SUPREME COURT OF MISSISSIPPI
NO. 2006-FC-00771-SCT

GEORGE PAZ, BARBARA FACIANE, JOE LEWIS, DONALD JONES, ERNEST E. BRYAN, GREGORY CONDIFF, KARLA CONDIFF, ODIE LADNER, HENRY POLK, ROY TOOTLE, WILLIAM H. STEWART, JR., MARGARET ANN HARRIS, JUDITH A. LEMON, THERESA LADNER, AND YOLANDA PAZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

v.

BRUSH ENGINEERED MATERIALS, INC., BRUSH WELLMAN, INC., WESS-DEL, INC., AND THE BOEING COMPANY.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE MISSISSIPPI MANUFACTURERS ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

On the certified question of law from the Fifth Circuit Court of Appeals, No. 05-60157, in the appeal from the Order of the Honorable Louis Guirola, Jr. of the United States District Court for the Southern District of Mississippi in the action styled George Paz, Barbara Faciane, Joe Lewis, Donald Jones, Ernest E. Bryan, Gregory Condiff, Karla Condiff, Odie Ladner, Henry Polk, Roy Tootle, William H. Stewart, Jr., Margaret Ann Harris, Judith A. Lemon, Theresa Ladner, and Yolanda Paz, individually and on behalf of all others similarly situated v. Brush Engineered Materials, Inc., Brush Wellman, Inc., Wess-Del, Inc., and the Boeing Company, No. 1:04cv597.

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v.

BRUSH ENGINEERED MATERIALS, INC., BRUSH WELLMAN, INC., WESS-DEL, INC., AND THE BOEING COMPANY.

MOTION OF THE MISSISSIPPI MANUFACTURERS ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES

Pursuant to Mississippi Rule of Appellate Procedure 29, the Mississippi Manufacturers Association (MMA), Coalition for Litigation Justice, Inc. (Coalition), National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), American Chemistry Council (ACC), National Association of Mutual Insurance Companies (NAMIC), Property Casualty Insurers Association of America (PCI), American Tort Reform Association (ATRA), Chamber of Commerce of the United States of America (U.S. Chamber), Pharmaceutical Research and Manufacturers of America (PhRMA), and National Association of Manufacturers (NAM)—collectively "*amici*"—hereby move for leave to file the accompanying brief in support of Defendants-Appellees in the above-captioned case. In support of their motion, *amici* state as follows:

1. *Amici* urge this Court to follow the guidance from the United States Supreme Court and state courts of last resort that have recently considered—and rejected—claims for medical monitoring absent a present physical injury.

2. As organizations that represent companies doing business in Mississippi and their insurers, *amici* have a substantial interest in ensuring that Mississippi's tort liability system is fair, follows traditional tort law principles, and reflects sound public policy. In that regard, our brief would explain how adoption of the theory urged by plaintiffs would turn traditional tort law on its head and have serious adverse consequences for Mississippi's courts, the state's businesses and economic environment, and the truly sick. We intend to bring this Court's attention to issues that go beyond those likely to be raised by the parties.

3. For more than fifty years, the MMA has been the Voice of Industry in the Magnolia State. Industry is the engine that powers Mississippi's economy. The MMS works to eliminate unfair, unnecessary, or costly burdens on the operations of Mississippi's manufacturing community.

4. The Coalition is a nonprofit association formed by insurers to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort that may have a significant impact on the toxic tort litigation environment.

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[1] The Coalition for Litigation Justice includes ACE-USA companies, Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., General Reinsurance Corp., Liberty Mutual Insurance Group, and the Great American Insurance Company.

5. The NFIB Legal Foundation, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The 600,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

6. ACC represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

7. Founded in 1895, NAMIC is a full-service national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

8. PCI is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI

members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2004, PCI members accounted for 47.6% of the homeowners' insurance premiums in Mississippi, 57.8% of the personal automobile insurance policies issued in Mississippi and wrote $1,658,670,000 of direct written premiums in Mississippi. Seven PCI members are domiciled in Mississippi. In light of its involvement in Mississippi, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

9. Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

10. The U.S. Chamber is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

11. PhRMA represents the country's leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA companies are leading the way in the search for new cures. PhRMA members alone invested an estimated $39.4 billion in 2005 in

discovering and developing new medicines. Industry-wide research and investment reached a record $51.3 billion in 2005.

12. NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

13. For these reasons, *amici* request that the Court grant their Motion for Leave to file a brief in this case.

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STATEMENT OF INTEREST

As organizations representing companies doing business in Mississippi and their insurers, *amici* have a substantial interest in ensuring that Mississippi's tort law follows traditional legal principles and reflects sound public policy.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of the Defendants-Appellees.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than 200 years, a fundamental tort law principle has been that a plaintiff must have a present, actual injury to obtain a recovery. *See* William Prosser, *Handbook on the Law of Torts* § 54, at 330-33 (4th ed. 1971).[2] The courts have developed this filter to prevent a flood of claims, provide faster access to courts for those with reliable and serious claims, and ensure that defendants are held liable only for genuine harm. Medical monitoring claims brought by asymptomatic plaintiffs conflict with the traditional rule. *See* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999); Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349 (2005).

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[2] *See also* Restatement (Third) of Torts: Liab. Physical Harm § 4 (P.F.D. No. 1, 2005) ("'Physical harm' means the physical impairment of the human body"); *id.* at § 4 cmt. c ("A change in the physical condition of a person's body or property must be detrimental for the change to count as a harmful impairment."); Restatement (Second) of Torts § 7 cmt (e) (1965) ("The words 'physical harm' are used to denote physical impairment of the human body"). Mississippi applies the traditional rule. *See, e.g., Brewton v. Reichhold Chems., Inc.*, 707 So. 2d 618, 620 (Miss. 1998) ("Mississippi does not recognize a cause of action for fear of possibly contracting a disease"); *Beech v. Leaf Forest Prods., Inc.*, 691 So. 2d 446, 451 (Miss. 1997) (no cause of action for fear of future disease); *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 658 (Miss. 1996) ("claim based on fear of future disease is at best, premature."); *see also* Miss. Code Ann. § 15-1-49(2) (latent harm claim accrues when plaintiff discovered or should have discovered the "injury"); *Schiro v. Am. Tobacco Co.*, 611 So. 2d 962, 965 (Miss. 1992) (stating that before smoker developed cancer she "would have been asking for a remedy without a wrong," and holding action not time-barred by plaintiff's "belief that she might have cancer sometime later.").

Judicial adoption of medical monitoring claims would be likely to foster litigation, *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 (2002), and undermine this Court's work to improve Mississippi's legal climate. *See* Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C. L. Rev. 393 (2005). Almost everyone comes into contact with a potentially limitless number of materials that could be argued to warrant medical monitoring relief. *See* Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize*?, 27 Wm. Mitchell L. Rev. 521 (2000). Courts would be forced to decide claims that are premature (because there is not yet any physical injury) or actually meritless (because there never will be). The truly injured would be adversely impacted by the unsound diversion of resources to the non-sick. Courts would face the difficult and time-consuming task of developing a system for the administration of medical monitoring claims. If Mississippi were to decide to adopt such a system, the legislature is best suited for that task.

ARGUMENT

I. Traditional Tort Law and Sound Public Policy Do Not Support Plaintiffs' Request

The United States Supreme Court and numerous high courts throughout the country have recognized the inherent and intractable problems with court-created medical monitoring programs. The same reasoning that supported those courts' rejection of such programs applies here.

A. The United States Supreme Court Rejected Medical Monitoring Absent Injury

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the United States Supreme Court rejected a medical monitoring claim under the Federal Employers' Liability Act, which has been construed liberally in favor of plaintiffs. The Court considered the serious policy

concerns militating against adoption of "a new, full-blown tort law cause of action." *Id.* at 440. These policy concerns include the difficulty in identifying which medical monitoring costs exceed the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs. *See id.* at 441-42. Additionally, in reaching its decision, the Court considered that defendants would be subject to unlimited liability and a "flood of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury. *Id.* at 442. Finally, the Court rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative sources of monitoring are often available, such as employer-provided health plans. *See id.* at 443-44.

B. Four Consecutive State Supreme Courts Have Rejected Medical Monitoring Claims in the Absence of Physical Injury

The Alabama, Nevada, Kentucky, and Michigan Supreme Courts – the four most recent courts of last resort to consider the issue—all rejected medical monitoring absent physical injury.

The Alabama Supreme Court in *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001), rejected a medical monitoring claim brought by a claimant exposed to a toxin allegedly released into the environment: "To recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide"—a voyage on which the court stated it was "unprepared to embark." *Id.* at 830. After discussing a number of public policy concerns, such as a potential flood of claims that could swamp defendants, *see id.* at 831, the court concluded, "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to

alleviate [plaintiff's] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury or illness." *Id.* at 831-32.

In *Badillo v. American Brands, Inc.*, 16 P.3d 435, 438 (Nev. 2001), the Nevada Supreme Court rejected claims by smokers and casino workers who sought a court-supervised medical monitoring program to diagnose alleged tobacco-related illnesses. The court described medical monitoring as "a novel, non-traditional tort and remedy," *id.* at 441, and concluded that, "[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function." *Id.* at 440.

The Kentucky Supreme Court rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), where plaintiffs sought a court-supervised medical monitoring fund to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen" diet drug combination. The court stated that, "a cause of action in tort requires a present physical injury to the plaintiff." *Id.* at 852. "To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id.* at 853-54. The court concluded: "[t]raditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles." *Id.* at 859.

Most recently, the Michigan Supreme Court in *Henry v. The Dow Chemical Co.*, 701 N.W.2d 684, 689 (Mich. 2005), rejected a request to establish a medical screening program for possible negative effects from dioxin exposure. The court said that adoption of a medical monitoring cause of action would create a "potentially limitless pool of plaintiffs" and "could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." *Id.* The court concluded that recognition of medical monitoring was an issue not suitable for resolution by the judicial branch. *See id.* at 694-95.

Many other courts have come to the same conclusion,[3] including three courts that rejected medical monitoring in cases like this one.[4] Plaintiffs, on the other hand, primarily rely on cases that are distinguishable;[5] that are by intermediate appellate courts;[6] that have been criticized;[7] limited by subsequent decision[8] or superseded by statute;[9] or involved a plaintiff with an injury.[10]

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3 *See Goodall v. United Illuminating*, 1998 WL 914274 (Conn. Super. Ct. Dec. 15, 1998); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984); *Abusio v. Consol. Edison Co. of N.Y., Inc.*, 238 A.D.2d 454 (N.Y. App. Div. 1997), *leave to appeal denied*, 686 N.E.2d 1363 (N.Y. 1997); *Mead v. Aventis Pasteur, Inc.*, No. 0107-07137 (Multnomah County Cir. Ct., OR, Oct. 8, 2003); *Garcia v. Aventis Pasteur Inc.*, No. 01-2-27335-3-SEA (King County Super. Ct., WA, Apr. 7, 2003); *see also Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951 (7th Cir. 1995) (Ind. law); *Thompson v. Am. Tobacco Co., Inc.*, 189 F.R.D. 544 (D. Minn. 1999); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994); *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000) (Neb. law), *vacated on other grounds sub nom. Exxon Mobil Corp. v. Allapatah Servs.*, 125 S. Ct. 2611 (2005); *Carroll v. Litton Sys., Inc.*, 1990 WL 312969 (W.D.N.C. Oct. 29, 1990); *Mehl v. Canadian Pac. Ry.*, 2005 WL 1027158 (D.N.D. May 4, 2005); *Rosmer v. Pfizer*, 2001 WL 34010613 (D.S.C. Mar. 30, 2001); *Bostick v. St. Jude Med. Cent.*, 2004 WL 3313614 (W.D. Tenn. Aug. 17, 2004); *Ball v. Joy Tech., Inc.*, 958 F.2d 36 (4th Cir 1991) (Va. law), *cert. denied*, 502 U.S. 1033 (1992); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001); *Purjet v. Hess Oil Virgin Islands Corp.*, 1986 WL 1200 (D.V.I. Jan. 8, 1996); *cf.* La. Civ. Code Ann. art. 2315 (West 2005).

4 *See Jones v. Brush Wellman, Inc.*, 2000 WL 33727733 (N.D. Ohio Sept. 13, 2000); *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290 (N.D. Ga. 2005); *Generoux v. Am. Beryllia Corp.*, No. 04-12137 JLT (D. Mass. May 12, 2005).

5 *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), involved a traumatic physical impact, or the presence of a physical symptom, from an airplane crash. The case does not support medical monitoring to detect the onset of latent injury for a potentially indefinite pool of asymptomatic individuals exposed over an extended period.

6 *See Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1988), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Petito v. A.H. Robins Co.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 1999), *review denied*, 780 So. 2d 912 (Fla. 2001); *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 (Ill. App. Ct. 2003).

7 *See Bower v. Westinghouse Corp.*, 522 S.E.2d 424, 434-36 (W. Va. 1999) (Maynard, J., dissenting); *Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 886 (W. Va. 2005) (Albright, C.J., concurring); *see also Monitoring: With Bad Law, the Supreme Court Is Threatening the State's Economy*, Charleston Daily Mail, Oct. 19, 1999, at 4A, *available at* 1999 WLNR 755567.

8 *Compare Bocook v. Ashland Oil Co.*, 819 F. Supp. 530, 537 n.9 (S.D. W. Va. 1993) (court opposed to medical monitoring but predicted Kentucky Supreme Court would allow it), with *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 852 (Ky. 2002) (rejecting medical monitoring); *see also Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987), *limited by Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993) (medical monitoring plaintiffs must prove injury resulting from direct exposure to a toxic substance); *Sinclair v. Merck & Co.*, 2005

(Footnote continued on next page)

II. Medical Monitoring Would Be Likely to Lead to a Flood of Claims, Depleting Resources that Should Go to the Sick

Adoption of medical monitoring for the non-sick would be likely to lead to a flood of claims,[11] because "we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances. . . ." Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 130 (1995). As the United States Supreme Court recognized, "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure related monitoring." *Metro-North*, 521 U.S. at 440.[12] Plaintiffs' lawyers could basically begin recruiting people off

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WL 1278364, *8 (N.J. Super. Ct. Law Div. May 19, 2005) (rejecting prescription drug medical monitoring class because "*Ayers*, as clarified by *Theer*, was not meant to extend to all products liability actions" and "medical monitoring is a remedy that is not easily invoked.").

9 *See Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 360-62 (La. 1998), *limited by* 783 So. 2d 1251 (La. 2001) (amended La. Civ. Code art. 2315 abolished medical monitoring absent physical injury for claims accruing after July 9, 1999).

10 *See Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313, 323 (D. Conn. 2002) ("The court accepts [plaintiff's] representation and does not construe [plaintiff's] complaint and subsequent pleadings as requesting medical monitoring based on exposure as the sole injury and cause of action.").

11 This occurred in West Virginia and Louisiana after those high courts adopted medical monitoring. *See Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 887 (W. Va. 2005) (Starcher, J., concurring) ("we have dumped an additional pile of medical monitoring cases into the circuit judge's lap."); *In re Tobacco Litig. (Medical Monitoring Cases)*, 600 S.E.2d 188 (W. Va. 2004) (affirming verdict denying medical monitoring claim in class involving some 270,000 present and former West Virginia smokers); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003) (medical monitoring class of approximately 5,000 users of drug); *State ex rel. E.I. DuPont de Nemours & Co. v. Hill*, 591 S.E.2d 318 (W. Va. 2003) (blood tests to approximately 50,000 individuals possibly exposed to material used to make fluoropolymers); *Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. Ct. App. 1999) (medical monitoring class action by seamen exposed to asbestos); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10 (La. Ct. App. 1998) (medical monitoring class of Louisiana cigarette smokers), *writ denied*, 731 So. 2d 189 (La. 1999); *Johnson v. Orleans Parish School Bd.*, 790 So. 2d 734 (La. Ct. App. 2001), *writ denied*, 801 So. 2d 378 (La. 2001) (medical monitoring class arising from plaintiffs' exposure to contaminated soils).

12 "Some 40 million persons—nearly 20 percent of the U.S. population—live within four miles of a hazardous waste site on the EPA's National Priority List, and eight out of ten Americans live near some type of hazardous waste site." Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 Colo. Law. 1533, 1533 (1994).

the street to serve as plaintiffs. *See* Victor E. Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now*!, USA Today, July 5, 1999, at A17. The Texas Supreme Court also has observed, "[i]f recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk." *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999).

The practical effect would be to facilitate recoveries for individuals who have no injury and may never become sick at the expense of the sick and dying and their families.[13] The asbestos litigation environment vividly illustrates this problem. Even though claimants are supposed to have an injury to bring a claim, the standards have become so permissive in many jurisdictions that up to ninety percent of asbestos claimants are not impaired. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 342 (2002).[14] Mass filings by the non-sick have pushed scores of employers into bankruptcy and threaten payments to the sick. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled*

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13 *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), *aff'd sub. nom. Ball v. Joy Tech., Inc.*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) ("There must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.").

14 Professor Lester Brickman has said, "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by the unimpaired. 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).

More Claims, 71 Miss. L.J. 531 (2001).[15] If medical monitoring could be obtained by the "[t]ens of millions of Americans [who] were exposed to asbestos in the workplace over the past several decades," the result could be devastating for the courts, defendant businesses, and deserving claimants with real injuries. Stephen J. Carroll et al., *Asbestos Litigation* 2 (RAND Inst. for Civil Justice 2005).

For instance, the Manville trustees report that a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6. The Trust is now paying out *five cents on the dollar* to asbestos claimants. The Celotex and Eagle-Picher Settlement Trusts also have cut payments to claimants. *See* Mark Goodman et al., Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, Nat'l L.J., Apr. 1, 2002, at B14.

Cancer victims now fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. In fact, some lawyers who primarily represent cancer victims have been highly critical of other plaintiffs' lawyers who file claims on behalf of the non-sick.

- Peter Kraus of Dallas: The non-sick are "sucking the money away from the truly impaired." Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1.

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[15] *See also Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 9 (Mich. 1986) ("discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers."); *In re Asbestos Prod. Liab. Litig. (No. VI)*, 2002 WL 32151574, *1 (E.D. Pa. Jan. 16, 2002) ("Oftentimes these suits are brought on behalf of individuals who are asymptomatic. . . . Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.").

- Matthew Bergman of Seattle: "[T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims." Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer, May 30, 2002, at B7, *available at* 2002 WLNR 2149929.
- Steve Kazan of Oakland: "It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them." *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan).

Adoption of medical monitoring would exacerbate these problems to the detriment of the sick.[16]

III. Courts Are Not Equipped to Answer the Many Questions Involved in Medical Monitoring Claims; the Matter Should Be Decided by the Legislature

Courts are suited to adjudicate disputes concerning discrete issues and parties. The development of an effective legal scheme for medical monitoring, however, involves a number of complex scientific, medical, and economic questions that a court is not designed to consider. The legislature, with its information-gathering ability, prospective treatment of new laws, and broad perspective, is better equipped to make far-reaching changes in the law.[17]

The myriad issues that must be addressed in developing such a system include the types of health conditions that may be monitored; the likelihood that monitoring will detect the

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16 *See Bower*, 522 S.E.2d at 435 (Maynard, J., dissenting) (adopting medical monitoring would "make almost every [Mississippian] a potential plaintiff. . . . Those who work in heavy industries such as coal, oil, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder linens in hotels have, no doubt, come into contact with hazardous substances. . . . [A]ll of these people may be able to collect money as victorious plaintiffs, without any showing of injury at all.").

17 *See* D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 Wm. Mitchell L. Rev. 1095, 1129 (2006) (urging courts to reject medical monitoring absent injury as issue is best suited for the legislature); Carey C. Jordan, Note, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 Hous. L. Rev. 473, 496 (1996) (same).

existence of disease and the adverse consequences that false positives may bring;[18] the types of substances and the level of exposure to those substances that may trigger the need for medical monitoring; the level of increased risk of an adverse health condition that may trigger monitoring and the measure of that increase; the types of tests to be used in monitoring; the potential medical, scientific, and economic downsides to medical monitoring, including the effect of such awards on job growth and the economy; the structure of the continuing administration of each patient's monitoring program; and whether recognition of medical monitoring may threaten adequate and timely compensation to the truly sick.

A. Courts Cannot Effectively Determine the Health Conditions for Which Medical Monitoring Should Be Available

When courts make bright-line rules allowing medical monitoring of all types of health conditions, they disregard the critical medical understanding that medical monitoring is only appropriate for curable or treatable conditions. Such decisions display a critical misunderstanding of the purpose of medical monitoring and illustrate that courts do not have access to all the information that is needed to make sound decisions about appropriate medical monitoring.[19]

Courts that allow medical monitoring claims must make scientific and medical decisions about which treatment is proper for specific plaintiffs. In some cases, plaintiffs' lawyers deluge

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[18] The risks of medical monitoring include "[f]alse positives [that] can devastate patients and their families." Schwartz et al., *The Right Way and the Wrong Way*, *supra*, at 356-57; *see also* Edward F. Patz, Jr., Editorial, *Lung Cancer Screening, Overdiagnosis Bias, and Reevaluation of the Mayo Lung Project*, 98 J. Am. Cancer Inst. 724, 724-25 (June 7, 2006) (noting problem of overdiagnosis bias in lung cancer screening and stating that, despite the substantial resources spent in screening for lung cancer, "none of these studies have shown a reduction in lung cancer mortality"—"the overall goal of a screening program.").

[19] *See Henry*, 701 N.W.2d at 699 (courts do not possess the "technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry and environmental science").

the court with a battery of diagnostic tests they would like to see the court allow for their clients.[20] Critics have suggested that "[t]he all-too-transparent method behind this madness is to inflate as much as possible the cost of yearly monitoring per plaintiff so as to maximize plaintiffs' damage award and their attorneys' contingent fees." Thomas M. Goutman, *Medical Monitoring: How Bad Science Makes Bad Law* 15 (2001). Courts must then decipher which of these suggested tests to channel the plaintiff toward by "[s]crutiniz[ing] the clinical efficacy of the [suggested diagnostic tests], and in some cases, even the treatments planned to follow identification of disease." David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890. Adding complexity, this determination may change over time with emerging cures and treatments for current diseases and with the introduction of new types of diseases.

Furthermore, "courts are limited to a 'battle of the experts' to determine the 'confusing, highly technical presentation of scientific evidence' in toxic tort cases." Schwartz et al., *Should Tort Law Say Yes?*, *supra*, at 1072; *see also* Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 Rev. Litig. 551, 568 (1998).[21] In contrast, legislatures are well-equipped to reach fully informed decisions by having complete access and ability to consider all such information.

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[20] For example, the plaintiffs in *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444 (3d Cir. 1997), requested the following tests for feared PCB exposure: amniocentesis, developmental and achievement testing, electrocardiography, pulmonary function tests, mammography, sigmoidoscopy, urine cytology, sputum cytology, basic immunotoxicology panel, chromosomal analysis, complete optomologic evaluation, complete cardiovascular evaluation, complete neurological evaluation, complete gastrointestinal evaluation, PCV detoxification, urinalysis, PSA, CBC, urine porphyrin, and male fertility evaluation. *See* Schwartz et al., *The Right Way and the Wrong Way,* at 377 n.171.

[21] Plaintiffs' argument that this Court should import the Department of Energy's regulatory standard for occupational beryllium exposure as the basis for a tort law cause of action is flawed. Administrative agencies, particularly those dealing with health and safety matters, ordinarily

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B. Courts Cannot Effectively Determine the Criteria that Should Apply to Allow Medical Monitoring in a Given Case

Recognition of a medical monitoring claim would require courts to detail the criteria for when recovery is allowed, since open-ended recovery would deluge the courts with claims. The enormity of potential claims requires a thorough study of who should be eligible for medical monitoring, and under what conditions. In an attempt to confine claims, courts that have permitted recovery for medical monitoring have established certain threshold criteria for these claims, but they have not demonstrated an ability to articulate consistent eligibility requirements for medical monitoring.[22]

A review of the different approaches taken by states illustrates the difficulty in developing a new remedy. *See, e.g., Bower*, 522 S.E.2d at 432-33 (plaintiff only has to show that "he or she has, relative to the general population, been significantly exposed" and "is not required to show that a particular disease is certain or even likely to occur as a result of exposure."); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145 (Pa. 1997)

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apply the so-called "precautionary principle" in evaluating potential harm and associated remedies. This principle applies the most conservative assumptions in an effort to avoid even the most remote possibility of harm. In contrast, courts are limited by doctrines, like standing, to providing relief to plaintiffs demonstrably injured by a defendant's behavior. This is not an inequitable result, but simply a recognition that under our system of jurisprudence, courts exist to remedy discrete wrongs and not to impose prophylactic remedies more suitable for administrative bodies. *See, e.g., Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996) (explaining that agencies make "prophylactic rules . . . to reduce public exposure to harmful substances. The agencies' threshold of proof is reasonably lower than that appropriate in tort law...."); *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1201 (11th Cir. 2002) (regulatory agency analysis "involves a much lower standard than that which is demanded by a court of law.").

22 *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824-25 (Cal. 1993) (five criteria for plaintiffs to satisfy); *Bower*, 522 S.E.2d at 433 (six criteria); *Bourgeois*, 716 So. 2d at 360-61 (seven criteria); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (eight criteria). When courts set forth generalized factors, they often do not specify whether each element must be separately established or whether all factors should be weighed together.

(plaintiff must show a "significantly increased risk of contacting serious latent disease" as a result of "exposure [to] greater than normal background levels."); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998) (plaintiff must demonstrate "a reasonable certainty of contracting a disease in the future.").

States also have different standards for what medical basis is required for a medical monitoring claim. *See, e.g., Bower*, 522 S.E.2d at 433 (medical monitoring can be "based, at least in part, on a plaintiff's subjective desires . . . for information concerning the state of his or her health."); *Redland Soccer Club*, 696 A.2d at 146 ("prescribed monitoring regime [must be] reasonably necessary according to contemporary scientific principles."). Legislatures are best equipped to consider these issues.

C. Issues of Collateral Benefits, Workers' Compensation, and Insurance Coverage Support Legislative Consideration

In addition to these issues, medical monitoring claims raise several other important issues that are board in scope and best suited for legislative consideration. These include accounting for the substantial overlap with third-party payment plans.[23] Most Americans are already eligible for monitoring through employer-provided health plans or other sources.[24] Medical monitoring could entail systemic costs without corresponding benefits if recovery were allowed "irrespective of the presence of a 'collateral source.'" *Metro-North*, 521 U.S. at 443.

Medical monitoring claims in the workplace setting also could fall outside of the workers' compensation system, which could subject employers to endless liability. Generally,

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23 In *Friends for All Children*, a case upon which most courts rely when recognizing medical monitoring, the court found that the claims of the French plaintiffs would not be covered by their health care system. *See id.* at 822 n.7.

24 Approximately 80% of all standard medical testing is paid for by third party insurance. *See* Am. Law Inst., 2 *Enter. Responsibility for Pers. Injury—Reporters' Study* 379 (1991).

workers' compensation systems afford the exclusive remedy for an injured worker, but sometimes an exception is recognized for harms that fall outside the scope of the workers' compensation statute. *See* Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Desk Edition* § 100.01 (2000). And adoption of medical monitoring could raise issues with regard to the availability of Commercial General Liability coverage that may require a present bodily injury. These issues are best explored by the legislature.

D. A Court-Administered Fund Would Tie Up Judicial Resources

Finally, the legislature could explore the best way to make sure that any funds available for monitoring would actually be used for that purpose. Here, plaintiffs apparently recognize that "the potential for abuse is apparent," 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, 283 (1993), when medical monitoring is awarded in lump-sum,[25] because they are seeking a court-administered fund. Once a medical monitoring precedent is established, however, there is no assurance that the remedy will be so limited. Plaintiffs' approach also would be likely to create high, ongoing costs for the courts.[26]

For instance, devising a sound medical monitoring plan would require, at a minimum, specifying the nature and amount of benefits available, the source of funding and funding allotments, the procedures for determining eligibility for monitoring, the payment mechanism for

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[25] *See* Maskin, *supra* at 540 ("The incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible. The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation.").

[26] *See Henry*, 701 N.W.2d at 698-99 ("the day to day operation of a medical monitoring program would necessarily impose huge clerical burdens on a court system, lacking the resources to effectively administer such a regime."); *see also* Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on This Trend?*, 70 Def. Counsel J. 315 (2003).

the provider and the percentage of provider reimbursement, when eligible parties may join the program, the length of time the program should last, the frequency of any periodic monitoring and the circumstances in which the frequency can be changed to allow special monitoring, the content of the monitoring exams, whether the facility testing will be formal or informal, and whether the service provider is to be designated by the court or chosen by the claimant. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-72 (1994). Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments, particularly if the program's designers erroneously estimate funding needs or the number of eligible participants.[27] The legislature is better suited to create proper parameters and allocate resources to scrutinize funds designated for medical monitoring.

CONCLUSION

For these reasons, *amici curiae* ask this Court to hold that Mississippi does not recognize medical monitoring absent physical injury and dismiss Plaintiffs' claims as a matter of law.

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27 *See Petito*, 750 So. 2d at 107 ("Doubtless many perplexing questions will arise in the administration of such a program.").

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PROOF OF SERVICE

I certify that on August 21, 2006, an original and four copies of the foregoing Motion and Brief were served on the Court via overnight mail, postage prepaid, addressed to the Clerk.

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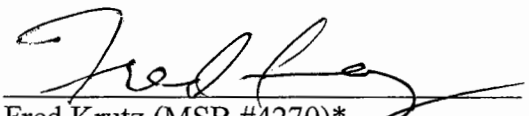

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