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Volume 2011 | Issue 1 Article 15

3-1-2011

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Nathan White, *Arguments Not Raised: How the Plaintiffs' Missed Opportunity Led to the Tenth Circuit's Decision in June v. Union Carbide Corp.*, 2011 BYU L. Rev. 245 (2011).
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Arguments Not Raised: How the Plaintiffs' Missed Opportunity Led to the Tenth Circuit's Decision in *June v. Union Carbide Corp.*

I. INTRODUCTION

At first glance, the Tenth Circuit's decision in *June v. Union Carbide Corp.*[1] is an unremarkable one. The court reaches what appears to be a reasonable result in interpreting the Price-Anderson Act to exclude medical monitoring claims, and the case mirrors the reasoning of a sister circuit in doing so. But while the court presents its reasoning as a matter of simple statutory interpretation, the court's holding fails to take into account or even mention its own reversal of previous Price-Anderson jurisprudence in the Tenth Circuit. Thus, the most striking aspect of the opinion is the court's lack of awareness that it is reversing itself.

Indeed, the plaintiffs failed to stress to the court that a previous panel of the Tenth Circuit had decided the issue in *Building & Construction Department v. Rockwell International Corp.*[2] Although the plaintiffs mentioned *Building & Construction Department* in their brief, they mostly cited it only to establish that the Tenth Circuit had previously approved of medical monitoring claims in general.[3] The plaintiffs failed to emphasize the fact that *Building & Construction Department* had decided the precise issue of whether a medical monitoring claim constitutes a claim for "bodily injury" under the Price-Anderson Act.[4] This oversight may have directly led to a decisive swing in favor of denying all such claims under the Act—an issue on which there remains a split in the circuits.

This Note begins with a brief history of medical monitoring claims, the Price-Anderson Act, and the relevant jurisprudence in those areas. The Note then recaps the Tenth Circuit's decision in *June*. Next, the Note analyzes the *June* decision and the alternate paths that decision could have taken had the court relied on *Building*

1. 577 F.3d 1234 (10th Cir. 2009).

2. 7 F.3d 1487 (10th Cir. 1993).

3. Appellant's Amended Principal Brief at 64, *June*, 577 F.3d 1234 (No. 07-1532), 2008 WL 951278, at *64.

4. *See infra* text accompanying notes 58–62.

& Construction Department—as the plaintiffs should have more pointedly asked it to do. The Note concludes by noting the potential nationwide consequences of the plaintiffs' failure to rely more heavily on *Building & Construction Department* in presenting their case to the court.

II. CONTEXT AND BACKGROUND

This Part of the Note will examine the relevant statutory authority and case law informing the Tenth Circuit's decision in *June*. This examination will begin with a brief discussion of the law regarding medical monitoring claims followed by a synopsis of the relevant provisions of the Price-Anderson Act. The Note will then survey the approaches the various circuits have taken in dealing with medical monitoring claims brought under the Act.

A. Medical Monitoring Claims

Medical monitoring first arose as an independent cause of action in the 1980s.[5] Philosophically, medical monitoring claims are based on the proposition that a person has "an interest in avoiding expensive medical evaluations caused by the tortious conduct of others."[6] Thus, it is appropriate for the tortfeasor to pay for the diagnostic costs of an event carrying with it a risk of injury "that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life."[7]

An early case based the decision to award medical monitoring costs to asymptomatic plaintiffs on the following hypothetical:

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force.

5. *See* Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 3 (2009); *see generally id.* at 3–12 (providing a comprehensive history of medical monitoring). This Note focuses specifically on medical monitoring causes of action that are recognized in the absence of physical symptoms of illness, rather than on those allowed where physical symptoms are also present. The latter type of claim appears to be widely accepted and relatively uncontroversial. *See, e.g.*, Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 438 (1997) ("The parties do not dispute—and we assume—that an exposed plaintiff can recover related reasonable medical monitoring costs if and when he develops symptoms.").

6. Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) (en banc).

7. Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984).

> 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.[8]

The D.C. Circuit, in examining this scenario, stated "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."[9]

Courts initially found this sort of reasoning persuasive, and over the next several years multiple jurisdictions adopted medical monitoring as an independent cause of action.[10] Notably, these jurisdictions included the Federal District of Colorado, which stated "that the Colorado Supreme Court would probably recognize, in an appropriate case, a tort claim for medical monitoring."[11]

However, in 1997 the U.S. Supreme Court decided *Metro-North Commuter Railroad Co. v. Buckley*,[12] which altered the face of medical monitoring jurisprudence. *Metro-North* involved a railroad pipefitter whose work resulted in near-constant exposure to asbestos.[13] After attending an asbestos-awareness class and learning of the health risks his job posed, he sued the railroad under the Federal Employers' Liability Act (FELA) and sought to recover the costs of future medical appointments to diagnose him with the asbestos-related diseases for which he was at risk.[14] The Court held that the worker was not entitled to medical monitoring costs under FELA since he did not manifest any physical symptoms as a result of

8. *Id.*

9. *Id.*

10. *See* D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095, 1114–16 (2006). Between 1984 and 1997, ten jurisdictions adopted medical monitoring as a cause of action, while only seven rejected it. *Id.* In contrast, between 1998 and 2006, ten jurisdictions *rejected* medical monitoring and only five adopted it. *Id.*

11. Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991). Colorado state courts have still not addressed the issue. *See* Appellants' Amended Principal Brief at 64, June v. Union Carbide Corp., 577 F.3d 1234 (10th Cir. 2009) (No. 07-1532), 2008 WL 951278, at *64.

12. 521 U.S. 424 (1997).

13. *Id.* at 427.

14. *Id.*

his exposure.[15] Writing for the seven Justice majority, Justice Breyer noted that extending medical monitoring relief "could threaten both a flood of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany unlimited and unpredictable liability."[16]

Metro-North appears to have marked a turning point in courts' attitudes towards medical monitoring. Since that decision, more courts have chosen to reject medical monitoring than before, and fewer courts have adopted it.[17] *Metro-North* has frequently been relied upon by both state and federal courts that have rejected medical monitoring causes of action.[18]

B. The Price-Anderson Act

The Price-Anderson Act ("the Act") was originally passed in 1957[19] as an amendment to the Atomic Energy Act of 1954, which opened up nuclear development to civilian industry.[20] The purpose of the Act was to limit the potential liability of the nuclear-development industry for "nuclear incidents."[21] Initially, the Act did not create a specific federal cause of action but relied on state causes of action already existing at the time.[22] In addition, the Act as first passed provided original federal jurisdiction only over "extraordinary nuclear occurrences" and not mere "nuclear incidents," which meant that most nuclear exposure claims ended up being litigated in state courts unless diversity jurisdiction applied.[23] Since the claims could not be easily consolidated, this caused considerable difficulties in situations where claims were brought by multiple plaintiffs from multiple states against a single defendant.[24]

15. *Id.* at 438–44.

16. *Id.* at 442 (citation omitted) (internal quotation marks omitted).

17. Aberson, *supra* note 10, at 1114–16.

18. *See, e.g.*, Norwood v. Raytheon Co., 414 F. Supp. 2d 659, 664–67 (W.D. Tex. 2006); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 5–6, 9 (Miss. 2007); Henry v. Dow Chem. Co., 701 N.W.2d 684, 695–96 (Mich. 2005).

19. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C. (2006)).

20. *See* Pub. L. No. 83-703, § 3, 68 Stat. 919, 922 (1954) (codified as amended at 42 U.S.C. §§ 2011–2297 (2006)).

21. Pub. L. No. 85-256, § 1, 71 Stat. at 576.

22. Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1503 (10th Cir. 1997).

23. Cook v. Rockwell Int'l Corp., 618 F.3d 1127, 1135–36 (10th Cir. 2010).

24. *See* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 477 (1999) (noting that

In response to this difficulty, Congress amended the Act in 1988 to provide, among other things, original federal jurisdiction over "nuclear incidents," a right of removal, and a federal cause of action.[25] The jurisdictional provisions were codified at 42 U.S.C. § 2210(n)(2), and provide for both original federal jurisdiction and a right to remove state actions to federal court, provided that the suit at issue is a "*public liability action* arising out of or resulting from a *nuclear incident*."[26] In creating the federal cause of action, the Act states that a "public liability action" is "an action arising under [§ 2210(n)(2)]," and further specifies that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section."[27] Thus, despite the presence of a federal cause of action, Congress appears to have intended that state law continue to apply in the majority of cases.

Under the Act, "public liability" is a catch-all term that encompasses "any legal liability arising out of or resulting from a nuclear incident."[28] In turn, a "nuclear incident" under the Act is "any occurrence" involving radioactive or nuclear materials that "caus[es] . . . *bodily injury*, sickness, disease, or death, or loss of or damage to property, or loss of use of property."[29] The Act is generally considered to provide the exclusive remedy for nuclear-radiation claims, although nothing in the language of the Act says so explicitly.[30]

Taken together, these provisions present three basic questions a federal court must decide in considering how to administer a particular case. First, the court must determine whether an action being brought under the Act (or an action by a party seeking to remove into federal court under § 2210(n)(2)) is a "public liability action" recognized under the Act.[31] If the action is a "public liability

this difficulty was particularly pronounced in the wake of the Three Mile Island incident).

25. *See* Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 11, 102 Stat. 1066, 1076 (codified as amended in scattered sections of 42 U.S.C. (2006)).

26. 42 U.S.C. § 2210(n)(2) (2006) (emphasis added).

27. *Id.* § 2014(hh).

28. *Id.* § 2014(w).

29. *Id.* § 2014(q) (emphasis added).

30. *See, e.g.*, Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir. 1997) ("[Plaintiff] can sue under the Price-Anderson Act, as amended, or not at all.").

31. *See* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 487–88 (1999) (deciding dispute over whether federal district court or tribal court should determine this question and

action," the court then examines the substantive tort law of the state in which the action is being brought to see if the state law is inconsistent with the provisions of the Act.[32] Finally, assuming it is not inconsistent with the provisions in § 2014(q), the court must decide how to apply the state law.[33] Thus, the amended Act provides a method for consolidating nuclear incident claims in a single federal forum while still applying the relevant state rules to such claims.

C. Medical Monitoring Under the Price-Anderson Act

Several courts have considered whether a medical monitoring claim may be brought under the Price-Anderson Act. The Sixth and Ninth Circuits have addressed the question directly, while courts in the Tenth Circuit, prior to *June*, had done so in dicta.

1. Circuit court precedent and the circuit split

a. The Sixth Circuit's decision in Rainer. Sixth Circuit precedent indicates that a medical monitoring claim may proceed under the Act, provided the claim is consistent with the underlying substantive state law. In *Rainer v. Union Carbide Corp.*, the Sixth Circuit considered a medical monitoring claim arising in Kentucky and brought under the Act.[34] Rather than examine for itself whether a claim for medical monitoring constituted "bodily injury," the court instead considered whether the "subcellular damage" the plaintiffs claimed they had suffered constituted "bodily injury" under Kentucky tort law.[35] The court then rejected the plaintiffs' claim based on its reading of Kentucky law.[36] Under the three-step rubric for deciding Price-Anderson cases, the *Rainer* court was not required to consider the first question of whether the plaintiffs' claim fit the definition of a "public liability action," since the plaintiffs effectively conceded this point.[37] Furthermore, the court implicitly

remanding to district court for determination).

32. *See In re* Berg Litig., 293 F.3d 1127, 1132–33 (9th Cir. 2002) (dismissing emotional distress claim as inconsistent with § 2014(q)).

33. *See* Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1490 (10th Cir. 1993) (applying Colorado law).

34. 402 F.3d 608 (6th Cir. 2005).

35. *Id*. at 618.

36. *Id*. at 622.

37. *See id*. at 617 (stating that plaintiffs' failure to argue whether the Act was controlling was "essentially a concession by the plaintiffs that the Price–Anderson Act governs their

decided the second question in the plaintiffs' favor, since it did not find their claim to be "inconsistent with the provisions" of the Act (although it is questionable whether this issue was ever raised before the court).[38] The *Rainer* plaintiffs' claim ultimately failed on the third question—the application of Kentucky state law.[39] Thus, if Kentucky law had recognized a claim for medical monitoring, the *Rainer* plaintiffs would have prevailed. The Sixth Circuit's analysis therefore indicates that a medical monitoring claim is not barred by the Act per se.

b. Ninth Circuit precedents. In contrast, Ninth Circuit precedent states that medical monitoring claims may not be brought under the Act under *any* circumstances.[40] In *In re Berg Litigation*, the Ninth Circuit upheld the district court's dismissal of a medical monitoring claim.[41] The district court had dismissed the claim on the grounds that "the Washington Supreme Court had not yet recognized such a cause of action for medical monitoring."[42] According to the district court, the plaintiffs' claim had failed for the same reason as the claim at issue in *Rainer*—the application of state law. The Ninth Circuit, however, upheld the dismissal on the grounds that a medical monitoring claim, like the emotional-distress claims also at issue in the case, "do[es] not demonstrate 'bodily injury, sickness, disease, or death . . . or property damage.'"[43] Accordingly, the court reasoned, "a cause of action for medical monitoring . . . fails to meet the *jurisdictional requirements* of the Price-Anderson Act."[44]

The court's reference to "jurisdictional requirements" was a nod toward § 2210(n)(2), which confers federal question jurisdiction on "action[s] arising out of or resulting from a nuclear incident."[45]

claims").

38. *See* Brief of Defendants-Appellees at 43 n.10, June v. Union Carbide Corp., 577 F.3d 1234 (10th Cir. 2009) (No. 07-1532), 2008 WL 2113581, at *19 (arguing that the question was never raised, and that the court's decision would have been different if it had been).

39. *Rainer*, 402 F.3d at 618.

40. *See* Dumontier v. Schlumberger Tech. Corp., 543 F.3d 567, 570 (9th Cir. 2008); *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1010 (9th Cir. 2008); *In re* Berg Litig., 293 F.3d 1127, 1133 (9th Cir. 2002).

41. *Berg*, 293 F.3d at 1132–33.

42. *Id.* at 1132.

43. *Id.* (quoting 42 U.S.C. § 2014(q) (2002)).

44. *Id.* at 1133 (emphasis added).

45. 42 U.S.C. § 2210(n)(2) (2002), *quoted in Berg*, 293 F.3d at 1131.

Since "nuclear incident" is defined as "any occurrence . . . causing . . . bodily injury, sickness, disease or death, or loss of or damage to property,"[46] it follows that "[p]hysical harm to persons or property is thus a jurisdictional prerequisite" under the Act.[47] Accordingly, the *Berg* court held that federal courts lack subject-matter jurisdiction over medical monitoring claims brought under the Act.[48] In other words, the *Berg* court held that a medical monitoring claim fails on the first step of the Price-Anderson analysis by failing to qualify as a "public liability action."[49]

The decision in *Berg* naturally led to the question of whether medical monitoring claims that would otherwise be brought under the Act could potentially be filed in state court. The Ninth Circuit's decision in *In re Hanford Nuclear Reservation Litigation*[50] dismissed that idea and repudiated the jurisdictional language in *Berg*:

> [W]e used the term "jurisdictional" in the loose sense, perhaps too loose . . . . The district court in this case clearly had subject matter jurisdiction under the PAA to decide the issue; the district court simply did not have the power to grant the relief requested because the plaintiffs have not suffered any physical injury.[51]

Thus, the court reasoned, the dismissals were warranted based on a failure to state a claim under the Act, not a lack of jurisdiction.[52] In contrast to the holding in *Berg*, the analysis in *Hanford* seems to implicate the second step of the Price-Anderson analysis; *Hanford* stands for the proposition that a medical monitoring claim, because it is not a claim for "bodily injury" or any other category of damage listed in the Act, is inconsistent with the Act's provisions.[53]

2. Colorado District Court and Tenth Circuit precedent

Prior to *June*, several decisions by both the Tenth Circuit and the Federal District Court for the District of Colorado had, in one

46. *Id.* § 2014(q).

47. *Berg*, 293 F.3d at 1131.

48. *Id.* at 1133.

49. *See supra* text accompanying note 31.

50. 534 F.3d 986 (9th Cir. 2008). Both *Berg* and *Hanford* arise from the same basic set of facts. *Id.* at 995.

51. *Id.* at 1009.

52. *See id.* at 1010.

53. *See id.* at 1009; *see also* Dumontier v. Schlumberger Tech. Corp., 543 F.3d 567 (9th Cir. 2008) ("The Act . . . permits recovery for disease—not simply a risk of disease.").

way or another, expressed approval for medical monitoring claims under the Price-Anderson Act. For example, in *Dodge v. Cotter Corp.*, the Tenth Circuit appeared to allow a medical monitoring claim to be brought under the Act without objection, although it seems that no analysis as to the propriety of allowing such a claim under the Act was ever undertaken.[54] In addition, in *Brafford v. Susquehanna Corp.*, Colorado's federal district court, in deciding whether to allow a claim for increased risk of cancer to proceed, stated that "subcellular damage resulting to plaintiffs because of their exposure to the radiation constitutes a present physical injury."[55] This holding is notable because a claim for increased risk of cancer, like a claim for medical monitoring under the Act, requires a showing of "a definite, present physical injury."[56] Furthermore, in *Cook v. Rockwell International Corp.*, Colorado's federal district court examined a medical monitoring claim brought under the Act and concluded that such a claim was permissible (although again, no analysis was undertaken regarding whether such claims fell within the language of the Act).[57]

The Tenth Circuit subsequently expressed its approval of the *Cook* court's reasoning in *Building & Construction Department v. Rockwell International Corp.*, noting that "the concept of medical monitoring [was] gaining wide acceptance."[58] However, *Building & Construction Department* went beyond the superficial analysis in *Cook*. *Building & Construction Department* concerned a medical monitoring claim brought by the employees of a Colorado facility that manufactured nuclear weapons.[59] In that case, the court held that a medical monitoring claim constituted a claim for "personal injury" under the Colorado workers' compensation statute.[60] In so doing, the court noted:

54. 203 F.3d 1190, 1192 (10th Cir. 2000). The plaintiffs brought claims under CERCLA also, and the court's opinion does not make clear which claims were brought under CERCLA versus under the Act. *See id.* Furthermore, it is worth noting that the *Dodge* court disallowed emotional-distress claims based on fear of cancer, which bear a strong conceptual resemblance to medical monitoring claims. *Id.* at 1201–02.

55. 586 F. Supp. 14, 18 (D. Colo. 1984).

56. *Id.* at 17.

57. *See* 755 F. Supp. 1468, 1476–77 (D. Colo. 1991).

58. 7 F.3d 1487, 1490 n.2 (10th Cir. 1993).

59. *Id.* at 1490.

60. *Id.* at 1493–94.

> The Price-Anderson Act grants federal jurisdiction only where there is a public liability action regarding a "nuclear incident" defined as a nuclear occurrence "causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property" as a result of exposure to radioactive and other toxic substances. 42 U.S.C. § 2014(q). Were we to find that plaintiffs' claims do not constitute "personal injury," it would raise questions as to federal jurisdiction.[61]

The court eventually held that, because "personal injury" claims were preempted by Colorado workers' compensation law, the plaintiffs could not bring their medical monitoring claim under the Act.[62]

Thus, the *Building & Construction Department* court made three important decisions. First, just as the Ninth Circuit did in *Berg*, the court read the "bodily injury" requirement to implicate the Act's jurisdictional provisions—and, unlike the *Berg* court, found that jurisdiction existed. Second, the court noted the Act's bodily-injury requirement and concluded that a medical monitoring claim would meet that requirement. Third, the court applied Colorado state law to decide whether the claim was consistent with that law (and ultimately found that it was not). The process the court undertook, and the results it reached, indicated that a medical monitoring claim that *was* consistent with Colorado law would be valid under the Act.

III. *JUNE V. UNION CARBIDE CORP.*

This Part of the Note will briefly summarize the facts of the *June* case. The Note will then discuss the Tenth Circuit's holding in the case along with the court's reasoning.

A. Facts of the Case

June concerns the now-abandoned mining town of Uravan, Colorado.[63] Since at least 1914, companies had mined and milled uranium, radium, and vanadium in the Uravan area.[64] Union Carbide purchased the mines in 1928 and began full-scale mining operations

61. *Id.* at 1494 n.7.

62. *Id.* at 1493.

63. June v. Union Carbide Corp., 577 F.3d 1234, 1237 (10th Cir. 2009).

64. *Id.* The name "Uravan" is a portmanteau of "uranium" and "vanadium." *See* URAVAN, COLORADO, http://www.uravan.com (last visited Mar. 4, 2011).

in 1936.[65] Because these operations required substantial manpower, the company built the town of Uravan to accommodate workers and their families.[66] Mining operations continued there until 1984.[67] Soon afterward, the Uravan area was designated as a Superfund site, and the town's residents were evacuated.[68]

The plaintiffs in *June* sued Union Carbide and alleged that the company had exposed them to hazardous radiation during their time in Uravan.[69] Plaintiffs initially brought eight causes of action, including a "public liability" claim under the Price-Anderson Act, and a medical monitoring claim.[70] The medical monitoring claim was originally brought as a state law claim, but the district court ruled that it, along with the other seven claims, was preempted by the Act; the court therefore consolidated all the other claims under the "public liability" umbrella.[71] The defendants then filed two motions for summary judgment, one of which argued that the medical monitoring claim was inconsistent with the provisions of the Act.[72]

The district court agreed with the defendants that the provisions of the Act barred any medical monitoring claim against them.[73] However, in doing so, the court construed the defendants' motion as a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[74] Accordingly, the dismissal was without prejudice.[75] The plaintiffs then appealed the district court's ruling.[76] The defendants did not cross-appeal.[77]

65. *June*, 577 F.3d at 1237.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*.
70. First Amended Complaint at 11–19, June v. Union Carbide Corp., No. 04-MK-123 (MJW) (D. Colo. May 13, 2004).
71. *June*, 577 F.3d at 1237.
72. *Id*. The other motion was a motion to dismiss the claims made by plaintiffs who had developed cancer or other diseases. The defendants argued that these plaintiffs had shown insufficient evidence of causation. *Id*. The district court agreed, and the Tenth Circuit affirmed. *Id*. at 1236.
73. *Id*. at 1238.
74. *Id*.
75. *Id*. at 1248.
76. *Id*. at 1238.
77. *Id*. at 1248 n.8.

On appeal to the Tenth Circuit, the plaintiffs argued that a showing of "subcellular injury" was sufficient to satisfy the "bodily injury" requirement of the Act.[78] Among other sources, the plaintiffs supported their position by citing the Colorado federal district court's decision in *Brafford*.[79] The plaintiffs also argued that the judicial interpretation of various industry insurance policies worked in their favor.[80] Although the plaintiffs cited *Building & Construction Department* in their brief, they did so primarily to show that the court had approved the dictum in *Cook* and did not explain the case's framework in detail.[81] For their part, the defendants argued that the district court had erroneously construed their motion as one for lack of subject-matter jurisdiction rather than a motion to dismiss for failure to state a claim.[82] A dismissal with prejudice, they contended, was warranted as per the Ninth Circuit's decision in *Hanford*.[83]

B. The Court's Reasoning

The Tenth Circuit affirmed the district court's dismissal of the plaintiffs' medical monitoring claim.[84] The court stated that "'DNA damage and cell death,' which creates only a possibility of clinical disease, does not constitute a 'bodily injury' under the Price-Anderson Act."[85] The court reasoned that medical monitoring claims are based on the invasion of one's possessory interest in one's own body and not on any actual injury or harm suffered.[86] Furthermore, the court reasoned that an interpretation of "bodily injury" that encompassed every exposure to harmful radiation would render that language superfluous, since every state law claim would also be a cognizable claim under the Act.[87] In addition, the court

78. Appellants' Amended Principal Brief at 60–62, *June*, 577 F.3d 1234 (No. 07-1532), 2008 WL 951278, at *27–29.

79. *Id.* at 61 n.28.

80. *Id.* at 60–62.

81. *See id.* at 64; *supra* text accompanying notes 56–57.

82. Brief of Defendant-Appellees at 47 n.12, *June*, 577 F.3d 1234 (No. 07-1532), 2008 WL 2113581, at *19.

83. *Id.*; *see supra* text accompanying notes 50–53.

84. *June*, 577 F.3d at 1248.

85. *Id.* at 1249.

86. *Id.* (citing Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) (en banc)).

87. *Id.* at 1250; *see also* 42 U.S.C. § 2014(hh) (2006) (barring state-law claims

distinguished the plaintiffs' insurance policy related arguments and cases, stating that those cases and canons of construction were particular to the insurance industry; in particular, they often construed the policy language in favor of providing coverage, even if a stricter construction would not have done so.[88] Finally, following *Metro-North*, the court cited a public policy concern that allowing medical monitoring claims under the Act would lead to an unfair distribution of scarce funds for plaintiffs.[89]

Since the court decided the medical monitoring issue on the basis of the language of the Act itself, it did not reach the question of whether Colorado law would recognize a medical monitoring claim.[90] In addition, although the court recognized the Ninth Circuit's holding in *Hanford* and noted, with *Hanford*, that bodily injury was not necessarily a jurisdictional requirement, it refused to grant the defendants' request to convert the dismissal to one with prejudice, citing their failure to cross-appeal.[91] Thus, the court's ultimate holding was that a medical monitoring claim does not fall within the subject-matter jurisdiction of the Act.[92]

IV. ANALYSIS

The question presented in *June* was whether a medical monitoring claim can be brought under the Price-Anderson Act. By barring the claim as being inconsistent with the jurisdictional requirements of the Act, the *June* court effectively adopted the approach taken by the Ninth Circuit in *Berg* and later clarified in *Hanford*.[93] However, the court's holding does not take into account the fact that the Tenth Circuit had already answered this question in *Building & Construction Department*. The primary reason the court failed to account for this precedent is that the *June* plaintiffs failed to apply it at any length to the facts of their case. This Part will discuss the potential effects the plaintiffs' reliance on *Building & Construction Department* could have had, and what *June* would have looked like had the court relied on its prior precedent.

"inconsistent with the provisions" of the Act).

88. *June*, 577 F.3d at 1250–51.
89. *Id.* at 1251–52.
90. *Id.* at 1252 n.12.
91. *Id.* at 1248 n.8.
92. *Id.* at 1248 & n.8.
93. *See supra* Part II.C.1.b.

A. Medical Monitoring as "Bodily Injury"

The most important facet of the holding in *Building & Construction Department* is the way it defines a medical monitoring claim as a claim for "personal injury" for purposes of the Colorado workers' compensation statute.[94] This may seem odd at first, because the fact that such a claim is defined as a "personal injury" claim under the state workers' compensation scheme seems to have little to do with the definition of the claim under federal law. After all, the opinion in *Building & Construction Department* was based in part on interpretive canons specific to construing a workers' compensation scheme.[95]

The question at issue in *Building & Construction Department* was whether an employer could claim immunity from a medical monitoring claim brought under the Act based on the exclusivity provisions of the Colorado workers' compensation statute.[96] In deciding that the employer was indeed immune to the claim, the court noted that, in light of the "'highly remedial and beneficent'"[97] purpose of the statute, "the immunity from common-law suits granted to the employer by the [statute] should be broadly construed."[98] Under this scheme, any claim for "personal injury" constituted a tort claim from which an employer was immune.[99] The plaintiffs sought to keep their medical monitoring claim from being classified as a "personal injury" claim and argued that "such claims require neither the present manifestation of physical injury nor any ultimate actual physical injury."[100] However, the court disagreed, noting that "[medical monitoring] claims arise primarily out of the risk of latent manifestation of physical injury from exposure to toxic substances and not out of some purely economic or property loss."[101]

94. Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1493–94 (10th Cir. 1993).

95. *Id.*

96. *See id.* at 1492.

97. *Id.* at 1493 (quoting *In re* Question Submitted by the U.S. Court of Appeals for the Tenth Circuit, 759 P.2d 17, 26 (Colo. 1988), *rev'd sub nom. on other grounds*, 858 F.2d 1479 (10th Cir. 1988)).

98. *Id.*

99. *See id.*

100. *Id.*

101. *Id.* at 1494.

So far, all of this appears "readily distinguishable" in the same manner as several of the *June* plaintiffs' arguments, which were based on judicial construction of the "bodily injury" language in insurance policies.[102] However, the court in *Building & Construction Department* expressed its awareness that, absent a finding of "bodily injury," jurisdictional issues could be raised.[103] This means that the court had impliedly considered, as a threshold matter, the meaning of "bodily injury" in § 2014(q) before it ever considered the meaning of "personal injury" under the workers' compensation statute. In other words, in order for the court to hear the medical monitoring claim at all, *it had to first decide that the claim was a "bodily injury" claim*. This, of course, is exactly the question the *June* court was deciding, and this decision presumably applied to the medical monitoring claim even absent the sorts of interpretive canons necessary to construe the claim as a "bodily injury" claim under the workers' compensation statute. Thus, *Building & Construction Department* provides evidence that a medical monitoring claim is a claim for "bodily injury" under the Act, and it does so while avoiding the *Rainer* problem of having perhaps failed to consider the issue.[104]

B. Alternative Interpretations of the Act

The *June* court presents its holding as primarily a matter of statutory interpretation. Specifically, the court claims that interpreting "bodily injury" to include subcellular injury would nullify a portion of the Act's language and is therefore impermissible.[105] However, the interpretation of "bodily injury" is less clear than the court claims; specifically, it is unclear whether Congress, by restricting the available causes of action under the Act to "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property," intended to foreclose medical monitoring claims.[106] The court's argument regarding the supposedly superfluous nature of "bodily injury" is obviated if at

102. *See supra* text accompanying note 88.

103. *See supra* text accompanying note 61; *see also In re* Berg Litig., 293 F.3d 1127, 1133 (9th Cir. 2002) (holding that failure to meet "bodily injury" requirement precludes exercise of subject-matter jurisdiction).

104. *See supra* Part II.C.1.a.

105. June v. Union Carbide Corp., 577 F.3d 1234, 1250 (10th Cir. 2009).

106. 42 U.S.C. § 2014(q) (2006).

least one class of common claims exists that is clearly outside the definition. And such a claim does exist in the form of the emotional distress claim. If we accept that emotional distress claims are not claims for "bodily injury" or any other category listed in the Act (and the case law points very definitely toward this interpretation),[107] then the phrase "bodily injury" does have a purpose—to screen out emotional distress claims.

Furthermore, in the debate over the 1988 amendments to the Act, Congress mentioned (and the defendants pointed out in their brief)[108] a concern that, without limits on the causes of action available under the Act, "juries may arbitrarily award overly generous compensation to some claimants for damages which show no physical manifestations."[109] Although this danger exists to some degree in the medical monitoring context, it is limited there by the jury's ultimate need to place a dollar figure on the sorts of procedures necessary to successfully monitor a patient's condition. No such limiting factor exists for emotional distress claims.

So far, none of this has anything to do with *Building & Construction Department*. However, *Building & Construction Department* helps bolster the case for medical monitoring claims by solving a problem the *June* court stumbled into—the potential construction of the "bodily injury" requirement as jurisdictional. Recall the Ninth Circuit's difficulties with subject-matter jurisdiction and the potential for state law claims—a difficulty that court ultimately had to eliminate via its holding, in *Hanford*, that § 2014(q) specified only elements of the cause of action.[110] Recall also that this same issue arose in *June* and could not be solved with a *Hanford*-style fix due to the defendants' failure to cross-appeal.[111]

Building & Construction Department points the way to an alternative solution. By construing medical monitoring claims as consistent with the provisions of the Act, *Building & Construction Department* avoids the subject-matter jurisdiction issue altogether. Under this construction, a medical monitoring claim would be

107. *See, e.g.*, *Berg*, 293 F.3d at 1133.

108. Brief of Defendants-Appellees at 39, *June*, 577 F.3d 1234 (No. 07-1532), 2008 WL 2113581, at *17.

109. *Id.* (quoting H.R. REP. NO. 110-104, pt. 2, at 16 (1987)).

110. *See In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009–10 (9th Cir. 2008).

111. *June*, 577 F.3d at 1248 n.8.

brought under the applicable state law: if that law allowed such claims, then they would be allowed under the Act. More importantly for jurisdictional purposes, any dismissals would be with prejudice for failure to state a claim under the Act.

Of course, had the *June* court chosen this course of action it would have had to decide the status of medical monitoring claims under Colorado law, something it was likely loath to do as a result of the clash between its pre-*Metro-North* precedent and the post-*Metro-North* world.[112] But the court could still have disavowed its previous precedent by pointing to the analysis (and in particular to the policy concerns raised) in *Metro-North*, just as it did in its actual opinion.[113]

V. CONCLUSION

Ultimately, it is not possible to tell what the *June* court would have done had the plaintiffs more directly presented it with the reasoning in *Building & Construction Department*. It is very possible that the court would have found a way to distinguish its own precedent (most likely by claiming that a decision in the workers' compensation context did not control in *June*), or that it would have found the expressions of legislative intent to be so directly on point that no case to the contrary would have swayed it. Nevertheless, had the plaintiffs relied more directly on *Building & Construction Department*, their odds of success would have increased substantially.

The consequences of the *June* decision may be far-reaching indeed. Already, the Tenth Circuit has relied on its decision in *June* in barring other claims brought under the Price-Anderson Act.[114] More broadly, *June* is likely to be a particularly influential opinion, since much of the litigation under the Act arises out of either the Ninth or Tenth Circuit.[115] As other circuits eventually address the issue of medical monitoring claims brought under the Act, they are likely to see that the two circuits with the most experience in

112. *See supra* Part II.C.2.

113. *See June*, 577 F.3d at 1251–52.

114. *See* Cook v. Rockwell Int'l Corp., 618 F.3d 1127, 1140–42 (10th Cir. 2010) (relying on *June* in holding that the presence of radioactive plutonium on plaintiffs' property does not constitute property damage under the Act).

115. Since 2001, only three reported cases arising under the Act have been decided at the federal appellate level by a court other than the Ninth or Tenth Circuit. *See* Smith v. Carbide & Chems. Corp., 507 F.3d 372 (6th Cir. 2007); Rainer v. Union Carbide Corp., 402 F.3d 608 (6th Cir. 2005); Sweet v. United States, 53 Fed. Cl. 208 (Fed. Cl. 2002), *enforced*, 63 Fed. Cl. 591 (Fed. Cl. 2005).

interpreting the Act are in agreement; accordingly, they will likely favor the *June* approach over the Sixth Circuit's approach in *Rainer*, which left open the door for medical monitoring claims that were consistent with the applicable state law.[116] Thus, the failure of the plaintiffs to fully apply *Building & Construction Department* to the *June* case may have foreclosed medical monitoring claims by not only the *June* plaintiffs, but plaintiffs nationwide.

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116. *See supra* Part II.C.1.a.

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