

**NOTE: A FIFTY-STATE SURVEY OF MEDICAL
MONITORING AND THE APPROACH THE MINNESOTA
SUPREME COURT SHOULD TAKE WHEN
CONFRONTED WITH THE ISSUE**

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I. INTRODUCTION

In “toxic tort” lawsuits, or claims brought as a result of exposure to hazardous substances, a typical plaintiff “alleges he has developed a disease because of exposure to a toxic substance negligently released by the defendant.”¹ In some cases, however, the plaintiffs “seek to recover the costs of long-term diagnostic testing and medical examinations, which they claim are necessary to detect latent diseases or ailments that might later develop as a result of toxic exposure.”² This novel theory of recovery is

1. Henry v. Dow Chem. Co., 701 N.W.2d 684, 686 (Mich. 2005).

2. Daniel L. Martens & Ernest J. Getto, *Medical Monitoring and Class Actions*, 17 NAT. RESOURCES & ENV'T 225, 225 (2003); see also Ayers v. Twp. of Jackson, 525 A.2d 287, 308 (N.J. 1987) (stating a claim for medical monitoring expenses “seeks to recover the cost of periodic medical examinations intended to monitor

frequently labeled “medical monitoring.”³ Plaintiffs bringing claims for medical monitoring “seek post-exposure, pre-symptom recovery for the expense of periodic medical examinations to detect the onset of physical harm.”⁴ Plaintiffs who bring actions seeking the establishment of a medical monitoring fund may not suffer any current physical injuries and often do not even exhibit symptoms of disease as a result of their alleged exposure.⁵

Many courts are “tempted to permit recovery for medical monitoring because the claims have ‘emotional and political appeal’ and [because] our society has developed a ‘heightened sensitivity to environmental issues.’”⁶ Thus, some courts across the country have permitted recovery for medical monitoring absent present physical injury.⁷ Other jurisdictions, however, have rejected recovery for medical monitoring absent present physical injury because of the “inherent complexities and significant public

plaintiffs’ health and facilitate early diagnosis and treatment of disease caused by plaintiffs’ exposure to toxic chemicals”).

3. Allan L. Schwartz, Annotation, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R. 5th 327 (2005). Medical monitoring is also sometimes referred to as “medical surveillance.” *Id.*

4. Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1058 (1999); *see also* Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 856 (Ky. 2002) (“Under this theory, a defendant is required to pay a plaintiff for the anticipated costs of checkups and procedures aimed at detection and early treatment of any disease that may arise in the future as a result of tortious exposure.”). The claim for medical surveillance is distinct from a claim for so-called “enhanced risk.” The Supreme Court of New Jersey in *Ayers* has been frequently quoted, explaining the difference as “[t]he enhanced risk claim seeks a damage award, not because of any expenditure of funds, but because plaintiffs contend that the unquantified injury to their health and life expectancy should be presently compensable, even though no evidence of disease is manifest.” 525 A.2d at 304. On the other hand, “the claim for medical surveillance . . . seeks specific monetary damages measured by the cost of periodic medical examinations . . . [to] redress . . . the fact that plaintiffs have been advised to spend money for medical tests, a cost they would not have incurred absent their exposure to toxic chemicals.” *Id.*

5. Martens & Getto, *supra* note 2, at 225.

6. Schwartz et al., *supra* note 4, at 1059 (quoting Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 121 (1995)); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 837 (2002) (“Another reason for the intuitive appeal of medical monitoring claims is that asbestos and other toxic substances have come to epitomize the evils of ruthless industrial technology in the public eye, and the plaintiffs are quintessentially innocent victims of wrongdoing.”).

7. *See infra* Part IV.A.

policy concerns” surrounding the awards.⁸ Finally, others have yet to rule on the issue.⁹

This Note begins by tracing the evolution of medical monitoring, including a discussion of the leading cases.¹⁰ It then examines Minnesota’s treatment of medical monitoring.¹¹ Next, this Note evaluates the state of medical monitoring in various other states and jurisdictions.¹² This Note further discusses the competing policy perspectives supporting various tests for medical monitoring.¹³ Finally, it suggests the proper standard for the review of medical monitoring issues in Minnesota, while encouraging Minnesota courts to leave the issue to the legislature altogether.¹⁴

II. THE DEVELOPMENT OF MEDICAL MONITORING

One of the “fundamental principles” of tort law over the past two hundred plus years has been the theory that liability should not be imposed without proof of a physical injury.¹⁵ The reason for this injury requirement is to “give security to the rights of individuals by putting within their reach suitable redress whenever their rights have been actually violated.”¹⁶ Thus, tort law provides relief to an individual under general tort theory only when they have suffered an actual injury to person or property.¹⁷

8. Schwartz et al., *supra* note 4, at 1059; *see infra* Part IV.B.

9. *See infra* Part IV.C.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Parts V-VI.

14. *See infra* Parts VI-VII.

15. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971); *see also* Henry v. Dow Chem. Co., 701 N.W.2d 684, 688-89 (Mich. 2005) (explaining that a present physical injury is required in the toxic tort context to recover under a negligence theory); Schwartz et al., *supra* note 4, at 1074 (“For over two hundred years, a fundamental principle of tort law has been that liability should only be imposed when a person has suffered an injury.”).

16. COOLEY ON TORTS § 32 (4th ed. 1932).

17. *See* Henry, 701 N.W.2d at 689. More eloquently stated:

Before any violation has in fact taken place, the law assumes that none will happen; but that each individual will respect the rights of all others. Therefore, it does not undertake in general to provide preventive remedies; it gives them in a few exceptional cases, which stand on peculiar grounds, and in which the mischiefs flowing from an invasion of rights might be such as would be incapable of complete redress in the ordinary methods, or perhaps in any manner. In most cases it is assumed that, if the law places within the reach of every one a suitable remedy to which he may resort when he suffers an injury, it has thereby not only

While this narrow principle may appear harsh, especially when examining some sympathetic plaintiffs, “it is the best filter the courts have been able to develop to prevent a flood of claims, to provide faster access to courts for those with ‘reliable and serious’ claims,¹⁸ and to ensure that defendants are held liable only for genuine harm.”¹⁹ Medical monitoring claims that are brought by plaintiffs lacking present physical injury challenge this traditional “physical injury” rule in tort law.²⁰ The following three cases illustrate how some courts have handled the issue of medical monitoring.

A. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*

The first case to award medical monitoring damages was *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*²¹ In *Friends for All Children*, Lockheed’s airplane was used in a rescue mission to evacuate Vietnamese children from Saigon near the end of the Vietnam War.²² Soon after takeoff, a locking system failed, causing the cargo doors and aft ramp to fall off the aircraft.²³ In addition, the interior compartments of the plane decompressed resulting in a loss of oxygen.²⁴ The plane later crashed, breaking into four large pieces and several smaller pieces.²⁵ Many of the orphans were killed, although 149 of the infants survived.²⁶

An organization named Friends for All Children (FFAC), claiming to be the legal guardian for the surviving children, filed a claim in the United States District Court for the District of

provided for him adequate protection, but has given him all that public policy demands. The remedies that are aimed at wrongs not yet committed but only threatened, are so susceptible of abuse that they are wisely restricted within very narrow limits.

COOLEY ON TORTS, *supra* note 16, § 32, *quoted in Henry*, 701 N.W.2d at 689.

18. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997).

19. *Schwartz et al.*, *supra* note 4, at 1059.

20. *Id.*

21. 746 F.2d 816 (D.C. Cir. 1984).

22. *Id.* at 819. The rescue mission, nicknamed “Operation Babylift,” took place on April 4, 1975. *Id.* The Lockheed C5A Galaxy aircraft took off for the United States with 301 passengers on board, mostly Vietnamese infant orphans. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The surviving orphans were later sent to San Francisco where they were examined by U.S. military physicians, and subsequently released to their adoptive parents. *Id.*

Columbia.²⁷ FFAC alleged that the accident resulted from Lockheed's negligent manufacture of the plane.²⁸ FFAC further claimed that because of the decompression and the crash itself, the survivors suffered from a neurological development disorder.²⁹ Thus, FFAC sought compensation from Lockheed for diagnostic examinations and continued medical monitoring to determine if the decompression or the crash itself caused residual brain dysfunction syndrome in the children.³⁰

The district court granted partial summary judgment in favor of the orphan children adopted by non-U.S. parents.³¹ In doing so, the court held that Lockheed was liable for the cost of diagnostic examinations of the children.³² The court also entered an injunction ordering Lockheed to create a \$450,000 fund from which reasonable costs of diagnostic examinations for the children living in France could be drawn.³³ Lockheed appealed, arguing in part that tort law in the District of Columbia had not recognized a cause of action for placing a person at risk in the absence of proof of actual physical injury.³⁴

On review, the United States Court of Appeals for the District of Columbia first noted that the law of the District of Columbia was in fact "silent on the specific issue of whether a plaintiff may maintain an action for diagnostic examinations in the absence of proof that he or she was physically injured."³⁵ The court, however,

27. *Id.*

28. *Id.* Lockheed in turn argued that the crash was caused by the negligent maintenance and operation of the plane by the U.S. Air Force. *Id.* at 819-20. Thus, Lockheed decided to implead the United States as a third party defendant. *Id.* at 820.

29. *Id.* at 819. The brain disorder was classified as Minimal Brain Dysfunction, or MBD. *Id.*

30. *Id.*

31. *Id.* at 822. Half of the adoptive parents were Europeans. *Id.* at 819.

32. *Id.* The court stated it could not "be reasonably disputed that the need for some *diagnostic* examinations . . . is itself a proximate result of this particular crash." *Id.*

33. *Id.* at 818-19. While the foreign plaintiffs lived in a number of European countries, the court concluded that because the public health services in countries other than France were likely to pay for the examinations, the relief in the form of the fund should apply only to the French plaintiffs. *Id.* at 822 n.7.

34. *Id.* at 823. Lockheed further argued that "if the District of Columbia courts were presented with this action they likewise would decline as a matter of law to recognize it." *Id.* at 824.

35. *Id.* Because the action was a diversity case, the court was obligated to apply the law of the District of Columbia. See *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360-61 (D.C. Cir. 1983). The principle set forth in *Erie*

went on to predict that, if faced with the same question under similar circumstances, the District of Columbia Court of Appeals would recognize a cause of action for medical monitoring in the absence of physical injury.³⁶ The court stated that its conclusion was supported by two fundamental purposes of tort law: “the deterrence of misconduct and the provision of just compensation to victims of wrongdoing.”³⁷

To aid in its determination of whether a cause of action for diagnostic examinations without proof of physical injury should exist, the court hypothesized an accident involving two individuals, Smith and Jones.³⁸ The court stated:

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.³⁹

The court noted that, based on this example, even though there is an absence of physical injury, Jones should still be able to recover the costs for the diagnostic examinations proximately caused by Smith’s actions.⁴⁰ The court similarly reasoned that here

Railroad Co. v. Tompkins, 304 U.S. 64 (1938) applies to federal courts in the District of Columbia when they exercise jurisdiction over state-created causes of action. *Id.*

36. *Friends for All Children*, 746 F.2d at 824-25. The court reasoned that general principles of tort law and the law of other jurisdictions supported its conclusion. *Id.* The court also concluded that the need for medical monitoring constituted an “injury” as defined by the Restatement (Second) of Torts. *Id.* at 826. The Restatement defines “injury” as “the invasion of any legally protected interest of another.” RESTATEMENT (SECOND) OF TORTS § 7 (1965). The court reasoned that because “an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury,” when a person invades that interest such person “should make the plaintiff whole by paying for the examinations.” *Friends for All Children*, 746 F.2d at 826.

37. *Id.* at 825. The court also distinguished the cases from other jurisdictions referenced by Lockheed because such jurisdictions’ refusals to recognize a cause of action for diagnosis in the absence of present injury were grounded upon difficulties of speculative proof, which were not present here. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* The court noted that this conclusion will deter misconduct and complies with the normative justice concerns applicable to tort law. *Id.* Because the plaintiff’s need for medical services as a result of the accident was beyond the services necessitated by normal life activities, the motorbiker should consequently pay. *Id.*

“no diagnostic examinations would be necessary ‘but for the fact that these children endured explosive decompression and hypoxia aboard [the] plane.’”⁴¹

Despite its holding, the court of appeals was concerned with the potential hardship its decision would impose on the defendant.⁴² To ensure that plaintiffs would be prevented from recovering excessive damages, the court affirmed the order of the district court creating a fund from which money could be disbursed only upon submission of a voucher detailing the expenses anticipated and upon the defendant having the opportunity to respond to the potential disbursement.⁴³ Moreover, in allowing a claim for medical monitoring expenses absent physical injury, it appears the court of appeals did not intend its decision to apply to cases where the “alleged injury to be compensated [is] speculative without the corroborative presence of physical injury.”⁴⁴

B. *Metro-North Commuter Railroad Co. v. Buckley*

In *Metro-North Commuter Railroad Co. v. Buckley*, the United States Supreme Court was faced with the question of whether a railroad worker, negligently exposed to asbestos but without symptoms of any disease, could recover under the Federal Employers’ Liability Act (FELA) for negligently inflicted emotional distress.⁴⁵

In *Metro-North*, the plaintiff worked as a pipefitter for Metro-North, a railroad.⁴⁶ For a period of three years, and for a time of roughly one hour per working day, the plaintiff’s job required him to remove insulation from pipes.⁴⁷ After completing such work plaintiff would often be covered with insulation dust containing asbestos.⁴⁸ After attending an “asbestos awareness” class, the plaintiff feared he would develop cancer as a result of his work.⁴⁹ He then sought periodic medical checkups for cancer and asbestosis, but those examinations did not reveal evidence of

41. *Id.* at 825 (quoting the district court’s Memorandum of Opinion).

42. *Id.* at 837-38.

43. *Id.* at 838 & n.42.

44. *Id.* at 826.

45. 521 U.S. 424, 426-27 (1997).

46. *Id.* at 427.

47. *Id.*

48. *Id.*

49. *Id.*

asbestos-related disease.⁵⁰

The plaintiff subsequently brought suit against Metro-North under FELA.⁵¹ Specifically, he sought damages for his emotional distress and to cover the expenses of future medical monitoring.⁵² In response, Metro-North argued, *inter alia*, that FELA did not permit the plaintiff to recover for injuries because he had not suffered physical harm.⁵³

The district court dismissed the plaintiff's claims, holding that the plaintiff did not "offer sufficient evidence to allow a jury to find that he suffered a real emotional injury."⁵⁴ The court also stated that the plaintiff suffered no "physical impact," and therefore, any emotional injury suffered by the plaintiff fell outside the circumstances under which FELA permits recovery.⁵⁵ The court did not address the plaintiff's medical monitoring claim.⁵⁶

On appeal, the Second Circuit vacated the judgment and held that the plaintiff's contact with the insulation dust fit within the definition of "physical impact" under FELA.⁵⁷ Thus, the court held that the plaintiff could recover under FELA for any accompanying emotional distress.⁵⁸ The court found that the plaintiff could recover only if he could prove that "by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe . . . a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure."⁵⁹ The plaintiff might then recover the costs of his medical checkups.⁶⁰

The U.S. Supreme Court granted certiorari to review the Second Circuit holding.⁶¹ The first question before the Court was whether the plaintiff's physical contact with the dust amounted to "physical impact" for purposes of the plaintiff's emotional distress

50. *Id.*

51. *Id.* Under FELA, a railroad worker may recover damages for an "injury . . . resulting . . . from" his employer's "negligence." 45 U.S.C. § 51 (2000).

52. *Metro-North*, 521 U.S. at 427.

53. *Id.*

54. *Id.* at 428.

55. *See id.*

56. *See id.*

57. *Buckley v. Metro-North Commuter R.R. Co.*, 79 F.3d 1337, 1345 (2d Cir. 1996).

58. *Id.*

59. *Id.* at 1347 (internal quotation omitted).

60. *Id.*

61. *Metro-North*, 521 U.S. at 428.

claim pursuant to FELA.⁶² The Court held that “physical impact” does not include slight contact with a substance where the only physical harm is that the substance may cause a disease in the future.⁶³

More important to the topic of this Note, the Court also addressed the question of whether the plaintiff could recover the cost of future medical checkups he expected to incur to monitor for potential asbestos-related disease.⁶⁴ By a vote of seven to two, the Court denied the plaintiff’s request for medical monitoring damages under FELA.⁶⁵ The Court noted a number of concerns with allowing such a claim absent physical injury, including (1) the fact that distinguishing medical monitoring costs from the costs of routine medical care would be problematic for judges and juries;⁶⁶ (2) the notion that allowing recovery would soak up medical resources better left to “those more seriously harmed”;⁶⁷ and (3) the fact that allowing such recovery would “ignore the presence of existing alternative sources of payment,” such as employers or insurance policies that may provide monitoring, leaving courts uncertain when calculating recoveries.⁶⁸

The Court was also concerned that such a remedy would produce a “flood” of cases and result in “unlimited and unpredictable liability.”⁶⁹ Writing for the Court, Justice Breyer stated that the majority were “troubled . . . by the potential systemic effects of creating a new, full-blown, tort law cause of action.”⁷⁰

62. *Id.* at 428-29.

63. *Id.* at 430. The Court noted:

[T]he words “physical impact” do not encompass every form of “physical contact.” . . . [T]hey do not include a contact that amounts to no more than an exposure . . . to a substance that poses some future risk of disease . . . and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.

Id. at 432.

64. *Id.* at 438.

65. *Id.* at 443-44.

66. *Id.* at 441.

67. *Id.* at 442.

68. *Id.* at 442-43.

69. *Id.* at 442. The Court was concerned that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.” *Id.*

70. *Id.* at 443-44. The Court noted the likely effects on potential plaintiffs not before the court but who “depend on a system that can distinguish between reliable and serious claims . . . and unreliable and relatively trivial claims.” *Id.* at 444.

C. *Bower v. Westinghouse Electric Corp.*

Despite the holding of the U.S. Supreme Court in *Metro-North*, in 1999, West Virginia's Supreme Court of Appeals became the most recent state court to recognize a cause of action for medical monitoring absent present physical injury.⁷¹ In *Bower*, the plaintiffs brought a claim in the Circuit Court of Marion County, West Virginia, alleging they were exposed to a number of toxic substances because defendants maintained a cullet pile containing debris from the manufacture of light bulbs.⁷² The plaintiffs sought, among other things, damages in the form of medical monitoring expenses.⁷³ At the time the plaintiffs brought suit, none exhibited symptoms of disease related to their potential exposure.⁷⁴

The defendants removed the case to the United States District Court for the Northern District of West Virginia and later moved to dismiss the plaintiffs' medical monitoring claim.⁷⁵ The plaintiffs subsequently sought to certify to the West Virginia Supreme Court of Appeals the issue of whether medical monitoring damages were a recognized form of relief under West Virginia tort law.⁷⁶ The district court asked the supreme court of appeals to resolve the following question: "In a case of negligent infliction of emotional distress absent physical injury, may a party assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic chemicals?"⁷⁷ In order to reach its holding on the issue of medical monitoring, however, the *Bower* court reformulated the certified question to read: "Whether, under West Virginia law, a plaintiff who does not allege a present physical injury can assert a claim for the recovery of future medical monitoring costs where such damages are the proximate result of defendant's tortious conduct."⁷⁸

71. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999).

72. *Id.* at 426. The tests performed on the pile indicated the presence of thirty potentially toxic substances. *Id.* at 427.

73. *Id.* Plaintiffs brought claims for: (1) negligent maintenance and operation of the refuse pile, (2) nuisance, (3) trespass, (4) negligent infliction of emotional distress, and (5) intentional disregard for the health and safety of plaintiffs. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 427-28.

77. *Id.*

78. *Id.* at 428-29. The court noted that it did not believe the district court

The court held that a present physical harm was not a prerequisite to bring a claim for medical monitoring.⁷⁹ The court further noted that a plaintiff seeking medical monitoring costs is not even required to show a “probable likelihood that a serious disease will result from the exposure.”⁸⁰ Rather, all a plaintiff must prove is that medical monitoring expenses are “necessary and reasonably certain to be incurred as a proximate result of a defendant’s tortious conduct.”⁸¹

After determining that future medical monitoring expenses are available pursuant to West Virginia law absent a present physical injury, the court set forth the following six-part test necessary for a plaintiff to sustain an action for medical monitoring costs under West Virginia law:

(1) [a plaintiff] . . . has . . . been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.⁸²

Justice Maynard dissented in *Bower*, arguing that the majority lacked the authority to create a medical monitoring cause of action absent a present physical injury.⁸³ Specifically, Justice Maynard was troubled that the court went beyond the “clear, concise and limited question” of the district court in an effort to satisfy the court’s “grand designs . . . despite the specific issue before it.”⁸⁴ Justice Maynard was more disturbed, however, that the majority’s decision to engage in judicial lawmaking violated the constitutional doctrine of separation of powers by “usurping the Legislature’s authority to enact laws.”⁸⁵ Finally, Justice Maynard criticized the majority for

meant “to pose such a narrow question.” *Id.* at 428. Thus, the court used its power under West Virginia Code sections 51-1A-1 through 51-1A-13 to reformulate the question. *Id.*

79. *Id.* at 430.

80. *Id.* at 431.

81. *Id.*

82. *Id.* at 432-33.

83. *Id.* at 434 (Maynard, J., dissenting).

84. *Id.* at 434-35.

85. *Id.* at 435.

rejecting the 200-year-old tort law rule requiring a present injury before allowing a plaintiff to recover damages, electing instead to favor a rule emphasizing “the speculative and amorphous showing of ‘increased risk.’”⁸⁶

III. MINNESOTA CASE LAW DISCUSSING MEDICAL MONITORING

Before analyzing the test that should be adopted by the Minnesota Supreme Court, it is important to briefly highlight previous Minnesota case law. To date, the law of medical monitoring in Minnesota is rather undeveloped. In fact, the Minnesota Supreme Court has yet to address the issue of medical monitoring and the Minnesota Court of Appeals has discussed the issue only once.

A. *Werlein v. United States*

The first case to address the issue of medical monitoring in Minnesota was *Werlein v. United States*.⁸⁷ In *Werlein*, the plaintiffs brought suit against a number of defendants for allegedly discharging chemical waste, including trichloroethylene (TCE), from the Twin Cities Army Ammunition Plant (TCAAP) and the “Trio Solvents” site.⁸⁸ The plaintiffs lived near the two sites and claimed that their water supply was polluted by the defendants.⁸⁹

The plaintiffs filed actions under federal and state statutes governing toxic pollution.⁹⁰ The plaintiffs also brought a number of common-law claims.⁹¹ In addition, the plaintiffs requested a

86. *Id.* Justice Maynard suggested that because a plaintiff is “not required to show that a particular disease is certain or even likely to occur as a result of exposure,” as a result of the majority’s decision “plaintiffs will . . . be compensated when there is no injury, thus providing a windfall for plaintiffs.” *Id.*

87. 746 F. Supp. 887 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992).

88. *Id.* at 890.

89. *Id.*

90. *Id.* The plaintiffs stated claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992, the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1376, the Minnesota Environmental Response and Liability Act (MERLA), MINN. STAT. §§ 115B.01-115B.20, and the Minnesota Environmental Rights Act (MERA), MINN. STAT. §§ 116B.01-116B.13. *Id.* Plaintiffs sought injunctive relief under these statutes, asking the court to supervise the cleanup of contaminants at both sites. *Id.*

91. *Id.* Plaintiffs sought liability for nuisance, trespass, battery, and intentional and negligent infliction of emotional distress. *Id.* Pursuant to such

medical monitoring fund, to be financed by the defendants, which would reimburse the plaintiffs exposed to the contaminants for the costs of medical screening.⁹² In response, the defendants brought motions for summary judgment and dismissal.⁹³

The United States District Court for the District of Minnesota held, *inter alia*, that medical monitoring costs could be recovered as tort damages under the common law of Minnesota.⁹⁴ The court was careful to note, however, that the costs of medical monitoring were available only where a plaintiff could show that they had a present injury that increased their risk of future harm.⁹⁵

B. Bryson v. Pillsbury Co.

The only instance of a Minnesota state court discussing the issue of medical monitoring occurred in *Bryson v. Pillsbury Co.*⁹⁶ In *Bryson*, the plaintiff's horse fell into a pit filled with storm water.⁹⁷ The pit was also allegedly used by the plaintiff's employer, a subsidiary of the defendant, to dispose of waste.⁹⁸ The plaintiff entered the pit to rescue the horse and noticed Captan-treated seeds floating in the water.⁹⁹ After rescuing the horse, the plaintiff later suffered from a recurring rash that covered her body.¹⁰⁰

The plaintiff brought an action against the defendant as a result of her exposure to Captan.¹⁰¹ The plaintiff argued that her exposure caused extensive chromosome breakage and an increased risk of developing cancer.¹⁰² The defendant moved for summary judgment on the grounds of assumption of risk and speculative

claims, plaintiffs asked for monetary damages, including compensation for both personal and property damages caused by the contaminants. *Id.* at 890-91.

92. *Id.* at 891. Plaintiffs contended that medical monitoring expenses could be recovered both as a response cost under CERCLA section 107 and under the common law. *Id.* at 901.

93. *Id.* at 890.

94. *Id.* at 904.

95. *Id.* The court stated that when a plaintiff can show they have present injuries that increase the risk of future harm, "monitoring is . . . a [recoverable] future medical cost." *Id.*

96. 573 N.W.2d 718 (Minn. Ct. App. 1998).

97. *Id.* at 719.

98. *Id.*

99. *Id.* Captan is a chemical treatment for seed designed to protect the seed from insects when placed in the soil. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

damages.¹⁰³ The district court granted the defendant's motion for summary judgment on the damages issue, because the plaintiff suffered no present injury and thus awarding damages for future harm was too speculative.¹⁰⁴

On appeal, the defendant argued that because the plaintiff's alleged chromosome damage was asymptomatic, no present injury existed.¹⁰⁵ Moreover, the defendant's expert testified that "an elevated number of chromosome aberrations [is] not considered an 'injury' per se because they do not in and of themselves result in any physical impairment."¹⁰⁶ The plaintiff contended that the chromosome breakage resulting from her exposure to Captan was a "real and present physical and biologic injury."¹⁰⁷

The Minnesota Court of Appeals reversed the district court's grant of summary judgment in favor of the defendant, stating that the plaintiff presented sufficient evidence to raise a genuine factual issue as to whether the plaintiff's chromosome breakage constituted a present injury.¹⁰⁸ In doing so, the court quoted *Werlein*, stating that "it could not rule as a matter of law that plaintiffs' alleged injuries [were] not 'real' simply because they [were] subcellular" and that "[i]t is for the trier of fact, aided by expert testimony, to determine whether the plaintiffs have suffered present harm."¹⁰⁹

For the purposes of this discussion, it is important to note that although the court held that the determination of whether subcellular damage actually constituted a present physical injury is one for the trier of fact, the court did require a present physical injury to pursue medical monitoring costs.

C. *Thompson v. American Tobacco Co.*

In *Thompson v. American Tobacco Co.*,¹¹⁰ the plaintiffs brought a claim alleging that the defendants participated in a large-scale fraudulent scheme to encourage people to either begin or continue smoking.¹¹¹ The plaintiffs further alleged that the

103. *Id.*

104. *Id.*

105. *Id.* at 720.

106. *Id.* at 721.

107. *Id.*

108. *Id.* at 720-21.

109. *Id.* at 721.

110. 189 F.R.D. 544 (D. Minn. 1999).

111. *Id.* at 547.

defendants' scheme exposed them to diseases and illnesses, and required the plaintiffs to participate in medical monitoring programs.¹¹² Thus, the plaintiffs alleged that the defendants' conduct constituted both common law and statutory fraud, and sought the establishment of a court-administered defendant-funded medical monitoring fund.¹¹³

The plaintiffs subsequently brought motions for class certification and to reserve individual injury and damage claims.¹¹⁴ The U.S. District Court for the District of Minnesota held, in relevant part, that the plaintiffs' request for medical monitoring presented too many individual issues to permit certification.¹¹⁵ In so holding, the court stated "[g]iven the novelty of the tort of medical monitoring and that the Minnesota Supreme Court has yet to recognize it as an independent theory of recovery, this Court is not inclined at this time to find that such a tort exists under Minnesota law."¹¹⁶

D. *In re* St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation

Minnesota's status as a state that requires the presence of a physical injury in seeking the recovery of medical monitoring costs was most recently confirmed in *In re St. Jude Medical, Inc.*¹¹⁷ In *St. Jude*, the defendant manufactured the "Silzone" valve, an artificial heart valve.¹¹⁸ After the Food and Drug Administration approved the Silzone valve, it was implanted into more than 10,000 people in the United States.¹¹⁹ After the valve's safety was called into question, the defendant issued a voluntary recall.¹²⁰ Shortly thereafter, individuals who alleged they had either been harmed by the Silzone valve, or who had the valve but did not have symptoms,

112. *Id.*

113. *Id.* Plaintiffs brought statutory claims pursuant to Minnesota Statutes sections 325F.67, 325F.68, 325F.69, and 325D.43. *Id.*

114. *See id.* at 548.

115. *Id.* at 552.

116. *Id.* However, for the purposes of ruling on plaintiffs' class certification motion, the court "assumed that medical monitoring [was] a proper theory of recovery." *Id.*

117. No. MDL 01-1396, 2004 WL 45504 (D. Minn. Jan. 5, 2004).

118. *Id.* at *1.

119. *St. Jude*, 2004 WL 45504, at *1.

120. *Id.*

brought a number of lawsuits against St. Jude Medical.¹²¹

The plaintiffs subsequently brought a motion seeking the certification of two classes.¹²² Class I included every patient in the United States who at the time of the claim had the Silzone valve implanted.¹²³ This class was designated the “monitoring” class, and sought injunctive relief in the form of medical monitoring.¹²⁴ Class II consisted of all people in the United States who received a Silzone valve and sustained physical injuries due to the valve.¹²⁵ This class was designated the “injury” class, and sought damages.¹²⁶

On March 27, 2003, the court conditionally certified Classes I and II pursuant to Rule 23 of the Federal Rules of Civil Procedure.¹²⁷ The court requested additional briefing on potential subclasses because the court anticipated creating subclasses to address any substantial differences in state law.¹²⁸

The Class I plaintiffs sought to recover the expenses of future medical examinations intended to detect the onset of injuries arising from the Silzone heart valve.¹²⁹ To that end, the Class I plaintiffs sought a medical monitoring program, paid for through a trust account funded by St. Jude Medical, and designed to monitor side effects associated with defective valves.¹³⁰

After considering the parties’ additional briefing and after hearing extensive arguments, the court concluded it would continue “to manage the monitoring class as a class action.”¹³¹ The

121. *Id.* On April 18, 2001, these cases were consolidated and transferred to the U.S. District Court in the State of Minnesota by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, for consolidated pretrial proceedings. *Id.*

122. *St. Jude*, 2004 WL 45504, at *1.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Specifically, referring to FED. R. CIV. P. 23, the court found that both Class I and II met the threshold requirements set forth in Rule 23(a), that common issues of law and fact predominated, and that a class action was the best way to adjudicate the claims. *Id.* As a result, the court conditionally certified the claims under Rules 23(b)(3) and (c)(4), and conditionally certified the medical monitoring claims of Class I under Rule 23(b)(2). *Id.*

128. *Id.* at *2.

129. *Id.* at *4.

130. *Id.* Plaintiffs also desired the program to include an epidemiological component “to collect data and study the effects of the Silzone valves.” *Id.*

131. *Id.* The court justified its decision, arguing that monitoring claims are typically smaller in value than personal injury claims, “and are closer to the ‘negative value’ lawsuits that class actions were intended to encompass.” *Id.* Other

court did recognize, however, that it must predict how each state would address medical monitoring claims, and that a “consequence of this sub-classing is that class members who are asymptomatic and whose claims arise in jurisdictions that require injury for a tort action to proceed will have to be excluded from the class entirely.”¹³² Despite this fact, the court determined that the differences in state laws of those states recognizing medical monitoring as a stand-alone claim did not undermine the medical monitoring class.¹³³

In evaluating the status of medical monitoring law in each state, “the Court recognize[d] . . . that medical monitoring law is not a well-established cause of action.”¹³⁴ Further, the court stated that because Minnesota is a state that recognizes medical monitoring but imposes an “injury” requirement, the individuals whose valves were implanted in Minnesota were not to be included in Class I.¹³⁵

Six months later, however, the court changed its mind. In a

commentators have similarly described the role of class actions in mass tort cases as a “vehicle” for small value claimants to combine their claims so as to ensure that bringing such claims is economically feasible. See John C. Coffee, Jr., *Class Wars: The Dilemma of Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 (1995). The court did, however, note “that some courts have been reluctant to certify medical monitoring classes,” especially those “involving exposure to environmental toxins and over-the-counter drugs.” *St. Jude*, 2004 WL 45504, at *4. The court contended, however, that “[t]he rationale for such hesitancy” was “not applicable” in this case, because “[u]nlike claims involving uncertain levels of exposure and an uncertain number of potential individuals exposed,” here “the medical monitoring class [was] certain and discrete.” *Id.* The court also justified its decision by noting that here the court would “not face issues of length or amount of exposure” as it does in “cases involving environmental toxins.” *Id.* Finally, the court stated that because it restricted the class “to include only asymptomatic individuals,” the case did “not present issues of causation.” *Id.*

132. *St. Jude*, 2004 WL 45504, at *5 (citing *In re Diet Drugs Prod. Liab. Litig.*, Civ. No. A-98-20626, 1999 WL 673066, at *16 (E.D. Pa. Aug. 26, 1999)).

133. *Id.* This was because the states that do recognize medical monitoring as an independent cause of action have elements that appear to be similar. *Id.* (citing *In re Baycol Prod. Litig.*, 218 F.R.D. 197 (D. Minn. Sept. 17, 2003)). In *Baycol*, the court decided against certifying a medical monitoring class because the class representatives had previously received the requested testing and monitoring. *In re Baycol Prod. Litig.*, 218 F.R.D. at 211. In addition, the class representatives had suffered injury, and thus the *Baycol* court was concerned the representatives would not “adequately represent the interests of the uninjured class members.” *Id.*; see also *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 287 (S.D. Ohio 1997) (certifying medical monitoring class and noting the only relevant variation in state law is whether an injury is required).

134. *St. Jude*, 2004 WL 45504, at *6.

135. *Id.* at *8-9.

separate proceeding of *In re St. Jude Medical, Inc.*, the plaintiffs argued that individuals with a Silzone valve did have present physical injuries in the form of subcellular injuries.¹³⁶ Thus, such individuals met the injury requirement in jurisdictions that did not allow medical monitoring absent present physical injury.¹³⁷ The court decided to include states in the class, as a separate subclass, only if they had previously recognized subcellular damage as a present injury.¹³⁸ Despite the fact that no Minnesota case has expressly held that subcellular damage constitutes a present physical injury, the court added individuals whose valves were implanted in Minnesota.¹³⁹

St. Jude Medical appealed the district court's decision to the Eighth Circuit Court of Appeals.¹⁴⁰ St. Jude Medical argued that the district court erred by certifying the medical monitoring class, in part, because of the "diverse legal and factual issues" present.¹⁴¹ The Eighth Circuit Court of Appeals agreed, and reversed the district court's certification of the medical monitoring class.¹⁴² Following the lead of other courts around the country, the Eighth Circuit Court of Appeals explained that the number of individual issues present in the medical monitoring class and the highly individualized nature of each plaintiff's need for medical monitoring made class certification improper.¹⁴³

136. No. 01-1396, 2004 WL 1630786 (D. Minn. July 15, 2005).

137. *Id.* at *4.

138. *Id.* at *4-5.

139. *Id.* at *5. The court stated that its decision to add Minnesota to the class was based on the Minnesota Court of Appeals decision in *Bryson* "that allegations of chromosome damage presented a fact question for the jury on whether an individual was 'injured.'" *Id.* The court also decided to include the plaintiffs whose valves were installed in Delaware "based on the Court's revised analysis of the Delaware Supreme Court's decision in *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984)." *Id.* In addition, the court included the plaintiffs whose valves were implanted in Ohio based on *Verbryke v. Owens-Corning Fiberglass Corp.*, 616 N.E.2d 1162 (Ohio Ct. App. 1992). *Id.* The remaining states originally excluded by the court because they required a present physical injury were not added to the class because those jurisdictions had not previously recognized that subcellular damage may constitute an "injury." *Id.*

140. *In re St. Jude Medical Inc.*, 425 F.3d 1116 (8th Cir. 2005).

141. *Id.* at 1121.

142. *Id.* at 1122-23.

143. *Id.* at 1122. For example, considerations such as a plaintiff's medical history, condition of heart valves at the time of implantation, risk factors, general health, and personal choice, all beg an individualized inquiry. *Id.*

IV. STATE-BY-STATE SURVEY ON THE LAW OF MEDICAL MONITORING

Currently, courts in at least thirteen states plus the District of Columbia and Guam recognize medical monitoring absent present physical injury. Further, courts in sixteen states plus the Virgin Islands appear to allow medical monitoring only if the plaintiffs can show present physical injury. The remaining jurisdictions either have not articulated a test or have not addressed the issue of medical monitoring. The tables below categorize the states based on the present physical injury requirement (or lack thereof). It is important to note that some states permit a cause of action for medical monitoring, while other states only allow medical monitoring as a remedy for an existing common law or statutory tort. See the Appendix in Part IX for a short summary of the relevant authority for each state.

A. States That Allow Medical Monitoring in the Absence of Present Physical Injury

State	Authority
Arizona	Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987)
California	Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993)
Colorado	Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468 (D. Colo. 1991)
Connecticut	Martin v. Shell Oil Co., 180 F. Supp. 2d 313 (D. Conn. 2002)
District of Columbia	Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) ¹⁴⁴
Florida	Petito v. A.H. Robins Co., 750 So. 2d 103 (Fla. Dist. Ct. App. 1999)
Guam	Abuan v. Gen. Elec. Co., 3 F.3d 329 (9th Cir. 1992), <i>cert. denied</i> , 510 U.S. 1116 (1994)
Illinois	Lewis v. Lead Indus. Ass'n, 793 N.E.2d 869 (Ill. App. Ct. 2003)
Montana	Lamping v. Am. Home Prods., Inc., No. DV-97-85786 (Mont. 4th Dist. Ct. Feb. 2, 2000)
New Jersey	Ayers v. Twp. of Jackson, 525 A.2d 287 (N.J. 1987)

144. See also *supra* Part II.A.

New York	Patton v. Gen. Signal Corp., 984 F. Supp. 666 (W.D.N.Y. 1997)
Ohio	Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994)
Pennsylvania	Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137 (Pa. 1997)
Utah	Hansen v. Mountain Fuel Supply, 858 P.2d 970 (Utah 1993)
West Virginia	Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999) ¹⁴⁵

B. States That Do Not Allow Medical Monitoring Absent a Present Physical Injury

State	Authority
Alabama	Hinton <i>ex rel.</i> Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001)
Delaware	Mergenthaler v. Asbestos Corp., 480 A.2d 647 (Del. 1984)
Indiana	Baker v. Westinghouse Elec. Corp., 70 F.3d 951 (7th Cir. 1995)
Kansas	Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995)
Kentucky	Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002)
Louisiana	LA. CIV. CODE ANN. art. 2315 (West Supp. 2004)
Michigan	Henry v. Dow Chem. Co., 701 N.W.2d 684 (Mich. 2005)
Minnesota	Bryson v. Pillsbury Co., 573 N.W.2d 718 (Minn. Ct. App. 1998) ¹⁴⁶
Missouri	Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994)
Nebraska	Trimble v. Asarco, Inc., 232 F.3d 946 (8th Cir. 2000), <i>abrogated on procedural grounds by Exxon Mobil Corp. v. Allapattah Servs. Inc.</i> , 125 S. Ct. 2611 (2005)
Nevada	Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001)

145. See also *supra* Part II.C.

146. See also *supra* Part III.

North Carolina	Carroll v. Litton Sys., Inc., No. B-C-88-253, 1990 WL 312969 (W.D.N.C. Oct. 29, 1990)
South Carolina	Rosmer v. Pfizer, Inc., No. CIV.A. 9:99-2280-18RB, 2001 WL 34010613 (D.S.C. Mar. 20, 2001)
Texas	Norwood v. Raytheon Co., No. EP-04-CA-127-PRM, 2006 WL 267335 (W.D. Tex. Jan. 17, 2006)
Virginia	Ball v. Joy Techs., Inc., 958 F.2d 36 (4th Cir. 1991), <i>cert. denied</i> , 502 U.S. 1033 (1992)
Virgin Islands	Purjet v. Hess Oil Virgin Islands Corp., Civ. No. 1985/284, 1986 WL 1200 (V.I. Jan. 8, 1996)
Washington	Duncan v. Nw. Airlines, Inc., 203 F.R.D. 601 (W.D. Wash. 2001)

C. States That Have Either Not Addressed the Issue of Medical Monitoring or Have Not Articulated a Test

State	Authority
Arkansas	Baker v. Wyeth-Ayerst Labs. Div., 992 S.W.2d 797 (Ark. 1999)
Maryland	Philip Morris Inc. v. Angeletti, 752 A.2d 200 (Md. 2000)
Puerto Rico	Barreras Ruiz v. Am. Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998)
Tennessee	Craft v. Vanderbilt Univ., 174 F.R.D. 396 (M.D. Tenn. 1996)
Alaska Georgia Hawaii Idaho Iowa Maine Massachusetts Mississippi New Hampshire New Mexico North Dakota Oklahoma Oregon Rhode Island	Medical monitoring issue not addressed

South Dakota Vermont Wisconsin Wyoming	
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V. POLICY ARGUMENTS FOR ALLOWING MEDICAL MONITORING
ABSENT PRESENT PHYSICAL INJURY

In states that allow recovery for medical monitoring without demonstrating present physical injury, the substantive question to be answered is: "Should courts allow plaintiffs to recover based on the possibility of future injuries by imposing on defendants the current costs of medically monitoring those persons placed at increased risk?"¹⁴⁷ A number of courts have answered this question affirmatively, setting forth policy arguments in support of their decision to allow medical monitoring absent some present physical injury.

In *Bower*,¹⁴⁸ the West Virginia Supreme Court of Appeals set forth four frequently cited public policy considerations, originally identified by the California Supreme Court in *Potter v. Firestone Tire & Rubber Co.*,¹⁴⁹ that favor the recognition of medical monitoring claims absent present physical injury: (1) allowing recovery fosters access to medical testing and facilitates early diagnosis and treatment,¹⁵⁰ (2) recognizing medical monitoring claims deters irresponsible distribution of toxic substances, (3) early monitoring may prevent future costs and reduce the potential liability of the tortfeasor,¹⁵¹ and (4) medical monitoring satisfies basic notions of fairness by assuring that wrongfully exposed plaintiffs recover the costs of medical treatment.

Henderson and Twerski¹⁵² have briefly addressed this analysis.¹⁵³ They argue that the first and third policy reasons stated

147. Henderson & Twerski, *supra* note 6, at 842.

148. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999).

149. *See* 863 P.2d 795, 824 (Cal. 1993).

150. *See also* *Ayers v. Twp. of Jackson*, 525 A.2d 287, 311 (N.J. 1987) (noting that early diagnosis and treatment is especially valuable for cancer patients, where delay in diagnosis often increases risks to the patient).

151. *See also id.* at 312 (granting the plaintiffs a monitoring remedy that potentially prevents future disease may "reduce the overall costs to the responsible parties").

152. Henderson and Twerski are tort scholars and reporters for the American Law Institute's Restatement of Torts, Third: Products Liability.

153. *See* Henderson & Twerski, *supra* note 6, at 842-43.

above are the same, because both go to the idea that medical monitoring helps prevent disease, which consequently benefits all other parties in the chain.¹⁵⁴ Further, they contend that the second policy rationale offered above “is valid only if one assumes that the social costs of any given exposure to asbestos or other toxic substance can, in the absence of physical injury, be determined fairly and accurately.”¹⁵⁵ In addition, the deterrence concern 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. Finally, the *Bower* court’s fourth policy justification “clearly begs the question of why justice is necessarily served by allowing, through the back door, recoveries that courts will not allow in through the front.”¹⁵⁶

VI. STRONG ARGUMENTS SUPPORT THE CONCLUSION THAT
MINNESOTA SHOULD REQUIRE A PRESENT PHYSICAL INJURY TO
ESTABLISH A CLAIM FOR MEDICAL MONITORING DAMAGES

As previously discussed, the Minnesota Supreme Court has not yet addressed the issue of medical monitoring. However, both the Minnesota Court of Appeals and the U.S. District Court for the District of Minnesota have properly determined that a present physical injury is required to establish a claim for medical monitoring expenses.

As noted above, some courts and commentators make policy arguments in support of the idea that recovery of medical monitoring expenses should be allowed absent present physical injury. To be sure, these are solid and persuasive policy considerations that deserve legitimate consideration. On balance, however, the policy concerns for denying medical monitoring

154. *Id.* at 843 n.172.

155. *Id.* at 843. In addition, other commentators have noted that “[f]orcing defendants to internalize unmaturred risk in the nature of medical monitoring expenses . . . raises serious concerns of overdeterrence.” Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 27 (1998); *see, e.g.*, Martin & Martin, *supra* note 6, at 142-43 (“[C]reating a new cause of action for medical monitoring that eliminates one of the traditional elements of tort actions does not seem warranted. Its deterrent value is negligible; its compensatory function should be rendered moot by changes in the health care system; and the costs of subsequent litigation will exceed the benefits obtained.”).

156. Henderson & Twerski, *supra* note 6, at 843.

absent present physical injury clearly outweigh any opposing concerns. Thus, when faced with the issue, the Minnesota Supreme Court should require a present physical injury to establish a claim for medical monitoring damages.

This standard strikes the appropriate balance between competing policy concerns because it still provides the ability to seek compensation for medical monitoring expenses to plaintiffs who suffer an actual, present physical injury from exposure to toxins. Moreover, the position that the Supreme Court of Minnesota should reject medical monitoring in the absence of present physical injury is a position supported by both the United States Supreme Court (under FEOLA) and a growing number of commentators for some of the reasons highlighted below.

A. Courts Encounter Administrative Problems in Medical Monitoring Cases

The process of actually distributing potentially millions of dollars in medical monitoring awards is one at which courts are not well equipped. Monitoring funds to be used by large numbers of people require court administration and do not guarantee that potential victims actually receive testing.¹⁵⁷ Moreover, lump-sum awards might not actually be used for medical costs.¹⁵⁸

Complicating the court's distribution of funds is the fact that "most monitoring systems established to accomplish marginal improvements would duplicate systems set up for similar purposes."¹⁵⁹ For example, many monitoring recipients may have some form of health insurance that will cover the costs of

157. *Id.* at 844.

158. *Id.*; see also Klein, *supra* note 155, at 24 ("[F]ew (if any) medical monitoring proponents suggest that courts award lump-sum damages to plaintiffs, presumably because they fear that plaintiffs will spend the money on goods and services other than medical surveillance."); 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, 541-42 (2000) (describing relevant data on plaintiffs' use of medical monitoring awards). As a result, some ask that recoveries for monitoring expenses go to fund court-administered programs as opposed to being paid directly to plaintiffs. See Henderson & Twerski, *supra* note 6, at 844; see also Maskin et al., *supra*, at 543 (advocating limiting recovery to a medical fund); Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 665-66 (1992) (explaining the periodic payment approach to dispersing medical monitoring funds).

159. Henderson & Twerski, *supra* note 6, at 844.

monitoring.¹⁶⁰

Furthermore, the U.S. Supreme Court noted in *Metro-North* additional impediments to a court's decision to allow recovery of the costs of medical monitoring, including (1) medical professionals offer conflicting recommendations concerning which treatments may be necessary, (2) individual plaintiffs' unique medical needs make pinpointing the reason for additional monitoring difficult, and (3) medical surveillance is prudent for a number of individuals even absent exposure to toxins.¹⁶¹

B. Medical Monitoring Misuses the Resources of Defendants, the Courts, and the Health Care System

Even though many defendants in medical monitoring actions tend to be large businesses or government agencies, such defendants "do not have an endless supply of financial resources."¹⁶² Thus, the natural result of such defendants having to shell out large amounts of money to satisfy medical monitoring judgments is that future victims who can demonstrate actual injuries that require immediate medical attention may not be fully compensated.¹⁶³

In addition, courts allowing monitoring claims absent present physical injury will not have the resources or time necessary to deal with large volumes of such claims.¹⁶⁴ This problem is exacerbated by the fact that those jurisdictions that have recognized monitoring claims absent present physical injury have not reached uniformity regarding what elements and prerequisites are necessary to prove a

160. *Id.*; see also *infra* Part VII.A.

161. 521 U.S. 424, 441-42 (1997).

162. *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 857 (Ky. 2002); see also *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 696-97 (Mich. 2005) ("[J]udicial recognition of a medical monitoring cause of action may do more harm than good . . . for Michigan's economy . . . [There is] no assurance that a decision in plaintiffs' favor . . . will not wreak enormous harm on Michigan's citizens and its economy."); *Henderson & Twerski*, *supra* note 6, at 844-45 ("[T]he serious negative impacts of [medical monitoring] liability on the business firms involved cannot be doubted [D]efendants in these medical monitoring cases face potentially crushing liabilities.").

163. *Wood*, 82 S.W.3d at 857.

164. See *Henderson & Twerski*, *supra* note 6, at 846 (predicting that the West Virginia Supreme Court of Appeals in *Bower* brought upon the state a volume of litigation "with which it is institutionally incapable of dealing" and where the "institutional costs to the courts in that state will [likely] be very great").

monitoring claim.¹⁶⁵

Moreover, medical monitoring potentially wastes scarce resources and clogs an already congested health care system, all the while placing those being monitored at risk of surveillance-related harm.¹⁶⁶

*C. Medical Monitoring Absent Present Physical Injury Is Too Far-
Reaching and Could Create a Potentially Limitless Pool of Plaintiffs and
Result in an Avalanche of Litigation*

The U.S. Supreme Court in *Metro-North* stated:

[T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring . . . [a]nd that fact, 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.”¹⁶⁷

Henderson and Twerski similarly wrote: “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.”¹⁶⁸

165. See *Wood*, 82 S.W.3d at 858.

166. See Henderson & Twerski, *supra* note 6, at 844 (“[S]uch monitoring—especially excessive monitoring—is not only wasteful of scarce resources, but often places those being monitored at risk of surveillance-related harm.”); see also *Henry*, 701 N.W.2d at 694-95 (“Litigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care It is less than obvious . . . that the benefits of a medical monitoring cause of action would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial system, and those responsible for administering and financing medical care.”). See generally George W.C. McCarter, *Medical Surveillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 276-80 (1993).

167. 521 U.S. 424, 442 (1997); see also Henderson & Twerski, *supra* note 6, at 845 (“If the past decade of asbestos litigation has taught us anything, it is that the appetites of the plaintiff’s bar know no limits in the ongoing search for secondary and even tertiary generations of defendants against whom to bring massive collective actions on new and expanding legal theories.”).

168. Henderson & Twerski, *supra* note 6, at 844; see also Schwartz et al., *supra* note 4, at 1072 (noting that people are exposed daily to health hazards “through the air they breathe, water they drink, food and drugs they ingest, and on the land on which they live”).

This was the situation that developed in West Virginia after the West Virginia Supreme Court of Appeals recognized in *Bower* a cause of action for medical monitoring absent present physical injury. A short time after the *Bower* decision, a class action was filed against major cigarette manufacturers on behalf of 270,000 present and former West Virginia smokers who had not been diagnosed with any smoking-related diseases, but were seeking the creation and funding by the defendants of a medical monitoring program for the early detection of tobacco-related diseases.¹⁶⁹ In another medical monitoring class action filed in West Virginia, asymptomatic coal preparation plant workers from seven states brought a claim against the suppliers of acrylamide, seeking medical monitoring for the plaintiffs' alleged exposure to the chemical.¹⁷⁰ Finally, in *Carter v. Monsanto Co.*, a landowner filed a class action, seeking to recover the cost of inspecting and monitoring his property for dioxin that had allegedly leaked from landfills.¹⁷¹ These three cases help illustrate the flood of litigation and difficult line-drawing that has accompanied West Virginia's decision to allow medical monitoring absent present physical injury.¹⁷²

D. Allowing Plaintiffs to Seek Medical Monitoring Damages Absent Present Physical Injury Will Potentially Preclude such Plaintiffs' Later Claims when Injury Actually Develops

Under the doctrine of *res judicata* (or claim preclusion) a judgment on the merits in a prior suit involving the same parties or their privies bars a subsequent suit based upon the same cause of

169. *In re Tobacco Litigation (Medical Monitoring Cases)*, 600 S.E.2d 188, 190-91 (W. Va. 2004).

170. *Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 879-80 (W. Va. 2005). The broadly defined class included coal preparation plant workers in West Virginia, Virginia, Illinois, Indiana, Pennsylvania, Ohio, and Tennessee. *Id.* at 880.

171. 575 S.E.2d 342, 344 (W. Va. 2002). The West Virginia Supreme Court of Appeals declined to create a new cause of action for "property monitoring," stating that "[n]either West Virginia common law nor West Virginia statutory law presently supports or recognizes a claim for property monitoring." *Id.* at 346.

172. *See also* *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 696 n.15 ("[E]ven if we were to create a medical monitoring cause of action, in light of both the essentially limitless number of such exposures and the limited resource pool from which such exposures can be compensated, a 'cutoff' line would still inevitably need to be drawn."); *Henderson & Twerski, supra* note 6, at 845 (noting that the *Bower* criteria "will not prevent most well-prepared cases from reaching triers of fact").

action.¹⁷³ For example, in a medical monitoring action where the plaintiff has been exposed to a toxic substance but has not suffered present physical injury, such a plaintiff may be awarded a sum of money commensurate with the costs of future medical surveillance.¹⁷⁴ If the same plaintiff were to later develop an injury as a result of the earlier exposure, that plaintiff may be precluded from bringing the same claim for additional damages.¹⁷⁵ Thus, a court's failure to recognize a cause of action for medical monitoring in the absence of a present physical injury could be considered a "safeguard that benefits victims."¹⁷⁶

VII. THE MINNESOTA SUPREME COURT SHOULD LEAVE THE ISSUE OF MEDICAL MONITORING TO THE LEGISLATURE

Another argument against the position that courts should allow recovery for medical monitoring absent present physical injury is that the authorization for such a remedy should come from the various state legislatures rather than as a judicially created remedy.¹⁷⁷ This section is not intended to suggest that the Minnesota Supreme Court is never capable of creating common law causes of action or remedies.¹⁷⁸ In fact, there are a number of instances where courts should further the law's development by adopting new common law claims and remedies independent of legislative action where public policy so demands. Nonetheless, this section argues that because of the extraordinary considerations involved with the medical monitoring issue in particular, the legislature is better equipped than courts to deal appropriately with the issue.

173. See *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 858 (Ky. 2002) (citing *City of Louisville v. Louisville Prof'l Firefighters Ass'n*, 813 S.W.2d 804, 806 (Ky. 1991)).

174. See *id.*

175. See *id.*; see also *Schwartz et al.*, *supra* note 4, at 1079 ("[A] medical monitoring award could preclude plaintiffs from seeking additional damages if and when they actually develop a disease or injury.").

176. *Wood*, 82 S.W.3d at 858.

177. See *Schwartz et al.*, *supra* note 4, at 1071.

178. See *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature.").

A. *The Large Number of Questions Associated with the Award of Monitoring Expenses Favors Legislative Consideration*

There are a number of convincing reasons why courts should avoid assuming the role of lawmakers with regard to medical monitoring.¹⁷⁹ First, legislatures are in a better position than courts to acquire all of the relevant information in making such a complex and sweeping change to traditional tort law.¹⁸⁰ Legislatures have more access to information and resources than the courts, and are in a better position than the courts to weigh the previously discussed social costs and benefits of monitoring programs.¹⁸¹ Moreover, because tort law has traditionally developed “in a slow, incremental fashion,” the recognition of such a novel theory “warrants legislative consideration.”¹⁸²

Second, a legislature’s prospective treatment of medical monitoring awards would provide fair notice to potential tortfeasors.¹⁸³ That is, because a court’s ruling occurs on a retroactive basis, the public is broad-sided when its potential legal obligations are changed for actions committed sometimes years before the ruling.¹⁸⁴ Thus, changing existing law in a prospective manner through the legislative process would provide “fair notice” to those potentially affected, and allow current offenders to change their behavior.¹⁸⁵

In addition, the complexity involved in determining whether monitoring payments are to be paid pursuant to a court-created fund or by lump-sum payment favor legislative control.¹⁸⁶ This justification is especially important given the pervasive abuse of

179. See Schwartz et al., *supra* note 4, at 1071-81.

180. *Id.* at 1071.

181. *Id.* at 1072-73.

182. *Id.* at 1073-74 (noting that judicial changes to longstanding common law rules “such as the development of strict products liability in tort, the removal of the privity barrier, . . . the evolution from contributory negligence to comparative fault, . . . the modification of traditional immunities, permitting recovery for a child who had been injured in the womb, and the modification of the assumption of risk defense” have occurred gradually over a number of years).

183. *Id.* at 1075.

184. *Id.*

185. *Id.*; see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (stating on the subject of punitive damages that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to [liability]”).

186. Schwartz et al., *supra* note 4, at 1077.

lump-sum monitoring awards.¹⁸⁷

Finally, monitoring claims involving collateral compensation demand careful consideration from the legislature.¹⁸⁸ Under the “collateral source rule,” benefits received by a plaintiff from a variety of sources including “health or medical insurance, disability insurance, workers’ compensation benefits, and . . . government benefits, are . . . deemed ‘collateral’ to the tortfeasor” and are thus not deducted when calculating plaintiff’s award under a monitoring claim.¹⁸⁹ As a result, third-party payment plans may overlap with an award of monitoring expenses further complicating the process.¹⁹⁰

B. Several Courts Favor Legislative Consideration of Medical Monitoring

A number of courts have similarly expressed concern over a judicially created remedy for medical monitoring, instead favoring a legislative approach. For example, in *Badillo v. American Brands, Inc.*, the Supreme Court of Nevada, addressing the issue of medical monitoring, stated: “Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function.”¹⁹¹ Similarly, in *Carroll*, the court noted: “If a North Carolina court were faced with the question of whether to create a tort . . . for medical monitoring costs . . . it would decline to create such a tort [and] [i]nstead it would look to the legislature for guidance.”¹⁹² The U.S. District Court for the Western District of Washington stated in *Duncan* that “[t]he Washington Supreme Court has traditionally deferred to the state legislature for the creation of new causes of action,” and “[t]he legislature has a ‘greater ability to fully explore the spectrum of competing societal interests,’ while the judiciary ‘is the least capable of receiving public input and resolving broad public policy questions based on societal consensus.’”¹⁹³

Most recently, the Michigan Supreme Court in *Henry v. Dow*

187. *Id.* at 1077-78.

188. *Id.* at 1078.

189. *Id.*; see also John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

190. Schwartz et al., *supra* note 4, at 1078.

191. 16 P.3d 435, 440 (Nev. 2001).

192. *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at *51 (W.D.N.C. Oct. 29, 1990).

193. *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 605-06 (W.D. Wash. 2001) (internal citation omitted).

Chemical Co. declined to recognize a medical monitoring claim absent present physical injury.¹⁹⁴ The court decided instead to defer to the state legislature, who in the court's opinion was "better suited to undertake the complex task of balancing the competing societal interests at stake."¹⁹⁵

The court in *Henry* proffered additional reasons for its preference that the legislature address medical monitoring. First, the court noted that the principle of separation of powers bars policy-making by the court.¹⁹⁶ In addition, the court was concerned with how to determine whether the plaintiffs would be eligible to participate in a particular monitoring program.¹⁹⁷ The court stated that "[s]uch a determination 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."¹⁹⁸ The court was also concerned with the subsequent administration of such programs.¹⁹⁹ The court

194. 701 N.W.2d 684, 685-86 (Mich. 2005) (involving residents allegedly exposed to dioxin discharged by a nearby chemical plant).

195. *Id.* at 686. The court stated that "[i]n reality, plaintiffs propose a transformation in tort law that will require the courts of this state—in this case and the thousands that would inevitably follow—to make decisions that are more characteristic of those made in the legislative, executive, and administrative processes." *Id.* at 692.

196. *Id.* at 697.

197. *Id.* at 698. Some of the questions facing courts when determining an individual's eligibility for a medical monitoring program include:

How old does the applicant have to be? How long must an applicant have lived in the affected area? Where, exactly, is the "affected area"? Must the applicant have measurable levels of dioxin in the bloodstream to qualify? If so, what is the threshold level of dioxin an applicant must have for eligibility?

Id. at 698 n.22.

198. *Id.* at 698.

199. *Id.* at 698-99. Some of the questions courts need to consider in administering a medical monitoring program include:

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?

noted that the operation of a monitoring program would “impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime” and that the courts do not “possess the technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science.”²⁰⁰ As a result of these concerns, the court concluded that “[t]he court system . . . is simply not institutionally equipped to establish, promulgate operative rules for, or administer such a program.”²⁰¹

C. Louisiana Serves as a Successful Model for Legislative Consideration of Medical Monitoring

Louisiana’s consideration of medical monitoring demonstrates that state legislatures are capable of making the complex policy decisions associated with the issue. In *Bourgeois v. A.P. Green Industries, Inc.*, past and current shipyard employees, who alleged that they were exposed to asbestos, brought a class action suit against manufacturers, sellers, and suppliers of asbestos used at the shipyards.²⁰² The plaintiffs sought medical monitoring to detect potential diseases, and the establishment of a judicially administered fund for the medical monitoring.²⁰³ The issue before the court was “whether asymptomatic plaintiffs, who have had significant occupational exposure to asbestos and must now bear the expense of periodic medical examinations to monitor the effects of that exposure, have suffered ‘damage’ under Louisiana Civil Code article 2315.”²⁰⁴ The applicable statute provided that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”²⁰⁵

Although the Louisiana Supreme Court recognized that Louisiana law had not previously allowed the recovery of medical expenses “[a]bsent a corresponding physical injury,” the court decided to recognize medical monitoring absent present physical injury.²⁰⁶ In doing so, the court stated that medical monitoring

Id. at 699 n.23.

200. *Id.* at 699.

201. *Id.*

202. 716 So. 2d 355, 356 (La. 1998).

203. *Id.* at 356-57.

204. *Id.* at 357.

205. *Id.* at 357 n.6 (internal citation omitted).

206. *Id.* at 358-59.

costs were a “compensable item of damage under Civil Code article 2315” as long as specific criteria were met.²⁰⁷

In response to the Louisiana Supreme Court’s decision in *Bourgeois*, the Louisiana legislature amended article 2315 in 1999 to supersede the court’s decision.²⁰⁸ Article 2315, which provides for a person’s liability for acts causing damages, now excludes the following types of damages: “costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.”²⁰⁹ Thus, article 2315 now excludes recovery for medical monitoring unless present physical injury can be shown.²¹⁰ More importantly, however, article 2315 displays the ability of state legislatures to evaluate and make rational decisions regarding significant and competing policy concerns that effect litigation.²¹¹

207. *Id.* at 360. The criteria included:

- (1) significant exposure to a proven hazardous substance; (2) as a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) plaintiff’s risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease; (4) a monitoring procedure exists that makes the early detection of the disease possible; (5) the monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) there is some demonstrated clinical value in the early detection and diagnosis of the disease.

Id. at 360-61.

208. Act of July 9, 1999, H.B. 1784, 1999 L.A. Legis 989 (1999) (revising article 2315); see also James E. Lapeze, *Implications of Amending Civil Code Article 2315 on Toxic Torts in Louisiana*, 60 LA. L. REV. 833, 833 (2000) (“The revision seems clearly aimed at eliminating medical monitoring as a viable element of damages recoverable in Louisiana.”).

209. Lapeze, *supra* note 208, at 841. The Louisiana Court of Appeals noted that despite the Legislature’s intent that the amendment have retroactive effect, the Louisiana Supreme Court has held that the amendment cannot be applied retroactively so as to violate a person’s due process rights by divesting such person of vested rights. *Motorola, Inc. v. Associated Indem. Corp.*, 878 So. 2d 824, 833-34 (La. Ct. App. 2004).

210. See Lapeze, *supra* note 208, at 842 (citing article 2315 and noting that the amended language “seems to be referring to a pure medical monitoring recovery, one that does not include any actual injury . . . barring medical monitoring as a separate theory of recovery in the absence of manifest physical or mental injury”).

211. See also Maskin et al., *supra* 158, at 548 (stating that article 2315 is an example “of a swift, clear legislative response to curb the scope of the medical monitoring remedy, in an attempt to compensate only those with truly meritorious

VIII. CONCLUSION

Recognition of medical monitoring absent present physical injury represents a sweeping change to tort law. Given the increasingly litigious nature of society, coupled with public hysteria concerning exposure to toxic contaminants, it is fair to say that future courts will be confronted with the medical monitoring issue on a number of occasions.

When faced with the issue, the Minnesota Supreme Court should require that plaintiffs show an actual, present physical injury prior to recovery. This is the approach supported by the United States Supreme Court in *Metro-North*²¹² and by a growing number of states.²¹³ It is also the best approach given the significant policy concerns present in permitting recovery absent present physical injury. Finally, this standard still allows plaintiffs who have developed a present and manifest illness or disease as a result of exposure to toxins the ability to seek recovery for the costs of monitoring.

That having been said, because of the complex policy considerations and the balancing of societal interests inherently present in evaluating the medical monitoring issue, the ideal scenario is for Minnesota courts to delay a judicially fashioned remedy for medical monitoring pending consideration of the issue by the Minnesota legislature.

IX. STATE SURVEY APPENDIX OF CASE LAW

The following appendix contains a brief summary of the case law noted in the tables found in Part IV.A-C.

Alabama

In *Hinton*, the plaintiff brought a claim against a chemical company alleging that he was exposed to polychlorinated biphenyls (PCBs) when the company released chemicals into the environment.²¹⁴ The plaintiff sought to recover the costs of medical monitoring.²¹⁵ In answering the question certified²¹⁶ by the U.S.

claims”).

212. See *supra* Part II.B.

213. See *supra* Part IV.

214. *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 828 (Ala. 2001).

215. *Id.*

216. The U.S. District Court certified the following question: “Does a complaint which does not allege any past or present personal injury to the plaintiff state a cause of action for medical monitoring and study when the plaintiff alleges

District Court for the Northern District of Alabama, the Supreme Court of Alabama stated that Alabama law does not recognize a cause of action for medical monitoring absent a manifest physical injury or illness.²¹⁷

Arizona

In *Burns*, residents of a trailer park located adjacent to an asbestos-producing mill brought suit, seeking damages for personal injuries and property damage.²¹⁸ The plaintiffs also sought damages for medical surveillance to monitor any potential development of asbestos-related diseases.²¹⁹ The Arizona Court of Appeals held that “despite the absence of physical manifestation of any asbestos-related diseases . . . plaintiffs should be entitled to . . . regular medical testing and evaluation.”²²⁰

Arkansas

In *Baker*, the Supreme Court of Arkansas noted that although “[t]he complaint originally contained a cause of action for medical monitoring . . . the plaintiffs agreed to treat medical monitoring as a type of damages instead of a separate cause of action.”²²¹ The court did not elaborate, however, on whether Arkansas law requires a plaintiff to show present physical injury to seek out such a remedy.

California

In *Potter*, the plaintiff landowners brought a claim against a tire manufacturer that disposed of its toxic waste at a nearby landfill.²²² The plaintiffs alleged that as a result of the defendant’s practices, they experienced prolonged exposure to carcinogens.²²³ The California Supreme Court concluded that the costs of medical monitoring were a compensable item of damages when “liability is

that he has been exposed to hazardous contamination and pollution by the conduct of the defendant?” *Id.*

217. *Id.* at 832; *see also* *S. Bakeries, Inc. v. Knipp*, 852 So. 2d 712, 717-19 (Ala. 2002) (reaffirming in an asbestos exposure case that Alabama does not recognize a cause of action for medical monitoring absent a present physical injury).

218. *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 29-30 (Ariz. Ct. App. 1987).

219. *Id.* at 30.

220. *Id.* at 33. The court also held that the money for medical monitoring should be allocated through a fund administered by the court, as opposed to a lump sum payment. *Id.* at 34.

221. *Baker v. Wyeth-Ayerst Lab. Div.*, 992 S.W.2d 797, 799 n.2 (Ark. 1999) (involving plaintiffs who had used a weight loss drug that was subsequently removed from the market due to its dangerousness).

222. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 801 (Cal. 1993).

223. *Id.*

established under traditional tort theories of recovery” and where the need for medical monitoring is a “reasonably certain consequence of a plaintiff’s toxic exposure and that the recommended monitoring is reasonable.”²²⁴ The court also noted, however, that “[r]ecognition that a defendant’s conduct has created the need for future medical monitoring does not create a new tort.”²²⁵

Colorado

In *Cook*, the plaintiffs were landowners who sued the operators of a nearby nuclear weapons plant for injuries and damages caused by hazardous substances either released or threatened to be released.²²⁶ The plaintiffs brought a number of claims including one for medical monitoring under Colorado common law.²²⁷ The U.S. District Court for the District of Colorado predicted that the Colorado Supreme Court would recognize a claim for medical monitoring.²²⁸

Connecticut

In *Martin*, the plaintiff landowners brought an action against the owner of a neighboring gas station after methyl tertiary-butyl ether (MTBE) was found in the groundwater near the gas station.²²⁹ The plaintiffs sought damages in the form of medical monitoring.²³⁰ In denying the defendant’s motion for summary judgment to bar the plaintiffs from pursuing medical monitoring as a remedy, the U.S. District Court for the District of Connecticut stated that the “Connecticut Supreme Court has cited favorably a Third Circuit case that allowed medical monitoring in the absence of present injury.”²³¹

224. *Id.* at 824.

225. *Id.* at 823; *see also* Lockheed Martin Corp. v. Superior Court, 63 P.3d 913 (Cal. 2003) (reaffirming that medical monitoring is not a separate cause of action under California law).

226. *Cook v. Rockwell Int’l Corp.*, 755 F. Supp. 2d 1468, 1471 (D. Colo. 1991).

227. *Id.* at 1476.

228. *Id.* at 1477. The court also predicted that the Colorado Supreme Court would not, on the other hand, likely recognize a claim for “generalized scientific studies” to be paid by defendant. *Id.* at 1478.

229. *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313, 316 (D. Conn. 2002).

230. *Id.* at 322.

231. *Id.* at 323; *see also* Doe v. City of Stamford, 699 A.2d 52 (Conn. 1997) (citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) favorably yet proceeding instead to analyze the facts under a state workers’ compensation law).

Delaware

In *Mergenthaler*, the plaintiffs, former asbestos workers and their spouses, brought claims against employers and others based on occupational exposure to asbestos during the course of their employment.²³² Specifically, the workers' wives brought an action seeking recovery of medical surveillance expenses as a result of potentially coming into contact with asbestos while washing their husbands' work clothes.²³³ The Supreme Court of Delaware determined that the workers' wives failed to state a claim because they made no showing of present physical injury or actual exposure to the asbestos.²³⁴

*District of Columbia*²³⁵*Florida*

In *Petito*, the plaintiffs brought a class action against pharmaceutical manufacturers and sellers seeking an injunction requiring the defendants to fund a court supervised medical monitoring program for conditions caused by the plaintiff's use of weight-loss drugs.²³⁶ At the time of the claim, the plaintiffs did not have physical injuries as a result of using the drugs.²³⁷ Nonetheless, the Florida District Court of Appeal held that Florida would recognize an action for medical monitoring absent physical injury if the plaintiffs could show the monitoring was reasonably necessary.²³⁸

Guam

In *Abuan*, the plaintiffs were allegedly exposed to PCBs, dioxins, and furans when the transformer on a junction box ruptured.²³⁹ Plaintiffs brought a class action against the PCB manufacturer and the manufacturer of the electrical transformer,

232. *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 649 (Del. 1984).

233. *Id.*

234. *Id.* at 651.

235. *See supra* Part II.A.

236. *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 104-05 (Fla. Dist. Ct. App. 1999).

237. *Id.* at 104. In response, defendants filed a motion for judgment on the pleadings, contending that the state of Florida does not recognize claims for the costs of medical monitoring absent injury. *Id.* at 105.

238. *Id.* at 105. The court later stated: "We find nothing in Florida law barring such a claim and caselaw [sic], equity, common sense, and the decisions of courts around the country persuade us that under the limited and appropriate circumstances outlined herein, such a claim is viable and necessary to do justice." *Id.* at 108 (footnote omitted).

239. *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 331 (9th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994).

seeking, among other things, to recover the costs of medical monitoring.²⁴⁰ The Ninth Circuit Court of Appeals held that because the plaintiffs could not show that they suffered a “significantly increased risk of contracting a serious latent disease,” the district court properly granted the manufacturers’ motion for summary judgment on plaintiff’s claim for medical monitoring damages.²⁴¹

Illinois

In *Carey v. Kerr-McGee Chemical LLC*, the U.S. District Court for the Northern District of Illinois stated that “[n]either the U.S. Court of Appeals for the Seventh Circuit nor any Illinois reviewing court has decided” whether the State of Illinois would recognize a claim for medical monitoring absent present physical injury.²⁴² Similarly, in *Guillory v. American Tobacco Co.*, the court stated, “[i]t should be noted . . . that it is far from clear whether Illinois recognizes medical monitoring as an independent cause of action.”²⁴³ However, in *Lewis*, the Illinois Appellate Court considered whether, unlike recovery for an increased risk of future harm in a tort action, “the cost of diagnostic testing to detect a possible injury . . . is in itself a present injury compensable in a tort action,” even in the absence of any present physical injury.²⁴⁴ The court reasoned that, “a claim seeking damages for the cost of a medical examination is not speculative and the necessity for such an examination is capable of proof within a ‘reasonable degree of medical certainty.’”²⁴⁵

240. *Id.*

241. *Id.* at 344-35. The court adopted the framework of *Ayers*, stating that in order to recover the expenses associated with medical monitoring the plaintiffs must show:

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

Id. at 335.

242. No. 96 C 8583, 1999 WL 966484, at *1 (N.D. Ill. Sept. 30, 1999).

243. No. 97 C 8641, 2001 WL 290603, at *7 (N.D. Ill. Mar. 20, 2001).

244. *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869, 873 (Ill. App. Ct. 2003).

245. *Id.* at 874.

Indiana

In *Baker*, the plaintiff homeowner brought a claim against the defendant employer, alleging the defendant allowed the plaintiff to take scrap insulation home for personal use despite the defendant's knowledge that the insulation was contaminated with PCBs.²⁴⁶ The complaint alleged a number of claims, and sought compensation for, among other things, the costs of future medical monitoring.²⁴⁷ The U.S. District Court for the Southern District of Indiana granted the defendant's motion to dismiss the plaintiff's claims for future medical monitoring expenses without prejudice.²⁴⁸ The district court allowed the plaintiffs an opportunity to amend their medical monitoring claim to allege a present physical injury caused by the contaminated insulation.²⁴⁹ The district court subsequently dismissed the plaintiff's claims for medical monitoring expenses after it found the plaintiff had not suffered any physical injury caused by exposure to PCBs.²⁵⁰ On appeal, the Seventh Circuit Court of Appeals affirmed the district court's findings, holding that the plaintiffs' waiver of all damages claims, including the medical monitoring claim, precluded the plaintiff's right to challenge the district court's rulings.²⁵¹

Kansas

In *Burton*, the plaintiff, a smoker who suffered from disease, brought a number of claims against manufacturers of cigarettes.²⁵² The defendants brought a motion to dismiss arguing, in part, that Kansas had not adopted medical monitoring as an independent cause of action.²⁵³ The U.S. District Court for the District of Kansas agreed, holding that the plaintiff's claim for medical monitoring was "merely a component of plaintiff's damages relating to his other claims."²⁵⁴ Thus, the court granted the defendant's motion to dismiss the plaintiff's medical monitoring claim, in effect holding that Kansas allows for the recovery of medical monitoring expenses in the form of damages when such expenses are related to a

246. *Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951, 952 (7th Cir. 1995).

247. *Id.* at 953.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 955.

252. *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1517-18 (D. Kan. 1995).

253. *Id.* at 1518.

254. *Id.* at 1523.

present physical injury.²⁵⁵

Kentucky

In *Wood*, the plaintiff, who had consumed diet drugs, brought an action against the drug manufacturer.²⁵⁶ The plaintiff alleged increased health risks resulting from the drug, and sought medical monitoring expenses and the establishment of a monitoring fund.²⁵⁷ At the time the plaintiff brought suit, the plaintiff had not suffered from any injury as a result of using the diet drugs.²⁵⁸ The Supreme Court of Kentucky rejected the plaintiff's claim for medical monitoring damages absent a showing of present physical injury.²⁵⁹

Maryland

In *Philip Morris Inc.*, the plaintiffs, current and former tobacco users, claimed to have been injured by tobacco use and brought an action against tobacco manufacturers.²⁶⁰ The plaintiffs sought, in part, injunctive relief through a court-supervised medical monitoring fund to be funded by the defendants.²⁶¹ The Maryland Court of Appeals granted the defendants' petition for writ of mandamus and prohibition seeking decertification of the plaintiffs' classes.²⁶² In doing so, the court noted that it had not yet addressed the issue of whether medical monitoring is a valid cause of action or remedy in Maryland, and while the court recognized it would need to do so eventually, the issue was not yet ripe for its decision.²⁶³

Michigan

In *Henry*, the plaintiff residents brought an action against a chemical company alleging that the defendant negligently released dioxin from its plant.²⁶⁴ The plaintiffs sought the creation of a

255. *Id.*; see also *Cott v. Peppermint Twist Mgmt. Co.*, 856 P.2d 906, 922 (Kan. 1993) (permitting recovery by plaintiffs for the costs of medical monitoring when such expenses were associated with a present physical injury).

256. *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 851 (Ky. 2002).

257. *Id.*

258. *Id.*

259. *Id.* at 859. Specifically, the court concluded "having weighed the few potential benefits against the many almost-certain problems of medical monitoring, we are convinced that this Court has little reason to allow such a remedy without a showing of present physical injury." *Id.*

260. *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 205 (Md. 2000).

261. *Id.* at 206.

262. See *id.* at 205.

263. *Id.* at 251.

264. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 685-86 (Mich. 2005). Dioxin is a synthetic chemical that can potentially be hazardous to human health. *Id.*

court-supervised program, paid for by the defendant, which would monitor the class for possible manifestations of dioxin-related disease.²⁶⁵ The defendant moved to dismiss the medical monitoring claim on the ground that the claim was not recognized in Michigan.²⁶⁶ The circuit court subsequently denied the motion and the Michigan Court of Appeals denied the defendant's application for interlocutory appeal.²⁶⁷ The Michigan Supreme Court reversed and remanded for summary disposition in favor of the defendant on the plaintiffs' medical monitoring claim.²⁶⁸ The court held that the plaintiffs did not present a cognizable negligence claim under Michigan common law because the plaintiffs failed to allege a present physical injury.²⁶⁹

*Minnesota*²⁷⁰

Missouri

In *Thomas*, the plaintiffs brought an action against a defendant corporation that allegedly caused groundwater contamination to which the plaintiffs were allegedly exposed.²⁷¹ The U.S. District Court for the Western District of Missouri stated that "[e]ntitlement to the costs of future medical monitoring requires plaintiff to prove actual present injury and an increased risk of future harm."²⁷² Because the plaintiffs did not present evidence of actual physical injury, the court granted the defendants motion for summary judgment on the plaintiffs' medical monitoring claim.²⁷³

Montana

In *Lamping*, a Montana state district court, in an unreported decision, recognized a cause of action for medical monitoring, stating that "the patient's independent claim for medical monitoring accrues when the patient can meet all of the elements

265. *Id.* at 686.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* The court explained that merely being exposed to toxins with the increased risk of future harm does not constitute an "injury" for tort law purposes. *Id.* at 688-89. Rather, "[i]t is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory." *Id.* at 689.

270. *See supra* Part III.

271. *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1403-04 (W.D. Mo. 1994).

272. *Id.* at 1410.

273. *Id.* The court noted, however, that if and when the plaintiffs exhibit injuries at some time in the future, the plaintiffs should "be able to bring such claims without suffering preclusive effects." *Id.* at 1411.

of the claim, which notably does not include an actual physical injury element.”²⁷⁴

Nebraska

In *Trimble*, plaintiffs who resided near a former lead refinery brought a class action against the owner and former operator of the plant alleging that their properties had been contaminated by pollutants from the site.²⁷⁵ The plaintiffs also brought a state law claim for medical monitoring.²⁷⁶ The United States Court of Appeals for the Eighth Circuit found that the plaintiffs’ claim for medical monitoring expenses in the absence of a present physical injury was not cognizable under Nebraska law.²⁷⁷

Nevada

In *Badillo*, smokers and casino employees brought a class action against the defendants.²⁷⁸ The plaintiffs sought the establishment of a court-supervised medical monitoring fund to help diagnose and treat tobacco-related illnesses.²⁷⁹ The Supreme Court of Nevada, after accepting the certified question from the U.S. District Court for the District of Nevada, determined that the common law of Nevada did not recognize a cause of action for medical monitoring.²⁸⁰

274. *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 01-1396, 2004 WL 45504, at *7 (D. Minn. Jan. 5, 2004) (quoting *Lamping v. Am. Home Prods., Inc.*, No. DV-97-85786 (Mont. 4th Dist. Ct. Feb. 2, 2000)). The court adopted the elements for a claim set forth by the Florida District Court of Appeals in *Petito*. *Id.*

275. *Trimble v. Asarco, Inc.*, 232 F.3d 946, 950 (8th Cir. 2000), *abrogated on procedural grounds* *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 125 S. Ct. 2611 (2005).

276. *Id.*

277. *Id.* at 963. The court agreed with the earlier prediction of the U.S. District Court for the District of Nebraska that the state of Nebraska would not recognize a claim for medical monitoring, which reasoned:

[T]he plaintiffs have cited no authority, and the court has found none, which would suggest that Nebraska law recognizes either a cause of action for medical monitoring or a remedy involving the creation of a medical monitoring fund. There exists no pending or prospective legislation to authorize a cause of action or a remedy for medical monitoring, and the court finds it improbable that the Nebraska courts would judicially fashion such a right or remedy.

Id. (quoting *Trimble v. ASARCO Inc.*, 83 F. Supp. 2d 1034, 1041 (D. Neb. 1999)).

278. *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 438 (Nev. 2001).

279. *Id.*

280. *Id.* at 440. The court did state that a remedy of medical monitoring could be available depending on the underlying cause of action. *Id.* at 441. While the court noted the fact that there is not agreement among other jurisdictions as to whether a present physical injury is necessary for a medical monitoring claim, the

New Jersey

In *Ayers*, the township residents brought an action against the municipality when toxic pollutants leached into a water aquifer from a landfill operated by the municipality.²⁸¹ The New Jersey Supreme Court held that medical monitoring expenses should be awarded to the residents based upon an enhanced, although unquantified, risk of future disease because of the plaintiffs' exposure to the pollutants.²⁸²

New York

In *Patton*, an employee brought suit against the defendants for improper removal and exposure to asbestos.²⁸³ The plaintiff sought damages including costs of future medical monitoring.²⁸⁴ The U.S. District Court for the Western District of New York predicted that the New York Court of Appeals would recognize a cause of action for medical surveillance absent proof of injury.²⁸⁵

court did not address the issue of whether a present physical injury would be necessary for such a remedy in Nevada. *See id.*

281. *Ayers v. Twp. of Jackson*, 525 A.2d 287, 291 (N.J. 1987).

282. *Id.* at 313. Thus, the court concluded that the plaintiffs were not required to demonstrate a prior injury from exposure before recovering the expenses of future medical monitoring. The court stated that:

[W]e hold that the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.

Id. at 312; *see also* *Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993) (concluding that "medical surveillance damages are not available for plaintiffs who have not experienced direct and hence discrete exposure to a toxic substance and who have not suffered an injury or condition resulting from that exposure"). *Ayers* is considered by some commentators to be the "seminal decision" allowing recovery for medical surveillance in the absence of present physical injury. Henderson & Twerski, *supra* note 6, at 839; *see also* Klein, *supra* note 155, at 6 (noting that *Friends for All Children* did not break ground in allowing medical surveillance claims).

283. *Patton v. Gen. Signal Corp.*, 984 F. Supp. 666, 667-68 (W.D.N.Y. 1997).

284. *Id.* at 668.

285. *Id.* at 673; *see also* *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (N.Y. App. Div. 1984) ("Medical monitoring could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures are 'reasonably anticipated' to be incurred by reason of their exposure."). *But see* *Abusio v. Consol. Edison Co. of N.Y. Inc.*, 656 N.Y.S.2d 371, 371-72 (N.Y. App. Div. 1997) (holding that for a plaintiff to maintain a cause of action for future medical monitoring costs "plaintiff must establish both that he or she was in fact exposed to the disease-causing agent and that there is a

North Carolina

In *Carroll*, the plaintiffs alleged exposure to chemicals including TCE emanating from the defendant's plant.²⁸⁶ The plaintiffs sought costs for medical surveillance "to detect the onset of any symptoms of diseases caused by the chemicals."²⁸⁷ The court held that it "should not recognize a common law claim for the costs of medical monitoring in the absence of clear direction from the North Carolina courts or legislature."²⁸⁸ The court further noted that North Carolina courts "if faced with the question of whether to create a tort . . . for medical monitoring costs . . . would decline to create such a tort."²⁸⁹

Ohio

In *Day*, employee workers and frequenters of a nuclear weapons components manufacturing plant brought a class action against the manufacturer for exposure to radiation.²⁹⁰ The plaintiffs sought a court supervised medical surveillance program.²⁹¹ The U.S. District Court for the Southern District of Ohio held that the plaintiffs could recover for medical monitoring if they could "show by expert medical testimony that they have increased risk of disease which would warrant a reasonable physician to order monitoring."²⁹²

Pennsylvania

In *Redland Soccer Club, Inc.*, the plaintiffs brought an action against the defendants alleging that the defendants' disposal of

'rational basis' for his or her fear of contracting the disease"; where "rational basis" means "the clinically demonstrable presence" of disease in plaintiff's body).

286. *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at *1 (W.D.N.C. Oct. 29, 1990).

287. *Id.* at *2.

288. *Id.* at *51.

289. *Id.* The court later stated that even if North Carolina courts would in fact recognize a cause of action for medical monitoring, the plaintiffs' claims would fail here because of the lack of evidence that the plaintiffs would contract any disease in the future. *Id.* at *53; *see also* *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 285 (4th Cir. 2000) (noting a jury award of \$9.5 million for medical monitoring damages, although not stating the test used by the court).

290. *Day v. NLO*, 851 F. Supp. 869, 874 (S.D. Ohio 1994).

291. *Id.* at 875.

292. *Id.* at 881. The court further provided that "[t]he monitoring must be directed toward the disease for which the tort victim is at risk, and will only include procedures which are medically prudent in light of that risk as opposed to measures aimed at general health." *Id.*; *see also* *McCafferty v. Centerior Serv. Co.*, 983 F. Supp. 715, 731 (N.D. Ohio 1997) ("Plaintiffs' claim for medical monitoring is dependent upon a finding of liability for a substantive cause of action.").

hazardous materials caused the plaintiffs harm.²⁹³ The plaintiffs sought the establishment of a medical monitoring trust fund to pay for physical examinations.²⁹⁴ The Supreme Court of Pennsylvania set forth the requirements for bringing a medical monitoring claim, which did not require a present physical injury for recovery.²⁹⁵

Puerto Rico

In *Barreras Ruiz*, persons who had purchased and smoked cigarettes, nicotine dependent cigarette smokers, and their relatives brought a motion for class certification in an action against tobacco manufacturers.²⁹⁶ Plaintiffs sought to recover damages resulting from their addiction, as well as the costs of medical monitoring.²⁹⁷ In denying plaintiffs' motion for class certification, the U.S. District Court for the District of Puerto Rico noted: "[W]e will not consider the substantive question of whether Puerto Rico law authorizes medical monitoring."²⁹⁸

South Carolina

In *Rosmer*, the plaintiff allegedly contracted hepatitis by using a prescription antibiotic designed by the defendant.²⁹⁹ In denying the plaintiff's motion to certify a medical monitoring class, the U.S. District Court for the District of South Carolina stated that "South Carolina has not recognized a cause of action for medical monitoring."³⁰⁰

Tennessee

In *Craft*, the plaintiffs, a group of women who unknowingly ingested radioactive isotopes while pregnant, brought suit on behalf of themselves and their children.³⁰¹ The U.S. District Court for the Middle District of Tennessee certified the class of exposed women and children under Rule 23(b)(2) for their medical

293. *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 139 (Pa. 1997).

294. *Id.* at 139-40.

295. *See id.* at 145-46.

296. *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194, 195 (D.P.R. 1998).

297. *Id.*

298. *Id.* at 197. The court denied plaintiffs' motion to certify the class "based on the proposed class action's lack of superiority over individual actions" and "the lack of a predominance of common issues among the members of the proposed class." *Id.* at 199.

299. *Rosmer v. Pfizer, Inc.*, No. CIV.A. 9:99-2280-18RB, 2001 WL 34010613, at *1 (D.S.C. Mar. 20, 2001).

300. *Id.* at *5.

301. *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 400 (M.D. Tenn. 1996).

monitoring claim.³⁰² The court, however, did not discuss the elements of a medical monitoring claim in the state of Tennessee.³⁰³

Texas

In *Norwood*, plaintiffs allegedly exposed to radars brought suit against defendant designers, manufacturers, and marketers of radar equipment.³⁰⁴ Plaintiffs sought to certify two classes, including a medical monitoring class consisting of individuals exposed to radiation but not suffering from illness or injury as a result of such exposure.³⁰⁵ Defendants brought a motion to dismiss plaintiffs' medical monitoring claims, arguing that Texas did not recognize medical monitoring as a cause of action.³⁰⁶ The U.S. District Court for the Western District of Texas granted defendants' motion to dismiss, holding that while "Texas courts have not had occasion to address medical monitoring as a cause of action," the Texas Supreme Court would likely reject medical monitoring claims absent a present physical injury.³⁰⁷

Utah

In *Hansen*, renovation workers brought an action against the owner of an office building seeking to recover the costs of medical monitoring arising from the plaintiffs' exposure to asbestos while performing renovation work.³⁰⁸ The Supreme Court of Utah set forth the test to use in determining whether to award medical monitoring expenses, noting specifically that the trial court applied the "wrong legal standard" when it granted the defendants' motion for summary judgment because "no bodily injury [had] been

302. *Id.* at 406-07.

303. *See id.*; *see also* Daniels v. Combustion Eng'g, Inc., 583 S.W.2d 768 (Tenn. Ct. App. 1978) (declining to address the issue of medical surveillance expenses where an employee who installed asbestos-related insulation contracted asbestosis and brought an action against insulation manufacturers).

304. *Norwood v. Raytheon Co.*, No. EP-04-CA-127-PRM, 2006 WL 267335, at *1 (W.D. Tex. Jan. 17, 2006).

305. *Id.* Specifically, the medical monitoring plaintiffs sought the establishment of a court administered medical monitoring fund to pay for medical surveillance "deemed reasonably and medically necessary" to protect the plaintiffs "from an increased risk of harm and disease." *Id.* at *2.

306. *Id.*

307. *Id.* at *5, 7. The court stated that the "Texas Supreme Court appears disposed to rely on the same policy considerations in rejecting medical monitoring claims that it relied on in rejecting mental anguish claims in the absence of a present physical injury." *Id.* at *5.

308. *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 972-73 (Utah 1993).

manifested [by the] plaintiff.”³⁰⁹

Virginia

In *Ball*, the plaintiffs, mostly former employees who had been exposed to toxic chemicals, brought an action against their employer seeking to recover damages for the cost of medical surveillance necessitated by their exposure.³¹⁰ The U.S. Court of Appeals for the Fourth Circuit held that the plaintiffs failed to show that they were suffering from present physical injury, and thus they could not recover the expenses of medical monitoring under Virginia law.³¹¹

Virgin Islands

In *Purjet*, the plaintiff brought suit alleging repeated exposure to asbestos at defendant’s refinery over the course of his employment as an insulation supervisor.³¹² Plaintiff also brought suit on behalf of his daughter, who was also allegedly exposed to asbestos that plaintiff brought home on his clothing.³¹³ At the time plaintiffs brought suit, neither was presently suffering from any asbestos-related disease.³¹⁴ Defendant brought a motion for summary judgment, arguing that the plaintiffs failed to state a legally cognizable claim.³¹⁵ The court granted defendant’s motion for summary judgment, stating that actual injury is a prerequisite to a claim for medical monitoring in the Virgin Islands.³¹⁶

Washington

In *Duncan*, the plaintiff, a nonsmoking flight attendant, brought a class action against the employer defendant claiming damages for personal injuries suffered from exposure to second-hand smoke on flights.³¹⁷ The plaintiff asserted a claim for medical

309. *Id.* at 979, 981.

310. *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 37 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

311. *Id.* at 39. The court, analyzing the case under Virginia and West Virginia law, similarly held that plaintiffs could not recover medical surveillance costs under the law of West Virginia absent present physical injury. *Id.* *But see* *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999) (rejecting “the contention that a claim for future medical expenses must rest upon the existence of present physical harm”).

312. *Purjet v. Hess Oil Virgin Islands Corp.*, Civ. No. 1985/284, 1986 WL 1200, at *1 (V.I. Jan. 8, 1996).

313. *Id.* Plaintiffs asserted four separate claims, including one for medical monitoring. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at *4.

317. *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 603 (W.D. Wash. 2001).

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monitoring.³¹⁸ The U.S. District Court for the Western District of Washington held that the Washington Supreme Court would not recognize a stand-alone cause of action for medical monitoring.³¹⁹ The court did, however, note that the “plaintiffs with a present [physical] injury may seek medical monitoring as a remedy to a negligence cause of action under existing Washington law.”³²⁰
*West Virginia*³²¹

318. *Id.*

319. *Id.* at 606.

320. *Id.*

321. *See supra* Part II.C.