American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement

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THE American Law Institute (ALI) is nearing the end of a two decades-long undertaking to "restate" the common law of torts for the third time. The final part of this effort is a project called the Restatement (Third) of Torts: Concluding Provisions.[1] The project

[1] Earlier parts of the Restatement (Third) of Torts include Products Liability (1998), Apportionment of Liability (2000), Liability for Physical and Emotional Harm (2012), and Liability for Economic Harm (2020). In addition to the Concluding Provisions Restatement, there are Restatement projects in development for Intentional Torts to Persons and Remedies.

was initiated in 2019 to address significant tort issues not covered in other parts of the Third Restatement of Torts.

One of the Concluding Provisions recommends that courts allow recovery for medical monitoring expenses, "even absent present bodily harm."[2] This approach is controversial because the existence of a physical injury has traditionally been a fundamental tort law requirement. The United States Supreme Court, for example, rejected medical monitoring claims for asymptomatic railroad workers exposed to asbestos. The Court expressed concern about the "threat of 'unlimited and unpredictable liability'" that could result from allowing unimpaired claimants to obtain tort recoveries.[3]

This article examines the Restatement's medical monitoring proposal and discusses how it might be improved.[4] The article encourages defense lawyers in the ALI to become engaged to help bring about constructive improvements.

I. Why the ALI's Proposed Rule Matters

The ALI is one of the most influential private organizations in the development of American law due in large part to the role Restatements have played for nearly a century. The ALI was founded in 1923 to promote clarity and uniformity in the law and has sought to accomplish this mission primarily through the development of educational resources for judges and other policymakers. The ALI leverages the collective expertise of a membership comprised of many of the nation's most distinguished judges, law professors, and practitioners to develop a variety of works with different objectives and audiences.[5] The ALI is perhaps best

[2] Restatement (Third) of Torts: Concluding Provisions, Council Draft No. 1, Medical Monitoring (Aug. 24, 2020) [hereinafter "ALI Council Draft No. 1, Medical Monitoring"]; Restatement (Third) of Torts: Concluding Provisions, Prelim. Draft No. 1, Medical Monitoring (Feb. 3, 2020) [hereinafter "ALI Prelim. Draft No. 1, Medical Monitoring"].

[3] Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 433 (1997) (quoting Consolidated Rail Corp. v. Gottshall, 512 U. S. 532, 557 (1994)).

[4] This article is an adapted version of a comment submitted by one of the article's co-authors to the Reporters of the Restatement (Third) of Torts: Concluding Provisions on the project's treatment of medical monitoring. *See* Letter from Victor Schwartz and Christopher Appel to Reporters of Restatement (Third) of Torts: Concluding Provisions regarding medical monitoring, June 12, 2020.

[5] The ALI publishes three basic categories of works: (1) Restatements; (2) Model Laws; and (3) Principles. Each category has a specific purpose and audience for the development of the law. *See* AM. L. INST.,

known for developing Restatements—works that are cited countless times each year by courts.

Restatements set forth "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court."[6] The ALI instructs the law professors who author Restatements (called Reporters) to survey case law and restate the "best" legal rules in existing common law.[7] Reporters do not have to adopt the majority view on an issue, but are directed to thoroughly explain the rationale for recommending a minority approach. The ALI cautions Reporters against recommending "[w]ild swings" in the law.[8]

The significant influence Restatements enjoy means that judges may view the ALI's treatment of medical monitoring as well-accepted, even though it is problematic. The proposal could have a significant impact on the future availability of medical monitoring recoveries in the United States because plaintiffs' lawyers will argue for the adoption of the Restatement's approach in jurisdictions where the common law presently requires a physical injury to support a tort claim.

II. The Restatement's Proposed Rule

The draft Restatement's medical monitoring proposal states:

> A person can recover for medical monitoring expenses, even absent present bodily harm, if:
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> (a) an actor's tortious conduct has exposed a person to a significant risk of serious future bodily harm;
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> (b) the exposure makes medical monitoring reasonable and necessary in order to prevent or mitigate the future bodily harm;
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> (c) the person has incurred the monitoring expense, will incur the monitoring expense, or would incur the monitoring expense if he or she could afford it; and;
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> (d) the actor's liability is not indeterminate.[9]

A threshold consideration with respect to this Restatement is whether the ALI should endorse *any* rule permitting a tort recovery in the absence of a present physical injury. The ALI does not appear to have previously adopted a Restatement provision allowing a

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[6] *See id.*

[7] *See id.* at 4-5.

[8] *Id.* at 6.

[9] *See* ALI Council Draft No. 1, Medical Monitoring, *supra* note 2.

tort recovery for asymptomatic claimants in its nearly 100-year history.

The case law regarding the availability of medical monitoring absent present bodily harm is divided. Many courts have rejected recovery without injury because of the serious public policy implications, including the potential that payments to the non-sick could deplete resources needed to compensate sick claimants in the future.[10] The bankruptcy of some 120 companies in the asbestos litigation illustrates the problem of scarcity of assets in mass exposure cases. By comparison, there is far greater consensus with respect to the availability of medical monitoring in present physical injury cases.

The topic of medical monitoring warrants restraint. The existence of a present physical injury is a bedrock tort law principle, and its erosion can have serious impacts on defendant companies and future claimants with actual injuries. Abandoning the physical injury rule in a Restatement would be a major departure from the previous two Restatements of Torts, which are among the most celebrated Restatements in the ALI's history.

In the Restatement (Third) of Torts: Apportionment of Liability (2000), the ALI took a neutral approach on the topic of joint and several liability, providing detailed explanations of competing approaches. The ALI would be wise to follow a similar approach on medical monitoring.

III. The Case Law on Medical Monitoring is Mixed with Many States Undecided

According to the Reporters of the proposed Restatement, a "slim majority" of jurisdictions allow medical monitoring absent present injury of the "*states that have expressly considered and taken a discernable stance on the issue*."[11] An Appendix to the medical monitoring section of the draft Restatement lists sixteen states and the District of Columbia as states that "authorize or appear to authorize medical monitoring absent present injury."[12]

This "head count" appears to be inflated to support the Restatement's proposed rule. The list includes several states where federal courts made a *prediction* as to state law.[13] The list also includes states (Minnesota and

[10] *See generally* Victor E. Schwartz, Mark A. Behrens, Emma K. Burton, and Jennifer L. Groninger, *Medical Monitoring – Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057 (1999).

[11] ALI Council Draft No. 1, Medical Monitoring, *supra* note 2, at Reporters' Note to cmt. a (emphasis added).

[12] *See id*. at Appendix on Medical Monitoring.

[13] The jurisdictions include Colorado, District of Columbia, and Ohio. *See id*. at Appendix on Medical Monitoring.

Massachusetts) that "require the plaintiff to submit proof of cellular, subcellular, or subclinical injury or the clinically demonstrable presence of toxins in the plaintiff's bloodstream."[14] The Appendix fails to address case law from Minnesota rejecting medical monitoring as an independent tort action.[15]

A case law survey appended to this article supplements the Restatement's Appendix with significant additional case law. As the included case law survey demonstrates, there are only ten states in which a state appellate court has adopted medical monitoring absent present physical injury.[16] At least as many states reject medical monitoring absent present injury.[17]

In most states, neither a state appellate court nor the legislative branch has decided the availability of medical monitoring absent a present bodily harm. The murkiness of the law in this area is yet another reason for the ALI to exercise restraint and offer competing approaches with explanations rather than advance a controversial approach.

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[14] *See id*. After ALI Council Draft No. 1 was issued, the Connecticut Supreme Court said it would "assume, without deciding, that Connecticut law recognizes a claim for subclinical cellular injury that substantially increased the plaintiffs' risk of cancer and other asbestos related diseases." Dougan v. Sikorsky Aircraft Corp., No. SC20271, 2020 WL 5521391, at *7 (Conn. Sept. 14, 2020). This decision suggests that Connecticut follows Massachusetts and Minnesota in allowing medical monitoring based on subcellular injuries.

[15] *See* Paulson v. 3M Co., No. C2-04-6309, 2009 WL 229667 (Minn. Dist. Ct. Jan 16, 2009) ("Medical monitoring is not an independent tort in Minnesota...."); Palmer v. 3M Co., No. C2-04-6309, 2007 WL 1879844, n.8 (Minn. Dist. Ct. June 19, 2007) ("Medical monitoring is not recognized as an independent cause of action under Minnesota law."); *see also* Thompson v. American Tobacco Co., Inc., 189 F.R.D. 544, 552 (D. Minn. 1999) ("Given 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.").

[16] These states include Arizona, California, Florida, Maryland, Missouri, Nevada, New Jersey, Pennsylvania, Utah, and West Virginia. *See infra* at Medical Monitoring: State Survey.

[17] These states include Alabama, Delaware, Georgia, Illinois, Kentucky, Louisiana, Michigan, Mississippi, New York, North Carolina, Oregon, Rhode Island, and Wisconsin. With respect to New York, some lower courts have interpreted the state high court's decision rejecting a medical monitoring cause of action absent present injury as allowing a claim for damages. Even if omitted, there are still eleven states with appellate court rulings rejecting medical monitoring absent present injury. *See id.* There are also at least twelve states in which federal courts have concluded that a state would be unlikely to recognize a claim for medical monitoring absent present injury. These states include Arkansas, Indiana, Iowa, Minnesota, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, Texas, Virginia, and Washington. *See id.*

IV. Medical Monitoring as a Cause of Action

The initial draft Restatement medical monitoring section recommended that courts adopt medical monitoring as a stand-alone tort cause of action.[18] This approach proved too controversial and was changed in the current draft to give courts flexibility to use "[w]hichever terminology a court uses or approach a court chooses" that will allow asymptomatic plaintiffs to recover medical monitoring expenses.[19]

Most states that permit medical monitoring claims absent present injury do so as an item of recoverable damages.[20] Only five states have adopted medical monitoring absent present injury as an independent cause of action.[21]

Several Advisers to the Restatement project expressed the view that the treatment of medical monitoring as an element of damages versus an independent tort action can have significant ramifications. Adviser and U.S. District Court Judge Dave Campbell explained that the distinction has "practical litigation consequences" in areas such as jury instructions.[22] The Reporters also acknowledged that a separate medical monitoring cause of action would raise issues regarding the proper statute of limitations governing a claim and that there may be other important issues implicated that are not readily apparent because few courts have adopted such an approach.[23]

By freeing courts to choose their approach with respect to the adoption of medical monitoring, the draft Restatement glosses over the important damages versus independent tort action distinction and continues to support recognition of "stand-alone causes of action."[24] The draft Restatement should make clear just how far out of the mainstream recognition of a stand-alone medical monitoring cause of action is so that judges are not misled into believing that this approach is widely accepted.

V. Other Areas for Improvement

The draft Restatement's treatment of medical monitoring would further benefit from greater

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[18] *See* ALI Prelim. Draft No. 1, Medical Monitoring, *supra* note 2.

[19] ALI Council Draft No. 1, Medical Monitoring, *supra* note 2, at cmt. h.

[20] *See infra* at Medical Monitoring: State Survey.

[21] These states include Florida, Massachusetts, Pennsylvania, Utah, and West Virginia. *See id.*

[22] Comment by Judge Campbell, Restatement (Third) of Torts: Concluding Provisions, Prelim. Draft. No. 1, Mar. 13, 2020 ("Suggesting that medical monitoring is a cause of action will cause confusion in jury instructions.").

[23] *See* ALI Prelim. Draft No. 1, Medical Monitoring, *supra* note 2, at cmt. c.

[24] ALI Council. Draft No. 1, Medical Monitoring, *supra* note 2, at cmt. h.

clarity with regard to the scope of a monitoring remedy.

To the Reporters' credit, the draft Restatement includes several safeguards to address concerns raised by the United States Supreme Court and other courts about the potential for unlimited or unpredictable liability. Comments supporting the Restatement's medical monitoring proposal state that "negligible or insignificant" risks of serious bodily harm will not subject an actor to liability, nor will liability be imposed if it would be "highly unpredictable or virtually unlimited."[25] The draft also explains the "reasonable and necessary" limitation on any recoverable medical monitoring expenses.[26] These efforts to set forth reasonable limitations on the scope of a medical monitoring recovery are helpful, but suggest the need for even further development.

1. Any Medical Monitoring Remedy Should Incorporate a More Demanding Liability Standard

As currently stated, the draft Restatement permits recovery of medical monitoring expenses whenever "an actor's tortious conduct has exposed a person to a significant risk of serious future bodily harm."[27] This broad approach could be improved by incorporating a more demanding liability standard.

One clear, case law supported approach to more carefully tailor the scope of a medical monitoring recovery would be to amend the requirement that a person demonstrate "a significant risk of serious future bodily harm" to instead show "*a reasonably certain* and significant increased risk of developing a latent disease."[28]

Although the draft Restatement confirms that an actor is not liable for negligible or insignificant increased risks, it expressly states that a person "need not show . . . harm is more-probable-than-not absent the preventive monitoring."[29] Hence, under the proposed rule, exposures with only a low probability of *potential* harm would enable a person to recover medical monitoring expenses. This approach appears overly permissive and could result in abusive litigation that may threaten the available recoveries of individuals who become sick.

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[25] *Id*. at cmt. d, g.
[26] *Id.* at cmt. e.
[27] *Id.* at cmt. b.
[28] Exxon Mobil Corp. v. Albright, 71 A.3d 30, 81 (Md. 2013) (emphasis added).
[29] ALI Council Draft No. 1, Medical Monitoring, *supra* note 2, at cmt. d.

2. The Restatement Should Include a Stronger Endorsement of Court-Supervised Medical Monitoring Funds

The draft Restatement includes a helpful, albeit brief, discussion of court-supervised funds to allocate medical monitoring expenses. A comment recommends the establishment of a court-administered and supervised fund as the "preferred approach,"[30] and indicates that it is a superior alternative to a lump sum damage award that might not be used for monitoring purposes. Some courts, though, may gloss over this important discussion or treat it as *dicta*. The Restatement should include establishment of a fund within the medical monitoring rule. There is case law support for requiring the establishment of a fund.[31]

3. The Restatement Should Provide a More Complete Discussion Regarding "Indeterminate Liability"

A more thorough discussion of the issue of indeterminate liability would improve the draft Restatement too. The draft's proposed rule permits a medical monitoring recovery if an actor's "liability is not indeterminate."[32] The practical effect of this limitation is unclear.

A comment in the draft elaborates on the limitation by stating that a "defendant whose conduct exposes a vast number of people to risk-creating agents or behaviors is not subject to liability for medical monitoring if the defendant is able to show that liability would be highly unpredictable and virtually unlimited."[33] The comment adds that a defendant is not subject to liability that "is likely to exceed the defendant's resources and

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[30] *Id.* at cmt. k. *See generally* Victor E. Schwartz, Leah Lorber, and Emily J. Laird, *Medical Monitoring: The Right Way and The Wrong Way*, 70 MO. L. REV. 349, 369 (2005) ("Lump sum awards are starkly at odds with the traditional scientific goal of medical monitoring and surveillance: detecting the onset of disease.").

[31] *See Albright*, 71 A.3d at 82 ("[W]here a plaintiff sustains his or her burden of proof in recovering this form of relief, the court should award medical monitoring costs ordinarily by establishing equitably a fund, administered by a trustee, at the expense of the defendant."); Redland Soccer Club, Inc., v. Dep't of the Army, 696 A.2d 137, 145-146 (Pa. 1997) (stating that citizen suit under Pennsylvania's Hazardous Sites Cleanup Act "encompasses a medical monitoring trust fund"); Ayers v. Township of Jackson, 525 A.2d 287, 314 (N.J. 1987) ("In litigation involving public-entity defendants, we conclude that the use of a fund to administer medical-surveillance payments should be the general rule, in the absence of factors that render it impractical or inappropriate.").

[32] ALI Council Draft No. 1, Medical Monitoring, *supra* note 2.

[33] *Id.* at cmt. g.

insurance coverage and thereby meaningfully reduce monies available to those exposed persons who ultimately develop bodily harm."[34] While constructive, these general statements raise significant issues that warrant greater development.

For example, the Restatement should address whether medical monitoring class actions are intended to be permitted, and, if so, how the concept of indeterminate liability serves to limit their scope. The project might also discuss indeterminate liability as it relates to other forms of collective action.

As with any early Restatement draft, the Reporters can be expected to flesh out discussions on issues such as indeterminate liability.

A sound approach would be to focus the project's discussion of indeterminate liability on the public policy considerations expressed by the United States Supreme Court and other state high courts in rejecting recovery of medical monitoring absent present injury.[35] The discussion would also benefit from an explanation and specific illustrations of what terminology such as "highly unpredictable" liability and "virtually unlimited" liability is intended to encompass as a practical matter.[36]

V. Conclusion

The ALI's proposed approach to medical monitoring in the Restatement (Third) of Torts: Concluding Provisions is problematic. The draft recommends that courts allow plaintiffs to recover medical monitoring expenses without a present physical injury. The draft also misses opportunities to establish clear, reasonable limits on the scope of medical monitoring recoveries. These concerns underscore the importance of engagement by defense lawyers in the ALI. Defense counsel should push the ALI to adopt a sound approach that properly considers the interests of civil defendants.

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[34] *Id.*

[35] *See, e.g.,* Henry v. Dow Chem. Co., 701 N.W.2d 684, 696 n.15 (Mich. 2005) (discussing the "reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis," and concluding that "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 . . . inevitably need to be drawn" for which the legislature is "better suited to draw"); Wood v. Wyeth-Ayerst Labs. Div. of Am. Home Prods., 82 S.W.3d 849, 857 (Ky. 2002) (stating that "defendants do not have an endless supply of financial resources" and that, in the absence of an injury, medical monitoring "remedies are economically inefficient, and are of questionable long-term public benefit").

[36] ALI Council Draft No. 1, Medical Monitoring, *supra* note 2, at cmt. g.

MEDICAL MONITORING: STATE SURVEY

STATE	Medical Monitoring Absent Injury?	Action / Damages?
ALABAMA	NO[i]	
ALASKA		
ARIZONA	YES (MID-LEVEL CT.)[ii]	DAMAGES
ARKANSAS	UNLIKELY[iii]	
CALIFORNIA	YES[iv]	DAMAGES
COLORADO	LIKELY[v]	
CONNECTICUT	LIKELY[vi] (SUBCELLULAR CLAIMS)	
DELAWARE	NO[vii]	
DISTRICT OF COLUMBIA	LIKELY[viii]	
FLORIDA	YES (MID-LEVEL CT.)[ix]	CAUSE OF ACTION
GEORGIA	NO (MID-LEVEL CT.)[x]	
HAWAII	UNCLEAR[xi]	
IDAHO	UNCLEAR[xii]	
ILLINOIS	NO[xiii]	
INDIANA	UNLIKELY[xiv]	
IOWA	UNLIKELY[xv]	
KANSAS	UNCLEAR[xvi]	
KENTUCKY	NO[xvii]	
LOUISIANA	NO (AFTER 7/9/1999)[xviii]	
MAINE	UNCLEAR[xix]	
MARYLAND	YES[xx]	DAMAGES
MASSACHUSETTS	YES[xxi] (SUBCELLULAR CLAIMS)	CAUSE OF ACTION
MICHIGAN	NO[xxii]	
MINNESOTA	UNLIKELY[xxiii]	
MISSISSIPPI	NO[xxiv]	
MISSOURI	YES (LIMITED TORTS)[xxv]	DAMAGES
MONTANA	LIKELY[xxvi]	
NEBRASKA	UNLIKELY[xxvii]	
NEVADA	YES[xxviii]	DAMAGES
NEW HAMPSHIRE	UNLIKELY[xxix]	
NEW JERSEY	YES (LIMITED TORTS)[xxx]	DAMAGES
NEW MEXICO		
NEW YORK	UNCLEAR[xxxi]	NO CAUSE OF ACTION
NORTH CAROLINA	NO (MID-LEVEL CT.)[xxxii]	
NORTH DAKOTA	UNLIKELY[xxxiii]	
OHIO	LIKELY[xxxiv]	
OKLAHOMA	UNLIKELY[xxxv]	
OREGON	NO[xxxvi]	
PENNSYLVANIA	YES[xxxvii]	CAUSE OF ACTION
RHODE ISLAND	NO (MID-LEVEL CT.)[xxxviii]	
SOUTH CAROLINA	UNLIKELY[xxxix]	
SOUTH DAKOTA		
TENNESSEE	UNCLEAR[xl]	
TEXAS	UNLIKELY[xli]	
UTAH	YES[xlii]	CAUSE OF ACTION
VERMONT	LIKELY[xliii]	
VIRGINIA	UNLIKELY[xliv]	
WASHINGTON	UNLIKELY[xlv]	
WEST VIRGINIA	YES[xlvi]	CAUSE OF ACTION
WISCONSIN	NO (MID-LEVEL CT.)[xlvii]	
WYOMING		

[i] Hinton v. Monsanto, 813 So. 2d 827, 829 (Ala. 2001) (refusing to allow a cause of action for monitoring when plaintiff could not show the traditional tort law requirement of present injury); *see also* Houston Cnty. Health Care Auth. v. Williams, 961 So. 2d 795, 810-811 (Ala. 2006) ("Under current Alabama caselaw, mere exposure to a hazardous substance resulting in no present manifestation of physical injury is not actionable under the [Alabama Medical Liability Act of 1987] where the exposure has increased only minimally the exposed person's chance of developing a serious physical disease and that person has suffered only mental anguish.").

[ii] Burns v. Jaquays Mining Corp., 752 P.2d 28, 33 (Ariz. Ct. App. 1988) ("We agree with the [New Jersey Supreme C]ourt in *Ayers*…that when the evidence shows 'through reliable expert testimony predicated on the significance and extent of exposure...the toxicity of [the contaminant], the seriousness of the diseases for which the individuals are at risk, the relative increase in the chance of onset of the disease in those exposed and the value of early diagnosis,... surveillance to monitor the effects of exposure to toxic chemicals is reasonable and necessary,' and its cost is a compensable item of damages."), *review dismissed*, 781 P.2d 1373 (Ariz. 1989).

[iii] Baker v. Wyeth-Ayerst Labs. Div., 992 S.W.2d 797, 798 n.2 (Ark. 1999) (class certification likely improper in action where plaintiffs agreed to treat medical monitoring as a type of damages instead of a separate cause of action); *compare In re* Prempro Prods. Liab. Litig., 230 F.R.D. 555, 569 (E.D. Ark. 2005) ("Arkansas has rejected medical monitoring as a cause of action, and questions its availability as a remedy"); *see also* Nichols v. Medtronic, Inc., No. 4:05-cv-681, 2005 WL 8164643, at *11 (E.D. Ark. Nov. 15, 2005) ("Arkansas has not clearly recognized a claim for medical monitoring and would not where no physical injury is alleged.").

[iv] Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824-825 (Cal. 1993) ("[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, the following factors are relevant: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. Under this holding, it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring."); *see also* Xavier v. Philip Morris USA, Inc., 2010 WL 3956860, at *5-6 (N.D. Cal. Oct. 8, 2010) (unreported) ("In California, medical monitoring is a remedy which must rely upon underlying claims. It does not stand alone.").

[v] Bell v. 3M Co., 344 F. Supp.3d 1207, 1224 (D. Colo. 2018) (concluding that "though it is a close call," the "Colorado Supreme Court would probably recognize a claim for medical monitoring absent present physical injury"); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991) ("Although Colorado has yet to do so, I conclude that the Colorado Supreme Court would probably recognize, in an appropriate case, a tort claim for medical monitoring."); *cf*. Satsky v. Paramount Commc'ns, Inc., 1996 WL 1062376, at *5 (D. Colo. Mar. 13, 1996) (unreported) ("[E]ven assuming that the Colorado Supreme Court would recognize a tort claim for individualized medical monitoring, the court does not believe that the Colorado Supreme Court would recognize a claim for the kind of generalized surveillance studies sought by the Plaintiffs.").

[vi] Dougan v. Sikorsky Aircraft Corp., No. SC20271, 2020 WL 5521391, at *7 (Conn. Sept. 14, 2020) ("[W]e will assume, without deciding, that Connecticut law recognizes a claim for subclinical cellular injury that substantially increased the plaintiffs' risk of cancer and other asbestos related diseases."); *but see* McCullough v. World Wrestling Entm't, Inc., No. 3:15-CV-1074, 2018 WL 4425977, at *9 (D. Conn. Sept. 17, 2018) (stating that medical monitoring does not constitute a cause of action under Connecticut law); Poce v. O & G Indus., Inc., 65 Conn. L. Rptr. 573, 2017 WL 6803084, at *5 (Conn. Super. Ct. Dec. 5, 2017) (rejecting medical monitoring claim because it failed to satisfy "actual injury" element of negligence action); Goodall v. United Illuminating, 1998 WL 914274, at *10 (Conn. Super. Ct. Dec. 15, 1998) (unreported) (holding that medical monitoring damages could not be recovered when plaintiffs demonstrated no physical manifestation of an asbestos-related disease) distinguishing Doe v. City of Stamford, 699 A.2d 52, 55 n.8 (Conn. 1997) (permitting medical monitoring in a workers' compensation case involving an employee exposed to HIV and tuberculosis, because the cases presented different policy considerations); Bowerman v. United Illuminating, 23 Conn. L. Rptr. 589, 1998 WL 910271, at *10 (Conn. Super. Ct. Dec. 15, 1998) (same).

[vii] Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647, 651 (Del. 1984) (holding that a claim for medically-required surveillance expenses is not maintainable in the absence of a present, physical injury); *but see* Guinan v. A.I. duPont Hosp. for Children, 597 F. Supp.2d 517, 528 (E.D. Pa. 2009) ("In Delaware, it is not clear whether medical monitoring is an independent tort or whether medical monitoring is simply a remedy, as it is in many other jurisdictions."), *see also id.* at 538 ("We predict that the Delaware Supreme Court would permit a claim for medical monitoring if it were confronted with the record currently before us."); Hess v. A.I. DuPont Hosp., 2009 WL 595602, at *12 (E.D. Pa. Mar. 5, 2009) (unreported) (same).

[viii] Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824-825 (D.C. Cir. 1984) (anticipating that the District of Columbia would recognize a cause of action for medical monitoring absent physical injury, but in a case involving plaintiffs who had suffered present physical injury); *see also* Arias v. DynCorp, 928 F. Supp.2d 10, 16 n.2 (D.D.C. 2013) ("To be successful, a plaintiff asserting a cause of action for medical monitoring must prove the essential elements of a claim for medical monitoring. The elements of a claim for medical monitoring are (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent acts of the defendant; (2) as a proximate result of that exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.") (quoting Reed v. Philip Morris Inc., 1997 WL 538921, at *16 n.10 (D.C. Super. Ct. Aug. 18, 1997)); Reed v. Philip Morris Inc., 1999 WL 33714707, at *20 n.19 (D.C. Super. Ct. July 23, 1999) (unreported) (stating same elements) (citing *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990)); *but see* Witherspoon v. Philip Morris Inc., 964 F. Supp. 455, 467 (D.D.C. 1997) (determining without reference to D.C. law that medical monitoring requires that the plaintiff suffer a present injury).

[ix] Petito v. A.H. Robins Co. Inc., 750 So. 2d 103, 106-107 (Fla. Dist. Ct. App. 1999) ("a trial court may use its equitable powers to create and supervise a fund for medical monitoring purposes if the plaintiff proves the following elements: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles."), *review denied*, 780 So. 2d 912 (Fla. 2001), *and review denied by* Zenith Goldline Pharms. Inc. v. Petito, 780 So. 2d 916 (Fla. 2001); Hoyte v. Stauffer Chem. Co., 2002 WL 31892830, at *37 (Fla. Cir. Ct. Pinellas Cnty. Nov. 6, 2002) (unreported) (listing *Petito* factors); Wyeth, Inc. v. Gottlieb, 930 So. 2d 635, 640 (Fla. Dist. Ct. App. 2006) (stating the *Petito* elements), *review denied*, 950 So. 2d 413 (Fla. 2007); Gibson v. Lapolla Indus., Inc., 2014 WL 12617007, at *3 (M.D. Fla. Jan. 31, 2014) (unreported) (same); *see also* Swartout v. Raytheon Co., 2008 WL 2824953, at *1 (M.D. Fla. July 16, 2008) (unreported) ("with respect to medical monitoring, the Complaint alleges the bare minimum to survive a motion to dismiss"); Zehel-Miller v. Astrazeneca Pharms., 223 F.R.D. 659, 664 n.6 (M.D. Fla. 2004) (citing *Petito*); Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, (S.D. Fla. 2003) ("Plaintiffs must prove the seven elements of the medical monitoring claim recognized [in *Petito*] as a cause of action in Florida."); *In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 394-395 (S.D.N.Y. 2008) (denying certification of three proposed state-wide medical monitoring class actions, but identifying Florida as jurisdiction allowing medical monitoring absent present physical injury).

[x] Parker v. Brush Wellman, Inc., 377 F. Supp.2d 1290, 1302 (N.D. Ga. 2005) ("no Georgia court has ever indicated an inclination to recognize such a remedy."), *aff'd*, 230 Fed. App'x 878, 883 (11th Cir. 2007) ("Plaintiffs have failed to point us to any Georgia authority that allows recovery of medical monitoring costs in the absence of a current physical injury, and *Boyd* suggests that Georgia would not recognize such a claim.") (citing Boyd v. Orkin Exterminating Co., Inc., 381 S.E.2d 295, 298 (Ga. Ct. App. 1989), *overruled on other grounds*, Hanna v. McWilliams, 446 S.E.2d 741 (Ga. Ct. App. 1994)); *Boyd*, 381 S.E.2d at 297 (rejecting medical monitoring claim where "there was no evidence that the appellants had sustained any specific injury"); *see also* Collins v. Athens Orthopedic Clinic, 815 S.E.2d 639, 645 (Ga. Ct. App. 2018) ("We find that, as in the context of medical monitoring in toxic tort cases, prophylactic measures such as credit monitoring and identity theft protection and their associated costs, which are designed to ward off exposure to future, speculative harm, are insufficient to state a cognizable claim under Georgia law."), *rev'd in part*, 837 S.E.2d 310 (Ga. 2019) (expressing no opinion on claim for monitoring costs because claim not before court).

[xi] *In re* Haw. Federal Asbestos Cases, 734 F. Supp. 1563, 1573 (D. Haw. 1990) (finding jury award of special damages for medical monitoring excessive where plaintiffs suffered no functional impairment due to asbestos exposure, but allowing award on condition plaintiffs requested remittitur).

[xii] Hepburn v. Boston Scientific Corp., No. 3:17-cv-00530, 2018 WL 2275219, at *5 (D. Idaho May 17, 2018) (allowing plaintiff to leave to amend her complaint where she "has not explained what type of medical monitoring she must endure, how invasive it is, how often she endures it, or how necessary the monitoring is").

[xiii] Berry v. City of Chicago, 2020 IL 124999, at *7 (Ill. Sept. 24, 2020) ("A plaintiff who suffers bodily harm caused by a negligent defendant may recover an increased risk of future harm as an element of damages, but the plaintiff may not recover solely for the defendant's creation of an increased of harm."); *but see* Lewis v. Lead Indus. Ass'n, 793 N.E.2d 869, 873-874 (Ill. App. Ct. 2003) (permitting medical monitoring claim); *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig., 314 F.R.D. 580, 591-592 (N.D. Ill. 2016) (rejecting "argument that a conflict of interest exists between those class members that reside in states that recognize medical monitoring claims and those that do not," and including Illinois among the states recognizing medical monitoring claims); Muniz v. Rexnord Corp., 2006 WL 1519571, at *7 (N.D. Ill. May 26, 2006) (unreported) (stating that medical monitoring is cognizable under Illinois law); Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109, 1119 (N.D. Ill. 1998) ("This court concludes that if faced with the precise issue now before the court, the Illinois Supreme Court would uphold a claim for medical monitoring without requiring plaintiffs to plead and prove either a

present physical injury or a reasonable certainty of contracting a disease in the future.").

[xiv] Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 639 (7th Cir. 2007) (rejecting claim for credit monitoring after finding no Indiana authority allowing medical monitoring in tort context); Johnson v. Abbott Labs., 2004 WL 3245947, at *6 (Ind. Cir. Dec. 31, 2004) (unreported) ("Indiana does not recognize medical monitoring as a cause of action."); Hunt v. American Wood Preservers Inst., 2002 WL 34447541, at *1 (S.D. Ind. July 31, 2002) (unreported) (a medical monitoring claim "is not cognizable in the State of Indiana."); *but see* Allgood v. General Motors Corp., 2006 WL 2669337, at *2 (S.D. Ind. Sept. 18, 2006) (unreported) ("Indiana law would probably recognize such a claim for medical monitoring damages, at least in a proper case."); Gray v. Westinghouse Elec. Corp., 624 N.E.2d 49, 54 (Ind. Ct. App. 1993) (allowing medical monitoring claim pursuant to state nuisance statute).

[xv] Pickrell v. Sorin Group USA, Inc., 293 F. Supp.3d 865, 868 (S.D. Iowa 2018) ("Due to Iowa's requirement that negligence claims include an actual injury, this Court concludes that the Iowa Supreme Court, if confronted with the opportunity to recognize a medical monitoring cause of action, would either decline to do so or would require an actual injury.").

[xvi] Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1522-1523 (D. Kan. 1995) (dismissing separate medical monitoring count for failure to state a claim under Kansas law but allowing plaintiff to pursue medical monitoring based on alleged exposure to hazardous substance absent present physical injury).

[xvii] Wood v. Wyeth-Ayerst Labs. Div. of Am. Home Prods., 82 S.W.3d 849, 855 (Ky. 2002) ("With no injury there can be no cause of action, and with no cause of action there can be no recovery. It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy.").

[xviii] LA. CIV. CODE ANN. Art 2315; *see also* Lester v. Exxon Mobil Corp., 102 So. 3d 148, 158 n.15 (La. Ct. App. 2012) (recognizing that statutory amendment "effectively eliminated medical monitoring as a compensable item of damage in the absence of a manifest physical or mental injury or disease."). Medical monitoring is awarded as damages for cases filed before July 9, 1999. Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355, 360-362 (La. 1998), limited by 783 So. 2d 1251 (La. 2001).

[xix] Millett v. Atlantic Richfield Co., No. 98-CV-555, 2000 WL 359979 (Me. Super. Mar. 2, 2000) (unreported) (denying class certification without stating that Maine does not recognize medical monitoring claims), *appeal dismissed*, 760 A.2d 250 (Me. 2000).

[xx] Exxon Mobil Corp. v. Albright, 71 A.3d 30, 81-82 (Md. 2013) ("In sum, we hold that Maryland recognizes a remedy of recovery for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct. To sustain an award for recovery for medical costs, a plaintiff must show that reasonable medical costs are necessary due to a reasonably certain and significant increased risk of developing a latent disease as a result of exposure to a toxic substance. In awarding relief, a court must consider whether the plaintiff has shown: (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. To determine what is a 'significantly increased risk of contracting a latent disease' for a particular plaintiff, the court may consider quantifiable and reliable medical expert testimony that indicates the plaintiff's chances of developing the disease had he or she not been exposed, compared to the chances of the members of the public at large of developing the disease. We hold further that, where a plaintiff sustains his or her burden of proof in recovering this form of relief, the court should award medical monitoring costs ordinarily by establishing equitably a fund, administered by a trustee, at the expense of the defendant."), *on reconsideration in part*, 71 A.3d 150 (concerning certain plaintiffs' non-medical monitoring claims), *cert. denied*, 134 S. Ct. 648 (2013); *see also* Exxon Mobil Corp. v. Ford, 71 A.3d 105, 132-133 (Md. 2013) (citing and discussing *Albright*).

[xxi] Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 902 (Mass. 2009) (permitting medical monitoring to be awarded if "(1) The defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint."); *compare* Genereux v. Raytheon, 754 F.3d 51 (1st Cir. 2014) ("Under the cause of action recognized in *Donovan I,* increased epidemiological risk of illness caused by exposure, unaccompanied by some subcellular or other physiological change, is not enough to permit recovery in tort.").

[xxii] Henry v. Dow Chem. Co., 701 N.W.2d 684, 701 (Mich. 2005) (medical monitoring, absent physical injury, is not a recognized legal claim).

[xxiii] Paulson v. 3M Co., 2009 WL 229667 (Minn. Dist. Ct. Wash. Cnty. Jan. 16, 2009) ("Medical monitoring is not an independent tort in Minnesota"); Palmer v. 3M Co., 2007 WL 1879844, n.8 (Minn. Dist. Ct. Wash. Cnty. June 19, 2007) ("Medical monitoring is not recognized as an independent cause of action under Minnesota law."); *see also* Thompson v. American Tobacco Co., Inc., 189 F.R.D. 544, 552 (D. Minn. 1999) ("Given 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."); *In re* St. Jude Med., Inc., 425 F.3d 1118 (8th Cir. 2005) (reversing federal district

court's certification of medical monitoring subclass, yet declining to state whether Minnesota recognizes such a remedy), *aff'd on reh'g*, 522 F.3d 836 (8th Cir. 2008). But courts have interpreted "injury" in a permissive fashion. *See* Bryson v. Pillsbury, 573 N.W.2d 718, 720-721 (Minn. Ct. App. 1998) (whether chromosome damage constituted proof of injury presented a fact question for the jury); *In re* Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 264 (D. Minn. 2018) ("To succeed on their medical monitoring claim under Minnesota law, Plaintiffs must prove that they incurred cell damage (injury) as a result of being exposed to the hazard . . . .").

[xxiv] Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1 (Miss. 2007) (medical monitoring, absent physical injury, is not a recognized legal claim).

[xxv] Meyer *ex rel*. Coplin v. Fluor Corp., 220 S.W.3d 712, 717-718 (Mo. 2007) ("[M]edical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories…. [A] plaintiff can obtain damages for medical monitoring upon a showing that 'the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.' Once that has been proven, the plaintiff must then show that 'medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease.'") (internal citation omitted); *compare* Ratliff v. Mentor Corp., 569 F. Supp.2d 926, 928-929 (W.D. Mo. 2008) ("By the Missouri Supreme Court's own definition of a medical monitoring claim, the *Meyer* decision does not apply to potential latent injuries resulting from anything other than exposure to toxic substances" and "*Meyer* does not support medical monitoring claims in garden variety products liability cases…."). *See generally* Mark A. Behrens and Christopher E. Appel, *Medical Monitoring in Missouri After* Meyer *Ex Rel*. Coplin v. Fluor Corp*.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135 (2007).

[xxvi] Lamping v. Am. Home Prods., Inc., No. DV-97-85786, 2000 WL 35751402 (Mont. 4th Dist. Ct. Missoula Cnty. Feb. 2, 2000) ("this Court concludes that public policy dictates Montana's recognition of an independent cause of action for medical monitoring under the specific facts of this case because of the statistically high risk of serious…disease…, and the public as well as individual benefits of mitigating against those serious injuries through early detection and treatment…. This court finds the [Florida] *Petito* court's recommendations for setting up and administering a medical monitoring fund appropriate, and should the Plaintiffs prevail, will consider and apply these recommendations to the extent necessary in carrying out the purposes of medical monitoring in this case.").

[xxvii] Trimble v. Asarco, Inc., 232 F.3d 946, 963 (8th Cir. 2000) (holding Nebraska law has not recognized a cause of action or damages for medical monitoring and predicting that Nebraska courts would not judicially adopt such a right or remedy), *abrogated on other grounds by* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005); Avila v. CNH Am. LLC, No. 4:04-cv-03384-RGK-CRZ, 2007 WL 2688613, at *1 (D. Neb. Sep. 10, 2007) (unreported) ("Nebraska law does not recognize a claim for medical monitoring when no present physical injury is alleged."); Schwan v. Cargill Inc., 2007 WL 4570421, at *1 (D. Neb. Dec. 21, 2007) (unreported) (same).

[xxviii] Sadler v. PacifiCare of Nev., Inc., 340 P.3d 1264, 1272 (Nev. 2014) ("[I]n a negligence action for which medical monitoring is sought as a remedy, a plaintiff may satisfy the injury requirement for the purpose of stating a claim by alleging that he or she is reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant."); Badillo v. Am. Brands, Inc., 16 P.3d 435, 440-441 (Nev. 2001) (denying a common law cause of action for medical monitoring); *see also* Galaz v. United States, 175 Fed. App'x. 831, 832 (9th Cir. 2006) (finding Nevada does not recognize medical monitoring claims absent a present physical injury).

[xxix] Brown v. Saint-Gobain Performance Plastics Corp., 2017 WL 6043956, at *7 (D. N.H. Dec. 6, 2017) (unreported) (stating that New Hampshire law generally requires a present physical injury to bring a cause of action, but considering certifying to state supreme court the question of whether a claim for medical monitoring absent a physical injury exists).

[xxx] Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987) (public nuisance case holding "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"), *limited by* Theer v. Philip Carey Co., 628 A.2d 724, 733 (N.J. 1993) (limiting *Ayers* to cases where "plaintiffs who have suffered increased risk of cancer when directly exposed to a defective or hazardous product..,,when they have already suffered a manifest injury or condition caused by that exposure, and whose risk of cancer is attributable to the exposure," and mentioning that *Ayers* was special because it was a public entity that was required to pay medical monitoring costs); Vitanza v. Wyeth, Inc., 2006 WL 462470 (N.J. Super. Ct. Jan. 24, 2006) (unreported) (finding that medical monitoring was derived for environmental tort actions and is not appropriate in a product liability consumer fraud case); Sinclair v. Merck & Co., Inc., 948 A.2d 587, 588-589 (N.J. 2008) ("We hold that the definition of harm under our Products Liability Act (PLA)…does not include the remedy of medical monitoring when no manifest injury is alleged. We also hold that the PLA is the sole source of remedy for plaintiffs' defective product claim….").

[xxxi] Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11 (N.Y. 2013) (rejecting equitable cause of action for medical monitoring for smoking-related disease); Benoit v. Saint-Gobain Performance

Plastics Corp., No. 17-3941, 2020 WL 2516636, at *39 (2d Cir. May 18, 2020) (concluding that the physical manifestation of or clinically demonstrable presence of toxins in the plaintiff's body are sufficient to ground a claim for personal injury, but that "it is hardly clear to us that *Caronia II* envisioned authorizing an award of medical monitoring to a plaintiff who has no cognizable claim for personal injury"); *but see In re* World Trade Center Lower Manhattan Disaster Site Litig., 758 F.3d 202, 213 (2nd Cir. 2014) (stating that "a fear of cancer without some physical manifestation of contamination is not an independent basis for a cause of action," but that "a plaintiff may obtain the remedy of medical monitoring 'as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action'") (quoting *Caronia*, 5 N.E.3d at 18-19); Benoit v. Saint-Gobain Performance Plastics Corp., 2017 WL 4331032, at *9-10 (N.D.N.Y. Aug. 16, 2017) (unreported) (denying judgment as a matter of law to defendants with respect to medical monitoring claims of non-symptomatic plaintiffs on basis that "*Caronia* appears to allow medical monitoring damages even if the only tort with a present 'injury' involves harm to property"); *see also* Macuka v. Le Creuset of America, Inc., 2019 WL 955344, at *3 (E.D.N.Y. Feb. 27, 2019) (holding "plaintiffs could not amend [their] complaint to allege a new stand-alone claim for medical monitoring under New York law, as such an amendment would be futile"); Ivory v. Int'l Bus. Machs. Corp., 983 N.Y.S.2d 110, 118 (N.Y. App. Div. 2014) ("*Caronia* . . . indicates that medical monitoring can be recovered as consequential damages associated with a separate tort alleging property damage."); Burdick v. Tonoga, Inc., 60 Misc.3d 1212(A), 2018 WL 3355239, at *13 (N.Y. Sup. Ct. July 3, 2018) (affirming certification of medical monitoring class for perfluorooctanoic acid (PFOA) groundwater contamination claim).

[xxxii] Curl v. American Multimedia, Inc., 654 S.E.2d 76, 81 (N.C. Ct. App. 2007) (refusing to create a "new cause of action" for medical monitoring and stating that it "is a policy decision which falls within the province of the legislature") (internal citation omitted); Carroll v. Litton Sys., Inc., 1990 WL 312969, at *53, 87 (W.D.N.C. Oct. 29, 1990) (unreported) (refusing to allow medical monitoring claim in absence of clear direction of the North Carolina legislature, and noting that even if North Carolina courts recognized medical monitoring, they would require a present physical injury), *aff'd and rev'd in part on other grounds*, 47 F.3d 1164 (4th Cir. 1995).

[xxxiii] Mehl v. Canadian Pac. Ry., 227 F.R.D. 505, 518 (D.N.D. 2005) ("a plaintiff [in North Dakota] would be required to demonstrate a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim."); North Dakota Dept. of Health v. Burlington N. & Santa Fe Ry. Co., 2004 WL 6225407 (N.D. Dist. Ct. Grand Forks Cnty. Sept. 8, 2004) ("The medical monitoring claims are speculative and lack sufficient standards to resolve.").

[xxxiv] Elmer v. S.H. Bell Co., 127 F. Supp.3d 812, 825 (N.D. Ohio 2015) ("Although medical monitoring is not a cause of action, under Ohio law, it is a form of damages for an underlying tort claim . . . . A plaintiff is not required to demonstrate physical injuries in order to obtain medical monitoring relief, but must 'show by expert medical testimony that [plaintiffs] have increased risk of disease which would warrant a reasonable physician to order monitoring.'") quoting Day v. NLO, 851 F. Supp. 869, 881 (S.D. Ohio 1994); Mann v. CSX Transp., Inc., 2009 WL 3766056, at *3 (N.D. Ohio Nov. 10, 2009) (unreported) ("Ohio law recognizes medical monitoring as a form of damages for an underlying tort.") citing Wilson v. Brush Wellman, Inc., 817 N.E.2d 59, 65 (Ohio 2004) ("Court supervision and participation in medical-monitoring cases is a logical and sound basis on which to determine whether the action is injunctive."), *aff'd sub nom.* Hirsch v. CSX Transp., Inc., 656 F.3d 359 (6th Cir. 2011); *see also* Baker v. Chevron U.S.A. Inc., 533 F. App'x. 509, 527 (6th Cir. 2013) ("*Hirsch* suggests that a medical monitoring remedy potentially exists for plaintiffs who are presently injured with an 'increased risk,' not for those who might suffer the potential injury of an 'increased risk.'"); Hardwick v. 3M Co., 2019 WL 4757134, at *12 (S.D. Ohio Sept. 30, 2019) (finding plaintiff pled a plausible claim for medical monitoring damages related to alleged exposure to per- and polyfluoroalkyl substances (PFAS)); *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 285 (N.D. Ohio 2007) (declining to certify class of welders from multiple states with no present injury seeking medical monitoring, but noting that all eight states at issue, including Ohio, did not require that plaintiff suffer an existing injury to obtain medical monitoring); Riston v. Butler, 777 N.E.2d 857, 866-867 (Ohio Ct. App. 2002) (refusing to grant sanctions for bringing medical monitoring claim because at least one unreported Ohio trial court decision and the Ohio federal court's decision in *Day* predicted Ohio would allow such a claim); Day v. NLO, 851 F. Supp. 869, 881 (S.D. Ohio 1994) (holding medical monitoring is available in Ohio if plaintiffs can "show by expert medical testimony that they have increased risk of disease which would warrant a reasonable physician to order monitoring" but "[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.").

[xxxv] McCormick v. Halliburton Co., 895 F. Supp.2d 1152, 1158 (W.D. Okla. 2012) ("due to the complete lack of Oklahoma law, both constitutional, statutory, and case law, on this issue, due to the importance of the public policies at issue, and due to the countless specifics that would need to be addressed if a medical monitoring remedy were recognized, such as how such a remedy would be structured, claim preclusion issues, elements for such a remedy, etc., the Court concludes that the Oklahoma Supreme Court would not recognize a medical monitoring remedy in the absence of any guidance from the Oklahoma legislature and would instead defer to the Oklahoma legislature to first recognize such a remedy."); Cole v. Asarco Inc., 256 F.R.D. 690, 695 (N.D. Okla. 2009) ("Oklahoma law requires plaintiffs to demonstrate an existing disease or physical injury before they can recover the costs of future medical treatment that is deemed medically necessary."); *see also* Taylor v. Michelin N. Am., Inc., No. 14-CV-293, 2018 WL 1569495, at *6-7 (N.D. Okla. Mar. 30, 2018) (unreported) (rejecting proposed medical monitoring class allegations where "plaintiffs have not yet presented evidence of physical injuries attributable to contaminants from the plant").

[xxxvi] Lowe v. Philip Morris USA, Inc., 183 P.2d 181 (Or. 2008) (dismissing plaintiff's negligence claim seeking medical-monitoring damages because lack of present injury resulted in failure to state a claim).

[xxxvii] Redland Soccer Club, Inc., v. Dep't of the Army, 696 A.2d 137, 145-146 (Pa. 1997) ("we hold that a plaintiff must prove the following elements to prevail on a common law claim for medical monitoring: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles."); Pohl v. NGK Metals Corp., 936 A.2d 43, 49-50 (Pa. Super. 2007), *appeal denied*, 952 A.2d 678 (Pa. 2008); *see also* Gates v. Rohm and Haas Co., 655 F.3d 255, 265 (3d Cir. 2011) (stating elements to prevail on medical monitoring claim in Pennsylvania); Sheridan v. NGK Metals Corp., 609 F.3d 239, 251 (3d Cir. 2010) (same); Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998) (holding that while Pennsylvania law permits medical monitoring, each member of a class action must individually demonstrate the need for medical monitoring beyond the general public's monitoring program); *In re* Orthopedic Bone Screw Prods. Liab. Litig., 1995 WL 273597, at *9 (E.D. Pa. Feb. 22, 1995) (unreported) ("medical monitoring is a 'viable' claim under Pennsylvania law."'); *cf*. *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990) ("We…predict that the Supreme Court of Pennsylvania would follow the weight of authority and recognize a cause of action for medical monitoring established by proving that: 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. These factors would, of course, be proven by competent expert testimony."), *aff'd in relevant part*, 35 F.3d 717 (3d Cir. 1994).

[xxxviii] Miranda v. DaCruz, 2009 WL 3515196 (R.I. Super. Ct. Oct. 26, 2009) (granting summary judgment for defendants on medical monitoring claim, citing the lack of any Rhode Island case law allowing medical monitoring for a possible, yet unmanifested, future harm and stating, "This Court is not persuaded to open the damages flood gates to indefinite future monitoring.").

[xxxix] Rosmer v. Pfizer, Inc., 2001 WL 34010613, at *5 (D. S.C. Mar. 30, 2001) (unreported) (noting that South Carolina has not recognized such a claim); *see also* Easler v. Hoechst Celanese Corp., 2014 WL 3868022, at *5 n.5 (D. S.C. Aug. 5, 2014) (unreported) (same).

[xl] Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 575 n.7 (6th Cir. 2005) (recognizing risk of harm as an injury in-fact to confer standing to maintain medical monitoring class and stating "although Tennessee law is murky on the issue of whether claims for medical monitoring are cognizable, there are reasons why such claims are most probably proper."); *but see* Jones v. Brush Wellman, Inc., 2000 WL 33727733, at *8 (N.D. Ohio 2000) (unreported) ("It is clear that under Tennessee law, a plaintiff must allege a present injury or loss to maintain an action in tort. No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury."); Bostick v. St. Jude Med., Inc., 2004 WL 3313614, at *14 (W.D. Tenn. Aug. 17, 2004) (unreported) ("[A] review of the applicable case law reveals that Tennessee does require a present injury").

[xli] Norwood v. Raytheon Co., 414 F. Supp.2d 659, 667 (W.D. Tex. 2006) (granting motion to dismiss medical monitoring claims because "it appears likely that the Texas Supreme Court would follow the recent trend of rejecting medical monitoring as a cause of action").

[xlii] Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) ("To recover medical monitoring damages under Utah law, a plaintiff must prove the following: (1) exposure, (2) to a toxic substance, (3) which exposure was caused by the defendant's negligence, (4) resulting in an increased risk, (5) of a serious disease, illness, or injury, (6) for which a medical test for early detection exists, (7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness, (8) and which test has been prescribed by a qualified physician according to contemporary scientific principles.").

[xliii] Sullivan v. Saint-Gobain Performance Plastics Corp., 2019 WL 7282104, at *14 (D. Vt. Dec. 27, 2019) ("[T]he court anticipates that this is the type of case in which Vermont decisional law will follow cases permitting proof of the elements of a medical monitoring remedy."); Stead v. F.E. Meyers Co., 785 F. Supp. 56 (D. Vt. 1990) (permitting plaintiffs' expert to testify concerning future risk of cancer because testimony was relevant to claim for medical monitoring).

[xliv] Ball v. Joy Tech., Inc., 958 F.2d 36, 39 (4th Cir. 1991) (dismissing plaintiffs claim for medical monitoring damages because Virginia law requires a present, physical injury prior to recovery for negligence), *cert. denied*, 502 U.S. 1033 (1992); *In re* All Pending Chinese Drywall Cases, 80 Va. Cir. 69, 2010 WL 7378659, at *10 (Va. Cir. Ct. City of Norfolk Mar 29, 2010) ("Circuit courts are not empowered to establish 'novel' or 'innovative' remedies that depart from Virginia common-law or legislative authority. Even though this Court might recognize the merits of a monitoring program, the creation of such a program is one for the legislature and not the courts.").

[xlv] Krottner v. Starbucks Corp., No. C09-0216-RAJ, 2009 WL 7382290, at *7 (W.D. Wash. Aug. 14, 2009) (unreported) ("Washington has never recognized a standalone claim for medical monitoring."), *aff'd in part*, 406 Fed. App'x 129 (9th Cir. 2010); DuRocher v. Riddell, Inc., 97 F. Supp.3d 1006, 1014 (S.D. Ind. 2015) ("the State of Washington does not recognize a standalone claim for medical monitoring");

Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 606 (W.D. Wash. 2001) (predicting Washington courts would not recognize a cause of action for medical monitoring because Washington law requires existing injury in order to pursue a negligence claim).

[xlvi] Bower v. Westinghouse Corp., 522 S.E.2d 424, 432-433 (W. Va. 1999) ("[I]n order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that (1) he or she has, relative to the general population, 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."); *see also* Rhodes v. E.I. du Pont de NeMours and Co., 636 F.3d 88, 93 n.1 (4th Cir. 2011) (discussing *Bower* elements); *In re* West Virginia Rezulin Litig., 585 S.E.2d 52, 73 (W. Va. 2003) (citing *Bower*); Perrine v. E.I. du Pont de Nemours and Co., 694 S.E.2d 815, 881 (W. Va. 2010) ("punitive damages may not be awarded on a cause of action for medical monitoring").

[xlvii] Alsteen v. Wauleco, Inc., 802 N.W.2d 212, 223 (Wis. Ct. App. 2011) (refusing to "'step into the legislative role and mutate otherwise sound legal principles' by creating a new medical monitoring claim that does not require actual injury.") (citation omitted), *review denied*, 808 N.W.2d 715 (Wis. 2011).