

A House Is Not a Thyroid: Analogy Issues and Other Problems for Plaintiffs Attempting to Recover in the Tenth Circuit Under the Price Anderson Act

Jeremy Speckhals*

Table of Contents

I. INTRODUCTION	234
II. THE PAA AND <i>COOK V. ROCKWELL</i>	235
A. The Price Anderson Act	235
B. <i>Cook v. Rockwell International Corp.</i>	237
1. Loss of or Damage to Property	239
2. Loss of Use of Property	241
III. THE <i>COOK</i> PLAINTIFFS DID NOT RAISE, AND THE COURT DID NOT ADDRESS, RELEVANT TENTH CIRCUIT PRECEDENT	241
A. Medical Monitoring as a Cause of Action	242
B. The Medical Monitoring and the Price Anderson Act in the Tenth Circuit	243
C. “Personal Injury” and “Physical Injury” Compared	247
IV. THE COURT MADE AN INAPT ANALOGY BETWEEN BODILY ORGANS AND HOUSES	248
A. “Bodily Injury” and “Damage to Property”	248
B. Personal Torts and Property Torts	250
V. THE TENTH CIRCUIT MISINTERPRETED, AND THE PLAINTIFFS DID NOT STRESS ENOUGH, THE “LOSS OF USE OF PROPERTY” LANGUAGE OF THE PAA	253
A. The <i>Cook</i> Plaintiffs and Actual Use of Property	253
B. Diminution of Property Value Plus Radiation Exposure	255
VI. CONCLUSION	256

* J.D. Candidate, May 2014, University of Colorado Law School. I would like to thank my fiancée Hillary Grady for her unwavering support and guidance. I would also like thank Ashley Palomaki and Luke Bonucci for their patience and understanding throughout my writing process.

I. INTRODUCTION

In *Cook v. Rockwell International Corp.*, a class of property owners sought to recover damages under the Price Anderson Act (“PAA”) after a nuclear plant exposed their property to plutonium radiation.¹ Following a four-month trial and three weeks of deliberation, the jury awarded the class just over \$926 million.² The Tenth Circuit subsequently remanded the case because, among other reasons, the plaintiffs did not show that exposure to nuclear radiation constituted damage to their property or that they were deprived of any use of their property.³

Under the PAA, a plaintiff can bring a suit arising from a “public liability action” if she can establish “loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material.”⁴ Once a plaintiff establishes a requisite injury, she must then prevail on her claim under substantive state law.⁵

This Note critiques the Tenth Circuit’s current jurisprudence regarding property claims under the PAA through the ruling in *Cook* for three reasons: (1) the plaintiffs did not raise, nor did the court address, relevant Tenth Circuit precedent regarding medical monitoring claims; (2) the court made an inapt analogy between bodily organs and houses that led to a ruling that inappropriately equated organs and real property; and (3) the Tenth Circuit construed the PAA’s meaning of “loss of use of property” too narrowly. Part I first examines the PAA in detail. It then discusses the Tenth Circuit’s reasoning for remanding the case. Part II argues that if the plaintiffs in *Cook* had argued relevant precedent, the outcome of the case might have been different. Part III argues that the court based much of its opinion on a faulty analogy equating “bodily injury” to “damage to property.” Part IV argues that the Tenth Circuit misinterpreted the “loss of use of property” language in the PAA. Finally, Part V concludes by arguing that even if the plaintiffs in *Cook* should not have prevailed on their claim, the Tenth Circuit’s ruling on the threshold elements of the PAA was too limited.

1. *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127 (10th Cir. 2010).

2. *Id.* at 1134.

3. *Id.* at 1142.

4. 42 U.S.C. § 2014(q), (hh) (2012).

5. *Id.* § 2014(hh).

II. THE PAA AND *COOK V. ROCKWELL*

This Part first outlines the history of the PAA and its survival of a constitutional challenge. It then looks at the basic components of a PAA claim. It finally concludes with the facts of *Cook* and why the Tenth Circuit remanded the case because of jury instruction inadequacies with regard to the “loss of or damage to property” and “loss of use of property” requirements of the PAA.

A. *The Price Anderson Act*

Congress passed the Atomic Energy Act of 1946, a precursor to the PAA, in reaction to World War II and the bombings of Hiroshima and Nagasaki. Realizing the potential of nuclear plants for energy production, Congress wanted to encourage nuclear energy.⁶ In 1957 the Atomic Energy Act was amended to require the Atomic Energy Commission (“AEC”) to oversee licensure and private nuclear production.⁷ While the AEC provided incentives to private companies to enter the nuclear energy business, many private entities were hesitant to invest in the nuclear industry for fear of extreme liability exposure given the unique nature of nuclear energy.⁸

In response to the private sector’s reluctance, Congress passed the PAA to limit the liability that nuclear manufacturers could face in the event of a nuclear incident.⁹ The PAA was passed with the dual purpose of encouraging development of nuclear energy and ensuring public safety. As the law currently stands, nuclear manufacturers are required to purchase the maximum insurance coverage that the private market allows.¹⁰ In the event of a nuclear incident, once the coverage afforded by private insurance is exhausted, the government will indemnify the nuclear manufacturer in an amount not exceeding \$500 million.¹¹

6. “Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that (a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.” 42 U.S.C. § 2011 (2012).

7. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 63 (1978).

8. *Id.* at 64.

9. *Id.*

10. *Id.* at 64–65.

11. *Id.* at 65.

In 1978, the PAA survived a constitutional challenge in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*¹² There, an environmental group and forty individuals living near a nuclear manufacturer sought declaratory judgment that the PAA is unconstitutional. The district court agreed and declared the PAA unconstitutional for two reasons. First, the district court held that the PAA violated the Due Process Clause of the Fifth Amendment because it allowed injuries without providing victims adequate compensation.¹³ Second, the district court held that the PAA violated the Equal Protection Clause of the Fifth Amendment because it forced victims to bear the burden of injury while allowing society by and large to benefit from the development of nuclear power.¹⁴ The Supreme Court invoked probable jurisdiction and reversed the district court's ruling. The Court ruled that the PAA provides an adequate substitute for common law or state tort remedies and thus does not violate the Due Process Clause of the Fifth Amendment.¹⁵ Likewise, the Court ruled that Congress's reason for encouraging private production of nuclear energy justified the different treatment between those injured by nuclear incidents and those injured by other causes. The PAA, therefore, did not violate the equal protection component of the Fifth Amendment.¹⁶

In 1988, the PAA was amended to provide a "public liability" federal cause of action over "nuclear incidents."¹⁷ A "public liability action" is "any suit asserting public liability."¹⁸ A "nuclear incident" is defined as:

[A]ny occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.¹⁹

In passing this amendment, Congress intended to limit nuclear manufacturer liability to only the harms listed under 42 U.S.C. § 2014(q), the portion of the PAA that outlines the damages a plaintiff must show to bring a suit; however, "substantive rules for decision in

12. *Duke Power Co.*, 438 U.S. 59.

13. *Id.* at 68.

14. *Id.*

15. *Id.* at 87.

16. *Id.* at 94.

17. Pub. L. No. 100-408, (codified as amended at 42 U.S.C. § 2210(n)(2) (2012)).

18. 42 U.S.C. § 2014(hh) (2012).

19. *Id.* § 2014(q).

such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.”²⁰ This means that once a plaintiff has established a “nuclear incident,” she then presents her case under an appropriate theory of law under the state jurisdiction of where the incident occurred.

To prevail on a claim brought under the PAA, plaintiffs must pass three hurdles. First, they must prove that a “public liability action” occurred, as defined by the PAA.²¹ Second, they must prove that the substantive state law, in the state where the incident occurred, is not inconsistent with the provisions of the PAA.²² Finally, they must prevail under the law of the state where the “nuclear incident” occurred.²³

A lawsuit brought under the PAA might proceed as follows: first, a plaintiff or plaintiff class has to prove a public liability action, such as “damage to property.” To do so, a plaintiff might show that nuclear waste from a nuclear manufacturer spilled over onto her property, causing damage to the integrity of the structure. Second, after showing that one of the requisite harms occurred, a plaintiff must show that her claim is not inconsistent with the PAA.²⁴ Third, a plaintiff must prevail on her claim under the substantive state laws, such as a claim for nuisance, where the “nuclear incident” occurred.

B. Cook v. Rockwell International Corp.

Cook was about a chemical manufacturing plant called Rocky Flats located near Denver, Colorado with a history of spilling nuclear waste. The plant was originally opened in the 1950s by the United States government to produce nuclear weapon components.²⁵ The Dow Chemical Company initially operated the facility, and later Rockwell International Corporation took over.²⁶ In 1989, the Environmental Protection Agency and the Federal Bureau of Investigation searched and

20. *Id.* § 2014(q), (hh).

21. See Nathan White, Note, *Arguments Not Raised: How the Plaintiffs’ Missed Opportunity Led to the Tenth Circuit’s Decision in June v. Union Carbide Corp.*, 2011 BYUL REV. 245, 249 (outlining how a claim under the PAA operates).

22. See *id.* at 250.

23. *Id.*

24. For example, in *In re Berg Litigation*, 293 F.3d 1127, 1132–33 (9th Cir. 2002), the court dismissed emotional distress as being inconsistent with the PAA.

25. *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1133 (10th Cir. 2010).

26. *Id.*

ultimately closed the facility.²⁷ After the closure, Rockwell was charged with, and pleaded guilty to, certain environmental crimes.²⁸ Rocky Flats is now a wildlife refuge.²⁹

In 1990, residents living within thirty miles east of Rocky Flats filed a federal class action lawsuit under the PAA alleging a “public liability action” against Dow Chemical Company and Rockwell International Corporation, seeking compensatory and punitive damages.³⁰ For a federal court to hear the claim, the plaintiff class alleged that trespass and nuisance claims under Colorado law occurred through “loss of or damage to property, or loss of use of property” under the PAA.³¹

After fifteen years of pre-trial litigation, the United States District Court for the District of Colorado conducted a four-month jury trial.³² The Tenth Circuit noted in regard to the jury instructions as follows:

[T]he jury instructions did not require Plaintiffs to establish either an actual injury to their properties or a loss of use of their properties. With respect to the nuisance claims, the district court instructed the jury that Plaintiffs could establish Defendants’ conduct interfered with the use and enjoyment of the class properties by proving Defendants’ conduct exposed Plaintiffs to ‘some increased risk of health problems’ or caused conditions ‘that pose a demonstrable risk of future harm to the Class Area.’ As to Plaintiffs’ trespass claims, the district court instructed the jury, ‘Plaintiffs are not required to show that plutonium is present on the Class Properties at any particular level or concentration, that they suffered any bodily harm because of the plutonium or that the presence of plutonium on the Class Properties damaged these properties in some other way.’³³

The plaintiffs presented evidence that plutonium exposure—at any level—increases one’s risk of cancer.³⁴ They did not present evidence as to how much plutonium exposure the property of the class was subject to, and they did not present evidence of actual, physical damage to plaintiff’s property.³⁵

27. *Id.*

28. *Id.*

29. *Id.*; see *Rocky Flats Plant*, EPA, <http://www2.epa.gov/region8/rocky-flats-plant-usdoe> (last updated Oct., 2013) (describing the history of Rocky Flats).

30. *Cook*, 618 F.3d at 1133.

31. *Id.* at 1134.

32. *Id.* at 1133.

33. *Id.* at 1134.

34. *Id.*

35. See *id.*

The jury deliberated for three weeks, found for the plaintiff class, and awarded \$176,850,340 in compensatory damages on the trespass claim and another \$176,850,340 on the nuisance claim.³⁶ The jury also awarded \$89,400,000 in punitive damages against Dow Chemical Company and \$110,800,000 in punitive damages against Rockwell International Corporation.³⁷ Both parties appealed.

The Tenth Circuit remanded the case on September 3, 2010 because the jury was not properly instructed about what constitutes a “nuclear incident,” a threshold element of all PAA claims.³⁸ In order to establish a “nuclear incident” under the PAA, the plaintiffs in this case could have shown either “loss of or damage to property” or “loss of use of property.”³⁹ The court held that the jury instructions did not properly instruct the jury as to whether the plaintiffs had established any of the requirements of 42 U.S.C. § 2014(q), and thus remanded the case.⁴⁰

In supplemental briefing after the trial, the *Cook* plaintiffs first argued that they needed only to assert that a “public liability action” occurred and that they did not have to prove it at trial.⁴¹ The court rejected this argument by stating that if it adopted that construction of the PAA, any claim brought under the PAA would be indistinguishable from a state law claim.⁴² Next, the court considered whether the plaintiff class had actually shown “loss of or damage to property” or “loss of use of property.” The Court found that the jury was improperly instructed on both possible threshold elements of the PAA.⁴³

1. Loss of or Damage to Property

In determining whether a “public liability action” was actually shown at trial, rather than merely asserted, the court turned to its earlier decision in *June v. Union Carbide Corp.* to begin its analysis.

There, the Tenth Circuit held that the PAA bars medical monitoring suits—cases where plaintiffs have not been injured but instead allege future injury—because such claims do not rise to the level of “bodily injury” required by 42 U.S.C. § 2014(q).⁴⁴ The court stated as follows:

36. *Id.*

37. *Id.*

38. *Id.* at 1142.

39. *See* 42 U.S.C. § 2014(q) (2012).

40. *Cook*, 618 F.3d at 1133, 1142.

41. *See id.* at 1139–40; *see also* 42 U.S.C. § 2014(hh) (2012) (a “public liability action . . . means any suit *asserting* public liability”) (emphasis added).

42. *Cook*, 618 F.3d at 1140.

43. *Id.* at 1142.

44. *Id.* at 1139; *see* discussion of medical monitoring suits *infra* Part II.A.

“In our view, ‘DNA damage and cell death,’ which creates only a possibility of clinical disease, does not constitute a ‘bodily injury’ under the Price-Anderson Act.”⁴⁵ The *June* court also relied on the canon of statutory interpretation against superfluity.⁴⁶ The plaintiffs argued that the PAA should be interpreted so that every claim that satisfies state law would also meet the requirements of the PAA.⁴⁷ The court reasoned that if it adopted such a construction, “bodily injury” would impose no limit on claims, and would thus be superfluous.⁴⁸ It therefore rejected this argument.

Returning to *Cook*, the court analogized medical monitoring to “damage to property.”⁴⁹

Our characterization of ‘damage to property’ is informed by the analysis in *June*, as the logic applies equally to the issue before us in this appeal. Just as an existing physical injury to one’s body is necessary to establish ‘bodily injury,’ so too is an existing physical injury to property necessary to establish ‘damage to property.’ Without a demonstrable manifestation of injury, the presence of plutonium can, at best, only establish a risk of future damage to property. As this court indicated in *June*, however, mere risk of future damage is insufficient.⁵⁰

The plaintiffs argued that contamination by itself was enough to establish “damage to property.”⁵¹ The court dismissed this argument, stating that if Congress wanted to establish contamination as an element of the PAA, then the statute could have said “contamination” in addition to “loss of or damage to property” and “loss of use of property.”⁵²

Because the plaintiffs did not present evidence of “actual damage” to property other than a small but quantifiable amount of radiation, the court held that they had not met the threshold element of a “nuclear incident” under the PAA through “loss of or damage to property.”⁵³

45. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1249 (10th Cir. 2009) (emphasis added).

46. *Id.* at 1250.

47. *Id.*

48. *Id.* at 1250.

49. *Cook*, 618 F.3d at 1140.

50. *Id.* (emphasis added).

51. *Id.* at 1140–41.

52. *See id.* at 1140.

53. *Id.* at 1142.

2. *Loss of Use of Property*

The court next examined whether the plaintiffs established a “nuclear incident” through “loss of use of property.”⁵⁴ Here, too, the court held that the jury instructions misstated the law.⁵⁵ The court began its analysis on the “loss of use of property” element of the PAA by stating “that when the presence of radioactive materials creates a sufficiently high risk to health, a loss of use may in fact occur.”⁵⁶ Rather than drawing a line for how much interference would constitute a loss of use, the court stated that a plaintiff has established the threshold injury requirement “where the evidence indicates the property has been affected by the radioactive material to such an extent that an otherwise appropriate use of the property is lost.”⁵⁷

During the trial, however, the plaintiffs only presented evidence that exposure to plutonium in any degree produces health risks.⁵⁸ They did not present evidence that they were deprived of any specific use of their property.⁵⁹ Because the jury instructions did not require the plaintiffs to show any loss of specific use, the court held that the jury was not properly instructed on the plaintiffs’ claim under the PAA.⁶⁰

III. THE *COOK* PLAINTIFFS DID NOT RAISE, AND THE COURT DID NOT ADDRESS, RELEVANT TENTH CIRCUIT PRECEDENT

This Part focuses on medical monitoring as a cause of action under the PAA because the Tenth Circuit treated “loss of or damage to property” essentially the same as “physical injury” by requiring actual, physical property damage—in other words, the court applied the same reasoning to both personal and property torts. The Tenth Circuit ruled that “future damage is insufficient” to satisfy the jurisdictional requirements of the PAA for personal torts and that the same reasoning applies to property torts.⁶¹

54. *Id.* at 1140.

55. *Id.* at 1142.

56. *Id.* at 1141.

57. *Id.* at 1142.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1140.

This Part first outlines medical monitoring as a cause of action. It then addresses a line of cases in the Tenth Circuit brought under the PAA that relied on the reasoning of medical monitoring claims, starting with *Building & Construction Department v. Rockwell International Corp.*, leading to *June v. Union Carbide Corp.*, and ending with *Cook v. Rockwell International Corp.* It then argues that if the plaintiffs in *June* had argued for the application of the Tenth Circuit's reasoning in *Building* to their case, then the plaintiffs in *June* might have prevailed. Similarly, if the *June* plaintiffs had prevailed, perhaps the plaintiffs in *Cook* might have also prevailed. It finally argues that the holding in *Building* should apply to *Cook* because "personal injury" and "physical injury" carry essentially the same meaning and should therefore be treated similarly.

A. Medical Monitoring as a Cause of Action

In *Building & Construction Department v. Rockwell International Corp.*, a plaintiff class of employees brought a PAA claim, alleging medical monitoring as their cause of action under state law.⁶² The court laid out the elements of a medical monitoring claim as requiring:

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.
4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.⁶³

62. *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1490 (10th Cir. 1993).

63. *Id.* at 1493 (quoting *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990)). This is generally how other courts have laid out the cause of action. See *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993) (en banc) (requiring "(1) the significance and extent of the plaintiff's exposure to the chemicals; (2) the relative toxicity of the chemicals; (3) the seriousness of the diseases for which plaintiff is at an increased risk; (4) the relative increase in the plaintiff's chances of developing a disease as a result of the exposure, when compared to (a) plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of members of the public at large of developing the disease; and (5) the clinical value of early detection and diagnosis"); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (requiring "(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

But, ultimately, the court held that the plaintiffs' PAA claims were barred by the exclusivity portion of the Colorado Workmen's Compensation Act (the "CWCA").⁶⁴

It is generally agreed that medical monitoring claims first arose in the 1984 case *Friends for All Children, Inc. v. Lockheed Aircraft Corp.* as a way for asymptomatic plaintiffs to recover for costs associated with diagnostic examinations.⁶⁵ In an oft-quoted statement, the United States District Court for the District of Columbia posed the following hypothetical to explain how tort law should treat plaintiffs that have not been physically injured, but nonetheless face serious costs associated with medical evaluations:

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.⁶⁶

The D.C. Circuit reasoned that even absent injury, Jones should be able to recover for costs associated by the negligent actions of Smith.⁶⁷ However, not all jurisdictions accept medical monitoring as a theory of recovery under all statutes.⁶⁸ The United States Supreme Court, for example, has rejected medical monitoring for claims brought under the Federal Employers' Liability Act.⁶⁹

B. The Medical Monitoring and the Price Anderson Act in the

disease, illness, or injury (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").

64. *Building*, 7 F.3d at 1494; *Building* is discussed in further detail *infra* Part II.B.

65. 746 F.2d 816 (D.C. Cir. 1984); see Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 18–19 (2009) (outlining medical monitoring as a cause of action).

66. *Friends for All Children*, 746 F.2d at 825.

67. *Id.*

68. See *Lowe v. Phillip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008) (rejecting medical monitoring as a cause of action because it does not require actual harm).

69. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) (a pipefitter exposed to asbestos could not recover under a medical monitoring theory under the Federal Employers' Liability Act).

Tenth Circuit

The plaintiffs in *Cook* should have argued that *Building* was applicable and asked the Tenth Circuit to apply that reasoning to their case. Although it is impossible to predict precisely how the Tenth Circuit would have ruled if it had the benefit of additional arguments, the *Cook* plaintiffs' case would likely have been stronger if they presented the holding in *Building* to the Tenth Circuit.

In *Building*, the Tenth Circuit addressed whether medical monitoring claims for exposure to nuclear radiation qualify as a "personal injury" for the purposes of the CWCA.⁷⁰ The court held that medical monitoring was properly characterized as "personal injury" under the CWCA.⁷¹ There, a group of then-current and former employees of Rocky Flats brought a medical monitoring suit against a Dow Chemical Company and Rockwell International Corporation, the same defendants as in *Cook*.⁷² In *Building*, however, the plaintiffs were employees of the plant rather than property owners. Upon receiving the complaint, the defendants filed a motion to dismiss for failure to state a claim.⁷³ The motion to dismiss considered issues not raised in the pleadings, so the United States District Court for the District of Colorado treated it as a motion for summary judgment.⁷⁴ Finding that the medical monitoring claims were barred by the CWCA's exclusivity provision, the district court granted the defendants' motion for summary judgment.⁷⁵ The Tenth Circuit affirmed the district court's ruling.⁷⁶

At the time of the ruling, the CWCA read:

[L]iability for the death of or personal injury to any employee, except as provided in said articles; and all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to

70. *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993). The Colorado Workmen's Compensation Act has been amended. It is now titled the "Workers' Compensation Act of Colorado." COLO. REV. STAT. ANN. § 8-40-101 (West 1990). However, since *Building* was decided prior to the change of title, I will refer to the language of the law as the "Colorado Workmen's Compensation Act."

71. *Building*, 7 F.3d at 1493.

72. *Id.* at 1490.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1496.

any such employee and accruing to any person are abolished except as provided in said articles.⁷⁷

The plaintiffs argued, among other things, that a medical monitoring claim was not an action for “personal injury,” and thus their claim was not barred by the exclusivity provision of the CWCA.⁷⁸ The Tenth Circuit, in addressing the plaintiffs’ argument, noted that the Colorado Supreme Court had interpreted the CWCA broadly by granting employers immunity from common law suits.⁷⁹ The Tenth Circuit then held that medical monitoring claims “arise primarily out of the risk of latent manifestation of physical injury from exposure to toxic substances and not out of some purely economic or property loss.”⁸⁰

Recall that the *June* court held that medical monitoring claims did not satisfy the “bodily injury” requirement of the PAA.⁸¹ However, the plaintiffs in *June* did not raise, and thus the Tenth Circuit did not address, *Building*’s holding that medical monitoring claims qualified as “personal injury” under the CWCA.⁸² The plaintiffs in *June* should have argued that the reasoning set forth in *Building*—that medical monitoring qualified as “personal injury”—applied to their case. If they could establish that medical monitoring qualifies as “personal injury,” it would be a small logical step to then reason that “personal injury” should constitute “bodily injury.” However, the holding in *Building* was never raised in *June*, and the Tenth Circuit did not have the opportunity to address whether “personal injury” could qualify as “bodily injury” for the purposes of the PAA.

Moving forward to *Cook*, there the Tenth Circuit did not have the opportunity to apply *Building*’s reasoning. Instead, the *Cook* court relied on the language of *June*:

[T]he plaintiffs in *June* claimed the defendants’ uranium operations increased their risk of developing health problems and thus pursued medical monitoring claims. The district court determined medical monitoring claims do not involve a ‘bodily injury’ and dismissed the action. This court affirmed and held ‘DNA damage and cell death’ do not constitute a bodily injury in the absence of the manifestation of an actual disease or injury, despite the increased risk of developing

77. *Id.* at 1492–93 (emphasis added).

78. *Id.* at 1493.

79. *Id.*

80. *Id.* at 1494 (emphasis added).

81. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1248–49 (10th Cir. 2009).

82. See *White*, *supra* note 21 (arguing that failure of the plaintiffs to argue the holding in *Building & Construction Department* to the Tenth Circuit could close the door on Tenth Circuit plaintiffs suing under the PAA).

disease in the future. In short, *June* makes clear that only an existing physical injury constitutes ‘bodily injury’ under the PAA; the mere subclinical effects of radiation exposure are insufficient.⁸³

The Tenth Circuit made its ruling in *Cook*—that exposure to radiation, without more, does not constitute “damage to property” just as exposure to radiation, without more, does not constitute “bodily injury”—without having the benefit of the analysis of *Building* that exposure to radiation qualifies as “personal injury” under the CWCA. Perhaps *Cook* might have come out differently if the Tenth Circuit had the benefit of using the holding in *Building* in its analysis of *June*.

Even if the plaintiffs in *June* had argued that the court should apply the *Building* holding, it is not certain that the Tenth Circuit would have allowed the case to be tried before a jury; it is possible that the court could have found a way to distinguish between the cases for one reason or another. In *Building*, for example, before the court conducted its analysis about the PAA, it was first tasked with interpreting the language of the CWCA.⁸⁴ Because the Colorado Supreme Court liberally construed the CWCA, the Tenth Circuit also liberally construed the meaning of “personal injury” and thus found medical monitoring suits to fit within that broad category of injuries.⁸⁵ Although the *June* court did not face the issues brought up by the CWCA, if it had, the court might have ruled that medical monitoring claims did not constitute “physical injury” absent any guidance from the Colorado Supreme Court requiring broad interpretation.

The CWCA and the PAA, however, are more similar than they might seem at first glance: both are intended to limit liability. The CWCA and the PAA both seek to strike a balance between providing appropriate compensation for injured persons and limiting an employer’s liability of being sued. If an employer qualifies as a “statutory employer” as defined by the CWCA, “the responsible employer is granted immunity from common law negligence liability.”⁸⁶ Part of the purpose of the PAA, likewise, is to limit the liability of nuclear manufacturers. Indeed, 42 U.S.C. § 2210 is titled “Indemnification and limitation of liability.” Nuclear manufacturers are required to pay the maximum amount that the private insurance market requires in premiums, and if a claim exceeds that amount, the federal government indemnifies the nuclear manufacturer for a certain amount exceeding what private insurance

83. *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1140 (10th Cir. 2010) (emphasis added) (citations omitted).

84. *Building*, 7 F.3d at 1492–93.

85. *Id.* at 1493.

86. *Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 63 (Colo. 1988).

would cover.⁸⁷ Because the CWCA and the PAA both operate similarly, it makes sense to interpret them similarly.⁸⁸ However, since the plaintiffs in *June* did not argue that the court should apply *Building* and its interpretation of “personal injury,” it is impossible to say how the Tenth Circuit would have ruled.

Although additional arguments might not have carried the day for the plaintiffs in *Cook*, their case would likely have been stronger had they argued that the *Building* reasoning should be applied to their case. Perhaps arguing that medical monitoring qualifies as “personal injury” for the purposes of the CWCA would have led the Tenth Circuit to find that medical monitoring qualifies as “physical injury” under the PAA.

C. “Personal Injury” and “Physical Injury” Compared

Beyond the language differences in the CWCA and the PAA, the *Cook* court might also have distinguished *June* because of the difference in language between “personal injury” and “physical injury.” However, when the two phrases are analyzed, they essentially have the same meaning.

“Personal” is defined as, “of, relating to, or affecting a particular person.”⁸⁹ In contrast, “physical” is defined as “of or relating to natural science.”⁹⁰ “Physical” is also defined as “of or relating to the body.”⁹¹ “Injury” is defined as “an act that damages or hurts.”⁹² It is also defined as a “violation of another’s rights for which the law allows an action to recover damages.”⁹³

When the word “injury” is combined with “personal” or “physical,” the slight difference in meaning between the latter two is more or less taken away. “Personal injury” can only mean a damage relating to a particular person. “Physical injury,” likewise, can only mean damage to the body. Although the two words are technically different, they have the same essential meaning: both relate to damage that a person suffers. Because they carry essentially the same meaning, it does not make sense to treat them differently.

Regardless of what would have happened had the *Cook* court addressed the reasoning of the *Building-June* line of cases, it is

87. 42 U.S.C. § 2210(b)(1) (2012).

88. *See id.*; COLO. REV. STAT. ANN. § 8-40-101 (West 1990).

89. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 924 (11th ed. 2003).

90. *Id.* at 935.

91. *Id.*

92. *Id.* at 644.

93. *Id.*

impossible to ignore that the Tenth Circuit held that medical monitoring qualifies as “personal injury” in one case but not as “bodily injury” in another. If the plaintiffs in *June* had argued this to the Tenth Circuit, perhaps the court would have treated medical monitoring claims differently in *Cook*.

IV. THE COURT MADE AN INAPT ANALOGY BETWEEN BODILY ORGANS AND HOUSES

This Part discusses the Tenth Circuit’s analogy comparing “bodily injury” in *June* to “damage to property” in *Cook*. It first outlines the reasoning of the analogy and how the Tenth Circuit formulated its opinion. It then critiques the analogy as improperly equating houses to humans. Finally, it argues that by requiring physical damage to property, the court has mostly eliminated a potential plaintiff’s use of “damage to property.”

A. “Bodily Injury” and “Damage to Property”

Aside from the fact that the plaintiffs in *Cook* did not argue that the court should have applied the holding of *Building* in *June*, and then to their case as well, the Tenth Circuit’s analogy of equating “bodily injury” to “damage to property” further muddies the reasoning behind *Cook*’s holding.⁹⁴ Despite houses and humans being quite different, the *Cook* court treated the two in the same way, and came to a conclusion that does not make logical sense.

The court begins its analysis of “damage to property” with the blanket statement that “[o]ur characterization of ‘damage to property’ is informed by the analysis in *June*, as the logic applies equally to the issue before us in this appeal.”⁹⁵ Although radiation exposure to humans and houses certainly share some similarities, the court provided no justification as to exactly why the logic of its reasoning applies equally to “bodily injury” and “damage to property.”

The Tenth Circuit’s analogy might be more appropriate if human bodies and houses could be harmed in precisely the same fashion. For example, take a human that is exposed to some amount of radiation and inevitably develops some disease at a time in the future. Now, take a residential home that is similarly exposed to the same amount of

94. See *supra* Part II.

95. *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1140 (10th Cir. 2010).

radiation, and at some time in the future part of its foundation cracks. Although the two entities were exposed to the same harm, the injuries are too distinct to equate to one another. Humans are much more fragile than houses—houses can survive for hundreds of years and humans cannot. Humans do not have foundations that can crack, and residential homes do not have organs that can become diseased. Moreover, if two people are exposed to radiation in equal amounts, it is possible for one to develop a disease and the other to remain healthy. Likewise, it is possible that two homes exposed to equal amounts of radiation could experience different levels of damage. One home's foundation could crack, and another could be left undamaged.

Aside from the harms to which humans and houses can be exposed, houses and humans are also drastically different in other ways. Houses are built—people are not. Houses are a commodity to be bought and sold—people are not. Houses are repaired, expanded, and demolished—people are not. Furthermore, there are entirely different bodies of law that deal with property and people.⁹⁶ There are simply too many variables at play to suggest that “bodily injury” and “damage to property” should be analyzed in the same way.

Despite lacking justification for analyzing the two types of injuries the same, the court continued by stating as follows:

Just as an existing physical injury to one's body is necessary to establish 'bodily injury,' so too is an existing physical injury to property necessary to establish 'damage to property'. As this court indicated in *June*, however, mere risk of future damage is insufficient. Rather, the physical damage must actually be manifest at the time the PAA claim is asserted.⁹⁷

The court seems to suggest that in order to prove “damage to property,” a plaintiff, or in this case a plaintiff class, must provide evidence of actual, physical damage to property, as opposed to “merely risk of future damage.” Although the court does not provide what would constitute “damage to property,” one can imagine that cracked foundations, chipped paint, or perhaps dying foliage might constitute actual physical damage. However, the plaintiffs in *Cook* did not present evidence of actual physical damage.⁹⁸

Admittedly, there is some appeal to the court requiring actual, physical damage to property in order to satisfy the jurisdictional element of the PAA for “damage to property.” In the context of humans being

96. *See infra* Part III.B.

97. *Cook*, 618 F.3d at 1140 (citations omitted).

98. *Id.* at 1141.

exposed to nuclear radiation, other circuits have been hesitant to allow medical monitoring to constitute “bodily injury” for the purposes of the PAA. In *Rainer v. Union Carbide Corp.*, the Sixth Circuit was faced with determining whether the Kentucky Supreme Court would equate “subcellular damage” with “bodily injury.”⁹⁹ Although the Kentucky Supreme Court had not ruled on the issue, the *Rainer* court concluded that if the case were decided in Kentucky state court, then “subcellular damage” and “bodily injury” could not be equated.¹⁰⁰ Likewise, the Ninth Circuit refused to allow medical monitoring claims to go forward under the PAA in *In re Berg Litigation*.¹⁰¹ The *In re Berg Litigation* court reasoned that absent a physical injury, the future risk of disease does not meet the jurisdictional requirements of the PAA.¹⁰²

However, the *Rainer* and *In re Berg Litigation* courts both evaluated whether actual medical monitoring claims could be brought under the PAA. But the *Cook* court determined whether or not exposure to radiation, although not amounting to actual, physical damage, could satisfy the “loss of or damage to property” language. *Cook* did not determine whether such exposure could satisfy the “bodily injury” language of the PAA. In other words, the *Cook* court was not tasked with examining whether or not medical monitoring could qualify under the PAA; it was instead tasked with determining whether or not radiation to property could qualify, using medical monitoring as a metaphor to guide its analysis. The *Cook* court treated damage to persons and damage to property in the same fashion, requiring actual physical damage to the plaintiffs’ property.¹⁰³

Although it might make sense initially to treat humans and buildings in a similar fashion, the two are just too different. Because of the differences between the two, they should not be treated the same.

B. Personal Torts and Property Torts

In addition to the differing types of harm that buildings and humans can experience, the types of torts that govern personal injuries and injuries to property also operate differently. Despite this difference, the

99. *Rainer v. Union Carbide Corp.*, 402 F.3d 608, 618 (6th Cir. 2005).

100. *Id.* at 622. Recall that under the PAA federal courts have jurisdiction but are required to apply state laws. Because the Kentucky Supreme Court had not ruled on the issue, the Sixth Circuit was tasked with predicting how the Kentucky Supreme Court would rule.

101. *In re Berg Litig.*, 293 F.3d 1127, 1132–33 (9th Cir. 2002).

102. *Id.*

103. *See supra* Part II.

Cook court equated “bodily injury” with “damage to property,” thus eviscerating any meaningful distinction between the two. Because personal torts and property torts are treated differently by the law, the reasoning behind the holding in *Cook* makes even less logical sense.

Personal torts and property torts often require different types of injuries for a plaintiff to prove a cause of action. For example, a plaintiff must show actual damage in negligence, products liability, and battery cases.¹⁰⁴ However, property torts are often treated differently. “The elements for the tort of trespass” for example “are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property.”¹⁰⁵ An injury is not required; one is liable for trespass whether or not harm occurs. Any intrusion on the land of someone else, absent a privilege, can give rise to a cause of action, even if that intrusion is beneficial or does not interfere with the owner’s enjoyment of that land.¹⁰⁶ Indeed, the plaintiffs in *Cook* succeeded on their trespass claim.

Likewise, “nuisance is predicated upon a substantial invasion of an individual’s interest in the use and enjoyment of his property.”¹⁰⁷ Nuisance claims can be an intentional invasion of a person’s interest, a negligent invasion of a person’s interests, or conduct that falls within the realm of strict liability.¹⁰⁸ As long as an action is unreasonable and substantial, any disturbance of a property that hinders enjoyment of that property can rise to a nuisance.¹⁰⁹ Although trespass requires no harm whatsoever, and nuisance requires a “substantial invasion of an individual’s rights,” nuisance does not require actual harm. “Significant harm,” an admittedly amorphous concept, is more than a “petty annoyance,” but does not have to amount to actual damage.”¹¹⁰ It is enough for a plaintiff to show a “real and appreciable interference with [her] use or enjoyment of his land.”¹¹¹ The plaintiffs in *Cook* also prevailed on their nuisance claim. In sum, property torts and personal torts often require different harms to be actionable.

104. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 13 (1965) (stating that battery requires (1) an act intending to cause a harmful or offensive contact with a person or third person and (2) harmful contact directly or indirectly results).

105. *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003) (citations omitted); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998).

106. RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).

107. *Hoery*, 64 P.3d at 218.

108. *Id.*

109. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 620 (5th ed. 1984).

110. RESTATEMENT (SECOND) OF TORTS § 821F cmt. c (1979).

111. *Id.*

Recall, however, that courts interpreting the PAA have been reluctant to completely substitute state law claims for threshold injuries.¹¹² The *June* court was not persuaded by the plaintiffs' argument that any claim which satisfied state tort law should qualify as a "public liability action" under the PAA.¹¹³ Likewise, the *Cook* court was not persuaded that a plaintiff need only assert a "public liability action" instead of actually proving one.¹¹⁴ However, the plaintiffs in *Cook* are exactly the type of individuals that the PAA was meant to cover: people who have been injured by the actions of a nuclear manufacturer. They are not asserting that the nuclear manufacturer caused them emotional distress, nor are they asserting that they were victims of battery.¹¹⁵ Those types of claims would clearly fall outside of what the PAA was meant to cover because they have nothing to do with nuclear manufacturing. Instead, the plaintiffs were asserting that they were damaged because of the presence of nuclear radiation on their properties, and property torts do not generally require actual damages. Although the plaintiffs put much stock in their argument that their properties were physically damaged by any amount of radiation, no matter how small that amount, they really had more of an argument to make based on the "loss of or damage to property, or loss of use of property" language of the PAA.¹¹⁶

In short, the types of injuries that the plaintiffs asserted in *Cook* fit the language of the PAA. "[B]odily injury, sickness, disease, or death" all appear to be injuries that would require actual damage, similar to the type of damage a plaintiff must show in negligence, battery, and products liability cases. "[L]oss of or damage to property, or loss of use of property," in contrast, appears to fit more into the category of property torts that do not necessarily require actual damage. By equating "bodily injury" with "damage to property," the *Cook* court takes away any distinction between the houses and humans and thus makes its ruling on the foundation of a faulty analogy.

112. Doing so would mean that any claim that satisfied state law would satisfy the threshold elements of the PAA. This interpretation would make the PAA essentially superfluous. See *supra* Part I.B.1.

113. See *supra* Part I.

114. *Id.*

115. See *In re Berg Litig.*, 293 F.3d 1127 (9th Cir. 2002).

116. 42 U.S.C. § 2014(q) (2012).

V. THE TENTH CIRCUIT MISINTERPRETED, AND THE PLAINTIFFS DID NOT STRESS ENOUGH, THE “LOSS OF USE OF PROPERTY” LANGUAGE OF THE PAA

This Part examines a different approach that the *Cook* plaintiffs could have taken to their PAA lawsuit—through the “loss of use of property” language in 42 U.S.C. § 2014(q). It first argues that the plaintiffs should have presented more evidence that their case satisfied the “loss of use of property” element of the PAA. It finally argues that given the evidence that the plaintiffs did present at trial, perhaps they could have convinced the Tenth Circuit that they did meet the “loss of use of property” language if they borrowed some arguments from insurance claim litigation.

A. *The Cook Plaintiffs and Actual Use of Property*

To prevent losing on appeal, the lawyers in *Cook* should have argued that their clients’ harms fit within the “loss of use of property” language of the PAA. However, the plaintiffs’ main strategy was to try their case under a nuisance theory in that any exposure to plutonium increases health risks; they did not focus on the threshold elements of a PAA claim.¹¹⁷

On appeal, the plaintiffs struggled to argue that their case satisfied the “loss of use of property” language because the trial judge did not require them to make such a showing at trial.¹¹⁸ With the facts that the plaintiffs did present at trial, the Tenth Circuit seemed more amenable to plutonium radiation qualifying as “loss of use of property” rather than “damage to property”:

We agree that when the presence of radioactive materials creates a sufficiently high risk to health, a loss of use may in fact occur. For instance, a residential or business use may be lost due to an increased risk to health so high that no reasonable person would freely choose to live on or work at the property. Similarly, agricultural use may be lost where the soil can no longer produce crops that are safe for consumption due to the presence of the radioactive substance. In short, where the evidence indicates the property has been affected by the radioactive material to such an extent that an otherwise

117. *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1141 (10th Cir. 2010).

118. *Id.* at 1142.

appropriate use of the property is lost, a plaintiff has established the threshold injury element of his PAA claim.¹¹⁹

The plaintiffs' expert witness only testified, however, that any exposure to plutonium increases health risks to some degree, not that the plaintiffs' property was exposed to enough radiation to meet any particular threshold.¹²⁰ The plaintiff class did not consist of any farmland that was deprived of use because of exposure to plutonium radiation, nor were any buildings deprived of a business use because of fear of exposure to radiation. The class mainly consisted of regular homeowners whose homes had been exposed to a small but quantifiable amount of radiation.

In addition to not meeting the "sufficiently high risk to health" requirement that the Tenth Circuit created out of whole cloth, the plaintiffs did not present any arguments that "loss of use of property" actually occurred. Because the plaintiffs did not show any specific uses of which they were deprived, the Tenth Circuit held that they had not shown "loss of use of property."¹²¹

However, it might have been enough to meet the requirements of the PAA if the plaintiffs had merely argued that they were indeed deprived of a use—any use at all—of their property. Aside from the "sufficiently high risk to health" threshold, the Tenth Circuit did not seem to create a very high burden when it comes to actual use: "[W]here the evidence indicates the property has been affected by the radioactive material to such an extent that an otherwise appropriate use of the property is lost, a plaintiff has established the threshold injury element of his PAA claim."¹²² Perhaps the plaintiffs could have argued that family members did not want to visit because of a fear of exposure to radiation. Or maybe they could have argued that they were deprived of a use of inviting their children's friends over to play. These are but two examples of such arguments; there could have been a myriad of other uses that might have met the Tenth Circuit's requirement of "appropriate use" had the plaintiffs brought them to the attention of the court.

This analysis, of course, has the benefit of hindsight, and it might not have been an obvious argument to make at the time—after all, the trial judge did not require them to make a showing of any particular loss of use. However, it seems rather intuitive that presenting arguments of

119. *Id.* at 1141–42.

120. *Id.* at 1142.

121. *Id.*

122. *Id.* at 1142 (emphasis added).

actual loss of use to the court would probably have made the plaintiffs' case stronger on appeal.

B. Diminution of Property Value Plus Radiation Exposure

The *Cook* court was unwilling to allow diminution of property value to establish “loss of use of property” or “damage to property.”¹²³ However, with the facts presented at trial, the plaintiffs might have satisfied the “loss of use of property” requirement had they argued that the diminution of property values combined with the actual radiation on their property satisfied the “loss of use of property” language. To do so, the plaintiffs might have drawn from another area of the law that deals with similar harms—insurance claims—and argued that the PAA should be treated similarly.

Courts have repeatedly held that pure economic loss, such as a loss of investment, does not constitute “loss of use of tangible property.”¹²⁴ In insurance claim litigation, parties often litigate what constitutes “loss of use of tangible property.” In these sorts of suits, an investment firm will take out an insurance policy on real property, and that insurance policy will contain a provision covering damage to property. As part of that damage to property section, there will be a specific provision covering “loss of tangible use of property.” Often times, something unexpected happens, such as a construction company going bankrupt or otherwise being unable to finish a project, and the investors are unable to recoup their investment. In these situations, the property will not have been physically harmed. Instead, the project gets put on hold because the construction company cannot finish. The investment firm will then bring

123. *Id.* at 1141 n.12.

124. *Hommel v. George*, 802 P.2d 1156, 1158 (Colo. App. 1990) (“While the loss of use of tangible property includes such property which has diminished in value or been made useless irrespective of any physical injury to the property, the phrase does not include mere economic damages in the nature of loss of investments, anticipated profits, and financial interests.”) (internal citations omitted); *Tschimperle v. Aetna Cas. & Sur. Co.*, 529 N.W.2d 421, 425 (Miss. Ct. App. 1995) (“[T]he general rule is that loss of investment does not constitute damage to tangible property.”) (internal citations omitted); *L. Ray Packing Co. v. Commercial Union Ins. Co.*, 469 A.2d 832, 835 (Me. 1983) (“[A] distinction must be drawn between loss of use of tangible property and loss of profits. While loss of use of tangible property does include tangible property which has been diminished in value or made useless irrespective of any physical injury to the property . . . it does not include mere economic damage in the nature of loss of investments, anticipated profits, and financial interests.”). *But see* *Hartford Accident & Indem. Co. v. Case Found. Co.*, 294 N.E.2d 7 (Ill. App. Ct. 1973) (noting that the loss of use of tangible property might have been satisfied if plaintiff alleged actual damage to property which caused an economic loss).

an action alleging “loss of use of tangible property” under the insurance agreement. The investment firm will argue that its economic loss of not being able to collect rents or sell the property is covered by the insurance policy. However, because actual harm, rather than economic loss, is usually not shown, the investment firm usually does not prevail in recovering for their loss.

The homeowners in *Cook*, in contrast, were not alleging mere economic damages. They were alleging actual damages in the form of a quantifiable amount of radiation on their properties. The insurance cases involving “loss of use of tangible property” seem to suggest that if property has been physically damaged in addition to the owner being unable to sell it or realize profits from it, then that combination might satisfy “loss of use of tangible property” for purposes of the insurance coverage.¹²⁵ Although a small amount of radiation and a diminution of property value were not, by themselves, enough to establish a “loss of use of property,” perhaps the court might have been more amenable to an argument that the two combined would be enough. After all, the radiation caused the diminution in property value; the two are inextricably linked. If an insurance claimant would succeed on a claim for coverage for “loss of use of tangible property” by alleging actual damage leading to an economic loss, the *Cook* plaintiffs should have succeeded on “loss of use of property” language by alleging actual radiation that leads to a diminution of property damage.

However, this argument certainly has its limitations. Insurance contracts and the PAA are two very different bodies of law. As with the other arguments presented in this Note, the Tenth Circuit might not have been persuaded by this argument because of the differences between the two areas of the law. On the other hand, “loss of use of property” and “loss of tangible use of property” are relatively similar in language, and maybe the argument would have prevailed had it been presented to the court.

VI. CONCLUSION

This Note critiqued the current jurisprudence in the Tenth Circuit under the PAA through the ruling in *Cook v. Rockwell International Corp.* for three reasons. First, in the *Building-June-Cook* lines of cases, the plaintiffs in *June* did not ask the court to apply the holding of *Building*. The plaintiffs in *Cook* also failed to present the *Building*

125. See *Hartford Accident & Indem. Co. v. Case Found. Co.*, 294 N.E.2d 7 (Ill. App. Ct. 1973).

holding as an argument in their favor, and the Tenth Circuit ruled that medical monitoring did not qualify either as a “physical injury” for purposes of the PAA or qualify as a “personal injury” for purposes of the CWCA. Second, the *Cook* court started its analysis regarding “damage to property” with a comparison to “physical injury.” Houses are not affected by radiation from plutonium exposure in the same way that human organs are, and thus the court’s analogy is inappropriate and its holding makes little sense. Finally, the court read “loss of use of property” too narrowly.

This argument does not suggest that the plaintiffs in *Cook* should have prevailed on their claim. Even if the plaintiffs would have prevailed on the threshold elements of their PAA claim, they still faced several other problems. First, the defendants in the case argued that federal statutes and federal nuclear radiations preempted any state action that the plaintiffs brought. The Tenth Circuit remanded the case and ordered the defendants to show exactly which statute and regulations preempted state action. Second, under the substantive state tort claim element, the court ruled that the jury instructions did not properly instruct the jury on trespass law of Colorado. Third, the *Cook* court ordered the district court to revisit whether or not the plaintiff class could be properly certified with regard to the threshold elements of the PAA as well as the substantive state tort law elements. Fourth, the Tenth Circuit also ruled that the jury instructions did not properly instruct the jury with regard to punitive damages. In short, the plaintiffs in *Cook* were faced with many more problems than just meeting the threshold requirements of the PAA.

This argument does suggest, however, that the Tenth Circuit’s ruling on the threshold elements of a claim under the PAA was too limited. While it might be good public policy to limit the liability that a nuclear manufacturer could face given the occurrence of a nuclear event in order to encourage good, safe production of nuclear energy, the Tenth Circuit has been too limited in its jurisprudence surrounding the threshold elements of a suit brought under the PAA. The Tenth Circuit’s interpretation of “loss of or damage to property, or loss of use of property” has made it too difficult for plaintiffs to recover.