EVOLVING STANDARDS FOR FEAR OF FUTURE DISEASE CLAIMS IN THE POST-*POTTER* ERA

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I. INTRODUCTION

The proliferation of toxic tort litigation in the United States has catapulted new damage theories into the courts. Plaintiffs in these cases often try to recover damages even though they are not able to establish that they have any present injury. In so doing, they often attempt to bring claims that fall into one of three categories: (1) fear of future disease, (2) increased risk of disease, and (3) medical monitoring.

One difficulty with allowing recovery for these types of claims is that exposure to natural and man-made substances considered at some dose to be toxic, hazardous, carcinogenic or potentially carcinogenic is unavoidable in twentieth century America. To distinguish among these myriad exposures, one must determine whether an individual has received a dose of a specific chemical which is known to cause a perceptible health effect. Dr. Bruce Ames, noted cancer researcher and professor of biochemistry and molecular biology at the University of California at Berkeley, has described the importance of recognizing widespread exposure to, and relative doses from, natural and man-made carcinogens:

> [A]lmost all the world is natural chemical, so it really makes you rethink everything. A cup of coffee is filled with chemicals. They've identified a thousand chemicals in a cup of coffee. But we only found 22 that have been tested in animal cancer tests out of this thousand. And of those, 17 are carcinogens. There are 10 milligrams of known carcinogens in a cup of coffee and that's more carcinogens that you're likely to get from pesticide residues for a year![1]

When plaintiffs are permitted to recover for future illness based on exposure to minute concentrations of chemicals in the environment without establishing a scientific basis that the feared disease is likely to develop, the class of potential plaintiffs can become almost limitless, and the extent of a defendant's liability may far exceed its culpability. In addition, the resulting costs of such litigation can be staggering, and

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1. Virginia Postreol, *Of Mice and Men, Finding Cancer's Causes*, REASON, Dec. 1991, at 18 (interview of Bruce N. Ames); *see also* Bruce N. Ames and Lois S. Gold, *Too Many Todent Carcinogens: Mitogenesis Increases Mutagenesis*, 240 SCIENCE 970-71 (1990) ("[H]umans are well buffered against toxicity at low doses from both man-made and natural chemicals .... [H]uman exposure to rodent carcinogens is far more common than generally thought; however, at the low doses of most human exposure ... the hazards may be much lower than is commonly assumed and will often be zero.").

society ultimately bears these costs through higher prices of products and higher costs of insurance. Thus, appropriate, scientifically-based standards of proof for this type of action are critical.

The California Supreme Court issued an important decision concerning claims for fear of future disease in 1993, in *Potter v. Firestone Tire and Rubber Co.*[2] Commentators called the decision a potential "landmark" or "seminal" case and generally agreed on its importance.[3] This Article will discuss fear of cancer as one of several relatively new theories of damage recovery in toxic tort actions. Part I will give the general background on three relatively new damage theories. Part II will discuss the *Potter* decision, and Part III will examine whether courts across the country are following *Potter* as they issue decisions in fear of future disease cases.[4]

II. SUMMARY OF NOVEL DAMAGE THEORIES

A. Fear of Future Disease

Claims involving fear of future disease constitute a subset of emotional distress claims.[5] Although fear of future disease claims include claims for both intentional and negligent infliction of emotional distress, this Article will focus on fear of future disease claims in the negligence context.[6]

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2. 6 Cal. 4th 965 (1993).

3. *See, e.g.*, Eric Scott Fisher, *Potter v. Firestone and the Infliction of Emotional Distress*, 30 TORT & INS. L.J. 1071, 1084-85 (1995) ("Fear of cancer claims involve intense emotional concerns, yet they also present enormous societal ramifications. *Potter* is significant because it provides the necessary judicial balancing between these competing concerns. . . . Although some plaintiffs may be foreclosed from recovery by the *Potter* analysis, it represents an optimal model for fear of cancer cases . . . *Potter* may be the solution."); *See also* Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 VAND. L. Rev. 789, 808 (1996) ("If increased risk were explicitly recognized as the injury underlying the fear of future disease claims, many of these inconsistencies could be reduced. In *Potter*, the Supreme Court of California made an important move in this direction.") (footnote omitted); Richard H. Krochock & Mark A. Solheim, *Psychological Damages From Toxic Substances: Problems and Solution*, 60 DEF. COUNS. J. 80, 83 (1993) ("*Potter v. Firestone Tire and Rubber Co.* is a potential landmark decision in its impact on future toxic exposure emotional distress claims.").

4. California courts continue to follow *Potter*. *See, e.g.*, *Macy's California Inc. v. Superior Ct.,* 48 Cal. Rptr. 2d 496 (Cal. Ct. App. 1995) (explicitly applying the *Potter* test to a cause of action for fear of AIDS).

5. *See* Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box*, 53 FORDHAM L. REV. 527, 570-71 (1984) (discussing the evolution of fear of future disease claims).

6. This Article will focus primarily, and almost exclusively, on fear of cancer cases. In particular, the issue of fear of AIDS is beyond the scope of this article. Fear of AIDS is developing

In order to thwart a potential flood of fraudulent claims for negligent infliction of emotional distress, courts have, since the inception of the cause of action, required corroborating evidence of the alleged mental anguish.[7] Traditionally, the required corroborating evidence consisted of an independent physical injury that caused the emotional distress.[8] In such cases, the emotional distress is parasitic to the host claim for negligently inflicted physical injuries.[9] More recently, many courts have employed a variant of the physical injury test by requiring evidence of either a physical injury which caused the emotional distress or evidence that the emotional distress has manifested itself in physical symptoms.[10]

A minority of states have abolished the physical injury requirement altogether.[11] In lieu of the physical injury requirement, these jurisdictions limit emotional distress causes of action by applying one of a number of objective "reasonableness" tests that vary significantly in their stringency.[12] For example, while some jurisdictions find that a fear

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along a parallel track with fear of cancer, but requires a different analysis due to significant differences in how the diseases are contracted, latency periods, and treatments. For a discussion of fear of AIDS, see Mark McAnulty, *Shattering the "Reasonable Window of Anxiety"—Recovering Emotional Distress Damages For the Fear of Contracting AIDS*, 19 S. ILL. U. L.J. 661 (1995); Richard K. Vanik, *Emotional Distress for Fear of Exposure to AIDS: An Infection Headed For Texas*, 32 HOUS. L. REV. 1451 (1996).

7. *See* Morehead Dworkin, *supra* note 5, at 545.

8. *See id.*; *see also* Susan J. Zook, *Under What Circumstances Should Courts Allow Recovery for Emotional Distress Based Upon the Fear of Contracting AIDS?*, 43 WASH. U. J. URB. & CONTEMP. L. 481, 485 n.28 (1993) (noting that only eight states still follow the independent physical injury rule, which is referred to as the "physical impact rule:" Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Mississippi, and North Carolina).

9. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 176 (Mass. 1982) (explaining the history of negligent infliction of emotional distress).

10. *See, e.g.*, Barnhill v. Davis, 300 N.W.2d 104, 107-08 (Iowa 1981).

11. The following jurisdictions have abolished the physical injury requirement: Alabama, California, Connecticut, Hawaii, Maine, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Texas, and Washington. *See* Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 TORT & INS. L.J. 1, 4 (1992). The following jurisdictions maintain the traditional rule requiring some form of physical injury to recover for negligent infliction of emotional distress claims: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming. *See id*. at 17.

12. *See* Richard K. Vanik, *Emotional Distress For Fear of Exposure to AIDS: An Infection Headed for Texas*, 32 HOUS. L. REV. 1451, 1469 (1996). Vanik Notes that

> [j]urisdictions have applied a spectrum of standards to the reasonableness of fearing a future disease. At the least restrictive end of the spectrum lie Pennsylvania and Maryland, which have allowed recovery even when there is

of future disease is not reasonable unless the feared disease is likely to occur,[13] others find these claims reasonable even if the risk of contracting the disease is minimal.[14] Still other courts hold that a plaintiff may recover for fear of future disease if a "person normally constituted" would experience the fear.[15]

Rather than use a likelihood test or a traditional reasonableness test, some courts have attempted to base the traditional reasonableness test on other criteria. Thus, the Northern District of Illinois determined that to succeed with a fear claim, the plaintiff need only have a "tangible reason to believe he was actually endangered by the incident."[16] The Iowa Court of Appeals attempted to define reasonableness in objective terms by requiring "reliable data available linking the particular herbicide the plaintiffs were exposed to an increased future risk of development of cancer."[17] The Iowa court did not, however, state the amount by which the risk has to be increased in order for a fear of future disease claim to stand.[18]

B. Increased Risk of Disease

The cause of action for increased risk of disease is distinguishable from fear of future disease because it seeks recovery not for the alleged present injury of fear currently experienced, but for the potential future injury of contracting the feared disease.[19] In other words, proponents of

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> no reliable relation between the fear and the likelihood of an occurrence of what is feared. Connecticut imposes a slightly more restrictive standard, allowing recovery when the possibility of disease can not be ruled out. New York applies a totality of the circumstances test to determine the reasonableness of the plaintiff's fears. Slightly more demanding is Nebraska, which considers fears reasonable if the feared event *might* occur. Kansas, Washington, and Wisconsin approach the stricter end of the spectrum by requiring more certainty. At the most restrictive end lies California, with its requirement that existence of the feared malady be 'more likely than not.'

Id. (footnotes omitted).

13. *See, e.g.,* Potter v. Firestone Tire and Rubber Co., 6 Cal. 4th 965, 977 (1993).

14. *See* Debbie E. Lanin, *The Fear of Disease as a Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 ST. JOHN'S L. REV. 77, 87-88 (1993); *see also* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (stating that "fears of future injury can be reasonable even where the likelihood of such injury is relatively low").

15. *See*, *e.g.*, Devlin v. Johns-Manville Corp., 495 A.2d 495, 497 (N.J. Super. Ct. Law Div. 1985).

16. Hennessy v. Commonwealth Edison Co., 764 F. Supp. 495, 506 (N.D. Ill. 1991).

17. Kosmacek v. Farm Serv. Co-op of Persia, 485 N.W. 2d 99, 104 (Iowa App. 1992).

18. *Id.*

19. *See generally* Fournier J. Gale, III & James L. Goyer, III, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723 (1985)(exploring cancerphobia and theories of recovery for fear of future diseases).

this cause of action seek damages for a disease that may never materialize.[20] Courts have been appropriately reluctant to recognize this cause of action due to its entirely speculative nature.[21] Those jurisdictions which do recognize a cause of action for enhanced risk of disease generally require plaintiffs to prove that it is more likely than not that they will contract a disease related to toxic exposure.[22] Few plaintiffs have been able to make the appropriate showing.

C. Medical Monitoring

Medical monitoring has proved by far the most successful for plaintiffs of these three novel tort damage theories. Medical monitoring entails recovery for diagnostic testing and medical examinations after exposure to a toxic substance in order to permit the earliest detection and treatment if the feared disease should occur. The seminal medical monitoring case that shaped the theory is *Ayers v. Jackson Township*.[23] In *Ayers*, a landfill leaked contaminants into the plaintiffs' drinking water.[24] The plaintiffs sought, and the court allowed, recovery for the cost of medical surveillance to detect future indications of cancer although none of the plaintiffs exhibited any present physical injury.[25] The court set forth a five factor analysis to test the necessity of medical monitoring damages. The analysis examined (1) the significance and extent of exposure as a result of defendant's negligence; (2) the toxicity of the chemical; (3) the seriousness of the disease for which the plaintiff is at risk; (4) a significant increase in risk as a proximate result of exposure; and (5) the clinical value of early diagnosis of the disease.[26] The court further required that these factors be proven through "reliable scientific testimony."[27] As a result of the adoption of this test by other

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20. *See id.* at 736 (discussing the "reasonable certainty" standard approved by some courts when discussing the likelihood that the disease will develop).

21. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1205-07 (6th Cir. 1988).

22. *See* Michael A. Pope, *Novel Damage Theories in Toxic Tort Litigation*, 497 PLI 167, 181 (1994); Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 VAND. L. REV. 789, 809 (1996).

23. 525 A.2d 287 (N.J. Super Ct. App. Div. 1987).

24. *Id.* at 291.

25. *Id.* at 297.

26. *Id.* at 291.

27. *Id.*

jurisdictions, medical monitoring is only applicable in cases involving future disease which is detectable and treatable.[28]

Other courts have agreed with New Jersey's reasoning in *Ayers*, and have allowed toxic tort plaintiffs to recover medical monitoring damages in the absence of physical injury in certain circumstances.[29] By way of example, California allowed plaintiffs to recover medical monitoring damages in *Miranda v. Shell Oil Co.*,[30] reasoning that public policy supports this novel form of damages. The Court of Appeals cited four public policy arguments that led it to accept medical monitoring as a form of recovery:

> (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 diseases; (3) Deterrence of polluters; and (4) Elemental justice.[31]

The court held that in order for a plaintiff to be able to recover damages for future medical surveillance, the plaintiff must "establish that the need for monitoring is a reasonably certain consequence of the exposure."[32]

The Supreme Court of Utah also has issued recently a decision in an asbestos case involving claims for medical monitoring damages.[33] In *Hansen v. Mountain Fuel Supply Co.,* the court found that in order

> [t]o recover medical monitoring damages under Utah law, a plaintiff must prove the following:
> (1) exposure
> (2) to a toxic substance,
> (3) which exposure was caused by the defendant's negligence,
> (4) resulting in an increased risk
> (5) of a serious disease, illness, or injury

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28. *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990) (The federal district court predicted that the Pennsylvania Supreme Court would allow medical monitoring claims only if the disease is amenable to early detection and treatment); *See also* Miranda v. Shell Oil Co., 17 Cal. App. 4th 1651, 1659 (Cal. Ct. App. 1993) (following *Ayers*).

29. *See Miranda,* 17 Cal. App. 4th at 1660. However, at least one court requires a physical injury in order to state a claim for medical monitoring. *See* Ball v. Joy Technologies, Inc., 755 F. Supp. 1344 (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36, 39 (4th Cir. W. Va. 1991) (a claim for medical monitoring is simply a claim for future damages, which under West Virginia law is available only where a plaintiff has suffered a physical injury that was proximately caused by defendant).

30. 17 Cal. App. 4th at 1660.

31. *Id.* (*citing Ayers*, 525 A.2d at 311, 312).

32. *Id.* at 1657.

33. Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993).

> (6) for which a medical test for early detection exists
> (7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness,
> (8) and which test has been prescribed by a qualified physician according to contemporary scientific principles.[34]

Notably, the court also held that any award for medical monitoring damages should *not* be paid directly to the plaintiff as payment for the costs of future monitoring in a lump sum or otherwise.[35] Rather, the defendant should pay only for the costs of the medical monitoring services that are actually provided to the plaintiff.[36]

Although medical monitoring is a more widely accepted form of damages than fear of disease or increased risk of disease damages, medical monitoring poses its own unique set of problematic questions. How significant must the increase in risk be in order to recover medical monitoring costs? In addition, how serious must the disease be for which the plaintiff has an increased risk? These same questions should also be asked in connection with all of the novel damage theories discussed above.

III. *POTTER V. FIRESTONE TIRE AND RUBBER CO.*

A. Background

In *Potter*, four plaintiffs who lived adjacent to a landfill claimed physical injuries from exposure to trace elements of volatile organic chemicals in their drinking water.[37] The plaintiffs alleged that Firestone Tire and Rubber Co. (Firestone) had contaminated their drinking water by illegally disposing of toxic waste at a Class II landfill.[38] The plaintiffs alleged specifically that Firestone had violated its own assurances as well as regulatory prohibitions by sending solvents, cleaning fluids, oils, and liquids to the disposal site.[39]

Testing of the plaintiffs' drinking water revealed the presence of certain chemicals in very low concentrations.[40] Although the plaintiffs

34. *Id.* at 979.
35. *See id.* at 982.
36. *See id.*
37. Potter v. Firestone Tire and Rubber Co., 6 Cal. 4th 965, 976 (1993).
38. *See id.* at 977.
39. *See id.* at 975.
40. *See id.* at 976.

alleged various physical symptoms, the trial court found no causal link between their symptoms and contamination of their well water.[41] This lack of causal proof notwithstanding, the trial court determined that "plaintiffs will always fear, and reasonably so, that physical impairments they experience are the result of the well water and are the precursors [sic] of life threatening disease. Their fears are not merely subjective but are corroborated by substantial medical and scientific opinion."[42]

The trial court awarded the plaintiffs $2.6 million in punitive damages, $800,000 for fear of future cancer, and $142, 975 for the cost of medical monitoring.[43] The court of appeals affirmed most aspects of the award, including the fear of cancer award, finding that plaintiffs were not required to establish a present physical injury in order to recover for fear of cancer.[44] The court of appeals also extended the trial court ruling by holding that plaintiffs did not even have to demonstrate a reasonable certainty that they would be diagnosed with cancer in the future before recovering for fear of cancer.[45] According to the court of appeals, any plaintiff exposed to any carcinogen could recover for fear of cancer as long as the fear was serious, certain, and real.[46]

B. Standard for Recovery for Fear of Cancer

A divided California Supreme Court reversed the court of appeals' ruling on recovery for fear of cancer damages. The Court held that

> [I]n the absence of a present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; *and* (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the

41. *See id.* at 978.
42. *Id.*
43. *See id.*
44. *See id.* at 979.
45. *Id.*
46. *See* Potter v. Firestone Tire and Rubber Co., 274 Cal. Rptr., 884, 894 (Cal. Ct. App. 1990).

> plaintiff will develop the cancer in the future due to the toxic exposure.[47]

The supreme court discussed five public policy reasons supporting its conclusion that emotional distress caused by fear of a cancer that is unlikely to develop should not be compensable in a negligence action.[48] First, the court reasoned that "all of us are potential fear of cancer plaintiffs."[49] The court discussed the danger and enormous social cost of having an almost unlimited plaintiff class in fear of future disease cases without any limiting factor in the test for recovery.[50] Such an unlimited plaintiff class would not only impose liability in excess of a tortfeasor's culpability, but would negatively impact the availability and affordability of liability insurance for toxic tort risks.[51] An increase in the cost of liability insurance would lead, in turn, to higher product costs as manufacturers passed on higher expenses to the consuming public.[52]

The court next considered the impact of unlimited plaintiff classes on the health care industry, and determined that the threat of numerous large awards and the cost of insuring against them would decrease the availability of cancer treatment.[53] Cancer drug researchers would be chilled from discovering and making public information about the harmfulness of certain medicines for fear of unlimited lawsuits by plaintiffs with no physical symptoms, but who fear adverse effects from the drugs they take.[54] Similarly, doctors would hesitate to prescribe innovative treatments for fear that later-discovered data about the treatment would spawn innumerable fear of cancer lawsuits by healthy plaintiffs.[55]

Third, the court reasoned, allowing plaintiffs with no physical injuries to recover for fear of cancer would harm the ability to recover of

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47. *Potter*, 6 Cal. 4th at 997.
48. *Id.* at 991-97.
49. *Id*. at 991. In support of this reasoning, see Richard H. Krochock & Mark A. Solheim, *Psychological Damages from Toxic Substances: Problems and Solution*, 60 DEF. COUNS. J. 80 (1993) ("It is difficult to go a week without news of toxic exposure. Virtually everyone in society is conscious of the fact that the air they breathe, [the] water, food and drugs they ingest, [the] land on which they live, or [the] products to which they are exposed are potential health hazards. Although few are exposed to all, few also can escape exposure to any." (quoting Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORD. L. REV. 527, 576 (1984))).
50. *Potter*, 6 Cal. 4th at 991.
51. *See id.*
52. *See id.*
53. *See id.* at 991-92.
54. *See id.* at 993.
55. *See id*.

plaintiffs with actual and present physical injuries.[56] In other words, defendants' resources would be consumed by awards to plaintiffs who will never contract cancer, leaving fewer resources for those plaintiffs who are highly likely to develop the disease.[57]

Fourth, judicial economy and legal predictability require a "sufficiently definite and predictable threshold for recovery" in fear of disease cases.[58]

Fifth, and finally, although the "more likely than not" standard will necessarily deny compensation to plaintiffs with a genuine fear of cancer, the court concluded that it must "limit the class of potential plaintiffs if emotional injury absent physical harm is to continue to be a recoverable item of damages" in light of a delicate balance of factors such as the intangible nature of the loss, the difficulty of measuring damages, and the social cost of attempting to compensate plaintiffs.[59]

C. Standard for Recovery for Defendant's Oppression, Fraud, or Malice

The California Supreme Court set a different standard for recovery for fear of cancer when a defendant has engaged in conduct constituting "oppression, fraud, or malice" according to California Civil Code § 3294(a), (b).[60] The court held that, absent a physical injury or illness, plaintiffs can recover damages for fear of cancer claims without demonstrating that the feared disease is more likely than not if they fulfill the following test:

> (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, he or she is exposed to a toxic substance which threatens cancer; (2) the defendant, in breaching its duty to the plaintiff, acted with oppression, fraud or malice . . . ; *and* (3) the plaintiff's fear of cancer stems from a knowledge, corroborated by reliable

56. *Id.* at 993.
57. *See id.*
58. *See id*.
59. *Id*. at 993-94.
60. Cal. Civ. Code § 3294 defines malice as "conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others. Oppression is defined as despicable conduct that subjects a "person to cruel and unjust hardship in conscious disregard of that person's rights"; and fraud is defined as an "intentional misrepresentation, deceit or concealment of a material fact known to the defendant with the intention . . . of depriving a person of property or legal rights or otherwise causing injury." *Id.*

> medical or scientific opinion, that the toxic exposure caused by the defendant's breach of duty has significantly increased the plaintiff's risk of cancer *and* has resulted in an actual risk of cancer that is significant.[61]

The court reasoned that this relaxed standard was appropriate because a defendant's conduct amounting to oppression, fraud, or malice significantly reduced concerns about imposing liability in excess of culpability.[62] Moreover, the size of the plaintiff class would be smaller in such cases.[63]

D. Analysis of Potter

In setting the "more likely than not" test as the general standard for recovery of fear of cancer damages, the *Potter* court reviewed the holdings of numerous fear of cancer cases across the country.[64] The court distinguished between cases in which the plaintiff suffered a present physical injury[65] and cases in which plaintiffs without physical injuries recovered fear of cancer damages merely by demonstrating the genuineness and reasonableness of their fear.[66]

Under California state law, when a plaintiff can demonstrate physical injury caused by the defendant's negligence, anxiety due to a reasonable fear of future harm caused by that injury is a proper element of damages.[67] Damages recovered as a result of this showing are called "parasitic" damages, which are attached to the "host" physical injury.[68] The California Supreme Court had not addressed, however, the question of recovery for fear of future disease in the absence of physical injury. The court ultimately rejected precedents presented by the plaintiffs in which recovery for fear of cancer required only a showing of genuineness and reasonableness.[69] The court determined that these decisions ignored

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61. *Potter*, 6 Cal. 4th at 999-1000.

62. *Id.* at 999.

63. *See id.* The *Potter* court also reached a number of other holdings concerning medical monitoring, comparative fault, and intentional infliction of emotional distress. These holdings are beyond the scope of this article.

64. *See id.* at 991-98.

65. *See Potter*, 6 Cal. 4th at 995-97 (discussing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988); Lavelle v. Owens-Corning Fiberglas Corp., 30 Ohio Misc. 2d 11, 507 N.E.2d 476 (Ohio Com. Pl. Jan. 12, 1987); Dartez v. Fiberboard Corp., 765 F.2d 456, 468 (5th Cir. 1985); Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993)).

66. *See id.* at 996-97 (discussing *In re* Moorenovich, 634 F. Supp. 634 (D. Me. 1986)).

67. *See id.* at 981.

68 *See id.* at 983-84.

69. *Id.* at 984.

the important policy arguments it had recognized and discussed with regard to the necessity of limiting plaintiff classes.[70]

The *Potter* court did not, however, determine how serious a physical injury must be in order to qualify for "parasitic damages."[71] Nor did the court clearly define how significant the increased risk of disease must be in order to recover for fear of future disease under the "oppression, fraud, or malice" test.[72] By confirming that California does not require a present physical injury in order to recover for fear of cancer, but adopting the "more likely than not" standard, the Potter court both broadened the class of available plaintiffs and limited potential claimants.[73] The *Potter* court weighed in at the more stringent end of a developing continuum of majority opinions on the issue of fear of cancer damages.[74]

IV. JURISDICTIONS DECIDING FEAR OF FUTURE DISEASE CLAIMS POST-*POTTER*

Since *Potter*, courts in many jurisdictions have issued decisions in cases involving claims for fear of future disease. As the following discussion demonstrates, courts are continuing to adopt a variety of approaches when deciding upon the standards for permitting plaintiffs to recover damages in these cases.

A. Delaware

In *In re Asbestos Litigation,* the Superior Court of Delaware made clear that the jurisdiction retains the requirement of a physical injury in order to state a claim for fear of cancer.[75] The plaintiffs in the case had been exposed to products containing asbestos and had been diagnosed with asbestos-related pleural disease.[76] Asbestos-related pleural disease is a nonmalignant and generally asymptomatic thickening of the thin

70. *Id.*
71. *See id.*
72. *Id.*
73. *See* Marjorie Ann Waltrip, *A Cause of Action for Damages For Fear of Cancer, In the Absence of Physical Injury, Must Include Proof That It is More Likely Than Not That Cancer Will Develop in The Future, Unless Toxic Exposure Results From Fraud, Oppression or Malice:* Potter v. Firestone Tire and Rubber Co., 22 PEPP. L. REV. 358, 362 (1994).
74. *See* Ernest J. Getto et al., *Potter v. Firestone Tire and Rubber Co.--Fear Alone Is Not Enough*, Toxic L. Rep. (BNA) 1134, 1138 (Mar. 9, 1994).
75. *In re* Asbestos Litigation, No. 87C-0924, 1994 WL 721763 at *4-5 (Del. Super. Ct. June 14, 1994).
76. *See id.* at *1.

membrane of the lungs as a result of contact with asbestos.[77] Pleural thickening can also occur as a result of other traumas to the lungs, independent of asbestosis.[78] The court determined that pleural thickening is not a compensable physical injury for purposes of recovering emotional distress damages absent recognizable physical symptoms or impairment.[79]

The court further noted that "Delaware does recognize a claim for fear of cancer or fear of asbestos-related diseases . . . . However, in any claim for mental anguish, whether it arises from witnessing the ailments of another or from the claimant's own apprehension, an essential element of the claim is that the claimant have a present physical injury."[80] Since the court determined that asymptomatic pleural thickening was not a compensable physical injury, it denied the plaintiffs' claim for fear of cancer.[81] However, Delaware has abandoned the "single action rule" in favor of a "separate disease" rule.[82] The single action rule bars plaintiffs from instituting later lawsuits related to claims asserted in a previous action.[83] Conversely, the separate disease rule allows plaintiffs who cannot recover for fear of future disease due to lack of a present physical injury to bring a later action should the feared disease manifest itself.[84] Thus, the statute of limitations begins to run not upon diagnosis of an asbestos-related disease, but "when a plaintiff is chargeable with knowledge that an impairment of his or her physical condition is attributable to asbestos exposure."[85]

B. Indiana

The fear of cancer issue came before the federal district court for the Northern District of Indiana in *Heacock v. Southland Corp.*[86] The plaintiff family's house was adjacent to a gas station owned and operated by the defendants.[87] The plaintiffs alleged that gas products leaked onto their property, causing both physical and emotional injuries, and sought recovery under the theories of increased risk of cancer, fear of cancer, and

77. *See id.* at *2.
78. *See id.*
79. *Id.* at *3.
80. *Id.* at *5.
81. *Id.* at *4.
82. *See id.*
83. *See id.*
84. *See id.* at *3-4.
85. *Id.* at *4.
86. No. Civ. H-91-309, 1994 WL 114656 (N.D. Ind. Mar. 29, 1994).
87. *See id.* at *1.

medical monitoring.[88] The case was tried before a jury, which awarded the Heacocks significant emotional distress damages.[89] Applying Indiana law, the federal court granted in part defendants' motion for judgment notwithstanding the verdict.[90]

The court first explained that Indiana law did not require the plaintiffs to prove a physical injury in order to recover for their emotional distress as a result of fear of cancer.[91] However, the plaintiffs' subjective fears must be reasonable in order to recover fear of cancer damages.[92] The Heacock family had not undergone diagnostic testing to determine their risk of contracting cancer.[93] At trial, the plaintiffs attempted to prove the reasonableness of their fear by introducing the testimony of an expert toxicologist regarding their increased risk of contracting cancer.[94] The trial court, however, did not allow the expert testimony because the expert refused to quantify the risk.[95] As a result, the defendants put on their expert witness, unchallenged, to testify that the plaintiffs were not at risk of contracting cancer as a result of their exposure to gasoline vapors.[96] Under these circumstances, the court found that no reasonable juror could have concluded that the plaintiffs had a reasonable fear of cancer in the future, and the court offered the plaintiffs the option of either accepting significantly reduced damages or having a new trial on the issue of damages.[97]

As in *Potter*, the manner employed by the *Heacock* court to determine the reasonableness of the plaintiffs' fears focused on the likelihood of contracting cancer in the future. However, due to the defendant's unchallenged testimony regarding increased risk, the court did not have occasion to determine the level of increased risk necessary for a plaintiff to be permitted compensation for the alleged emotional distress.

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88. *See id*.
89. *See id.* at *2.
90. *Id.*
91. *Id*. at *4.
92. *See id*.
93. *See id.*
94. *See id.*
95. *Id.*
96. *Id*. at *7.
97. *Id*. at *7, 11.

C. Iowa

Iowa does recognize a cause of action for fear of future disease even absent present physical injury.[98] In *Slaymaker v. Archer-Daniels-Midland Co.*, the Iowa Court of Appeals set forth the standard for asserting a fear of future disease cause of action.[99] In that case, plaintiff demolition workers sued the owner of a demolished building as well as their employer alleging injuries resulting from asbestos exposure.[100] Neither of the plaintiffs had suffered significant injury caused by the asbestos exposure.[101] The court held that, "[t]o recover for fear of future injury, plaintiffs must show (1) they are aware they possess an increased statistical likelihood of physical injury and (2) from that knowledge there exists a reasonable apprehension which manifests itself in mental distress. The emotional distress must be so severe that a reasonable man or woman must not be expected to endure it."[102] The court then determined that the plaintiffs had not met that burden, having not established either the likelihood of developing the feared disease in the future or the severity of their mental distress.[103]

The Iowa Court of Appeals did not clarify how significant the increased likelihood of physical injury must be in order to meet the first prong of the test (i.e. "more likely than not" or "51%" as in *Potter*). Thus, rather than measuring the reasonableness of the plaintiffs' fears solely in terms of objective likelihood, the Iowa Court of Appeals outlined a two-prong test combining some increase in risk with a more subjective test of the severity of the mental distress.[104]

D. Kentucky

An asbestos case caused Kentucky to face the issue of recovery for fear of disease in the absence of a present physical injury. In *Capital Holding Corp. v. Bailey*, a worker and his spouse sued a building owner for negligence and intentional infliction of emotional distress as a result of asbestos exposure sustained as the worker removed pipes and ducts

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98. *See* Slaymaker v. Archer-Daniels-Midland Co., 540 N.W. 2d 459, 460 (Iowa Ct. App. 1995).

99. *Id.*

100. *See id.*

101. *See id.*

102. *Id.* at 461 (citation omitted).

103. *Id.* ("Instead, plaintiffs have merely testified to vague fears of developing cancer in the future. Such fears do not create an issue of material fact sufficient to withstand summary judgment.").

104. *Id.* at 461.

from the building.[105] The trial court granted summary judgment to the defendant but provided in its final order that the plaintiffs were not barred from bringing a later claim against the defendant if asbestos-related disease manifested itself.[106] The Court of Appeals reversed.[107]

The Kentucky Supreme Court then reversed the Court of Appeals, holding that no cause of action had accrued to sustain an award for either increased risk of disease or fear of disease.[108] The cause of action for fear of cancer would not accrue until the plaintiffs had suffered a compensable injury or loss, or what the court called a "harmful change."[109] However, "mere ingestion of a toxic substance does not constitute sufficient physical harm upon which to base a claim for damages."[110] The court further refused to recognize any distinction between a cause of action for increased risk of cancer and a cause of action for fear of cancer, instead requiring that the plaintiff prove "some harmful result from the exposure" in order to state either claim.[111]

Unlike the *Potter* court, Kentucky ultimately required a physical injury in order to sustain a cause of action for fear of cancer. Rather than treating fear of cancer or increased risk of cancer as separate claims for damages, however, Kentucky instead explained that a recovery for increased risk or fear of cancer should depend on the likelihood of the plaintiffs actually developing the disease.[112] Therefore, the court reasoned, the more likely the occurrence of the disease, the more damages the jury should award in compensating for future physical pain and suffering, future loss of earning power, and future medical expenses.[113]

E. Louisiana

The law is settled in Louisiana that plaintiffs may recover for fear of future disease absent physical injury.[114] In a recent Louisiana case

105. Capital Holding Corp. v. Bailey, 873 S.W. 2d 187, 189-90 (Ky. 1994).
106. *Id.* at 189.
107. *Id.* at 190-91.
108. *Id.* at 192.
109. *Id.* at 193.
110. *Id.* at 195.
111. *Id.*
112. *Id.*
113. *Id.*
114. *See* Vallery v. Southern Baptist Hospital, 630 So. 2d 861, 866 (Kent. 1993) ("Mrs. Vallery's claim is one for negligent infliction of emotional distress unaccompanied by any physical injury. While recovery for such claims has been controversial or limited by special rules in some jurisdictions, it is well established in this state's caselaw." (citation omitted)).

dealing with the issue, however, the plaintiffs simply failed to introduce any evidence that they actually feared cancer.[115] In *Bartless v. Browning-Ferris Industries*, plaintiffs brought an action against the operators of a hazardous waste facility seeking an injunction and damages for negligent operation of the site.[116] The court rejected the plaintiffs' claim for fear of cancer because one plaintiff testified that he refused to fear cancer, another testified that he had no fear, and a third testified that she did fear cancer, but had not feared cancer before consulting her attorney and had never discussed this fear with her doctor on her many consultations.[117]

The federal district court in Louisiana had occasion to discuss in more detail the state's test for fear of cancer in *Triche v. Overnite Transportation Co.*[118] In that case, a drum of chemicals leaked from a truck and spewed onto the plaintiff, who was behind the truck in his car.[119] The court upheld the claim of fear of cancer with respect to one of the plaintiffs, but denied the claim with respect to two others.[120] The court held that

> Damages awarded for this fear are considered compensation for the mental anxiety resulting from fear of developing that condition which the plaintiff endures on a daily basis. It is compensable even if the possibility of developing cancer is remote . . . . However, in order for a plaintiff to recover for 'fear of cancer' or 'cancerphobia,' the Court must find that the fear is (1) reasonable, (2) causally related to the defendant's negligence, and (3) a result of a present injury.[121]

It is clear that the decision in *Triche* requiring a present physical injury conflicts with the decision in *Vallery*, which emphasizes that Louisiana requires no present physical injury in order to recover for negligent infliction of emotional distress in the form of fear of cancer. Both of the decisions, however, differ markedly from the *Potter* standard insofar as they do not implement the "more likely than not" standard of testing reasonableness.

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115. Bartlett v. Browning-Ferris Indus., Chem. Serv., Inc., 683 So. 2d 1319, 1320 (La. Ct. App. 1996).

116. *Id.*

117. *Id.* at 1322-23.

118. No Civ. A. 95-0691, 1996 WL 396041 (E.D. La. July 12, 1996).

119. *See id.* at *1.

120. *Id.* at *15.

121. *Id.* at *14 (citation omitted).

F. Massachusetts

Massachusetts requires a physical injury in order to state a claim for negligent infliction of emotional distress. Of note, however, the case law indicates that the state allows a claim for increased risk of cancer if accompanied by physical injury, but will not recognize a claim for fear of cancer itself.[122] In *Curran v. Massachusetts Turnpike Authority*, the plaintiffs sued to recover damages related to the contamination of the well water supply for their home.[123] In analyzing the plaintiffs' claim for emotional distress damages, the court first held that "[t]o recover for negligently inflicted emotional distress, a plaintiff must prove: (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case."[124] The court did not fully grant the defendant's motion for summary judgment on the plaintiffs' emotional distress claims, but warned that

> Massachusetts does not allow recovery for emotional distress damages for fear of future injury . . . . Only where a plaintiff alleges emotional distress for an increased risk that a disease will occur from the same disease process from which she or he currently suffers can there be recovery of damages for future injury. In other words, where a plaintiff claims a present physical injury which increases his susceptibility, he may recover for mental anguish and fear of developing cancer in the future.[125]

Thus, Massachusetts seems to have chosen a standard that differs from most jurisdictions, which are beginning to allow recovery for fear of future disease but which remain wary of the cause of action for increased risk of disease.

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122. *See* Curran v. Massachusetts Turnpike Auth., No. 923002A, 1995 WL 879865 at *4. (Mass. June 6, 1994).

123. *Id.* at *1.

124. *Id.* at *4.

125. *Id.* at *5 (citations omitted).

G. Mississippi

Mississippi came close to setting a standard for recovery of fear of cancer damages in *Leaf River Forest Products, Inc. v. Ferguson*,[126] but fell just short of actually doing so. In that case, landowners filed suit against a paper mill claiming infliction of emotional distress and nuisance as a result of alleged dioxin contamination of the Leaf and Pascagoula Rivers.[127] At trial, a jury found in favor of the Fergusons on their nuisance and emotional distress claims, and awarded $3,000,000 in punitive damages.[128] The Mississippi Supreme Court reversed and found in favor of the paper mill.[129]

The Mississippi Supreme Court held that emotional distress based on fear of future disease "must await a manifestation of that illness *or* be supported by substantial exposure to the danger, *and* be supported by medical or scientific evidence so that there is a *rational basis* for the emotional fear."[130] It seems, then, that Mississippi has announced an either/or test for recovery for fear of future disease. Either a plaintiff has a present physical manifestation of the feared disease, in which case she can recover for fear of the disease, or the plaintiff can prove substantial exposure and medical evidence proving a "rational basis" for the fear. The court left undefined what kind of medical or scientific evidence would support a "rational basis" for a fear of disease. Also unclear is what kind of physical manifestation of illness is necessary to satisfy the first prong of the test. However, the Mississippi Supreme Court specifically allowed the plaintiffs to bring a later action against the defendants if physical manifestations of the feared illness did occur.[131]

H. Missouri

Rather than using the *Potter* test for reasonableness of a plaintiff's fear of cancer, Missouri law examines whether the plaintiff's mental anguish resulting from fear of disease is "medically diagnosable and of sufficient severity to be medically significant."[132] In *Thomas v. FAG Bearings Corp.,* plaintiffs alleged that the defendant had caused

126. 662 So. 2d. 648 (Miss. 1995). The court cautioned, "this Court has never allowed or affirmed a claim of emotional distress based on a fear of contracting a disease or illness in the future, however reasonable." *Id.* at 658.

127. *See id.* at 650.

128. *See id.*

129. *Id.*

130. *Id.*

131. *Id.* at 657.

132. Thomas v. FAG Bearings Corp., 846 F. Supp. 1400, 1405 (W.D. Mo. 1994).

them to be exposed to contaminated groundwater.[133] The court granted summary judgment in favor of defendant on the cause of action for fear of cancer.[134] The court explained that "[a] condition that is medically significant is one that is severe enough to require medical attention. 'Mere upset, dismay, humiliation, grief and anger' do not suffice."[135] The plaintiffs could not meet this standard, largely because none of the plaintiffs had been treated by a health care professional for their mental suffering until the eve of the summary judgment motion and at the direction of their attorneys.[136]

The danger of Missouri's test is that it allows plaintiffs to state a claim for fear of disease if they can find a health care professional in advance of trial who is willing to say that they suffer a medically diagnosable and medically significant mental disorder. The Missouri test does not include any additional safeguards to prevent frivolous claims, such as an examination of the reasonableness or the genuineness of the alleged fear.

I. Ohio

In *Day v. NLO*, plaintiff workers and visitors at a nuclear weapons components manufacturing plant brought a class action against the manufacturer alleging exposure to radiation.[137] The plaintiffs claimed physical harm in the form of increased risk of disease, emotional distress over the increased risk of disease, and disease itself.[138] With regard to their emotional distress claims, the court first noted that plaintiffs with a present physical injury need not prove that their emotional distress is severe and debilitating in order to recover.[139] Moreover, if plaintiffs could prove that they were exposed to a "sufficiently high dose of radiation," the exposure itself would constitute a physical injury for purposes of recovering for emotional distress.[140] The court explained:

> So, even though the Plaintiffs may not assert a cause of action for actual cancer, they must prove that on account of their exposure to high doses of radiation, they have

133. *Id.* at 1404.
134. *Id.* at 1401.
135. *Id.* at 1406 (citations omitted).
136. *Id.* at 1407.
137. Day v. NLO, 851 F. Supp. 869, 874-75 (S.D. Ohio 1994).
138. *See id.* at 875.
139. *Id.* at 877.
140. *Id.* at 878.

> experienced emotional distress in the form of a fear of cancer. They will be required to show that their apprehensions of developing cancer are reasonable. Consequently, the Plaintiffs must be allowed present evidence which includes the risk of cancer.[141]

Presumably, then, plaintiffs which could not show sufficient exposure to radiation to constitute a physical injury would be required to show that their emotional distress was severe and debilitating, in accord with previous Ohio law.[142]

While the court did note that the plaintiffs must prove that their fear of cancer was reasonable and that evidence would thus be admitted regarding the risk of cancer, the court failed to set an objective level of risk at which the plaintiffs' fears would be reasonable per se. Thus, it remains unclear at what level of increased risk the plaintiffs' fears will become reasonable.

Ohio's test thus differs significantly from the test set forth in *Potter*. While Ohio retained the physical injury requirement for parasitic emotional distress damages, it determined that exposure alone could constitute the physical injury.[143] In addition to the physical injury requirement, Ohio added a reasonableness requirement based on increased risk, but failed to specify the level of risk at which the fear of cancer becomes reasonable. Absent physical injury, rather than relying on the objective likelihood that the feared disease would manifest itself, Ohio appears to rely solely on the subjective analysis of severity.

J. New York

Two recent asbestos exposure cases illustrate New York's stance regarding emotional distress damages for fear of disease. In *Wolff v. A-One Oil, Inc.*, the defendant appealed a denial of its motion for partial summary judgment as to the plaintiffs' claims for fear of cancer.[144] The court outlined the New York test for fear of cancer recovery, stating,

> Under the prevailing case law, in order to maintain a cause of action for 'fear of [developing] cancer' following exposure to a toxic substance like asbestos, a plaintiff must establish both that he was in fact exposed to the

141. *Id.* (citations omitted).
142. *See* Paugh v. Hanks, 451 N.E. 2d 759 (1983).
143. *Day*, 851 F. Supp. at 878.
144. Wolff v. A-One Oil, Inc., 627 N.Y.S. 2d 788, 789 (App. Div. 1995).

> disease-causing agent and that there is a 'rational basis' for his fear of contracting the disease. This 'rational basis' has been construed to mean the clinically demonstrable presence of asbestos fibers in the plaintiff's body, or some indication of asbestos-induced disease (i.e. some physical manifestation of asbestos contamination).[145]

The court found that the plaintiffs had not demonstrated any asbestos contamination, and therefore dismissed their fear of cancer cause of action.[146] However, like many other jurisdictions, the court circumvented the single action rule by specifically allowing the plaintiffs to bring a later cause of action against the defendants should they develop physical manifestations of asbestos contamination in the future.[147]

Thus, unlike jurisdictions which have held that pleural thickening is not a compensable injury for purposes of emotional distress damages, New York's "rational basis" test would appear to allow fear of cancer claims in the presence of pleural thickening. In cases where there is no other explanation for change in the lining of the lungs, the thickening would appear to constitute a physical manifestation of asbestos contamination.

In another New York asbestos case, however, the Appellate Division described the test to recover fear of cancer damages quite differently.[148] The court in *Doner v. Ed Adams Contracting, Inc.* stated that

> Recovery for negligent infliction of 'purely mental suffering' is permitted when the circumstances of the case provide a guarantee of the genuineness of the claim but only if the alleged emotional distress is reasonable, given the situation presented. Mental anxiety occasioned by the fear of developing a disease is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent, and a likelihood of contracting the disease as a result.[149]

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145. *Id.* (citations omitted).
146. *Id.*
147. *Id.* at 790.
148. *See* Doner v. Ed Adams Contracting, Inc., 208 A.2d 1072, 1073 (N.Y. App. Div. 1994).
149. *Id.* (citations omitted).

The court went on to focus specifically on the likelihood of the plaintiff contracting an asbestos-related disease as a result of his exposure, rather than on the factor the *Wolff* court found determinative—contamination of the lungs.[150] The *Doner* court particularly noted that evidence of contamination is not enough to state a claim for fear of cancer if the plaintiff is not likely to suffer from cancer in the future.[151]

The status of New York law regarding fear of cancer claims, then, is unclear in light of these conflicting opinions. While *Doner* appears disposed to a more *Potter*-esque test which evaluates reasonableness in terms of the likelihood of contracting disease (yet does not define the level of increased risk at which the fear of cancer becomes reasonable), *Wolff* uses an objective physical injury test which defines physical injury as mere evidence of "contamination." Because *Doner* does not determine how likely the cancer must be in order to state a claim for fear of disease, and because the physical injury test in *Wolff* is less stringent than that imposed by many jurisdictions, it becomes unclear which test is more exacting and which will survive the increasing number of fear of cancer claims.

K. Pennsylvania

Joining Delaware, Pennsylvania recently adopted the separate disease rule in lieu of the single action rule in asbestos cases.[152] In other words, plaintiffs who bring a cause of action for exposure to asbestos but do not suffer from a present physical injury are not precluded from suing the same defendant at a later date if a physical injury proximately caused by the exposure manifests itself.[153] As a result, the Superior Court of Pennsylvania ruled in 1993 that claims for increased risk and fear of cancer would no longer form a basis for recovery in asbestos cases in which cancer was not present.[154]

The Supreme Court of Pennsylvania had occasion to review that holding in *Simmons v. Pacor, Inc.*[155] The Supreme Court affirmed the Superior Court's ruling that asymptomatic pleural thickening was not a compensable injury and that plaintiffs could therefore not recover for their emotional distress.[156] The court declined to accept plaintiffs'

150. *Id.*
151. *Id.*
152. *See* Marinari v. Asbestos Corp., Ltd., 612 A. 2d 1021, 1028 (Pa. Super. Ct. 1992).
153. *See id.*
154. Giffear v. Johns-Manville Corp., 632 A. 2d 880, 888 (Pa. Super. Ct. 1993).
155. 674 A.2d 232 (Pa. 1996).
156. *Id.* at 238-39.

argument that the separate disease rule did not bar a cause of action for fear of cancer because the fear was not a future injury but rather an injury suffered presently.[157] The court reasoned that because asymptomatic pleural thickening did not constitute a compensable physical injury, and because Pennsylvania law requires a present physical injury in order to state an emotional distress claim, the plaintiffs' fear of cancer cause of action must fail.[158] A policy discussion focusing on the speculative nature of fear of cancer damages and the inequity of compensating plaintiffs who would never contract cancer also compelled the court to dismiss the plaintiffs' claim.[159] The court concluded that "[t]he actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested,"[160] and added that the plaintiffs could also assert their claims for emotional distress or mental anguish at that time.

V. CONCLUSION

The California Supreme Court's decision in *Potter* is significant because it is one of the first decisions by a state's highest court to assess the broad societal implications of allowing recovery for fear of cancer due to exposure to toxic or potentially toxic substances. Other courts in other jurisdictions have subsequently issued their own decisions in fear of disease cases with varying results. One pattern that seems to repeat itself in recent cases is a new flexibility with respect to the single action rule. Courts in Delaware, Pennsylvania, Kentucky, Mississippi and New York have allowed plaintiffs to bring a separate action if a physical manifestation of the toxic exposure should appear at a future time. Thus, either an express or a *de facto* abolishment of the single action rule has emerged as an alternative to the standard for recovering damages for fear of future disease set forth in *Potter*. Although courts may choose to set varying standards for permitting recovery in fear of disease cases, it is essential that courts grappling with these issues in the future strive to set scientifically-based standards that appropriately balance the interests of the toxic tort plaintiffs in receiving compensation in instances where they truly have been injured, the interests of the defendants in not having liability imposed on them that exceeds their culpability, and the interests of society and judicial administration in limiting the costs of litigation and the costs of products and insurance.

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157. *Id.* at 238.
158. *Id.*
159. *Id.*
160. *Id.*