], a national trade association representing nearly 60 percent of the property/casualty marketplace, we would like to respectfully express our concerns about SB 111 currently under consideration by the committee which would create a new private right of action for medical monitoring damages allegedly warranted by exposure to PFAS. While well-intentioned, we are concerned that the bill may result in unintended consequences and could negatively impact the business community as well as New Hampshire's economy.

If enacted, this legislation would place New Hampshire among a small minority of states that recognize this broadly disfavored doctrine. In fact, the U.S. Supreme Court and most state and federal courts of last resort have rejected medical monitoring claims absent a present physical injury. In its 1997 decision in *Metro-North Commuter Rail v. Buckley*, the U.S. Supreme Court found that medical monitoring is unwarranted because:

1. There could be an avalanche of claims, creating potentially unlimited liability exposure for defendants.

[1] Effective January 1, 2019, the American Insurance Association (AIA) and the Property Casualty Insurers Association of America (PCIAA) merged to form the American Property Casualty Insurance Association (APCI). Representing nearly 60 percent of the U.S. property casualty insurance market, APCI promotes and protects the viability of private competition for the benefit of consumers and insurers. APCI represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCI members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.

2. A flood of less severe cases would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injuries and adversely affect the allocation of scarce medical resources. This has been seen in the asbestos context, where bankruptcy trusts are paying pennies on the dollar to claimants with mesothelioma because of medical monitoring and other resources expended on claimants who are not truly sick.

3. There are several public policy concerns that weigh against requiring medical monitoring, such as (a) difficulty in identifying which costs are over and above the preventative medicine ordinarily recommended for everyone; (b) conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments; and (c) each plaintiff's unique medical needs.

4. Requiring medical monitoring in one context would permit literally tens of millions of individuals to justify some form of substance-exposure-related medical monitoring.

5. Medical monitoring could lead to double recoveries because alternative, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.

Governor Sununu vetoed a similar proposal in 2020 and expressed concerns regarding the potential impact on businesses and consumers in New Hampshire. These concerns still exist as they relate to SB 111. Medical monitoring legislation has also been rejected in the neighboring state of Vermont, having been vetoed by the Governor in 2018 and 2019. Governor Scott's 2018 veto message warned that *"the level of liability and uncertainty this legislation creates for employers could prove catastrophic for Vermont's fragile economy and the bill establishes a standard that does not exist anyplace else in the country... Costs would rise for employers, and consumers. And Vermont would become a substantially less attractive place to create jobs and run a business. Some employers including many we've heard from--might have reason to pull up stakes and leave."* He goes on to note that the bill *"...will also make insurance significantly more expensive and less available in Vermont. Subjecting manufacturers and other businesses in the state to large uninsured losses will, in effect, slowly drive them out of business. A single medical monitoring claim could be significant enough to drain all of a company's resources."*

A stand-alone cause of action for medical monitoring would result in significant legal and economic difficulties even if it were narrowly defined. However, there are additional concerns with the proposal including the following:

- No standards for what constitutes a significant exposure.
- No requirement that an exposure violate applicable state or federal guidelines.
- No meaningful burden of proof, but rather a "preponderance of the evidence" standard.
- No requirement of a probable link between exposure to PFAS and a latent disease.

- No requirement that a person's exposure to PFAS significantly increases the risk of developing the latent disease.
- No requirement that testing be considered reasonably necessary only if a disease would not be detected as part of routine diagnostic tests and medical examinations.
- No requirement that the purported benefits of the proposed medical monitoring be weighed against the costs or risks inherent in the monitoring procedure.

There is a concern that businesses of any size (including small farms) and even individuals may be found liable for potentially costly medical monitoring and attorney's fees in circumstances where any risk of illness or disease is only infinitesimally greater than that of the general public, and may not be susceptible to differentiation from illness or disease resulting from other causes.

The potential impact on financial, medical, and judicial resources resulting from a flood of speculative claims for medical monitoring that lack a scientific foundation will pose a threat to the viability of businesses and the health of New Hampshire's economy. In light of the ongoing COVID pandemic, now may not be the time to enact legislation that could potentially harm ongoing recovery efforts. We would welcome the opportunity to discuss this issue with you further to come up with a meaningful solution to address the problem in a manner that does not negatively impact the business community.

Thank you for the opportunity to comment and share our concerns regarding SB 111. Please feel free to contact us if there are any questions or if additional information is needed.

Sincerely,

Alison Cooper

Alison Cooper
Vice President, State Government Relations
APCIA
Alison.Cooper@apci.org
518.462.1695

cc: Members of the Senate Judiciary Committee

3075277

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

March 20, 2018

FILE COPY

Case Name: **John Hermens, et al v Textiles Coated Incorporated d/b/a Textiles Coated International**
Case Number: **216-2017-CV-00524** ***216-2017-CV-00525***

You are hereby notified that on March 16, 2018, the following order was entered:

RE: MOTION TO STAY AND MOTION TO DISMISS:

See copy of Order attached. (Brown, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Paul Mario DeCarolis, ESQ; Kevin Scott Hannon, Esq.; Daniel E. Will, ESQ; Joshua M. Wyatt, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

John Hermens and Brenda Hermens

v.

Textiles Coated Incorporated d/b/a Textiles Coated International

Docket No. 216-2017-CV-524, -525

ORDER

Plaintiff brought these class action suits against defendant alleging trespass, nuisance, negligence, negligent failure to warn, and unjust enrichment.[1] The claims arise out of the alleged contamination of soil and groundwater by defendant. Presently before the Court are: (1) defendant's motions to temporarily stay proceedings; and (2) defendant's motions to dismiss. The Court held a hearing on January 31, 2018. Upon consideration of the pleadings, arguments, and the applicable law, the Court finds and rules as follows.

Factual Background

From approximately 1985 to 2006, defendant operated a manufacturing facility at 105 Route 101 in Amherst, New Hampshire. In the ordinary course of its business, defendant used chemicals containing ammonium perfluorooctanoate, which is a derivative of perfluorooctanoic acid (hereinafter collectively referred to as "PFOA"). PFOA is water soluble and resistant to environmental degradation, making it readily capable of groundwater contamination.

[1] The claim for unjust enrichment is only raised in 216-2017-CV-524.

Throughout its operation of the Amherst site, defendant failed to take appropriate measures to limit its release of PFOA into the area around its plant. As a result, defendant allowed PFOAs to contaminate the surrounding air, soil, and ground and surface water. Defendant also failed to warn residents in the affected area of the contamination.

On or about April 15, 2016, the New Hampshire Department of Environmental Services ("DES") performed testing on water wells in the vicinity of defendant's Amherst site and discovered PFOA contamination. On May 11, 2016, DES began recommending that certain residents in the area begin using bottled water for all household purposes, cease drinking or cooking with well water, and avoid eating vegetables grown in their gardens. While DES's investigation remains ongoing, plaintiffs initiated these actions.

Analysis

I. Motion to Stay

Defendant has moved to stay these proceedings pending the results of DES's investigation into the PFOA contamination in Amherst. In support, defendant argues the investigation could have the effect of narrowing the issues before the Court, specifically with respect to damages and liability. Defendant maintains there is a possibility that the investigation will show that it was not the sole contributor to PFOA contamination in the area. In addition, defendant argues it has already undertaken voluntary remediation measures for houses within a half-mile radius around its Amherst site in the form of installing point-of-entry water filtration systems. Finally, defendant has agreed to fund the connection of certain homes in that same radius to Amherst's public water system.

"The decision to stay or hold in abeyance a particular action is within the sound discretion of the trial court." Johns-Manville Sales Corp. v. Barton, 118 N.H. 195, 198 (1978). "A stay is not a matter of right, even if irreparable injury might otherwise result," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." Nken v. Holder, 556 U.S. 418, 433–34 (2009). "Stays cannot be cavalierly dispensed: there must be good cause for their issuance; they must be reasonable in duration; and the court must ensure that competing equities are weighed and balanced." Marquis v. F.D.I.C., 965 F.2d 1148, 1155 (1st Cir. 1992).

Defendant argues the doctrine of primary jurisdiction provides good cause for a stay. "The doctrine of primary jurisdiction provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." Frost v. Comm'r, New Hampshire Banking Dep't, 163 N.H. 365, 371 (2012).

> [The doctrine] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.

Id. "Where, however, the issue or issues involve purely questions of law, the matter will not be referred to an agency." Id. The decision to not exercise jurisdiction on a particular matter is a matter of discretion for the trial court. Id. Here, defendant raises three factors in support of the application of the doctrine: (1) DES's level of expertise in the relevant issues; (2) the need for uniformity of decisions in light of DES's

investigation already being underway; and (3) judicial action by this Court may have an adverse impact on DES's investigation.

Here, plaintiffs bring common law claims alleging trespass, nuisance, negligence, negligent failure to warn, and unjust enrichment. These are actions involving questions of law that do not necessarily conflict with the DES investigation. See Sullivan v. Saint-Gobain Performance Plastics Corp., 226 F. Supp. 3d 288, 295 (D. Vt. 2016) ("No ruling on issues of negligence, nuisance, trespass, or Plaintiffs' other common-law theories, will necessarily conflict with Vermont's regulatory scheme or process regarding PFOA."). Plaintiffs seek compensatory damages for the injuries they sustained as a result of defendant's alleged negligence, and their claims do not touch on remediation measures that may be underway as part of defendant's cooperation with DES. Cf. Collins v. Olin Corp., 418 F. Supp. 2d 34, 46 (D. Conn. 2006) (dismissing only counts seeking injunctive relief requiring defendant to undertake remediation efforts already taken up by regulatory agency). Further, as the United States District Court of Connecticut noted:

> Although the resolution of the issues in this case undoubtedly will require some technical analysis, the claims—for example, whether Shell breached a duty to the plaintiffs, whether Shell trespassed or created a nuisance on the plaintiffs' property, whether Shell defrauded the plaintiffs, or whether Shell was willful, wanton or reckless in its actions toward the plaintiffs—are all of a type commonly adjudicated by the courts. They do not require extensive interpretation of agency regulations. Although the CTDEP undoubtedly possesses expertise in the area of environmental pollution, the defendant has not persuaded this court that the CTDEP's expertise is essential in adjudicating the matters at hand.

Martin v. Shell Oil Co., 198 F.R.D. 580, 585–86 (D. Conn. 2000).

With respect to uniformity, defendant argues there is significant overlap in the substantive issues before both DES and this Court. Specifically, defendant cautions that there is a significant risk of the Court issuing an order that would conflict with one from DES. As noted above, however, an award of damages will not conflict with the remediation efforts undertaken by DES.

With respect to the potential for adverse impact, defendant argues that DES regulations contain a provision that requires a financial assurance plan for any remediation efforts that will be ongoing for ten or more years. See N.H. Code Admin. Rules Env-Or 606.20(a). Defendant essentially argues an award of damages in this action may impact its ability to comply with this regulation. However, defendant also notes that it is too early to determine whether that regulation is even applicable. Therefore, as plaintiffs argue, this claim is entirely speculative and cannot serve as a basis to stay the case. For the foregoing reasons, the Court finds the doctrine of primary jurisdiction is not applicable to this case and does not provide good cause for a stay.

At the hearing, defendant also noted that in a recently issued opinion, the United States District Court for the District of New Hampshire indicated the possibility that it would certify a question to the New Hampshire Supreme Court on the availability of a claim for medical monitoring damages, one of the claims brought by plaintiff in this case. See Brown v. Saint-Gobain Performance Plastics Corp., No. 16-cv-242-JL, 2017 WL 6043956, at *7 (D.N.H. Dec. 6, 2017.) However, the federal court provided no timeline for this decision, and the Court is not inclined to grant a stay on such a nebulous basis. Accordingly, defendant's motion for a temporary stay is DENIED.

II. Motions to Dismiss

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

1. Property Damage

Defendant first argues plaintiffs have no right to bring an action seeking damages for contamination of their groundwater as the State of New Hampshire holds all water in the state in the public trust. See RSA 481:1; 485-C:1, II. "The right to use water does not carry with it ownership of the water lying under the land." In re Town of Nottingham, 153 N.H. 539, 548 (2006) (quoting Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 668 (Fla. 1979)). "The loss of the use of ground water is not a loss of the use or enjoyment of the overlying land. In this case, plaintiffs' complaint, alleging only a deprivation of the flow of groundwater, did not state a claim for compensation." Id. at 549 (quoting Smith v. Summit County, 721 N.E.2d 482, 488 (Ohio Ct. App. 1998)). In Nottingham, the New Hampshire Supreme Court found that plaintiff did not demonstrate

a protected property interest in the groundwater under their land, and thus could not establish the grant of a groundwater withdrawal permit amounted to a constitutional taking. Id. at 548–49.

Here, plaintiffs do not merely allege the deprivation of the flow of groundwater. Rather, they allege contamination of the "air, soil, structures, trees, groundwater wells, household piping, and other property owned and used by plaintiffs." (Compl. ¶ 22.) None of the cases cited by defendant preclude claims alleging such contamination. In Ivory v. International Business Machines Corp., while the court did state that plaintiffs could not bring trespass claims based on contaminated groundwater because they lacked an ownership interest in it, it explicitly permitted trespass claims for contaminated soil that resulted from said groundwater contamination. 983 N.Y.S.2d 110, 116 (N.Y. App. Div. 2014). In Baker v. Saint-Gobain Performance Plastics Corp., the court recognized the availability of a trespass action to remedy the contamination of a private well, noting that "it is the possessory interest in the well itself that is invaded" and that "the groundwater . . . was simply the medium through which [the plaintiff's] property was invaded." 232 F. Supp. 3d 233, 247 (N.D.N.Y. 2017). The Court finds these cases persuasive. While plaintiffs may not have an ownership interest in the groundwater that flows under their land, this does not preclude recovery for contamination of property they do own.

Accordingly, defendant's motion to dismiss with respect to plaintiff's claims for trespass, nuisance, negligence, and negligent failure to warn is DENIED.

Defendant next argues the plaintiffs cannot maintain a claim for unjust enrichment. "Unjust enrichment is an equitable remedy that is available when an

individual receives 'a benefit which would be *unconscionable* for him to retain.'" Axenics, Inc. v. Turner Const. Co., 164 N.H. 659, 669 (2013) (quoting Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 210 (2009)). "The party seeking restitution must establish not only unjust enrichment, but that the person sought to be charged had wrongfully secured a benefit or passively received one which it would be unconscionable to retain . . . ." General Insulation Co. v .Eckman Const., 159 N.H. 601, 611 (2010).

In their complaint, plaintiffs allege defendant has benefited from failing to make expenditures on proper containment and disposal procedures at its manufacturing site. In Brown, a case involving virtually identical facts, the United States District Court rejected such a claim, characterizing it as one for "negative unjust enrichment" not recognized in New Hampshire. Brown v. Saint-Gobain Performance Plastics Corp., No. 16-cv-242-JL, 2017 WL 6043956, at *9–10 (D.N.H. Dec. 6, 2017). In addressing unjust enrichment in the area of toxic torts, the United States District Court for the District of Nevada has stated:

> It is possible that a toxic tort plaintiff could allege a claim under an unjust enrichment theory. For example, a plaintiff could allege that a defendant stored barrels of toxic materials or heaps of waste materials on the plaintiff's land without payment, making the defendant liable for the value of the storage under an unjust enrichment theory. But Plaintiffs here only appear to allege storage of materials on Defendants' own land, with the resulting toxic seepage better characterized as trespass, negligence, nuisance, or battery. Particularly, because Plaintiffs do not allege ever to have permitted or acquiesced in the "storage" of anything directly on their own land with the expectation of payment, the unjust enrichment claim does not lie here.

Roeder v. Atlantic Richfield Co., No. 3:11-cv-105-RCJ-RAM, 2011 WL 4048515, *1 at *8 (D. Nev. Sept. 8, 2011).

The Court is persuaded by these cases that no action for unjust enrichment lies here. Plaintiffs' claims are appropriately and adequately addressed by their counts for trespass, nuisance, negligence, and negligent failure to warn. Accordingly, defendant's motion to dismiss with respect to plaintiff's claim for unjust enrichment is GRANTED.

2. Medical Monitoring

In their second action, plaintiffs allege many of the same causes of action as in the first—nuisance, negligence, and negligent failure to warn—but seek a specific remedy: the cost of a medical monitoring program for the purpose of detecting diseases caused by their exposure to PFOA. Defendant argues this relief is unavailable under New Hampshire law, and the action must therefore be dismissed. In support of its claim, defendant raises four arguments: (1) plaintiffs lack a present injury required to bring a claim; (2) plaintiffs' action is prohibited due to the speculative nature of their damages; (3) plaintiffs' action is barred by the economic loss doctrine; and (4) there already exists a sufficient administrative remedy. The Court will address each argument in turn.

a. Present Injury

Defendant argues that plaintiffs' medical monitoring claim ought to be dismissed because they fail to establish the existence of a present injury. Plaintiffs object, arguing their claim does not require a showing of a present physical injury. This issue appears to be one of first impression in New Hampshire, but both parties cite a number of cases from outside jurisdictions in favor of their respective positions.

On the one hand, some courts reject claims for medical monitoring on the simple basis that plaintiffs have not yet suffered a present physical injury, and their claims of

injury are therefore merely speculative. See Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 3 (Miss. 2007); Henry v. Dow Chemical Co., 701 N.W.2d 684, 688 (Mich. 2005); Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849, 852 (Ky. 2002).

On the other hand, some courts take a less restrictive view of what constitutes an injury. In Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984), the court held that "an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury." Id. at 826. The Court created the following hypothetical to simplify the 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.

Id. at 825. The Court stated that from this example, "it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action." Id. Looking to the Restatement (Second) of Torts § 7, which defines injury as "the invasion of any legally protected interest of another," the Court concluded that "[w]hen a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations." Id.

The Supreme Court of California later followed this reasoning, allowing recovery of "expenditures for prospective medical testing and evaluation, which would be unnecessary if the particular plaintiff had not been wrongfully exposed to pollutants."

Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 822 (Cal. 1993). The Court stated that "[i]t bears emphasizing that allowing compensation for medical monitoring costs does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate." Id. at 824. "[I]t 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." Id.

A number of other courts have also "reject[ed] the contention that a claim for future medical expenses must rest upon the existence of present physical harm." Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 430 (W.Va. 1999); see also Sadler v. PacifiCare of Nev., 340 P.3d 1264, 1269 (Nev. 2014) (listing cases both for and against); Exxon Mobil Corp. v. Albright, 71 A.3d 30, 75–76 (Md. Ct. App. 2013) (finding "exposure itself and the concomitant need for medical testing is the compensable injury for which recovery of damages for medical monitoring is permitted because such exposure constitutes an invasion of a legally protected interest"). The key distinction between the cases that accept or reject claims for medical monitoring is the definition of injury, with those permitting such claims placing emphasis on the Restatement's definition, which is broader than mere physical injury. The Court finds this approach to be the more persuasive and equitable course. The Court therefore finds the plaintiffs' complaint alleging exposure to PFOA as a result of the negligent acts of defendant adequately establishes the existence of an injury.

In recognizing a claim for medical monitoring, the Court further adopts the standard set forth in Bower, which found that in order to sustain such a claim, plaintiff must prove that:

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

522 S.E.2d at 432–33.

b. Speculative Cost

Defendant argues damages for medical monitoring are by their nature speculative, as actual physical injury may never manifest. Moreover, defendant argues the issue is even more pronounced here given that PFOA is known to cause a wide range of medical complications. (See Compl. ¶ 21.) However, as the Court noted above in order to prevail on their claim, plaintiffs will need to establish reasonable necessity of medical testing as determined by a medical professional. Therefore, the Court agrees with plaintiffs that this is not an appropriate argument to make at the motion to dismiss stage, where plaintiffs lack the benefit of discovery, expert testimony, and the submission of evidence. Moreover, plaintiffs' class is defined by geographic area, levels of PFOA contamination, and length of exposure. Further, the damages sought are confined to periodic testing as will be determined by medical professionals.

The Court notes that the method used to compute damages "need not be more than an approximation." Boynton v. Figueroa, 154 N.H. 592, 606 (2006). In addition,

relief should not be barred just because PFOA causes more types of physical illnesses than other substances, such as asbestos.

c. The Economic Loss Doctrine

"The economic loss doctrine is a common law rule that emerged with the advent of products liability." Plourde Sand & Gravel v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007). It is a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." Id. Courts have "expanded the economic loss doctrine to bar economic recovery in tort cases where there is no contract and thus no privity." Id. at 795. "The policy behind this principle is to prevent potentially limitless liability for economic losses . . . ." Id. "In New Hampshire, the general rule is that persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss." Id.

Again, there is case law supporting both parties' positions. For example, the Oregon Supreme Court has held that that cost of medical monitoring "is not sufficient to give rise to a negligence claim" under the economic loss doctrine. Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 186 (Or. 2008). While the New York Court of Appeals acknowledged "an important public health interest in fostering access to medical testing," it could not ignore "the potential system effects of creating a new, full-blown, tort law cause of action." Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 17–18 (N.Y. Ct. App. 2013). The Court noted the risk of "tens of millions" of potential plaintiffs

"flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage." Id.

Courts that find the economic loss doctrine bars actions for medical monitoring tend to do so on the basis that "plaintiffs attempt to blur the lines between 'damages' and 'injury'" and their "economic losses are whole derivative of a *possible, future* injury rather than an *actual, present* injury." Henry, 701 N.W.2d at 691. In other words, these cases also tend to not recognize claims for medical monitoring generally. Because this Court has recognized such a claim, it finds the reasoning of these cases unpersuasive with respect to the economic loss doctrine.

On the other hand, in Sadler, the Court determined that the economic loss doctrine did not bar the plaintiffs' medical monitoring claim on the basis that the plaintiffs' injury—exposure to unsafe injection practices that put them at increased risk for contracting blood-borne diseases—"are noneconomic detrimental changes in circumstances that the [plaintiffs] would not have experienced but for the negligence of [the defendant]." 340 P.3d at 1268. The Court in Potter also noted the fear of opening "the floodgates of litigation" is addressed by the "substantial evidentiary burdens for toxic exposure plaintiffs." 863 P.2d at 825. "[T]oxic exposure plaintiffs may recover only if the evidence establishes the necessity, as a direct consequence of the exposure in issue, for specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight." Id. The Court again finds this reasoning compelling and finds that the economic loss doctrine does not bar plaintiffs' claim.

d. Administrative Remedy

Defendant finally argues current New Hampshire administrative regulations provide for an adequate administrative remedy. Defendant relies on regulations in Env-Or 600 that establish "[p]rocedures and requirements for the investigation, management, and remediation of contamination from the discharge of regulated contaminants that adversely affect human health or the environment resulting from human operations or activities." NH Admin. Rule Env-Or 601.01(a). Rule Env-Or 606.10(d)(1) establishes a remedial action plan that, among other things, "[p]rovide[s] for protection of human health."

Plaintiffs argue this remedial action plan does not address the harm to plaintiffs individually, but focuses on cleaning up soil and water and ensuring no further contamination. Plaintiff further notes that defendant fails to cite any actual instance in which the regulations have been applied to address claims like those raised in this case. The Court agrees with plaintiff. Defendant has provided no support for its position that the rule authorizes DES to provide specific damages for plaintiffs' injuries in this case.

Accordingly, for the foregoing reasons, defendant's motion to dismiss plaintiff's claim for medical monitoring is DENIED.

SO ORDERED.

3/16/18
Date

K.C. Brown
Kenneth C. Brown
Presiding Justice

Jennifer Horgan

From: Sharon Carson
Sent: Tuesday, March 23, 2021 12:22 PM
To: Jennifer Horgan
Cc: Sharon Carson
Subject: FW: NHAJ comments on SB 111
Attachments: 2018-03-16 Decision Notice Order Motion to Dismiss (1).pdf

Jen,

Did not see your nae on this so I am sending it along to you for the record.

Deb

From: Marissa Chase <mchase@nhaj.org>
Sent: Tuesday, March 23, 2021 11:38 AM
To: Sharon Carson <Sharon.Carson@leg.state.nh.us>; Harold French <Harold.French@leg.state.nh.us>; William Gannon <William.Gannon@leg.state.nh.us>; Becky Whitley <Becky.Whitley@leg.state.nh.us>; Jay Kahn <Jay.Kahn@leg.state.nh.us>
Subject: NHAJ comments on SB 111

Good morning Senators,

Thank you for allowing me to testify on SB 111 last week. Before the hearing, members of NHAJ's legislative committee reviewed the forthcoming amendment and expressed neutrality. After the hearing on SB 111, I was contacted by a NHAJ member with more expertise in medical monitoring who reviewed the amendment and shared the following concerns.

Attached is the TCI decision on medical monitoring from Judge Brown (see page 9 and after). This is a good decision for victims of toxic tortious conduct. Both the TCI judge (Messer) and the Saint-Gobain judge have relied on this. Lawyers have spent over $500,000 building a medical monitoring program around these elements in designing a medical monitoring program for the respective citizens.

Judge Brown ruled that medical monitoring does not require proof of present physical injury. That is the prevailing view across the states, and common sense for the principle of medical monitoring. If you have to prove a present physical injury, you no longer have the latent disease that medical monitoring is looking for. It's too late, the disease has progressed too far and so it eliminates the benefit of early detection.

Judge Brown held that medical monitoring is based on exposure (what you breathed or drank) not proof of existing injury.

The amendment of course would do that. It makes one have to prove present physical injury in code:

"The plaintiff provides evidence through an appropriate medical test that shows that

the plaintiff suffers from a significantly increased risk of illness, disease, or latent disease based on

at least one published peer reviewed medical scientific paper."

A "medical test" can only look for present physical injury. A "medical test" is something a doctor does. So you have to do the medical monitoring, and impliedly find something, to show that the plaintiff suffers an increased risk. In turn, the plaintiff has to do medical monitoring to get medical monitoring.

The *Friends* case we have cited again and again proves the fallacy of this. If I get an x-ray after a negligent auto accident, I don't have to prove by a medical test that I needed the x-ray, it's the fact of the accident (here, exposure) that increases the risk of a broken arm. You don't have to pay for and have a positive test, to get another diagnostic test.

The amendment sneaks in something we could never agree to because it makes it harder to get medical monitoring, undercuts Judge Brown's decision, undercuts prevailing law, and undercuts the medical monitoring programs we have already worked so hard to prepare.

Note the existing medical monitoring program at DuPont in West Virginia (the Dark Waters case).

http://www.c-8medicalmonitoringprogram.com

No element of this requires participants to have a medical test first to get the monitoring.

It is far better that we go the road of common law, have this case work through the courts.

Thank you for your consideration, and please do not hesitate to contact me with any questions.

Sincerely,

Marissa

Marissa Chase

Executive Director

New Hampshire Association for Justice

10 Ferry Street, #311

Concord, NH 03301

O 603.224.7077 I **F** 603.224.3256 I **C** 603.854.9330

Voting Sheets

Senate Judiciary Committee
EXECUTIVE SESSION RECORD
2021-2022 Session

Bill # SB 111

Hearing date: _____

Executive Session date: _____

Motion of: IS **Vote:** 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☒	☐
Sen. Gannon, V-Chair	☐	☒	☒	☐
Sen. French	☐	☐	☒	☐
Sen. ~~Kahn~~ Sherman	☐	☐	☒	☐
Sen. Whitley	☒	☐	☒	☐

Motion of: Consent **Vote:** 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☐	☐
Sen. Gannon, V-Chair	☐	☐	☐	☐
Sen. French	☒	☐	☐	☐
Sen. ~~Kahn~~ Sherman	☐	☐	☐	☐
Sen. Whitley	☐	☒	☐	☐

Motion of: _____ **Vote:** _____

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☐	☐
Sen. Gannon, V-Chair	☐	☐	☐	☐
Sen. French	☐	☐	☐	☐
Sen. Kahn	☐	☐	☐	☐
Sen. Whitley	☐	☐	☐	☐

Reported out by: Carson

Notes: premature legal cases

Senate Judiciary Committee
EXECUTIVE SESSION RECORD
2021-2022 Session

Bill # SB111

Hearing date: _____

Executive Session date: _____

Motion of: Refer **Vote:** 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☒	☐	☒	☐
Sen. Gannon, V-Chair	☐	☐	☒	☐
Sen. French	☐	☒	☒	☐
Sen. Kahn	☐	☐	☒	☐
Sen. Whitley	☐	☐	☒	☐

Motion of: Consent **Vote:** 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☒	☐
Sen. Gannon, V-Chair	☐	☐	☒	☐
Sen. French	☒	☐	☒	☐
Sen. Kahn	☐	☒	☒	☐
Sen. Whitley	☐	☐	☒	☐

Motion of: _____ **Vote:** _____

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☐	☐
Sen. Gannon, V-Chair	☐	☐	☐	☐
Sen. French	☐	☐	☐	☐
Sen. Kahn	☐	☐	☐	☐
Sen. Whitley	☐	☐	☐	☐

Reported out by: Carson

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Wednesday, March 24, 2021

THE COMMITTEE ON Judiciary

to which was referred **SB 111**

AN ACT relative to claims for medical monitoring.

Having considered the same, the committee recommends that the Bill

BE RE-REFERRED TO COMMITTEE

BY A VOTE OF: 5-0

Senator Sharon Carson
For the Committee

This bill would establish the elements of a claim for medical monitoring and the damages that may be awarded. The Committee recommends re-referring this bill due to concerns raised during the hearing. By supporting the re-refer motion there will be an opportunity for the parties to attempt to resolve those concerns and subsequently bring forward language that would work for our New Hampshire citizens.

Jennifer Horgan 271-7875

FOR THE CONSENT CALENDAR

JUDICIARY

SB 111, relative to claims for medical monitoring.
Re-refer to Committee, Vote 5-0.
Senator Sharon Carson for the committee.

This bill would establish the elements of a claim for medical monitoring and the damages that may be awarded. The Committee recommends re-referring this bill due to concerns raised during the hearing. By supporting the re-refer motion there will be an opportunity for the parties to attempt to resolve those concerns and subsequently bring forward language that would work for our New Hampshire citizens.

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Wednesday, December 15, 2021

THE COMMITTEE ON Judiciary

to which was referred **SB 111**

AN ACT relative to claims for medical monitoring.

Having considered the same, the committee recommends that the Bill

BE REFERRED TO INTERIM STUDY

BY A VOTE OF: 5-0

Senator Sharon Carson
For the Committee

This bill would establish the elements of a claim for medical monitoring and the damages that may be awarded. There are legal cases currently pending regarding these issues and therefore, the Committee recommends that SB111 be referred to Interim Study to give the judicial process time to play out before making legislative changes.

Jennifer Horgan 271-7875

FOR THE CONSENT CALENDAR

JUDICIARY

SB 111, relative to claims for medical monitoring.
Interim Study, Vote 5-0.
Senator Sharon Carson for the committee.

This bill would establish the elements of a claim for medical monitoring and the damages that may be awarded. There are legal cases currently pending regarding these issues and therefore, the Committee recommends that SB111 be referred to Interim Study to give the judicial process time to play out before making legislative changes.

SB111

Bill Details

Title: relative to claims for medical monitoring.

Sponsors: ***(Prime)*** Carson (R)

LSR Number: **21-0966**
General Status: **SENATE**
Senate:
Committee: Judiciary
Floor Date: 1/5/2022
Status: INTERIM STUDY

Bill Docket

Body	Description
S	Introduced 01/06/2021 and Referred to Judiciary; SJ 3
S	Remote Hearing: 03/16/2021, 01:20 pm; Links to join the hearing can be found in the Senate Calendar; SC 15
S	Committee Report: Rereferred to Committee, 04/01/2021; Vote 5-0; CC; SC 17
S	Rereferred to Committee, RC 23Y-1N, MA; 04/01/2021; SJ 10
S	Committee Report: Referred to Interim Study, 01/05/2022; Vote 5-0; CC; SC 49
S	Refer to Interim Study, MA, VV; 01/05/2022; SJ 1

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: SB111 **Senate Committee:** Jud

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

X Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

X Bill version as it came to the committee

X All Calendar Notices

X Hearing Sign-up sheet(s)

X Prepared testimony, presentations, & other submissions handed in at the public hearing

X Hearing Report

___ Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

X - amendment # 07905 ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

X Executive Session Sheet

X Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

___ - amendment # _____ ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

Post Floor Action: (if applicable) {Clerk's Office}

___ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

___ Enrolled Bill Amendment(s)

___ Governor's Veto Message

All available versions of the bill: {Clerk's Office}

___ as amended by the senate ___ as amended by the house

___ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

_____ 8/12/22

Committee Aide **Date**

Senate Clerk's Office AK