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DIAGNOSING MEDICAL MONITORING COSTS UNDER CERCLA: CHECKING FOR A PULSE

I. INTRODUCTION

In recent years, society has become increasingly concerned with the health dangers posed by human exposure to hazardous substances. The potential severity of diseases caused by hazardous substances, coupled with prolonged latency periods, has burdened many with "a continuing need for frequent testing for possible, resultant disease."¹ Individuals exposed to toxic waste hope that medical monitoring will "expedite the early diagnosis of diseases secondary to toxic exposure."²

Medical monitoring, however, is an expensive undertaking. Consequently, individuals exposed to hazardous substances have attempted to shift these surveillance costs to those responsible for the pollution. The shifting of the burden from the victim to responsible parties, would have various results.³ First, a remedy including medical monitoring costs would provide financial resources and compensation to victims.⁴ Second, it would deter environmental irresponsibility.⁵ Failure to award such costs to victims possessing sufficient resources would cause innocent parties to bear the cost of medical monitoring themselves;⁶ moreover, in cases where injured parties lack financial capacity, medical monitoring would become an impossibility.⁷

1. Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 TUL. ENVTL. L.J. 1, 2 (1989).

2. Akim F. Czmus, *Medical Monitoring of Toxic Torts*, 13 TEMP. ENVTL. L. & TECH. J. 35, 39 (1994).

3. *Id.* at 38. Medical monitoring, as a remedy, has three potential benefits. *Id.* "First, the medical monitoring remedy provides financial resources that enable victims to receive needed medical testing. Second, it deters businesses and corporations from acting irresponsibly. Third, the medical monitoring remedy compensates victims for injuries sustained and ameliorates the harm which they must endure." *Id.* (citing Allan Kanner, *Medical Monitoring Remedies*, C855 ALI-ABA 737, 740-41 (1993)).

4. *Id.*

5. *Id.*

6. *Id.* (citing Leslie S. Gara, Comment, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 265 (1988)).

7. Czmus, *supra* note 2, at 38.

Traditionally, injured parties have sought to recover medical monitoring costs through state common law tort actions.⁸ Other plaintiffs have sought to recover medical monitoring costs under the statutory provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁹ Plaintiffs in the latter category have argued that medical monitoring costs are necessary "response costs"¹⁰ under section 107 of CERCLA.¹¹ Courts, however, have not uniformly decided the issue of whether medical monitoring costs are recoverable under CERCLA. Although two circuit courts have found such costs not recoverable,¹² several district courts have split on the subject.¹³ This Comment traces the evolution of the recovery of medical monitoring costs under CERCLA, addresses their current status, and offers a prognosis for their future.

II. STATUTORY BACKGROUND

A. The History and Purpose of CERCLA

In response to mounting public outcry concerning improper private hazardous waste disposal practices,¹⁴ Congress enacted CER-

8. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 785 (3d Cir. 1994), cert. denied sub nom.; *General Elec. Co. v. Ingram*, 115 S. Ct. 1253 (1995) (holding medical monitoring costs recoverable under Pennsylvania law); *Ayers v. Jackson Township*, 525 A.2d 287, 311-12 (N.J. 1987) (holding expenses for medical surveillance recoverable under New Jersey law).

9. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 §§ 101-405 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)).

10. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). For a further discussion of "response costs" under CERCLA, see *infra* notes 40-51 and accompanying text.

11. See CERCLA § 107, 42 U.S.C. § 9607.

12. When a claim for medical monitoring costs under CERCLA was brought before the Third Circuit, the court expressly declined to resolve this issue. *Redland Soccer Club, Inc. v. Department of the Army of the United States*, 55 F.3d 827 (3d Cir. 1995). According to the *Redland* court, because the "[p]laintiffs failed to introduce sufficient evidence to survive a summary judgment motion on their medical monitoring claim, we need not and do not address whether they could recover medical monitoring costs from the United States as a 'response cost' under CERCLA." *Id.* at 848 n.12.

For a discussion of the three circuit court cases that did address whether medical monitoring costs are recoverable as "response costs" under CERCLA, see *infra* notes 122-133 and accompanying text.

13. For a discussion of district court cases finding medical monitoring costs recoverable under CERCLA, see *infra* notes 73-100 and accompanying text. For a discussion of district court cases finding medical monitoring costs not recoverable under CERCLA, see *infra* notes 101-121 and accompanying text.

14. H.R. REP. NO. 1016, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.A.N. 6119, 6119-23. Potential environmental hazards such as those en-

CLA,¹⁵ a statute with a retrospective and remedial purpose and framework.¹⁶ CERCLA's bifurcated objective aims to effectuate the expeditious response and cleanup of hazardous substance release sites, while placing "ultimate financial responsibility for the cleanup on those responsible for the waste."¹⁷ In order to avoid the potential conflict between CERCLA's separate objectives, Congress created the Hazardous Substance Response Trust Fund (Superfund).¹⁸ In accordance with Superfund, CERCLA cleanup actions can be carried out in one of three ways: 1) the government may allow, under some circumstances, a responsible party to conduct its own cleanup action under government supervision;¹⁹ 2) the government may charge the responsible party for the costs associated with the cleanup action as conducted by the government;²⁰ or 3) in cases where the identity of the responsible party is not known prior to government action, the government may conduct cleanup efforts, using moneys provided by the Superfund.²¹

countered at Love Canal in New York and at the Valley of the Drums in Kentucky caught the attention of the public and, thereafter, Congress. *Id.*

15. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675. CERCLA was passed in an effort "to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws." *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (quoting FREDERICK ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

16. *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1079 (D. Colo. 1985).

17. Kathryn E. Hand, Comment, *Someone to Watch Over Me: Medical Monitoring Costs Under CERCLA*, 21 B.C. ENVTL. AFF. L. REV. 363, 367 (1994). CERCLA applies "primarily to the cleanup of leaking inactive and abandoned sites and to emergency responses to spills." Anderson, *supra* note 15, at 568. In addition, courts have held that CERCLA is to be given a broad and liberal construction. *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985).

18. 42 U.S.C. § 9631 (repealed 1987), *recodified in* 26 U.S.C. § 9507. Superfund was formed as a result of "the conflict between the urgency of cleanup needs and the time-consuming process of ascertaining the responsible parties." Hand, *supra* note 17, at 367.

19. *See* CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).

20. *See id.*

21. *See* Hand, *supra* note 17, at 367-68. The government may later bring suit against potentially responsible parties to recover the costs it expended during cleanup. *See* CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

B. CERCLA Liability and Cost Recovery Actions

Under CERCLA's liability provision,²² "responsible persons"²³ are held financially accountable in three situations.²⁴ First, a responsible party will be liable to the government for Superfund moneys expended while conducting "removal"²⁵ or "remedial ac-

22. See CERCLA § 107(a), 42 U.S.C. § 9607(a).

23. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4). The term "responsible persons" is used in this context to include:

- (1) the owner and operator of a vessel . . . or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs,

Id.

24. See CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

25. CERCLA defines "remove" or "removal" as: the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternate water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.]. CERCLA § 101(23), 42 U.S.C. § 9601(23) (footnote omitted). "Removal efforts" generally concern short-term cleanup arrangements. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985).

tion”²⁶ in response to actual or threatened “release”²⁷ of a “hazardous substance”²⁸ at a “facility.”²⁹ Second, a responsible party will be liable to any other person³⁰ who has incurred necessary response

26. CERCLA defines “remedy” or “remedial action” as:

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition off-site of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

CERCLA § 101(24), 42 U.S.C. § 9601(24). “Remedial actions” generally concern long-term or permanent containment or disposal programs. *Shore Realty*, 759 F.2d at 1040.

27. CERCLA defines “release” as any “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . .” CERCLA § 101(22), 42 U.S.C. § 9601(22).

28. CERCLA defines “hazardous substance” as: “(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] . . .” CERCLA § 101(14), 42 U.S.C. § 9601(14).

29. CERCLA defines “facility” as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . .

CERCLA § 101(9), 42 U.S.C. § 9601(9).

30. Section 107(a)(4)(B) serves as a basis for private cost recovery actions under CERCLA. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). *See Brewer v. Ravan*, 680 F. Supp. 1176, 1178 (M.D. Tenn. 1988) (“[C]ourts have held almost unanimously that section 9607(a)(1-4)(B) creates a private cause of action against section 9607(a) responsible parties for the recovery of ‘necessary costs of response incurred . . . consistent with the National Contingency Plan.’”).

costs consistent with the National Contingency Plan (NCP).³¹ Finally, a responsible party will be liable for "damages for injury to, destruction of, or loss of natural resources including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."³² This Comment focuses on the application of CERCLA section 107(a)(4)(B) in the context of recovering medical monitoring costs.

Although the terminology of section 107(a)(4)(B) appears straightforward, judicial application of this section has proved troublesome.³³ Due to the haste with which CERCLA was enacted, Congress drafted the statute replete with compromise which has subsequently been described as being "marred by vague terminology and deleted provisions."³⁴ Furthermore, "the lack of a clear legislative history [makes] interpretation of CERCLA's broadly drafted provisions a difficult task for courts."³⁵

Section 107(a)(4)(B) specifically states that responsible parties "shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan."³⁶ Therefore, a private party seeking recovery under section 107(a)(4)(B) of CERCLA must meet three threshold requirements: 1) the claimant must not be a potentially responsible

31. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). The National Contingency Plan (NCP) empowers the President to set up a framework detailing procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants. CERCLA § 105, 42 U.S.C. § 9605.

32. CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607 (a)(4)(C).

33. See *Price v. United States Navy*, 39 F.3d 1011, 1015 n.10 (9th Cir. 1994). In *Price*, the court acknowledged the diversity of judicial interpretation regarding the term "response costs" as found in CERCLA. *Id.*

34. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 838-39 n.15 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

"In 1980, while the Senate considered one early version of CERCLA, the House considered and passed another." *Shore Realty*, 759 F.2d at 1039-40 (citing H.R. REP. NO. 7020, 96th Cong., 2d Sess. (1980), reprinted in 2 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), at 391-463 (Comm. Print 1983)). The version passed by both Houses, however, was a last minute compromise assembled in large part by Senate leaders. *Id.* at 1040. "Although Congress considered the possibility of legislation enabling private actions, both Houses rejected the inclusion of any provision allowing recovery of private damages unrelated to cleanup efforts." Czmus, *supra* note 2, at 49.

35. Brian S. McCaughan, Comment, "CERCLAing" the Field of Lender Liability: Clarifying the Security Interest Exemption, 4 VILL. ENVTL. L.J. 89, 92 & n.22 (1993) (citing Douglas M. Garrou, *The Potentially Responsible Trustee: Probable Target for CERCLA Liability*, 77 VA. L. REV. 113, 119 (1991)).

36. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). For a further discussion of the NCP, see *supra* note 31 and *infra* note 39 and accompanying text.

party (PRP);³⁷ 2) the response costs must be necessary;³⁸ and 3) the costs must be consistent with the NCP.³⁹

C. Medical Monitoring as a “Necessary Cost of Response”

The second threshold requirement associated with recovery has been the subject of litigation because CERCLA’s drafters neglected to define the phrase “necessary costs of response.”⁴⁰ This omission leaves open the possibility that medical monitoring costs fall within the parameters of necessary CERCLA response costs.⁴¹ Section 101(25) defines “response” as “remove, removal, remedy, and remedial action”⁴² Section 101(23), thereafter, defines “remove” and “removal” as “cleanup or removal of released hazardous substances from the environment,”⁴³ while the terms “remedy” and “remedial,” as defined in section 101(24), address “actions consistent with permanent remedy taken instead of or in addition to removal actions.”⁴⁴ These definitions make no specific reference to medical monitoring costs, yet “both subsections specifically include *monitoring* conducted in the interests of [protecting] public health and welfare in their lists of examples.”⁴⁵

The legislative history of section 107 does little to clarify the ambiguous terminology.⁴⁶ Discussing the compromise bill which

37. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4). See Hand, *supra* note 17, at 370.

38. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

39. *Id.* Courts have turned this into a five-part test. For a discussion of this test, see *infra* note 96. The NCP “is an EPA-promulgated series of regulations regarding aspects of hazardous waste cleanups and cleanup plans.” Hand, *supra* note 17, at 364 n.7. The NCP “is basically a procedural document with few substantive criteria . . . [which] poses little problems for plaintiffs.” *Id.* at 370. See CERCLA § 105, 42 U.S.C. § 9605.

40. See CERCLA § 101, 42 U.S.C. § 9601.

41. See *Jones v. Inmont*, 584 F. Supp. 1425, 1429-30 (S.D. Ohio 1984).

42. CERCLA § 101(25), 42 U.S.C. § 9601(25).

43. CERCLA § 101(23), 42 U.S.C. § 9601(23). For a further discussion of these terms, see *supra* note 25 and accompanying text.

44. CERCLA § 101(24), 42 U.S.C. § 9601(24). For a discussion of these terms, see *supra* note 26 and accompanying text.

45. Hand, *supra* note 17, at 369 (emphasis added). In pertinent part, § 101(23) includes “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to *prevent, minimize or mitigate damage to the public health or welfare.*” CERCLA § 101(23), 42 U.S.C. § 9601(23) (emphasis added). Similarly, § 101(24) refers to “any monitoring reasonably required to assure that such actions *protect the public health and welfare.*” CERCLA § 101(24), 42 U.S.C. § 9601(24) (emphasis added).

46. See *Coburn v. Sun Chem. Corp.*, No. CIV.A.88-0120, 1988 WL 120739, at *3 (E.D. Pa. Nov. 9, 1988) (“The legislative history of CERCLA offers little guidance into the definition of ‘necessary costs of response.’”).

was subsequently passed by Congress, Senator Randolph, one of the legislation's co-sponsors, explained, "[w]e have deleted the Federal cause of action for medical expenses . . ."47 These sentiments were echoed by Senator Stafford, the bill's co-sponsor.48 Senator Mitchell, in describing the legislation's deficiencies, lamented that the bill "provides nothing for what is the most important part of the problem: injury to people. . . . We are abandoning that principle here today when the damage involved is to a person [as opposed to compensation for damage to property]."49 The remarks of these Senators may have been aimed at the term "medical expenses" as defined in previous unpassed legislation.50 If this is the case, these Senators were not discussing costs associated with medical monitor-

47. 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980), *reprinted in* HELEN C. NEEDHAM & MARK MENEFFEE, *THE ENVIRONMENTAL LAW INSTITUTE, SUPERFUND: A LEGISLATIVE HISTORY*, at 294 (1982) (quoting statement of Sen. Randolph).

48. 126 CONG. REC. S14,967 (daily ed. Nov. 24, 1980), *reprinted in* NEEDHAM & MENEFFEE, *supra* note 47, at 294 (statement of Sen. Stafford). The Senator further elaborated, "[w]e eliminated all third party compensation from the fund, including out-of-pocket medical expenses of victims of releases." *Id.* Similar comments were espoused by Senators Culver and Williams, the latter of whom professed, "[m]y most serious concern with the proposed legislation is the absence of a provision for the compensation of victims of chemical wastes for their out-of-pocket medical expenses." 126 CONG. REC. S14,983 & S14,984 (daily ed. Nov. 24, 1980), *reprinted in* NEEDHAM & MENEFFEE, *supra* note 47, at 296 (statements of Sens. Culver and Williams).

49. 126 CONG. REC. S14,973 (daily ed. Nov. 24, 1980), *reprinted in* NEEDHAM & MENEFFEE, *supra* note 47, at 294 (statement of Sen. Mitchell). Further, the Senator stated, "[n]o longer can a victim of chemical poisoning seek from the fund out-of-pocket medical expenses for an illness resulting from the action or inaction of another party." *Id.* at 295. At this point, the Senator described the bill's impact in the form of an analogy:

Under this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover from the fund for the cost of repairing the damage, but the person cannot. In effect, at least as to the superfund, it's all right to kill people, but not trees. . . . Under the bill before us, the State may be fully reimbursed from the fund for the cost of restoring new trees to its park. But what about the little girl? We have given her no recourse from the fund. She cannot recover the money it will take to give her proper medical care . . . It is simply a failure of will on the part of the Congress to deal with what is the most serious part of the problem-injuries to persons.

126 CONG. REC. S14,973 & S14,974 (daily ed. Nov. 24, 1980), *reprinted in* NEEDHAM & MENEFFEE, *supra* note 47, at 295 (statement of Sen. Mitchell).

Yet, the Senator recognized that traditional state tort actions provide a legal cause of action against a party causing the injury. *Id.* See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 715, 715 (3d Cir. 1994).

50. See S. REP. NO. 1480, 96th Cong., 2d Sess. (1980), *reprinted in* NEEDHAM & MENEFFEE, *supra* note 47, at 299. Section 4(c)(1) of S. REP. NO. 1480 explains that medical expenses are defined in § 4(a)(2)(F). *Id.* Section 4(a)(2)(F), in turn, defines "medical expenses" as "all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury." *Id.*

ing, but rather out-of-pocket medical expenses resulting from personal injury.⁵¹

D. Promulgation and Purpose of the ATSDR

CERCLA section 104(i) establishes the Agency for Toxic Substances and Disease Registry (ATSDR) within the Public Health Service.⁵² The ATSDR exists to study the effects of hazardous substance exposure on human health.⁵³ Specifically, the ATSDR was created to: 1) establish and maintain both a national registry of persons exposed to toxic substances and a national registry of serious diseases;⁵⁴ 2) establish and maintain an inventory of literature on the health effects of toxic substances;⁵⁵ 3) compile a list of areas restricted or closed due to toxic substance contamination;⁵⁶ 4) provide medical care to those exposed or believed to be exposed to toxic substances in cases of public health emergencies;⁵⁷ and 5) "conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness."⁵⁸

The Superfund Amendments and Reauthorization Act of 1986 (SARA)⁵⁹ expanded the ATSDR's function to encompass studies concerning the impact of toxic substances on human health.⁶⁰ The ATSDR is now responsible for compiling "health assessments"⁶¹ for

51. See, e.g., Kanner, *supra* note 1, at 13 (concluding CERCLA, as passed into law, excluded personal injury-related medical expenses but included medical monitoring as response costs).

52. CERCLA § 104(i), 42 U.S.C. § 9604(i). See 42 U.S.C. §§ 201 & 300f-300j-26 (establishing Public Health Service).

53. Dan A. Tanenbaum, Comment, *When Does Going to the Doctor Serve the Public Health? Medical Monitoring Response Costs Under CERCLA*, 59 U. CHI. L. REV. 925, 935 (1992) (arguing that ATSDR should not preclude private monitoring programs, but serve as model).

54. CERCLA § 104(i)(1)(A), 42 U.S.C. § 9604(i)(1)(A).

55. CERCLA § 104(i)(1)(B), 42 U.S.C. § 9604(i)(1)(B).

56. CERCLA § 104(i)(1)(C), 42 U.S.C. § 9604(i)(1)(C).

57. CERCLA § 104(i)(1)(D), 42 U.S.C. § 9604(i)(1)(D). The measures to be taken include, but are not "limited to, tissue sampling, chromosomal testing . . . , epidemiological studies, or any other assistance appropriate under the circumstances." *Id.*

58. CERCLA § 104(i)(1)(E), 42 U.S.C. § 9604(i)(1)(E). "In cases of public health emergencies, exposed persons shall be eligible for admission to hospitals and other facilities and services operated or provided by the Public Health Service." *Id.*

59. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1980) (codified as amended in scattered sections of 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)).

60. Tanenbaum, *supra* note 53, at 935 (citing CERCLA § 104(i)(6), 42 U.S.C. § 9604(i)(6)). The ATSDR now has specific procedures that it must follow ranging from general research to detailed analysis. *Id.*

61. The term "health assessments" for purposes of this subsection includes:

each facility listed on the National Priorities List (NPL),⁶² as well as for facilities where the ATSDR receives information that individuals have been exposed to hazardous substances as a result of a release.⁶³ The health assessments are then used to assist in determining whether to establish a "health surveillance program" for the area in question.⁶⁴ In situations where the ATSDR determines that a health surveillance program would be advantageous,⁶⁵ the program shall include, but shall not be limited to, periodic medical screening for diseases for which the population is at significant risk,⁶⁶ and a treatment mechanism for those people who are screened and test positive for such disease.⁶⁷

The ATSDR, however, is restricted by the scope of its charter.⁶⁸ As a result, the ATSDR may act only where the area in question is

preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the existence of potential pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size and potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure. . . .

CERCLA § 104(i)(6)(F), 42 U.S.C. § 9604(i)(6)(F).

62. CERCLA § 104(i)(6)(A), 42 U.S.C. § 9604(i)(6)(A). The National Priorities List (NPL), established under CERCLA § 105, is a method for ranking and identifying sites of all known and threatened releases throughout the United States. CERCLA § 105(a)(8)(A)-(B), 42 U.S.C. § 9605(a)(8)(A)-(B). This list is to be updated on an annual basis. CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B). Listings are based upon the "relative risk or danger to public health or welfare or the environment, . . . taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies . . ." CERCLA § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A).

63. CERCLA § 104(i)(6)(B), 42 U.S.C. § 9604(i)(6)(B). If the ATSDR opts not to conduct a health assessment, the Administrator of ATSDR shall provide a written explanation as to why an assessment is not appropriate. *Id.*

64. CERCLA § 104(i)(6)(G), 42 U.S.C. § 9604(i)(6)(G). The health assessments are also used to determine whether an epidemiological study or implementation of a registry is needed instead of, or in addition to, the health surveillance program. *Id.*

65. A health surveillance program is deemed advantageous when the "Administrator of ATSDR has determined that there is a significant increased risk of adverse health effects in humans from exposure to hazardous substances based on the results of a health assessment" or related measures. CERCLA § 104(i)(9), 42 U.S.C. § 9604(i)(9).

66. CERCLA § 104(i)(9)(A), 42 U.S.C. § 9604(i)(9)(A).

67. CERCLA § 104(i)(9)(B), 42 U.S.C. § 9604(i)(9)(B).

68. CERCLA §§ 104(i)(1)-(6) & 105(a)(8)(A), 42 U.S.C. §§ 9604(i)(1)-(6) & 9605(a)(8)(A). *See Hand, supra* note 17, at 372.

listed on the NPL, a requirement making the ATSDR “essentially helpless to deal with smaller or less flagrantly contaminated locations.”⁶⁹ Moreover, the short-term damage control nature of ATSDR’s power limits its ability to accomplish long-term remedial measures.⁷⁰ As one commentator noted, “although treatment is obviously necessary in cases of human exposure to toxic substances, it is not the purpose of the ATSDR, an agency designed primarily for information-gathering, to bear the responsibility for providing individual health care.”⁷¹

III. CASE LAW ANALYSIS

There is considerable conflict among the federal courts concerning whether medical monitoring costs are “necessary costs of response” as provided by CERCLA section 107(a)(4)(B).⁷² The following sections analyze the divergent approaches taken by the courts.

A. District Courts Finding Medical Monitoring Costs Recoverable as CERCLA Response Costs

In *Jones v. Inmot Corp.*, the United States District Court for the Southern District of Ohio addressed a motion to dismiss a complaint seeking recovery of medical monitoring costs under CERCLA.⁷³ In *Jones*, the court concluded that, as a matter of law, the plaintiffs were not precluded from recovering damages that met the CERCLA definition of response costs, including those for medical monitoring.⁷⁴ The *Jones* court’s analysis focused on the definition

69. Hand, *supra* note 17, at 372.

70. See CERCLA § 104(i)(7)-(9), 42 U.S.C. § 9604(i)(7)-(9). Furthermore, § 104(c)(1) provides that any such short-term removal action is limited to \$2,000,000 or 12 months in duration unless the Administrator determines that continuation of the removal action is consistent with any plans for long-term remedial action. CERCLA § 104(c)(1), 42 U.S.C. § 9604(c)(1).

71. Hand, *supra* note 17, at 372-73. The ATSDR’s primary purpose is not related to medical surveillance even though “the ATSDR may conduct medical surveillance of unspecified duration as part of an assessment where it finds a ‘significant increased risk of adverse health effects in humans’ . . .” *Id.* at 372 (quoting CERCLA § 104(i)(9), 42 U.S.C. § 9604(i)(9)).

72. CERCLA § 107, 42 U.S.C. § 9607. See *Price*, 39 F.3d at 1015 n.10.

73. *Jones*, 584 F. Supp. 1425 (S.D. Ohio 1984). See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

74. *Jones*, 584 F. Supp. at 1428-30. The court’s discussion began with a statutory analysis of CERCLA, by noting that “broad judicial interpretation” is given to private parties’ actions under § 107 to recover response costs from responsible third parties. *Id.* at 1428 (citing *City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982)).

of "response costs."⁷⁵ While cognizant that the phrase "response costs" is not defined in the statute, the court found that the plaintiffs' allegations of incurred costs for medical testing and other damages "appear to meet the definition of 'removal' expressed in section 9601(23)."⁷⁶ Furthermore, the court found that "[t]he statutory definitions of removal and remedial actions are broadly drawn and appear to cover at least some of the elements of damages claimed by these plaintiffs."⁷⁷

Relying on *Jones*, the United States District Court for the District of Tennessee in *Adams v. Republic Steel Corp.*,⁷⁸ recognized medical monitoring costs as recoverable under CERCLA. The *Adams* court, however, took a much narrower position on the medical monitoring costs issue than did the court in *Jones*. Specifically, the *Adams* court held that "[t]hese costs must be part of a 'clean up' or response to a hazardous waste problem, . . . and a private right of action for damages only is not available under the Act."⁷⁹ Nevertheless, the court found that the plaintiffs "alleged sufficient facts to warrant a finding that a claim ha[d] been stated 'arising under' CERCLA."⁸⁰ As a result, the court denied the defendants' motion to dismiss the plaintiffs' CERCLA claim.⁸¹

In *Brewer v. Ravan*,⁸² the United States District Court for the Middle District of Tennessee approached the issue of medical mon-

75. *Id.* at 1428-29. "To survive the defendant's motion to dismiss . . . , the damages enumerated must be 'necessary costs of response' and 'consistent with the national contingency plan.'" *Id.* at 1429 (citing CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B)).

76. *Id.* at 1429. The court asserted that "[i]t would be premature for this Court to attempt to decide whether plaintiffs are entitled to recover any damages that would meet the CERCLA definition of response costs. . . . [H]owever, we cannot say as a matter of law that the plaintiffs are not so entitled." *Id.* at 1430.

For a discussion of "removal," see *supra* note 25 and accompanying text.

77. *Jones*, 584 F. Supp. at 1430. For definitions of "removal" and "remedial action," see *supra* notes 25 & 26, respectively, and accompanying text.

78. 621 F. Supp. 370, 376 (D. Tenn. 1985) (citing *Jones*, 584 F. Supp. at 1429).

79. *Id.* (citing *City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1146 (E.D. Pa. 1982)). The court also cited previous comments regarding CERCLA made by former Senator Albert Gore, Jr., as member of the House Interstate and Foreign Commerce Committee: "A clear, uniform federal law defining a victim's cause of action [for damages arising from release of hazardous wastes] is sorely needed but [this] bill does not provide one." *Id.* at n.2 (quoting ADDITIONAL VIEWS FOR "SUPERFUND" REPORT, Albert Gore, Jr., reprinted in 1980 U.S.C.C.A.N. 6139, 6141).

80. *Adams*, 621 F. Supp. at 377. The court noted, "[t]o the extent that plaintiffs may have suffered actual injury that may be remedied by an award of response costs, it cannot be said that their claim is immaterial or wholly insubstantial." *Id.*

81. *Id.* at 377.

82. 680 F. Supp. 1176 (M.D. Tenn. 1988).

itoring costs in a slightly different manner. The court determined that medical expenses related to treatment differ from those incurred in evaluating health risks.⁸³ The court began its analysis by acknowledging that earlier cases had found “considerable difficulty” in applying section 107(a) due to CERCLA’s failure to define the term “necessary costs of response.”⁸⁴ The *Brewer* court then noted that “CERCLA’s legislative history clearly indicates that medical expenses incurred in the treatment of personal injuries or disease caused by an unlawful release or discharge of hazardous substances are not recoverable under section 9607(a).”⁸⁵ Nevertheless, the court took the position that medical surveillance aimed at assessing public health risks should be recoverable under CERCLA.⁸⁶ The court found that “[p]ublic health related medical tests and screening clearly are necessary to ‘monitor, assess, [or] evaluate a release’ and, therefore, constitute ‘removal’ under section 9601(23).”⁸⁷ In effect, the court distinguished medical expenses associated with treatment of disease from expenses incurred in evaluation of health risks.⁸⁸ Ultimately, the *Brewer* court held the plaintiffs’ claim for CERCLA response costs should not be dismissed.⁸⁹

83. *Id.* at 1179. The plaintiffs in *Brewer* alleged, *inter alia*, that they “have been or may be forced to perform . . . soil testing, water monitoring, and medical screening.” *Id.* (citing Plaintiffs’ Complaint at 14).

84. *Id.* (citing *Jones*, 584 F. Supp. at 1429-30).

The court also referred to several cases that found “necessary costs of response” included on-site testing and investigative costs. *Id.* See *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 617-18 (S.D.N.Y. 1986); *Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp.*, 21 Env’t Rep. Cas. (BNA) 2118, 2121-22 (E.D. Tenn. 1984).

85. *Brewer*, 680 F. Supp. at 1179. See CERCLA § 107, 42 U.S.C. § 9607; *Chaplin v. Exxon Co.*, No. CIV.A.H-84-2524, 1986 WL 13130, at *2 (S.D. Tex. June 10, 1986) (discussing CERCLA legislative history); *Artesian Water Co. v. Government of New Castle County*, 605 F. Supp. 1348, 1356 n.10 (D. Del. 1985).

86. *Brewer*, 680 F. Supp. at 1179. “To the extent that plaintiffs seek to recover the cost of medical testing and screening conducted to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release, however, they present a cognizable claim under section 9607(a).” *Id.* (emphasis in original). See *Jones*, 584 F. Supp. at 1429-30; *Adams*, 621 F. Supp. at 376; see also *Velsicol*, 21 Env’t Rep. Cas. (BNA) at 2121 (finding it is “difficult to see how costs of identifying and determining how to allay the environmental problem presented” are not recoverable response costs under § 107(a)).

87. *Brewer*, 680 F. Supp. at 1179. According to the court, “[b]ecause the term ‘response’ is defined in section 9601(25) to mean, in part, ‘remove or removal,’ costs incurred as a result of conducting such tests and screening are recoverable response costs under section 9607(a).” *Id.*

88. *Id.*

89. *Id.* at 1180. In support of its ruling, the court stated that though “it is unclear whether the medical tests and screening allegedly conducted by plaintiffs

The United States District Court for the Eastern District of Kentucky supported the view that medical monitoring costs are recoverable in *Lykins v. Westinghouse Electric*.⁹⁰ In *Lykins*, the defendants argued that plaintiffs' claims for medical expenses and relocation costs were not recoverable as "response costs."⁹¹ The court, however, determined that section 107(a)(4)(B) of CERCLA authorizes a party to recover costs incurred for medical testing and for loss of the use of wells that provided drinking water.⁹² The court qualified its finding by requiring that the costs "be part of a 'clean up' or response to a hazardous waste problem" and not merely a private cause of action for damages.⁹³ Based on this reasoning, the court denied the defendants' motion to dismiss the plaintiffs' CERCLA claims.⁹⁴

In *Williams v. Allied Automotive, Autolite Division*,⁹⁵ the defendants unsuccessfully sought summary judgment against the plaintiffs' claims for future medical monitoring costs under CERCLA.⁹⁶ The *Williams* court determined that "[t]he statutory definition of the

were public health related, at this early stage of the proceedings, the Court cannot say that it appears beyond doubt that plaintiffs can prove no set of facts in support of their CERCLA claim." *Id.*

90. No. CIV.A.85-508, 1988 WL 114522 (E.D. Ky. Feb. 29, 1988).

91. *Id.* at *3. Under 42 U.S.C. § 9607(a)(4)(B), a party may recover response costs as long as they are correlative with a "clean up" or a "response to a hazardous waste problem." *Id.*

92. *Id.* See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

93. *Lykins*, No. CIV.A.85-508, 1988 WL 114522, at *3 (citing *Adams*, 621 F. Supp. at 370). The court recognized that an inconclusive list of response costs are recoverable under CERCLA. This list included relocation costs; "litigation costs; monitoring; assessing and evaluating expenses; future response costs consistent with the NCP; investigation costs; property damage; and supervision costs." *Id.* at *4 (citations omitted).

94. *Id.* at *4. The court concluded that "[i]t would be premature for this Court to attempt to decide whether plaintiffs are entitled to recover any damages that would meet the CERCLA definition of response costs. In light of the present procedural posture of the case, however, it cannot say, as a matter of law, that the plaintiffs are not so entitled." *Id.*

95. 704 F. Supp. 782 (N.D. Ohio 1988).

96. *Id.* at 787. The court listed the prima facie elements for the plaintiffs' claim for recovering costs under CERCLA § 107(a)(4)(B):

- 1) defendants must fall within one of the four categories of covered persons;
- 2) there must have been a release or a threatened release;
- 3) the release or threatened release has caused plaintiffs to incur costs;
- 4) plaintiffs' costs must be necessary costs of response; and
- 5) plaintiffs' response action must be consistent with the National Contingency Plan.

Id. at 784 (citing 42 U.S.C. § 9607(a)(4)(B)).

The court further explained that plaintiffs could recover the costs of "such actions as may be necessary to monitor, assess, and evaluate the release . . . , or the taking of such other actions as may be necessary to prevent, minimize, or mitigate

terms 'remove' or 'removal' clearly contemplates such actions as are necessary to making a reasoned determination whether physical removal of hazardous contaminants is necessary in a given situation."⁹⁷ The court further recognized that medical testing costs consistent with the NCP are recoverable response costs under CERCLA.⁹⁸ According to the court, "[i]n the absence of any controlling authority on the issue, this Court is of the opinion that costs of future medical monitoring are not categorically unrecoverable as response costs under CERCLA, provided that plaintiffs meet their burden of proving that such costs are necessary and consistent with the NCP."⁹⁹ As a result, the court denied the defendants' motions for summary judgment regarding medical monitoring costs under CERCLA.¹⁰⁰

B. District Courts Finding Medical Monitoring Costs Not Recoverable as CERCLA Response Costs

When confronted with the issue, a number of federal district courts have concluded that medical monitoring costs are not "necessary costs of response" as provided within CERCLA section 107(a)(4)(B).¹⁰¹ In *Chaplin v. Exxon Co.*,¹⁰² the United States District Court for the Southern District of Texas held that medical de-

damage to the public health or welfare . . . , which may otherwise result from a release." *Id.* (quoting CERCLA § 101(23), 42 U.S.C. § 9601(23)).

97. *Williams*, 704 F. Supp. at 784. See *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 406 (W.D. Mo. 1985) (holding costs of activities useful and necessary for implementing proposed remedy are conceivably recoverable as response costs), *order modified*, 681 F. Supp. 1394 (W.D. Mo. 1988).

98. *Williams*, 704 F. Supp. at 784. According to the court, "[c]osts of medical testing falling within the statutory definition and consistent within the National Contingency Plan (NCP) are recoverable response costs under CERCLA." *Id.* (citing *Brewer*, 680 F. Supp. at 1179) (holding medical monitoring targeted at public health risks should be recoverable under CERCLA).

99. *Id.*

100. *Id.* Although the court considered future medical monitoring costs recoverable under CERCLA, it made the following observation: "[while] liability for future costs can presently be determined and declaratory relief granted, the Court cannot award costs until they are incurred." *Id.* (citations omitted).

101. See, e.g., *Frys v. General Motors Corp.*, No. 93-CV-924A, 1995 WL 322585 (W.D.N.Y. Mar. 31, 1995); *Woodman v. United States*, 764 F. Supp. 1467 (M.D. Fla. 1991); *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992); *Coburn*, No. CIV.A.88-0120, 1988 WL 120739; *Wehner v. Syntex Corp.*, 681 F. Supp. 651 (N.D. Cal. 1987).

102. No. CIV.A.H-84-2524, 1986 WL 13130 (S.D. Tex. June 10, 1986). The *Chaplin* court was one of the first courts to address the issue of whether medical monitoring costs qualify as "necessary response costs." *Id.* at *1. In *Chaplin*, the numerous defendants filed motions to dismiss pursuant to FED. R. CIV. P. 12(b)(1) & (6), claiming that medical monitoring costs were not "necessary response costs" as covered by CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). *Id.*

tection and monitoring costs are not “recoverable costs” as contemplated by Congress when it enacted CERCLA.¹⁰³ The *Chaplin* court, after noting the ambiguity of section 107,¹⁰⁴ found that the legislative history, albeit sparse, indicated “the specific omission of such private rights from the final version [of the Act at the time of its passage].”¹⁰⁵ Particular emphasis was placed on the remarks of Senator Randolph, co-author of the compromise bill, who stated “[w]e have deleted the federal cause of action for medical expenses or property or income loss.”¹⁰⁶

Next, the court determined that the plain meaning of the phrase “necessary costs of response,” as used in section 107(a)(4)(B), does not encompass medical monitoring.¹⁰⁷ In reaching this conclusion, the court found that CERCLA requires “an actual past outlay of expenses for cleanup” before an action can be properly brought under this section.¹⁰⁸ In the court’s view, the prospective nature of medical monitoring costs thereby render them incompatible with section 107(a)(4)(B).¹⁰⁹

An action for medical monitoring costs under CERCLA section 107(a)(4)(B) was subsequently denied by the United States District Court for the Eastern District of Pennsylvania in *Coburn v. Sun*

103. *Id.* at *2. Similarly, in *Wehner*, the United States District Court for the Northern District of California held that medical monitoring costs incurred for personal health reasons are not recoverable under CERCLA. 681 F. Supp. at 651. The *Wehner* court found that while Congress originally considered including medical monitoring costs under CERCLA, the bill was passed without such a provision. *Id.* at 653.

104. *Chaplin*, No. CIV.A.H-84-2524, 1986 WL 13130, at *1. The court attributed the ambiguity of § 107 to the “haste with which Congress drafted and adopted the final version of the statute.” *Id.* The court also found that “[p]laintiffs by seeking medical detection and monitoring costs present a unique cause of action under CERCLA and to date there is no apparent precedent directly in [sic] point.” *Id.* at *2.

105. *Id.* The court recognized that earlier bills in both the House and Senate contained provisions allowing for medical monitoring as a “necessary cost of response,” but that those provisions had been eliminated from § 107 as adopted. *Id.* See S. REP. NO. 1480, 96th Cong., 2d Sess. § 4(a)(2)(F) (draft of July 11, 1979); H.R. REP. NO. 7020, 96th Cong., 2d Sess. § 3071(b) (draft of Apr. 2, 1980).

106. *Chaplin*, No. CIV.A.H-84-2524, 1986 WL 13130, at *2 (quoting 126 CONG. REC. S14,964 (1980) (statement of Senator Randolph)). For a discussion of CERCLA’s legislative history, see *supra* notes 46-51 and accompanying text.

107. *Id.* at *7.

108. *Id.* at *3. The court found that the plaintiffs could not seek damages unless they “affirmatively demonstrate[d] that [they] incurred necessary costs of response.” *Id.* But see *Jones*, 584 F. Supp. at 1430 (holding when some response costs are incurred under CERCLA courts can determine liability for future costs).

109. *Chaplin*, No. CIV.A.H-84-2524, 1986 WL 13130, at *3-4. The court dismissed the plaintiff’s action pursuant to FED. R. CIV. P. 12(b)(1) & (6). *Id.*

*Chemical Corp.*¹¹⁰ Unlike the court in *Chaplin*, the *Coburn* court began its analysis by interpreting the plain language of section 107(a)(4)(B).¹¹¹ After establishing that the phrase “necessary costs of response” is not defined in CERCLA and that the term “response” is “defined in a most indirect and ambiguous manner,” the court directed its attention to CERCLA’s legislative history.¹¹² The court opined that “[t]he legislative history of CERCLA offers little guidance into the definition of ‘necessary costs of response,’ ”¹¹³ since “the compromise bill which became CERCLA differed markedly from the original Senate Superfund Bill.”¹¹⁴

Recognizing the absence of federal appellate court precedent and that federal district courts are divided on the issue, the *Coburn* court analyzed the two leading cases that had found medical moni-

110. No. CIV.A.88-0120, 1988 WL 120739 (E.D. Pa. Nov. 9, 1988). See also *Cook v. Rockwell Int’l Corp.*, 755 F. Supp. 1468, 1474 (D. Colo. 1991) (“The *Coburn* line of cases is persuasive authority that the costs of medical testing to monitor the health effects of a release or threatened release are not recoverable under section 9607(a).”); *Woodman v. United States*, 764 F. Supp. 1467, 1469 (M.D. Fla. 1991) (relying exclusively on decision in *Coburn* to find that medical monitoring expenses are not CERCLA response costs); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 714 (D. Kan. 1991); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 (M.D. Pa. 1990) (holding *Coburn* court’s in-depth analysis leads to belief that medical monitoring costs are not necessary response costs under § 107); *States v. BFG Electroplating & Mfg. Co.*, No. CIV.A.87-1421, 1990 WL 67978, at *2 (W.D. Pa. Apr. 6, 1990) (adopting rationale and conclusion reached in *Coburn*); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 418 (M.D. Pa. 1989) (holding *Coburn* conclusion correct).

111. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *2. The court recognized that “[i]t is well settled that ‘the starting point for interpreting a statute is the language of the statute itself.’ ” *Id.* (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 107, 108 (1980)).

112. *Id.* In its analysis, the court relies on 42 U.S.C. § 9601(23) and (24) for definitions of “remove” and “remedy”. *Id.* For a further discussion of the terms “remove,” “removal,” “remedy,” and “remedial action,” see *supra* notes 25, 26 and accompanying text.

113. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *3. The court noted that

[t]he circuitous language of CERCLA reflects the statute’s checkered legislative formulation. After a number of predecessor bills failed to muster sufficient support, a group of senators submitted the Stafford-Randolph compromise bill to a lame duck Congress in the waning days of the Carter Administration. That bill, however, did not receive careful study by a committee, and voting on the floor was controlled by a procedure that permitted no amendments, other than one previously cleared. The legislative history, therefore, furnishes at best a sparse and unreliable guide to the statute’s meaning.

Id. (quoting *Artesian Water*, 851 F.2d at 648).

114. *Id.* This court, as in *Chaplin*, placed great emphasis on the remarks of Senator Randolph concerning the issue of medical monitoring costs. *Id.* See *BFG*, No. CIV.A.87-1421, 1990 WL 67978, at *3. For a discussion of the Senator’s statements, see *supra* note 49 and accompanying text.

toring costs recoverable under section 107(a)(4)(B).¹¹⁵ The court stated that *Jones*, “did not actually address the issue of whether costs of medical detection and monitoring are ‘necessary costs of response’ under CERCLA.”¹¹⁶ The court then examined the second case, *Brewer*, in greater detail. The *Coburn* court explained that *Brewer* distinguished medical expenses incurred in the treatment of personal injuries from expenses incurred as a result of medical testing or screening, where only the latter is included as a “necessary cost of response.”¹¹⁷

The *Coburn* court, however, disagreed with the result reached in *Brewer* and held that the “costs of medical screening and/or future medical monitoring are clearly not ‘necessary costs of response’ under section 107 of CERCLA.”¹¹⁸ The court determined that the statutory definitions of the words “response,” “remove,” “removal,” “remedy,” and “remedial action” do not contain any reference to medical monitoring costs nor their recoverability under section 107(a)(4)(A).¹¹⁹ The court also cited CERCLA’s legislative history as support for its conclusion.¹²⁰ Accordingly, the court

115. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *3-5. See *BFG*, No. CIV.A.87-1421, 1990 WL 67978, at *2 (adopting court’s analysis and conclusion stated in *Coburn*).

116. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *4. In *Jones*, the court recognized that “few courts have faced the issue of what items of damages are response costs recoverable under CERCLA.” 584 F. Supp. at 1429. For a discussion of *Jones*, see *supra* notes 73-77 and accompanying text.

117. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *4. See also *Cook v. Rockwell Int’l Corp.*, 755 F. Supp. 1468 (D.Colo. 1991). In *Cook*, the United States District Court for the District of Colorado held that medical monitoring costs were not recoverable. The *Cook* court, however, also concluded that because “CERCLA was designed to facilitate the cleanup of toxic substances from the environment . . . [i]f plaintiffs can show that medical testing is necessary to monitor the environmental effects of a ‘release’ or ‘threatened release,’ the costs of such medical testing plainly fall within the purview of section 9601(25).” *Id.* at 1474. See also *Woodman*, 764 F. Supp. at 1469-70 (holding *Brewer* does not equate all medical monitoring costs with CERCLA response costs).

118. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *5. The court did recognize that other district courts have followed the ruling of *Brewer*. *Id.* at *4. See, e.g., *Lykins*, No. CIV.A.85-508, 1988 WL 114522 (following the *Brewer* rationale that “plaintiffs’ costs of medical screening and/or possible future medical monitoring comprise recoverable response costs under CERCLA”); *Williams v. Allied Automotive, Autolite Division*, 704 F. Supp. 782 (N.D. Ohio 1988) (holding costs of future medical monitoring may be recovered under CERCLA).

119. *Williams*, 704 F. Supp. at 782.

120. *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *5. Not only does the congressional record support this reading of the legislative history, the Supreme Court, “after reviewing this legislative history, observed that CERCLA was not intended to compensate private parties for damages resulting from hazardous substance discharge.” *Id.* For further discussion of CERCLA’s legislative history, see *supra* notes 48-53 and accompanying text.

found "cases which have denied motions to dismiss claims for medical detection and monitoring costs . . . unpersuasive."¹²¹

C. Circuit Courts of Appeals Finding Medical Monitoring Costs Not Recoverable as CERCLA Response Costs

The Tenth Circuit Court of Appeals denied the recovery of medical monitoring costs under section 107(a)(4)(B) in *Daigle v. Shell Oil Co.*¹²² In an analysis similar to that of the district court in *Coburn*, the *Daigle* court began with the language of CERCLA section 107(a)(4)(B) and its corresponding definitions.¹²³ After determining that "certain monitoring costs are recoverable as 'removal action' or 'remedial action' 'response costs[,]'" . . . [the court found that] the *Brewer* court [went] awry in affording a broad sweep to the 'public health and welfare' language in the definitions."¹²⁴ The Tenth Circuit then concluded that CERCLA's legislative history pointed toward denial of recovery for medical monitoring costs.¹²⁵

121. *Id.* The court noted that "[t]he *Jones* court never actually addressed the issue of whether costs of medical detection and monitoring are 'necessary costs of response' . . . [but,] [i]t merely stated that '[t]he statutory definitions of removal and remedial actions are broadly drawn and appear to cover at least some of the elements of damages claimed by these plaintiffs.'" *Id.* (quoting *Jones*, 584 F. Supp. at 1430). See *Werlein*, 746 F. Supp. at 903.

The *Coburn* court also reiterated the *Brewer* court's discussion, but disagreed with the *Brewer* court's conclusion that "'[p]ublic health related medical tests and screening clearly are necessary to monitor, assess [or] evaluate a release.'" *Coburn*, No. CIV.A.88-0120, 1988 WL 120739, at *6 (quoting *Brewer*, 680 F. Supp. at 1179). The court concluded, "We find it difficult to understand how future medical testing and monitoring of persons who were exposed to contaminated well water prior to the remedial measures currently underway will do anything to 'monitor, assess [or] evaluate a release' of contamination from the site. We, therefore, elect not to follow the rationale of *Brewer*." *Id.* See *Werlein*, 746 F. Supp. at 903.

122. 972 F.2d 1527, 1537 (10th Cir. 1992). The *Daigle* case was "the first Court of Appeals case to address the issue of whether medical monitoring costs are recoverable by private plaintiffs as a necessary 'response' under CERCLA." *Price v. United States Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994).

123. *Daigle*, 972 F.2d at 1533-36.

124. *Id.* at 1535. The court determined that in the context of the "monitoring" and "health and welfare" language, "both definitions are directed at containing and cleaning up hazardous substance releases." *Id.* (citing CERCLA § 101(23), 42 U.S.C. § 9601(23)). Further, the "remedial action" definition focuses only on actions necessary to prevent hazardous substances from contaminating the environment. *Id.* (citing CERCLA § 101(24), 42 U.S.C. § 9601(24)). In light of the definitions and the specific examples of removal costs enumerated therein, the court followed the statutory canon of construction which necessitates that all things be of similar type. *Id.* Consequently, because medical monitoring costs are unlike security fences and trenches, those expenses cannot be contained within the provision. *Id.*

125. *Id.* at 1535-36. The court noted that "the history of the enactment of CERCLA reveals that both houses of Congress considered and rejected any provision for recovery of private damages unrelated to the cleanup effort, including

Finally, the Tenth Circuit held that because medical expenses are explicitly provided for in section 104(i) (8) of CERCLA,¹²⁶ they necessarily are not “response cost[s]” as contemplated in section 107(a) (4) (B).¹²⁷

Subsequently, the Ninth Circuit Court of Appeals addressed the issue of medical monitoring costs under section 107(a) (4) (B) in *Price v. United States Navy*.¹²⁸ The court, relying exclusively on the Tenth Circuit’s analysis in *Daigle*, held that medical monitoring costs are not “response costs” under CERCLA.¹²⁹ Accordingly, the plaintiff’s claim for medical monitoring costs, supported by the same arguments as those advanced by the plaintiffs in *Daigle*, was rejected.¹³⁰

The Ninth Circuit revisited the medical monitoring costs issue in *Durfey v. E. I. DuPont De Nemours Co.*¹³¹ In *Durfey*, the plaintiffs appealed the district court’s decision dismissing their medical monitoring claims for lack of subject matter jurisdiction.¹³² Relying on both its earlier decision in *Price* and the Tenth Circuit’s holding in

medical expenses.” *Id.* at 1535. The court also relied on the remarks of Senator Randolph, co-sponsor of the compromise bill, who “expressly acknowledged the intentional deletion of any private cause of action for personal injury.” *Id.* at 1536. Further, the court quoted Representative Gore who recognized “[t]he drastic whitening down of the original liability provisions.” *Id.* at 1536 n.7 (citing H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. I, at 62-65 (1980) reprinted in 1980 U.S.C.C.A.N. 6119, 6139-41).

126. CERCLA § 104(i) (8), 42 U.S.C. § 9604(i) (8). The ATSDR is empowered with a broad base of functions for dealing with the assessment of health effects of actual and threatened hazardous substance releases. *Daigle*, 972 F.2d at 1536. For an explanation of the ATSDR section, see *supra* notes 52-71 and accompanying text.

127. *Daigle*, 972 F.2d at 1537. The court subsequently reversed the district court’s order denying the defendants’ motion to dismiss. *Id.* See *Frys*, No. 93-CV-924A, 1995 WL 322585; *Woodman*, 764 F. Supp. 1467 (M.D. Fla. 1991); *Werlein*, 746 F. Supp. 887 (D. Minn. 1990); *Coburn*, No. CIV.A.88-0120, 1988 WL 120739; *Wehner*, 681 F. Supp. 651 (N.D. Cal. 1987).

128. 39 F.3d 1011 (9th Cir. 1994).

129. *Id.* at 1015-17 (citing *Daigle*, 972 F.2d at 1527). The court further opined, “[p]laintiff’s request for medical monitoring to allow ‘prevention or early detection of chronic disease’ smacks of a cause of action for damages resulting from personal injury.” *Id.* (quoting *Daigle*, 972 F.2d at 1535).

130. *Id.*

131. 59 F.3d 121 (9th Cir. 1995).

132. *Id.* at 123. Specifically, the district court held that until the ATSDR completed its investigation, any medical monitoring claim brought under CERCLA would be a “premature challenge.” *Id.* As a result, the district court “dismissed all the medical monitoring claims for lack of subject matter jurisdiction pursuant to CERCLA section 113(h).” *Id.* (citing *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1564-65 (E.D. Wash. 1991)).

Daigle, the Ninth Circuit reaffirmed its position that “medical monitoring costs are not ‘response’ costs under CERCLA.”¹³³

IV. IMPACT

The conflicting judicial interpretation of CERCLA section 107(a)(4)(B), highlights a tension between a legislative history which explicitly rejects private recovery of medical monitoring costs, and a compelling public policy aimed at holding polluters accountable for the costs of environmental cleanup.¹³⁴ In accordance with the circuit courts’ decisions in *Daigle*, *Price*, and *Durfey*,¹³⁵ the current judicial trend is to deny recognition of medical monitoring as a “necessary cost of response.”¹³⁶ To combat this development, several legal commentators have actively sought to resuscitate the recovery of medical monitoring costs under CERCLA section 107(a)(4)(B).¹³⁷

A. Medical Monitoring Costs as Deterrent for Polluters

Those who view medical monitoring costs as response costs under section 107(a)(4)(B) argue that allowing recovery serves CERCLA’s overriding purpose and deters potential environmental polluters. In particular, supporters submit that allowing recovery achieves CERCLA’s overall purpose of compensating victims of environmental contamination while holding polluters liable for its

133. *Durfey*, 59 F.3d at 125.

134. “Although the legislative history indicates that private recovery under CERCLA was specifically rejected by Congress, CERCLA’s provisions do not forbid recovery of medical costs. The legislative history of CERCLA indicates that Congress intended to recover from polluters the costs incurred in cleanup.” Czmus, *supra* note 2, at 53 (citing H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119-20).

135. To date, only the Ninth and Tenth Circuits have explicitly addressed the issue of medical monitoring under § 107(a)(4)(B) of CERCLA.

136. This interpretation is further supported by the observation that the *Williams* court, in 1988, was the last district court to find future medical monitoring expenditures recoverable as response costs under CERCLA. See *Williams v. Allied Automotive, Autolite Division*, 704 F. Supp. 782 (N.D. Ohio 1988).

137. As one commentator has pointed out, public policy supports recognition of claims to recover costs for post-exposure, pre-symptom medical surveillance. Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 678-82 (1992). Blumenberg noted the public policy reasons commonly cited for holding toxic tortfeasors liable for medical monitoring costs, namely that such awards provide services to those who would otherwise be unable to afford them, offer information regarding health consequences, and the deterrence of future toxic torts. *Id.* See also Gara, *supra* note 6, at 267-72 (arguing polluters should be held liable for medical monitoring costs because this promotes goals of deterrence and mitigation of harm to exposure victims).

cleanup.¹³⁸ These same proponents also contend that interpreting medical monitoring costs as response costs under CERCLA acts as a significant deterrent to polluters.¹³⁹

Despite CERCLA's noble purpose and the allure of an effective pollution deterrent provision, the aforementioned arguments falter when viewed in light of the final draft's specific statutory language. CERCLA's statutory language may not expressly forbid the recovery of medical monitoring costs as "necessary costs of response;" Congress, however, did not expressly provide for recovery of such costs.¹⁴⁰ Specifically, unlike security fences and confinement ditches, medical monitoring is not listed among the statutory examples of either "removal efforts" or "remedial actions."¹⁴¹ In addition, CERCLA's establishment of the ATSDR, an agency explicitly authorized to assess health effects associated with actual and threatened hazardous substance releases, indicates that Congress perceived medical monitoring costs and response costs as two distinct concepts.¹⁴² The legislative history of CERCLA, moreover, indicates an intentional elimination of a provision for recovery of

138. Czmus, *supra* note 2, at 53. A commentator observed:

Although Congress may not have wished to provide all victims of toxic exposures with a private remedy of medical monitoring, the availability of such a remedy under CERCLA for exposures related to toxic cleanup is not inconsistent with the purpose of CERCLA. In CERCLA, Congress wished to create a remedy for allowing compensation for the costs of cleanup that also force [sic] polluters to cleanup their pollution. Allowing recovery of exposure such as that which occurred in *Daigle* is consistent with the desire to require polluters to pay for the costs incurred in cleanups.

Id. (citing H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119-20).

139. Blumenberg, *supra* note 137, at 681. "Once polluters were subject to significant liability, they would be more willing to incur the expense of proper disposal rather than the expense of protracted litigation and payment of medical surveillance claims." *Id.*

140. For a discussion of the statutory language that pertains to "necessary cost of response," see *supra* notes 40-51 and accompanying text.

141. For a discussion of the statutory examples of the terms "removal efforts" and "remedial actions," see *supra* notes 25 & 26, respectively, and accompanying text.

142. See *Daigle*, 972 F.2d at 1537. In its analysis, the court compares § 107(a)(4)(D) (health assessment costs) with § (4)(A) (response costs). *Id.* According to the court, "[t]hat Congress provided separate recovery and funding provisions for health assessment costs indicates that such costs, including the medical monitoring Plaintiffs seek, differ from response costs, and "response costs" are the only available costs to private parties under the s[sic] 107(a)(4)(D) liability provision." *Id.* For a further discussion of the ATSDR, see *supra* notes 52-71 and accompanying text.

medical costs in order to ensure political passage of the bill.¹⁴³ Thus, notwithstanding CERCLA's overriding purpose and any potential deterrent effect to polluters, the statutory language of CERCLA itself denies the recovery of medical monitoring costs as response costs under section 107(a)(4)(B).

B. Insufficiency of Traditional Tort Remedies

A second argument in support of equating medical monitoring costs with response costs urges that medical monitoring suits under CERCLA offer an efficient means to address serious health issues created by environmental pollution.¹⁴⁴ Advocates of this position believe traditional tort remedies cannot sufficiently compensate victims of toxic exposure.¹⁴⁵ According to one commentator, "[s]ince the latency of toxic exposure delays manifestations of any disease for months or even years, . . . traditional tort principles inadequately address the issues in toxic tort litigation."¹⁴⁶ Due to long latency periods, advocates contend that medical monitoring is invaluable to "toxic exposure victims [who] may fail to initiate an action

143. See *Daigle*, 972 F.2d at 1535-36. Though the court recognized that the legislative history of CERCLA is sparse, "the history of the enactment of CERCLA reveals that both houses of Congress considered and rejected any provision for recovery of private damages unrelated to the clean-up effort, including medical expenses." *Id.* The court attached significant importance to Senator Randolph's comment, "[w]e have deleted the Federal cause of action for medical expenses or income loss," and treated this comment as a reliable indicator that Congress did intend to exclude "medical expenses" from recovery. *Id.* For a further discussion of CERCLA's legislative history, see *supra* notes 46-51 and accompanying text.

144. One author has cited what he considers "three good reasons to favor recovery of medical monitoring costs." Tanenbaum, *supra* note 53, at 949. First, "medical monitoring suits directly implicate health problems that may already be dangerous and could be getting worse daily. There is an immediate danger in these cases that must be met with vigorous responses." *Id.* Next, medical monitoring may provide efficiency by saving time, resources, and money associated with future medical costs. *Id.* Lastly, "CERCLA is the result of a congressional policy choice to make cleanup of hazardous wastes the priority." *Id.* at 950.

145. One commentator has explained the problem in this manner:

The common law tort system was developed to address conflicts raised by simple, straightforward traumatic injuries. . . . Toxic tort injuries, however, may remain undetected for years because cancer and other exposure-related diseases have long latency periods, during which time the ailment cannot be clinically diagnosed. Because of the long latency periods, toxic exposure victims may fail to initiate an action because they do not know that they have been harmed by a toxic substance.

Blumenberg, *supra* note 137, at 668 (footnote omitted).

146. Czmus, *supra* note 2, at 35 (citing D. Alan Rudlin & Michael R. Shebel-skie, *Novel Toxic Tort Claims and Insurance Coverage in* 495 PLI/COMM 243, 251 (1989)).

because they do not know that they have been harmed by a toxic substance.”¹⁴⁷

While a cause of action based on exposure to toxic substances may not have been anticipated by traditional tort theories, the common law may adapt to accommodate such a problem.¹⁴⁸ In fact, common law remedies that award medical monitoring costs to toxic exposure victims presently exist and continue to evolve in most states.¹⁴⁹ Indeed, state courts have begun to allow claimants in toxic exposure cases to collect future medical monitoring costs as a component of plaintiff awards.¹⁵⁰ Thus, it is appropriate to seek reimbursement for medical monitoring costs under state common law rather than under CERCLA section 107(a)(4)(B).

C. Innocent Plaintiff Rationale

Commentators further cite a policy rationale for authorizing the recovery of medical monitoring costs under CERCLA. They argue that innocent plaintiffs may be unable to afford the costs associated with medical monitoring.¹⁵¹ Under this rationale, corporate defendants are in better financial positions to bear the costs of

147. Blumenberg, *supra* note 137, at 668. The author notes that due to this long latency period, the illness may not be detected until the applicable statute of limitation has run, thereby precluding the plaintiff from recovery. *Id.* at 669. Many jurisdictions, though, have adopted a theory where the statute of limitations begins to toll when the illness is discovered, rather than when it is contracted. *Id.* (citing *Ayers v. Jackson Township*, 525 A.2d 287, 300 (N.J. 1987)).

148. Czmus, *supra* note 2, at 36. The judicial system has developed alternative theories of liability due to the inherent difficulty in proving toxic torts. *Id.* These alternatives include recovery for increased risk of contracting future medical problems, fear of future illnesses, as well as medical monitoring. *Id.* (citing Rudlin, *supra* note 146, at 251). See also *Ayers*, 525 A.2d at 299 (outlining requirements for expert testimony in medical monitoring cases).

149. Czmus, *supra* note 2, at 36 (citing Kanner, *supra* note 3, at 739). Due to these evolving theories of liability, plaintiffs can now recover damages that are different in nature from traditional tort awards. *Id.* As Czmus points out, “[d]amages for increased risk or for medical monitoring may be considered either an equitable remedy for exposure to a toxic substance or, alternatively, a form of damages.” *Id.* (citing Kanner, *supra* note 3, at 739-40).

150. In fact, “[w]hen requesting damages for medical monitoring, the plaintiff need not demonstrate any current harm, but rather must show that medical monitoring is recommended to detect the early onset of a medical illness resulting from the toxic exposure.” Czmus, *supra* note 2, at 36 (citing Kanner, *supra* note 3, at 740). “Moreover, the plaintiff does not even have to demonstrate that future illness is likely to occur.” *Id.*

151. Czmus, *supra* note 2, at 36-37. “As a public policy consideration, in contrast to the plaintiff’s financial inability to bear the costs of medical monitoring, the corporate defendant may be in a better position to undertake the burden of such testing.” *Id.* (citing Kathleen A. O’Nan, *The Challenge of Latent Physical Effects of Toxic Substances: The Next Step in the Evolution of Toxic Torts*, 7 J. MIN. L. & POL’Y 227, 228 (1991-92)).

medical surveillance than individuals exposed to toxic substances.¹⁵²

Initially, this policy argument appears reasonable when assessing financial liability between corporate defendants and innocent plaintiffs. As previously stated, however, CERCLA's legislative history and statutory language prohibit such a construction while state tort remedies address this problem. Moreover, allowing additional suits under CERCLA could create an abundance of medical monitoring litigation, leading to unanticipated consequences such as paralysis of industry and business. Furthermore, rather than reducing toxic exposure, such suits could deter technological innovation.¹⁵³

D. Distinction Between Medical Treatment Expenses and Medical Surveillance Costs

Finally, some writers have cleverly argued for the recovery of medical monitoring costs by drawing a distinction between medical treatment expenses and medical surveillance costs. According to Dan A. Tanenbaum, the conflict among the courts is rooted in the initial judicial characterization of the claims.¹⁵⁴ As Tanenbaum has argued, "[m]edical *monitoring* costs must be distinguished from direct medical *treatment* costs."¹⁵⁵

Tanenbaum has developed a three-part test to evaluate claims brought by private litigants seeking to recover medical monitoring response costs.¹⁵⁶ First, a plaintiff must demonstrate that a system

152. *Id.* at 37 (citing O'Nan, *supra* note 151, at 228).

153. *See id.* at 54. According to Czmus, "in any incident carrying the risk of such exposure, the responsible party would be liable for medical monitoring for the remainder of any victim's lifespan." *Id.*

154. Tanenbaum, *supra* note 53, at 939-40.

Some courts characterize the plaintiffs' claims not as investigatory response cost actions, but as suits to recover medical damages. These courts reject monitoring costs as a matter of course. The courts that are more receptive to allowing recovery of medical monitoring costs distinguish monitoring from treatment, and maintain that medical monitoring may be a viable investigatory cost under CERCLA.

Id.

155. *Id.* at 929 (emphasis in original). A determination of whether or not medical monitoring costs are recoverable largely depends on the initial classification of those costs. Under an appropriate classification scheme, recoverable response costs "would include medical monitoring costs expended to determine the extent of environmental harms, but would not include expenditures for treating individuals for illnesses caused by those harms." *Id.* at 927.

156. *Id.* at 951. Tanenbaum recognizes the possibility that "if medical monitoring expenses are awarded with regularity, parties will begin to sue for monitoring costs as a 'back door' method of recovering medical treatment costs under CERCLA." *Id.* at 943. Nevertheless, he feels that an argument refusing to award costs based on this potential for abuse is "easily countered." *Id.* He reasons that

of testing has already been established or can be immediately implemented.¹⁵⁷ Next, a plaintiff must show that “the testing procedures are tailored to determine the effects of substances that are known or suspected to be present at the particular site.”¹⁵⁸ Finally, a plaintiff must demonstrate “that it is the entire community (around the site) that is being tested, not just the named plaintiffs.”¹⁵⁹ In Tanenbaum’s view, satisfaction of these three criteria should enable a court to find that the incurred costs are consistent with CERCLA’s definition of “removal” thereby making these costs recoverable.¹⁶⁰

Despite the attractiveness of Tanenbaum’s argument, any distinction between medical treatment expenses and medical monitoring costs is little more than an exercise in word-play. Since 1988, all federal courts have found this distinction unpersuasive.¹⁶¹ Furthermore, judicial implementation of such a classification scheme would only add to what the *Daigle* court referred to as CERCLA’s “notorious lack of clarity.”¹⁶² Consequently, while Tanenbaum’s arguments, and those set forth by other commentators in favor of recovering medical monitoring costs under CERCLA’s response cost provision are thoughtful, they are not persuasive.

V. CONCLUSION

The injuries that result from toxic exposure which medical monitoring attempts to minimize are truly unfortunate. The reality that innocent victims suffer disease is disturbing. A common reac-

not only would this challenge the validity of any award of investigatory costs but also that abuse is better controlled by closer judicial scrutiny, not limited recoveries. *Id.*

157. *Id.* at 951.

158. *Id.* This requirement would entail documentation of the specific substances at issue and the scientific design of the intended study. *Id.*

159. Tanenbaum, *supra* note 53, at 951. According to Tanenbaum, “[t]his last burden protects against charges that only the plaintiffs are profiting from the enterprise.” *Id.*

160. *Id.* “Once these three burdens are met, the court should determine that the costs of response will enable parties to ‘monitor, assess, and evaluate [a] release or threat of release,’ and are therefore recoverable.” *Id.* (quoting definition of “removal” in CERCLA § 101(23), 42 U.S.C. § 9601(23)).

161. *See Williams v. Allied Automotive, Autolite Division*, 704 F. Supp. 782 (N.D. Ohio 1988).

162. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992). *See Colin Crawford, Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 276-77 (1994) (“[D]uring a period of economic uncertainty, critics are likely to greet the suggestion that courts employ yet another tool for assessing liability with extreme skittishness, especially because CERCLA is notorious for its poor draftsmanship and the runaway costs associated with its imperfect enforcement.”).

tion is to point the finger at those responsible for the pollution and seek to recover damages from these parties. The authors of this Comment recognize this natural inclination, as well as the persuasive arguments proffered by both sides in the medical monitoring debate.

In a utopian society, there would be no environmental hazards or toxic torts. In a slightly less than perfect world, polluters would be held liable for all costs associated with their contamination. Unfortunately, a flawed statute, CERCLA, governs this area of law. In the absence of an overhaul of this legislation, its terms and its limitations prevail.

As *Daigle*, *Price*, and *Durfey*, have held, CERCLA, in its current form, does not authorize the private recovery of medical monitoring costs. While state tort actions are not a panacea for disease resulting from toxic exposure, such actions remain the best vehicles for reaching the road to recovery of medical monitoring costs. Medical monitoring costs under section 107(a)(4)(B) of CERCLA, on the other hand, still suffer from the terminal condition pronounced by the *Daigle* court. The Ninth Circuit provided environmentalists with a second opinion in *Price* and *Durfey*, and the prognosis remains grim: medical monitoring costs should not be recoverable as necessary costs of response under CERCLA.

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