Redland Soccer Club, Inc. v. Department of the Army: The Recovery of Medical Monitoring Costs under HSCA's Citizen Suit Provision

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REDLAND SOCCER CLUB, INC. v. DEPARTMENT OF THE ARMY: 
THE RECOVERY OF MEDICAL MONITORING COSTS 
UNDER HSCA'S CITIZEN SUIT PROVISION

I. Introduction

The Commonwealth of Pennsylvania produces fifty million tons of hazardous waste each year.\(^1\) To deter careless or haphazard


Section 103 of the Hazardous Sites Cleanup Act (HSCA) defines “hazardous substance” and “hazardous waste.” See Pa. Stat. Ann. tit. 35, § 6020.103 (West 1993) [hereinafter HSCA]. HSCA defines “hazardous substance[s]” as substances designated as hazardous under either the Solid Waste Management Act (SWMA), 1980 Pub. L. 380, No. 97, or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9601 et seq., as well as a substance whose release, or a threatened release, poses a substantial threat to the public health, not including any petroleum products. See HSCA, § 6020.103 (defining “hazardous waste” as “[a]ny waste defined as hazardous under the act of July 7, 1980 (Pub. L. 380, No. 97), known as the Solid Waste Management Act, and any regulations promulgated under the act”).

SWMA defines hazardous waste as follows: Any garbage, refuse, sludge from an industrial or other waste water treatment plant, sludge from a water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semi-solid or contained gaseous material resulting from municipal, commercial, industrial, institutional, mining, or agricultural operations, and from community activities, or any combination of the above, (but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under § 402 of the Federal Water Pollution Control Act, as amended (66 Stat. 880) or source, special nuclear, or by-product material as defined by the U.S. Atomic Energy Act of 1954, as amended (68 Stat. 923), which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

1. cause or significantly contribute to an increase in mortality or an increase in morbidity in either an individual or the total population; or
2. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

(201)
management of that waste, the Pennsylvania General Assembly enacted the Hazardous Sites Cleanup Act (HSCA).² HSCA authorizes the Pennsylvania Department of Environmental Protection (DEP) to compel regulated entities to comply with the provisions of

The term "Hazardous Waste" shall not include coal refuse as defined in the act of September 24, 1968 (Pub. L. 1040, No. 318), known as the "Coal Refuse Disposal Control Act." "Hazardous Waste" shall not include treatment sludge from coal mine drainage treatment plants, disposal of which is being carried on pursuant to and in compliance with a valid permit issued pursuant to the act of June 22, 1937 (Pub. L. 1987, No. 394), known as "The Clean Streams Law." P.A. Stat. 35, P.S. § 6018.103. 

PA. STAT. ANN. tit. 35, § 6018.103 (West 1993).

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986) (codified at 42 U.S.C. §§ 9601-9675), gives the federal government broad authority to provide for the cleanup of hazardous substance sites. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 257-58 (3d Cir. 1992). Section 104(a) of CERCLA authorizes the President to respond to a release, or a threatened release, of hazardous substances by undertaking removal and remedial action, or any other response action deemed necessary to protect the public health or welfare, not inconsistent with the National Contingency Plan, which prescribes methods for undertaking response actions. See 42 U.S.C. § 9604(a); 40 C.F.R. Part 300; see also Alcan, 964 F.2d at 258. The President delegated CERCLA response authority to Department of Defense facilities to the Secretary of Defense, with the Environmental Protection Agency having final cleanup authority. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987); 42 U.S.C. § 9620(e)(4)(A).

CERCLA section 107(a) imposes liability on "responsible persons" for a release, or a threatened release, of a hazardous substance. 42 U.S.C. § 9601. Under CERCLA, both private parties as well as the federal government can be liable as responsible persons. See id. § 101(21), 42 U.S.C. §§ 9601(21), 9607. Regarding the scope of liability, CERCLA provides that a responsible person shall be liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . .

(C) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id. § 107(a)(4)(A), (B) & (D), 42 U.S.C. § 9607(a)(4)(A), (B) & (D).

2. See HSCA, § 6020. The Pennsylvania General Assembly found that "improper disposal . . . [of hazardous substances] pose[s] a real and substantial threat to the public health and welfare of the residents of [Pennsylvania]." Id. § 102(2). For the most recent information regarding HSCA, including information on the most current annual report, fact sheets, HSCA site list and remedial sites status, see the Pennsylvania Department of Environmental Protection Homepage (last modified Feb. 18, 1998) <http://www.dep.state.pa.us/default.htm>.
HSCA.\textsuperscript{3} Like many other Pennsylvania environmental statutes,\textsuperscript{4} HSCA contains a citizen suit provision.\textsuperscript{5} This provision enables pri-

3. See HSCA, § 6020.301. In the "Declaration of Policy" section of HSCA, the General Assembly stated: 
Many of the hazardous sites in this Commonwealth which do not qualify for cleanup under the Federal Superfund Act pose a substantial threat to the public health and environment. Therefore, an independent site cleanup program is necessary to promptly address the problem of hazardous substance releases in this Commonwealth, whether or not these sites qualify for cleanup under the Federal Superfund Act. 

\textit{Id.} § 102(8). The Pennsylvania Department of Environmental Protection (DEP) is responsible for implementing HSCA's "independent site cleanup program." \textit{Id.} § 301. DEP has the power and duty to "[d]evelop, administer and enforce a program to provide for the investigation, assessment and cleanup of hazardous sites in this Commonwealth pursuant to the provisions of this act and regulations adopted under this act." \textit{Id.} 


5. See HSCA, § 6020.1115. The "Citizen Suit" provision of HSCA, section 1115, provides:
(a) General rule. — A person who has experienced or is threatened with personal injury or property damage as a result of a release of a hazardous substance may file a civil action against any person to prevent or abate a violation of this act or of any order, regulation, standard or approval issued under this act.

(b) Jurisdiction. — The courts of common pleas shall have jurisdiction over any actions authorized under this section. No action may be commenced under this section prior to 60 days after the plaintiff has given notice to the department, to the host municipality and to the alleged violator of this act, or of any regulations or orders of the department under this act; nor may such action be commenced when the department has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a state to require compliance with the statute, permit, standard, regulation,
vate individuals to compel regulated entities to comply with HSCA’s provisions when DEP is either unwilling or unable to do so.\(^6\)

condition, requirement, prohibition or order. In any such civil action commenced by the department, any person may intervene as a plaintiff as a matter of right. The court may grant any equitable relief; may impose a civil penalty under section 1104; and may award litigation costs, including reasonable attorney and witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate.  

\textit{Id.} § 6020.1115(b).

6. \textit{See} HSCA, § 6020.1115(b). HSCA’s “Scope of Liability” provision, section 701(a), defines the class of regulated entities as follows:

\begin{enumerate}[(a)]
\item General Rule. — Except for releases of hazardous substances expressly and specifically approved under a valid Federal or State permit, a person shall be responsible for a release or threatened release of a hazardous substance from a site when any of the following apply:
\begin{enumerate}[(i)]
\item when a hazardous substance is placed or comes to be located in or on a site;
\item when a hazardous substance is located in or on the site, but before it is released; or
\item during the time of the release or threatened release.
\end{enumerate}
\item The person generates, owns or possesses a hazardous substance and arranges by contract, agreement or otherwise for the disposal, treatment or transport for disposal or treatment of the hazardous substance.
\item The person accepts hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person from which there is a release or a threatened release of a hazardous substance which causes the incurrence of response costs.
\end{enumerate}

\textit{Id.} § 701(a).

Citizen suits perform an important function in the implementation and enforcement of many of Pennsylvania’s environmental statutes. \textit{See} Pa. Bar Inst., supra note 4, at 27-32 (commenting that because many of Pennsylvania’s environmental statutes contain citizen suits provisions, those provisions are vital to enforcement of environmental regulations). Citizen suit provisions are primarily a mechanism through which private individuals may compel regulated entities to comply with state and federal statutes when the government either lacks significant funds or is unwilling to do so. \textit{See id.} Individuals’ ability to bring suit ensures protection of the general public’s interest in a safe and clean environment. \textit{See id.; see also} Jean Buo-lin Chen Fung, KFC Western, Inc. v. Meghrig: \textit{The Merits and Implications of Awarding Restitution to Citizen Plaintiffs Under RCRA} § 6972(a)(1)(B), 22 Ecology L.Q. 785, 828 (1995) (commenting that citizen suits’ most widely acknowledged purpose is to enable private citizens to influence and direct enforcement of state and federal statutes). Thus, private individuals are able to act as “private attorneys general” in the enforcement of Pennsylvania’s statutes. Pa. Bar Inst., supra note 4, at 27-32. \textit{See also}, Fung, supra, at 828-29 (describing citizen suits as allowing private individuals to act as private attorneys general); \textbf{JAMES T. BLANCH} et al., \textit{CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY} I (1996) [hereinafter \textbf{QUI TAM ACTIONS}] (stating that “[c]itizen suits are intended to be actions by ‘private attorneys general’ — that is, lawsuits brought in the public interest by citizens seeking to vindicate important national priorities’’). For a discussion of citizen suits as a critical tool for the enforcement of environmental legislation, \textit{see generally} Ross Macfarlane & Lori Terry, \textit{Citizen Suits: Impacts on Permitting and Agency Enforcement}, 11 Nat. Res. J. No. 4, 20, 23-25 (Spring 1997).
Until recently, private individuals rarely invoked HSCA's citizen suit provision.\textsuperscript{7} The Pennsylvania Supreme Court's decision in \textit{Redland Soccer Club, Inc. v. Department of the Army},\textsuperscript{8} however, promises to generate new interest in this provision.\textsuperscript{9} In \textit{Redland}, the supreme court held that HSCA's citizen suit provision authorizes private individuals to assert claims for medical monitoring.\textsuperscript{10} A claim for medical monitoring allows a private individual to seek recovery for the costs of periodic medical examinations conducted to detect physical injury that may result from contact with a hazardous substance.\textsuperscript{11} From a plaintiff's perspective, a claim for medical moni-

As a legislatively created right of action, the prerequisites to bringing citizen suits and the remedies available thereunder are specifically prescribed and limited. \textit{See} PA. BAR INST., \textit{supra} note 4, at 27-32. \textit{See also} John M. Hyson and John P. Judge, \textit{A Comparative Analysis of the Federal and Pennsylvania Superfund Acts}, \textit{1 VILL. ENVTL. L.J.}, 1, 100-02 (1990) (comparing citizen suit provisions of HSCA and CERCLA). Accordingly, the specific terms of the statutory provisions under which a citizen brings suit are of paramount importance in defining the scope of the action. \textit{See} PA. BAR INST., \textit{supra} note 4, at 27-32.

7. Individuals have rarely litigated the scope of HSCA's citizen suit provision. \textit{See} PA. BAR INST., \textit{supra} note 4, at 27-28. This is largely because individuals may appeal DEP actions directly to the Environmental Hearing Board (EHB). \textit{See} HSCA, \textsection 6020.1102(d). EHB is an independent quasi-judicial agency whose sole function is to review orders, permits, licenses and decisions. \textit{See id.} \textsection 7513-14. Thus, because EHB provides almost immediate access and heightened familiarity with the provisions of HSCA, most appeals have been traditionally funneled through EHB. \textit{See} PA. BAR INST., \textit{supra} note 4, at 27-28. Individuals seeking redress of injuries not attributable to DEP actions, such as a common law claim for medical monitoring, may not appeal to EHB but instead must seek judicial resolution of their claims. \textit{See} HSCA, \textsection 7514.


9. \textit{See id.} The Pennsylvania Supreme Court's \textit{Redland} decision did not affect Pennsylvania residents' ability to assert claims for medical monitoring under common law. \textit{See} HSCA, \textsection 6020.1107 (section 1107 provides: "[n]othing contained in this act shall abridge or alter rights of action or remedies at law or equity"). A medical monitoring claim under HSCA's citizen suit provision, however, incorporates additional incentives such as the element of strict liability and attorneys' fees. \textit{See id.} \textsection 702, 1115. For a discussion of the elements of both a common law and HSCA claim for medical monitoring, see \textit{infra} notes 105-13 and accompanying text.

10. \textit{See Redland}, 696 A.2d at 144-45. For a discussion of the Pennsylvania Supreme Court's decision in \textit{Redland}, see \textit{infra} notes 82-116 and accompanying text.


While there is some evidence that courts may permit recovery for medical monitoring in the context of various injuries such as those resulting from automobile accidents, this Note will concentrate on medical monitoring in the environmental tort context — by far the most common use of medical monitoring claims. \textit{See} Miranda v. Shell Oil Co., 847 P.2d 574 (5th Dist. 1993) (noting plaintiffs most often assert medical monitoring claims in environmental context).
monitoring under HSCA’s citizen suit provision combines the powerful incentives of strict liability with the potential for recovery of attorney fees.12 While plaintiffs exposed to hazardous substances in Pennsylvania may still recover medical monitoring under the common law, a suit initiated under HSCA’s citizen suit provision is now the easiest and most cost-effective means through which private individuals may recover medical monitoring damages.13

This Note analyzes HSCA’s provision authorizing claims for medical monitoring. First, Part II defines medical monitoring claims and examines HSCA’s policy goals and its legislative history14 with an emphasis on the language of HSCA’s “citizen suit” and “scope of liability” provisions.15 Further, Part II discusses the approaches that state and federal courts have taken pursuant to claims for medical monitoring.16 Next, Part III outlines the facts of Redland.17 Then, Part IV considers the Pennsylvania Supreme Court’s holding and reasoning in Redland.18 Part V then critically analyzes the supreme court’s determination that private individuals may assert claims for medical monitoring under HSCA’s citizen suit

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12. See HSCA, §§ 6020.702, 1115. Section 702(a) holds persons responsible for a release of hazardous substances strictly liable for the ensuing release costs. See id. § 702(a). Section 1115(b) permits the recovery of attorney fees to the prevailing or substantially prevailing party. See id. § 1115(b). For the text of § 1115(b), see supra note 5.
13. See id. § 1107.
14. For a discussion of HSCA’s policy goals, see infra notes 29-31 and accompanying text. For an analysis of HSCA’s legislative history, see infra notes 32-39 and accompanying text.
15. For an examination of HSCA’s citizen suit provision, section 1115, see infra note 33 and accompanying text. For an examination of HSCA’s scope of liability provision, section 702, see infra note 34 and accompanying text.
16. For a discussion of state courts’ decisions regarding claims for medical monitoring, see infra notes 40-60 and accompanying text. For a discussion of the federal courts’ decisions regarding medical monitoring claims, see infra notes 60-70 and accompanying text.
17. For a discussion of the facts of Redland, see infra notes 71-81 and accompanying text.
18. For an examination of the Pennsylvania Supreme Court’s holding and reasoning in Redland, see infra notes 82-116 and accompanying text.
provision. Finally, Part VI considers the implications and effects of the supreme court's decision in Redland.

II. BACKGROUND

A. Medical Monitoring

In asserting a claim for medical monitoring, a private individual seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of diseases resulting from exposure to hazardous substances. Because modern toxins tend to cause injuries which are not fully apparent at the time of exposure, preventative monitoring is especially important in toxic exposure cases. Traditionally, individuals have pled medi-

19. For a critical analysis of the Redland decision, see infra notes 117-48 and accompanying text.

20. For a discussion of the impact of the Redland decision, see infra notes 149-55 and accompanying text.

21. See generally AEI Analysis, supra note 11; Myron F. Beeler & Robert Sappenfield, Medical Monitoring, What is it, How Can it Be Improved?, 87 AM. J. CLINICAL PATHOLOGY 285 (1987) (commenting that medical monitoring is process in which periodic medical examinations are conducted to monitor changes in patient's condition); Albert Wong, Note, Medical Monitoring in a Toxic Age, 2 TUL. ENVTL. L.J. 1, 2 (1986) (asserting individuals exposed to toxic substances are entitled to medical monitoring to both determine whether that exposure will adversely impact them as well as reduce severity of harm caused by exposure). See also Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 821 (Cal. 1993) (commenting that in context of toxic exposure case for medical monitoring seeks cost of future periodic medical examinations intended to result in early detection and treatment of disease caused by plaintiff's exposure to possible toxins).

Medical monitoring, as a remedy, has four principal benefits including: (1) public health interest in encouraging and fostering access to early medical testing for those exposed to hazardous substances; (2) possible economic savings realized by the early detection and treatment of the disease; (3) deterrence for polluters; and (4) elemental justice. See Allen L. Schwartz, Annotation, Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition, 17 A.L.R. FED. 5TH 327, § 2 (1994); see also Allan Kanner, Medical Monitoring Remedies, C855 ALI-ABA 737, 740-41 (1993). In asserting medical monitoring claims, individuals seek to recover the actual costs of the tests they must undergo to detect possible latent injuries. See Schwartz, supra, at § 2.

cal monitoring claims as one element of legal damages, an independent tort, or a form of equitable relief. 23 Debate exists among courts regarding whether claims should proceed at law or at equity. 24 In some jurisdictions, if a court awards damages in one

23. See Bill Charles Wells, The Grin Without The Cat: Claims For Damages From Toxic Exposure Without Present Injury, 18 WM. & MARY J. ENVTL. L. 285, 293 (1994) (commenting that different forms of medical monitoring claims exist because medical monitoring developed from several different theoretical roots including traditional tort, legal damages and equitable remedies).

24. See Carol E. Dinkins et al., Overview: Recent Trends and Developments in Environmental and Toxic Tort Litigation, 57 ALI-ABA LITIGATION 1, 7 (1996) (asserting court supervised funds are solely useful in context of rough estimates of damages).

One scholar opines that if a court characterizes a remedy as punitive, then it should award a plaintiff a lump-sum recovery. See George W.C. McCarter, Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation, 45 RUTGERS L. REV. 227, 253-54 (1993) (proposing damages courts award in medical monitoring cases may be classified as either at law or equity, depending on courts’ determination of remedy’s purpose). In contrast, another commentator argues that if a court recognizes recovery as a means of facilitating public health or policy, it should look toward fashioning equitable remedies. See Wells, supra note 23, at 294 (asserting court supervised funds are solely useful in context of rough estimates of damages).

One reason courts encounter difficulty in determining whether to award recovery at law or at equity is that individuals asserting medical monitoring claims are required to demonstrate neither current harm resulting from exposure to toxic substances nor even the likelihood of developing a disease in the future. See Anthony R. Laratta and Brian S. Paszamant, Comment, Diagnosing Medical Monitoring Costs Under CERCLA: Checking for a Pulse, 7 VILL. ENVTL. L.J. 81, 107 (1996). Plaintiffs need only show that medical monitoring would decrease the likelihood of their developing a disease. See id.

In the majority of jurisdictions that have recognized medical monitoring, these costs have been viewed as an element of damages under traditional common law tort theories. See Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *15 (D.C. Super. Aug. 18, 1997) (holding medical monitoring claims are requests for damages, not requests for injunctions); Harding v. Tambrands Inc., 165 F.R.D. 623, 632 (D. Kan. 1996) (holding certification of class action seeking injunctive relief in form of medical monitoring of alleged victims of toxic shock syndrome resulting from plaintiffs’ use of defendants’ tampon products was inappropriate because plaintiffs sought primarily money damages as relief); Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir. 1995) (holding district court did not abuse its discretion in refusing certification of class action sought on basis of claims for injunctive relief concerning medical monitoring of alleged victims of exposure to hazardous emissions in light of fact that plaintiffs sought primarily money damages as relief); Thomas v. FAG Bearings Corp., 846 F. Supp. 1400, 1403-04 (W.D. Mo. 1994) (finding plaintiffs’ request for future medical monitoring costs was insufficient basis for certification of plaintiff class in action alleging corporation’s contamination of groundwater because those damages were mere element of tort damages and did not constitute injunctive relief).

A few states have awarded medical monitoring costs pursuant to a recognized cause of action in independent tort, rather than as a claim for damages. See, e.g.,
lump sum, the action is at law; or, conversely, if a court places the funds in a court-supervised account, the action is at equity. Other


25. See Ayers v. Township of Jackson, 525 A.2d 287, 288-91 (N.J. 1987). The New Jersey Supreme Court was one of the earliest jurisdictions to advocate the court supervised fund. See id. In Ayers, the residents of Jackson brought a nuisance action against the township alleging that toxins from their town's landfill contaminated their water. See id. at 291. The plaintiffs sought a medical monitoring trust fund to pay for periodic medical examinations to determine whether their contact with the contaminated water would produce latent injuries. See id. The Ayers court stated:

In our view, the use of a court-supervised fund to administer medical-surveillance payments in mass exposure cases . . . is a highly appropriate exercise of the Court's equitable powers . . . . Such a mechanism offers significant advantages over a lump-sum verdict . . . . [A] fund would serve to limit the liability of defendants to the amount of expenses actually incurred. A lump-sum verdict attempts to estimate future expenses, but cannot predict the amounts that actually will be expended for medical purposes. Although conventional damage awards do not restrict plaintiffs in the use of money paid as compensatory damages, mass-exposure toxic-tort cases involve public interests not present in conventional tort litigation. The public health interest is served by a fund mechanism that encourages regular medical monitoring for victims of toxic exposure . . . . Although there may be administrative and procedural questions in the establishment and operation of such a fund, we encourage its use by trial courts in managing mass-exposure cases . . . . [M]edical-surveillance damages will be paid only to compensate for medical examinations and tests actually administered, and will encourage plaintiffs to safeguard
jurisdictions view either of these two methods of awarding medical monitoring damages to be a form of legal damages.26

B. HSCA

1. Declaration of Policy

The Pennsylvania General Assembly passed HSCA to protect the health and welfare of Pennsylvania residents from the improper disposal of hazardous waste.27 After considering past responses to hazardous waste disposal in Pennsylvania, the General Assembly concluded that "traditional remedies were inadequate."28 Regardless of their health by not allowing them the option of spending the money for other purposes.


26. See Werlein v. United States, 746 F. Supp. 887, 895 (D. Minn. 1990) (finding claim for medical monitoring to be claim for money damages). In Werlein, the court stated:

the medical monitoring fund proposed by the plaintiffs simply is not an injunctive remedy. Plaintiffs propose that defendants be forced to pay a lump sum of cash into a fund, and that persons eligible for medical monitoring use that pot of cash to obtain reimbursement costs incurred as the result of medical screening examinations. Payment of cash by one party to reimburse other parties for costs incurred is not injunctive relief.

Id. (emphasis added). See also Mertens v. Abbott Lab., 99 F.R.D. 38 (D.N.H. 1983) (holding medical monitoring not injunctive relief); Jaffee v. United States, 592 F.2d 712, 715 (3d Cir. 1979) (asserting plaintiff cannot transform claim for damages into equitable action by asking for injunction that orders payment of money); Castano v. American Tobacco Co., 160 F.R.D. 544, 552 (E.D. La. 1995) (declining to certify plaintiffs’ claims for medical monitoring of diseases related to exposure to tobacco under Rule 23(b)(2) because plaintiffs were primarily seeking monetary damages not equitable relief). See also Richard P. Campbell and Michelle I. Schaffer, Requests for Class Action Certification of Medical Monitoring Claims, 63 Def. Couns. J. 26, 31 (1996) (commenting most courts conclude that medical monitoring relief is simply compensation for necessary medical expenses plaintiffs reasonably anticipate they will incur and therefore classify those costs as item of damages); Allen Kanner, Environmental and Toxic Tort Issues, AMER. L. INST. (1995) (damages refer to amount of monetary compensation responsible party owes for property damage and personal injury and this award is different from punitive damages which are to punish and deter wrongdoing, and from equitable remedies such as injunctions).

27. See HSCA, § 6020.102(2). The Pennsylvania General Assembly declared that citizens have a right to clean water and a healthy environment, and that the General Assembly is responsible for ensuring protection of that right. See id. § 102(1). To fulfill that responsibility, the General Assembly sought to create an independent site cleanup program to promptly and comprehensively address the problem of hazardous waste releases in Pennsylvania. See id. § 102(8).

28. Id. § 102(5). Traditional remedies were ineffective in preventing the release of hazardous substances, specifying the obligations of persons responsible for the release and identifying new remedies to protect the citizens of Pennsylvania. See id. The General Assembly further stated that "[t]raditional methods of administrative and judicial review have interfered with responses to the release of hazard-
less of whether the waste disposal sites qualified for cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the General Assembly deemed “extraordinary enforcement remedies” necessary to encourage the clean-up of hazardous sites in a manner that would promote the public health and safety of Pennsylvania’s citizens.

2. The Statute and Its Legislative History

HSCA is silent regarding private individuals’ recovery for medical monitoring in both section 1115, its “Citizen Suit” provision, and 1110’s “extraordinary enforcement remedies” provision.

For the text of section 1115(a), see supra note 5. Citizen suits rarely allow recovery for private injuries. See generally, Barry Breen, Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law, 24 WAKE FOREST L. REV. 851, 870 (1989) (stating that “[b]ecause [citizen suits] involve citizens vindicating public rights, they are different from private causes of action for harm to plaintiffs personally. They thus do not include toxic tort suits for personal injury or property damage [because of plaintiff’s status as a private attorney general].”); PA. BAR INST., supra note 4, at 1 (stating that citizen suits are not designed to redress private grievances and that remedies in citizen suits are generally in form of injunctions, costs and attorneys fees, and occasionally, civil penalties); Shay S. Scott, Combining Environmental Citizen Suits and Other Private Theories of Recovery, 8 J. ENVTL. L. & LITIG. 369, 377-78 (1993) (noting that citizen suit provisions almost never provide for recovery of damages, but instead provide for injunctive relief, costs and attorneys fees, and occasionally, civil penalties which are paid to government).

There are, however, instances in which a citizen suit may benefit the public only in a general way while directly forwarding a private party’s goals. See PA. BAR INST., supra note 4, at 3. For instance, one commentator notes that in federal citizen suits, “while penalties assessed must go to the federal treasury and citizen plaintiffs are not entitled to sue for damages, courts generally have been liberal about allowing settlements to include ‘supplemental environmental projects.
and section 702, its "Scope of Liability" provision.32 Although sec-

(SEPs)."  Id. at 21. SEPs are payments derived from settlements with alleged viola-
tors of environmental statutes.  See id. In light of the severe sanctions that courts
often levy in large cases, and because plaintiffs can expect no personal economic
gain, they will often opt for settlement in the form of SEPs rather than endure
extensive litigation.  See id. See also Ross Macfarlane & Lori Terry, Citizen Suits: Im-
acts on Permitting and Agency Enforcement, 11 NAT. RESOURCES J. No. 4, 20, 21
(Spring 1997) (noting although private parties cannot sue for damages, courts
have generally been liberal about allowing settlements to include "supplemental
environmental projects," which can include payments to environmental groups
and projects). For an example of a Pennsylvania citizen suit that does permit the
recovery of private damages, see infra note 123.

Rather than provide for private recovery, citizen suits are a vehicle for private
enforcement of public rights.  See PA. BAR INST., supra note 4, at 1. They are pri-
marily a mechanism through which private individuals may compel regulated enti-
ties to comply with state and federal statutes when the government is unwilling or
unable to pursue the action.  See id. These goals are also reflected in Penn-
sylvania's citizen suits provisions.  See supra note 7. For example, there are a
number of Pennsylvania citizen suit provisions that forbid private enforcement
when DEP is actively involved in prosecuting the case.  See PA. BAR INST., supra note
4, at 31. HSCA has an identical limitation.  See HSCA, § 6020.1115(b). Under
HSCA, section 1115(b), "[n]o action may be commenced under this section prior
to 60 days after the plaintiff has given notice to the department . . . nor may such
action be commenced when the department has commenced and is diligently
prosecuting [in order to] require compliance with the statute . . . ."  Id. The sixty
day notice period provides DEP time to investigate the site at issue and decide
whether to prosecute.  See id. As section 1115(b) demonstrates, DEP is the primary
enforcer of HSCA.  See id. A private individual brings a citizen suit only when DEP
is unwilling or unable to do so.  See id. Thus, while DEP requires "compliance with
the statute," a private individual is powerless to bring suit.  See id.

Nevertheless, a citizen may intervene as a matter of right in a DEP prosecu-
tion in the interest of protecting his stake in the litigation.  See id. This allows third
parties to challenge permits, approvals, orders and decisions that DEP may have
granted.  See PA. BAR INST., supra note 4, at 28. Similarly, even if an individual
brings a citizen suit after the sixty day period, DEP may also intervene as a matter
of right and consequently relieve the private individual of prosecutorial duties.  See
HSCA, § 6020.1115(c).

32. See HSCA, § 6020.702. The "Scope of Liability" provision of HSCA, sec-
tion 702, provides in relevant part:

(a) General rule. — A person who is responsible for a release or
threatened release of a hazardous substance from a site as specified
in section 701 is strictly liable for the following response costs and
damages which result from the release or threatened release or to
which the release or threatened release significantly contributes:

(1) Costs of interim response which are reasonable in light of the
information available to the department at the time the interim
response was taken.

(2) Reasonable and necessary or appropriate costs of remedial re-
sponse incurred by the United States, the Commonwealth or a
political subdivision.

(3) Other reasonable and necessary or appropriate costs of response
incurred by any other person.

(4) Damages for injury to, destruction of or loss of natural resources
within this Commonwealth or belonging to, managed by, con-
trolled by or appertaining to the United States, the Common-
wealth or a political subdivision. This paragraph includes the
tion 702 does provide that responsible persons are liable for the cost of a "health assessment or health effects study," supra HSCA does not specifically define the term "health assessment." HSCA's legislative history is similarly silent regarding recovery for medical

reasonable costs of assessing injury, destruction or loss resulting from such a release.

(5) The cost of a health assessment or health effects study... Id.

33. Id. Caselaw does not indicate courts' interpretation of "health assessment or health effects study." Id. One district court that considered the issue decided the case without addressing the term's meaning. See Lutz v. Chromatex, Inc., 725 F. Supp. 258, 263-65 (M.D. Pa. 1989). In Lutz, the plaintiffs sought to recover costs for "medical surveillance" under HSCA. See id. The court did not reach the issue of whether those damages were available because it found that there exists no private cause of action under HSCA. See id. Research fails to reveal any other reported case where plaintiffs sought medical monitoring damages under HSCA. See generally, Little Superfunds, supra note 29, at 92-96; Hyson, supra note 6, at 97-100.

Moreover, courts' interpretations of whether the "person" in 702(a) refers to private individuals have varied. HSCA defines "person" as:

An individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, authority, interstate body or other legal entity which is recognized by law as the subject of rights and duties. The term includes the Federal Government, state governments and political subdivisions.

HSCA, § 6020.103. Although the inclusion of "individual" as a component of HSCA's definition of "person" suggests that private persons may bring suits under section 702, courts' interpretations of this section have varied. See generally, Hyson, supra note 6, at 103 (commenting although section 702 does provide that responsible persons are liable for response costs "incurred by any other person," as no provision of HSCA creates private right of action in which such "other person" may recover his response costs, such right of action might be implied as it was under CERCLA). See, e.g., PA. BAR INST., supra note 4, at 36.

To clarify, section 507(a) provides that responsible parties or a person who (1) causes a release or threatened release of a hazardous substance, (2) violates an order of DEP or (3) causes a release of non-hazardous waste to which DEP responds under its emergency response authority are liable for the resulting response costs and natural resource damages. See HSCA, § 6020.507(a). Section 701 then delineates which persons are responsible for response costs under HSCA. See id., § 701. Finally, section 702 provides the scope of costs that are recoverable as "response costs." See id., § 702.

34. See HSCA, § 6020. While HSCA does not define "health assessments," CERCLA's definition may be instructive. CERCLA defines "health assessments" as including:

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... 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 § 9604(i)(6)(F).
monitoring.\textsuperscript{35} It does, however, indicate some discussion among the General Assembly concerning recovery for personal injury under HSCA.\textsuperscript{36} Although the version of HSCA the Pennsylvania House of Representatives originally passed included a private cause of action for personal injury recovery,\textsuperscript{37} the final version of HSCA did not contain such a provision.\textsuperscript{38}

\textsuperscript{35} See H.B. 1852-3428, at 41-42, Printer's No. 3428, § 509. One federal court has noted that the legislative history of HSCA is not as exhaustive as that of its federal counterpart CERCLA. See Toole v. Gould, Inc., 764 F. Supp. 985, 994 (M.D. Pa. 1991). In commenting on HSCA's legislative history, the Toole court proposed that the general lack of definitive legislative history concerning many statutes is the result of no one person being responsible for the passage of state legislation. See id. With this in mind, legislative intent, which one may discern to a degree from a statute's legislative history, is only one factor in determining the proper meaning of a statute. See id.; see generally Remarks of Rep. Manderino 61 House Legislative Journal 1718 (stating that "[w]hile virtually everyone has supported a State hazardous waste cleanup program, the approaches taken by various interest groups were varied, and often they were divergent").

\textsuperscript{36} See H.B. 1852-3428, at 41-42, Printer's No. 3428, § 509. [37 House Legislative Journal at 991-1039]. The House of Representatives passed the following version of the bill on June 7, 1988:

Private Cause of Action.

Any person responsible for a release of a hazardous substance under this act shall also be strictly liable for any personal injury or property damage resulting from the release or for any response costs incurred which are not inconsistent with a departmental action pursuant to section 505.

Id.

HSCA section 505 outlines the development and implementation of response actions Department of Environmental Resources of Pennsylvania has taken. See HSCA, § 6020.505.

\textsuperscript{37} See id. The Pennsylvania Supreme Court did not comment on this part of the legislative history of HSCA. See generally Redland, 696 A.2d at 137.

\textsuperscript{38} See HSCA, § 6020. The Senate Environmental and Energy Resources Committee deleted section 509. See H.B. 1852, Printer's No. 3558. At least one court has considered the deletion of this provision as persuasive evidence for denying plaintiffs a private cause of action under HSCA. See Lutz v. Chromatex, 730 F. Supp. 1328, 1332 (M.D. Pa. 1990) (holding HSCA does not provide private cause of action). But see General Elec. Envtl. Servs. v. Envirotech, Corp., 763 F. Supp. 113, 117 (M.D. Pa. 1991) (noting section 509's deletion is attributable to existence of section 702(a)(3), which permits private right of action); Smith v. Weaver, 665 A.2d 1215, 1217-19 (1995) (holding private right of action exists under HSCA). Unfortunately, HSCA's legislative history does not include the rationale supporting that deletion. See generally Toole, 764 F. Supp. 985 (acknowledging lack of legislative history noting that only time private right of action was explicitly proposed, it was stricken from bill).
C. Medical Monitoring in State Courts

Historically, plaintiffs exposed to hazardous substances experienced frustration when bringing claims for medical monitoring.39 These plaintiffs faced the difficult task of proving the existence of a recoverable injury.40 Injuries stemming from exposure to hazardous substances generally produce latent injuries that individuals may not detect for many years.41 One way in which plaintiffs enjoyed a limited measure of success was by asserting claims based on


40. See Czmus, supra note 24, at 37 (highlighting plaintiffs’ inability to ascertain precise dollar amounts and levels of exposure to toxins as difficulties plaintiffs encounter in their attempts to establish claims for medical monitoring); Slagel, supra note 22, at 860 (finding individuals’ inability to illustrate particular level of increased risk of disease resulting from exposure to hazardous substances); Kathleen A. O’Nan, Note, 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, 238 (1991-92) (noting courts’ hesitancy to recognize claims for increased risk of disease in toxic tort cases). Cf. Carey C. Jordan, Comment, Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?, 33 Hous. L. Rev. 473 (1996) (commenting plaintiffs have had little success with enhanced risk claims, but have had greater success with claims based on fear of disease).

41. See Jordan, supra note 40, at 475. One commentator notes: [t]here is typically a long latency period between exposure and the appearance of health effects. The effects are rare and may be characterized as "nonsignature" diseases. In other words, not everyone exposed to a toxic chemical will become sick, and those who do may not be aware that the illness results from the exposure. In addition, it may be impossible to reconstruct which chemical (if any) caused the illness or when the exposure occurred.

their enhanced risk of future injury. These claims generally failed because plaintiffs were unable to demonstrate actual injuries.

A Pennsylvania court refused to require plaintiffs to demonstrate an actual injury for the first time in *Habitants Against Landfill Toxicants v. City of York*. The *Habitants* court held that where a plaintiff is at risk of contracting a serious latent disease, but is unable to establish a present injury, he can maintain a common law claim *in equity* for medical monitoring. Other courts have recog-


44. 15 Envtl. L. Rep. 20937 (Pa. Com. Pl. 1985). In *Habitants Against Landfill Toxicants v. City of York*, the plaintiffs alleged injuries from toxic chemicals that had leaked into their property from a neighboring landfill. See *id.* at 20937. The plaintiffs requested that the court establish a $1,000,000 trust fund to monitor and detect all future medical problems the landfill might cause. See *id.* The plaintiffs also requested an injunction requiring defendants to abate the nuisance, trespass and threat to the public health that the site's hazardous substances posed. See *id.* In granting the medical monitoring trust fund, the court characterized the action as in equity and denied the plaintiffs attorneys' fees because there existed no statutory basis for their provision. See *id.* The court rejected the defendant's contention that it should not grant equitable relief in the form of a trust fund because there existed an adequate remedy at law. See *id.* The defendant argued the remedy available at law was a future lawsuit, which plaintiffs could bring if, and when, actual damages became apparent. See *id.* The court rejected the defendant's argument, however, by noting the difficult legal barriers that the plaintiffs would face if the court forced them to bring a future, rather than present, action. See *id.*

45. See *id.* at 20939. The court noted that "if plaintiffs are deprived of any necessary diagnostic services in the future because they have no source of funds available to pay for the testing, the consequences may result in serious, if not fatal illness." *Id.* at 20938.
nized the injustice of requiring plaintiffs to demonstrate actual physical injury as a prerequisite to recovery and consequently developed the tort remedy of "medical monitoring."\(^{46}\) Several jurisdictions have permitted claims for medical monitoring as a separate cause of action rather than as a claim for damages.\(^{47}\) The majority of courts, however, have allowed medical monitoring costs as an element of damages under traditional common law tort theories.\(^{48}\)

The New Jersey Supreme Court, in a decision that other courts have widely accepted, adopted medical monitoring as a distinct cause of action at law in Ayers v. Township of Jackson.\(^{49}\) The Ayers

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\(^{47}\) For lists of jurisdictions that have recognized some form of medical monitoring, as well as a list of states that have rejected medical monitoring outright, see *supra* note 24.


court emphasized the distinction between plaintiffs’ recovery for their enhanced risk of injury and their claims for medical monitoring.50 Under Ayers, whereas in asserting a claim based on enhanced risk of future injury a plaintiff seeks damages based on an unquantifiable degree of injury to the plaintiff’s health and life expectancy, a medical monitoring claim allows for compensation of the actual costs of periodic medical testing.51 Thus, the Ayers decision entitled the plaintiffs therein to recover for the economic injury suffered as a result of having to undergo periodic medical examinations, costs they would not have incurred absent their exposure to hazardous substances.52

Notably, the Utah Supreme Court embraced the Ayers rationale when it decided Hansen v. Mountain Fuel Supply Co.53 Although it


50. See Ayers, 525 A.2d at 303. The court stated:
[t]he enhanced risk claim seeks a damage award, not because of any expenditure of funds, but because plaintiffs contend that the unquantified injury to their health and life expectancy should be presently compensable, even though no evidence of disease is manifest . . . . By contrast, the claim for medical surveillance does not seek compensation for an unquantifiable injury, but rather seeks specific monetary damages measured by the cost of periodic medical examinations.

Id. at 304.

51. See id. at 303. The recovery in medical monitoring cases is for the economic harm that plaintiffs incur as a result of being forced to submit to periodic medical testing. See id. For a discussion of the difficulty plaintiffs in enhanced risk of future injury cases encounter in proving causation and damages, see Ellen Relkin, Emerging Damage Theories in Toxic Tort Actions, Brief at 48 (Spring 1992) (commenting on difficulty confronting plaintiffs attempting to demonstrate causation and damages because of latent nature of injuries). See also Keith W. Lapeze, Comment, Recovery for Increased Risk of Disease in Louisiana, 58 LA. L. REV. 249 (1997) (noting difficulty in proving increased risk of future disease when invisible carcinogenic material has entered human body); Margaret G. Farrell, The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts, 2-FALL WIDENER L. SYMP. J. 235, 243 (1997) (commenting that evidence to support claims for enhanced risk of future injury often require complex probability determinations, epidemiological studies, statistical analysis and medical evidence); Janet H. Smith, Increasing Fear of Future Injury Claims: Where Speculation Carries the Day, 64 DEF. COUNS. J. 547, 553 (1997) (noting that standard of proof in increased risk of future injury claims can be more probable than not, reasonably certain, reasonably probable, medically probable, probability or reasonable medical certainty).

52. See Ayers, 525 A.2d at 304.

53. 858 P.2d 970 (1993). In Hanson v. Mountain Fuel Supply Co., the plaintiff argued that his exposure to asbestos entitled him to periodic medical testing to facilitate early diagnosis and treatment of diseases stemming from his exposure. See id. at 976. The defendant countered by asserting plaintiff’s inability to demonstrate that he required anything other than routine maintenance. See id.

In support of its holding that the plaintiff was entitled to the costs of periodic medical testing, the Utah Supreme Court cited two common law principles: (1) the “doctrine of avoidable consequences,” which required the plaintiff to either submit to medical treatment or risk extinguishment of his right to recover future
acknowledged the need to compensate plaintiffs for the costs associated with periodic medical testing that Ayers highlighted, the Hansen court formulated its own test for a cause of action after it declined to accept the specific elements the Ayers court enumerated.\textsuperscript{54} Other states' high courts, including Pennsylvania's, have similarly embraced actions for medical monitoring.\textsuperscript{55}

The Pennsylvania Supreme Court examined for the first time in Simmons v. Pacor whether a private individual may assert a claim for medical monitoring.\textsuperscript{56} After rejecting the enhanced risk approach, the Simmons court cited the non-speculative nature of medical monitoring as the legal basis for a valid course of action.\textsuperscript{57} Nevertheless, because the plaintiff in Simmons did not request medi-

\textsuperscript{54} See id. In Utah, to recover for medical monitoring, a plaintiff must prove:
1. exposure;
2. to a toxic substance;
3. which exposure was caused by the defendant's negligence;
4. resulting in the increased risk;
5. of a serious disease, illness, or injury;
6. for which early detection is beneficial; meaning that a treatment exists that can alter the course of the illness;
7. and which test has been prescribed by a qualified physician according to contemporary scientific principles.


\textsuperscript{56} 674 A.2d 232 (Pa. 1996). In Simmons v. Pacor, the plaintiff was exposed to asbestos while serving with the United States Navy. See id. at 232-36. The plaintiff developed asymptomatic pleural thickening, a condition that does not impair an individual's ability to lead an active, normal life. See id. at 236. Based on its finding that plaintiff suffered no actual injury, the Pennsylvania Supreme Court held that asymptomatic pleural thickening is not a compensable injury that gives rise to a cause of action. See id. at 237. Nevertheless, the court did recognize an exception regarding damages for expenses a plaintiff may incur in his medical surveillance of the condition. See id. at 239. The supreme court later stated in Redland that its holding in Simmons was not limited to asbestos cases. See Redland, 696 A.2d at 145. The Redland court commented that the non-speculative nature of a claim for medical monitoring supported its decision to permit a common law claim for medical monitoring. See id.

\textsuperscript{57} See Simmons, 674 A.2d at 236 & 240 n.11.
cal monitoring as a form of relief, the court did not specify the elements that comprise a medical monitoring claim.\textsuperscript{58}

D. The Third Circuit’s Treatment of Medical Monitoring Claims in Pennsylvania

The Pennsylvania Supreme Court ultimately rejected the elements for medical monitoring these courts utilized and instead adopted a test that has its genesis in several Third Circuit decisions.\textsuperscript{59} The first time the Third Circuit examined a Pennsylvania common law claim for medical monitoring was in \textit{In re Paoli Railroad Yard PCB Litigation (Paoli I)}.\textsuperscript{60} Noting that neither the Pennsylvania Supreme Court nor the Pennsylvania Superior Court had ever addressed this issue, the Third Circuit predicted that the supreme court would permit individuals to assert a claim for medical monitoring.\textsuperscript{61} After distinguishing a claim for medical monitor-

\textsuperscript{58} See id. at 240. In reaching its decision, the Simmons court acknowledged that the United States Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would allow, in certain cases, recovery for medical monitoring. See id. at 239 (citing \textit{In re Paoli R.R. Yard PCB Litig.}, 916 F.2d 829 (3d Cir. 1990) (\textit{Paoli I}) (recognizing claim for medical monitoring where plaintiffs were exposed to polychlorinated biphenyls (PCBs)’ found in railcar transformers); \textit{In re Paoli R.R. Yard PCB Litig.}, 35 F.3d 717 (3d Cir. 1994) (\textit{Paoli II}) (holding medical monitoring claim viable under Pennsylvania law)). The court also examined the rationale articulated by the Court of Appeals of Arizona in \textit{Burns v. Jaquays Mining Corp.} and found it to apply to its own analysis. See id. (citing \textit{Burns v. Jaquays Mining Corp.}, 752 P.2d 28 (1987) (holding plaintiffs are entitled to customary medical testing and evaluation despite absence of physical manifestation of asbestos-related diseases)).

\textsuperscript{59} See \textit{Redland}, 696 A.2d at 145 (agreeing with reasoning supporting both New Jersey as well as Utah Supreme Courts’ tests regarding medical monitoring, but declining verbatim adoption of either state’s test).

\textsuperscript{60} See \textit{Paoli I}, 916 F.2d at 848. In \textit{Paoli I}, the Third Circuit addressed a Pennsylvania common law claim for medical monitoring. See id. at 836. The \textit{Paoli I} plaintiffs sought medical monitoring damages in response to their prolonged exposure to poly-chlorinated biphenyls (PCBs). See id. at 835. They also sought recovery for property damages and response costs under CERCLA. See id. The Third Circuit remedied the case so that the plaintiffs could present their evidence in a manner consistent with the Third Circuit’s test. See id. at 862. For the text of the \textit{Paoli I} test, see infra note 63. For a discussion of \textit{Paoli I}, see generally, Noel C. Birle, Note, \textit{Toxic Torts - Evidence - Third Circuit Recognizes Medical Monitoring Tort and Makes Significant Rulings Concerning Expert Testimony in Toxic Torts Cases}, 37 Vill. L. Rev. 1174 (1994) [hereinafter \textit{Toxic Torts}].

\textsuperscript{61} See \textit{Paoli I}, 916 F.2d at 849. In support of its conclusion, the Third Circuit noted that as a federal court sitting in diversity, it had to predict whether the Pennsylvania Supreme Court would recognize a claim for medical monitoring under the substantive law of Pennsylvania and, if so, what elements it would entail. See id. (citing Eric R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). The Third Circuit also acknowledged that one Pennsylvania trial court had allowed a similar claim to proceed. See id. at 849 n.20 (citing \textit{Habitants Against Landfill Toxicants v. City of York}, 15 Envtl. L. Rep. 20937 (1985)). The Third Circuit then highlighted a different Pennsylvania trial court’s denial of a similar claim. See id. at 849 n.20 (citing
ing from a claim of enhanced risk of harm, the Third Circuit concluded that a medical monitoring claim involves none of the speculation that is inherent in a claim based on enhanced risk. The Third Circuit then outlined a test it believed the Pennsylvania Supreme Court would employ in determining whether a plaintiff had established a claim for medical monitoring.

The Third Circuit further examined the Pennsylvania common law position regarding medical monitoring claims in *In re Paoli Railroad Yard PCB Litigation (Paoli II).* The court amended the test it

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Peterman v. Techalloy Co., Inc., 29 Pa. D & C.3d 104 (Mont. Co. 1982)). The Third Circuit rejected Peterman on the grounds that the plaintiffs therein had requested a medical monitoring trust fund, as opposed to damages for specific medical surveillance costs, which the Third Circuit presumed would also include the costs of future medical treatment, instead of solely medical surveillance. *See id.*

62. *See id.* at 850-51. The Third Circuit characterized an action for medical monitoring as an effort to recover only the quantifiable costs of periodic medical examinations that are necessary to detect an injury. *See id.* at 850. Differently, the court noted, the goal of an enhanced risk claim is compensation for the anticipated harm itself, proportionally reduced to reflect the chance that it will not occur. *See id.* An enhanced risk claim, the court continued, is inherently speculative because it forces courts to anticipate the probability of future injury. *See id.; see also Ayers v. Township of Jackson, 525 A.2d 287, 297-313 (N.J. 1987) (discussing distinction between recovery for enhanced risk of contracting serious illness and claim for medical monitoring, concluding preference for latter). But see Kristen Chapin, Comment, Toxic Torts, Public Health Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 129, 141 (1993) (highlighting benefits of claims based on enhanced risk of future injury, including compensating plaintiffs prior to development of disease, increasing public awareness of neighborhood toxins, promoting accountability and deterring individuals from engaging in dangerous activities).*

63. *See Paoli I, 916 F.2d at 852. The Third Circuit presented the following test in Paoli I to determine whether a plaintiff establishes a claim for medical monitoring:*

1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant;
2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease;
3. That increased risk makes periodic diagnostic medical examinations reasonably necessary; and
4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

*Id.*

64. *See Paoli II, 35 F.3d at 787. In Paoli II, the Third Circuit addressed the defendant’s claims that Pennsylvania courts’ decisions subsequent to Paoli I had undercut that court’s conclusion that a common law claim for medical monitoring was viable in Pennsylvania. *See id.* at 785-86. Noting that although some Pennsylvania courts actions since Paoli I had cast doubt on whether the Pennsylvania Supreme Court would accept a claim for medical monitoring, the Third Circuit refused to overrule Paoli I absent definitive guidance from the Pennsylvania Supreme Court. *See id.* at 786. The Paoli II court also addressed the district court’s holding that the plaintiffs did not present sufficient evidence to support their medical monitoring claim. *See id.* The Third Circuit then concluded that medical monitoring was still a viable claim in Pennsylvania and that the plaintiffs, in fact,
outlined in Paoli I with the requirement that a plaintiff demonstrate a need for "special medical monitoring." "Special medical monitoring" is a medical monitoring regime that differs from commonly recommended medical examinations due to plaintiff's exposure to hazardous substances.

In the Redland federal action, the Third Circuit reaffirmed its adherence to the element of "special monitoring." Although a common law claim for medical monitoring was not at issue, the

had presented sufficient evidence to survive a motion for summary judgment on their claim. See id.

For a discussion of the caselaw the Third Circuit considered in Paoli II in reaffirming its position that Pennsylvania common law recognized a common law claim for medical monitoring, see Paoli II, 35 F.3d at 785-86.

65. Id. at 788. For a discussion of the “special medical monitoring” requirement, see infra notes 111-15.

66. See id. The Third Circuit relied primarily on the Utah Supreme Court's decision in Hansen v. CCI Mechanical, Inc. in formulating its “special medical monitoring” requirement. See 858 P.2d 970 (Utah 1993). The Hansen court stated that to demonstrate significant exposure to a proven hazardous substance, (element (1) of the Paoli I test), a plaintiff must:

prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful act increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff.

Id. at 980 (emphasis added).

67. Redland Soccer Club v. Department of the Army, 55 F.3d 827 (3d Cir. 1995). The plaintiffs in the Redland federal action filed their action for medical monitoring under the Federal Torts Claims Act (FTCA), CERCLA and HSCA. See id. at 829. Regarding the claim the plaintiffs brought pursuant to FTCA, the Third Circuit held that the plaintiffs presented evidence sufficient to permit a reasonable fact finder to infer that individuals that had been exposed to carcinogens and non-carcinogens had increased their risk of illness beyond the one-in-a-million benchmark the Environmental Protection Agency (EPA) uses. See id. at 847-48. Then, regarding the plaintiffs' claim brought pursuant to CERCLA, the court found that health risk assessment fees were not "response costs" for purposes of CERCLA. See id. at 848-49. Lastly, regarding the claim the plaintiffs brought under HSCA, the Third Circuit concluded that as the plaintiffs had not presented sufficient evidence to demonstrate their need for "special medical monitoring," their claim would not survive a motion for summary judgment. See id.

68. See id. at 850 n.14. While the Redland federal action did not assert a common law medical monitoring claim, the Third Circuit nevertheless gave conflicting signals. The court first stated that "[w]e believe that the elements of a claim for medical monitoring under CERCLA and HSCA are the same as the elements for a common law medical monitoring claim set out in Paoli I and Paoli II." Id. at 849 n.12. Later, however, the Third Circuit stated that "[w]e express no opinion, however, about any claim for medical monitoring under state law." Id. Nevertheless, considering its Paoli decisions, it appears that the Third Circuit believes that a claim for medical monitoring is permissible under Pennsylvania common law. See id.
Third Circuit concluded that HSCA’s requirements for medical monitoring were identical to common law claims.69

III. REDLAND SOCCER CLUB, INC. v. DEPARTMENT OF THE ARMY

Between 1917 and 1950, the United States Army used a fourteen-acre tract of land in Fairview Township, Pennsylvania, as a dump site for various hazardous wastes.70 Once the Army closed the site, Fairview Township assumed ownership of the land.71 Fairview Township then transformed the site into “Marsh Run Park,” which the Redland plaintiffs used as a recreational facility.72 Nearly three decades later, the Army returned to Marsh Run Park to conduct tests to determine whether hazardous wastes remained.73 The Army’s findings prompted the Redland plaintiffs to

Further evidence of this proposition was offered by the Third Circuit in In re Paoli Railroad Yard PCB Litigation, 113 F.3d 444, 459 (3d Cir. 1997) (Paoli III). In Paoli III, the Third Circuit held that plaintiffs must demonstrate that they were exposed to the hazardous substances at levels significantly above their normal background level to demonstrate a need for medical monitoring under Pennsylvania state common law. See id. at 459 (quoting Redland, 55 F.3d at 847).

69. See Redland, 55 F.3d at 827. Because the plaintiffs in Redland did not demonstrate that they required “special medical monitoring,” the Third Circuit denied their claim. See id.

70. See Redland, 696 A.2d at 139. For HSCA’s definition of “hazardous waste,” see supra note 1.

71. See id. In April of 1987, the Army began testing the park for possible contaminants and in August of that year the park was closed in response to preliminary testing that revealed hazardous substances were indeed present. See id. When the Army decided to abandon the area, it placed a layer of soil and coal ashes over the debris on the site. See id. When the Fairview Township later decided to convert the site into a recreational facility, the township added an additional layer of topsoil. See id.

72. Id. at 140. In the Redland state action, the class of Redland plaintiffs consisted of three groups: (1) children and their family members who participated in soccer activities in the park; (2) Fairview Township employees who prepared the park for the Township’s use; and (3) residents living near the park and relatives who regularly visited them. See Redland Soccer Club, Inc. v. Department of the Army, No. 00388HBC94, slip op. at 2, 3 (Pa. Super Ct. 1994). For a more detailed discussion of the facts of the present action as the Third Circuit presented them in the Redland federal action, see Redland, 55 F.3d at 827. For a discussion of the Redland plaintiffs’ specific allegations and claims for relief, see infra notes 77-81 and accompanying text.

73. See Redland, 696 A.2d at 139. In 1987, while the Redland Soccer Club was still using Marsh Run Park, the United States Corps of Engineers performed soil testing at the former landfill site to determine whether hazardous substances had contaminated it. See Redland v. Department of Army, 55 F.3d at 835-36. The testing revealed contamination in most of the soil and sediment samples. See id. at 836. The testing was funded as part of the Defense Environmental Restoration Account (DERA). See id. The DERA, a program established under 10 U.S.C.A. § 2701 et seq., was initiated to investigate and remedy environmental contamination at former Department of Defense sites. See 10 U.S.C.A. § 2701 et seq. (West 1983).
file suit under HSCA because they were previously unaware that hazardous substances existed at Marsh Run Park. The plaintiffs sought the establishment of a medical monitoring trust fund that would support their efforts to determine whether they incurred harm as a result of the exposure to hazardous substances in Marsh Run Park.

In 1992, after an initial attempt to bring their case in federal district court, the plaintiffs brought the present action in the Court of Common Pleas of York County, Pennsylvania. The court held that although HSCA permits private individuals to assert monitoring costs, the Redland plaintiffs failed to submit sufficient evidence of exposure to hazardous materials in Marsh Run Park to satisfy the burden of proof HSCA imposed. On appeal, the super-

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74. See Redland, 696 A.2d at 143. The Redland plaintiffs asserted their claim under HSCA's citizen suit provision, section 1115, seeking a medical monitoring trust fund and attorneys' fees. See id. The plaintiffs alleged that section 1115's grant of "equitable powers" to courts enabled the Pennsylvania Supreme Court to grant this relief because a medical monitoring trust fund is a cognizable response cost under the "Scope of Liability" provision of HSCA, section 702. See id. For the text of section 1115, see supra note 5.

75. See Redland, 696 A.2d at 137-43.


In 1995, the United States Court of Appeals for the Third Circuit affirmed the district court's dismissal of the claims for medical monitoring, but on grounds different from those upon which the district court decided the case. See Redland Soccer Club, Inc. v. Dep't of the Army, 55 F.3d 827 (3d Cir. 1995) (cert. denied, 116 S.Ct. 772 (1996)). The Third Circuit held that although the Redland plaintiffs presented sufficient evidence of their exposure to toxic substances, they had not demonstrated their need for "special medical monitoring." See id. Therefore, the Third Circuit granted the Army's motion for summary judgment. See id.


78. See id. The plaintiffs relied on a "Public Health Risk Assessment of a Soccer Field Near the New Cumberland Army Depot Fairview Township, [Pennsylvania]" which was conducted to assess the extent of contamination at Marsh Run Park. See id. at 10. The court held that this assessment was "insufficient." See id. The court further stated:

Mere speculation based on risk assessments and statistical assumptions should not provide the basis for relief. [P]laintiffs must show actual exposure to the contaminants. The [r]isk [a]ssessment, while useful with respect to cleanup efforts and preventing exposure to possible contaminants in the future, should not provide the basis for liability for alleged exposure in the past.
ior court reversed the trial court's decision and held that the Redland plaintiffs had presented sufficient evidence to support a claim under HSCA and that it was necessary for the Redland plaintiffs to undergo "special medical monitoring." Although the Pennsylvania Supreme Court affirmed the superior court's ruling that HSCA permits recovery of a medical monitoring trust fund, it also held that plaintiffs must demonstrate a need for "special medical monitoring" before it would allow plaintiffs to recover that fund.

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Id. at 11.

Further holding that attorneys' fees are not recoverable in citizen suits plaintiffs bring under HSCA, the court granted defendant's motion for summary judgment. See id. at 16.

79. See Redland Soccer Club, Inc. v. Department of the Army, No. 033HBG95 (Pa. Super. 1995). The court did not elaborate on its decision not to adopt the "special medical monitoring" element, stating only that "the rule is not a necessary element of a cause of action under [HSCA]." Id. at 12. The superior court also held that contrary to the lower court's ruling, attorneys' fees are recoverable in a citizen suit under HSCA. See id.

80. See Redland, 696 A.2d at 139. The Pennsylvania Supreme Court granted the Army's Petition for Allowance of Appeal limited to the issues of "(1) whether private plaintiffs must show that they require special medical monitoring to recover medical monitoring damages as response costs under HSCA, and (2) whether HSCA authorizes attorney fees for medical monitoring claims." Id. at 140-41. The Army challenged the superior court's holding that a demonstration of a need for "special medical monitoring" was unnecessary in a claim for medical monitoring under HSCA. See Appellant's Brief at 16-17, Redland Soccer Club, Inc. v. Department of the Army, 696 A.2d 137 (3d Cir. 1997) (No. 0046) [hereinafter Appellant's Brief]. The Army also contended that HSCA did not provide for medical monitoring costs as damages at all. See id. at 17. Finally, the Army asserted that attorney fees were not recoverable in an action for medical monitoring. See id. at 17-18.

The Redland plaintiffs argued that the supreme court should adopt the superior court's decision that HSCA does not require demonstration of the element of "special medical monitoring." See id. at 9. Instead, the Redland plaintiffs claimed the only appropriate standard is one requiring proof that medical testing is reasonably necessary under contemporary scientific principles. See id. at 9. The Redland plaintiffs further asserted that HSCA permits private individuals to recover attorneys' fees. See id.

In its decision, although the supreme court agreed with the Army that a medical monitoring claim under HSCA requires evidence to support a need for "special medical monitoring," it also held that attorney fees are recoverable in an action for medical monitoring. See Redland, 696 A.2d at 147. Central to the court's decision was its requirement that the plaintiffs demonstrate a need for "special medical monitoring." See id. at 146. The court defined "special medical monitoring" as monitoring which is "different [t]han normally recommended in the absence of the exposure." Id. In reaching its decision, the court held that section 1115 of HSCA permits courts to grant equitable relief in the form of medical monitoring fees, which are a cognizable recovery cost under section 702. See id. at 142. In finding that HSCA permits a claim for medical monitoring when "special monitoring" is necessary, the court held that the elements are the same as a common law claim for medical monitoring. See id. at 145.
IV. NARRATIVE ANALYSIS

In Redland Soccer Club, Inc. v. Department of the Army, the Pennsylvania Supreme Court held that HSCA’s citizen suit provision authorizes private individuals to assert medical monitoring claims upon their showing of a need for “special medical monitoring.” In reaching its decision, the court first determined that HSCA’s citizen suit provision authorizes a claim for medical monitoring, and then proceeded to outline the elements of that claim by drawing from both Pennsylvania common law as well as several Third Circuit decisions.

A. HSCA’s Citizen Suit Provision Authorizes Private Individuals’ Claims for Medical Monitoring

The Redland court began its determination of whether HSCA permits private individuals to assert claims for medical monitoring by briefly examining the purposes underlying HSCA. The court noted the General Assembly’s belief that “traditional legal remedies were not adequate” to prevent the release of hazardous substances into the environment. It also highlighted the General Assembly’s

81. See id. “Special medical monitoring” is the need for a medical monitoring regime that is different than that which would normally be recommended absent exposure to the hazardous substances. See id. at 145-46. The supreme court agreed with the superior court’s decision that attorney fees were recoverable by private individuals under HSCA’s citizen suit. See id. at 147.


83. See Redland, 696 A. 2d at 141.

84. HSCA, § 6020.102(5). The General Assembly stated: [(t)raditional legal remedies have not proved adequate for preventing the release of hazardous substances into the environment or for preventing the contamination of water supplies. . . . It is necessary, therefore, to clarify the responsibility of persons who own, possess, control or dispose of hazardous substances; to provide new remedies to protect the citizens of this Commonwealth against the release of hazardous substances; and to assure the replacement of water supplies.

Id.
determination that proper regulation and control of hazardous substances in Pennsylvania required "extraordinary enforcement remedies." 85

Turning to the language of HSCA, the Redland court found that although section 702 does not explicitly provide for private individuals' recovery of medical monitoring, such recovery could be implied from section 1115. 86 The court first noted that section 1115(a) permits individuals to assert claims against parties responsible for the release of hazardous substances. 87 It also highlighted that section 1115(b) authorizes courts to grant equitable relief to injured individuals. 88 The Redland court then examined section 702(a)(5) to determine the scope of courts' equitable powers under section 1115(b). 89

85. See id. at § 6020.102(9). The General Assembly commented, "[e]xtraordinary enforcement remedies and procedures are necessary and appropriate to encourage responsible persons to clean up hazardous sites and to deter persons in possession of hazardous substances from careless or haphazard management." Id.

86. See Redland, 696 A.2d at 141-42. The Redland court began its examination of the plaintiffs' medical monitoring claim under HSCA's citizen suit, section 1115. See id. at 141. The following is the pertinent part of the court's analysis:

HSCA makes it unlawful to "[c]ause or allow a release of a hazardous substance." Private citizens injured or threatened with injury from the release of a hazardous substance may bring suit under the citizen suit provision of HSCA [section 1115]. HSCA imposes liability for certain remedies related to the release of a hazardous substance [in section 702]. Id. at 141 (citations omitted).

The court noted that the Redland plaintiffs filed their complaint pursuant to section 6020.1115 and section 6020.702 of HSCA. See id. at 142. It further stated that the plaintiffs requested equitable relief under section 6020.1115(b) "in the form of a medical monitoring trust fund, which they claimed is a cognizable response cost under section 6020.702(a)." Id. The court then held that although section 6020.702(a) does not explicitly use the words "medical monitoring trust fund", the terms "cost of response", "health assessment" and "health effects study" in section 6020.702(a) encompass a claim for medical monitoring. See id. The court ultimately concluded that under their interpretation of these terms, that medical monitoring was recoverable in an action under HSCA's citizen suit provision and was consistent with the General Assembly's "clearly stated intent 'to provide new remedies to protect the citizens of this Commonwealth against the release of hazardous substances.'" Id. (quoting PA. STAT. ANN. tit. 35 § 6020.102(5)).

87. See HSCA, § 6020.1115(a). For the text of section 1115(a), see supra note 5.

88. See id. Section 1115(b) states, "[t]he court may grant any equitable relief; may impose a civil penalty under section 1104; and may award litigation costs, including reasonable attorney and witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." Id.

89. See Redland, 696 A.2d at 142. The Redland court did not elaborate on its decision to consider section 702 in its determination of the scope of its equitable powers. See id. The court's reliance on policies illuminates its decision that a request for medical monitoring damages is an action at equity, rather than at law. See id. Specifically, the distinction between an action at law, which would require
In examining section 702(a)(5), the Redland court determined that although that section refers explicitly only to recovery for the cost of a "health assessment or health effects study," that recovery includes a medical monitoring trust fund. The court supported damages, and an equitable action, which would satisfy section 1115(b), lies in the distinction between a request for a lump sum award of damages and a trust fund. See id. at 142 n.6. The court held that a claim for a medical monitoring trust fund is significantly different from a claim for a lump sum award of damages because a trust fund only compensates the plaintiff for the monitoring costs he actually incurs, whereas damages in the form of a lump sum allows a plaintiff to spend the money as he sees fit. See id.

The court cited the New Jersey Supreme Court's decision in Ayers as instructive. See id. (citing Ayers v. Township of Jackson, 525 A.2d 287 (1987)).

The Pennsylvania Supreme Court concluded that: We, too, believe that a medical monitoring trust fund is a more appropriate remedy than lump sum damages in mass exposure toxic tort cases. However, because the Redland Plaintiffs are seeking only a medical monitoring trust fund, we offer no opinion concerning whether lump sum damages are recoverable under HSCA.

Redland, 696 A.2d at 142 n.6.

The Pennsylvania Supreme Court commented on the appropriateness of the trust fund approach:

A claim for a medical monitoring trust fund is significantly different from a claim for a lump sum award of damages. A trust fund compensates the plaintiff for only the monitoring costs actually incurred. In contrast, a lump sum award of damages is exactly that, a monetary award that the plaintiff can spend as he or she sees fit. Various courts have advocated the trust fund approach instead of the lump sum approach.

Id. (citing Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993) (holding that medical monitoring was proper recovery in light of need to compensate plaintiffs for economic injury associated with need for periodic medical testing); Ayers v. Township of Jackson, 525 A.2d 287 (1987) (rejecting enhanced risk of injury approach court held that medical monitoring was proper method of recovery for plaintiffs requiring medical surveillance following exposure to toxic substances); Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987) (holding that without actual physical injury plaintiff did not have cause of action but was entitled to costs of medical surveillance)).

90. See id. Although the General Assembly did not define "health assessment" or "health risk study," it defined "response" for purposes of HSCA as: Action taken in the event of a release or threatened release of a hazardous substance or a contaminant into the environment to study, assess, prevent, minimize or eliminate the release in order to protect the present or future public health, safety, or welfare or the environment. The term includes, but is not limited to:

(1) Emergency response to the release of hazardous substances or contaminants.

(2) Actions at or near the location of the release, such as studies; health assessments . . . monitoring and maintenance reasonably required to assure that these actions protect the public health, safety, and welfare and the environment.

(5) Other actions necessary to assess, prevent, minimize or mitigate damage to the public health, safety or welfare or the environment which
its interpretation of "health effects study" in section 702(a)(5) by reasoning that it was consistent with the General Assembly's stated intent "to provide new remedies" to protect individuals from the risks associated with exposure to hazardous substances. After finding that medical monitoring was a cognizable response cost under section 702(a)(5), the court permitted the Redland plaintiffs to bring a citizen suit action under section 1115(a) and to recover a medical monitoring trust fund on the basis of its equitable powers under section 1115(b).

B. The Elements of a Medical Monitoring Claim Under HSCA

Following its rationale that section 1115 permits a private individual to assert a claim for the recovery of a medical monitoring trust fund, the Pennsylvania Supreme Court delineated the elements of such a claim. The supreme court accepted the Third Circuit's conclusion in the Redland federal action that the elements of a medical monitoring claim under HSCA are the same as the elements of a Pennsylvania common law claim for medical monitor-

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HSCA, § 6020.103.

91. Redland, 696 A.2d at 142. The court stated that because a trust fund compensates the plaintiff for only the actual costs associated with periodic medical testing, it is preferable as a remedy to a lump sum award, which a plaintiff might use in any manner he decides. See id. at 142 n.6. The court again agreed with the New Jersey Supreme Court's decision in Ayers, wherein it found that "medical-surveillance damages will be paid only to compensate for medical examinations and tests actually administered, and will encourage plaintiffs to safeguard their health by not allowing them the option of spending the money for other purposes." Id. (citing Ayers, 525 A.2d at 300-05). For a discussion of the effects of the Ayers decision on claims for medical monitoring, see McCarter, supra note 24.

92. See Redland, 696 A.2d at 142. The court relied on the Ayers court's reasoning in finding that "the use of a court-supervised fund to administer medical-surveillance payments in mass exposure cases . . . is a highly appropriate exercise of the Court's equitable powers . . . ." See id. at n.6 (quoting Ayers, 525 A.2d at 300-05). The court, however, did not specify why a court supervised fund would qualify as an equitable remedy. See id. For a discussion of the differing viewpoints concerning the distinction between court supervised funds and lump sum awards, see supra notes 24-27 and accompanying text.

93. See id. at 143. For a discussion of the evolution of medical monitoring claims in the common law of Pennsylvania, see supra notes 40-59 and accompanying text.
ing. Thus, to ascertain these elements, the court examined Pennsylvania common law.

The Pennsylvania Supreme Court briefly addressed the historical evolution of medical monitoring in Pennsylvania. Initially, courts rejected such claims because plaintiffs were unable to establish actual injury. Eventually, however, Pennsylvania courts recognized the difficulty inherent in demonstrating a latent injury and permitted common law claims for medical monitoring to proceed in equity. The court then examined the treatment of this issue in the Third Circuit's Paoli I, Paoli II and Redland decisions. Unlike the superior court, the supreme court embraced the element of "special medical monitoring" the Third Circuit utilized in those decisions. The supreme court, however, declined to adopt the specific test the Third Circuit developed in those cases because "the nuances added to Paoli I in Paoli II and Redland [made] the verba-

94. See id. at 143-47. In the Redland federal action, the Third Circuit commented in a footnote that a claim for medical monitoring under HSCA is the same as a common law claim for medical monitoring in Pennsylvania. See Redland, 55 F.3d at 849 n.12. The court reached this conclusion through its decision in Paoli I and Paoli II. See id. For a discussion of the Paoli I and Paoli II decisions, see supra notes 60-67.

95. See Redland, 693 A.2d at 143-45.
96. See id. at 143.
97. See Redland, 696 A.2d at 142.
98. See id. at 143-44. The Pennsylvania Supreme Court first acknowledged a claim for medical monitoring in Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996). See id. at 144. Although Simmons specifically addressed the early detection of injury due to exposure to asbestos, the Court did not limit its holding to asbestos cases. See id. at 145. In support of extending the right of medical monitoring beyond asbestos cases, the Redland court reasoned:

[M]edical surveillance damages promote early diagnosis and treatment of disease or illness resulting from exposure to toxic substances caused by a tortfeasor's negligence. Allowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence. Indeed, in many cases a person will not be able to afford such tests, and refusing to allow medical monitoring damages would in effect deny him or her access to potentially life-saving treatment. It also affords toxic-tort victims, for whom other sorts of recovery may prove difficult, immediate compensation for medical monitoring needed as a result of exposure. Additionally, it furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure. Allowing such recovery is also in harmony with "the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease."

Id. (citations omitted).

99. See id. at 145. The Third Circuit predicted that the Pennsylvania Supreme Court would permit claims for medical monitoring. See id. For a discussion of these opinions, see supra notes 60-70 and accompanying text.
100. See id.
tim adoption of the *Paoli I* test impractical."\(^{101}\) Instead, the supreme court determined that to assert a claim for medical monitoring, an individual must satisfy each of the following seven elements:\(^{102}\)

(1) exposure greater than normal background levels;\(^{103}\)

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101. *Id.* The court did not elaborate on what the term "nuances" entailed. See *id.*

102. See *id.* at 145-46. While the *Redland* court did not adopt the specific elements that other state and federal courts have applied to claims for medical monitoring, it indicated its approval of the Third Circuit's, as well as the New Jersey and Utah Supreme Courts' formulations. See *id.*

As only the "special medical monitoring" element was at issue in *Redland*, the Pennsylvania Supreme Court did not have an opportunity to delineate the scope of the other elements of its test. See *id.* at 145-46. Lower Pennsylvania courts will thus be required to interpret the exact scope and meaning of the elements that remain undefined.

Counsel involved in either presenting or defending against a medical monitoring claim should be aware that expert medical witnesses will be involved in litigation. See Schwartz, *supra* note 21, at § 2. Medical monitoring claims are "ultimately dependent" on reliable expert testimony. See generally Burns v. Jacquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987). Counsel preparing to settle medical monitoring claims should be aware that inflation is of such obvious concern to future claimants that parties should address it in all settlement class actions. See BrianWolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U.L. REV. 439, 497 (1996) (highlighting concerns class action plaintiffs encounter in bringing claims for future harm). One scholar has proposed the following rule to apply to plaintiffs seeking settlement of their claims:

In cases providing monetary relief for class members who will suffer injuries in the future, the court may not approve a settlement that does not make periodic adjustments to take into account increases in the cost of living, both generally and with respect to subcomponents of the cost of living for the type of costs for which the monetary relief is provided, unless the settling parties show, and the court finds, that there is good cause why such periodic adjustments should not be made.

*Id.*

103. The Third Circuit characterized this element as whether or not the plaintiff has proven "significant exposure" to a hazardous substance. *Paoli III*, 113 F.3d 444, 459 (3d Cir. 1997) (citing Redland Soccer Club v. Department of the Army, 55 F.3d 827 (3d Cir. 1995)). "Significant exposure" is exposure to toxins at levels significantly above the normal background presence. See *id.* In *Paoli III*, the plaintiffs were exposed to PCBs while living nearby a railroad. See *id.* at 444. The Third Circuit approved of the following jury instruction in *Paoli III*:

Each plaintiff must prove through competent expert testimony that he or she was significantly exposed to PCBs from the Paoli Railyard. The plaintiff must prove that PCBs from the Paoli Yard actually entered his or her body in amounts significantly beyond what would enter a person's body in everyday life elsewhere in the Philadelphia area and in amounts sufficient to cause the plaintiff to have a risk of future disease significantly greater than what he or she would have had without exposure.

*Id.* at 459.

The Utah Supreme Court defined "exposure" in medical monitoring claims to include: "ingesting, inhaling, injecting, or otherwise absorbing the substance in
(2) to a proven hazardous substance;\textsuperscript{104}  
(3) caused by defendant's negligence;\textsuperscript{105}  
(4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease;\textsuperscript{106}  
(5) a monitoring procedure exists that makes the early detection of the disease possible;\textsuperscript{107}  
(6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure;\textsuperscript{108}  


104. Section 301 of HSCA defines "hazardous substance" as it applies to a medical monitoring claim. See HSCA, § 6020.301. Included in HSCA's definition is any substance (1) designated as "hazardous" under the Solid Waste Management Act, (2) defined as "hazardous" pursuant to CERCLA, (3) that poses a substantial threat to the public health and safety or the environment as determined by DEP, and (4) listed in the regulations of the Environmental Quality Board. See id.

For medical monitoring claims in Pennsylvania that do not qualify for adjudication under HSCA, the Utah Supreme Court has offered the following definition of a toxin: a poison, that is, "a substance that through its chemical action usually kills, injures, or impairs an organism." Hansen, 858 P.2d at 979.

105. In light of HSCA's existence as a strict liability statute, it appears that the Pennsylvania Supreme Court, in holding that the elements of a claim for medical monitoring under HSCA are the same as a common law claim for medical monitoring, unintentionally included the element of negligence in the test's elements. See generally HSCA, § 6020.702(a) (stating that "[a] person who is responsible for a release or threatened release of a hazardous substance . . . is strictly liable . . ."). One commentator suggests that in an action for medical monitoring under HSCA, plaintiffs may establish negligence per se. See Danielle N. Rodier, Supreme Court Allows Monitoring Fees, PA. L. WKLY, June 7, 1997, at 30. Pennsylvania cases decided under the Pennsylvania Clean Streams Law and Solid Waste Management Act, however, suggest that negligence per se does not apply. See generally Fleck v. Timmons, 543 A.2d 148 (Pa. Super. Ct. 1988); Lutz v. Chromotex, Inc., 718 F. Supp. 413, 426-30 (M.D. Pa. Ct. 1989). But see generally Centolanza v. Lehigh, 755 A.2d 322 (Pa. Super. Ct. 1999) (suggesting that negligence per se might apply).

106. The Utah Supreme Court has commented on the element of "significantly increased risk of injury." Hansen, 858 P.2d at 979. The court stated: No particular level of quantification is necessary to satisfy this requirement of significantly increased risk . . . Because the injury in question is the increase in risk that requires one to incur the cost of monitoring, the plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of the exposure. It is sufficient that the plaintiff show the requisite increased risk.

Id. at 979. Moreover, the Hansen court defined a "serious" illness as one that in "its ordinary course may result in significant impairment or death." Id.

107. The Utah Supreme Court also requires that a test exist for detecting the injury. See id. If no test exists, then monitoring is pointless and the plaintiff is not harmed until the onset of the actual illness. See id. Only when a test is developed, or an actual injury manifests itself, may a plaintiff bring an action for medical monitoring. See id.

108. The Third Circuit appears to consider elements (1), "significant exposure," and (6), the "special medical monitoring" requirement, to be complimen-
(7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.\textsuperscript{109}

The sixth element, the "special medical monitoring" requirement, was the sole element at issue in \textit{Redland}.\textsuperscript{110} After concluding that the plaintiffs satisfied this element, the court determined that the \textit{Redland} plaintiffs could assert a claim for medical monitoring.\textsuperscript{111}

\textit{Hansen}, 858 P.2d at 980.

The California Supreme Court similarly requires that a plaintiff prove the cost of medical monitoring to be a reasonably certain consequence of his exposure to hazardous substances and the recommended monitoring be reasonable. \textit{See generally} Potter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Cal. 1993). In determining the reasonableness and necessity of monitoring, the following factors are relevant:

1. the significance and extent of the plaintiff's exposure to chemicals;
2. the toxicity of the chemicals;
3. the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease;
4. the seriousness of the disease for which the plaintiff is at risk; and
5. the clinical value of early detection and diagnosis.

\textit{Id.}

\textsuperscript{109} \textit{See Redland}, 696 A.2d at 145-46. Regarding this element, the Utah Supreme Court has commented:

We therefore require not only that a doctor prescribe the test for th[e] plaintiff, but also that the test is shown by expert testimony to be one a reasonable physician in the area of specialty would order for a patient similarly situated, i.e., facing a similar risk of the same serious illness from the same cause.

\textit{Id.}

\textsuperscript{110} \textit{See id.} at 146-47. The court based its conclusion that the \textit{Redland} plaintiffs satisfied the element of "special monitoring" on their doctor's prescription of a monitoring regime that was "[s]ignificantly different from that normally recommended in the absence of exposure . . . ." \textit{Id.} at 147. The controversy surrounding this issue stemmed from the plaintiffs' doctor's comments regarding the monitoring regime:

I emphasize, as well, that the examinations suggested . . . are not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society from those carcinogen exposures which are already prevalent. It is because of the increased risk of the exposures at the Marsh Run area, however, that such examinations become more urgent, and access to such examinations should not be left to vicissitudes of employment, health insurance contract, or other individual economic difficulties so prevalent in current health care delivery.

\textit{Id.} at 146. When the Third Circuit in the \textit{Redland} federal action addressed the questions the plaintiffs' doctor's statements raised, it concluded that as the monitoring regime she recommended was not out of the ordinary, the plaintiffs could
The court therefore declined to grant defendant’s motion for summary judgment because the difference between plaintiffs’ monitoring regime and the regime normally recommended in the absence of exposure to hazardous substances sufficed to support a claim for special medical monitoring.112

V. CRITICAL ANALYSIS

In Redland, the Pennsylvania Supreme Court held that HSCA section 1115 authorizes claims for medical monitoring.113 Medical monitoring, however, is not an appropriate citizen suit action because such an action seeks recovery of private damages.114 Consequently, the Redland plaintiffs should have instead asserted their
not satisfy the “special monitoring” requirement. See Redland Soccer Club v. Department of the Army, 55 F.3d 827, 847-48 (3d Cir. 1995). The Supreme Court also noted that the Army’s own medical expert had reviewed the plaintiffs’ doctor’s report and found that it differed from the procedures doctors normally recommended to individuals that have been exposed to the toxic substances found in the American Cancer Society’s “Recommendations for the Early Detection of Cancer in Asymptomatic People.” See Redland, 696 A.2d at 146-47. Acknowledging the inconsistencies of the plaintiffs’ doctor’s report, the court held that, viewed in the light most favorable to the plaintiffs, her monitoring regime differed sufficiently from one that would be prescribed to a member of the general public absent the exposure to withstand a motion for summary judgment. See id. at 147.

112. See id. After the court briefly addressed the Redland plaintiffs’ second claim for the recovery of attorneys’ fees under HSCA, the court held that because section 1115 is the only HSCA provision that authorizes citizen suits, and permits the recovery of attorneys’ fees, a plaintiff can recover attorneys’ fees even when receiving relief from another section of the Act. See id.

113. See id. at 137-40. For the facts of Redland, see supra notes 70-80 and accompanying text.

114. See, e.g., Peterman v Techalloy Co., 29 Pa. D. & C. 3d 104 (1982); Ball v. Joy Technologies, Inc., 958 F.2d 36, 38 (4th Cir. 1991) (holding medical monitoring is claim for damages); Jaffee v. United States, 592 F.2d 712, 715 (3d Cir. 1979) (stating plaintiff cannot transform claim for damages into equitable action by asking for injunction that orders payment of money); Castano v. American Tobacco Co., 160 F.R.D. 544, 552 (E.D. La. 1991) (declining to certify plaintiffs’ claims for medical monitoring of diseases related to exposure to tobacco under Rule 23(b)(2) because plaintiffs primarily sought monetary damages, not equitable relief). But see Barnes v. American Tobacco Co., 989 F. Supp. 661, 665 (E.D. Pa. 1997) (holding if plaintiffs seek establishment of court-supervised medical monitoring program through which class members will receive periodic examinations, court can properly characterize plaintiffs’ medical monitoring claim as claim seeking injunctive relief); Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824-26 (D.C. Cir. 1984) (finding equitable remedy of providing diagnostic examinations preferable to post-trial award of damages); Barth v. Firestone Tire & Rubber Co., 661 F. Supp. 193 (N.D. Cal. 1987) (upholding employee’s request for “equitable relief” through which he sought creation of medical monitoring fund which would gather and forward to treating physicians information relating to diagnosis of diseases which might result from plaintiff’s exposure to toxins while employed at defendant’s tire manufacturing facility). The Barth court explained, in sustaining the plaintiff’s claim for equitable relief, that but for its creation of a fund that would locate exposed workers and aid in the early diagnosis
claim under section 702.115 Whereas section 1115 explicitly permits courts to award attorneys’ fees, section 702 does not.116 Accordingly, the Redland court’s desire to award both attorneys’ fees and medical monitoring to a class of sympathetic plaintiffs drove its decision.117 Essentially, the supreme court decided Redland incor-

of diseases they might potentially develop, most employees would never know that they had been exposed to toxins. See id.

115. In the Redland federal action, the plaintiffs’ claim for medical monitoring was characterized as an action for personal damages rather than as a proper matter for a citizen suit. See Redland Soccer Club, Inc. v. Department of the Army, 801 F. Supp. 1432, 1436 (M.D. Pa. 1992). The district court noted that the plaintiffs should have asserted their claim under section 702. See id. In response to the plaintiffs’ claim for attorney fees, the district court stated:

Plaintiffs also make their requests for attorney fees and expert fees under HSCA . . . . The language of that statute does not support plaintiffs’ interpretation. The relevant section, § 6020.702(a), allows recovery of “(3) Other reasonable and necessary or appropriate cost of response incurred by any other person.” Courts have implied a private cause of action from this provision . . . . It is clear, however, that private recovery is allowed only for “costs of response . . . .” No language in that definition . . . lends credibility to plaintiff’s claim for attorney fees. Further, HSCA expressly allows the Commonwealth to recover attorney fees . . . . Certainly, had it so intended, the legislature could have included a legal fee provision for private suits. It did not and we will not imply one.

Id. at 1436 (emphasis added) (citations omitted).

116. See generally HSCA, § 6020. Section 1115(b) provides, “[t]he court may . . . award litigation costs, including reasonable attorney and witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate.” See HSCA, § 6020.1115(b). Section 702 contains no language authorizing attorney fees. See id. § 702.


Compare Kristin Bohlken, Note, Fitting the Square Peg of Alternative Toxic Tort Remedies into the Round Hole of Traditional Tort Law, 1 DRAKE J. AGRIC. L. 263 (1996) (commenting analysis of medical monitoring case law illustrates not only courts’ slow acceptance of alternative tort theory, but also reasoning for doing so).


In its Paoli decisions, the Third Circuit predicted that the Pennsylvania Supreme Court would adopt medical monitoring as a viable cause of action. See In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 849 (3d Cir. 1990). For a further
rectly because it allowed the Redland plaintiffs to forego the prerequisites of section 1115(a) and thereby unjustifiably benefit from the equitable powers under section 1115(b).\(^{118}\)

A. The Redland Court Improperly Held That Plaintiffs May Assert a Claim for Medical Monitoring Under HSCA’s "Citizen Suit" Provision, Section 1115

Section 1115(a), HSCA’s “citizen suit” provision, requires plaintiffs to file a civil action to “prevent or abate a violation of HSCA.”\(^{119}\) A claim for medical monitoring does not, however, “pre-

discussion of Paoli I, see supra note 60 and accompanying text. However, their prediction was at common law. See id. Faced with pressure from both academics and other jurisdictions that had already accepted claims for medical monitoring, as well as with the prospect of denying a class of sympathetic plaintiffs a remedy for their exposure to hazardous substances, the Pennsylvania Supreme Court failed to acknowledge that it was not dealing with a common law claim for medical monitoring but rather with a Pennsylvania state statutory provision.

118. In the court’s opinion, there is no attempt to reconcile the Redland plaintiff’s claim with the language of section 1115. In Redland, since this was the first time that the Pennsylvania Supreme Court had decided the issue of medical monitoring under HSCA, it seems that, at the least, the court missed the opportunity to clearly demonstrate how a claim for medical monitoring “abates a violation” of HSCA and then falls within the court’s equitable powers. Given the debate over whether actions for medical monitoring are either legal or equitable in nature, the court should have clarified its position on this issue as well. For a discussion of this debate, see supra note 24-28 and accompanying text.

Concerning the supreme court’s support for its award of attorney fees to the Redland plaintiffs, the following is the court’s entire analysis:

Section 6020.1115 is the only section of HSCA that authorizes citizen suits, and thus, it is the only section under which the Redland Plaintiffs could have brought suit. Section 6020.702 specifies various categories of relief for which a defendant may be liable under HSCA. A plaintiff cannot bring a citizen suit under section 6020.702. Instead, a plaintiff must bring a citizen suit under section 6020.1115 and may seek the relief available to private plaintiffs included in section 6020.702, which, as previously discussed, encompasses a medical monitoring trust fund. Although section 6020.702 is silent concerning attorney fees, section 6020.1115(b) explicitly empowers a court to award attorney fees to the prevailing or substantially prevailing party if the court determines that such an award is appropriate. Thus, a plaintiff filing a citizen suit under section 6020.1115, seeking equitable relief in the form of a medical monitoring trust fund under section 6020.702, can also seek attorney fees under section 6020.1115.

Redland, 696 A.2d at 147. The court’s reasoning offers little to illuminate how a medical monitoring claim, one that is essentially requesting a set amount of damages from the defendant to be paid into a court supervised fund, satisfies section 1115(b).

119. See HSCA, § 6020.1115(a). In the context of HSCA’s citizen suit provision, the public’s right to force responsible persons to clean up hazardous sites is at issue. See id. § 102. Because a citizen suit must be an action to “prevent or abate a violation” of HSCA, it is important to determine what constitutes a “violation” under HSCA. See Hyson, supra note 6, at 101. Although HSCA does not define “violation,” section 1108 does define “unlawful conduct.” See id. Under section

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36
vent or abate a violation of HSCA." The Redland plaintiffs were not interested in abating a violation of HSCA because the Army was already working to restore Marsh Run Park in an attempt to comply with HSCA provisions. Instead, the Redland plaintiffs asserted their claim to recover personal injury damages to pay for the costs of periodic medical examinations. A citizen suit is not a mechanism for private recovery of personal injury damages, but is

1108(1) of the Act, it is unlawful for a person to "[c]ause or allow a release of a hazardous substance." HSCA, § 6020.1108(1). Therefore, a "release" is a violation of HSCA. See Hyson, supra note 6, at 101.

The Pennsylvania Supreme Court apparently assumed that medical monitoring "abates a release." It is not immediately evident, however, how medical monitoring abates a release, especially within the context of a citizen suit. The remedies available in citizen suits are almost always in the form of injunctions or civil penalties. See Pa. Bar Inst., supra note 4, at 1. Moreover, while the General Assembly did not define "abatement" for purposes of HSCA, it did define "abatement" for purposes of SWMA. See HSCA, § 6018.103. For purposes of SWMA, "abatement" is "[t]he restoration, reclamation, recovery, etc., of a natural resource adversely affected by the activity of a person, permittee or municipality." Id. Without an indication from the General Assembly that private damages were recoverable under HSCA's citizen suit, the Pennsylvania Supreme Court was not at liberty to grant this recovery.

120. Redland, 696 A.2d at 141. The Redland court analyzed this issue by holding that "[p]rivate citizens injured or threatened with injury from the release of a hazardous substance may bring suit under the citizen suit provision of HSCA." Id. However, this only addresses the initial requirement of section 1115(a). In its entirety, section 1115(a) provides that:

A person who has experienced or is threatened with personal injury or property damage as a result of a release of a hazardous substance may file a civil action against any person to prevent or abate a violation of this act or of any order, regulation, standard or approval issued under this act.

HSCA, § 6020.1115(a) (emphasis added). Although section 1115(a) allows plaintiffs to bring a suit when they have suffered injury, it also requires that the plaintiffs' action is brought to prevent or abate a violation of HSCA. By not addressing this concern, the court overlooked a fundamental aspect of section 1115(a).

121. See Redland, 696 A.2d at 139. After testing determined that there existed hazardous substances at Marsh Run Park, the Army initiated a program to remediate the contamination. See id.

122. For a proposal that medical monitoring claims are, in actuality, little more than plaintiffs' requests for damages, see supra notes 81-85 and accompanying text.

123. See Pa. Bar Inst., supra note 4, at 1. There exists some indication that the General Assembly did not intend for plaintiffs bringing claims under HSCA to be able to recover even private damages. See H.B. 1852-3428, at 41-42, Printer's No. 3428, § 509. [37 House Legislative Journal at 991-1039.]. A version of HSCA that would have explicitly provided for private injury damages was deleted in the final version. See id.

Citizen suit provisions occasionally permit recovery for personal injury damages. See Pa. Stat. Ann. tit. 92, § 680.15(c) (Storm Water Management Act [SWMA]). Notably, in the instances in which the General Assembly allowed private individuals to file citizen suits to recover personal injury damages, they have also authorized equitable remedies and explicitly provided for personal injury damages. See id. The SWMA citizen suit provision explicitly provides:
designed to enable private individuals to enforce public rights.\footnote{124} Moreover, in the \textit{Redland} federal action, the Third Circuit did not identify the plaintiffs' medical monitoring claim as an action under section 1115, but as an action for "response costs" in the form of "health risk assessment fees," which plaintiffs may recover under section 702.\footnote{125} Therefore, the \textit{Redland} plaintiffs' claim failed to satisfy the requirements of section 1115(a).\footnote{126}

The \textit{Redland} plaintiffs' claim also failed to satisfy the requirements of section 1115(b) because their claim for personal injury damages fell outside the scope of the equitable remedies, civil penalties and litigation costs that are available as judicial remedies under section 1115(b).\footnote{127} In \textit{Redland}, the court held that it would place any medical monitoring award in a court-supervised fund rather than distribute it to the plaintiffs as a lump sum, characterizing the monetary award as equitable rather than legal damages.\footnote{128} Nevertheless, medical monitoring in either form is no different

\begin{itemize}
\item[(a)] Any activity conducted in violation of the provisions of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, is hereby declared a public nuisance.
\item[(b)] Suits to restrain, prevent or abate violation of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, \textit{may be instituted in equity} or at law by the department, any affected county or municipality, or any aggrieved person. Except in cases of emergency where, in the opinion of the court, the circumstances of the case require immediate abatement of the unlawful conduct, the court may, in its decree, fix a reasonable time during which the person responsible for the unlawful conduct shall correct or abate the same. The expense of such proceedings shall be recoverable from the violator in such manner as may now or hereafter be provided by law.
\item[(c)] Any person injured by conduct which violates the provisions of section 13 may, in addition to any other remedy provided under this act, recover damages caused by such violation from the landowner or other responsible person.
\end{itemize}

\textit{Id.} (emphasis added).

Nevertheless, SWMA's allowance for private recovery is a highly unique feature in Pennsylvania citizen suit provisions. \textit{See generally}, The Storage Tank and Spill Prevention Act, PA. STAT. ANN. tit. 35, § 6021.1305 (West 1993); Safe Drinking Water Act, § 721.13(b); Phosphate Detergent Act, § 725.13(g); Storm Water Management Act, § 680.15; Flood Plain Management Act, § 679.502(b).

\footnote{124} See PA. BAR. INST., \textit{supra} note 4, at 1. For a general discussion of the purposes of citizen suits, see \textit{supra} note 7.

\footnote{125} See \textit{Redland Soccer Club} v. Department of the Army, 55 F.3d at 849 n.12.

\footnote{126} See \textit{Redland}, 696 A.2d at 139-48.

\footnote{127} See HSCA, § 6020.1115(a), (b). For a non-exhaustive list of jurisdictions that have held that medical monitoring claims are actions for damages, see \textit{supra} note 26. For a non-exhaustive list of jurisdictions that have held that medical monitoring damages in the form of a court-supervised fund are equitable in nature, see \textit{supra} note 24.

\footnote{128} For a discussion of the \textit{Redland} court's reasoning, see \textit{supra} notes 81-112 and accompanying text.
from a traditional damages claim for medical expenses. Rather than pay the damages award directly to the plaintiff, the defendant merely places the money into a court-supervised account.

In further support of its holding, the supreme court cited HSCA's intent "to provide new remedies" to protect Pennsylvania citizens against the release of hazardous substances. Policy arguments, however, are not a substitute for rigorous statutory analysis. By passing HSCA, the General Assembly accomplished its goal of "providing new remedies." The General Assembly did not intend this general policy to act as a waiver of express statutory language.

B. The Redland Court Should Have Analyzed the Medical Monitoring Claim Under HSCA's "Scope of Liability" Provision, Section 702

In determining whether medical monitoring is available under HSCA, the supreme court should have analyzed the Redland plaintiffs' claim under section 1101 rather than under section 1115.

129. See generally Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991) (stating that "[a] claim for medical surveillance costs is simply a claim for future damages").

130. See Ian Gallagher, Hazardous Substance Litigation in Maryland: Theories of Recovery and Proof of Causation, 18 J. CONTEMP. HEALTH L. & POL'Y 423, 438 (1997) (commenting most state courts considering medical monitoring issue have analyzed recovery in terms of legal measure of damages); Campbell & Schaffer, supra note 26, at 31-32 (noting most courts first conclude that medical monitoring relief is simply compensation for necessary medical expenses plaintiffs reasonably will incur in future and classify those costs as item of damages). See also Werlein v. United States, 746 F. Supp. 887, 895 (D. Minn. 1990) (stating that "[p]ayment of cash by one party to reimburse other parties for costs incurred is not injunctive relief"). But see Terry Christovich Gay & Paige Freeman Rosato, Combating Fear of Future Injury and Medical Monitoring Claims, 61 DEF. CONS. J. 554, 554 (1994) (suggesting courts consider medical monitoring to be equitable relief).

131. See Redland, 696 A.2d at 142. The General Assembly's stated purpose in enacting HSCA was "to provide new remedies to protect the citizens of this Commonwealth against the release of hazardous substances . . . .". HSCA, § 6020.102(5).

132. Section 1115(a) requires a person seeking relief under HSCA's citizen suit to file an action to "abate a violation" of HSCA. See HSCA § 6020.1115(a). The court apparently interpreted the Redland plaintiff's claim for medical monitoring as a "new remedy" that "abates a violation" of HSCA. See id. It is difficult to imagine that the General Assembly determined that Pennsylvania courts were free to grant any and all "new remedies" into the provisions of HSCA as they should develop. See id.

133. See HSCA, § 6020.1101. Section 1101 provides: [a] release of a hazardous substance or a violation of any provision, regulation, order or response approved by the department under this act shall constitute a public nuisance. Any person allowing such a release or committing such a violation shall be liable for the response costs caused by the release or the violation. The board and any court of competent juris-
Section 1101 places liability on persons responsible for releases of hazardous substances.\textsuperscript{134} Section 702 delineates the scope of liability for these responsible persons.\textsuperscript{135} As HSCA’s "Scope of Liability" provision, section 702 is not encumbered by the same restrictions that a claim under HSCA’s citizen suit provision necessarily entails.\textsuperscript{136} Section 702 does not require a plaintiff seeking recovery to assert a claim for the abatement of a release of hazardous sub-

\textit{Id.} For the text of section 1115, see \textit{supra} note 5.

\textsuperscript{134} See \textit{id.} Prior to \textit{Redland}, the Pennsylvania Supreme Court held that HSCA permits a private right of action. See Smith v. Weaver, 665 A.2d 1215, 1221 (Pa. Super. 1995). Similarly, the District Court for the Middle Eastern District of Pennsylvania held that private damages are recoverable under HSCA. See Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., 891 F. Supp. 221, 225-26 (E.D. Pa. 1995) (holding no provision of HSCA permits recovery for private damages). The district court required that the plaintiff in \textit{Bethlehem Iron Works} first establish that the defendant was a "responsible person" under section 701, and then demonstrate that the recovery requested was a response cost under section 702. See \textit{id.} See generally Recent Developments In Pennsylvania Law, 34 DuQ. L. Rev. 553, 620 (1996) (noting Pennsylvania courts have held that section 1101 in combination with section 702 permits private cause of action).


Recent decisions in which courts consider whether a private cause of action exists under HSCA have tended to find that a private cause of action does exist under HSCA. See generally Smith v. Weaver, 665 A.2d 1215, 1221 (Pa. Super. 1995); \textit{Bethlehem Iron Works}, 891 F. Supp. at 225-26.

Generally, the courts in those cases relied on: (1) the language of HSCA section 702(a)(5), which provides for recovery of response costs "incurred by any other person;" (2) parallel provisions of CERCLA, which courts have interpreted as providing for a private right of action; and (3) the Pennsylvania Department of Environmental Resources’ interpretation of section 702(a), which supports the finding of a private right of action. See generally Smith, 665 A.2d at 1220; Toole v. Gould, Inc., 764 F. Supp. 985, 992 (M.D. Pa. 1991); General Elec. Envtl. Services v. Envirotech, Corp., 763 F. Supp. 113, 115-21 (M.D. Pa. 1991).

In the \textit{Redland} federal action, the district court found that HSCA, section 702(a)(3), authorized a private cause of action for response costs and that section 702(a)(5) provided for the recovery of medical monitoring damages. \textit{Redland}, 835 F. Supp. at 803. The Third Circuit did not reach these issues because it found that 1) the \textit{Redland} plaintiffs failed to introduce sufficient evidence of exposure to hazardous waste to survive a motion for summary judgment on their Federal Torts Claims Act (FTCA) medical monitoring claim, and 2) the elements for a medical monitoring claim were the same under HSCA as under the FTCA. See \textit{Redland Soccer Club}, Inc. v. Department of the Army, 55 F.3d 827, 849 n.12 (3d Cir. 1995).

\textsuperscript{136} See HSCA, § 6020.1115(a). As a prerequisite to suit, section 1115(a) requires that an injured plaintiff bring an action to abate the release of a hazardous substance before he may compel a regulated entity to comply with the regulations of HSCA. See \textit{id.} Section 702 holds responsible persons \textit{strictly liable} for the costs stemming from the release of the hazardous substance. See \textit{id.} § 702. A plaintiff
stances.\textsuperscript{137} Instead, after a release occurs, a plaintiff may recover for the damages associated with that release.\textsuperscript{138} While section 1115 focuses on compelling a regulated entity to comply with the provisions of HSCA, section 702 permits recovery for the effects that result from non-compliance with HSCA.\textsuperscript{139}

One category of recovery under section 702 is response costs associated with the "cost of a health assessment or health affects study."\textsuperscript{140} Because the \textit{Redland} plaintiffs would have been able to attain relief under this section, the supreme court should have focused its analysis on this section.\textsuperscript{141} Moreover, HSCA does not bar plaintiffs from seeking remedies either at law or equity.\textsuperscript{142} Even if the Pennsylvania Supreme Court decided that HSCA does not authorize a private right of action, which is an unlikely proposition given its holding, it could have permitted the \textit{Redland} plaintiffs to proceed with a common law claim for medical monitoring.\textsuperscript{143} Under this approach, however, the plaintiffs would not have recovered attorneys' fees.\textsuperscript{144}

\textsuperscript{137} See id. Pennsylvania courts have interpreted section 702 as providing a separate cause of action although it requires only a demonstration of injury. See id.

\textsuperscript{138} See id.

\textsuperscript{139} See id. If the General Assembly had intended (in actions brought under HSCA's citizen suit provision) to permit recovery for all cognizable recoveries throughout HSCA, it would have had no purpose in enacting the citizen suit provision. See Hyson, supra note 6, at 100. By placing an attorneys' fee provision in section 702, the General Assembly could have avoided forcing citizen suits to proceed via section 1115. See id.

\textsuperscript{140} HSCA, § 6020.702(a). This section provides that a responsible person "is strictly liable for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes ... [t]he cost of a health assessment or health effects study." Id.

\textsuperscript{141} For a discussion of the term "health affects study" and how Pennsylvania courts have interpreted it, see supra note 33 and accompanying text.

\textsuperscript{142} See HSCA, § 6020.1107. Section 1107 provides that "[n]othing contained in this act shall abridge or alter rights of action or remedies at law or in equity." Id.

\textsuperscript{143} See id. The \textit{Redland} court's possible hesitancy to proceed under section 702 did not necessitate its employment of section 1115, or even HSCA at all. It was therefore unnecessary for the court to distort the purposes of HSCA in order to provide the remedy that the plaintiffs sought. The plaintiffs could have simply filed their claim for medical monitoring under a negligence or nuisance action at common law. See \textit{Redland}, 696 A.2d at 143. As the \textit{Redland} decision demonstrates, the court was already prepared to acknowledge a common law claim for medical monitoring. See id. Of course, this approach would not permit the recovery of attorney fees.

\textsuperscript{144} See \textit{Pa. Stat. Ann. tit. 42, § 1726(a)(1) (West 1993). In Pennsylvania, the "American Rule" is embodied in section 1726(a)(1), which provides that absent authorization by either statute or contract, each party must pay his own attorneys' fees. See id.
VI. IMPACT

As a result of the Pennsylvania Supreme Court’s decision in Redland, Pennsylvania residents may now recover medical monitoring costs under both the common law and HSCA.145 Plaintiffs pursuing actions under HSCA have the additional incentive of the potential for attorneys’ fees.146 Pennsylvania courts are responsible for developing the scope of the Redland test for medical monitoring and, in light of Redland, it appears they may interpret the Redland elements broadly in the interest of effectuating the General Assembly’s intent to “provide new remedies.”147

Broad judicial interpretation of HSCA will provide plaintiffs considerable latitude when attempting to satisfy the Redland test.148 Plaintiffs that have been exposed to hazardous substances will encounter few impediments when asserting medical monitoring claims in Pennsylvania. For instance, the Redland court found that the plaintiffs satisfied the “special medical monitoring” requirement, even after their own doctor concluded that the recommended tests were “not out of the ordinary.”149 Although the Pennsylvania Supreme Court’s interpretation of the need for “spe-

145. After Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996), some doubt existed regarding whether claims for medical monitoring would apply only in actions involving asbestos exposure. See M&M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683 (M.D. Pa. 1997) (noting Simmons decision might not apply to other causes of action). In Redland, the Pennsylvania Supreme Court held that medical monitoring actions were not limited to asbestos cases and that, instead, courts would determine whether a certain factual situation qualified for medical monitoring under the test the court outlined in Redland. See Redland, 696 A.2d at 143. The court also extended medical monitoring to suits under HSCA. See id.


147. Although the Pennsylvania Supreme Court decided against the wholesale adoption of the tests the Third Circuit or other state courts advanced, counsel bringing medical monitoring claims in Pennsylvania, as well as in other jurisdictions, should look to these decisions to determine the scope of the elements necessary to prove claims for medical monitoring.

148. For instance, in Redland, to determine whether particular diagnostic examinations satisfied the element of “special medical monitoring,” the court relied on a standard the American Cancer Society supplied. See Redland, 696 A.2d at 146. The court, however, did not state why it applied that particular standard. See id.

149. Redland, 696 A.2d at 146. Although the Redland court was clearly sympathetic to the plaintiffs’ claim, one commentator suggests that the requirement that plaintiffs demonstrate the elements of a medical monitoring claim will likely allay concerns that medical monitoring claims will result in a multitude of lawsuits. See Schwartz, supra note 21, at § 2. See also Miranda v. Shell Oil Co., 15 Cal. Rptr. 2d 569, 574 (Cal. App. Dist. 1993) (commenting courts’ “decision to permit medical monitoring” neither eliminates plaintiff’s obligation to prove all elements of his cause of action or to demonstrate reasonable necessity of medical monitoring).
cial medical monitoring" may produce a just result under the common law, in light of HSCA's language, the court should have left this determination to the General Assembly.

State legislatures in other jurisdictions should recognize that, because they may not have contemplated medical monitoring as a valid cause of action when enacting state environmental statutes, these statutes may act as a bar to recovery. Medical monitoring is a highly appropriate means of compensating plaintiffs for the costs of periodic medical examinations associated with exposure to hazardous substances. The common law in many jurisdictions has evolved to meet the peculiar challenges facing the toxic tort victim and state legislatures should not hesitate to follow their lead.

Craig A. Stevens


151. See Laratta Paszamant, supra note 24, at 103-04 (acknowledging, although long latency periods associated with many diseases resulting from contact with hazardous substances may frustrate many traditional tort principles of recovery, common law is still able to evolve to meet plaintiffs' needs).