

## New Hampshire Supreme Court Declines to Recognize Cause of Action for Medical Monitoring in Context of PFAS Claims

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Insurance Coverage and Bad Faith Alert

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On March 21, 2023, the New Hampshire Supreme Court, answering a certified question from the U.S. District Court for the District of New Hampshire, concluded that New Hampshire does not recognize a cause of action for recovery of medical monitoring costs by plaintiffs who allege they were exposed to a toxic substance. *See Brown v. Saint-Gobain Performance Plastics Corp.*, No. 2022-013, 2023 N.H. LEXIS 23 (Mar. 21, 2023). The issue arose in a lawsuit by residents who alleged the defendants' use of PFAS in their plastic manufacturing processes had contaminated the air, ground and water in Merrimack and other towns in the Granite State. The residents alleged they had been exposed to PFAS and, as a result, faced "a significant increased risk" of developing sickness and disease, including cancer, immunotoxicity and thyroid disease. The residents argued the defendants, therefore, were required to fund a program for monitoring the detection of such "health problems."

In support of their position, the residents cited decisions from other jurisdictions that recognized claims for the costs of medical monitoring. The Supreme Court, however, found the issue was controlled by "well-established" New Hampshire precedent, including its pronouncement over 80 years ago that, although the possibility that injury may result from an act or omission "'is sufficient to give the quality of negligence to the act or omission,'" the mere possibility of injury "'is insufficient to impose any liability or give rise to a cause of action.'" *Id.* at \*6 (quoting *White v. Schnoebelen*, 18 A.2d 185, 186 (N.H. 1941)). In other words, "an increased risk of harm is not an injury for purposes of a negligence action." *Id.* at \*7. Agreeing with the federal court, the Supreme Court found that the residents' characterization of their alleged "injury" as a need for medical testing conflated injury ("an instance of actionable harm") with damages ("a sum of money awarded to one who has suffered an injury"). *Id.*

The Supreme Court also disagreed with the residents' suggestion that "important public interests," such as promoting early diagnosis and treatment of illness resulting from exposure to toxic substances, supported the conclusion that their purported need to incur medical monitoring costs was a compensable injury. The court cited a recent failure to pass legislation in New Hampshire that would have created a cause of action for medical monitoring for toxic substances without proof of present physical injury or symptoms. According to the court, "[t]his recent legislative action reflects the current public policy of this state." *Id.* at \*9.

Whether a plaintiff can recover the costs of medical monitoring is an issue that frequently arises in suits alleging exposure to PFAS and other toxic substances. With this decision, New Hampshire joins other jurisdictions that have declined to recognize common-law medical monitoring claims and deferred to the legislature to decide what they view as a public policy issue.

If you have any questions or would like further information, contact Paul Briganti ([brigantip@whiteandwilliams.com](mailto:brigantip@whiteandwilliams.com); 215.864.6238).

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