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July 9, 2012

BY FEDEX

Bessie M. Decker, Clerk
Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
361 Rowe Blvd.
Annapolis, Maryland 21401

Re: *Exxon Mobil Corporation v. Paul D. Ford, et al.,* No. 16, September Term 2012

Dear Ms. Decker:

Enclosed for filing is:

1. an original and 7 copies of Motion for Leave to Participate as Amici Curiae of Chamber of Commerce of the United States of America and Maryland Chamber of Commerce and a proposed order; and

2. an original and 20 copies of Brief of Amici Curiae of Chamber of Commerce of the United States of America and Maryland Chamber of Commerce.

Also enclosed are additional copies of the Motion and Brief to be file-stamped and returned to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving a copy of the enclosed on all counsel of record.

Thank you for your attention to this matter. If you have any questions, please call.

Respectfully submitted,

Samara L. Kline

SLK:jd
Enclosures
cc: Stephen L. Snyder
Robert J. Weltcheck
Ava E. Lias-Booker
Charles P. Scheeler
John E. Griffith, Jr.
Jeffrey D. Herschman
James F. Sanders
Thomas H. Dundon

NO. 16

SEPTEMBER TERM, 2012

IN THE COURT OF APPEALS OF MARYLAND

EXXON MOBIL CORPORATION,

Petitioner, Cross-Respondent, and Cross-Petitioner,

v.

PAUL D. FORD, ET AL.,

Respondents, Cross-Petitioners, and Cross-Respondents.

MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MARYLAND CHAMBER OF COMMERCE

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Of Counsel for Chamber of Commerce of the United States of America

MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MARYLAND CHAMBER OF COMMERCE

The Chamber of Commerce of the United States of America ("U.S. Chamber") and the Maryland Chamber of Commerce ("Maryland Chamber"), pursuant to Maryland Rule 8-511, hereby request permission of the Court to participate and file a Brief as *amici curiae* in the above-captioned case. The Brief is being submitted to the Court and served on all counsel of record simultaneously with this Motion. In support of the Motion, the U.S. Chamber and the Maryland Chamber state:

I. INTEREST OF *AMICI CURIAE*

The U.S. Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. U.S. Chamber members transact business throughout the United States. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in courts throughout the country on issues of national concern to the business community. The expansion of tort law damages for fear of cancer and medical monitoring to plaintiffs with no present injury is one such issue.

The Maryland Chamber is a statewide, private, not-for-profit business organization financed by member firms and businesses — over 750 large and small businesses located throughout the State of Maryland. The Maryland Chamber is the leading statewide business advocacy organization with a mission of supporting its members and advancing the State of Maryland as a national and global competitiveness leader in economic growth and private sector job creation. Its members provide over 443,000 jobs — more than twenty percent of all private sector employees in the state. The Maryland Chamber represents employers of all types and sizes in every jurisdiction in the state. Seventy percent of its member companies have fewer than 100 employees.

II. THE BRIEF OF *AMICI* IS DESIRABLE

This case presents unsettled questions regarding the legal standard under Maryland law governing claims for fear of cancer and medical monitoring. *Amici* intend to assist the Court by summarizing the reasoning of other state supreme courts around the country that have declined to depart from traditional legal principles and refused to recognize fear-of-cancer and medical monitoring claims absent present injury. A survey of these cases demonstrates a clear judicial trend over the past 15 years to resist efforts to erode the present injury requirement. These decisions illustrate the policy factors militating against recognition of unrestricted claims for fear of cancer and medical monitoring.

The same reasoning should lead this Court to require, at a minimum, proof of present injury as a predicate to recovery of damages for fear of future illness and medical monitoring. Recognizing such claims in the absence of physical injury would invite a flood of litigation. The speculative and unpredictable nature of such claims makes them especially difficult to resolve outside of court, and they would consume disproportionate private and public resources within the judicial process. Expanding Maryland law to allow recovery of such damages absent proof of present injury would significantly and detrimentally affect companies that do business in the State and the State's economy.

III. ISSUES RAISED IN THE BRIEF OF AMICI

Amici address the following issues: (1) whether Maryland should recognize a claim for recovery of damages for fear of cancer by a plaintiff with no present injury or illness; and (2) whether Maryland should recognize a claim for recovery of medical monitoring damages by a plaintiff with no present injury or illness. For the reasons discussed in the brief of *amici*, Maryland should join the national mainstream and answer both of these questions, "no." In this respect, amici supports the position of Exxon Mobil Corporation. *Amici* take no position on other issues that may be presented by the parties.

IV. IDENTIFICATION OF PERSONS OR ENTITIES WHO MADE A MONETARY OR OTHER CONTRIBUTION TO THE BRIEF

The U.S. Chamber is the only person and/or entity that made a monetary or other contribution to the preparation or submission of the Brief.

Respectfully submitted,

David Super w permission by SLL

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July 9, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2012 copies of Motion For Leave To Participate as *Amici Curiae* of Chamber of Commerce of The United States of America and Maryland Chamber of Commerce were delivered by overnight mail to the following:

Stephen L. Snyder SNYDER & SNYDER 1829 Reisterstown Road, Suite 100 Baltimore, MD 21208	Charles P. Scheeler John E. Griffith, Jr. Jeffrey D. Herschman DLA PIPER LLP (US) The Marbury Building 6225 Smith Avenue Baltimore, MD 21209-3600
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Samara L. Kline

NO. 16

SEPTEMBER TERM, 2012

IN THE COURT OF APPEALS OF MARYLAND

EXXON MOBIL CORPORATION,

Petitioner, Cross-Respondent, and Cross-Petitioner,

v.

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Respondents, Cross-Petitioners, and Cross-Respondents.

ORDER

Having read and considered Motion For Leave To Participate as *Amici Curiae* of the Chamber of Commerce of The United States of America and Maryland Chamber of Commerce, it is this _____ day of _____, 2012, by the Court of Appeals of Maryland, hereby

ORDERED that Chamber of Commerce of the United States of America and the Maryland Chamber of Commerce may participate and file a Brief as an *amici curiae* in the above-captioned case, subject to the briefing schedule of Petitioner Exxon Mobil Corporation.

_____

Judge
Court of Appeals of Maryland

IN THE
COURT OF APPEALS
OF MARYLAND

NO. 16

SEPTEMBER TERM, 2012

EXXON MOBIL CORPORATION,

Petitioner, Cross-Respondent, and Cross-Petitioner,

v.

PAUL D. FORD, ET AL.,

Respondents, Cross-Petitioners, and Cross-Respondents.

On Certiorari to the Court of Special Appeals of Maryland

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MARYLAND CHAMBER OF COMMERCE

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IDENTIFICATION OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Chamber members transact business throughout the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in courts throughout the country on issues of national concern to the business community.

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ARGUMENT

I. Introduction

The lessons of the past counsel against expanding Maryland law to encompass recovery by persons with no existing physical injury or disease who seek damages for alleged fear of contracting a disease in the future and for expenses related to future medical monitoring they might undertake. Other courts and commentators have confronted the same issues repeatedly over three decades. With history as a guide, the result of expanding damage remedies to plaintiffs with no present physical injury is predictable and undesirable.

Modern society exposes all of us every day to substances that potentially could be argued to warrant this type of relief. As a result, recognizing claims for fear of cancer and medical monitoring absent present injury would invite an unlimited variety of new court cases. Such claims, for example, have been premised upon alleged exposure to asbestos while laundering clothes of industrial workers,[1] potential infections arising from breast implant surgery,[2] possible health effects of dioxin discharged from a plant located on a river bank,[3] increased likelihood of cancer resulting from prenatal exposure to a widely used prescription drug,[4] increased risk of heart disease due to use of weight-loss medication,[5] and risk of lung cancer from smoking cigarettes.[6] In each of those cases, courts in various states declined to expand traditional remedies to award damages absent present injuries.

Recognizing nontraditional avenues of recovery in Maryland would generate increased litigation of a type that is more difficult to resolve outside the

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

2 *Houston County Health Care Authority v. Williams*, 961 So.2d 795 (Ala. 2006).

3 *Henry v. Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005).

4 *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982).

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

6 *Lowe v. Philip Morris*, 183 P.3d 181 (Ore. 2008).

judicial system and consumes disproportionate resources if resolved in court. Incentivizing such claims thus promises to drain private and public resources at a time of economic uncertainty and shrinking government resources. Further, loosening standards for anticipatory claims by individuals who never experience physical injury comes at the expense of those who actually do develop disease. In a world of finite resources, such a first-come, first-served regime overcompensates individuals with no present illness while threatening the ability to later compensate any plaintiffs with real injuries and proven causation. The cycle of asbestos litigation that began in the 1980s plainly demonstrates the dangers of swamping courts and defendants with claims by healthy plaintiffs based on fear of future illness, leaving sick plaintiffs to face clogged court dockets and bankrupt defendants.

For these and other reasons, Maryland would be best served by retaining traditional limits on recovery in negligence and refusing to recognize claims for fear of cancer and medical monitoring without proof of present physical injury. The well-reasoned opinions of other courts reaching the same conclusion are further detailed below.

II. Maryland Should Not Allow Recovery For Fear of Cancer Absent Present Illness.

A. The U.S. Supreme Court articulated sound reasons to reject fear of cancer claims.

The U.S. Supreme Court in *Metro-North Commuter Railroad Company v. Buckley* recognized the dangers in expanding tort law to encompass pre-injury claims for fear of future disease and for medical monitoring. 521 U.S. 424 (1997). In *Buckley*, the Court decided whether a railroad worker negligently exposed to a carcinogen but without symptoms of disease could recover under the Federal Employers Liability Act (FELA). *Id.* at 426-27. The plaintiff had proved what the Second Circuit Court of Appeals described as "massive, lengthy and tangible" asbestos exposure that "would cause fear in a reasonable person," and an expert

witness testified that the exposure increased the plaintiff's risk of death due to cancer or other asbestos-related disease. *Id.* at 428.

The Court, construing the statutory requirement of "injury" liberally in light of the statute's "humanitarian purposes," nonetheless concluded that "physical contact with a substance that might cause a disease at a substantially later time" was not a compensable "injury" under the statute. *Id.* at 427, 429. The Court articulated several reasons for its decision.

First, because "contacts, even extensive contacts, with serious carcinogens, are common," evidence of exposure alone does not help courts or juries to separate valid from invalid claims for emotional distress. *Id.* at 434. "The evaluation problem seems a serious one." *Id.* at 435.

> [H]ow can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an increased mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated—particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics?

Id.

The Court also expressed concern that widespread exposure and uncertainty surrounding potential exposure-based recovery would promote "unlimited and unpredictable liability" and a "'flood' of cases that, if not 'trivial,' are comparatively less important." *Id.* The Court noted additional policy concerns raised by the prospect of allowing recovery absent physical injury, particularly the prospect of unfairly allocating limited resources.

> [Would] such liability mean, for example, that the costs associated with a rule of liability would become so great that, given the nature of the harm, it would seem unreasonable to require the public to pay the higher prices that may result? . . . In a world of limited resources, would a rule permitting immediate large-

> scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?

Id. at 435-36 (citations omitted).

B. Most state courts do not allow fear of cancer claims absent present injury.

Based on these concerns and others, decisions throughout the country, from Massachusetts to Oregon, have rejected claims for fear of disease absent a present physical injury.[7] Like the U.S. Supreme Court, these courts recognize that a

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[7] *See Adams v. Star Enterprise*, 51 F.3d 417, 423 (4th Cir. 1995) ("fears of future harm and ill health effects from the migration of the oil spill are not compensable under Virginia law absent a showing of physical impact or physical injury"); *Ball v. Joy Tech., Inc.*, 958 F.2d 36, 38 (4th Cir. 1991) ("Except for the intentional infliction of emotional distress, damages for emotional distress may not be recovered under West Virginia or Virginia law absent a finding of physical injury."); *Houston County Health Care*, 961 So. 2d at 795 ("mere exposure to a hazardous substance resulting in no present manifestation of physical injury is not actionable under [Alabama law] where the exposure increased only minimally the exposed person's chances of developing a serious physical disease and that person has suffered only mental anguish"); *Mergenthaler*, 480 A.2d at 651 (Del. 1984) (concession by plaintiffs that they suffered no physical injury due to asbestos exposure was dispositive of fear of cancer claim under Delaware law); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky. 1994) (where evidence showed significantly increased risk of developing mesothelioma as a result of asbestos exposure but plaintiff had no present manifestation of disease, no cause of action had accrued for damages based on fear of contracting disease); *Payton*, 437 N.E.2d at 174 (in case involving *in utero* exposure to prescription drug, refusing to recognize under Massachusetts law action for emotional distress caused by negligence resulting in increased likelihood that plaintiff will suffer serious disease in the future, absent any evidence of present physical harm); *Henry*, 701 N.W.2d at 688 (Michigan law requires a present physical injury for a negligence claim based on dioxin exposure); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5 (Miss. 2007) ("Mississippi does not recognize a cause of action for fear of possibly contracting a disease at some point in the future."); *Lowe*, 183 P.3d at 181 (Oregon law does not allow claim by cigarette smoker for threat of future disease absent present physical effect); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996) (under Pennsylvania law, reversing judgment of damages

physical injury requirement provides a clear and comprehensible legal standard that limits frivolous lawsuits and provides a reasonable safeguard against false claims. For the reasons expressed in prior cases, Maryland law also should require a physical injury as a predicate to recovering for fear of cancer.

1. *Allowing recovery for fear of cancer invites a flood of litigation.*

The speculative nature of a claim for fear of cancer absent physical injury and the potential flood of litigation if such claims were allowed are common concerns. The Rhode Island Supreme Court, for example, predicted that "[i]f

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for fear of cancer where plaintiffs exposed to asbestos had no present physical impairment); *Kelley v. Cowesett Hills Assoc.*, 768 A.2d 425 (R.I. 2001) (under Rhode Island law, "the possibility of contracting cancer resulting from mere exposure to a carcinogen, although potentially increasing one's risk of developing cancer, is too tenuous to be a viable cause of action"); *Temple-Inland Forest Prod. Co. v. Carter*, 993 S.W.2d 88 (Tex. 1999) (Texas law does not allow recovery for fear of developing future disease when no disease is presently manifest).

See also Galaz v. U.S., No. 04-15970, 2006 WL 897584 at *832 (9th Cir. Mar. 31, 2006) (affirming dismissal of claims under Nevada law based on exposure to jet fuel leak, where plaintiff did not allege present physical injury); *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."); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 606 (W.D. Wash. 2001) (Washington law "is grounded in actual present injury and limits recovery for enhanced risk"); *DeStories v. City of Phx.*, 744 P.2d 705 (Ariz. Ct. App. 1987) (workers exposed to asbestos during airport remodeling could not recover for fear of cancer absent physical injury); *Russaw v. Martin*, 472 S.E.2d 508, 510 (Ga. Ct. App. 1996) ("Where a claim is based on ordinary negligence, the general rule is that damages for mental distress can only be recovered in the event of physical injury."); *Reynolds v. Highland Manor, Inc.*, 954 P.2d 11, 13 (Kan. Ct. App. 1998) ("To sustain a claim for negligent infliction of emotional distress, the plaintiff must establish that the conduct complained of was accompanied by, or resulted in, immediate physical injury."); *see also Rabb v. Orkin Exterminating Co., Inc.*, 677 F. Supp. 424 (D. S.C. 1987) (where plaintiff alleged exposure to negligently applied termiticide, trial court properly excluded evidence of fear of future disease because South Carolina law requires presently existing bodily injury and proof that feared condition is reasonably certain to occur).

mere exposure to a potential carcinogenic was actionable, the courts would be inundated with actions arising merely from an individual's daily activities . . . ." *Kelley*, 768 A.2d at 430 (affirming summary judgment to landlord on negligence claim by tenant seeking recovery for fear of cancer arising from asbestos exposure during apartment repairs).

The California Supreme Court likewise recognized that allowing a fear of cancer claim based solely on exposure would open the floodgates of litigation and liability:

> [A]ll of us are potential fear of cancer plaintiffs, provided we are sufficiently aware of and worried about the possibility of developing cancer from exposure to or ingestion of a carcinogenic substance. The enormity of the class of potential plaintiffs cannot be overstated. . . . [T]he tremendous societal cost of otherwise allowing emotional distress compensation to a potentially unrestricted plaintiff class demonstrates the necessity of imposing some limit on the class.

Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 812 (Cal. 1993); *see also Temple-Inland*, 993 S.W.2d at 93 ("Most Americans are daily subjected to toxic substances in the air they breathe and the food the eat."); *Houston County Health Care*, 961 So.2d at 811 ("[o]pening the courts generally for compensation for fear of future disease would be a dramatic change in the law and could engender significant unforeseen and unforeseeable consequences").

2. *Fear of cancer claims are speculative, difficult to evaluate or quantify, and produce inconsistent results.*

Claims for fear of cancer are by their nature speculative and difficult to quantify. "The difficulty in predicting whether exposure will cause any disease and if so, what disease . . . make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not." *Temple-Inland*, 993 S.W.2d at 93 (plaintiff with increased risk of disease from asbestos inhalation cannot recover for fear of developing disease they may never contract).

> This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared.

Id. The inherently speculative nature of this type of claim led the Rhode Island Supreme Court to hold that "the possibility of contracting cancer resulting from mere exposure to a carcinogen, although potentially increasing one's risk of developing cancer, is too tenuous to be a viable cause of action." *Kelley*, 768 A.2d at 427.

Grounded in speculation and prospective by nature, fear-of-cancer claims also are inherently impossible to quantify properly. These claims require the jury to guess about what might happen decades into the future and premise recovery on one of the most subjective of human emotions. A tiny risk of future harm may be horribly frightening to one person but warrant only a passing thought to someone else. Without a sufficiently definite and predictable threshold, fear of cancer cases will produce unfairly inconsistent results, because juries will differ over the point at which a plaintiff's fear is genuine and reasonable. *See Potter*, 863 P.2d at 813-14 ("one jury might deem knowledge of a 2 or 5 percent likelihood of future illness or injury to be sufficient, . . . while another jury might not"); *see also Simmons*, 674 A.2d at 238 (damages for fear of cancer are "speculative" and "would lead to inequitable results").

Requiring physical injury as a prerequisite to recovery mitigates the speculative nature of these claims by providing an objective, ascertainable legal standard. *Henry*, 701 N.W.2d at 690-91. Any looser standard "would exacerbate not only the multiplicity of suits but the unpredictability of results." *Temple-Inland*, 993 S.W.2d at 93.

The present injury requirement also reduces the opportunity and incentive to manufacture false claims of subjective fear. "[I]n the absence of . . . resulting bodily harm, such emotional disturbance can be too easily feigned or imagined." *Payton*, 437 N.E.2d at 178.

> A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. If such a plaintiff's testimony is believed, and there is no requirement of objective corroboration of the emotional distress alleged, a defendant would be held liable unjustifiably.

Id. "It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress." *Id.*

3. *Allowing fear of cancer claims benefits healthy plaintiffs at the expense of those who may later contract disease.*

Another concern courts considering fear-of-cancer claims express is that "allowing recovery to all victims who have a fear of cancer may work to the detriment of those who sustain actual physical injury and those who ultimately develop cancer as a result of toxic exposure." *Potter*, 863 P.2d at 813. Without objective limits such as an injury requirement, "[l]itigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." *Henry*, 701 N.W.2d at 694; *see also Temple-Inland*, 993 S.W.2d at 93 ("Suits for mental anguish damages caused by exposure that has not resulted in disease would compete with suits for manifest diseases for the legal system's limited resources.").

4. *Traditional legal rules preclude recovery for fear of cancer absent present injury.*

Some courts liken a claim for fear of cancer to a claim for negligent infliction of emotional distress, which is generally not a recognized cause of action. *See Temple-Inland*, 993 S.W.2d at 90 ("[a]bsent physical injury, the

common law has not allowed recovery for negligent emotional distress except in certain specific, limited instances"). Traditionally, without intent to harm, the defendant's fault is viewed as "not so great that he should be required to make good a purely mental disturbance." *Payton*, 437 N.E. 2d at 178-79.[8] In addition, denying recovery where there has been only negligent conduct and no physical injury harmonizes with the traditional legal rule that plaintiffs in negligence cases can recover only those damages that are reasonably foreseeable to the defendant. *Id.* at 180-81.

C. Some states address these problems by requiring proof that the plaintiff will more likely than not contract cancer as a result of exposure.

Most states lessen the speculation inherent in a fear-of-cancer claim by requiring a present physical injury. Some courts instead, or additionally, limit fear-of-disease claims by other strict proof requirements. In *Potter v. Firestone Tire & Rubber Company*, the California Supreme Court held that to recover damages for fear of cancer absent present injury, the plaintiff must prove that, due to alleged exposure to a hazardous substance, it is more likely than not that the plaintiff will develop cancer in the future. 863 P.2d at 816.

In *Potter*, four landowners living adjacent to a landfill sued Firestone after their domestic water wells were contaminated with carcinogenic substances. The trial court found Firestone liable for negligence and intentional infliction of emotional distress arising from prohibited waste disposal practices. *Id.* at 802. The trial court awarded damages that included $800,000 for the plaintiffs' lifelong fear of cancer and resultant emotional distress. *Id.* at 803.

Addressing these damages, the California Supreme Court cautioned that "meaningful limits" and "clear guidelines" are necessary to guard against fraudulent fear-of-cancer claims and resulting undue burdens on courts,

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[8] *See also Capital Holding Corp.*, 873 S.W.2d at 195-96; *Potter*, 863 P.2d at 817.

corporations, insurers and society in general. *Id.* at 810. The court also agreed that the reasonableness of such a claim is not established by "the mere fact of an exposure or a significant increase in the risk of cancer." *Id.* at 810-11.

> A carcinogenic or other toxic ingestion or exposure, without more, does not provide a basis for fearing future physical injury or illness which the law is prepared to recognize as reasonable. The fact that one is aware that he or she has ingested or been otherwise exposed to a carcinogen or other toxin, without any regard to the nature, magnitude and proportion of the exposure or its likely consequences, provides no meaningful basis upon which to evaluate the reasonableness of one's fear. For example, nearly everybody is exposed to carcinogens which appear naturally in all types of foods. Yet ordinary consumption of such foods is not substantially likely to result in cancer.

Id. at 811. The Court concluded that "the way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance." *Id.*

For many of the same policy reasons that have led other courts to maintain a present injury requirement, the California Supreme Court further concluded that "emotional distress caused by the fear of a cancer that is not probable should generally not be compensable in a negligence action." *Id.* This accords with Maryland law holding that "recovery of damages based on future consequences of an injury may be had only if such consequences are reasonably probable," i.e., there is a greater than 50% chance that a future consequence will occur. *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir. 1986) (citing *Pierce v. Johns Manville Sales Corp.*, 296 Md. 656, 666 (1983)).

The California Supreme Court adopted a requirement that, absent present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff proves that:

- "(1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and

- (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure."

Id. at 816.[9] Absent the more-likely-than-not restriction, and given the ubiquitous exposure to potential health hazards encountered by virtually everyone in society, fear-of-cancer claims pose a "tremendous societal cost" that would be "borne by the public generally in substantially increased insurance premiums or, alternatively, in the enhanced danger that accrues from the greater number of residents and businesses that may choose to go without any insurance." *Id.* at 812.[10]

Since *Buckley* was decided in 1997, only two state supreme courts have upheld fear-of-disease claims. The Louisiana Supreme Court's decision in *Arabie v. Citgo Petroleum Corp.*, __ So.3d __ 2012 WL 798758 (Mar. 13, 2012), emphasized that the plaintiffs had suffered physical injuries, including eye irritation, nausea, and difficulty in breathing, that they experienced contemporaneously with exposure to odors and fumes from a catastrophic spill of slop oil and untreated wastewater. *Id.* at *1, *13. Based on these present injuries, the court distinguished its prior decision in a fear-of-cancer case arising from asbestos exposure, which held that "a defendant will not be held liable where his conduct is merely negligent and causes only emotional injury unaccompanied by

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[9] *See also Stead v. F.E. Myers Co.*, 785 F. Supp. 56, 56 (D. Vt. 1990) (to recover for fear of cancer, plaintiff must "show to a reasonable degree of medical certainty [that they] were more likely than not to develop cancer"); *Rabb*, 677 F. Supp. at 428 (South Carolina allows recovery only for emotional distress attendant to physical injury when the fear and condition is reasonably certain to occur).

[10] The California court also expressed concern that, if not properly limited, fear of cancer claims would impede development of prescription drugs and negatively impact availability and cost of medical malpractice insurance. *Id.* at 812-13.

physical injury." *Id.* at *14 (citing *Moresi v. State Dept. of Wildlife & Fisheries*, 567 So.2d 1081 (La. 1990)).

In *John and Jane Roes v. FHP, Inc.*, 985 P.2d 661, 663 (Haw. 1999), the Hawai'i Supreme Court considered a claim by baggage handlers who came into contact with HIV-positive blood that the defendant was transporting for testing. The plaintiffs sued for negligent infliction of emotional distress and sought damages for fear of being exposed to HIV and AIDS. The Court stated the general rule that recovery for negligent infliction of emotional distress is permitted only when there is a predicate physical injury. *Id.* at 665. The Court carved out "an exception to the general rule" where the defendant's negligence "subjects an individual to an actual, direct, imminent and potentially life-endangering threat to his or her physical safety by virtue of exposure to HIV." *Id.* at 666. This decision appears to be predicated upon the rationale that exposure to HIV-positive blood "guarantee[s] the genuineness and seriousness of the claim" and "would foreseeably engender serious mental distress in a reasonable person." *Id.* at 667.

This Court's decision in *Faya v. Almaraz*, 329 Md. 435 (1993), also arose in the context of the AIDS epidemic. The *Faya* plaintiffs alleged that a surgeon had acted negligently by operating on the plaintiffs without informing them that he was HIV-positive (and in the case of one of the operations, ill from AIDS). *Id.* at 441. The Court noted that while transmission from doctor to patient during surgery was unlikely, "the patient will almost surely die if the virus is transmitted." *Id.* at 449.

Neither *FHP* nor *Faya* supports recognizing claims for fear of cancer from alleged exposure to potentially hazardous substances absent present injury. Both cases are limited to their facts and the available knowledge regarding the AIDS virus at the time of the decisions. Neither *FHP* nor *Faya*, which predated *Buckley* by four years, addresses any of the policy concerns that the U.S. Supreme Court and other courts around the country associate with recognizing fear-of-cancer claims absent present injury.

Further, the *Faya* plaintiffs alleged direct physical invasions and present injuries proximately resulting from the negligence alleged in that case. The plaintiffs claimed that, had the surgeon disclosed that he was HIV-positive, they would have withheld their consent to invasive surgery *that they instead underwent*. *Id.* at 441-42. In addition to subjecting themselves to surgery, the *Faya* plaintiffs immediately underwent blood tests when they learned the information that they claimed the surgeon wrongfully withheld. *Id.* at 441. The plaintiffs pleaded injuries including "pain and expense associated with repeated blood tests" in addition to "fear of having contracted HIV." *Id.* at 451. The Court agreed that these allegations pleaded a negligence claim. *Id.* at 447-48. As in *FHP*, the forseeability of the harm was central to the Court's analysis in *Faya*—taking the plaintiffs' allegations as true, "it was foreseeable that Dr. Almaraz might transmit the AIDS virus to his patients during invasive surgery." *Id.* at 448.

III. Maryland Should Not Recognize Claims For Lump Sum Medical Monitoring Damages Absent Present Injury.

Considerations similar to those presented by fear-of-cancer claims also led the United States Supreme Court and numerous state supreme courts to reject claims for medical monitoring damages absent physical injury. The same reasoning applies here.

In *Buckley*, the Supreme Court held that an asymptomatic plaintiff was not entitled under FELA to recover costs for medical monitoring arising from his workplace asbestos exposure. 521 U.S. at 426-27. As with recovery for fear of cancer, medical monitoring claims present unpredictable and uncertain liability. *Id.* at 442. Given that "tens of millions of individuals may have suffered from exposure to substances that might justify some form of substance-exposure-related medical monitoring," recognizing such a claim threatens a flood of less important cases. *Id.* Vast liability for testing would in turn "potentially absorb[] resources better left available to those more seriously harmed" and "adversely affect[] allocation of scarce medical resources." *Id.*

The Court also noted the special difficulties for judges and juries in identifying what monitoring costs are warranted over and above those that would otherwise be recommended absent exposure.

> Those difficulties in part can reflect uncertainty among medical professionals about just which tests are most usefully administered and when. And in part those difficulties can reflect the fact that scientists will not always see a medical need to provide systematic *scientific* answers to the relevant *legal* question, namely, whether an exposure calls for *extra* monitoring.

Id. at 441 (citations omitted, emphasis in original). In addition, tort recovery of lump sum damages for medical monitoring "would ignore the presence of existing alternative sources of payment," for example current or future employers or insurance that might provide monitoring. *Id.* at 442.[11]

A. Medical monitoring damages contradict traditional rules of recovery in negligence actions.

Whether Maryland recognizes claims for medical monitoring is an open question. Like the U.S. Supreme Court, however, the majority of states that have decided this issue refuse to recognize medical monitoring claims absent present physical injury. Most recently, the Wisconsin Court of Appeals rejected such claims last year. *See Alsteen v. Wauleco*, 802 N.W.2d 212 (Wis. Ct. App. 2011), *review denied*, 808 N.W.2d 15 (2011). The *Alsteen* case involved exposure to benzene, dioxin, and other hazardous chemicals spilled or discharged from a window factory into the air, soil and groundwater. 802 N.W.2d at 214. Residents

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[11] Even setting these alternatives aside, there is simply no guarantee that a lump sum damage award calculated based on a lifetime of medial monitoring actually would be used for that purpose. This, in turn, would present further complications if a future illness gave rise to a later lawsuit. Would a plaintiff's failure to obtain medical monitoring be admissible? Would it bar a disease-based claim? Would it evidence failure to mitigate? What if a parent failed to use a medical monitoring award to a child for its intended purpose and the child later became ill?

in the neighborhood surrounding the factory sued for medical monitoring expenses related to a significantly increased risk of cancer caused by the exposure. *Id.* The court affirmed dismissal of the claims on the ground that the plaintiffs had failed to allege an actual, present injury. *Id.* at 223. The "mere possibility of harm" did not constitute actual injury, and defining the need for medical monitoring as an injury "does nothing more than attach a specific item of damages to what is actually a claim for increased risk of future harm." *Id.* at 218-19.

After surveying the law in other jurisdictions regarding medical monitoring claims, the Wisconsin court declined to abandon the traditional requirement of present injury. The court found particularly instructive the reasoning in *Buckley* and six subsequent state supreme court decisions, all of which declined to recognize claims for medical monitoring absent present injury. *See Henry,* 701 N.W.2d at 686 (plaintiffs exposed to dioxin released from chemical plant who did not allege a present injury presented no viable negligence claim under Michigan law); *Hinton v. Monsanto Co.*, 813 So. 2d 827, 828, 831–32 (Ala. 2001) (plaintiff with no past or present injury could not recover medical monitoring expenses based on environmental PCB exposure); *Wood* 82 S.W.3d at 850–51 (affirming dismissal of medical monitoring claims under Kentucky law by plaintiffs who used diet drug "Fen-Phen" and had no present physical injuries); *Lowe,* 183 P.3d at 182-83 (cigarette smoker with "a significantly increased risk of future injury" unable to recover medical monitoring expenses under Oregon law absent present physical injury); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 2, 9 (Miss. 2007) (refusing to recognize medical monitoring recovery in case based on beryllium exposure); *Badillo v. American Brands, Inc.*,16 P.3d 435, 437 (Nev. 2001).[12] The Michigan Supreme Court, for example, described such a claim as

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[12] *See also Parker v. Wellman*, 230 F. App'x 878, 879–80, 883 (11th Cir. 2007) (affirming dismissal of medical monitoring claims arising from beryllium exposure on basis that Georgia would not recognize claim absent present injury); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 950, 963 (8th Cir. 2000), *abrogated on*

other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005) (rejecting cause of action for medical monitoring based on lead exposure from former smelter and refinery that "would, in effect, expand substantive liability under Nebraska law"); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 37, 39 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (affirming summary judgment for defendant on claims by worker exposed to toxic chemicals because Virginia law would not allow recovery of "medical surveillance costs" without a current injury); *Cole,* 256 F.R.D. at 693, 695 (no medical monitoring claim under Oklahoma law where class representatives claimed no present injuries from alleged property contamination due to defendant's mining activities); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 660, 668–69 (W.D. Tex. 2006) (holding that Texas courts would not likely recognize plaintiffs' medical monitoring claims based on exposure to radiation from defendants' radar equipment); *Mehl v. Can. Pac. Ry., Ltd.*, 227 F.R.D. 505, 507, 518 (D.N.D. 2005) (predicting that plaintiff in suit arising from release of ammonia due to freight train crash would be required to demonstrate a legally cognizable injury to recover on medical monitoring claim under North Dakota law); *Rosmer v. Pfizer, Inc.*, No. CIV. A. 9:99-2280-18RB, 2001 WL 34010613, at *1, *5 (D.S.C. Mar. 30, 2001) (denying certification of medical monitoring class composed of prescription antibiotic users because "South Carolina has not recognized a cause of action for medical monitoring"); *Duncan,* 203 F.R.D. at 603, 608–09 (granting summary judgment for defendant on ground that "there is no cause of action for medical monitoring as an independent tort under Washington law" but noting that flight attendant exposed to second-hand smoke could recover medical monitoring as a remedy for negligence where she alleged existing injury); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 555–56 (D. Minn. 1999) (holding that, under Minnesota law, cigarette smokers had to show "'present injuries' that increase their risk of future harm" in order to participate in a medical monitoring program); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at *1, *51 (W.D.N.C. Oct. 29, 1990) (holding that North Carolina courts would not recognize a medical monitoring tort where plaintiffs were exposed to trichloroethylene and other hazardous chemicals that escaped from defendant's plant into nearby groundwater); *Johnson v. Abbott Labs.*, No. 06C01-0203-PL-89, 06C01-0206-CT-243, 2004 WL 3245947, at *1, *6 (Ind. Cir. Ct. Dec. 31, 2004) (denying class certification of claims arising from use of prescription drug OxyContin, and noting that "Indiana does not recognize medical monitoring as a cause of action") (citing *Hunt v. Am. Wood Preserves Inst.*, No. IP-02-0389-C-M/S (S.D. Ind. July 30, 2002)); *Miranda v. DaCruz*, No. PC 04-2210, 2009 WL 3515196 (R.I. Super. Ct. Oct. 26, 2009) (granting defendant's motion in limine to exclude testimony regarding medical monitoring since plaintiff had no "physiological changes indicative of future harm" resulting from exposure to lead paint while a tenant of defendant's dwelling). *Cf.* LA. CIV.

one that "departs drastically from [] traditional notions of a valid negligence claim," represents an "enormous shift" in tort jurisprudence, and may lead to "dramatic reallocation of societal benefits and burdens." *Henry*, 701 N.W.2d at 694, 697.

In traditional tort law, "[t]he threat of future harm, not yet realized, is not enough" on which to base recovery in negligence actions. *Id.* at 689 (quoting Prosser & Keeton, Torts (5th ed. § 30, p. 165)).

> In most cases it is assumed that, if the law places within the reach of everyone a suitable remedy to which he may resort when he suffers an injury, it has thereby not only 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.

Henry, 701 N.W.2d at 689 n. 6 (quoting Cooley on Torts (4th ed.), § 32, pp. 57-58); *see also Lowe*, 183 P.2d at 184. Based on another traditional rule precluding recovery in negligence for purely economic loss, the Oregon Supreme Court considered medical monitoring costs to be an economic harm that is not recoverable absent physical injury or a special duty owed by the defendant to the plaintiff beyond the duty to exercise reasonable care. *Lowe,* 183 P.2d at 186 (holding that "present economic harm that defendants' actions allegedly have caused—the cost of medical monitoring—is not sufficient to give rise to a negligence claim").

B. Allowing recovery for medical monitoring invites a flood of litigation.

Courts rejecting medical monitoring claims absent present injury are also cognizant of the problems presented by allowing claims based on exposure alone.

CODE. ANN. art. 2315(B) (2011) ("Damages do not include 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.").

"[A] cost-benefit analysis counsels against recognizing a cause of action for medical monitoring." *Hinton*, 813 So.2d at 830. Addressing medical monitoring claims arising from the release of the potentially hazardous chemical dioxin into the flood plain where the plaintiffs lived and worked, the Michigan Supreme Court concluded that "recognizing a cause of action based solely on exposure—one without a requirement of a *present* injury—would create a potentially limitless pool of plaintiffs." *Henry*, 701 N.W.2d at 694 (emphasis in original). "It is a reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis." *Id.* at 686, n.15.

> To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm.

Id.; *see also Wood*, 82 S.W.3d at 856 ("Without an actual injury requirement, . . . any exposure might result in litigation, supported only by speculative fears of future injury and costs.").

Commentators issue similar warnings. "[M]edical monitoring claims will potentially clog the courts as contingency fee lawyers use consumers as vehicles for enormous awards; furthermore money awarded for the purpose of health care will go in large percentage to those same lawyers, not the exposure victims." *Id.* at 858 (citing Victor E. Schwartz, *Medical Monitoring: Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1079–1080 (1999)).

Courts also reason that prohibiting claims for medical monitoring absent physical injury does not eliminate recovery altogether. A plaintiff with a present injury who proves negligence and causation generally can seek recovery for associated costs of medical monitoring.

> From a policy standpoint, this outcome should act as a sufficient deterrent to those who would negligently produce and distribute harmful substances, for they shall still have to compensate victims for any injury caused. Likewise, recognizing only claims supported by physical injury will prevent the flood of litigation stemming from unsubstantiated or fabricated prospective harms, thereby preserving judicial and corporate resources to compensate actual victims who develop injuries in the future.

Wood, 82 S.W.3d at 859.

C. By depleting finite resources, medical monitoring damages reward healthy plaintiffs at the expense of those who become sick.

As with fear of cancer, a significant problem in recognizing medical monitoring absent physical injury is the potential for depleting resources available to individuals who manifest present injury. Unimpaired plaintiffs can, as the Supreme Court cautioned, "absorb[] resources better left available to those more seriously harmed." *Buckley*, 521 U.S. at 442; *see also Henry*, 701 N.W. 2d at 694 ("[l]itigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care.").

Scholars who studied the lifespan of asbestos litigation, for example, concluded that the surge of unimpaired individuals' claims negatively affected the ability of asbestos defendants to pay the judgments owed to injured plaintiffs. *See* 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, 834 (2002) ("Almost every judge and scholar who has addressed the issue of recovery for mental distress arising from exposure to asbestos has noted the irony that the huge volume of mental distress claims can devour the assets of defendants at the expense of more seriously injured plaintiffs."); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the*

Brave New World of Aggregative Litigation, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001) (stating that "the 'asbestos litigation crisis' would never have arisen and would not exist today" absent claims by the uninjured).

D. Appropriate medical monitoring is controversial and ill-suited for resolution by judges or juries.

Another significant factor is that "[i]t is far from settled that judicially supervised medical monitoring is an unmitigated benefit for all concerned." *Henry*, 701 N.W.2d at 695 n.14 (citing scholars and commentators noting the undesirability of judicially sanctioned medical monitoring claims). Medical monitoring claims are complicated by the absence of consistent consensus, even in the medical community, regarding which medical testing is useful and provides benefits that outweigh the risks. Recommendations concerning screening for relatively common and well-studied diseases (including, for example, breast cancer and prostate cancer) change periodically as the balance of harm and benefit becomes more informed; for rarer illnesses, there may be no reputable studies on which reliable recommendations can be made. Medical monitoring itself presents potential risks, including the risk that diagnostic testing will produce false positives leading to unnecessary and potentially harmful treatment. Further, potential risks associated with medical monitoring might outweigh benefits for a one particular individual, but not another (who, for example, has a pre-existing disease, a family history of disease or other disease risk factors). *See* Herbert L. Zarov et al., *A Medical Monitoring Claim For Asymptomatic Plaintiffs: Should Illinois Take The Plunge?*, 12 DEPAUL J. OF HEALTH CARE LAW 1, 29-37 (2009); George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy In Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 276-81 (1993).

In short, "courts allowing recovery for increased risk and medical screening may be creating significant public policy problems." *Wood*, 82 S.W.3d at 857. Judicial recognition of a medical monitoring claim "may do more harm than

good"—not only for the state's economy but also for other potential litigants "who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Henry*, 701 N.W.2d at 696 (quoting *Buckley*, 521 U.S. at 443-44). In light of the host of problems presented, the Michigan Supreme Court cautioned against expanding the common law to encompass medical monitoring claims "when it is unclear what the consequences of such a decision may be and when we have strong suspicions, shared by our nation's highest court, that they may well be disastrous." *Henry*, 701 N.W.2d at 697.

E. Any recognition of medical monitoring damages should incorporate strict proof requirements.

Since *Buckley*, only four state supreme courts have recognized potential claims for medical monitoring. These decisions, however, underscore the need to limit such claims through objective, ascertainable proof standards. The most recent, *Donovan v. Philip Morris*, 914 N.E.2d 891, 898 (Mass. 2009), is characterized by a physical impact requirement and additional stringent elements of proof. In *Donovan*, the court held that physiological changes in the plaintiffs' bodies allegedly caused by smoking, which significantly increased their risk of cancer, constituted a sufficient physical impact upon which to premise recovery of reasonably necessary medical expenses. *Id.* at 900-901. Notably, in articulating the proof requirements for such a claim, the court required not only proof that (i) exposure produced at least subcellular changes that substantially increased the risk of serious disease, but also that (ii) "an effective medical test for reliable early detection exists" ***and*** (iii) "early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease." *Id.* at 901-902; *see also Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (plaintiff must prove that test for early detection exists and "a treatment exists that can alter the course of the illness"); *In re Paoli Railroad Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990) (requiring proof that

"procedures exist which make the early detection and treatment of the disease possible and beneficial").[13]

Two earlier decisions allowed for the possibility of medical monitoring damages, but because of the procedural posture of the cases, the decisions left for another day articulation of the required elements of proof. In *Badillo v. American Brands, Inc.*, 16 P.3d 435, 437 (Nev. 2001), the Nevada Supreme Court, answering a certified question in tobacco litigation, refused to create a new cause of action for medical monitoring. The court acknowledged that medical monitoring might be available as a remedy for existing causes of action, but decided that it lacked sufficient information to determine the required elements of proof for such a claim. *Id.* In *Meyer v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007), the Missouri Supreme Court reversed an order denying certification of a class of children exposed to lead from a smelter. While indicating that Missouri would recognize recovery of medical monitoring damages without a present injury requirement, the court saw "no need to establish precisely what must be proven in order to recover medical monitoring damages" given the procedural posture of the case at hand. *Id.* at 718 n.7.

IV. Any Expansion of Available Remedies For Plaintiffs Without Physical Injury Should Be Accomplished Through Legislative Action, Not Expansion of Common Law Doctrine.

Claims for fear of cancer and medical monitoring are so laden with public policy implications that some courts have opined that they are more suited for legislative consideration than judicial expansion of common law remedies. The Michigan Supreme Court viewed recognition of medical monitoring claims as a

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[13] *But see Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424, 432 (W. Va. 1999) (eliminating requirement that monitoring must be tied to a proven treatment protocol); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997) (same). *Redland* was decided a few months before *Buckley* and interpreted based on common law a state statute enacted to provide "extraordinary enforcement remedies" to prevent the release of hazardous substances." *Id.* at 141.

"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." *Henry*, 701 N.W.2d at 692. The court emphasized that judicial deference to the legislative branch is particularly important when faced with medical monitoring claims in the context of environmental contamination, especially where the legislature has vested state agencies with authority to respond. *Id.* at 697-99.

> [H]owever much equity might favor lightening the economic burden now borne by parties exposed to dioxin in the Tittabawassee flood plain, we have no assurance that a decision in plaintiffs' favor—which would create a hitherto unrecognized cause of action with a potentially limitless class of plaintiffs—will not wreak enormous harm on Michigan's citizens and its economy. Such a decision necessarily involves a drawing of lines reflecting considerations of public policy, and a judicial body is ill-advised to draw such lines.

Id. at 696-97. The North Carolina Court of Appeals, refusing to recognize a cause of action for medical monitoring absent present injury in a case involving groundwater contamination, agreed. "[B]alancing the humanitarian, environmental, and economic factors implicated by these issues is a task within the purview of the legislature and not the courts." *Curl v. American Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. 2007).

Notably, Congress has routinely established statutory causes of action that do not allow compensation for medical monitoring claims. *See Buckley*, 521 U.S. at 441-44 (1997) (FELA); *June v. Union Carbide Corp.*, 577 F.3d 1234, 1249-51 (10th Cir. 2009) (no medical monitoring with respect to nuclear radiation under

Price-Anderson Act); *Syms v. Olin Corp.*, 408 F.3d 95, 105 (2d Cir. 2005) (no medical monitoring as "response costs" under CERCLA).[14]

CONCLUSION

The clear trend in mainstream jurisprudence over the past fifteen years favors maintaining traditional limitations on recovery for tort damages. Numerous well-reasoned decisions by other state supreme courts caution against recognizing anticipatory claims for fear of cancer and medical monitoring by individuals who have no present injury or illness. For the reasons outlined above, this Court also should decline to recognize such claims.

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[14] Further, after the Louisiana Supreme Court recognized a cause of action for medical monitoring, the Louisiana Legislature disagreed by enacting legislation precluding recovery of costs for future medical services unless directly related to a manifest injury or disease. *See Henry*, 701 N.W.2d at 698 n.21 (quoting LA. CIV. CODE ANN. art 2315(b)).

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STATEMENT REGARDING FONT AND TYPE SIZE

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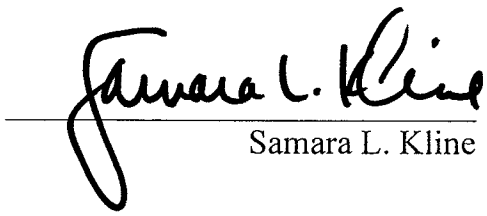

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