

## **A MEDICAL MONITORING CLAIM FOR ASYMPTOMATIC PLAINTIFFS: SHOULD ILLINOIS TAKE THE PLUNGE?**

*By Herbert L. Zarov, Sheila Finnegan, Craig A. Woods, and Stephen J. Kane<sup>1</sup>*

Assume the following hypothetical: Acme Corporation sells a popular prescription drug called Generic for five years before pulling Generic from the market after studies link the drug with various types of cancer. Thousands of former Generic users sue Acme, alleging claims for “medical monitoring.” The plaintiffs concede that they have not incurred a physical injury. Nevertheless, the plaintiffs allege that their use of Generic places them at an increased risk of contracting cancer. As a result, the plaintiffs demand that Acme fund a program providing annual medical examinations to screen for the types of cancer that Generic allegedly causes.

The lawsuits against Acme raise a threshold legal question: may plaintiffs who have not incurred physical injuries nevertheless state a claim for medical monitoring? Beginning in the mid-1980s, a number of courts faced with toxic tort and other claims brought by asymptomatic plaintiffs answered “yes” and in the process abandoned the longstanding requirement that plaintiffs prove a physical injury to recover in tort. It is not difficult to understand why some courts abandoned the physical injury requirement. Individuals exposed to harmful substances that increase their risk of disease make sympathetic plaintiffs. What’s more, the conventional wisdom that medical monitoring offers patients an unmitigated benefit has undoubtedly motivated courts to provide that purported benefit to asymptomatic plaintiffs.

In 1997, however, the United States Supreme Court’s decision in *Metro-North Commuter Railroad Co. v. Buckley*<sup>2</sup> called into question the viability of medical monitoring claims by squarely rejecting the claim under the Federal Employers’ Liability Act. The *Buckley* Court recognized that notwithstanding the reasons that led some courts to adopt medical monitoring claims, a number of countervailing considerations counsel against abandoning the physical injury requirement. The Court noted, for example, that because of the ubiquity of harmful substances in modern society, virtually everyone is a potential member of multiple medical monitoring classes. The

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<sup>1</sup> Herb, Sheila, Craig, and Steve are partners at Mayer Brown LLP.

<sup>2</sup> *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

ensuing flood of litigation would, among other things, diminish defendants' ability to compensate those who later incur actual injuries, require courts to expend resources on administering medical monitoring programs at the expense of more pressing cases, and reduce the availability of scarce medical resources. Moreover, the medical community has rejected the conventional wisdom that medical monitoring provides an unmitigated benefit to asymptomatic patients and, in any event, insurance covers the cost of medically necessary monitoring for the vast majority of Americans.

Relying on these public policy considerations, most courts addressing the issue since *Buckley* have rejected claims for medical monitoring absent physical injury. Nevertheless, a few courts have issued post-*Buckley* decisions adopting claims for medical monitoring, while other courts have continued to implement pre-*Buckley* decisions. Thus, although there is a clear trend against the recognition of medical monitoring claims, the debate is far from over.

This article argues that the Illinois Supreme Court should align itself with the growing majority of post-*Buckley* decisions by rejecting a claim or remedy for medical monitoring absent proof of a present physical injury. We focus on Illinois because although an Illinois intermediate appellate court has adopted a medical monitoring remedy for asymptomatic plaintiffs,<sup>3</sup> the Illinois Supreme Court has not yet addressed the issue. Furthermore, because Illinois has been a magnet for the plaintiffs' bar—with Illinois counties until recently holding the dubious distinction of being named three of the top six “Judicial Hellholes” in the country<sup>4</sup>—a decision from the Illinois Supreme Court approving of medical monitoring could open the floodgates to claims from the uninjured. Notwithstanding our focus on Illinois, however, the arguments that we set forth below should be generally applicable across the country.

In Section I, we outline the origins of medical monitoring claims and describe the recent trend of decisions rejecting such claims for asymptomatic plaintiffs. Section II discusses Illinois cases that have addressed requests for medical monitoring. In Section III, we argue that recognition of a claim for medical monitoring would revolutionize Illinois law by abandoning the requirement that plaintiffs prove a present physical injury. Section IV contends that the public policy considerations at issue weigh heavily against the recognition of a

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<sup>3</sup> *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 871 (Ill. App. Ct. 2003).

<sup>4</sup> American Tort Reform Foundation, *Judicial Hellholes*, 2006, at 18.

medical monitoring claim for asymptomatic plaintiffs. Finally, Section V argues that even if adoption of a medical monitoring claim were warranted, the Illinois General Assembly is far better suited than the judiciary to devise and administer such a claim.

**I. FROM *FRIENDS FOR ALL CHILDREN TO HENRY*: A BRIEF HISTORY OF CLAIMS FOR MEDICAL MONITORING ABSENT PHYSICAL INJURY.**

Courts and commentators generally trace the origins of medical monitoring claims to the D.C. Circuit's decision in *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*<sup>5</sup> *Friends For All Children* arose out of an airplane crash that killed about half of the 301 passengers on board, most of whom were Vietnamese orphans. A public interest organization suing on behalf of the surviving orphans alleged that Lockheed negligently manufactured the airplane involved in the accident. The plaintiff claimed that the crash placed the surviving orphans at an increased risk of suffering a neurological development disorder called Minimal Brain Dysfunction ("MBD"). As a result, the plaintiff sought, among other things, the cost of diagnostic examinations for the forty surviving orphans who resided in countries that did not provide the examinations for free.<sup>6</sup>

The district court concluded that MBD "can be adequately treated and the disabling symptoms minimized only if identified early in life, and before the onset of adolescence."<sup>7</sup> Indeed, the parties' experts agreed "that most if not all these children should receive a comprehensive set of diagnostic examinations to identify their maladies, if any, and to determine appropriate treatment."<sup>8</sup> Therefore, the district court ordered Lockheed to create a \$450,000 fund to reimburse the cost of diagnostic examinations. The court also established a panel of medical experts to decide which, if any, additional diagnostic tests should be provided.<sup>9</sup>

The D.C. Circuit affirmed, rejecting Lockheed's argument that the district court had erred by recognizing "a cause of action for recompense for diagnostic examinations designed to discover whether

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<sup>5</sup> *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984).

<sup>6</sup> *Id.* at 819, 822.

<sup>7</sup> *Id.* at 822.

<sup>8</sup> *Id.* at 825.

<sup>9</sup> *Id.* at 823.

an individual has been injured.”<sup>10</sup> In doing so, the court posed the following hypothetical:

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 for what turns out to be the substantial cost of the diagnostic examinations.<sup>11</sup>

The D.C. Circuit concluded that “even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith’s negligent action.”<sup>12</sup> The court provided two reasons for its conclusion. First, “[a] cause of action allowing recovery for the expense of diagnostic examinations recommended by competent physicians will, in theory, deter misconduct.”<sup>13</sup> Second, recognition of a medical monitoring claim “accords with commonly shared intuitions of normative justice which underlie the common law of tort. The motorbike rider, through his own negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services—a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life.”<sup>14</sup> Applying this reasoning to the case before it, the court concluded that Lockheed “should make the [orphans] whole by paying for the examinations.”<sup>15</sup>

The facts presented in *Friends For All Children* are significantly different from those in typical medical monitoring cases. First, as the Supreme Court recognized in *Buckley*, *Friends For All Children* involved “special recovery-permitting circumstances”—*i.e.*, “the presence of a traumatic physical impact.”<sup>16</sup> The *Buckley* Court pointed out that cases involving traumatic physical impact are “beside the point” in the typical medical monitoring case, where plaintiffs seek monitoring to detect far more speculative injuries resulting from

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<sup>10</sup> *Id.* at 824.

<sup>11</sup> *Id.* at 825.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 826.

<sup>16</sup> *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).

exposure to harmful substances.<sup>17</sup> Indeed, in a subsequent lawsuit against a tobacco manufacturer, a court applying District of Columbia law did not even cite *Friends For All Children* in holding that “medical monitoring requires that the plaintiff have a present injury.”<sup>18</sup> Second, *Friends For All Children* did not provide the crash’s survivors with annual medical examinations of the sort typically requested in medical monitoring cases. Rather, the D.C. Circuit authorized one-time diagnostic examinations and established a panel of experts to determine the need for further testing. Of course, “ongoing ‘medical surveillance’ in a toxic tort case is a far broader remedy than one time only diagnostic examinations necessitated by a single traumatic event.”<sup>19</sup> Third, *Friends For All Children* limited the medical monitoring award to survivors of the crash who resided in countries that would not provide the requisite diagnostic examinations free of charge. By contrast, courts adopting medical monitoring claims in the toxic tort context generally have not barred plaintiffs from recovering the costs of medical examinations covered by collateral sources such as insurance.

Notwithstanding these distinctions, a number of courts have uncritically applied *Friends For All Children* in adopting a medical monitoring claim or remedy for uninjured plaintiffs in toxic tort cases. In *Potter v. Firestone Tire & Rubber Co.*,<sup>20</sup> for example, four landowners living adjacent to a landfill alleged that toxic wastes disposed at the landfill had exposed the plaintiffs to various carcinogens. The plaintiffs conceded that they had not suffered any physical injuries, but alleged that the exposure had increased their risk of developing cancer. The trial court agreed and awarded almost \$150,000 to enable the plaintiffs to “receive periodic medical monitoring to detect the onset of disease at the earliest possible time.”<sup>21</sup>

Relying heavily on *Friends For All Children*, the California Supreme Court affirmed the trial court’s judgment and recognized medical monitoring as a remedy for asymptomatic plaintiffs. The court cited four public policy considerations in support of its conclusion.

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<sup>17</sup> *Id.*; see also *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 183 n.5 (Or. 2008).

<sup>18</sup> *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997); see also Donald L. DeVries & Ian Gallacher, *Medical Monitoring and Medical Device Cases: Taking the Temperature of a New Theory*, 68 DEF. COUNSEL. J. 163, 164 (Apr. 2001) (*Friends For All Children* “does not represent the law of the District of Columbia”).

<sup>19</sup> George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 240 (1993).

<sup>20</sup> *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993).

<sup>21</sup> *Id.* at 801-03.

First, “there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients.”<sup>22</sup> “Second, there is a deterrence value in recognizing medical surveillance claims— ‘allowing plaintiffs to recover the costs of this care deters irresponsible discharge of toxic chemicals by defendants.’”<sup>23</sup> Third, “[t]he availability of a substantial remedy before the consequences of the plaintiffs’ exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties.”<sup>24</sup> Finally, “it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary.”<sup>25</sup>

To determine “the reasonableness and necessity of monitoring,” the *Potter* court identified the following relevant factors:

- (1) the significance and extent of the plaintiff’s exposure to chemicals;
- (2) the toxicity of the chemicals;
- (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff’s chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease;
- (4) the seriousness of the disease for which the plaintiff is at risk;
- and (5) the clinical value of early detection and diagnosis.<sup>26</sup>

The court chose a court-supervised fund rather than lump sum damages as the remedy, explaining that “a fund remedy will encourage plaintiffs to spend money to safeguard their health by not allowing them the option of spending the money for other purposes.”<sup>27</sup>

*Potter* is far from alone. Although they differ both as to the elements necessary to obtain relief and the form any relief should take, the Supreme Courts of Missouri, New Jersey, Pennsylvania, Utah, and West Virginia have all recognized claims or remedies for medical

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<sup>22</sup> *Id.* at 824.

<sup>23</sup> *Id.* (internal alterations omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 824-25.

<sup>27</sup> *Id.* at 825 n.28.

monitoring without proof of physical injury.<sup>28</sup> Several states' intermediate appellate courts, as well as a few federal courts predicting state law, have also adopted medical monitoring as either an independent cause of action or as a remedy tied to an established tort.<sup>29</sup>

As we have said, the trend toward recognition of medical monitoring claims for uninjured plaintiffs shifted in 1997, when the Supreme Court issued its decision in *Buckley*. In that case, an asymptomatic railroad worker exposed to asbestos brought suit for the costs of medical monitoring under the Federal Employers' Liability Act ("FELA"). Writing for a 7-2 majority, Justice Breyer rejected a claim for medical monitoring absent physical injury.<sup>30</sup>

The *Buckley* Court cited three principal public policy considerations in support of its conclusion. First, because "the particular cancer-related costs at issue are the extra monitoring costs, over and above those otherwise recommended" for non-exposed individuals, "their identification will sometimes pose special 'difficult[ies] for judges and juries.'"<sup>31</sup> The Court explained that "[t]hose difficulties in part can reflect uncertainty among medical professionals about just which tests are most usefully administered and when," and continued by noting that "in part those difficulties can reflect the fact that scientists will not always see a medical need to

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<sup>28</sup> *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 717-18 (Mo. 2007); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 312 (N.J. 1987); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999). Some courts have limited plaintiffs' ability to recover medical monitoring under these states' laws outside the context of toxic tort litigation. *E.g.*, *Sinclair v. Merck & Co.*, 948 A.2d 587, 595 (N.J. 2008) (declining to extend medical monitoring to products liability litigation); *Ratliff v. Mentor Corp.*, 569 F. Supp. 2d 926, 929 (W.D. Mo. 2008) (same).

<sup>29</sup> *E.g.*, *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. Ct. App. 1987); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1477 (D. Col. 1991); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106-07 (Fla. Dist. Ct. App. 1999); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 320 (S.D.N.Y. 2006) (Maryland law); *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (N.Y. App. Div. 1984); *Day v. NLO*, 851 F. Supp. 869, 879-81 (S.D. Ohio 1994); *see also Allgood v. Gen. Motors Corp.*, 2005 WL 2218371, at \*7 (S.D. Ind. 2005) (stating a "provisional prediction that the Indiana courts are likely to recognize a claim for medical monitoring damages"); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 575 n.7 (6th Cir. 2005) (medical monitoring claims "are probably proper" under Tennessee law).

<sup>30</sup> *Metro-N. Commuter R.R. Co.*, 521 U.S. 424, 427 (1997).

<sup>31</sup> *Id.* at 441.

provide systematic scientific answers to the relevant legal question, namely, whether an exposure calls for extra monitoring.”<sup>32</sup>

Second, *Buckley* noted that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.”<sup>33</sup> Moreover, the Court recognized that medical monitoring can be a costly remedy, comparing the plaintiff’s request for “damages worth \$950 annually for 36 years” with the \$12,500 paid to injured asbestos claimants in cases settled by the Center for Claims Resolution during a five-year period and the average of \$8,810 paid to “nonmalignant plaintiffs among this group.”<sup>34</sup> The Court concluded that the extraordinarily high number of potential medical monitoring plaintiffs, “along with uncertainty as to the amount of liability, could threaten both a ‘flood’ of less important cases (potentially absorbing resources better left available to those more seriously harmed), and the systemic harms that can accompany ‘unlimited and unpredictable liability’ (for example, vast testing liability adversely affecting the allocation of scarce medical resources).”<sup>35</sup>

Third, *Buckley* stated that a “full-blown ordinary tort liability rule would ignore the presence of existing alternative sources of payment, thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources (say, insurance now or in the future) might provide monitoring in any event.”<sup>36</sup> Thus, although acknowledging “important competing considerations” and the “sympathetic” plaintiff, the Court found those considerations to be outweighed “by the potential systemic effects of creating a new, full-blown, tort law cause of action” for medical monitoring.<sup>37</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 442.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (internal citation omitted).

<sup>36</sup> *Id.* at 442-43.

<sup>37</sup> *Id.* at 443. Although some courts have distinguished *Buckley* because it involved a request for lump sum damages rather than a court-supervised fund, “the policy concerns cited by” *Buckley* are equally “applicable to a medical-monitoring fund.” *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 666 n.12 (W.D. Tex. 2006). And although some courts may be tempted to distinguish *Buckley* because it addressed an independent cause of action for medical monitoring rather than a request for monitoring as a remedy tied to an established tort, that too is a distinction without a



Since *Buckley*, the Supreme Courts of Alabama, Kentucky, Michigan, Mississippi, Nevada, and Oregon have all relied on the public policy considerations discussed in Justice Breyer's opinion in rejecting medical monitoring claims for asymptomatic plaintiffs.<sup>38</sup> Several states' lower courts and federal courts predicting state law have relied on similar public policy considerations in rejecting medical monitoring claims.<sup>39</sup> Taken together, these cases show that *Buckley* ushered in a "recent trend of rejecting medical monitoring" for asymptomatic plaintiffs.<sup>40</sup>

In *Henry v. Dow Chemical Co.*, for example, the plaintiffs brought a putative class action on behalf of individuals who lived or worked near a manufacturing plant owned by Dow Chemical. The plaintiffs alleged that Dow had negligently exposed them to dioxin, a potentially hazardous chemical. The plaintiffs conceded that they did not have physical injuries, but claimed that their alleged exposure placed them at an increased risk of contracting various diseases. Accordingly, they demanded that Dow fund a court-supervised medical monitoring program to screen the class members for symptoms of dioxin-related diseases.<sup>41</sup>

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difference. Plaintiffs must prove an injury to prevail regardless of whether medical monitoring is framed as an independent claim or as a remedy.

<sup>38</sup> *Hinton v. Monsanto Co.*, 813 So. 2d 827, 832 (Ala. 2001); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 859 (Ky. 2002); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 704 (Mich. 2005); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 7 (Miss. 2007); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 437 (Nev. 2001); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 187 (Or. 2008).

<sup>39</sup> *E.g.*, *Bowerman v. United Illuminating*, 1998 WL 910271, at \*10 (Conn. Super. Ct. Dec. 15, 1998); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984); *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997); *Parker v. Wellman*, 2007 WL 1149982, at \*4 (11th Cir. Apr. 18, 2007) (Georgia law); *Johnson v. Abbott Labs.*, 2004 WL 3245947, at \*6 (Ind. Cir. Ct. Dec. 31, 2004); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1523 (D. Kan. 1995); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 552 (D. Minn. 1999); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (Nebraska law); *Curl v. Am. Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. Ct. App. 2007); *Rosmer v. Pfizer, Inc.*, 2001 WL 34010613, at \*5 (D.S.C. Mar. 30, 2001); *Jones v. Brush Wellman, Inc.*, 2000 WL 33727733, at \*8 (N.D. Ohio Sept. 13, 2000) (Tennessee law); *Norwood*, 414 F. Supp. 2d at 668; *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (Virginia law); *Purjet v. Hess Oil Virgin Islands Corp.*, 1986 WL 1200, at \*4 (D.V.I. Jan. 8, 1996); *Duncan v. N.W. Airlines, Inc.*, 203 F.R.D. 601, 608-09 (W.D. Wash. 2001); *see also* La. Civ. Code Ann. art. 2315.

<sup>40</sup> *Norwood*, 414 F. Supp. 2d at 667.

<sup>41</sup> *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 685-86 (Mich. 2005).

In an opinion that quickly proved to be influential, the Michigan Supreme Court rejected the plaintiffs' request for medical monitoring and reaffirmed "the principle that a plaintiff must demonstrate a present physical injury to person or property *in addition* to economic losses that result from that injury in order to recover under a negligence theory."<sup>42</sup> The court reasoned that requiring "a present physical injury to person or property serves a number of important ends," including the reduction of fraudulent claims and the provision of a clear line permitting fact-finders to distinguish between plaintiffs who have a cause of action and those who do not.<sup>43</sup> In doing so, the court rejected the plaintiffs' argument "that the need to pay for medical monitoring is *itself* a present injury sufficient to sustain a cause of action for negligence."<sup>44</sup> The court explained that the plaintiffs' argument was an "attempt to blur the distinction between 'injury' and 'damages.' While plaintiffs arguably demonstrate economic losses that would otherwise satisfy the 'damages' element of a traditional tort claim, the fact remains that these economic losses are wholly derivative of a *possible future* injury rather than an *actual, present* injury."<sup>45</sup> Accordingly, the court held that "the medical expenses plaintiffs claim to have suffered (and will suffer in the future) are not compensable" because the "plaintiffs have not alleged a present physical injury."<sup>46</sup>

In addition to requiring that plaintiffs prove a physical injury, the *Henry* court stated that the "plaintiffs' claim may also have undesirable effects that neither we nor the parties can satisfactorily predict."<sup>47</sup> First, "recognizing a cause of action based solely on exposure—one without a requirement of a *present* injury—would create a potentially limitless pool of plaintiffs."<sup>48</sup> "Litigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care."<sup>49</sup> Second, citing authorities questioning the value of some monitoring regimes, the court pointed out that "it is far from settled that judicially supervised medical monitoring is an unmitigated benefit for all concerned."<sup>50</sup> Third, "we have no assurance that a decision in

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<sup>42</sup> *Id.* at 690.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 691.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 694.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 695 n.14.

plaintiffs' favor ... will not wreak enormous harm on Michigan's citizens and its economy."<sup>51</sup> Citing *Buckley*, the court concluded: "We would be unwise, to say the least, to alter the common law in the manner requested by plaintiffs when it is unclear what the consequences of such a decision may be and when we have strong suspicions, shared by our nation's highest court, that they may well be disastrous."<sup>52</sup>

The court noted that legislatures, not courts, should resolve the type of "far-reaching and complex public policy issues" raised by the plaintiffs' request for medical monitoring.<sup>53</sup> It explained that the decision whether to adopt a medical monitoring claim "necessarily involves a drawing of lines reflecting considerations of public policy, and a judicial body is ill-advised to draw such lines given the limited range of interests represented by the parties and the resultant lack of the necessary range of information on which to base a resolution."<sup>54</sup> In addition to the difficulties posed by the threshold question of whether to adopt a medical monitoring claim, the court noted "practical questions of how such a monitoring program would work."<sup>55</sup> For example, determining eligibility for monitoring "involves the consideration of a number of practical questions and the balancing of a host of competing interests—a task more appropriate for the legislative branch than the judiciary."<sup>56</sup> Finally, the difficulties inherent in judicial administration of a medical monitoring program "would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime."<sup>57</sup> Courts simply do not "possess the technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science. The burdens of such a system would more appropriately be borne by an administrative agency specifically created and empowered to administer such a program."<sup>58</sup> Given all of these concerns, the court decided to "defer" resolution of the plaintiffs' request for medical monitoring "to the people's representatives in the

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<sup>51</sup> *Id.* at 696-97.

<sup>52</sup> *Id.* at 697.

<sup>53</sup> *Id.* at 699 n.24.

<sup>54</sup> *Id.* at 697.

<sup>55</sup> *Id.* at 698.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 699.

<sup>58</sup> *Id.*

Legislature, who are better suited to undertake the complex task of balancing the competing societal interests at stake.”<sup>59</sup>

## II. FROM *MORRISSY* TO *JENSEN*: ILLINOIS’ EVOLVING TREATMENT OF MEDICAL MONITORING CLAIMS.

The first Illinois appellate court to consider a request for medical monitoring suggested that Illinois would not recognize such a claim without proof of a physical injury. In *Morrissy v. Eli Lilly & Co.*,<sup>60</sup> a woman whose mother had ingested the anti-miscarriage drug Diethylstilbestrol (“DES”) during pregnancy brought a purported class action against numerous DES manufacturers and related defendants. The plaintiff alleged that the class members had symptoms suggesting that they would contract cancer from their exposure to DES. The plaintiff requested that the court order the defendants to establish a fund with more than \$41 million to provide the class members with medical monitoring for the rest of their lives.<sup>61</sup>

The appellate court affirmed the denial of class certification, holding that “individual determinations of proximate cause” predominated over any common issues.<sup>62</sup> In doing so, the court characterized the plaintiff’s claim as “essentially alleging the existence of latent disease as a present injury.”<sup>63</sup> The court rejected that claim, stating that the link “suggested between exposure to DES In [sic] utero and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury.”<sup>64</sup> It reasoned that “possible future damages in a personal injury action are not compensable unless reasonably certain to occur.”<sup>65</sup> At least two trial courts subsequently relied on *Morrissy* in holding that

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<sup>59</sup> *Id.* at 686.

<sup>60</sup> *Morrissy v. Eli Lilly & Co.*, 394 N.E.2d 1369 (Ill. App. Ct. 1979).

<sup>61</sup> *Id.* at 1371-72.

<sup>62</sup> *Id.* at 1376. In a subsequent article, we will analyze whether courts may properly certify medical monitoring class actions.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* The Illinois Supreme Court subsequently clarified that plaintiffs who have already incurred a physical injury may recover damages for the increased risk of future injuries even if the future injuries are “not reasonably certain to occur.” *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 370 (Ill. 2002) (permitting recovery for increased risk of future harm where jury awarded damages “for past pain and suffering” based on defendants’ negligence in leaving a catheter fragment in plaintiff’s heart).

Illinois does not recognize a medical monitoring claim absent proof of a present physical injury.<sup>66</sup>

In *Carey v. Kerr-McGee Chemical Corp.*,<sup>67</sup> however, a federal district court predicted that “the Illinois Supreme Court would uphold a claim for medical monitoring without requiring plaintiffs to plead and prove ... a present physical injury.” The *Carey* plaintiffs had filed a putative class action against a manufacturer of thorium and the manufacturer’s parent corporation, alleging that the defendants had improperly disposed of radioactive byproducts called thorium tailings. Although they did not suffer from any physical injuries, the plaintiffs contended that their exposure to thorium tailings increased their risk of contracting various diseases. The plaintiffs pled claims for, among other things, strict liability and negligence, and requested relief in the form of a court-supervised fund to pay for the costs of medical monitoring.<sup>68</sup>

In an opinion that failed to cite *Buckley*, the court conceded that “no Illinois court has as yet accepted such a claim in the absence of any present physical injury.”<sup>69</sup> Nevertheless, relying almost exclusively on a Third Circuit decision interpreting Pennsylvania law, the court held that plaintiffs may recover the costs of medical monitoring “should expert testimony establish that such expenditures are necessary ‘to a reasonable degree of medical certainty.’”<sup>70</sup> The court reasoned that allowing plaintiffs to recover the costs of medical monitoring “deters irresponsible discharge of toxic chemicals by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible.”<sup>71</sup> Attempting to distinguish *Morrissy*, the court stated that “the plaintiff in *Morrissy* sought a fund for treatment for future injuries as well as monitoring, while the plaintiffs in [*Carey*] sought only

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<sup>66</sup> *Hayes v. ACandS, Inc.*, No. 95-CH-01835, Order at 12-13 (Ill. Cir. Ct. Oct. 30, 1996), *appeal dismissed*, No. 1-97-0606 (Ill. App. Ct. Jan. 27, 1998); *Blesy v. Kustom Signals, Inc.*, No. 94-CH-03564, Tr. at 8 (Ill. Cir. Ct. Nov. 14, 1995), *aff’d*, No. 1-95-4302 (Ill. App. Ct. Mar. 24, 1997).

<sup>67</sup> *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109 (N.D. Ill. 1998).

<sup>68</sup> *Id.* at 1111, 1117.

<sup>69</sup> *Id.* at 1118.

<sup>70</sup> *Id.* at 1120 (citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990)). The only Illinois decision that *Carey* cited in support of its holding stands for the unremarkable proposition that plaintiffs who already suffer from a physical injury may recover the costs of medical monitoring. *Id.* at 1119 (citing *Betts v. Manville Personal Injury Settlement Trust*, 588 N.E.2d 1193 (Ill. App. Ct. 1992)).

<sup>71</sup> *Id.* at 1120.

monitoring damages.”<sup>72</sup> The court failed to explain why the plaintiffs’ request of “a fund for treatment for future injuries” in *Morrissy* prevented the appellate court from taking the lesser step of establishing a medical monitoring fund. The *Carey* court subsequently acknowledged that there were “substantial grounds for differences of opinion” and certified for an interlocutory appeal the issue of whether to adopt a medical monitoring claim without proof of physical injury.<sup>73</sup> The Seventh Circuit declined to accept interlocutory review, and the parties ultimately settled.<sup>74</sup>

Relying in part on *Carey*, the Illinois Appellate Court first recognized a remedy for medical monitoring without proof of physical injury in *Lewis v. Lead Industries Ass’n*.<sup>75</sup> In *Lewis*, the plaintiffs brought a purported class action against several lead paint manufacturers on behalf of all “parents and guardians of minor children [living in Illinois] who have undergone or will undergo medical screening, assessment, or monitoring for lead poisoning or latent diseases associated with lead poisoning.”<sup>76</sup> The plaintiffs asserted six different claims and sought damages as a remedy for each of the claims to compensate them for the costs of medical monitoring. The trial court dismissed the action because the plaintiffs failed to allege a physical injury.

The appellate court reversed in part in a cursory opinion that failed to cite *Buckley* or any other decision rejecting medical monitoring absent physical injury. The court acknowledged that in *Dillon v. Evanston Hospital*, the Illinois Supreme Court had held that plaintiffs may obtain damages for an increased risk of future harm only by proving that “the defendant’s breach of duty caused a *present injury* which resulted in that increased risk,”<sup>77</sup> with any damages for the increased risk of harm “reflect[ing] the low probability of occurrence.”<sup>78</sup> However, the *Lewis* court cited *Friends For All Children* in stating that “an action seeking recovery for the cost of [medical] examinations is distinct from a claim seeking recovery for an increased risk of harm.”<sup>79</sup> The court reasoned that “[u]nlike a claim seeking

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<sup>72</sup> *Id.* at 1119.

<sup>73</sup> *Carey v. Kerr-McGee Chem. LLC*, 1999 WL 966484, at \*1 (N.D. Ill. Sept. 30, 1999).

<sup>74</sup> *Perez v. Metabolife Int’l, Inc.*, 218 F.R.D. 262, 267 n.2 (S.D. Fla. 2003).

<sup>75</sup> *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869, 871 (Ill. App. Ct. 2003).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 873 (emphasis added).

<sup>78</sup> *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 370 (Ill. 2002).

<sup>79</sup> 793 N.E.2d at 873.

damages for an increased risk of future harm, a claim seeking damages for the cost of a medical examination is not speculative.”<sup>80</sup> Relying on *Carey*, the court concluded:

If a defendant’s breach of duty makes it necessary for a plaintiff to incur expenses to determine if he or she has been physically injured, we find no reason why the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty.<sup>81</sup>

*Lewis* failed to offer any guidance concerning the elements that plaintiffs must establish to obtain medical monitoring.<sup>82</sup>

The Illinois Appellate Court’s most recent treatment of medical monitoring came in *Jensen v. Bayer AG*.<sup>83</sup> *Jensen* arose out of a putative class action alleging that use of the anti-cholesterol drug Baycol subjected the class members to an increased risk of contracting rhabdomyolysis—a rare condition that can result in muscle breakdown and kidney failure—and necessitated that plaintiffs undergo medical monitoring. The appellate court affirmed the dismissal of the plaintiff’s complaint, holding that even if “our supreme court would recognize” a medical monitoring claim absent physical injury, the plaintiff failed to present any evidence showing that monitoring was necessary.<sup>84</sup> Interestingly, the panel suggested that plaintiffs cannot rely on *Lewis* to recover medical monitoring. The court explained that the plaintiff in *Lewis* “sought compensation for medical testing to detect a *present* physical injury.”<sup>85</sup> *Lewis* “did not address the question posed by plaintiff here; namely, whether a plaintiff may bring a claim for medical monitoring for potential *future* harm, where no present injury is shown.”<sup>86</sup>

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<sup>80</sup> *Id.* at 874.

<sup>81</sup> *Id.*

<sup>82</sup> *Jensen v. Bayer AG*, No. 01 CH 13319, 2003 WL 22962431, at \*4 (Ill. Cir. Ct. Dec. 15, 2003), *aff’d*, 862 N.E.2d 1091 (Ill. App. Ct. 2007) (“*Lewis* does not give trial courts much guidance on what elements are sufficient to state an independent claim of medical monitoring.”); *see also* *Pelzer v. Transformer Co.*, No. 01 C 6485, 2005 WL 1651729, at \*3 (N.D. Ill. July 6, 2005) (“Illinois courts and federal courts have grappled with the medical monitoring remedy and have produced less than clear results.”).

<sup>83</sup> 862 N.E.2d 1091 (Ill. App. Ct. 2007).

<sup>84</sup> *Id.* at 1100.

<sup>85</sup> *Id.* at 1101.

<sup>86</sup> *Id.*

Although *Jensen* demonstrates that the question whether to adopt a medical monitoring claim remains open in Illinois' lower courts, the plaintiffs' bar has taken advantage of *Carey* and *Lewis* by filing an increasing number of lawsuits that seek medical monitoring on behalf of uninjured individuals.<sup>87</sup> Plaintiffs' tactics have met with some success. In *Gates v. Rohm & Haas Co.*, for example, a Pennsylvania federal district court held that although Illinois law "is unclear," "the Illinois Supreme Court likely would recognize a claim for medical monitoring" without physical injury.<sup>88</sup> The court observed that in *Dillon*, the Illinois Supreme Court allowed injured plaintiffs to recover for the increased risk of future harm in part because of "the single recovery principle, which 'requires that all damages, future as well as past, must be presented and considered at the time of trial.'"<sup>89</sup> While acknowledging that *Dillon* involved a plaintiff with physical injuries, the *Gates* court asserted that medical monitoring claims do not require physical injuries because "the cost of diagnostic testing is a compensable 'injury,' albeit financial, in and of itself."<sup>90</sup> Moreover, *Gates* reasoned that "under the principle of single recovery, plaintiffs do not have the option to wait until symptoms appear."<sup>91</sup>

For the reasons we discuss below, *Gates* rests on a misreading of Illinois law. Moreover, cases like *Morrissy*, *Carey*, *Jensen*, and *Gates* demonstrate that courts are divided on this important issue. As a result, it is imperative that the Illinois Supreme Court resolve once and

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<sup>87</sup> *E.g.*, *Duffin v. Exelon Corp.*, No. 06 C 1382, 2006 WL 2578954 (N.D. Ill. Sept. 5, 2006) (alleging exposure to radioactive waste); *Woll v. Astrazeneca Pharm. LP*, No. 3:06-57 (S.D. Ill.) (alleging use of the drug Astrazeneca); *Hubbard v. Johnson & Johnson*, No. 06-51 (S.D. Ill.) (alleging use of a birth control patch); *Grant v. Ill. Tool Works, Inc.*, No. 04-CH-21112 (Ill. Cir. Ct.) (alleging exposure to manganese in welding fume). The plaintiffs' bar has also relied on *Carey* and *Lewis* in seeking to represent Illinois citizens in putative multi-state medical monitoring class actions. *E.g.*, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 22, 2006); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (D. Minn. Apr. 27, 2006); *Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006).

<sup>88</sup> No. 06-1743, 2007 WL 2155665, at \*2 n.5 (E.D. Pa. July 26, 2007).

<sup>89</sup> *Id.* at \*3 (quoting *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 369 (Ill. 2002)).

<sup>90</sup> *Gates*, 2007 WL 2155665, at \*3.

<sup>91</sup> *Id.* at \*5; *see also* *Stella v. LVMH Perfumes & Cosmetics USA, Inc.*, 564 F. Supp. 2d 833, 836 & n.1 (N.D. Ill. 2008) ("in the absence of guidance from the Illinois Supreme Court on the propriety of medical monitoring claims under Illinois law, I find persuasive the federal case law finding such a claim cognizable"); *Muniz v. Rexnord Corp.*, No. 04 C 2405, 2006 WL 1519571, at \*5, \*7 (N.D. Ill. May 26, 2006) (medical monitoring "is cognizable under Illinois law" without proof of a physical injury).



for all whether Illinois recognizes a medical monitoring claim or remedy for uninjured plaintiffs.

### **III. RECOGNITION OF A CLAIM FOR MEDICAL MONITORING WOULD REVOLUTIONIZE ILLINOIS TORT LAW BY ABANDONING THE REQUIREMENT THAT PLAINTIFFS PROVE A PRESENT PHYSICAL INJURY.**

We are unaware of any Illinois Supreme Court decision holding that a plaintiff may obtain relief in tort without proving a present physical or mental injury or property damage. To the contrary, the Illinois Supreme Court has repeatedly rejected plaintiffs' requests to abandon that longstanding requirement.<sup>92</sup> The court has held that "to recover for medical expenses, the plaintiff must prove that," among other things, "she necessarily incurred the medical expenses *because of injuries* resulting from the defendant's negligence."<sup>93</sup> In addition, the court has specifically stated that "[a] threat of future harm, not yet realized, is not actionable."<sup>94</sup> Likewise, courts across the country have recognized that the adoption of a claim or remedy for medical

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<sup>92</sup> *E.g.*, Pasquale v. Speed Prods. Eng'g, 654 N.E.2d 1365, 1373 (Ill. 1995) ("physical harm is required to state a bystander's cause of action and recovery [sic] based on strict liability"); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983) (bystanders in "zone of physical danger" negligence actions "must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence," with recovery limited to "physical injury or illness resulting from emotional distress").

<sup>93</sup> Arthur v. Catour, 833 N.E.2d 847, 853 (Ill. 2005) (emphasis added); *see also* Jackson v. Seib, 866 N.E.2d 663, 672-73 (Ill. App. Ct. 2007) (rejecting a rule "that permits the plaintiff to recover for all medical testing reasonably related to the events at issue regardless of whether the testing reveals an injury" because such a rule "would be contrary to our public policy and well-established principles of negligence, which require," among other things, "damages before a person can be held liable for the medical expenses of another").

<sup>94</sup> Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 272 (Ill. 1995); *see also* Bd. of Educ. v. A, C & S, Inc., 546 N.E.2d 580, 587 (Ill. 1989) ("dangerousness which creates a risk of harm is insufficient standing alone to award damages in either strict products liability or negligence"); Yu v. IBM Corp., 732 N.E.2d 1173, 1177 (Ill. App. Ct. 2000) (affirming dismissal of complaint alleging latent defect in computer because plaintiff failed to state "a legally cognizable present injury or damage"); Verb v. Motorola, Inc., 672 N.E.2d 1287, 1295 (Ill. App. Ct. 1996) (affirming dismissal of complaint alleging that cell phone use placed plaintiffs at increased risk of future harm because "possible future damages in a personal injury action are not compensable").

monitoring without proof of a physical injury would be “a drastic and fundamental departure from traditional tort doctrine,”<sup>95</sup> require courts “to completely rewrite [the] tort-law system,”<sup>96</sup> and “represent a radical extension of currently existing ... law.”<sup>97</sup>

The requirement that plaintiffs establish a physical injury to recover in tort serves two principal interests. First, it provides boundaries allowing courts to distinguish among cases warranting their attention.<sup>98</sup> As Dean Prosser recognized:

It does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many cases of ascertaining the real facts or of providing any effective remedy, have meant that there must be some selection of those more serious injuries which have the prior claim to redress and are dealt with more easily.<sup>99</sup>

The limitations on courts’ ability to right all perceived wrongs have particular relevance in medical monitoring cases because harmful substances are ubiquitous in modern society. The Supreme Court recognized as much in *Buckley*, stating that “contacts, even extensive contacts, with serious carcinogens are common.”<sup>100</sup> Indeed, a recent study conducted by the Center for Disease Control and Prevention found that every one of the approximately 5000 individuals tested had at least 148 different toxins present in their bodies.<sup>101</sup> Therefore, if Illinois law permitted recovery in tort based on nothing more than mere exposure to a harmful substance, virtually every Illinois resident would

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<sup>95</sup> *Parker v. Wellman, Inc.*, 377 F. Supp. 2d 1290, 1302 n.10 (N.D. Ga. 2005), *aff’d*, 2007 WL 1149982 (11th Cir. Apr. 18, 2007).

<sup>96</sup> *Hinton v. Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001).

<sup>97</sup> *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006); *see also* *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 855 (Ky. 2002) (abandoning the physical injury requirement would be a “sweeping change to traditional tort law”).

<sup>98</sup> *Lowe v. Philip Morris USA, Inc.*, 142 P.3d 1079, 1091 (Or. Ct. App. 2006), *aff’d*, 183 P.3d 181 (Or. 2008) (requiring proof of physical injury “constrain[s] the possibility of limitless or indeterminate liability”).

<sup>99</sup> W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984); *see also* *Champion v. Gray*, 478 So. 2d 17, 18 (Fla. 1985) (“[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society”).

<sup>100</sup> *Buckley v. Metro-N. Commuter R.R. Co.*, 521 U.S. 424, 434 (1997).

<sup>101</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION, THIRD NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS (2005).

be a potential plaintiff.<sup>102</sup> And as we discuss below, the dramatic increase in the pool of potential plaintiffs would have a host of negative consequences.

The second principal interest served by the physical injury requirement is to “corroborate the authenticity of a plaintiff’s allegations and provide ‘proof’ that the plaintiff has been harmed.”<sup>103</sup> To borrow from our hypothetical involving Acme’s sale of the prescription drug Generic, suppose that Acme later sold Generic over the counter. In many cases, the only evidence that the plaintiff used Generic would be the plaintiff’s say-so. The present physical injury rule requires the plaintiff to provide some objectively verifiable evidence that he sustained the same type of injury that is allegedly caused by Generic. To be sure, the physical injury requirement does not eliminate fraudulent claims altogether. Some plaintiffs afflicted with the disease allegedly caused by Generic will file lawsuits against Acme based on false allegations of Generic use. But the physical injury requirement at least serves to reduce the risk of fraudulent claims.<sup>104</sup>

Abandoning the physical injury requirement would have consequences for other legal rules as well. First, it is difficult to reconcile a medical monitoring claim for uninjured plaintiffs with the Illinois Supreme Court’s decision in *Dillon*, which requires that plaintiffs prove a present physical injury to prevail on a claim for increased risk of future harm.<sup>105</sup> Recall that in *Lewis* and *Gates*, the courts attempted to explain away this tension by suggesting that

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<sup>102</sup> E.g., *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 694 (Mich. 2005); *Wood*, 82 S.W.3d at 857-58 (“Given that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless.”); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 435 (W. Va. 1999) (Maynard, J., dissenting) (“the practical effect” of adopting a medical monitoring claim “is to make almost every West Virginian a potential plaintiff”).

<sup>103</sup> Terry C. Gay & Paige F. Rosato, *Combating Fear of Injury and Medical Monitoring Claims*, 61 DEF. COUNS. J. 554, 560 (Oct. 1994).

<sup>104</sup> Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1074 (1999) (“In order to determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective manifestation that an individual has been harmed.”); see also *Lowe v. Philip Morris USA, Inc.*, 142 P.3d 1079, 1090-91 (Or. Ct. App. 2006), *aff’d*, 183 P.3d 181 (Or. 2008) (requiring proof of physical injury “enable[s] the courts to separate legitimate claims from speculative or spurious ones”).

<sup>105</sup> *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 849, 873 (Ill. App. Ct. 2003) (citing *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 370 (Ill. 2002)).

medical monitoring claims are less speculative than increased risk claims. But courts that have adopted medical monitoring claims require plaintiffs to show that the defendant's conduct increased (to varying degrees) the plaintiff's risk of future harm.<sup>106</sup> Thus, a request for medical monitoring "remains occasioned by a mere risk of possible future harm."<sup>107</sup> Medical monitoring claims are therefore just as speculative as claims for increased risk of future harm because they both base liability on speculation about the likelihood that the plaintiff may someday contract a particular disease.<sup>108</sup> Accordingly, if uninjured plaintiffs may not sue for increased risk of future harm, then logically plaintiffs may not recover medical monitoring absent physical injury.

Second, recognition of a medical monitoring claim for uninjured plaintiffs may run afoul of the economic loss rule. In an attempt to "avoid the consequences of open-ended tort liability," the Illinois Supreme Court has long held that "[a]bsent injury to a plaintiff's person or property, a claim presents an economic loss not recoverable in tort."<sup>109</sup> The costs of medical monitoring are, of course, mere economic loss.<sup>110</sup> Thus, a purported need to spend money on medical monitoring cannot constitute the requisite "injury" because that alleged harm is "purely economic."<sup>111</sup> Therefore, a clear tension exists between the rule barring the recovery of mere economic loss in

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<sup>106</sup> *E.g.*, *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145 (Pa. 1997) (plaintiffs must prove "a significantly increased risk of contracting a serious latent disease" to recover medical monitoring).

<sup>107</sup> *Lowe*, 142 P.3d at 1092.

<sup>108</sup> *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 15 (1998) ("when one recalls that significant enhanced risk is almost always a predicate to medical monitoring recovery, the distinction begins to look like an enhanced risk 'Trojan horse': enhanced risk is not compensable, but if you demonstrate an increased risk of disease, you can recover medical monitoring costs ... as a means of compensation for the enhanced risk").

<sup>109</sup> *In re Chicago Flood Litig.*, 680 N.E.2d 265, 274-76 (Ill. 1997); *see also* *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 453 (Ill. 1982) ("plaintiff cannot recover for solely economic loss under the tort theories of strict liability, negligence and innocent misrepresentation").

<sup>110</sup> *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1139-43 (Ill. 2004); *see also* *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 439 (1997) (referring to medical monitoring costs as an "economic 'injury'"); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 854-55 (Ky. 2002) (rejecting plaintiff's contention that her injury was "the financial expense of ... medical monitoring" because "[t]he words 'physical harm' are used to denote physical impairment of the human body, or of tangible property" and "the only tangible property in question is [plaintiff's] money").

<sup>111</sup> *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 186 (Or. 2008); *see also* *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686 (Mich. 2005).

tort and the abandonment of the physical injury requirement in order to allow medical monitoring claims.

Third, adoption of a medical monitoring claim would require courts to adjust rules governing the accrual of statutes of limitations. The Illinois Supreme Court has held that the statute of limitations begins to run on personal injury claims “when the first symptoms begin to appear.”<sup>112</sup> Of course, courts could not apply that accrual rule to medical monitoring claims, which by definition involve a plaintiff who is asymptomatic.<sup>113</sup>

Finally, Illinois law requires plaintiffs to establish standing “by demonstrating some injury to a legally cognizable interest.”<sup>114</sup> But as some courts and commentators have noted, it is not at all clear that a purported need for future medical monitoring constitutes an injury to a “legally cognizable interest.”<sup>115</sup> In sum, the difficulty reconciling a medical monitoring claim with other legal rules highlights the need for caution in considering whether to depart from a longstanding rule such as the physical injury requirement.

#### **IV. PUBLIC POLICY CONSIDERATIONS WEIGH HEAVILY AGAINST ADOPTING A MEDICAL MONITORING CLAIM ABSENT PROOF OF A PHYSICAL INJURY.**

As we discuss more fully below, the costs of adopting a medical monitoring claim vastly outweigh the benefits that such a claim would provide. First, a medical monitoring claim would result in a host of negative consequences for current and future plaintiffs, the judicial system, and society as a whole. Second, the medical community has cast significant doubt upon the efficacy of monitoring for many diseases. Third, the public policy considerations offered by courts in

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<sup>112</sup> Nolan v. Johns-Manville Asbestos, 421 N.E.2d 864, 867 (Ill. 1981).

<sup>113</sup> See Hinton v. Monsanto Co., 813 So. 2d 827, 830 (Ala. 2001) (questioning the impact of medical monitoring claims “upon our statutes of limitation and the legal doctrines that have developed to guide the courts in the application of these statutes”).

<sup>114</sup> Vill. of Chatham v. County of Sangamon, 837 N.E.2d 29, 39 (Ill. 2005).

<sup>115</sup> Sutton v. St. Jude Med., Inc., 292 F. Supp. 2d 1005, 1007-09 (W.D. Tenn. 2003), *rev'd*, 419 F.3d 568 (6th Cir. 2005) (asymptomatic plaintiff seeking medical monitoring due to implantation of defective medical device lacked requisite injury-in-fact); DeVries & Gallacher, *supra* note 17, at 172 (“it would be difficult for medical monitoring plaintiffs to allege present injuries-in-fact”).

support of a medical monitoring claim are insufficient to tip the scales in favor of adopting such a claim.

**A. Adoption Of A Medical Monitoring Claim Would Have A Host Of Negative Consequences For Current And Future Plaintiffs, The Judicial System, And Society As A Whole.**

**1. Allowing Uninjured Plaintiffs To Sue Could Bar Those Plaintiffs From Seeking Compensation For Any Subsequently Incurred Injuries And Would Deplete Resources Needed To Compensate The Injured.**

Adoption of a medical monitoring claim for the uninjured would endanger the claims of future plaintiffs who incur actual injuries. Although “the perception seems to be that [medical monitoring] damages are a relatively inexpensive means of addressing potential problems, the reality is that damages for medical surveillance costs can be staggering, especially in cases involving multiple plaintiffs.”<sup>116</sup> For example, a West Virginia jury recently required DuPont to fund a medical monitoring program for forty years at an estimated cost of more than \$100 million;<sup>117</sup> in *Ayers v. Township of Jackson*, the New Jersey Supreme Court approved of a medical monitoring award in excess of \$8 million for 139 plaintiffs;<sup>118</sup> and in *Potter*, the California Supreme Court affirmed a medical monitoring award of \$142,975 to only four plaintiffs.<sup>119</sup> Given the enormous pool of potential plaintiffs, damages can rise exponentially. For example, a New Jersey lawsuit alleging exposure to fen-phen sought nearly \$1 billion for medical monitoring, while a West Virginia medical monitoring class action against tobacco manufacturers demanded \$450 million.<sup>120</sup> But “defendants do not have an endless supply of financial resources” to

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<sup>116</sup> Eric W. Wiechmann, *Curse of the Unsick: Update on Latent Injury Claims in Toxic Tort Cases*, THE BRIEF 10, 44 (Summer 1996).

<sup>117</sup> *DuPont Guilty of Wanton, Willful, Reckless Conduct*, Charleston Gazette, Oct. 20, 2007.

<sup>118</sup> *Ayers v. Twp. of Jackson*, 525 A.2d 287, 312 (N.J. 1987).

<sup>119</sup> *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 803 (Cal. 1993).

<sup>120</sup> Gregory C. Reed, *Medical Monitoring: The New Gold Rush*, 68 DEF. COUNS. J. 141, 142 (Apr. 2001).

pay both large medical monitoring awards and subsequent personal injury awards.<sup>121</sup> Thus, as a number of courts have recognized in rejecting medical monitoring claims, “[s]pending large amounts of money to satisfy medical monitoring judgments will impair [defendants’] ability to fully compensate victims who emerge years later with actual injuries that require immediate attention.”<sup>122</sup>

The asbestos litigation provides an object lesson for courts to consider when deciding whether to adopt a claim for medical monitoring without proof of a physical injury. To alleviate perceived injustice in asbestos cases, many courts “deviated from accepted legal principles to permit recoveries that traditionally would have been barred.”<sup>123</sup> Courts thus expanded the pool of plaintiffs who could sue for asbestos-related injuries, which resulted in “a disaster of major proportions.”<sup>124</sup> Plaintiffs “with very serious harms had to wait long periods of time before courts could hear their cases” and “some did not live to obtain a remedy.”<sup>125</sup> In addition, the flood of new plaintiffs led to some eighty-five companies (at last count) filing for bankruptcy.<sup>126</sup> The companies responsible for the vast majority of asbestos-related injuries are thus now unable to compensate plaintiffs who contract serious diseases such as mesothelioma.<sup>127</sup> The decreasing “number of plausible, solvent asbestos defendants” has even led to tension between plaintiffs’ lawyers “that represent only very sick plaintiffs” and “firms

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<sup>121</sup> Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 857 (Ky. 2002).

<sup>122</sup> *Id.*; see also Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 438 (1997); Henry v. Dow Chem. Co., 701 N.W.2d 684, 694 (Mich. 2005); Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), *aff’d sub nom.*, Ball v. Joy Techs., Inc., 958 F.2d 36 (4th Cir. 1991) (“to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely”).

<sup>123</sup> Schwartz, *supra* note 102, at 1073; see also James A. Henderson & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 817 (2002) (in asbestos cases, “some courts have recognized theories of recovery that are both substantively unfair and certain to favor claimants whose suffering is minor over claimants who will suffer serious harm in the future”).

<sup>124</sup> *Judicial Conference Ad Hoc Committee on Asbestos Litigation 2* (Mar. 1991).

<sup>125</sup> Schwartz et al., *supra* note 102, at 1073-74.

<sup>126</sup> Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135, 148 (2007).

<sup>127</sup> *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (“The resources available to persons injured by asbestos are steadily being depleted . . . . The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.”).

that represent all plaintiffs, including the unimpaired.”<sup>128</sup> As a leading lawyer who represents only sick plaintiffs explained, “the interests of the unimpaired clients in fact are better served by giving them nothing or very little now, but making sure that if they were to get sick later on there will be money for them.”<sup>129</sup> The asbestos litigation teaches that courts should be circumspect when examining requests to abandon longstanding requirements in an attempt to provide all plaintiffs with relief.

In addition to harming future injured plaintiffs, the adoption of a medical monitoring claim for asymptomatic plaintiffs could have the perverse effect of barring those same plaintiffs from suing should they later incur actual injuries. As the Kentucky Supreme Court explained in rejecting a medical monitoring claim, courts that permit an uninjured plaintiff to sue for medical monitoring may well allow the plaintiff to “collect a sum of money commensurate with the medical testing costs that await her.”<sup>130</sup> If, however, the plaintiff “were to develop an injury or illness later from the exposure,” then the res judicata doctrine may bar her from “bring[ing] another negligence claim for additional damages.”<sup>131</sup> Thus, the “failure to recognize a cause of action in the absence of an injury is essentially a safeguard that benefits victims.”<sup>132</sup>

Similarly, Illinois’ rule against claim splitting—which is a species of res judicata—“prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action.”<sup>133</sup> The Illinois Supreme Court considers separate claims to be the same cause of action if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.<sup>134</sup> In other words, “[i]f the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted.”<sup>135</sup> Under a literal interpretation of this test, a pre-injury claim for medical monitoring and a subsequent claim for personal

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<sup>128</sup> Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 155, 170.

<sup>129</sup> *Id.*

<sup>130</sup> *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 858 (Ky. 2002).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1206 (Ill. 1996).

<sup>134</sup> *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 891 (Ill. 1998); *see also* AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

<sup>135</sup> *People ex rel. Burris v. Progressive Land Developers, Inc.*, 602 N.E.2d 820, 825 (Ill. 1992).



injuries are the same cause of action because the claims arise from the same facts, *i.e.*, the plaintiff's exposure to allegedly harmful substances produced by the defendant. Indeed, as we described above, the district court in *Gates* appeared to suggest that the rule against claim splitting *requires* asymptomatic plaintiffs to file suit for medical monitoring and the increased risk of future harm in a single lawsuit.

To be sure, some courts outside of Illinois have held that the rule against claim splitting does not bar plaintiffs from bringing successive actions that allege differing asbestos-related injuries.<sup>136</sup> But the Illinois Supreme Court has never addressed that issue and may well agree with the minority view that plaintiffs must seek all damages—including damages for future injuries—in one suit.<sup>137</sup> Indeed, the court has suggested that it may follow the minority view, stating without qualification that the rule against claim splitting “requires that all damages, future as well as past, must be presented and considered at the time of trial,”<sup>138</sup> and making clear that the rule is not to be discarded lightly.<sup>139</sup> In any event, even if the Illinois Supreme Court were to make an exception to the rule against claim splitting for asbestos cases, it is far from clear that the court would extend such an exception outside of the asbestos context. To the contrary, the *Dillon* court permitted injured plaintiffs to recover for the increased risk of future harm in part because that rule “better comports with this state’s

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<sup>136</sup> *E.g.*, *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643 (Tex. 2000); *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627 (Wis. 1999). In *VaSalle v. Celotex Corp.*, 515 N.E.2d 684, 686-88 (Ill. App. Ct. 1987), a divided panel suggested in *dicta* that the rule against claim splitting would not have barred the decedent's claim that he contracted lung cancer due to exposure to the defendants' asbestos products if the decedent had previously filed suit to recover for asbestosis. The Illinois Supreme Court has never cited *VaSalle*.

<sup>137</sup> *E.g.*, *Howell v. Celotex Corp.*, 904 F.2d 3, 5 (3d Cir. 1990); *Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985).

<sup>138</sup> *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 369 (Ill. 2002); *see also* AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. c (1982) (“It is immaterial that in trying the first action he was not in possession of enough information about the damages, past or prospective, or that the damages turned out in fact to be unexpectedly large and in excess of the judgment.”).

<sup>139</sup> *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1207 (Ill. 1996) (rule against claim splitting “is founded on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits”); *see also* *Federated Dep't Stores, Inc. v. Mottie*, 452 U.S. 394, 401 (1981) (“*res judicata* ... is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts”).

principle of single recovery.”<sup>140</sup> Thus, adoption of a medical monitoring claim absent physical injury runs the very real risk of harming the same plaintiffs that the claim purports to help.

## **2. Medical Monitoring Claims Would Divert Courts’ Attention From More Important Cases.**

The expansion of the plaintiff pool through the recognition of a medical monitoring claim would further clog Illinois’ already crowded courts. In addition to increasing the sheer number of lawsuits through the abandonment of the physical injury requirement, a claim for medical monitoring would also require courts to spend an inordinate amount of time devising and administering medical monitoring programs. As one commentator noted:

Devising a sound medical monitoring plan would require, at a minimum, specifying the nature and amount of benefits available, the source of funding and funding allotments, the procedures for determining eligibility for monitoring, the payment mechanism for the provider and the percentage of provider reimbursement, when eligible parties may join the program, the length of time the program should last, the frequency of any periodic monitoring and the circumstances in which that frequency can be changed to allow special monitoring, the content of the monitoring exams, whether the facility testing will be formal or informal, and whether the service provider is to be designed by the court or chosen by the claimant.<sup>141</sup>

Moreover, a medical monitoring program’s “scope and administrative operation will inevitably require adjustments, particularly if the program’s designers erroneously estimate funding needs or the number of eligible participants.”<sup>142</sup> Several courts have recognized these problems in rejecting medical monitoring claims, explaining that the

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<sup>140</sup> *Dillon*, 771 N.E.2d at 369.

<sup>141</sup> Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 381 (2005); *see also* Behrens & Appel, *supra* note 128, at 149.

<sup>142</sup> *Id.*

adoption of such claims “will potentially clog the courts as contingency fee lawyers use consumers as vehicles for enormous awards.”<sup>143</sup>

Illinois courts have expressed similar concerns about the judiciary’s ability to operate effectively in refusing to adopt claims that would have consumed a great deal of judicial resources. In rejecting the market share liability theory, for instance, the Illinois Supreme Court explained that adoption of the theory “and the concomitant burden placed on the courts and the parties will imprudently bog down the judiciary in an almost futile endeavor. This would also create a tremendous cost, both monetarily and in terms of the workload, on the court system ... .”<sup>144</sup> Similarly, the Cook County Circuit Court established an “Asbestos Deferred Registry” that placed asymptomatic plaintiffs’ asbestos-related claims on a deferred docket pending the onset of actual injuries.<sup>145</sup> In approving the registry, the Illinois Appellate Court observed that “the unfortunate reality is that many of the most severely affected claimants might be unable to gain access to the courts in a timely fashion if the courts are required to consider each case as it is filed and without regard to the severity of the injury.”<sup>146</sup>

Given the limitless pool of potential plaintiffs and the ongoing need to supervise medical monitoring programs, the recognition of a medical monitoring claim would have an even greater effect on courts’ ability to function effectively than would the market share theory or the processing of asymptomatic plaintiffs’ asbestos claims. Nor is there any pressing need for courts to take on the added burden of hearing medical monitoring cases—the benefits of monitoring are (as we explain below) illusory in many cases and “money awarded for the purpose of health care will go in large percentage to [plaintiffs’] lawyers, not the exposure victims.”<sup>147</sup> In short, Illinois courts would be better suited to focus more attention on cases involving plaintiffs who have actually been harmed rather than diluting that focus by hearing the claims of the uninjured.

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<sup>143</sup> *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 858 (Ky. 2002); *see also* *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), *aff’d sub nom.*, *Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991)(medical monitoring claims “could potentially devastate the court system”).

<sup>144</sup> *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 338 (Ill. 1990).

<sup>145</sup> *In re Asbestos Cases*, 586 N.E.2d 521, 521 (Ill. App. Ct. 1991).

<sup>146</sup> *Id.* at 523.

<sup>147</sup> *Wood*, 82 S.W.3d at 858.

### 3. Medical Monitoring Claims Would Diminish Scarce Medical Resources And Reduce The Accessibility Of Beneficial Products.

As the Supreme Court noted in *Buckley*, the recognition of a medical monitoring claim might affect “the allocation of scarce medical resources.”<sup>148</sup> Indeed, in an apparent attempt “to inflate as much as possible the cost of yearly monitoring per plaintiff so as to maximize plaintiffs’ damage award and their attorneys’ contingent fees,”<sup>149</sup> plaintiffs typically request a wide array of diagnostic exams. In one case, plaintiffs alleging exposure to PCBs requested amniocentesis, developmental and achievement testing, electrocardiography, pulmonary function tests, mammography, sigmoidoscopy, urine cytology, sputum cytology, basic immunotoxicology panel, chromosomal analysis, complete optomologic evaluation, complete cardiovascular evaluation, complete neurological evaluation, complete gastrointestinal evaluation, complete urinalysis, PSA, CBC, urine porphyrin, and male fertility evaluation.<sup>150</sup> In a world of limited medical resources, granting such wide-ranging requests is costly, particularly in class actions where the number of plaintiffs can rise into the thousands. Courts should consider the effect of awarding medical monitoring to asymptomatic plaintiffs on the provision of medical services to injured patients in deciding whether to adopt a medical monitoring claim.<sup>151</sup>

A medical monitoring claim for uninjured plaintiffs also may affect the availability and cost of insurance, resulting in higher costs for and reduced production of beneficial products.<sup>152</sup> To illustrate, suppose that Illinois adopted a claim for medical monitoring without proof of physical injury. Assuming that insurance would be available at all, rates would no doubt rise to cover the risk of judgments against companies like our hypothetical Acme. As a result, Acme would either raise the price of its drugs—thereby placing them out of reach for many low-income consumers—or abandon their manufacture altogether. But that

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<sup>148</sup> *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997).

<sup>149</sup> Thomas M. Goutman, *Medical Monitoring: How Bad Science Makes Bad Law* 15 (2001).

<sup>150</sup> *Id.* at 14-15 (citing *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444 (3d Cir. 1997)).

<sup>151</sup> D. Scott Abernethy, *Note: A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted With the Issue*, 32 WM. MITCHELL L. REV. 1095, 1121 (2006) (“medical monitoring potentially wastes scarce resources and clogs an already congested health care system”).

<sup>152</sup> Gay, *supra* note 101, at 563.

result directly conflicts with the Illinois Supreme Court's recognition of "the social desirability of encouraging the research and development of beneficial drugs."<sup>153</sup> Indeed, in an analogous situation, the Illinois Supreme Court based its rejection of the market share liability theory in part on its conclusion that the "added potential for liability" created by adoption of the theory "will likely contribute to diminishing participants in the market as well as research and availability of drugs."<sup>154</sup> Accordingly, courts should also weigh the effects that medical monitoring claims would have on the accessibility of beneficial products when deciding whether to adopt the claim without requiring proof of a physical injury.

### **B. The Benefits Of Medical Monitoring Have Been Vastly Oversold.**

Courts that have adopted claims for medical monitoring often betray a fundamental misconception about the benefits that monitoring provides. In *Ayers*, for example, the New Jersey Supreme Court stated that "[t]he value of early diagnosis and treatment for cancer patients is well-documented."<sup>155</sup> Yet the medical community has reached a distinctly different conclusion. As one commentator noted, "[t]he excessive claims" made about medical monitoring "in regard to the prevention of disease have little or no relation to reality or objectivity."<sup>156</sup> In short, courts must "disabuse themselves of the notion ... that medical testing is invariably useful or beneficial to the person tested."<sup>157</sup>

To begin with, undergoing a battery of diagnostic exams is no walk in the park.<sup>158</sup> Rather, "it cannot be stressed greatly enough that medical monitoring is a medical intervention into a patient's life, qualitatively similar to other potentially harmful interventions such as starting a patient on a medication or performing surgery."<sup>159</sup> A recent study reports that Americans are being exposed to record amounts of

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<sup>153</sup> *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 199 (Ill. 1980).

<sup>154</sup> *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 342 (Ill. 1990).

<sup>155</sup> *Ayers v. Twp. of Jackson*, 525 A.2d 287, 311 (N.J. 1987).

<sup>156</sup> W.K.C. MORGAN, *Medical Monitoring with Particular Attention to Screening for Lung Cancer*, in OCCUPATIONAL LUNG DISEASE 157, 157 (1984).

<sup>157</sup> McCarter, *supra* note 18, at 276.

<sup>158</sup> *Id.* ("there can be medical risk associated with the testing procedures themselves").

<sup>159</sup> Christopher P. Guzelian et al., *A Quantitative Methodology for Determining the Need for Exposure-Prompted Medical Monitoring*, 79 IND. L.J. 57, 67 (2004).

ionizing radiation—potentially the most hazardous form of radiation—in large part due to a dramatic increase over the last twenty-five years in the use of CT scans and other x-rays.<sup>160</sup> Such exposure is not without cost: the World Health Organization and other leading health organizations have classified x-rays as carcinogens because studies have shown that exposure can cause leukemia and cancers of the thyroid, breast, and lung.<sup>161</sup> Indeed, about 1.5 to 2% of all cancers in the United States may be attributable to radiation from CT scans.<sup>162</sup> To take two other examples of the risks posed by medical monitoring, the use of amniocentesis to detect birth defects can damage the fetus, while colonoscopies used to test for colon cancer can result in perforation of the colon.<sup>163</sup> It is thus no surprise that clinical trials have shown that “fewer individuals request medical monitoring once they observe ... that monitoring is certainly not a costless procedure.”<sup>164</sup>

Moreover, many medical monitoring regimes are simply ineffective. The U.S. Preventative Services Task Force (the “Task Force”)—the leading independent panel of experts in preventative care—has identified two principal requirements that must be satisfied for medical monitoring to be considered effective:

First, “[t]he test must be able to detect the target condition earlier than without screening and with sufficient accuracy to avoid producing large numbers of false-positive and false-negative results,” and second, “screening for and treating persons with early disease should improve the likelihood of favorable health outcomes ... compared to treating patients when they present with signs or symptoms of the disease.”<sup>165</sup>

With respect to the first requirement, some medical monitoring regimes fail to detect disease in asymptomatic patients any earlier than would otherwise occur. To take just one example, monitoring regimes have failed to detect nephrotoxicity resulting from lead exposure prior to the

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<sup>160</sup> Roni C. Rabin, *With Rise in Radiation Exposure, Experts Urge Caution on Tests*, N.Y. TIMES, June 19, 2007, at F5.

<sup>161</sup> *Id.*

<sup>162</sup> David J. Brenner & Eric J. Hall, *Computed Tomography—An Increasing Source of Radiation Exposure*, 357 NEW ENG. J. MED. 2277, 2282 (Nov. 29, 2007).

<sup>163</sup> Guzelian et al., *supra* note 157, at 70.

<sup>164</sup> *Id.* at 69-70.

<sup>165</sup> U.S. Preventative Services Task Force, *Guide to Clinical Preventative Sources* xxxi (2d ed. 1996) (“1996 Guide”).

onset of symptoms.<sup>166</sup> Medical monitoring fails to provide any benefit—and may do significant harm—in such cases.

In addition, many medical monitoring regimes result in large numbers of false positives, *i.e.*, “the test result indicates disease even though the person is healthy.”<sup>167</sup> And in what is known as the “cascade effect,” patients who incorrectly test positive for disease are then subjected “to more invasive follow-up testing that may be uncomfortable, expensive, and, in some cases, potentially harmful.”<sup>168</sup> For example, one study found that a screening exam for lung cancer resulted in 20% of patients being incorrectly diagnosed with cancer.<sup>169</sup> Those patients subsequently underwent thoracotomies only to learn that they did not have cancer at all.<sup>170</sup> Another study showed that half of chest radiographic exams that tested positive for cancer were found to be inaccurate by subsequent spiral CT scans.<sup>171</sup> To make matters worse, at least 90% of the spiral CT scans that resulted in diagnoses of cancer turned out to be false positives. As a result, the patients were “exposed not only to radiation, but also to anxiety and risks involved in having a suspicious finding confirmed by invasive diagnostic procedures.”<sup>172</sup> Indeed, commentators have noted that in addition to the risks posed by progressively invasive medical monitoring procedures, courts should not “lightly dismiss the dread and anxiety that false positives will cause for a statistically inevitable cohort of subjects and their families, especially where cancer is concerned.”<sup>173</sup> Furthermore, the Task Force has stated that “labeling” patients as sick may result in “altered behavior and decreased work productivity.”<sup>174</sup>

The risk of false positives is particularly pronounced when testing asymptomatic patients because very few individuals will actually have the target disease in an asymptomatic population.<sup>175</sup> The Task Force provides the following illustration:

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<sup>166</sup> Schwartz et al., *supra* note 139, at 355.

<sup>167</sup> Guzelian et al., *supra* note 157, at 69.

<sup>168</sup> 1996 Guide at xliv.

<sup>169</sup> Takeshi Nawa et al., *Lung cancer screening using low-dose spiral CT ‘results of baseline and one year follow up studies,’* CHEST, July 2002; 122 (1:15-20).

<sup>170</sup> *Id.*

<sup>171</sup> Valerie A. Palda & Harriette G.C. Van Spall, *Screening for Lung Cancer: Updated Recommendations from the Canadian Task Force on Preventative Health Care*, at 7 (Aug. 2003).

<sup>172</sup> *Id.* at 7-8.

<sup>173</sup> McCarter, *supra* note 18, at 276-77.

<sup>174</sup> 1996 Guide at xliv.

<sup>175</sup> *Id.*

In a population of 100,000 in which the prevalence of a cancer is 1%, there would be 1,000 persons with cancer and 99,000 without cancer. A screening test that yields 10% false positives and 10% false negatives would detect 900 of the 1,000 cases of the disease, but it would also mislabel 9,900 healthy persons as having cancer. The proportion of persons with positive test results who actually had cancer—the “positive predictive value” of the test—would be only 8.3%.<sup>176</sup>

This risk of false positives compounds in the types of annual medical monitoring regimes established by some courts, where every year’s tests bring with them a new chance for inaccurate diagnoses.<sup>177</sup> Thus, medical monitoring of asymptomatic patients will in many cases result in an unacceptably high number of false positives.

Medical monitoring also brings with it the risk of false negatives, *i.e.*, “the test result indicates the person is healthy even though disease is present.”<sup>178</sup> For instance, some clinical trials have shown that chest x-rays identify only 40% to 50% of lung cancers present, meaning that at least half of the x-rays yielded false negatives.<sup>179</sup> The Task Force has pointed out that patients who receive test results that falsely indicate the absence of disease “might develop a misplaced sense of security, resulting in inadequate attention to risk-reducing behaviors and delays in seeking medical care when warning symptoms become present.”<sup>180</sup> Patients who receive false negative diagnoses are also “less likely to improve their health habits,” a problem that has led “many specialists in preventative medicine [to] stress that behavior modification focusing on diet, exercise, and substance abuse, is far more important for maintaining health than is medical monitoring in asymptomatic individuals.”<sup>181</sup> For example, the Canadian Task Force on Preventative Health Care has stated that the high rate of false negatives in screening for lung cancer has created “a risk that the patient will be less motivated to quit smoking.”<sup>182</sup> Accordingly, patients generally should not undergo medical monitoring regimes that result in significant numbers of false negatives.

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<sup>176</sup> *Id.*

<sup>177</sup> Guzelian et al., *supra* note 157, at 81-82.

<sup>178</sup> *Id.* at 69.

<sup>179</sup> McCarter, *supra* note 18, at 136.

<sup>180</sup> 1996 Guide at xliii.

<sup>181</sup> McCarter, *supra* note 18, at 277-78.

<sup>182</sup> Palda & Van Spall, *supra* note 168, at 8.



Even in cases where medical monitoring is both sufficiently accurate and able to detect disease before symptoms appear, many monitoring regimes fail to improve the patient's outcome. For instance, the Task Force has declined to recommend screening for prostate cancer because the evidence that screening improves patient outcomes is too uncertain in light of the countervailing costs.<sup>183</sup> Similarly, a recent study of asymptomatic smokers found that although annual CT scans increased the rate of lung cancer diagnoses, "[t]here was no evidence that CT screening reduced the risk of death due to lung cancer."<sup>184</sup> The study theorized that the increase in diagnoses failed to reduce the death rate because the annual CT scans detected cancers that would not have grown sufficiently during the patient's lifetime to cause any harm.<sup>185</sup> Yet the ten-fold increase in the number of thoracic surgeries that resulted from the additional diagnoses may well have caused harm because "the postoperative mortality rate following resection of lung cancer in the United States averages 5%, and the frequency of serious complications ranges from 20% to 44%."<sup>186</sup> These types of studies have led the Task Force to decline to endorse lung cancer screening for asymptomatic individuals.<sup>187</sup>

Moreover, medical monitoring for some diseases—such as Parkinson's Disease—is ineffective because there is currently no cure, regardless of when the disease is detected.<sup>188</sup> The medical community generally considers monitoring to be inappropriate in such cases

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<sup>183</sup> U.S. Preventative Services Task Force, *Screening for Prostate Cancer: U.S. Preventative Services Task Force Recommendation Statement*, 149 ANNALS OF INTERNAL MEDICINE 185, 185-86 (Aug. 5, 2008).

<sup>184</sup> Peter B. Bach et al., *Computed Tomography Screening and Lung Cancer Outcomes*, 297 JAMA 953, 956 (Mar. 7, 2007).

<sup>185</sup> *Id.* at 959.

<sup>186</sup> *Id.*

<sup>187</sup> U.S. Preventative Services Task Force, *Guide to Clinical Preventative Services* 36 (3d ed. 2005); 1996 Guide at 135. A recent study provides some hope that screening for lung cancer may be beneficial. Claudia I. Henschke et al., *Survival of Patients with Stage I Lung Cancer Detected on CT Screening*, 355 NEW ENG. J. MED. 1763 (Oct. 26, 2006). But the Henschke study has been met with heavy criticism because, *inter alia*, it was based on survival rates (rather than mortality rates) and incorrectly "assumed everyone with lung cancer would die of it without treatment." Gina Kolata, *Study Raises Doubts About Lung Cancer Screening*, N.Y. TIMES, Mar. 6, 2007, at A18. As a result, the Henschke study appears unlikely to change the position held by leading medical organizations that the costs of screening for lung cancer outweigh its benefits. Gina Kolata, *Study Sees Gain on Lung Cancer*, N.Y. Times, Oct. 26, 2006, at A1.

<sup>188</sup> 1996 Guide at xlviv-xlvi.

because “early detection can lead to great patient turmoil but cannot lead to cure or treatment of the disease.”<sup>189</sup>

In sum, medical monitoring is far from the unmitigated benefit many believe it to be. To be sure, medical monitoring plays a useful role in detecting some diseases in asymptomatic patients. But courts must move beyond the conventional wisdom that medical monitoring is always useful and take a more realistic view of the costs and benefits of monitoring when deciding whether to adopt a medical monitoring claim for asymptomatic plaintiffs.

**C. The Public Policies Identified By Courts In Support Of Medical Monitoring Claims Are Insufficient To Justify Adoption Of The Claim.**

Courts have offered four reasons in support of allowing asymptomatic plaintiffs to recover medical monitoring. First, as the California Supreme Court put it in *Potter*, “there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients.”<sup>190</sup> But most individuals do not need defendants to “foster access to medical testing”—insurance provides access to any necessary medical monitoring for about 85% of Americans.<sup>191</sup> Moreover, the interest in fostering access to medical monitoring rests on the mistaken premise that monitoring provides an unmitigated benefit to individuals who fear latent disease. In fact, as we discussed above, “the stated policy concern of facilitating early detection and treatment glosses over the uncertainty and debate in the medical community regarding the availability and accuracy of testing to detect the onset of disease.”<sup>192</sup> In any event, fostering access to medical monitoring for the uninjured may detract from the overall “public health interest” by limiting defendants’ ability to compensate plaintiffs with actual injuries that require treatment, increasing the time necessary to obtain compensation for injured plaintiffs in the tort system, and

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<sup>189</sup> Schwartz et al., *supra* note 139, at 354.

<sup>190</sup> *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993).

<sup>191</sup> U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2007* at 19 (Aug. 2008).

<sup>192</sup> John J. Weinholtz, *Defending “No Injury . . . Yet” Medical Monitoring Claims in Class Action Settings*, 30-SPG Brief 17, 18-19 (2001).

reducing the availability of medical resources and products helpful for the treatment of the injured.

Second, *Potter* justified its adoption of a medical monitoring remedy by stating that “[t]he availability of a substantial remedy before the consequences of the plaintiffs’ exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties.”<sup>193</sup> This rationale’s focus on fostering access to medical monitoring in order to diagnose disease earlier than would otherwise occur is similar to the first justification offered by *Potter* and is subject to the same criticisms.<sup>194</sup> Moreover, in the unusual case where medical monitoring would reduce the defendant’s overall liability, a rational defendant would voluntarily pay the costs of monitoring. A purported concern for defendants’ liability is no reason to impose a medical monitoring claim by judicial fiat.

Third, *Potter* reasoned that “it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary.”<sup>195</sup> But as the reporters for the *Restatement (Third) of Torts: Products Liability* noted in arguing that courts should reject medical monitoring claims, *Potter*’s assertion that “allowing medical monitoring claims will provide compensation to plaintiffs who cannot prove that they have been or are likely to be injured ... clearly begs the question of why justice is necessarily served by allowing, through the back door, recoveries that courts will not allow through in the front.”<sup>196</sup> In jurisdictions that allow plaintiffs to recover lump sum damages this rationale proves even less persuasive because there is good reason to believe that many plaintiffs will not use their damages awards to obtain medical monitoring.<sup>197</sup> For example, a commentator who interviewed three of the plaintiffs in *Ayers* reported that one of the plaintiffs used his damages award to buy a new home, while the other two “denied

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<sup>193</sup> 863 P.2d at 824.

<sup>194</sup> Henderson & Twerski, *supra* note 121, at 843 n.172.

<sup>195</sup> 863 P.2d at 824.

<sup>196</sup> Henderson & Twerski, *supra* note 121, at 843.

<sup>197</sup> Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law’s Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 526 (2000) (assertion that it would be unfair for plaintiffs to pay for their own medical monitoring “loses its initial intuitive appeal if many plaintiffs choose not to seek medical attention in the wake of their exposure”).

seeing a physician more frequently as a result of the award.”<sup>198</sup> Similarly, the plaintiffs in a Utah medical monitoring lawsuit first expressed concern about their exposure to asbestos in 1986 but had submitted to only one preliminary examination by the time they filed suit in 1993.<sup>199</sup> And even in cases where “plaintiffs do indeed undergo the diagnostic examinations they purport to seek, any money they recover will be a true windfall for those whose health insurance already covers such costs.”<sup>200</sup>

Finally, the district court in *Carey* justified its conclusion that Illinois would adopt a medical monitoring remedy for asymptomatic plaintiffs on its assertion that allowing plaintiffs to recover the costs of medical monitoring “deters irresponsible discharge of toxic chemicals by defendants.”<sup>201</sup> But as the Kentucky Supreme Court pointed out, requiring defendants to compensate *injured* plaintiffs “should act as a sufficient deterrent to those who would negligently produce and distribute harmful substances.”<sup>202</sup> Furthermore, the *Carey* court’s deterrence rationale “fails to consider the fact that in some instances the practices that result in a plaintiff’s claim for medical monitoring damages, such as distribution or dumping of toxic substances that took place years ago, were legal at the time they occurred, and, most importantly, have already been terminated by the defendant.”<sup>203</sup>

In fact, providing a medical monitoring claim to the millions of individuals who are at some unquantified increased risk of harm may well result in “significant overdeterrence.”<sup>204</sup> The Illinois Supreme Court has recognized that “the economic consequences of any single accident are virtually limitless.”<sup>205</sup> Therefore, “[i]f defendants were held liable for every economic effect of their negligence, they would face virtually uninsurable risks far out of proportion to their culpability, and far greater than is necessary to encourage potential tort defendants to exercise care in their endeavors.”<sup>206</sup> To make matters worse, courts’ inability to offer a predictable standard for success in medical monitoring cases “undoubtedly increases transaction and litigation

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<sup>198</sup> McCarter, *supra* note 18, at 257-58 n.158.

<sup>199</sup> Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993).

<sup>200</sup> Maskin et al., *supra* note 193, at 528.

<sup>201</sup> Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109, 1120 (N.D. Ill. 1998).

<sup>202</sup> Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 859 (Ky. 2002).

<sup>203</sup> Aberson, *supra* note 149, at 1118.

<sup>204</sup> Henderson & Twerski, *supra* note 121, at 843.

<sup>205</sup> *In re Chicago Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997).

<sup>206</sup> *Id.*

costs.”<sup>207</sup> Finally, the deterrence rationale “fails to adequately consider whether a defendant’s activity might be replacing more dangerous risks than it has created.”<sup>208</sup> In sum, *Carey’s* assertion that medical monitoring claims are necessary to deter wrongdoing is misguided because the threat of lawsuits filed by plaintiffs with actual injuries provides sufficient deterrence, and any deterrence added by medical monitoring claims may well have the perverse effect of reducing the manufacture of beneficial products.

## V. THE ILLINOIS GENERAL ASSEMBLY IS FAR BETTER SUITED THAN THE JUDICIARY TO DEVISE AND ADMINISTER A MEDICAL MONITORING CLAIM.

As we have explained, there are numerous reasons why the Illinois Supreme Court should reject a medical monitoring claim for asymptomatic plaintiffs. But even if adoption of such a claim were warranted, courts are not well-suited to make that decision. The Illinois Supreme Court has repeatedly held that the legislature—not the judiciary—should resolve public policy disputes that could result in a sweeping expansion of the common law.<sup>209</sup> In rejecting the market share liability theory, for example, the court reasoned that “this change is most appropriate for the legislature to develop, with its added ability to hold hearings and determine public policy.”<sup>210</sup> Similarly, in refusing to adopt an “expansion of the common law” to allow plaintiffs to sue the firearms industry for expenditures incurred due to gun violence, the court explained that “[a]ny change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts.”<sup>211</sup> Although the plaintiffs’ bar has complained that such rulings constitute an abandonment of the court’s “responsibility to declare the

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<sup>207</sup> Klein, *supra* note 106, at 26-27.

<sup>208</sup> *Id.* at 27.

<sup>209</sup> *E.g.*, Reed v. Farmers Ins. Group, 720 N.E.2d 1052, 1057 (Ill. 1999) (“the General Assembly, which speaks through the passage of legislation, occupies a superior position in determining public policy”); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1192 (Ill. 1996) (“the court is not designed or equipped to make public policy decisions”); Gordon v. Dep’t of Transp., 457 N.E.2d 403, 405 (Ill. 1983) (“It is the legislature’s task to codify public policy; we refrain from undertaking such impermissible judicial legislation.”).

<sup>210</sup> Smith v. Eli Lilly & Co., 560 N.E.2d 324, 342 (Ill. 1990).

<sup>211</sup> City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1148 (Ill. 2004).

common law,” the court has rightly responded by “point[ing] to the virtue of judicial restraint.”<sup>212</sup>

As the Michigan Supreme Court recognized in *Henry*, there are three principal reasons why legislatures are better suited than courts to resolve complex public policy disputes. First, “‘information-gathering’” by courts “‘is limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests.’”<sup>213</sup> By contrast, legislatures “‘can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made.’”<sup>214</sup> The Illinois Supreme Court has recognized the same point, stating that the legislature “has a superior ability to gather and synthesize data” because “[i]t is free to solicit information and advice from the many public and private organizations that may be impacted.”<sup>215</sup> Courts, on the other hand, are “ill-equipped” to resolve complex public policy disputes because they “can consider only one case at a time and are constrained by the facts before [them].”<sup>216</sup>

Second, “‘legislatures make law prospectively, which gives the public fair notice about significant legal changes.’”<sup>217</sup> Courts, on the other hand, “‘make law retroactively. This creates notice and fairness problems.’”<sup>218</sup> Third, legislatures “‘must be sensitive to the will of the public’” to an extent far greater than even elected judges, and “‘if far-reaching public policy decisions are to be made, the public should have the opportunity to evaluate those changes and express their agreement or disagreement in the voting booth.’”<sup>219</sup> As the Illinois Supreme Court explained, “‘[i]f their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. They can write to their representatives or appear before them and let their protests be heard.’”<sup>220</sup> A court, on the other hand, “is not so easy to reach[,] nor is it so easy to persuade that its judgment ought to be revised. A legislature may not be

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<sup>212</sup> *Id.*

<sup>213</sup> 701 N.W.2d at 699 n.24.

<sup>214</sup> *Id.*

<sup>215</sup> *Charles v. Seigfried*, 651 N.E.2d 154, 160 (Ill. 1995).

<sup>216</sup> *Id.*

<sup>217</sup> *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 699 n.24 (Mich. 2005).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1192 (Ill. 1996).

a hard horse to harness, but it is not quite the stubborn mule that a court can be.”<sup>221</sup>

To be sure, courts have properly weighed public policy in expanding the common law. But as a number of courts have recognized, medical monitoring is different.<sup>222</sup> To begin with, and as our discussion thus far suggests, courts must weigh a host of public policy issues in resolving the threshold question whether to recognize a medical monitoring claim. It is no exaggeration to say that lawsuits seeking the adoption of medical monitoring claims ask courts to overturn centuries of tort law by abandoning the physical injury requirement.<sup>223</sup> In doing so, plaintiffs ask courts to foresee what other legal doctrines—*e.g.*, rules governing standing, the accrual of statutes of limitations, the bar on claim splitting, the economic loss rule, claims for increased risk of future harm—may unravel in the process. In addition, lawsuits seeking the recognition of medical monitoring claims ask courts to make a complex cost-benefit analysis. Courts must decide, for instance, whether the benefits of providing medical monitoring to uninjured plaintiffs outweigh the costs to, among other things, future plaintiffs who incur actual injuries, the judiciary’s ability to process more important cases, the availability of beneficial products at accessible prices, and the economy as a whole.

Furthermore, most courts that have adopted medical monitoring claims have expressed a preference that relief be provided in the form

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<sup>221</sup> *Id.*

<sup>222</sup> *Henry*, 701 N.W.2d at 699 n.24; *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 858 (Ky. 2002); *Badillo v. Am. Brands*, 16 P.3d 435, 440 (Nev. 2001) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function.”); *Carroll v. Litton Sys., Inc.*, 1990 WL 312969, at \*87 (W.D.N.C. 1990) (recognition of a medical monitoring claim “implicates policy issues that should be left to the legislature in the first instance”); *see also Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 435 (W.Va. 1999) (Maynard, J., dissenting) (recognition of a medical monitoring claim usurps the legislature’s right to create causes of action); David C. Campbell, Comment, *Medical Monitoring: The Viability of a New Cause of Action in Oregon*, 82 OR. L. REV. 529, 546-47 (2003) (“[T]he creation of a medical monitoring tort by the Oregon courts is not appropriate. Instead, this decision should be left to the wisdom of the legislature, which can carefully balance the need for a new cause of action against the potential flood of litigation the tort will likely initiate.”).

<sup>223</sup> *E.g.*, *Henderson & Twerski*, *supra* note 121, at 841-42 (“From the beginnings of our negligence jurisprudence, ‘injury’ has been synonymous with ‘harm,’ and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm.”); *Schwartz et al.*, *supra* note 102, at 1059 (“For over two hundred years, one of the fundamental principles of tort law has been that a plaintiff cannot recover without proof of a physical injury.”).

of court-supervised programs rather than lump sum damages.<sup>224</sup> Those courts have reasoned that many plaintiffs will use lump sum damages for purposes other than visits to the doctor, thereby negating one of the principal purposes behind medical monitoring claims—to diagnose and treat disease. Although clearly preferable to lump sum damages, court-supervised programs require judges to make an endless series of medical decisions based on little more than the experts proffered by the parties. As we discussed above, plaintiffs typically allege an increased risk of contracting numerous different diseases and demand a wide array of medical monitoring regimes to detect those diseases, leaving it to the court to sort out which of the requested exams is medically necessary. The court therefore must “assess the accuracy of each proposed monitoring [regime] to determine whether it is reliable,” which in turn requires “an analysis of prevalence (*i.e.*, the proportion of the population with the suspect condition) and the proposed test’s scientific sensitivity, specificity, and predictive value.”<sup>225</sup> Without such an assessment, the court could not “discern risks inherent in the testing procedure, such as the incidence of false positives and false negatives.”<sup>226</sup> The court also must decide whether each proposed monitoring regime would detect each feared disease before the onset of symptoms and, if so, whether the early diagnosis would make a difference in the plaintiff’s medical outcome.<sup>227</sup> To make matters more difficult, decisions about the proper monitoring regime may depend on factors peculiar to each plaintiff—*e.g.*, age, gender, individual risk factors—and initial decisions may require reconsideration as new exams and diseases emerge.<sup>228</sup> Finally, the court must establish: (a) a “trigger” to determine eligibility for the program; (b) the frequency of the monitoring; and (c) the duration of the program.<sup>229</sup> In short, the construction of a medical monitoring program would require courts to “dictate medical guidelines,” a task to which judges are “hardly suited.”<sup>230</sup>

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<sup>224</sup> *E.g.*, *Petito v. A.H. Robins Co., Inc.*, 750 So.2d, 103, 105 (Fla. Dist. Ct. App. 1999); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 34 (Ariz. Ct. App. 1987); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 313-14 (N.J. 1987).

<sup>225</sup> *Schwartz et al.*, *supra* note 102, at 1073.

<sup>226</sup> *Id.*

<sup>227</sup> 1996 Guide at xliii.

<sup>228</sup> Myrton F. Beeler & Robert Sappenfield, *Medical Monitoring: What is It, How Can It Be Improved?*, 87:2 AM. J. OF CLINICAL PATHOLOGY 287 (1987).

<sup>229</sup> *Schwartz et al.*, *supra* note 102, at 1076.

<sup>230</sup> *Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988).



In addition to requiring courts to resolve difficult scientific questions, medical monitoring claims also call for courts to make a series of more mundane—but no less important—decisions about the monitoring program’s administration. *Henry* cited the following questions that courts devising medical monitoring programs would have to resolve:

How would claims be filed? How would claims be processed? Who would do the processing—court staff or a private contract firm? Would a claimant be free to receive testing from any medical facility he chooses, or would a claimant’s choice of testing facility be limited? To keep down costs of the program, could defendant be permitted to establish a “preferred provider network” of medical professionals such that claimants could only be tested within the network? In the absence of such a network, would claimants be limited to the usual and necessary costs for such services, or is the sky the limit? How would the system reconcile two different physicians’ opinions of what is “reasonable” in terms of medical testing? Would there be a grievance procedure? Would defendant be billed directly, or would it periodically pay into a fund?<sup>231</sup>

Courts would also have to resolve a host of additional questions, *e.g.*, whether the collateral source rule enables plaintiffs to participate in a monitoring program even though insurance provides the same monitoring for free and whether money not spent by the monitoring program would revert to the defendant.

Courts simply do not “possess the technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science. The burdens of such a system would more appropriately be borne by an administrative agency specifically created and empowered to administer such a program.”<sup>232</sup> And as one commentator noted, “if the only proper way to allocate damages in this situation is through an agency-like process, one should consider whether it might not be more sensible to use an agency in the first place.”<sup>233</sup>

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<sup>231</sup> *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 699 n.23 (Mich. 2005).

<sup>232</sup> *Id.* at 699.

<sup>233</sup> Klein, *supra* note 106, at 32 n.149.

## Conclusion

Since the beginning of American law, courts have required plaintiffs to prove a physical injury to recover in tort. The physical injury requirement has provided a bright line rule that distinguishes among cases that warrant judicial resources and minimizes the risk of fraudulent claims. Over the last twenty years, however, the plaintiffs' bar has relied upon society's fear of latent disease to convince a number of courts—including some in Illinois—that the benefits provided by medical monitoring are sufficient to overcome the physical injury requirement. But abandoning the physical injury requirement may have troubling consequences for other legal doctrines, such as rules governing standing, the accrual of statutes of limitations, the bar on claim splitting, the economic loss rule, and claims for increased risk of future harm. Moreover, there are a host of public policy considerations that weigh against the adoption of a medical monitoring claim for uninjured plaintiffs. A claim for medical monitoring would make virtually everyone a potential plaintiff. The expansion of the plaintiff pool would in turn result in a reduction in defendants' ability to compensate the injured, further congestion in the courts, the expenditure of scarce medical resources, limitations on the accessibility of beneficial products, and harm to the economy as a whole. Nor is there any pressing need to adopt a medical monitoring claim for asymptomatic plaintiffs. Although medical monitoring is useful in some cases, the medical community has cast significant doubt on many monitoring regimes, and insurance provides any medically necessary monitoring for the vast majority of Americans. Finally, even if adoption of a medical monitoring claim were warranted, the legislature—not the judiciary—is best-suited to make that far-reaching decision and to implement such an unwieldy claim.