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## Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive

Mark A. Behrens

*Shook, Hardy & Bacon L.L.P.*, Mark.Behrens@shb.net

Christopher E. Appel

Chris.Appel@shb.net

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**MEDICAL MONITORING IN MISSOURI AFTER *MEYER ex rel. COPLIN v. FLUOR CORP.*: SOUND POLICY SHOULD BE RESTORED TO A VAGUE AND UNSOUND DIRECTIVE**

MARK A. BEHRENS\* AND CHRISTOPHER E. APPEL\*\*

INTRODUCTION

Historically, the Missouri Nonpartisan Court Plan has been a national model for selecting a judiciary that is not only independent but also fair and balanced.<sup>1</sup> A recent decision from the Missouri Supreme Court, however, may cause some to question whether that balance is at risk of being lost in the area of tort law.<sup>2</sup>

In *Meyer ex rel. Coplin v. Fluor Corp.*,<sup>3</sup> the Missouri Supreme Court held that plaintiffs with no present physical injury may recover medical monitoring as an item of compensable damages when liability is established under a traditional tort law theory of recovery. Medical monitoring claims seek to recover the anticipated costs of long-term diagnostic testing to detect the onset

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\* Mark A. Behrens is a partner in the Washington, D.C.-based Public Policy Group of Shook, Hardy & Bacon L.L.P. He received his B.A. in Economics from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University Law School in 1990, where he was a member of the *Vanderbilt Law Review*. The author acknowledges the support of Altria Group, Inc. in connection with the preparation of this article, however, the views discussed herein are solely those of the author as a scholar of tort law and from his work as counsel in numerous *amicus* briefs filed on behalf of national business organizations in medical monitoring appeals before state courts of last resort.

\*\* Christopher E. Appel is an attorney in the Washington, D.C.-based Public Policy Group of Shook, Hardy & Bacon L.L.P. He received a B.S. from the University of Virginia's McIntire School of Commerce with a double concentration in Finance and Marketing and an additional Economics degree from the College in 2003. He received his J.D. from Wake Forest University School of Law in 2006.

1. See generally Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273 (2002) (promoting appointive judicial selection systems over state judicial elections).

2. See Donna Walter, *Group Releases 'Judicial Hellholes' Report for 2007*, DAILY REC. (KANSAS CITY, MO.), Dec. 19, 2007, available at 2007 WLNR 25185325 (reporting that the Missouri Supreme Court received a "dishonorable mention" by the American Tort Reform Foundation in its 2007 list of judicial "hellholes").

3. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007).

of disease from exposure to a toxic substance.<sup>4</sup> The *Meyer* court also held that the potential harmful exposure at issue, namely, lead emitted from defendant's smelting plant—because it came from a single source—was enough to satisfy the requirements for class certification under Missouri law.<sup>5</sup> *Meyer* has been listed by one of the nation's foremost plaintiffs' class action attorneys as one of the "top ten" decisions of 2006-2007.<sup>6</sup>

This Comment will discuss the *Meyer* opinion in detail and provide suggestions for lower courts that may be faced with answering the many questions raised by the court's vague directive. If serious problems emerge with respect to the Missouri Supreme Court's approach, not only will the court's historically solid reputation suffer, but the "Missouri Plan" itself may come under greater attack.<sup>7</sup>

### I. MEYER EX REL. COPLIN V. FLUOR CORP.

#### A. *The Meyer Opinion*

*Meyer* involved a medical monitoring class action filed by over 200 children allegedly exposed to lead released into the environment by defendant's smelter.<sup>8</sup> Plaintiffs sought compensatory damages to establish a medical monitoring program to obtain ongoing diagnostic testing to determine

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4. *Id.* at 716.

5. *Id.* at 719.

6. Elizabeth J. Cabraser, *Top Ten Class Action Decisions of 2006-2007*, in *Civil Practice and Litigation Techniques in Federal and State Courts* (ALI-ABA Course of Study July 11-13, 2007).

7. For recent articles discussing a broader debate that is occurring over the Missouri Plan, see, e.g., Amanda Bronstad, *State's Judicial Nomination Process Threatened*, NAT'L L.J., Aug. 20, 2007, at 6; *Former Missouri Supreme Court Justices Defend Court Plan*, KAN. CITY STAR, Aug. 14, 2007, at D11, available at 2007 WLNR 15670101; Bill Graham, *Commentary, Missouri Judiciary Is at Stake*, KAN. CITY STAR, Aug. 15, 2007, at 2, available at 2007 WLNR 15753211; Scott Lauck *et al.*, *And Then There Were 3: Supreme Court Selections Spark New Attacks on Non-Partisan Plan*, MO. LAW. WKLY., July 30, 2007, at 1, available at 2007 WLNR 14696317; Scott Lauck, *Best-Laid Plan*, MO. LAW. WKLY., Sept. 3, 2007, at 1, available at 2007 WLNR 17301307; Bill McLellan, *Editorial, Nonpartisan Court Plan May Not Be So Nonpartisan*, ST. LOUIS POST-DISPATCH, July 27, 2007, at C1, available at 2007 WLNR 14429233; Laura Denver Stith, *Address at the Missouri Bar and the Judicial Conference of Missouri Annual Meeting* (Sept. 27, 2007), in MO. LAW. WKLY., Oct. 1, 2007, at 8-9, available at 2007 WLNR 22561813; Kelly Wiese, *Missouri Court Plan Reform Sought for '08 Ballot*, DAILY REC. (KANSAS CITY, MO.), Nov. 13, 2007, at 1, available at 2007 WLNR 22561313; Virginia Young, *Chief Justice Defends Missouri's Judge Selection Process*, ST. LOUIS POST-DISPATCH, Sept. 12, 2007, at C4, available at 2007 WLNR 17810551.

8. *Meyer*, 220 S.W.3d at 714.

whether exposure to lead and other toxins from defendant's plant had caused or was in the process of causing an injury or illness.<sup>9</sup>

As a threshold matter, the court had to determine whether Missouri permits a medical monitoring action or remedy for plaintiffs with no present physical injury. 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.<sup>10</sup> At times, this bright line rule may seem harsh, but courts 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 objectively verifiable, genuine harm.<sup>11</sup> As explained below, the United States Supreme Court, most recent state courts of last resort, and numerous other state and federal courts have rejected medical monitoring claims absent physical injury. Some courts, however, have permitted a medical monitoring action or remedy as an exception to the traditional physical injury rule.<sup>12</sup>

The *Meyer* court chose to align itself with courts that have permitted medical monitoring. The court suggested that the "widely recognized tort law concepts premised upon a present physical injury are ill-equipped to deal with cases involving latent injury,"<sup>13</sup> because "a physical injury requirement essentially extinguishes the claim and bars the plaintiff from a full recovery."<sup>14</sup> The court held that medical monitoring is "a compensable item of damage when liability is established under traditional theories of recovery."<sup>15</sup> To recover medical monitoring damages in Missouri, a plaintiff must show "a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure."<sup>16</sup> Once this baseline requirement has been proved, the plaintiff must show that "medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease."<sup>17</sup>

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9. *Id.*

10. See WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS § 54, at 330–33 (4th ed. 1971); see also RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 4 (Tentative Draft No. 5, 2007) ("Physical harm" means the physical impairment of the human body. . . ."); RESTATEMENT (SECOND) OF TORTS § 7 cmt. e (1965) ("The words 'physical harm' are used to denote physical impairment of the human body").

11. See PROSSER, *supra* note 10, at 21.

12. *Meyer*, 220 S.W.3d at 716 n.3.

13. *Id.* at 716.

14. *Id.* at 718.

15. *Id.* at 717.

16. *Id.* at 718 (quoting *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 433 (W.Va. 1999)). See generally Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975, 1980–81 (2002) (providing examples of when absolute or relative risk may be deemed "significant" enough to support imposition of liability for medical monitoring costs).

17. *Meyer*, 220 S.W.3d at 718 (quoting *Bower*, 522 S.E.2d at 431).

Next, the court held that exposure to a set of toxins from a single source was sufficient to permit class certification. The court said that individual factors, such as the intensity or duration of exposure, were “not particularly relevant because the need for monitoring is based on a common threshold of exposure.”<sup>18</sup> In contrast, “the majority of courts that have addressed certification for medical monitoring claims have rejected class treatment.”<sup>19</sup>

Finally, a majority of the court rejected the contention of several dissenting justices that the class should not have been certified because the proposed representative plaintiff was atypical of the class members.<sup>20</sup> The proposed class representative had filed an individual lawsuit to recover for an actual injury, not medical monitoring. Thus, the dissenting justices argued, the proposed representative plaintiff’s claims were not only dissimilar to those of the class seeking medical monitoring, but actually in conflict.<sup>21</sup> The majority swept these concerns aside, asserting that any such problem could be corrected on remand through substitution of parties.<sup>22</sup>

*B. The Meyer Opinion is Out of Step with Recent Medical Monitoring Decisions*

The *Meyer* court suggested that its decision to discard the traditional physical injury requirement and allow recovery of medical monitoring damages by asymptomatic plaintiffs fell within the legal mainstream. The court said, “tort law has evolved over the years to allow plaintiffs compensation for medical monitoring.”<sup>23</sup> To support its conclusion, the court relied upon questionable dictum in a Nevada case suggesting that a medical monitoring remedy may be available in that state, but not deciding the issue (while actually rejecting medical monitoring as a cause of action);<sup>24</sup> a

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18. *Id.* at 719.

19. Beko Reblitz-Richardson, Note, *Lockheed Martin and California’s Limits on Class Treatment for Medical Monitoring Claims*, 31 *ECOLOGY L.Q.* 615, 625 (2004); see also P. Campbell & Michelle I. Schaffe, *Request for Class Action Certification of Medical Monitoring Claims*, 63 *DEF. COUNS. J.* 26, 27–28 (1996) (“Because medical monitoring claims involve numerous individualized issues, many courts have found that they cannot efficiently or fairly be adjudicated on a class action basis.”).

20. *Meyer*, 220 S.W.3d at 719; see also *id.* at 720–21 (Price, J., dissenting and Russell, J., concurring in the dissent); *id.* at 721 (Limbaugh, J., dissenting).

21. See *id.* at 720–21 (Price, J., dissenting and Russell, J., concurring in the dissent); *id.* at 721 (Limbaugh, J., dissenting).

22. See *id.* at 719–20 (majority opinion).

23. *Id.* at 716.

24. See *id.* at 716 n.3 (citing *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001)). But see *Badillo*, 16 P.3d at 441 (“[W]e hold that Nevada common law does not recognize a cause of action for medical monitoring. A remedy of medical monitoring may be available for an underlying cause of action, but neither party has briefed the issue nor set forth the cause of action to which it would provide a remedy.”).

Louisiana case that was subsequently overruled by statute,<sup>25</sup> a West Virginia case that has been criticized;<sup>26</sup> a Tennessee case that did not involve medical monitoring (while failing to note more recent cases predicting that Tennessee would not allow medical monitoring recoveries by asymptomatic plaintiffs),<sup>27</sup> a New Jersey case limited by subsequent decision,<sup>28</sup> a Connecticut case examining a workers' compensation statute (while failing to note that medical monitoring was rejected in two subsequent unreported tort cases);<sup>29</sup> and opinions by intermediate appellate courts.<sup>30</sup> The court also cited cases decided

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25. See *Meyer*, 220 S.W.3d at 716 n.3 (citing *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355 (La. 1998)). Soon after *Bourgeois* was decided, the legislature "overruled" the court's decision and abolished medical monitoring absent physical injury. See LA. CIV. CODE ANN. art. 2315 (2007).

26. See *Meyer*, 220 S.W.3d at 716 n.3 (citing *Bower v. Westinghouse Corp.*, 522 S.E.2d 424 (W. Va. 1999)). But see *Bower*, 522 S.E.2d at 434-36 (Maynard, J., dissenting).

27. See *Meyer*, 220 S.W.3d at 716 n.3 (citing *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431 (Tenn. 1982) (couple could recover mental anguish for ingesting indefinite amount of a harmful substance)). But see *Jones v. Brush Wellman, Inc.*, No. 1:00 CV 0777, 2000 WL 33727733, at \*8 (N.D. Ohio 2000) (unreported) ("It is clear that under Tennessee law, a plaintiff must allege a present injury or loss to maintain an action in tort. No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury."); *Bostick v. St. Jude Med., Inc.*, No. 03-2626 BV, 2004 WL 3313614, at \*14 (W.D. Tenn. Aug. 17, 2004) (unreported) ("[A] review of the applicable case law reveals that Tennessee does require a present injury.").

28. See *Meyer*, 220 S.W.3d at 716 n.3 (citing *Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987)). *Ayers* was limited by *Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993) (requiring that medical monitoring plaintiffs must prove injury resulting from direct exposure to a toxic substance); see also *Vitanza v. Wyeth, Inc.*, 2006 WL 462470, at 6-7 (N.J. Super. Jan. 24, 2006) (unpublished) (holding that medical monitoring was derived for environmental tort actions and is not appropriate in a product liability consumer fraud case). But see *Sinclair v. Merck & Co., Inc.*, 913 A.2d 832, 842 (N.J. Super. Ct. App. Div.) (denying motion to dismiss until evidential foundation is developed to evaluate plaintiff's claims in light of *Ayers*), cert. granted, 921 A.2d 446 (N.J. 2007).

29. See *Meyer*, 220 S.W.3d at 716 n.3 (citing *Doe v. City of Stamford*, 699 A.2d 52 (Conn. 1997)). But see *Goodall v. United Illuminating*, No. X04CV 950115437S, 1998 WL 914274, at \*10 (Conn. Super. Ct. Dec. 15, 1998) (unreported) (holding that medical monitoring damages could not be recovered when plaintiffs demonstrated no physical manifestation of an asbestos-related disease, distinguishing *Doe*); *Bowerman v. United Illuminating*, No. X04CV 94011536S, 1998 WL 910271, at \*10 (Conn. Super. Ct. Dec. 15, 1998) (unreported) (same). Cf. *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.").

30. See *Meyer*, 220 S.W.3d at 716 n.3 (citing *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. App. 1988), review dismissed, 781 P.2d 1373 (Ariz. 1989); *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (N.Y. App. 1984)); see also *id.* at 718 (citing *Petito v. A.H. Robins Co.*, 750 So. 2d 103 (Fla. App. 1999), review denied, 780 So. 2d 912 and 780 So. 2d 916 (Fla. 2001)). *Askey* has been followed in New York, see *Patton v. General Signal Corp.*, 984 F. Supp. 666, 674 (W.D.N.Y. 1997); *Gibbs v. E.I. DuPont de Nemours & Co., Inc.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995); *Gerardi v. Nuclear Util. Servs., Inc.*, 566 N.Y.S.2d 1002, 1004 (N.Y. Sup. Ct.

prior to the United States Supreme Court's landmark opinion in *Metro-North Commuter R.R. Co. v. Buckley*,<sup>31</sup> which rejected medical monitoring for asymptomatic Federal Employees' Liability Act (FELA) plaintiffs.<sup>32</sup>

In *Buckley*, the Supreme Court ruled 7–2 against allowing negligent infliction of emotional distress or medical monitoring claims brought by an asymptomatic pipefitter against his employer for occupational exposure to asbestos under the FELA, a statute that has often been construed in favor of plaintiffs.<sup>33</sup> The Court concluded that a worker “cannot recover unless, and until, he manifests symptoms of disease.”<sup>34</sup> The Court carefully considered the policy concerns militating against adoption of a medical monitoring cause of action, including the difficulty in identifying which medical monitoring costs are over and above 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.<sup>35</sup> The Court appreciated that medical monitoring would permit literally “tens of millions of individuals” to justify “some form of substance-exposure-related medical monitoring.”<sup>36</sup> The Court also rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because

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1991), but may be limited. See *Abusio v. Consolidated Edison Co. of N.Y., Inc.*, 656 N.Y.S.2d 371, 372 (N.Y. App. Div.) (requiring a showing of clinically demonstrable presence of toxins in the plaintiff's body or some indication of exposure-related disease to establish “reasonable basis” for recovery of medical monitoring costs), *leave denied*, 664 N.Y.S.2d 268 (N.Y. 1997); *Jones v. Utils. Painting Corp.*, 603 N.Y.S.2d 546, 546–47 (N.Y. App. Div. 1993) (holding that plaintiffs could not recover medical monitoring absent specific allegation of actual exposure to asbestos at toxic levels given that plaintiffs still in employ of defendant were receiving medical monitoring under the federal Occupational Safety & Health Act), *leave denied*, 611 N.Y.S.2d 134 (N.Y. 1999).

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

32. Compare *Meyer*, 220 S.W.3d at 716 n.3 (citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990), *cert. denied sub nom.* *General Elec. Co. v. Knight*, 499 U.S. 961 (1991); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Burns*, 752 P.2d 28; *Askey*, 477 N.Y.S.2d 242), with *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

33. See, e.g., *Beeber v. Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) (“If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable.”); *Pry v. Alton & S. Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992) (“[U]nder FELA . . . [o]nly slight negligence of the defendant needs to be proved . . .”).

34. See *Buckley*, 521 U.S. at 427.

35. *Id.* at 441–42.

36. *Id.* at 442.

alternative, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.<sup>37</sup>

The *Buckley* opinion has been highly influential. In accordance with *Buckley*, traditional principles of tort law, and sound public policy, most state courts of last resort recently presented with the issue have rejected medical monitoring.

For instance, in *Badillo v. American Brands, Inc.*, the Nevada Supreme Court rejected class actions by smokers and casino workers seeking the establishment of a court-supervised medical monitoring program to aid in the early diagnosis and treatment of alleged tobacco-related illnesses.<sup>38</sup> The court, describing medical monitoring as “a novel, non-traditional tort and remedy,”<sup>39</sup> held that “Nevada common law does not recognize a cause of action for medical monitoring.”<sup>40</sup> In dictum cited by the *Meyer* court,<sup>41</sup> the Nevada Supreme Court said that a “remedy of medical monitoring may be available for an underlying cause of action. . . .”<sup>42</sup> The *Badillo* court, however, specifically declined to consider that issue<sup>43</sup> because neither party had briefed it and the plaintiffs refused to identify the cause of action to which such a remedy would attach, “even when specifically questioned on this topic.”<sup>44</sup>

Contrary to the *Meyer* court’s assumption, it is not entirely clear that Nevada would recognize a medical monitoring remedy if the issue were properly presented, or at least not for all causes of action. Before declining to decide the issue in *Badillo*, the Nevada Supreme Court acknowledged that some pre-*Buckley* courts had recognized medical monitoring as a remedy<sup>45</sup> but also said that plaintiffs’ “trend analysis [wa]s somewhat overstated”<sup>46</sup> and “would not present a rational basis for th[e] court’s compliance.”<sup>47</sup> In addition, the *Badillo* court said that “[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative,

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37. *See id.* at 443 (“[W]here state and federal regulations already provide the relief that a [medical monitoring] plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits” because recovery would be allowed “irrespective of the presence of a ‘collateral source’ of payment.”).

38. *Badillo v. American Brands, Inc.*, 16 P.3d 435, 441 (Nev. 2001).

39. *Id.* at 438.

40. *Id.*

41. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 n.3 (2007).

42. *Badillo*, 16 P.3d at 441.

43. *Id.* at 440–41.

44. *Id.* at 440; *see also* *Badillo v. American Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001) (federal court on remand stating, “the Court also concurs with the Nevada Supreme Court that Plaintiffs have failed to demonstrate a viable cause of action to which medical monitoring could properly be tied as a remedy. . . .”).

45. *Badillo*, 16 P.3d at 440 n.3.

46. *Id.* at 439.

47. *Id.* at 440.

not a judicial function.”<sup>48</sup> Perhaps tellingly, the research for this Comment found no reported (or unreported) cases awarding a medical monitoring remedy under Nevada law in the many years since *Badillo*.

Later in 2001, the Alabama Supreme Court in *Hinton v. Monsanto Co.* considered a medical monitoring claim in the context of a putative class action brought by asymptomatic plaintiffs allegedly exposed to toxins released into the environment by the defendant.<sup>49</sup> The court began its analysis by stating that “Alabama has long required a manifest, present injury before a plaintiff may recover in tort,”<sup>50</sup> and that “[n]oted commentators have agreed with this approach.”<sup>51</sup> The court then summarized the complex legal issues raised by medical monitoring claims, including the impact on other areas of the law that would be caused by “such a drastic departure from [the] traditional tort law” physical injury rule.<sup>52</sup> The court stated, “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.”<sup>53</sup> The court said it was “unprepared to embark on such a voyage.”<sup>54</sup>

The *Hinton* court also discussed a number of public policy concerns raised by the United States Supreme Court in *Buckley*, such as a potential avalanche of claims and the unlimited liability exposure for defendants that would flow from adoption of a medical monitoring action.<sup>55</sup> The *Hinton* court echoed the *Buckley* Court’s concern that “a ‘flood’ of less important cases” would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury and adversely affect the allocation of scarce medical resources.<sup>56</sup> In addition, the Alabama Supreme Court rejected the argument that medical monitoring awards are not costly, particularly when they are aggregated in class actions.<sup>57</sup> The court concluded:

[W]e find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiffs’] concerns about what *might* occur in the future. We believe that Alabama law, as it currently exists, must be applied to balance

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48. *Id.* at 440 (emphasis added).

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

50. *Id.* at 829.

51. *Id.*

52. *Id.* at 830.

53. *Id.*

54. *Id.*

55. *Hinton*, 813 So. 2d at 831 (citing *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 441–43 (1997)).

56. *Id.* (quoting *Buckley*, 521 U.S. at 442).

57. *See id.*

the delicate and competing policy considerations presented here. That law provides no redress for a plaintiff who has no present injury or illness.<sup>58</sup>

In 2002, the Kentucky Supreme Court rejected a medical monitoring action and remedy for asymptomatic plaintiffs in *Wood v. Wyeth-Ayerst Laboratories*.<sup>59</sup> Plaintiff sought the creation of a court-supervised medical monitoring fund, for herself and as representative for a class of patients, to detect the possible onset of primary pulmonary hypertension after ingesting the “Fen-Phen” diet drug combination.<sup>60</sup> The court, citing cases dating as far back as 1925, stated, “This Court has consistently held that a cause of action in tort requires a present physical injury to the plaintiff.”<sup>61</sup> “Taken together,” the court said, “all of these cases lead to the conclusion that a plaintiff must have sustained some physical injury before a cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent.”<sup>62</sup>

The *Wood* court recognized that courts in some states had “venture[ed] into uncharted territory as they create[d] medical monitoring causes of action and [made] available remedies that [did] not require a showing of present physical injury.”<sup>63</sup> The Kentucky Supreme Court described these courts as “well-intentioned,” but said that allowing recovery for medical screening “may be creating significant public policy problems.”<sup>64</sup> “In the name of sound policy,” therefore, the court “decline[d] to depart from well-settled principles of tort law.”<sup>65</sup> The court noted that its rejection of prospective medical monitoring claims (in the absence of present injury) was supported “by both the United States Supreme Court and a persuasive cadre of authors from academia.”<sup>66</sup>

For instance, the court noted that the *Buckley* Court observed that the “tens of millions of individuals” who have been exposed to substances that might justify some form of monitoring “could threaten both a ‘flood’ of less important cases (potentially absorbing resources better left available to those more seriously harmed)” and create “unlimited and unpredictable liability.”<sup>67</sup> The *Wood* court also observed that scholars such as Professors James Henderson, Jr. and Aaron Twerski, the Reporters for the *Restatement Third, Torts: Products Liability*, have weighed the benefits against the potentially negative effects of medical monitoring remedies and “have made similarly

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58. *Id.* at 831–32.

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

60. *Id.* at 851.

61. *Id.* at 852.

62. *Id.* at 853–54.

63. *Id.* at 856.

64. *Id.* at 857.

65. *Wood*, 82 S.W.3d at 856.

66. *Id.* at 857.

67. *Id.* (quoting *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997)).

convincing arguments against medical monitoring causes of action or damages in the absence of present injury or illness.”<sup>68</sup>

For example, courts will inevitably run into problems in determining how to distribute medical monitoring awards. Lump-sum awards might not actually be used for medical costs, especially if a recipient has insurance that will cover such expenses. Monitoring funds to be used by large numbers of people . . . require court administration and does not guarantee that potential victims actually get tested. These remedies are economically inefficient, and are of questionable long term public benefit. Furthermore, defendants do not have an endless supply of financial resources. Spending large amounts of money to satisfy medical monitoring judgments, will impair their ability to fully compensate victims who emerge years later with actual injuries that require immediate attention.<sup>69</sup>

Lastly, the Alabama Supreme Court noted the problem of issue preclusion as yet “another obvious impasse” for medical monitoring remedies granted in the absence of present injury.<sup>70</sup> The court explained that denying medical monitoring actually “benefits victims” by alleviating the possibility that a plaintiff who recovers medical monitoring costs may be unable to bring another negligence claim and obtain a much larger recovery later if the person were to develop an actual illness.<sup>71</sup>

In 2005, the Supreme Court of Michigan declined to recognize medical monitoring in *Henry v. Dow Chemical Co.*, an action brought by 173 plaintiffs on behalf of a putative class of thousands seeking the establishment of a court-supervised program to monitor the class and their representatives for possible future manifestations of dioxin-related disease caused by release of the chemical into the flood plain where the plaintiffs and putative class members lived and worked.<sup>72</sup> The court held that the plaintiffs, who did not suffer from a present physical harm, could not recover under existing law because “Michigan law requires an actual injury to person or property as a precondition

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68. *Id.* (citing 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)).

69. *Id.* (citing Henderson & Twerski, *supra* note 68, at 844).

70. *Id.* at 858.

71. *Wood*, 82 S.W.3d at 858; *see also* *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999) (“If 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.”).

72. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 685–86 (Mich. 2005); *see generally* Francine Nesti, Note, *Tort Law – Negligence – There Is No Cause of Action for Medical Monitoring, Based on Negligence, Absent a Physical Injury*, *Henry v. Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005), 84 U. DET. MERCY L. REV. 55 (2006) (discussing the Michigan Supreme Court’s refusal to recognize a cause of action for medical monitoring, absent a physical injury).

to recovery under a negligence theory.”<sup>73</sup> The court explained that the physical injury requirement “serves a number of important ends” such as reducing the risks of fraudulent claims and providing courts with a clear standard to determine which plaintiffs have stated a valid claim, and which plaintiffs have not.<sup>74</sup>

The Michigan Supreme Court went on to discuss whether the common law of negligence should be modified in order to permit plaintiffs’ medical monitoring claim to proceed. The court concluded that recognition of a medical monitoring cause of action would “depart[] drastically from [the] traditional notions of a valid negligence claim” and that “judicial recognition of plaintiffs’ claim [may] have undesir[ed] effects that neither [the court] nor the parties can satisfactorily predict.”<sup>75</sup>

For instance, the *Henry* court said that adoption of medical monitoring “would create a potentially limitless pool of plaintiffs” with pre-injury claims and “could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care.”<sup>76</sup> The court said it shared the concerns raised by the Supreme Court in *Buckley* that judicial adoption of medical monitoring “may do more harm than good – not only for Michigan’s economy but also for “other potential plaintiffs who are not before the court and 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.”<sup>77</sup> The *Henry* court concluded that it would be “unwise, to say the least, to alter the common law in the manner requested by plaintiffs when it is unclear what the consequences of such a decision may be and when we have strong suspicions, shared by the nation’s highest court, that they may be disastrous.”<sup>78</sup> Any such change, the court believed, “ought to be made, if at all, by the Legislature.”<sup>79</sup>

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73. *Henry*, 701 N.W.2d at 689.

74. *Id.* at 691.

75. *Id.* at 694.

76. *Id.*

77. *Id.* at 696 (quoting *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443–44 (1997)).

78. *Id.* at 697.

79. *Henry*, 701 N.W.2d at 686; see also David C. Campbell, Comment, *Medical Monitoring: The Viability of a New Cause of Action in Oregon*, 82 OR. L. REV. 529, 547–49 (2003) (concluding that the “creation of a medical monitoring tort is based largely, if not exclusively, on public policy considerations” and that the legislature “is better suited than the courts to revise our tort system by eliminating the physical injury requirement”); 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 and suggesting the 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).

More recently, in 2007, Mississippi's highest court rejected medical monitoring in *Paz v. Brush Engineered Materials, Inc.*<sup>80</sup> just a few months before *Meyer* was decided. In *Paz*, class action plaintiffs sought the establishment of a medical monitoring fund for detection of disease development from beryllium exposure.<sup>81</sup> The court said, "There is no tort cause of action in Mississippi without some identifiable injury, either physical or emotional."<sup>82</sup> Therefore, "it would be contrary to current Mississippi law to recognize a claim for medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure."<sup>83</sup> The court also noted that the United States Supreme Court concluded in *Buckley* that "to recognize medical monitoring alone as a separate injury is to go 'beyond the bounds of currently evolving common law.'"<sup>84</sup> "Accordingly," the Mississippi Supreme Court concluded, "as plaintiffs invite this Court to recognize a medical monitoring cause of action, an act which would require an unprecedented and unfounded departure from the long-standing traditional elements of a tort action, this Court declines that invitation."<sup>85</sup>

Many other state and federal courts have come to the same conclusion.<sup>86</sup>

80. *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007).

81. *Id.* at 2.

82. *Id.* at 5.

83. *Id.* at 5–6.

84. *Id.* at 6 (quoting *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 439 (1997)).

85. *Id.*

86. See *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7<sup>th</sup> Cir. 2007) (rejecting claim for credit monitoring after finding no Indiana authority allowing medical monitoring in tort context); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8<sup>th</sup> Cir. 2000) (stating that Nebraska law has not recognized a medical monitoring action or remedy and predicting that Nebraska courts would not judicially adopt such a right or remedy), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Ball v. Joy Tech., Inc.*, 958 F.2d 36, 39 (4<sup>th</sup> Cir. 1991) (dismissing claim for medical monitoring damages because Virginia law requires a present, physical injury prior to recovery for negligence), *cert. denied*, 502 U.S. 1033 (1992); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 667 (W.D. Tex. 2006) (granting motion to dismiss medical monitoring claims and predicting that "it appears likely that the Texas Supreme Court would follow the recent trend of rejecting medical monitoring as a cause of action"); *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005) ("[N]o Georgia court has ever indicated an inclination to recognize such a remedy."); *Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505, 518 (D.N.D. 2005) ("[A] plaintiff [in North Dakota] would be required to demonstrate a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim."); *Bostick v. St. Jude Med., Inc.*, No. 03-2626 BV, 2004 WL 3313614, at \*14 (W.D. Tenn. Aug. 17, 2004) (unreported) ("[A] review of the applicable case law reveals that Tennessee does require a present injury."); *Rosmer v. Pfizer*, No. CIV.A. 9:99-2280-18RB, 2001 WL 34010613, at \*5 (D.S.C. Mar. 30, 2001) (unreported) (noting that South Carolina has not recognized such a claim); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 606 (W.D. Wash. 2001) (anticipating that Washington courts would not recognize a cause of action for

Quite remarkably, the *Meyer* court took no effort to address, or even discuss, the serious concerns raised by the United States Supreme Court and the many recent state courts of last resort that have rejected medical monitoring for pre-injury plaintiffs. In fact, the *Buckley*,<sup>87</sup> *Hinton*,<sup>88</sup> *Wood*,<sup>89</sup> *Henry*,<sup>90</sup> and *Paz*<sup>91</sup> cases are not mentioned anywhere in the opinion.

The *Meyer* court apparently failed to consider that allowing a medical monitoring remedy absent physical injury may lead to a flood of claims, because “we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances. . . .”<sup>92</sup> Almost everyone comes into contact with a potentially limitless number of materials that could be argued to warrant medical monitoring relief.<sup>93</sup> Plaintiffs’ lawyers could

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medical monitoring because Washington law requires existing injury in order to pursue a negligence claim); *Jones v. Brush Wellman, Inc.*, No. 1:00 CV 0777, 2000 WL 33727733, at \*8 (N.D. Ohio Sept. 13 2000) (unreported) (“It is clear that under Tennessee law, a plaintiff must allege a present injury or loss to maintain an action in tort. No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury.”); *Thompson v. American Tobacco Co., Inc.*, 189 F.R.D. 544, 552 (D. Minn. 1999) (“Given the novelty of the tort of medical monitoring and that the Minnesota Supreme Court has yet to recognize it as an independent theory of recovery, this Court is not inclined at this time to find that such a tort exists under Minnesota law.”); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at \*87 (W.D.N.C. Oct. 29, 1990) (unreported) (refusing to allow medical monitoring claim in absence of clear direction of the North Carolina legislature, and noting that even if North Carolina courts recognized medical monitoring, they would require a present physical injury); *Purjet v. Hess Oil Virgin Islands Corp.*, Civ. No. 1985/284, 1986 WL 1200, at \*4 (D.V.I. Jan 08, 1986) (rejecting medical monitoring claim absent physical injury under Virgin Islands law); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (a claim for medically-required surveillance expenses is not maintainable in the absence of a present, physical injury); *Johnson v. Abbott Labs.*, No. 06C01-0203-PL-89, 06C01-0206-CT-243, 2004 WL 3245947, at \*6 (Ind. Cir. Ct. Dec. 31, 2004) (unreported) (“Indiana does not recognize medical monitoring as a cause of action.”); *Bowerman v. United Illuminating*, No. X04CV 940115436S, 1998 WL 910271, at \*10 (Conn. Super. Ct. Dec. 15, 1998) (unreported); *Goodall v. United Illuminating*, No. X04cv 950115437S, 1998 WL 914274, at \*10 (Conn. Super. Ct. Dec. 15 1998) (unreported); cf. LA. CIV. CODE ANN. art. 2315 (2007).

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

88. *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

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

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

91. *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007).

92. Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 130 (1995). “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).

93. 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).

basically begin recruiting people off the street to serve as plaintiffs.<sup>94</sup> 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.<sup>95</sup>

The asbestos litigation environment vividly illustrates this problem. “By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.”<sup>96</sup> Mass filings by the non-sick have pushed an estimated eighty-five employers into bankruptcy and threaten payments to the sick.<sup>97</sup> For example, the Manville trustees reported that a “disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.”<sup>98</sup> The Trust is now paying out five cents on the dollar to asbestos claimants.<sup>99</sup> Other asbestos-related bankruptcy trusts, such as the Celotex and Eagle-Picher Settlement Trusts, have also cut payments to claimants.<sup>100</sup> In fact, lawyers who primarily represent cancer victims have been highly critical of mass filings by the unimpaired, because these claims drain resources needed to compensate their sick clients.<sup>101</sup>

94. See Victor E. Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA TODAY, July 5, 1999, at A17.

95. See *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (“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.”), *aff’d*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

96. Henderson & Twerski, *supra* note 68, at 823; see also Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A15; Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004, at 186, available at 2004 WLNR 17888598 (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are ‘unimpaired’—that is, they have slight or no physical symptoms.”).

97. Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001).

98. Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, available at 2001 WLNR 2021170.

99. *Id.*

100. See Mark Goodman *et al.*, Editorial, *Plaintiffs’ Bar Now Opposes Unimpaired Asbestos Suits*, NAT’L L.J., Apr. 1, 2002, at B14.; James L. Stengel, *The Asbestos End-Game*, N.Y.U. ANN. SURV. AM. L. 223, 262 (2006).

101. See *e.g.*, *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan).

The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. 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

In addition, a medical monitoring action or remedy would be likely to create high, ongoing costs for Missouri courts.<sup>102</sup> 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 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.<sup>103</sup> Furthermore, 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. Administrative intricacies compound in the instance of medical monitoring class actions, where courts would have to manage each class member's monitoring program, a task that "places additional strains on courts that should be hesitant to undertake such a costly and time-consuming responsibility."<sup>104</sup>

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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.

*Id.*; Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits* SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7, available at 2002 WLNR 2149929 ("Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. . . . [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."); Andrew Schneider, *Asbestos Lawsuits Anger Critics; Mass Medical Screenings, Run by Lawyers, Reel in Many Who Don't Feel Ill*, ST. LOUIS POST-DISPATCH, Feb. 9, 2003, at A1, available at 2003 WLNR 16115293 (quoting Andrew O'Brien of St. Louis: "There is a limited amount of money available to properly compensate people who are really sick from asbestos disease." He added that consideration should be given to "the needs of those who are seriously ill" by not "flooding the courts with those who are not sick today and may never become impaired to the point they can't lead a normal life."); Susan Warren, *Competing Claims: Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1, abstract available at 2002 WLNR 2320384 (quoting Peter Kraus of Dallas: plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired.").

102. See *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 698-99 (Mich. 2005) ("[T]he 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.").

103. See Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 AM. J.L. & MED. 251, 267-72 (1994).

104. Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on this Trend?*, 70 DEF. COUNS. J. 315, 320 (2003).

Other issues raised by medical monitoring programs include the likelihood that monitoring will detect the existence of disease and the adverse consequences that false positives may bring;<sup>105</sup> the health risks posed by the proposed tests;<sup>106</sup> the effect of such awards on job growth and the economy;<sup>107</sup> the likelihood that such plans would overlap with third-party health insurance plans and entail systemic costs without corresponding benefits; whether medical monitoring claims in the workplace setting would fall outside of the workers' compensation system, which could subject employers to endless liability; and issues with regard to the availability of commercial general liability coverage that may require a present bodily injury.

The *Meyer* court apparently failed to consider any of these potential negative impacts. Instead, the court aligned itself with the two post-*Buckley* state supreme court decisions that adopted medical monitoring—and that have turned out to be highly problematic: *Bower v. Westinghouse Electric Corp.*<sup>108</sup> and *Bourgeois v. A.P. Green Industries, Inc.*<sup>109</sup>

In *Bower*,<sup>110</sup> the Supreme Court of Appeals of West Virginia established an independent cause of action for individual recovery of future medical monitoring costs absent physical injury. The plaintiffs, who had no present symptoms of any disease, alleged they were exposed to thirty toxic substances as a result of defendants maintaining a pile of debris from the manufacture of light bulbs.<sup>111</sup> The court “reject[ed] the contention that a claim for future medical expenses must rest upon the existence of present physical harm.”<sup>112</sup> The court defined the elements necessary to sustain a medical monitoring

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105. The risks of medical monitoring include “[f]alse positives [that] can devastate patients and their families.” Victor E. Schwartz *et al.*, *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 357 (2005) [hereinafter Schwartz *et al.*, *Medical Monitoring: The Right Way*]; see also Edward F. Patz, Jr., Editorial, *Lung Cancer Screening, Overdiagnosis Bias, and Reevaluation of the Mayo Lung Project*, 98 J. NAT’L 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.”).

106. See Steven Sternberg, *Study: Unnecessary CT Scans Exposing Patients to Excessive Radiation*, USA TODAY, Nov. 28, 2007, at A1, available at [http://www.usatoday.com/news/health/2007-11-28-dangerous-scans\\_N.htm](http://www.usatoday.com/news/health/2007-11-28-dangerous-scans_N.htm) (“Overuse of diagnostic CT scans may cause as many as 3 million excess cancers in the USA over the next two to three decades,” according to a study in the *New England Journal of Medicine*).

107. *Henry*, 701 N.W.2d at 696.

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

109. *Bourgeois v. A.P. Green Indus., Inc.* 716 So. 2d 355 (La. 1998).

110. See *Bower*, 522 S.E.2d 424 (W. Va. 1999).

111. See *id.* at 426–27.

112. *Id.* at 430.

claim,<sup>113</sup> but said that medical monitoring can be awarded *even* if the amount of exposure to a toxic substance does not correlate with a level sufficient to cause injury<sup>114</sup> or if there is no effective treatment available for the disease.<sup>115</sup> Instead, “[a]ll that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.”<sup>116</sup> The court’s criteria state that this “significantly increased risk” must make it “reasonably necessary” to undergo medical monitoring that could allow early detection of the disease.<sup>117</sup> The court explained, however, that “factors such as financial cost and the frequency of testing need not necessarily be given significant weight” in determining the reasonableness of a proposed monitoring program.<sup>118</sup> The court’s ruling also allows for medical monitoring based on “the subjective desires of a plaintiff for information concerning the state of his or her health.”<sup>119</sup> Finally, the *Bower* court rejected the argument that any funds awarded should be awarded in a court-administered fund and instead awarded funds to plaintiffs in a lump sum.<sup>120</sup> In other words, West Virginia permits uninjured plaintiffs to sue for medical monitoring even when testing is not medically necessary or beneficial, and does not require plaintiffs to spend any of the award on actual monitoring.

In a strongly worded dissent, Justice Maynard argued that the majority’s decision to engage in judicial lawmaking violated the constitutional separation of powers by “usurping the Legislature’s authority to enact laws.”<sup>121</sup> He also criticized the majority for rejecting the 200-year-old “physical injury rule” in favor of a “speculative and amorphous showing of ‘increased risk.’”<sup>122</sup> Justice

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113. *Bower* permits a plaintiff to recover medical monitoring expenses under West Virginia law if: “(1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.” *Id.* at 432–33.

114. *See id.* at 433 ([T]he plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure.”).

115. *See id.* at 433–34 ([A] plaintiff should not be required to show that a treatment currently exists for the disease that is the subject of medical monitoring.”).

116. *Bower*, 522 S.E.2d at 433. The court said that “no particular level of quantification is necessary to satisfy the [‘increased risk’] requirement. *Id.*”

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.*; see also Shannon L. Smith Wolfe, Note, *The Recovery of Medical Monitoring Costs: An Argument for the Fund Mechanism in the Wake of Bower v. Westinghouse*, 103 W. VA. L. REV. 103 (2000).

121. *Bower*, 522 S.E.2d at 435 (Maynard, J., dissenting).

122. *Id.*

Maynard concluded that the majority's decision was "bad law"<sup>123</sup> because it would lead to a stampede of new claims:

[The] practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action. Those who work in heavy industries such as coal, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiff without any showing of injury at all.<sup>124</sup>

*Bower* has fueled medical monitoring litigation in West Virginia<sup>125</sup> and is a primary reason the courts in West Virginia are considered unfair and imbalanced.<sup>126</sup> The respected torts scholars who served as the Reporters for the *Restatement Third, Torts: Products Liability* have criticized *Bower's* "superlative"-riddled criteria.<sup>127</sup> They note that *Bower's* criteria "will not prevent most well-prepared cases from reaching triers of fact. There is no escaping the conclusion that defendants in these medical monitoring cases face

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123. *Id.*

124. *Id.*; see also Gregory C. Read, *Medical Monitoring: The New Gold Rush*, 68 DEF. COUNS. J. 141, 141 (2001) ("Almost anyone is a potential plaintiff in a medical monitoring case.").

125. See, e.g., *Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 887 (W. Va. 2005) (Starcher, J., concurring) (involving asymptomatic coal preparation plant workers: "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 prescription drug); *State ex rel. E.I. DuPont de Nemours and 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). Not all of these suits have been successful, however, the parties were forced to incur substantial litigation costs.

126. See Robert D. Mauk, Editorial, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, CHARLESTON GAZETTE & DAILY MAIL (WV), Mar. 1, 2003, at 5A, available at 2003 WLNR 1597810 ("[T]he *Bower* medical-monitoring ruling has cast a shadow over our state's reputation in the legal field. It affects West Virginia's jobs, taxes, health care and the public credibility of our courts."); Robert D. Mauk, Editorial, *No Common Sense, W.Va. Picking Up Tab for Out-of-State Suits*, CHARLESTON GAZETTE & DAILY MAIL (WV), Dec. 12, 2001, at 5A, available at 2001 WLNR 708939 ("We are famous for 'No proof? No problem' medical monitoring lawsuits, which negatively impact many of our large employers, as well as a small business, a local town, and West Virginia University."); John R. Thomas, Editorial, *Lawsuits are Hazardous to Health, West Virginians Pay a High Price in Access to Care*, CHARLESTON GAZETTE & DAILY MAIL (WV), Sept. 30, 2002, at 4A, available at 2002 WLNR 1045754 ("We see more and more medical monitoring suits based on the [*Bower*] rule that people should be able to sue even when they have no proof of injury. \* \* \* We see lawsuit advertising in newspapers and on TV, saying things like, 'You may be able to obtain a cash recovery, even if you aren't sick.'").

127. See Henderson & Twerski, *supra* note 68, at 845.

potentially crushing liabilities.”<sup>128</sup> The *Bower* ruling also contributed to West Virginia being named the only statewide “Judicial Hellhole” by the American Tort Reform Association for several years running.<sup>129</sup> A recent U.S. Chamber of Commerce State Liability System Ranking Study put West Virginia at the very bottom of all states for creating a fair and reasonable litigation environment.<sup>130</sup>

In *Bourgeois*,<sup>131</sup> the Louisiana Supreme Court decided whether asymptomatic plaintiffs who were exposed to asbestos and claimed the need for regular medical examinations to detect the onset of possible latent diseases had suffered “damage” as defined by the Louisiana Civil Code.<sup>132</sup> The court acknowledged that traditional tort law awarded medical expenses only when there was a corresponding physical injury.<sup>133</sup> The reasoning for the traditional rule, according to the *Bourgeois* court, was the danger of bringing about an “atmosphere of unlimited and unpredictable liability.”<sup>134</sup> Nevertheless, the court decided that medical monitoring is a compensable item of damage under Louisiana’s statutory code, provided that a plaintiff can satisfy certain criteria developed by the court.<sup>135</sup> In recognizing medical monitoring as a form of damages, the court made special note that it was not creating a new cause of action. Under the *Bourgeois* standard, a plaintiff must still establish liability under a traditional tort theory of recovery, such as negligence, strict liability, or a similar theory.<sup>136</sup> The court also highlighted the distinction between a

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128. *Id.* at 845.

129. See Am. Tort Reform Ass’n, Bringing Justice to Judicial Hellholes 5 (2006), available at <http://www.atra.org/reports/hellholes/report.pdf>.

130. See U.S. Chamber of Commerce, 2007 State Liability Systems Ranking Study: Final Report 15 (Harris Interactive, Inc. Apr. 16, 2007), available at <http://www.instituteforlegalreform.org/lawsuitclimate2007/index.cfm>.

131. See *Bourgeois v. A.P. Green Indus., Inc.* 716 So. 2d 355 (La. 1998); see generally D. Clayron Cambre, Note, *Bourgeois v. A.P. Green Industries, Inc.: Medical Monitoring Expenses Recoverable in Louisiana*, 45 LOY. L. REV. 193 (1999).

132. See *Bourgeois*, 716 So. 2d at 357.

133. See *id.* at 358.

134. *Id.*

135. The *Bourgeois* court identified the following criteria: (1) significant exposure to a proven hazardous substance; (2) as a proximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) plaintiff’s risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease; (4) a monitoring procedure exists that makes the early detection of the disease possible; (5) the monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) there is some demonstrated value in the early detection and diagnosis of the disease. See *id.* at 360–61.

136. See *id.* at 361.

medical monitoring fund and a lump-sum award, noting that it was not offering an opinion concerning whether lump-sum damages are recoverable under Louisiana law.<sup>137</sup>

Significantly, the *Bourgeois* court expressed “confiden[ce]” that its holding would “not create an atmosphere of unlimited and unpredictable liability.”<sup>138</sup> Almost immediately, however, the court’s decision spurred litigation.<sup>139</sup> Consequently, the Louisiana legislature acted swiftly to “overrule” *Bourgeois* by amending the statutory law to *exclude* medical monitoring as a recoverable item of damages unless the claim is “directly related to a manifest physical or mental injury or disease.”<sup>140</sup>

### C. Reasonable Parameters to Meyer

The Missouri Supreme Court also declined to establish any parameters for medical monitoring, leaving litigants and lower courts unguided to find their way in the tangle of medical, scientific, and policy issues involved in implementing the court’s vague directive.<sup>141</sup> Below are some parameters that the Missouri Supreme Court or lower courts may wish to consider to restore some degree of reasonableness to the *Meyer* opinion.

#### 1. Lump-Sum Awards Should Not be Permitted

If medical monitoring is to be awarded, it should not be made in a lump-sum payment. Otherwise, “there is no assurance that the award, however

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137. *See id.* at 362 n.16.

138. *Id.* at 362.

139. *See, e.g.,* *Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. App. 1999) (medical monitoring class action by seamen exposed to asbestos); *Scott v. American Tobacco Co.*, 725 So. 2d 10 (La. App. 1998) (medical monitoring class of Louisiana cigarette smokers), *writ denied*, 731 So. 2d 189 (La. 1999); *Johnson v. Orleans Parish Sch. Bd.*, 790 So. 2d 734 (La. App. 2001) (medical monitoring class arising from plaintiffs’ exposure to contaminated soils), *writ denied*, 801 So. 2d 378 (La. 2001); *cf. Lilley v. Board of Sup’rs of La. State Univ.*, 735 So. 2d 696 (La. App. 1999) (rejecting medical monitoring claim by firefighters exposed to asbestos because minimal increase in the risk of disease was insufficient to satisfy the test set forth in *Bourgeois*), *writ denied*, 744 So. 2d 629 (La. 1999).

140. *See* LA. CIV. CODE ANN. art 2315 (2007). The law applies to all causes of action accruing on or after July 9, 1999. *See Bourgeois v. A.P. Green Indus., Inc.*, 783 So. 2d 1251 (La. 2001).

141. *See Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 718 n.7 (Mo. 2007) (“In this appeal of a class action decision, which is a procedural matter, there is no need for this Court to establish precisely what must be proven in order to recover medical monitoring damages.”).

large, will be used to help a person detect the onset of treatable disease.”<sup>142</sup>  
“[T]he potential for abuse is apparent.”<sup>143</sup>

The New Jersey Supreme Court’s decision in *Ayers v. Township of Jackson*<sup>144</sup> illustrates the fact that medical monitoring awards often may not lead to any medical monitoring. In *Ayers*, 339 plaintiffs, all without present physical injury, were each awarded over \$8 million as a lump-sum for medical monitoring.<sup>145</sup> One author conducted an informal survey of some plaintiffs after the lawsuit: one plaintiff noted that he used his recovery to buy a home and that after receiving his award, he had not seen his doctor any more than in prior years. The two other respondents, who could not even remember if the damages they received were for medical monitoring, reported they did not see their doctors more frequently as a result of the award.<sup>146</sup>

Similarly, in *Hansen v. Mountain Fuel Supply Co.*,<sup>147</sup> workers sought medical monitoring because of asbestos exposure. Nearly seven years after learning of their exposure, the plaintiffs participated in only preliminary examinations revealing no asbestos-related illness. Other than the preliminary tests, the plaintiffs underwent no further testing. One commentator remarked, “[t]he fact that none had undergone testing over a period of almost seven years casts grave suspicion over their assertions that they would use any medical monitoring sums awarded for their stated purpose.”<sup>148</sup>

In *Friends for All Children, Inc. v. Lockheed Martin Aircraft Corp.*,<sup>149</sup> the defendant’s airplane was used in a rescue mission to evacuate Vietnamese children from Saigon at the end of the Vietnam War.<sup>150</sup> Tragically, the plane crashed mid-flight due to the decompression of the interior compartment.<sup>151</sup> Friends for All Children, the legal guardian for the surviving children, sought compensation from Lockheed for diagnostic examinations to determine if the decompression or the crash itself caused residual brain dysfunction syndrome in the children.<sup>152</sup> A partial settlement was reached early in the case, in which the defendant provided \$5,000 to each of the infants’ guardians *ad litem*. The

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142. Victor E. Schwartz *et al.*, *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1077–78 (1999).

143. 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) [hereinafter McCarter].

144. *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987).

145. *See id.* at 291.

146. *See* McCarter, *supra* note 143, at 257 n.158.

147. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993).

148. Maskin *et al.*, *supra* note 93, at 541–42.

149. *Friends for All Children, Inc. v. Lockheed Martin Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984).

150. *Id.* at 819.

151. *See id.*

152. *See id.*

funds could be used either for the childrens' medical treatment or for their litigation expenses.<sup>153</sup> All of the money was used for litigation expenses.<sup>154</sup>

These examples show that medical monitoring awards may not result in plaintiffs actually being monitored. As one group of commentators noted:

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.<sup>155</sup>

If medical monitoring is to be permitted at all, it should be done through a court-administered fund rather than in a lump-sum award. Distribution of resources in this manner would reduce the potential for abuse and ensure that the goal of the award is met.<sup>156</sup>

## 2. Eliminate Double Recoveries

The rationale for awarding medical monitoring costs "assumes that plaintiffs do indeed incur the expenses associated with medical monitoring."<sup>157</sup> In many instances, however, there may be little need for court-awarded medical monitoring because other established sources of payment exist to cover these costs, such as employer-provided health plans.<sup>158</sup> Commentators have explained, "medical monitoring may be an entirely redundant remedy for those who already have health insurance."<sup>159</sup> The United States Supreme Court also observed in *Buckley* that a medical monitoring recovery

153. *See id.* at 820.

154. *See* Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury*, 18 WM. & MARY ENVTL. L. 285, 307 n.150 (1994).

155. McCarter, *supra* note 143, at 283.

156. *See* Abraham, *supra* note 16, at 1987 ("If the plaintiffs are permitted to use damages paid to them for medical monitoring costs in order to pay college tuition or take a vacation, the very purpose behind the imposition of liability is defeated."); *see also* Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 693 (1992) ("Lump sum awards can result in windfalls for tort victims and their survivors" and explaining that an advantage of periodic payments "is that they provide a plaintiff with an opportunity for federal income tax savings, which does not exist with a lump sum award.").

157. Schwartz *et al.*, *Medical Monitoring: The Right Way*, *supra* note 105, at 384 (quoting Maskin *et al.*, *supra* note 93, at 526).

158. *See* AM. LAW INST., 2 ENTER. RESPONSIBILITY FOR PERS. INJURY—REPORTERS' STUDY 379 (1991) (stating that approximately 80% of all standard medical testing is paid for by third party insurance).

159. Maskin *et al.*, *supra* note 93, at 528; *see also* John J. Weinholtz, *Defending "No Injury . . . Yet" Medical Monitoring Claims in Class Action Settings*, 30-SPG BRIEF 17 (2001) (Westlaw) (medical monitoring "assumes that plaintiffs would otherwise have to pay such costs

[W]ould ignore the presence of existing alternative sources of payment, thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources (say, insurance now or in the future) might provide monitoring in any event.<sup>160</sup>

Medical monitoring should not be available if it would be duplicative of a benefit the plaintiff is receiving or is eligible to receive from another source. For example, in *Friends for All Children*,<sup>161</sup> the court took steps to prevent redundant testing. The court required a doctor's review of what tests a child had already undergone before allowing more tests, in an attempt to eliminate unnecessary duplication.<sup>162</sup> Importantly, the court ensured its decision avoided double recovery by limiting medical monitoring relief to the children adopted in countries that did not have public health systems that would pay for the children's medical examinations.<sup>163</sup>

### 3. Other Parameters for Courts Applying *Meyer*

The *Meyer* court left open other issues that can be clarified in the future. These issues include more specific criteria as to when medical monitoring is "necessary in order to diagnose properly the warning signs of disease."<sup>164</sup>

First, a plaintiff should be required to prove that a "monitoring procedure exists that makes the early detection of the disease possible."<sup>165</sup> "If no such test exists, then periodic monitoring is of no assistance and the cost of such monitoring [should not be] recoverable."<sup>166</sup>

Second, a plaintiff should be required to show that "administration of the diagnostic test is medically advisable for him or her specifically" and that the "testing is of a type that a reasonable physician in the area of specialty would order to a similarly situated patient."<sup>167</sup> "This dual requirement prevents

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out of their own pockets, ignoring the real likelihood that most medical tests would be covered by some form of insurance.").

160. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997).

161. *Friends for All Children, Inc. v. Lockheed Martin Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984).

162. *See id.* at 835 n.34.

163. *See id.* at 822 n.7 (allowing recovery only for the French plaintiffs).

164. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 718 (Mo. 2007) (quoting *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999)).

165. *Bourgeois v. A.P. Green Indus., Inc.* 716 So. 2d 355, 361 (La. 1998).

166. *Id.*

167. *Id.* (citing *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993); *Schwartz et al., Medical Monitoring: The Right Way*, *supra* note 105, at 104 ("According to prevailing medical thought, medical monitoring tests must be tailored to specific diseases and to specific individuals.")).

recovery for costs of treatment not generally accepted by the medical community.”<sup>168</sup>

Third, a plaintiff should be required to demonstrate “that his or her increased risk of disease warrants medical monitoring beyond that which an individual should pursue as a matter of general good sense and foresight.”<sup>169</sup> “[T]here should be no recovery for preventative medical care and checkups to which members of the public at large should prudently submit.”<sup>170</sup>

Fourth, there should be some demonstrated clinical value in the early detection and diagnosis of the disease.<sup>171</sup> As the *Meyer* court explained, medical monitoring damages “compensate the plaintiff for the quantifiable costs of periodic medical examinations reasonably necessary for the early detection and treatment of latent injuries. . . .”<sup>172</sup> Unless a treatment is available, “then there is nothing for the plaintiff to gain from a hastened diagnosis” and such testing should not be recoverable.<sup>173</sup> “[T]he majority of doctors and scientists believe medical monitoring programs, which generally pose some degree of risk to the patient, must have the potential to be effective. They believe medical monitoring is only appropriate when it could lead to the cure or prevention of disease.”<sup>174</sup> Examples of untreatable and incurable diseases that are not appropriate for medical monitoring include mesothelioma, multiple sclerosis, and amyotrophic lateral sclerosis.<sup>175</sup>

Fifth, the disease development sought to be monitored should be “serious.”<sup>176</sup> Medical monitoring should not be permitted to detect trivial or nonimpairing conditions.<sup>177</sup>

168. *Bourgeois*, 716 So. 2d at 361.

169. *Id.*; *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 825 (Cal. 1993).

170. *Bourgeois*, 716 So. 2d at 361. Professor Andrew Klein has argued that “a plaintiff ordinarily should recover medical monitoring damages only when she proves that the exposure more than doubled her enhanced risk of disease.” Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 38 (1998). In other situations, he argues, “tort law is not the appropriate place for medical monitoring recovery.” *Id.* at 38.

171. See Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 REV. LITIG. 551, 563 (1998) (“If early detection makes no difference on whether a disease can be treated, or if there is no available method of disease detection or treatment, then a medical monitoring fund would serve no purpose.”).

172. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 718 (Mo. 2007) (emphasis added).

173. *Bourgeois*, 716 So. 2d at 361; see also *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 433 (W. Va. 1999).

174. Schwartz *et al.*, *Medical Monitoring: The Right Way*, *supra* note 105, at 350–51 (citing Myrton F. Beeler & Robert Sappenfield, *Medical Monitoring: What Is it, How Can it Be Improved?*, 87 AM. J. CLINICAL PATHOLOGY 285, 286 (Myrton F. Beeler *et al.*, eds., 1987) [hereinafter Beeler & Sappenfield]).

175. See *id.* at 354 (citing W.K.C. Morgan, *Medical Monitoring with Particular Attention to Screening for Lung Cancer*, in OCCUPATIONAL LUNG DISEASE 157, 157 (J. Bernard L. Gee *et al.*, eds., 1984)).

176. *Bower*, 522 S.E.2d at 432.

Sixth, courts should utilize a cost-benefit analysis to determine whether medical monitoring is appropriate.<sup>178</sup> “Many doctors and scientists caution, ‘[i]t is important that courts resist efforts to extend injury surveillance to circumstances in which it does not serve health promotion goals in a cost-effective manner.’”<sup>179</sup> The Utah Supreme Court also explained in *Hansen v. Mountain Fuel Supply Co.*,<sup>180</sup>

[I]f a reasonable physician would not prescribe [medical monitoring] for a particular plaintiff because the benefits of monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed.<sup>181</sup>

Courts also should consider the possibility that a defendant’s resources may be exhausted, leaving injured claimants without an adequate recovery because of the potential for so many individuals to become claimants.<sup>182</sup> This risk is especially problematic given the questionable health benefits of medical monitoring and the fact that many claimants already receive monitoring funds through insurance coverage.

Additional criteria that should be considered were set forth in the diet drug litigation for use in evaluating the fairness of a class action settlement that established a complicated compensation and medical screening program.<sup>183</sup> There, the judge found the medical monitoring scheme was fair because it met each of the following criteria, namely whether: (1) the disease in question progresses asymptotically following toxic exposure; (2) a diagnostic test with high sensitivity exists; (3) the exposed population has a relatively high prevalence of disease; (4) the diagnostic test therefore has a high predictive value; (5) the test is relatively low-cost; (6) medical monitoring could be integrated into standard clinical follow-up of those with disease; (7) monitoring could lead to early preventive care; and (8) monitoring allows for the appropriate timing of definitive treatment.<sup>184</sup> The *Journal of the American*

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177. See Beeler & Sappenfield, 87 AM. J. CLINICAL PATHOLOGY at 285 (“[T]he event itself must be serious enough, if untreated, to justify the treatment.”).

178. See Abraham, *supra* note 16, at 1979 (advocating for “something like a reasonable-expenditure standard” to ensure that the benefits of monitoring are worth their costs).

179. Schwartz *et al.*, *Medical Monitoring: The Right Way*, *supra* note 105, at 355 (quoting David M. Studdert *et al.*, *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public’s Health?*, JAMA, Feb. 19, 2003, at 889, 893–94 [hereinafter Studdert *et al.*]).

180. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993).

181. *Id.* at 980.

182. See *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997).

183. See *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042 (E.D. Pa. Feb. 1, 2000), *reh’g denied*, 2000 WL 1599259 (E.D. Pa. Oct. 26, 2000).

184. See *id.* at \*54.

*Medical Association* found these stringent criteria to be “consonant with sound epidemiological principles and the best available scientific knowledge of the disease at issue. They also resonate with health policy recommendations for the adoption of cost-effective disease prevention strategies.”<sup>185</sup>

*D. Legislative Response Possibly Needed*

Whether *Meyer* will produce substantial negative impacts may depend upon how the Missouri Supreme Court’s vague ruling is implemented. By refusing “to establish precisely what must be proven in order to recover medical monitoring damages”<sup>186</sup> the Missouri Supreme Court gave subsequent courts flexibility to develop sound and fair guidelines, such as those described above, to avoid extreme and unsound consequences. If Missouri courts do not accept this invitation, however, and problems emerge—such as those described by the United States Supreme Court in *Buckley*, and like those that occurred in West Virginia and Louisiana following the adoption of medical monitoring in those states—then a legislative response may be appropriate. The Missouri legislature may wish to consider the approach taken by the Louisiana legislature and restrict medical monitoring awards to claims “directly related to a manifest physical or mental injury or disease.”<sup>187</sup>

#### CONCLUSION

Traditionally, the Missouri Supreme Court has been highly respected for reaching fair and sound tort law decisions. The Missouri Supreme Court’s recent decision in *Meyer*, however, represents a dramatic departure from that tradition. The court held that plaintiffs with no present physical injury may recover medical monitoring as an item of compensable damages when liability is established under traditional tort law theories of recovery. The opinion is inconsistent with decisions from the United States Supreme Court and the five consecutive state courts of last resort that had recently considered—and rejected—medical monitoring claims by pre-injury plaintiffs. Remarkably, none of the serious policy concerns raised by those influential courts were even discussed in the *Meyer* opinion.

*Meyer* is a weak opinion and should be viewed as an anomaly given the recent strong trend in other states. Consequently, the opinion’s influence outside of Missouri should be limited. Even within Missouri, the opinion’s influence will depend largely on how subsequent courts fill in the many gaps left by the *Meyer* court’s vague directive. If Missouri courts do not accept this

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185. Studdert *et al.*, *supra* note 179, at 893.

186. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 718 n.7 (Mo. 2007).

187. *See* LA. CIV. CODE ANN. art. 2315 (2007).

opportunity to restore sound policy to Missouri medical monitoring law, the legislature would be wise to consider a statutory fix.

