COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. 10409

KATHLEEN DONOVAN and
PATRICIA CAWLEY,

Plaintiffs,

v.

PHILIP MORRIS USA, INC.,

Defendant.

On a Certified Question from the United States District
Court for the District of Massachusetts
C.A. No. 06-CV-12234-NG

BRIEF OF *AMICI CURIAE* COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, AMERICAN INSURANCE ASSOCIATION, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANT - APPELLEE

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STATEMENT OF INTEREST

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address and improve the asbestos and toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future 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 that may have a significant impact on the asbestos and toxic tort litigation environment.

The Chamber of Commerce of the United States of America ("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

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[1] The Coalition includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("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.

Founded in 1986, the American Tort Reform Association ("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.

The American Chemistry Council ("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.

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The American Insurance Association ("AIA") is a leading national trade association representing major property and casualty insurers writing business in Massachusetts, nationwide, and globally. AIA members collectively underwrote more than $124 billion in direct property and casualty premiums in 2007, including almost 40% of the commercial market in Massachusetts. AIA members, based in Massachusetts and most states, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this court.

The Property Casualty Insurers Association of America ("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 United States property and casualty insurance industry. PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

ISSUE PRESENTED

The following brief of *amici curiae* addresses one of the two questions certified by the United States District Court for the District of Massachusetts: whether Massachusetts recognizes a claim for medical monitoring absent manifest present physical injury.

STATEMENT OF THE CASE

Plaintiff/Appellants, Kathleen Donovan and Patricia Cawley, long-term smokers, ask the Court to establish, supervise and regulate an ongoing Low-Dose CT screening program to detect the onset of lung cancer among a putative class of Massachusetts residents who are: (1) fifty years of age or older; (2) have cigarette smoking histories of twenty pack-years or more using Marlboro cigarettes; (3) currently smoke Marlboro cigarettes or quit smoking Marlboro cigarettes within one year of the filing date of the initial Complaint in this action; (4) are not diagnosed with lung cancer or under investigation by a physician for suspected lung cancer; and (5) have smoked Marlboro cigarettes within the Commonwealth of Massachusetts. While both allege that smokers generally suffer "subclinical injuries" from every puff of smoke they inhale, these plaintiffs do not allege that they themselves have suffered any manifest injuries. *Brief of Appellant,* at 7.

STATEMENT OF FACTS

Where relevant, *amici curiae* cite to the Statement of Facts adopted by the District Court submitted with the certified questions to this Court.

SUMMARY OF ARGUMENT

For more than 200 years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has sustained a physical injury. This rule requires an objective showing that the plaintiff has been harmed in order to support the transfer of resources to that plaintiff from the defendant. Medical monitoring cases brought by plaintiffs with no manifest present physical injury cannot be reconciled with this traditional tort law which has been followed in Massachusetts. Without this traditional rule, it is virtually impossible to make an objective determination that a plaintiff has suffered actual harm. The creation of a medical monitoring claim as proposed by the Plaintiffs would eliminate the long-established injury requirement by permitting plaintiffs to recover based on the mere *possibility* of a future injury.

Medical monitoring claims have been rejected by the Supreme Court of the United States and seven of the last eight state courts of last resort to consider the issue – *i.e.*, the New Jersey, Oregon, Alabama, Nevada, Kentucky, Michigan, and Mississippi Supreme

Courts[2] – along with numerous other state and federal courts.[3]

Plaintiffs try to avoid the weight of these cases by suggesting that because smokers may experience "sub-cellular injuries," a claim of injury that is not manifest, they somehow satisfy the requirement that they suffer a present physical injury. The remedy they seek - medical monitoring - addresses not these subcellular changes but the plaintiffs' claim to be at an increased risk of suffering an actual manifest injury sometime in the future.

Claims for recognition of medical monitoring absent present physical injury should be rejected in Massachusetts for several reasons. First and foremost, allowing such claims would mark a major substantive change in fundamental tort law and one that is not permitted under the law of Massachusetts.

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[2] *See Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008); *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007) (en banc); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002); *Hinton v. Monsanto Co.*, 813 So. 2d 827, 828 (Ala. 2001); *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001). Of these eight recent decisions, Missouri is the only state to hold otherwise. *See* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer Ex Rel. Coplin v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135 (2007).

[3] *See infra*, note 12 and accompanying text.

Furthermore, in order to fashion a medical monitoring remedy, courts would be faced with the monumental task of developing a system for the fair and equitable administration of these monitoring claims, a function that would overwhelm judicial resources. Medical monitoring claims also threaten payment to the truly injured, who are in greater need of adequate and timely relief. Further, a medical monitoring remedy would foster widespread litigation with potentially unchecked liability.

On a daily basis, almost everyone comes into contact with a large number of substances that, someone might try to argue, may warrant medical monitoring relief. Whether, as a matter of public policy it is in the best interests of the state or country to monitor the health of these or other plaintiffs is a question that is better directed to other branches of government, which are better equipped to create, regulate and supervise any medical monitoring program. If a legislature decides, after exercising its information-gathering functions, that it is in the best interest of the citizenry to do so, the legislature is better equipped to create such an ongoing medical program. These claims, however, do not sound in tort which is fundamentally grounded on the principle that in order to recover, a plaintiff must allege and prove a present physical injury.

Claims of such "sub-cellular," non-manifest "injury" ignore the important distinction between *present physical harm*, which may give rise to a cause of action in tort, and *present physical effect*, which does not.

This Court's recognition of a claim for medical monitoring absent physical injury would also have significant negative consequences beyond Massachusetts and beyond when future courts consider whether to allow medical monitoring claims for any mere exposure in their own jurisdictions. This Court should neither recognize nor endorse novel new claims involving such a substantial departure from fundamental tort law and sound public policy.

ARGUMENT

I. TRADITIONAL TORT LAW AND SOUND PUBLIC POLICY DO NOT SUPPORT THE RECOGNITION OF MEDICAL MONITORING ABSENT PHYSICAL INJURY

For over 200 years, one of the fundamental principles of tort law has been that a plaintiff cannot recover without proof of a physical injury. *See* William L. Prosser, *Handbook on the Law of Torts* § 54, at 330- 33 (4th ed. 1971).[4] Such a rule is the

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[4] *See Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 184 (Or. 2008) (proof of damage is an essential element of negligence action). Massachusetts law follows this traditional physical injury rule. *See Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171, 181 (1982) (holding

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best filter the courts have been able to develop to prevent a flood of claims, to provide faster access to courts for those with "reliable and serious" claims, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997), and to ensure that defendants are held liable only for objectively verifiable, genuine harm. Medical monitoring cases brought by plaintiffs with no present manifest injury cannot be reconciled with the traditional "physical injury" rule in tort law.

Courts may be tempted to permit recovery for medical monitoring because the claims have "emotional and political appeal" and our society has developed a "heightened sensitivity to environmental issues." Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 121 (1995) ("Martin & Martin"). Nevertheless, the significant problems surrounding medical monitoring awards absent physical injury show the law should not be stretched to recognize such claims. *See* Victor E. Schwartz et al., *Medical Monitoring - Should Tort Law Say Yes?*, 34 Wake Forest

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(continued ...)
that a plaintiff must suffer physical harm and "that the physical harm must be manifested by objective symptomatology and substantiated by expert medical testimony").

L. Rev. 1057 (1999) ("Schwartz et al."); Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349 (2005).

A. Medical Monitoring Will Lead To A Flood Of Litigation, Clogging Access To Courts And Depleting Resources That Would Be Better Used To Compensate The Truly Injured

Allowing a claim for medical monitoring for asymptomatic plaintiffs would likely attract a flood of new lawsuits to the Commonwealth. This concern, among others, was a primary reason for the United States Supreme Court to reject medical monitoring claims in *Metro-North*, *supra*, where the Court noted, "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Metro-North*, 521 U.S. at 442 (rejecting medical monitoring claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq*).

Aligning with the U.S. Supreme Court, commentators have noted that allowing medical monitoring claims for asymptomatic plaintiffs will impose astronomical costs on defendants, because "we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances." Martin & Martin, *supra*, at 131; Schwartz et al., *supra* at 1071 ("[C]ourts awarding medical

monitoring produce results that can allow for unfettered recoveries and lead to an avalanche of claims."). An example of the "enormity of the universe of potential medical monitoring plaintiffs" is the amount of potentially hazardous substances with which the public comes into contact. 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, 528 (2000) ("Maskin et al.").[5]

Because so many individuals may qualify as potential medical monitoring claimants, plaintiffs' attorneys could basically recruit people off the street to serve as plaintiffs. No longer would plaintiffs' attorneys have to wait for injury to file suit. The familiar advertisement, "Have you been injured?" could become, "Don't wait until you're hurt, call now!" Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA Today, July 5, 1999, at

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[5] The Environmental Protection Agency reported in 1992 that nearly 20 percent of the U.S. population, or approximately 40 million people, live within four miles of a hazardous waste site on the National Priority List. *See* Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 Colo. Law 1533, 1533 (1994) (citing U.S. Department of Health and Human Services, Hazardous Substances & Public Health (Atlanta: Agency for Toxic Substances and Disease Registry, Vol. 2, No. 2, May/June 1992)), at 1.

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). As a result, Massachusetts courts could become clogged with speculative medical monitoring claims. Access to justice for those with present, serious, physical injuries may be delayed or denied. As one court rejecting medical monitoring noted,

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . 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.

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (emphasis added) (applying Virginia law), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

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. *See id.* The asbestos litigation environment vividly illustrates this problem. Even though claimants are supposed to have an injury to bring a claim, the standards became so permissive in many jurisdictions that at one point up to ninety percent of asbestos claimants were 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).[6] Mass filings by the non-sick pushed an estimated eighty-five 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); Martha Neil, *Backing Away from the Abyss*, A.B.A. J. (Sep. 2006) at 26, 29; *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise

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[6] 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).

viable companies into bankruptcy."). 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). Adoption of medical monitoring would exacerbate these problems to the detriment of the sick.

There is also little need for a medical monitoring cause of action because other established sources of payment exist to cover the costs of a screening program, like employer-provided health insurance plans. As the U.S. Supreme Court recognized, recovery based on medical monitoring without present injury "would 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." *Metro-North*, 521 U.S. at 442.

In addition, medical monitoring claims in the workplace setting could fall outside of the workers'

compensation system, which could subject employers to endless liability. Generally, workers' compensation systems afford the exclusive remedy for an injured worker. *See* Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Desk Edition* § 100.01 (2000). One exception to this rule is that an employee may sue an employer for injuries not within the scope of the workers' compensation statute. This is logical as a general proposition, because to hold otherwise would mean that no recovery is available for injuries falling outside of the workers' compensation system.

It is not hard to imagine a situation in which, more than a year after a plaintiff was last exposed to a substance, a report is issued indicating that the substance may increase the plaintiff's risk of disease by a minimal 1-in-100,000 (equating to a 99,999-in-100,000 chance that the plaintiff will **never** develop the disease), which is all that some state courts require for medical monitoring claims to proceed. The employer could then be liable for the cost of monitoring for the onset of the disease in which there is a 99,999-in-100,000 chance that plaintiff will **never** contract the medical condition. Examples of situations in which this could happen abound: gas station attendants exposed to gasoline fumes, or barbers and beauticians exposed to chemical fumes from hair products, to name just two. Virtually every

employer could be at risk of being responsible for employee health care costs indefinitely, even though there is virtually no chance - *i.e.*, only 1-in-100,000 - that the plaintiff will contract the disease.

II. MOST OTHER JURISDICTIONS THAT HAVE RECENTLY CONSIDERED THIS ISSUE HAVE REJECTED MEDICAL MONITORING ABSENT PRESENT PHYSICAL INJURY

This Court's decision to reject medical monitoring claims would be in line with most other jurisdictions that have considered this issue, particularly since the United States Supreme Court's opinion in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). Other courts have rejected medical monitoring based on exposure to a wide range of substances, including asbestos, cigarette smoke, water pollution, and prescription drugs.

A. The United States Supreme Court Has Rejected Medical Monitoring

In *Metro-North*, the United States Supreme Court ruled 7-2 against allowing a medical monitoring claim brought by a pipefitter against his employer for occupational exposure to asbestos under the Federal Employers' Liability Act (FELA), a statute that has often been construed in favor of plaintiffs.[7] The

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[7] *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.*

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Supreme Court closely 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. *See Metro-North*, 521 U.S. at 441-42. The Court appreciated that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." *Id.* at 442. 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, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.[8]

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Co., 698 N.E.2d 484, 499 (Ill. App. 1992) (under FELA "[o]nly slight negligence of the defendant needs to be proved").

[8] Medical monitoring "may be an extremely redundant remedy for those who already have health insurance." Maskin et al., *supra*, at 528.

B. Most States Considering Medical Monitoring Absent Physical Injury Have Refused To Recognize It As A Viable Claim

In accordance with *Metro-North*, traditional principles of tort law, and sound public policy, most state courts of last resort recently presented with the issue have rejected medical monitoring. The most recent decision, *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 183 (Or. 2008), is nearly identical to the case at hand. There, the Plaintiffs alleged that they and all similarly situated citizens of Oregon "have suffered injury in that they have been significantly exposed to proven hazardous substances in defendants' cigarettes, and suffer significantly increased risk of developing lung cancer." In dismissing the Plaintiffs' case, the Oregon Supreme Court held that "the fact that a defendant's negligence poses a threat of future physical harm is not sufficient, standing alone, to constitute an actionable injury. *Id.* at 184. The Court also rejected Plaintiffs' claim regarding medical monitoring, holding that "negligent conduct that results only in a significantly increased risk of future injury that *requires* medical monitoring

does not give rise to a claim for negligence." *Id.* at 187 (emphasis added).[9]

Similarly, in *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001), the Nevada Supreme Court rejected claims by smokers and casino workers who brought class actions seeking the establishment of a court-supervised medical monitoring program to aid in the early diagnosis and treatment of alleged tobacco-related illnesses. The court held that "Nevada common law does not recognize a cause of action for medical monitoring," *id.* at 438, observing that medical monitoring is "a novel, non-traditional tort and remedy." *Id.* at 441. The court stated 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 Alabama Supreme Court considered medical monitoring in *Hinton v. Monsanto Co.*, 813 So.2d 827,

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[9] Likewise, the New Jersey Supreme Court recently rejected claims for medical monitoring brought under that state's product liability statute. *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 61 (N.J. 2008). In *Sinclair,* Plaintiffs contended that, as a result of ingesting the drug Vioxx, they were at an increased risk of suffering from cardiovascular disorders. The Court held that a claim for medical monitoring in the absence of physical injury does not fit within the Product Liability Act's definition of "harm" and is, therefore, not recoverable. *Id.*

828 (Ala. 2001), which involved a claim by a citizen who alleged that he had been exposed to polychlorinated biphenyls ("PCBs") that were reportedly released into the environment by the defendant. The Alabama Supreme Court refused to recognize a medical monitoring cause of action in the absence of a "manifest, present injury." *Id.* at 829. The court stated that "[t]o 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 was "unprepared to embark." *Id.* at 830. The court also discussed a number of public policy concerns, such as a potential never-ending avalanche of claims and the unlimited liability exposure for defendants. It realized 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. *Id.* at 831 (internal citations omitted). The court concluded: "we 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. . . . That law provides no

redress for a plaintiff who has no present injury or illness." *Id.* at 831-32.

The highest court in Kentucky has also rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002). There, the 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 from ingesting the "Fen-Phen" diet drug combination. The Kentucky Supreme 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." *Id.* at 852. The court concluded that "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." *Id.* at 853-54.[10]

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[10] A subsequent Sixth Circuit decision applying Kentucky law reinforced the public policy reasons against allowing claims absent present physical injury. In *Rainer v. Union Carbide Corp.*, 402 F.2d 608 (6th Cir.), *cert. denied*, 546 U.S. 978 (2005), the court determined that like medical monitoring claims, claims of subcellular damage to DNA and chromosomes without any salient clinical symptoms cannot be sustained as a matter of public policy. The court reasoned:

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Additionally, the Supreme Court of Michigan decided not to recognize medical monitoring in *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005). Plaintiffs there brought a claim based on the negligent release of dioxin by a chemical company, alleging no claims of present injury but sought to recover for harm resulting from the potential health effects of the exposure. The court concluded that the recognition of a medical monitoring cause of action would "depart[] drastically from [the] traditional notions of a valid negligence claim" and that

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> Given that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless." Accepting the plaintiffs' claim would therefore throw open the possibility of litigation by any person experiencing even the most benign subcellular damage. Based upon the average American's exposure to chemically processed foods, toxic fumes, genetically modified fruits and vegetables, mercury-laden fish, and hormonally treated chicken and beef, this might encompass a very large percentage of the total population. Nowhere in their arguments do the plaintiffs address these "floodgate" concerns.

Id. at 621 (quoting *Wood*, 82 S.W.3d at 857-58) (citation omitted).

"judicial recognition of plaintiffs' claim may also have undesirable effects that neither [the court] nor the parties can satisfactorily predict." *Id.* at 694. The court further opined that this type of claim would "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care," and that this was a change that "ought to be made, if at all, by the Legislature." *Id.* at 686, 694.

More recently, Mississippi's highest court rejected medical monitoring in *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1 (Miss. 2007) (en banc, where a class of workers exposed to beryllium sought the establishment of a medical monitoring fund). *Id.* at 2. The court held that "[t]he possibility of a future injury is insufficient to maintain a tort claim," and that "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." *Id.* at 5. The court noted that it had "continuously rejected the proposition that within tort law there exists a cause of action or a general category of injury consisting solely of potential future injury," and that it

"continues to decline to recognize such a cause of action." *Id.* at 9.[11]

Several federal courts have also addressed medical monitoring and have expressed concerns similar to those of many of the state courts. For instance, in *Carroll v. Litton Sys., Inc.*, 1990 WL 312969 (W.D.N.C. Oct 29, 1990), the U.S. District Court for the Western District of North Carolina dismissed plaintiffs' medical monitoring claims because "[n]o statute or case in North Carolina creates causes of action based upon claims of increased risk of disease or for medical monitoring costs." *Id.* at 87. The court went on to say that "[t]he creation of such causes of action implicates policy issues that should be left to the legislature in the first instance." *Id.*

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[11] In contrast, the Missouri Supreme Court recently sided with West Virginia, reaching the opposite conclusion and choosing to recognize medical monitoring in *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007) (en banc). The Court's opinion relies upon pre-*Metro-North* authority and does not address any of the concerns identified by the Supreme Court and other states that have rejected medical monitoring. Moreover, unlike Massachusetts, Missouri case law did not require a present physical injury in order to recover under a tort theory. *Id.* at 719. Like other courts, the Missouri Supreme Court also declined to establish any parameters for the new tort it created, leaving litigants and its lower courts unguided to find their way in the tangle of medical, scientific, and policy issues involved in implementing the court's vague directive. *Id.* at 718 n.7.

The U.S. District Court for the Western District of Texas, in *Norwood v. Raytheon Co.*, 414 F.Supp. 2d 659 (W.D. Tex 2006), similarly objected to the recognition of medical monitoring as a separate cause of action, chiefly citing the U.S. Supreme Court's reasoning in *Metro-North*. *Id.* at 666-67. The court observed that "medical monitoring as an independent cause of action in the absence of a present physical injury is neither universally rejected nor accepted," and that "[t]he majority of states considering medical monitoring as a cause of action since *Metro-North* have rejected the claims." *Id.* at 666. Many other state and federal courts have come to the same conclusion and have declined to recognize medical monitoring.[12]

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[12] *See, e.g., Goodall v. United Illuminating*, 1998 WL 914274, *7-10 (Conn. Super. Ct. Dec. 15, 1998) (unreported); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Johnson v. Abbott Laboratories*, 2004 WL 3245947, *6 (Ind. Cir. Ct. Dec. 31, 2004) (unreported) ("Indiana does not recognize medical monitoring as a cause of action."); *Abusio v. Consol. 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 future medical monitoring costs), *lv. denied*, 686 N.E.2d 1363 (N.Y. 1997); *see also Parker v. Wellman, Inc.*, 230 Fed. Appx. 878, 880, 2007 WL 1149982 (11th Cir. 2007) (rejecting claim for medical monitoring); *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th 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); *Thompson v. Am. Tobacco Co.*,

(continued...)

These jurisdictions demonstrate careful analysis and prudent decision making when faced with the same question pressed now before this Court. In accordance with these jurisdictions, and for the reasons

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(continued …)
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."); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (holding Nebraska law has not recognized a cause of action or damages for medical monitoring and predicting that Nebraska courts would not judicially adopt such a right or remedy), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *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."); *Rosmer v. Pfizer*, 2001 WL 34010613, *5 (D.S.C. Mar 30, 2001) (unreported) (noting that South Carolina has not recognized such a claim); *Jones v. Brush Wellman, Inc.*, 2000 WL 33727733, *8 (N.D. Ohio 2000) (unreported) ("It is clear that under Tennessee law, a plaintiff must allege a present injury or loss to maintain an action in tort. No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury."); *Bostick v. St. Jude Med., Inc.*, 2004 WL 3313614, *14 (W.D. Tenn. Aug 17, 2004) (unreported) ("[A] review of the applicable case law reveals that Tennessee does require a present injury.") (interpreting Tennessee law); *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 medical monitoring because Washington law requires existing injury in order to pursue a negligence claim); *Purjet v. Hess Oil Virgin Islands Corp.*, 1986 WL 1200, *4 (D.V.I. Jan. 08, 1986) (rejecting medical monitoring claim absent physical injury under Virgin Islands law).

discussed herein, this Court should refuse to recognize medical monitoring without present physical injury as a viable cause of action in Massachusetts.

C. Subclinical or "Sub-Cellular" Changes Do Not Constitute A Present Physical Injury

In an attempt to avoid the weight and number of cases that reject medical monitoring as a cause of action, Plaintiffs creatively allege that smoking cigarettes causes changes in the cells of the lungs and that these changes constitute an "injury" sounding in tort despite the fact that Plaintiffs do not suffer from any present manifest physical injury. *See Statement of Facts*, at 4 (submitted by the federal district court with the certified question) (February 23, 2009). Putting aside for a moment the inherent conflict in Plaintiffs' claims - they allege an "injury" based on these sub-cellular changes but seek a remedy (medical monitoring) based on an increased risk of a wholly different "injury" - lung cancer - most courts, including courts applying Massachusetts law, that have considered a tort claim based on these sorts of physical changes have rejected them.

Two decisions from the Massachusetts federal district court, applying Massachusetts law, have squarely addressed such claims and determined that they were insufficient to satisfy the "injury" element

essential to a tort cause of action. In *Caputo v. Boston Edison Co.*, 1990 WL 98694, * 4 (D. Mass. 1990), the district court held that cellular chromosomal damage "does not rise to the level of physical injury as a matter of law because nothing in the record relates them to any objective symptoms of illness or disease." Similarly, in *In re Massachusetts Asbestos Cases,* 639 F. Supp. 1, 2-3 (D. Mass. 1985), the court rejected an argument that injury occurs upon mere exposure to a potentially hazardous substance and a plaintiff must have manifest symptoms of injury to state a cause of action. *Id.* at 2-3.

Other jurisdictions have similarly recognized that while sub-cellular changes may constitute a present physical effect, they do not constitute a present physical harm needed to satisfy the "injury" element that lies at the heart of a tort claim. In *Parker v. Wellman*, 230 Fed. Appx. 878, 880, 2007 WL 1149982 (11th Cir. 2007), Plaintiffs who were exposed to beryllium sought damages because they "suffered and will suffer in the future personal injuries in the form of sub-clinical, cellular and sub-cellular damage." In rejecting their claim, like the Plaintiffs here, that "the subclinical and cellular damage from their exposure, by itself, is an injury," the Eleventh Circuit held:

> But Plaintiffs have not alleged that this subclinical damage has resulted in an identifiable physical disease, illness, or impairing symptoms. And to the extent that Plaintiffs allege that their subclinical condition will eventually cause - or will at least increase their risk of developing - future disease, pain or impairment, Plaintiffs concede that they do not seek current compensation for this anticipated harm.

Parker, 230 Fed. Appx. 878, 2007 WL 1149982, at *3 n.3 (citing similar decisions from the Third, Sixth and Eighth Circuit Court of Appeals).

Beyond twisting the logic of the term "injury," a ruling that permits a cause of action based on changes in one's body at the sub-cellular or genetic level without any manifest injury or symptoms would be so broad as to allow tort claims by anyone exposed to any number of substances whether or not they are injured by that exposure.

The view that alleged increased risk of future injury from exposure to a toxin is akin to a physical injury from a car accident is false. *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, 841 (2002). Professors Henderson and Twerski, who served as the Reporters for the recent Restatement, Third of Torts: Products Liability and

are the nation's leading academic tort experts, have written: "From the beginning of our negligence jurisprudence, 'injury' has been synonymous with 'harm' and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm." *Id.* at 842. Physical injury has been the "linchpin in determining the duties of care owed by defendants." *Id.* Allowing a plaintiff to pursue a tort claim without any manifest physical injury would be to wholly disregard these bedrock tort principles.

D. The States That Have Adopted Medical Monitoring Demonstrate Why It Should Not Be Recognized By This Court

Although several states have decided to adopt medical monitoring, their experiences demonstrate why this Court should not follow suit. Most states that have adopted medical monitoring did so prior to the Supreme Court's *Metro-North* decision. Their subsequent experience serves as a cautionary tale. West Virginia is perhaps the best illustration of adverse impacts of why not to permit medical monitoring claims for asymptomatic plaintiffs. In *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432-33 (W. Va. 1999), the Supreme Court of Appeals of West Virginia established an independent cause of action for an individual to recover future medical

monitoring costs absent physical injury, stating that the amount of exposure to a toxic substance required to file a suit does not have to correlate with a level sufficient to cause injury. *See id.* at 433-34. 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.

As a result, thousands of uninjured people from other states have sought to have their medical monitoring claims adjudicated en masse in West Virginia, which has caused a great deal of concern. *See, e.g.*, Robert D. Mauk, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette, Mar. 1, 2003, at 5A ("[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."). *Bower* contributed to West Virginia being roundly criticized by the American Tort Reform Association for several years running. Several recent U.S. Chamber of Commerce studies also ranked West Virginia close to the bottom among all states for creating a fair and reasonable litigation environment.

Louisiana provides another clear example as to why the Court should not adopt medical monitoring. The Supreme Court of Louisiana recognized medical monitoring as a cause of action in *Bourgeouis v. A.P. Green Indust., Inc.*, 716 So. 2d 355 (La. 1998), stating that "a plaintiff who can demonstrate a need for medical monitoring has suffered damage . . . ." *Id.* at 361. Experience in Louisiana since *Bourgeois* has demonstrated that recognition of medical monitoring will lead to more litigation. *See, e.g., Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. App. 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10 (La. App. 1998) (certifying as a medical monitoring class all Louisiana residents who were cigarette smokers on or before May 24, 1996, provided that each claimant started smoking on or before Sep. 1, 1988), *writ denied*, 731 So. 2d 189 (La. 1999). The state legislature swiftly reversed *Bourgeouis*, amending its statutory law to *exclude* medical monitoring claims as a basis for liability for damages. *See* La. Civ. Code Ann. at 2315 (1999) (disallowing civil damages "for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or

disease."). Louisiana's experience strongly demonstrates that this issue is appropriately left to the legislative process and should not be resolved by judicial action.

Moreover, it is also troublesome that these recognizing states are split over the fundamental nature of medical monitoring. Several courts have held that medical monitoring is properly recognized as an independent cause of action,[13] while others have concluded that it is merely a potential remedy.[14] The inability of medical monitoring jurisprudence to even agree on basic theory is yet another reason why the doctrine should not be adopted by this Court. The states recognizing medical monitoring have shown that it is an undesirable outcome and is therefore one that this Court should choose to avoid.

III. THE ENFORCEMENT OF REMEDIES FOR MEDICAL MONITORING ABSENT PHYSICAL INJURY IS UNWORKABLE

There are two potential methods to award a medical monitoring remedy: as a lump sum payment or by a court-administered monitoring program. Both of

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[13] *See Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993).

[14] *Hansen v. Mountain Fuel Supply Co.*, 858 F.2d 970, 978 (Utah 1993); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 429 (W. Va. 1999).

these options may cause serious problems for the Court and create doubt about the availability of a suitable remedy for medical monitoring claims.

A. Lump Sum Awards for Medical Monitoring Create the Opportunity for Abuse

Courts have recognized the futility of lump sum cash payments because a court cannot dictate how recipients will spend it. "Since the medical monitoring award itself is not appropriately monitored, there is no assurance that the award, however large, will be used to help a person detect the onset of treatable disease." Schwartz et al., *supra*, at 1077-78.[15] Any person who was even momentarily exposed to a toxic substance will be able to recover damages. "[T]he 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) ("McCarter").

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[15] *See, e.g., Lilley v. Bd. of Supervisors of La. State Univ.*, 735 So. 2d 696 (La. App.), *writ denied*, 744 So. 2d 629 (La. 1999). Merely one year after the Louisiana Supreme Court recognized medical monitoring as a cause of action, the trial court awarded $12,000 per plaintiff for medical monitoring *despite the fact the Bourgeois court expressly declined to extend its holding to claims for lump sum damages. See Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 357 n.3 (La. 1998). The award was overturned on appeal.

The New Jersey Supreme Court's decision in *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987), illustrates the fact that awards for medical monitoring often may not lead to any medical monitoring whatsoever. In *Ayers*, 339 plaintiffs, all without present physical injury, were awarded over $8 million as a lump sum for medical monitoring. *See id.* at 291. One author conducted an informal survey of the plaintiffs after the lawsuit. While the survey garnered only three responses, they may be telling: 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. *See* McCarter, *supra*, at 257-58 n.158.

The testimony of some plaintiffs who have sought medical monitoring damages is an indicator of the level of their unwillingness to use any funds for monitoring and lack of desire to be tested. In *Ironbound Health Rights Advisory Board Commission v. Diamond Shamrock Chemical Co.*, 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990), motion practice left medical monitoring as the only damage claim remaining

for most of the ninety-seven plaintiffs in a dioxin exposure suit. *See* McCarter, *supra*, at 270 n.212.

In one plaintiff's deposition, the defense attorney asked the plaintiff if he had ever been or ever wanted to be tested to discover if he had any toxic substance in his body. The plaintiff seeking medical monitoring replied, "I don't know. I don't know if I want to know." *Ironbound*, 578 A.2d at 1249. At trial, the plaintiffs were cross-examined about whether they had ever expressed their concerns about their exposures to their doctors during doctor visits in the time leading up to trial. Time and time again, plaintiffs responded they had not mentioned any such concerns, though they knew of the exposures at the time of the visits. *See* McCarter, *supra*, at 270-71 n.212. The fact that these plaintiffs did not alert their doctors to their exposures during routine visits may suggest other plaintiffs will not be quick to do so either if they are allowed to bring medical monitoring claims under Massachusetts law.

Similarly, in *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993), 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. As 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." Maskin et al., *supra*, at 541-42.

These examples show that medical monitoring awards may not result in the plaintiff 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. Visiting a physician is not something many people wish they could do more often.

Maskin et al., *supra*, at 540-41. Likely because Plaintiffs recognize the ineffectiveness of an award of monetary damages for a claim of medical monitoring, they label the relief they seek as injunctive in nature. But such a court-ordered screening program, while probably more effective, is just as unworkable.

B. A Court Administered Monitoring Program Will Be Overly Burdensome For Courts and Will Tie Up Judicial Resources

Recognizing the ineffectiveness of a monetary award, Plaintiffs label the court-created, supervised and enforced monitoring treatment program they seek an

"injunctive remedy." Whether such a monitoring program is injunctive or monetary in nature,[16] it remains that courts are not well-suited to oversee such an extraordinary, unwarranted remedy. While a court-administered monitoring program seemingly would mitigate the potential for abuse, this solution would be likely to create high, ongoing administrative costs for the court system and its personnel.[17]

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

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[16] Because Plaintiffs seek for Defendant to fund the creation of the CT Scan Program, it could be argued that they still seek a monetary damage award. *See Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979) (plaintiffs cannot "transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money," and finding that plaintiffs' request for a medical monitoring fund was a "disguised claim" for future medical expenses); *Great-West Life v. Annuity Ins. Co., v. Knudson*, 534 U.S. 204, 210-11 (2002) ("injunction to compel the payment of money...was not typically available in equity"); *Richards v. Delta Airlines,* Inc., 453 F.3d 525, 531 (D.C. Cir. 2006) ("[P]laintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money.").

[17] *Amici* express no view as to the general acceptance in the medical community or the efficacy of the screening program for which Plaintiffs advocate.

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); Gary R. Krieger et al., *Medical Surveillance and Medical Screening for Toxic Exposure*, *in* Clinical Envtl. Health & Toxic Exposures 108, 113-15 (John B. Sullivan, Jr. & Gary R. Krieger eds., 2d ed. 2001); Myrton F. Beeler & Robert Sappenfield, *Medical Monitoring: What Is it, How Can it Be Improved?*, 87:2 Am. J. of Clinical Pathology 285, 286-87 (Myrton F. Beeler et al., eds. 1987) ("Beeler & Sappenfield"); David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890 ("Studdert"). Plaintiffs themselves acknowledge that the program would require a court to oversee the hiring of personnel, notification and consent, equipment purchases, quality control, rendering medical advice and record keeping. *Brief for Appellant* at 11.

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. 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 would place "additional strains on courts that should be hesitant to undertake such a costly and time-consuming responsibility." Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on this Trend?*, 70 Def. Counsel J. 315, 320 (2003).

IV. THE DECISION WHETHER TO RECOGNIZE MEDICAL MONITORING IS BEST LEFT TO THE LEGISLATURE

Medical monitoring absent present physical injury presents an about-face to 200 years of substantive tort law. Medical monitoring claims "reject[] the prerequisite of palpable harm," eschewing "several time-honored tenets of personal injury litigation." Studdert, *supra*, at 890, 894.

Whether Massachusetts should permit a claim for medical monitoring absent physical injury should be decided by the Legislature, if it is to be adopted at all. The questions raised by medical monitoring claims are difficult and complex, presenting great

changes to traditional tort law concepts. *See* Patricia E. Lin, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 Rev. Litig. 551, 568 (1998) ("Lin"). There is no dispute that the judiciary has the power to alter the common law. But, because the questions raised by medical monitoring are complex, involve so many intersecting entities and public policy concerns - from employers to health care providers to health insurance companies -- and require investigation in order to implement this remedy properly, it is a task more suitable for the Legislature.

The effect of recognizing medical monitoring would extend far beyond the confines of this case and would involve the consideration of many issues other than those presently before the Court. The questions raised by medical monitoring claims are difficult and complex and present great changes to traditional tort law concepts. *See* Lin, *supra*, 17 Rev. Litig. at 568. For example, consideration must be given to the types of health conditions that may be monitored; the likelihood that monitoring will detect the existence of disease and the adverse consequences that false positives may bring; 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 developing an adverse health

condition that may trigger monitoring and the measure of that increase; the types of tests to be used in monitoring; and the potential medical, scientific, and economic downsides to medical monitoring; as well as how to structure the continuing administration of each patient's monitoring program.

Medical monitoring claims necessarily include scientific and medical decisions about which treatment is proper for specific plaintiffs. The U.S. Supreme Court recognized these difficult considerations, noting that "[t]hose difficulties can reflect uncertainty among medical professionals about just which tests are most usefully administered and when." *Metro-North*, 521 U.S. at 441. 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. *See* Beeler & Sappenfield, *supra*, at 287.

The Legislature would also be best suited to establish the circumstances under which a medical monitoring cause of action would be available. The scope of this issue is exceedingly broad and may encompass many different types of exposure that do not require legal protection. As the U. S. Supreme Court stated,

> [T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-

> related medical monitoring . . . . [T]hat fact, along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases . . . and the systemic harms that can accompany "unlimited and unpredictable liability."

Metro-North, 521 U.S. at 442. Only a legislature, with its ability and experience in considering the different angles of an issue, is able to adequately craft a medical monitoring program that properly addresses the perceived problem while minimizing other unwanted effects - if in fact, such a legislature deems a medical monitoring cause of action necessary at all. Indeed, in an attempt to confine claims, courts that have permitted recovery for medical monitoring have not demonstrated an ability to articulate consistent eligibility requirements for medical monitoring, and have produced results permitting unlimited recoveries.[18]

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[18] *See generally* 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, *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, *Medical Monitoring in Toxic*

(continued...)

It is perilous for courts to attempt to fashion a bright-line rule allowing medical monitoring of all types of health conditions, due to the depth and complexity of the issues involved. This type of decision requires access to a substantial amount of complicated, scientific information and the resources to appropriately consider this information. This is precisely the type of decision- making process that falls within the legislative function and thus this Court should leave medical monitoring to be established, if at all, to a legislative body.

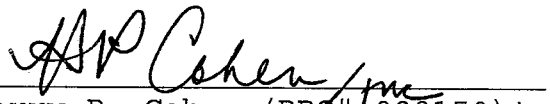
Finally, there are many policy concerns on both sides of this issue that the Legislature is best equipped to balance and consider. All interested persons and entities will be able to actively engage in the political process and voice their concerns. This type of involvement is vital to the resolution of the medical monitoring issue. Moreover, the legislative process will provide potential defendants with adequate notice of the law, thereby enabling them to conform their behavior.

(continued ...)
Tort Cases: Another Windfall for Texas Plaintiffs?, 33 Hous. L. Rev. 473, 496 (1996) (same).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court respond to Question 1 of the questions certified by the federal district court in the negative.

Respectfully submitted,



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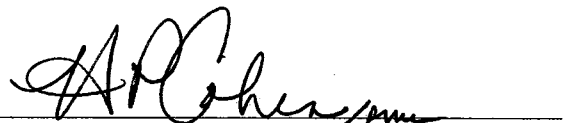
CERTIFICATE OF COMPLIANCE

I, Harry P. Cohen, do hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs of *amici curiae*, including but not limited to, Mass. R.A.P. 16(h) (length of briefs) and Mass. R.A.P. 20 (form of briefs, appendices and other papers).



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of *Amici Curiae* were served on counsel listed below, by federal express, on May 13, 2009.

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