

## The Wisconsin Court of Appeals Upholds Dismissal of Medical Monitoring Claims

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In *Alsteen v. Wauleco*, 2011 WL 2314988 (Wis. Ct. App. June 14, 2011), the Wisconsin Court of Appeals upheld the dismissal of numerous plaintiffs' claims for medical monitoring, holding that the plaintiffs' alleged increased risk of future harm was not an actual injury that would support an award of damages under Wisconsin law. Amber Alsteen and 69 other plaintiffs (collectively, "Alsteen") alleged the defendants were liable for the release of a chemical preservative called "Penta" into a residential neighborhood in Wausau, Wisconsin from 1946 to 1986. While Alsteen did not suffer from any present adverse health effects due to the alleged contamination, she alleged that Penta exposure "significantly increased [her] risk of contracting cancer" and sought "future expenses related to medical monitoring." The trial court dismissed Alsteen's claims, finding that the alleged risk of future harm was insufficient to state a claim for actual injury, as required by Wisconsin law.

The Wisconsin Court of Appeals affirmed the dismissal of Alsteen's claims. The court noted that Wisconsin law requires plaintiffs to prove an actual injury before they may recover in tort, and Alsteen did not allege any actual injury or damage. First, Alsteen's allegation that she faces a significantly increased risk of cancer does not state an injury, because Wisconsin law holds that the "mere possibility of future harm" does not constitute actual injury. Second, the court held that mere exposure to a hazardous substance is not an actual injury, rejecting Alsteen's reliance on cases involving needlesticks and the fear of HIV. The court explained that the needlestick cases involved actual injury (the needlestick) and different policy concerns than the possibility of environmental exposure to toxins, as "most people are exposed to a wide variety of environmental contaminants, including carcinogens, on a daily basis." Finally, the court rejected Alsteen's argument that her alleged future need for diagnostic examinations was an actionable injury. As the court explained, "Alsteen's argument turns tort law on its head by using the remedy sought - compensation for future medical monitoring - to define the alleged injury." *Id.*

By dismissing Alsteen's claims, the Wisconsin Court of Appeals "recognize[d] that allowing a medical monitoring claim absent present injury would constitute a marked alteration in the common law." Thus, the court preserved Wisconsin's basic common law principle that a plaintiff must allege and prove an actual, present injury to recover in tort.

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