**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

DOCKET NO. 2022-0132

KEVIN BROWN ET AL.

V.

SAINT-GOBAIN PERFORMANCE PLASTICS CORP. ET AL.

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RULE 34 CERTIFIED QUESTION FROM UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

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# CONSENTED TO BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANTS

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## INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to improvement and reform of the law in the United States and elsewhere, particularly as governing the liability of manufacturers of products and others in the supply chain. PLAC's perspective derives from the experiences of a corporate membership spanning a diverse group of industries throughout the manufacturing sector. In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law affecting product risk management.

Members of PLAC, and other product manufacturers, have a strong interest in in one of tort law's fundamental premises—that only actual injuries warrant compensation. PLAC believes that the law should not recognize a novel cause of action that would allow a multitude of individuals without present physical injury to sue over bare allegations of exposure to allegedly hazardous substances, which would transform unrealized risks into major litigation, burdening business, litigants, and the judicial system.

[1] See https://plac.com/PLAC/AboutPLACAmicus.

This brief is respectfully submitted to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

## **SUMMARY OF ARGUMENT**

Plaintiffs ask this Court to recognize a new cause of action, independent of the traditional requirement of tort law, under which innumerable plaintiffs could sue a wide range of defendants, large and small, for supposed wrongful conduct in connection with unrealized risks of exposure to any allegedly hazardous substance. They reject any restrictions based on the likelihood of future injury. If successful, such actions would compel defendants to fund elaborate court-run public health monitoring open to anyone claiming exposure, all without any present physical injury. Such actions would necessarily have judges making public health decisions and supervising these open-ended medical programs.

Unsurprisingly, no-injury medical monitoring lacks any basis in this Court's jurisprudence. The parties' briefs demonstrate how these claims implicate a broad range of complex public policy issues. Policy-related concerns counsel against recognition of no-injury medical monitoring, whether viewed as an independent cause of action or as a remedy. The Court should avoid entering a jurisprudential muddle with no clear elements or outcomes.

The U.S. Supreme Court and many state high courts have declined to extend traditional causes of action to allow no-injury medical monitoring. They recognize that abandoning tort law's foundational present injury element would result in exactly what these plaintiffs advocate—mass

pursuit of speculative medical monitoring expenses by uninjured persons, the vast majority of whom will never suffer any actual harm. Moreover, states permitting some form of medical monitoring claims by uninjured persons are hopelessly divided over the elements of such claims. Plaintiffs here are advancing the most radical form of an already novel recovery theory.

## INTRODUCTION

As discussed in more detail in defendant Saint-Gobain's papers, Plaintiffs here seek to eliminate the traditional present injury requirement of New Hampshire tort law to pursue a class action on behalf of just about everyone in the Merrimack, New Hampshire area—some 28,000 presently uninjured people—allegedly because everyone has some level of per- and polyfluoroalkyl substances ("PFAS") in their blood. Plaintiffs seek "medical monitoring" of these uninjured persons because PFAS are allegedly "associated" with increased future risk of various diseases, from cancer to high cholesterol. Plaintiffs pursue these claims despite:

- Including would-be claimants whose PFAS exposure is no more, and often less, than ordinary background levels. See Apx.II.112, 179-180, 184; Apx.IV.118-119; Apx.VIII.51.
- Failure to establish that would-be claimants are at a substantially increased risk of any alleged condition. See Apx.III.135-36; Apx.IV.72; Apx.VIII.107; Apx.IX.141; Apx.XI.172-73, 175-76, 182; S.Apx.III.99, 103.

- Seeking monitoring for infinitesimal increased risks that would take many years to detect even one new case. See Apx.IV.72; Apx.IX.141; Apx.XI.182; S.Apx.III.99, 103.
- Failure to quantify anyone's actual PFAS blood levels. See Apx.IV.16-17, 126-28, 224-26; Apx.V.68-69; Apx.VII.113-14.
- Having no published study or medical organization recommending PFAS medical monitoring. See Apx.III.137.
- Having no published study or medical organization concluding that PFAS causes cancer or any other human disease. See Apx.III.92-93, 135-36; Apx.VII.139; Apx.V.79-80; Apx.IV.23-25, 40.

In short, this litigation is a poster child for why no-injury medical monitoring *should not* be adopted in New Hampshire—or anywhere else. Plaintiffs cannot point to any person in the class who is "reasonably certain" to suffer any future injury, as New Hampshire law requires. E.g., Torromeo Industries v. State, 173 N.H. 168, 176, 238 A.3d 1077, 1085 (2020); Laramie v. Stone, 160 N.H. 419, 428, 999 A.2d 262, 270 (2010). Courts throughout the country retain tort law's traditional present injury requirement and reject similar allegations because, as this litigation demonstrates, allowing lawsuits based on bare claims of increased risk opens the door to massive class action litigation over *de minimis* exposures and to potentially vast numbers of claims over mere possibilities of increased risk.

The law has traditionally precluded tort plaintiffs from suing before they have suffered injury, and this case demonstrates that generations of

judges have been right to maintain present injury as a prerequisite to recovery in tort.

## ARGUMENT

### I. NEW HAMPSHIRE LAW DOES NOT, AND SHOULD NOT, PERMIT RECOVERY OF MEDICAL MONITORING EXPENSES ABSENT EXTANT, PRESENT INJURY.

In New Hampshire, as elsewhere, "[i]t is axiomatic that there is no cause of action … unless and until there has been an injury." Smith v. Cote, 128 N.H. 231, 248, 513 A.2d 341, 352 (1986). Traditionally, under New Hampshire law, a mere "possibility that injury may result from an act or omission … is insufficient to impose any liability or give rise to a cause of action.... [T]here is no cause of action unless and until there has been an injury." Draper v. Brennan, 142 N.H. 780, 785, 713 A.2d 373, 376 (1998) (quoting White v. Schnoebelen, 91 N.H. 273, 274, 18 A.2d 185, 186 (1941)). Thus, "the plaintiff must establish the existence of a duty, the breach of which proximately causes injury to the plaintiff." Smith, 128 N.H. at 240, 513 A.2d at 346.

In addition to following the Court's bedrock White precedent, Smith looked to W. Prosser & P. Keeton, Prosser and Keeton on the Law of Torts, at 164-65 (5th ed. 1984). 128 N.H. at 240, 513 A.2d at 346. At the cited pages, the professors explained:

> [P]roof of damage was an essential part of the plaintiff's [negligence] case. Nominal damages … cannot be recovered in a negligence action, where no actual loss has occurred. *The threat of future harm, not yet realized, is not enough.* Negligent conduct in itself is not such an interference with the

> interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

Id. at 165 (citations omitted) (emphasis added).[2] Similarly, "the basis of any claim involving products liability" is a product "defect" that "causes the injury for which recovery is sought." Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 826, 713 A.2d 381, 383 (1998). That injury must be "physical harm." Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 831, 891 A.2d 477, 492 (2005) (quoting Restatement (Second) of Torts §402A (1965)).[3]

Plaintiffs attempt to tease a no-injury medical monitoring cause of action from Smith, Porter v. City of Manchester, 151 N.H. 30, 849 A.2d

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[2] This Court has relied on Prof. Prosser's tort treatise many times, including: the requirement that a "breach" must "proximately cause[] injury," England v. Brianas, 166 N.H. 369, 371, 97 A.3d 255, 257 (2014); Peterson v. Gray, 137 N.H. 374, 378, 628 A.2d 244, 246 (1993); general rejection of claims for "purely" economic loss, Border Brook Terrace Condominium Ass'n v. Gladstone, 137 N.H. 11, 18, 622 A.2d 1248, 1253 (1993); and physical injury as a prerequisite to recovery for emotional distress. Thorpe v. State, Dept. of Corrections, 133 N.H. 299, 303-04, 575 A.2d 351, 353 (1990).

[3] See also Plourde Sand & Gravel v. JGI East, Inc., 154 N.H. 791, 795, 917 A.2d 1250, 1254 (2007) ("In New Hampshire, the general rule is that persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss.") (citation and quotation marks omitted); Benson v. New Hampshire Insurance Guarantee Ass'n, 151 N.H. 590, 596, 864 A.2d 359, 365 (2004) ("A cause of action for tort arises when causal negligence is coupled with *harm* to the plaintiff.") (emphasis original).

103 (2004), and State v. Exxon Mobil Corp., 168 N.H. 211, 126 A.3d 266 (2015). PB at 14-15.[4] None of those decisions supports such fundamental reordering of traditional tort principles. In Smith, which allowed parents a wrongful birth cause of action, there was no question that an actual "injury"—a child's birth defects—had occurred due to the defendant's alleged tortious conduct. Indeed, as just discussed, this Court in Smith reaffirmed the requirement of present injury. Smith allowed plaintiff parents to recover only "tangible losses" and not purported "intangible losses." Id. at 245-47, 513 A.2d at 350-51. But plaintiffs fail to mention that Smith also rejected the minor-plaintiff's novel "wrongful life" cause of action outright, *precisely because* it involved no cognizable injury. As to that claim, Smith held that "we will not permit a person to recover damages from one who has done him no harm." Id. at 252, 513 A.2d at 355.

Porter permitted a cause of action for wrongful termination. That claim necessarily involved present harm, since the plaintiff had both lost his job and allegedly suffered "emotional distress." 151 N.H. at 43-44, 849 A.2d at 118. Porter thus contrasts starkly with the no-injury claims here, of some 28,000 putative plaintiffs. Again, plaintiffs do not mention another aspect of Porter that is fatal to their claims. Porter reaffirmed New Hampshire's standard for recovery of "future" economic losses—that such damages "must be shown with reasonable certainty or reasonable

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[4] Plaintiffs also cite intentional tort cases, PB 29, but allege no intentional torts. One of plaintiffs' *amici*, but not plaintiffs, raises N.H. Const. pt. 1, art. 14 (concerning remedies). CLF AB at 19-20. That provision has peacefully coexisted with this state's present injury requirement for over two centuries.

probability." Id. at 45, 849 A.2d at 119 (citation and quotation marks omitted). Plaintiffs here utterly fail to allege any person's risk of future disease is "reasonably" certain or probable.

State v. Exxon has nothing to do with whether presently uninjured persons can bring tort lawsuits. In Exxon the state of New Hampshire sued in a *parens patriae* capacity over physical injuries, chemical contamination of land, that had "already occurred." 168 N.H. at 263, 126 A.3d at 308. Recovery of future consequences of already extant injuries is not the certified question before this Court.

Moreover, as with Smith and Porter, plaintiffs once again ignore the more pertinent aspect of the Court's analysis in Exxon—its discussion (in the context of market share liability) of when "policy reasons" support relaxation of traditional tort requirements. Id. at 248-49, 126 A.3d at 296-97. This Court considers novel theories when otherwise the law would "place a 'practically impossible burden' upon injured plaintiffs. By contrast, we have declined to expand products liability law in cases in which plaintiffs have not faced a practically impossible burden of pro[of]." Id. at 248, 126 A.3d at 296-97 (citations omitted).[5] This case, unlike Exxon, involves no "practically impossible burden." Should any plaintiff (or putative class member) *actually* suffer injury, they can sue, as they always could. Indeed, to the extent difficulties of proof exist in this case, those problems are inherent in plaintiffs' basing their claims solely on abstract risks, rather than any concrete injury.

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[5] Quoting Trull v. Volkswagen of America, 145 N.H. 259, 265, 761 A.2d 477, 482 (2000).

Lacking any New Hampshire law basis for no-injury medical monitoring claims, plaintiffs and their *amici* repeatedly suggest that support for those novel claims can be found in Restatement (Second) of Torts §7 (1965), concerning "injury" and "harm," and/or in Restatement (Second) of Torts §919(1) (1979).[6] This Court has cited §7(1), once, for the unremarkable proposition that without a "legal injury"—some violation of a "legally protected interest"—a tort action cannot lie. Smith, 128 N.H. at 248, 513 A.2d at 352 (rejecting "wrongful life" claim). This Court has never cited Restatement §919(1). Neither section contemplates tort claims existing without any present injury.

While some courts have misinterpreted §7 to justify no-injury medical monitoring, that section only defines "injury," "harm," and "physical harm," and has no substantive effect. Comment a to §7 shows that those definitions were not intended to permit recovery without any present injury. Rather, Restatement's drafters found it "desirable to have a word" to describe "tortious" conduct "even though there is *no harm* for which compensatory damages can be given." Id. (emphasis added). That lack of compensable harm is why this Court cited §7(1) while rejecting the wrongful life claim in Smith.

Further, §7, comment d recognizes that "[h]arm, like injury, is not necessarily actionable." As defined in the Restatement:

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[6] PB at 16-21, 27-28, 40; CLF AB at 21-22; NHAJ AB at 13-16.

> [H]arm, which is merely personal loss or detriment, gives rise to a cause of action only when it results from the invasion of a legally protected interest, which is to say an injury.

Id. Thus, §7 does not answer, or even bear on, the certified question, which is whether mere increased risk, without any present detriment, constitutes an actionable "legally protected interest." In §7(1) the Second Restatement merely exchanged one word, "injury," for three, "legally protected interest." Under New Hampshire law, an unmanifested increased risk of future injury, by itself, is neither.

Restatement §919(1) deals only with mitigation of "harm"—not unrealized risks as alleged here. The accompanying illustrations confirm that no relaxation of the present injury requirement was intended, since all four posit an existing injury. Id. at Illustration 1 (defendant "hits and bruises" plaintiff); Illustration 2 (defendant "destroys" plaintiff's property); Illustration 3 (defendant "sets on fire" plaintiff's property); Illustration 4 (defendant forced plaintiff to "pay[] the excess amount").[7]

Plaintiffs' attempt to find Restatement support for no-injury medical monitoring is futile. Neither in the Second Restatement—nor anywhere else—has the American Law Institute ("ALI") recognized any form of medical monitoring recovery by uninjured persons. To the contrary, in 2010, the ALI stated:

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[7] Restatement (Second) of Torts §901 (1979), mentioned in passing by one of plaintiffs' *amici*, NHAJ AB at 29, has likewise never been cited by this Court.

> The availability of medical monitoring as a remedy, or as an independent claim, in the absence of physical injury, is an issue that has divided the courts. Initial acceptance of medical monitoring has waned, and the last decade has seen more states decline to recognize it than adopt it. *The Institute has never taken a position on whether recovery for medical monitoring should be permitted in these circumstances*, and these Principles similarly take no position on medical monitoring as a matter of substantive law, except that adjudications should be conducted with fidelity to applicable substantive law.

ALI, Principles of the Law, Aggregate Litigation §2.04, comment b (2010) (emphasis added).[8]

Finally, the ALI adopted §7 in 1965, under the auspices of ALI's official reporter for the Second Restatement—the same Professor Prosser who, as quoted above, stated in his treatise that "threat of future harm, not yet realized, is not enough" to support a tort suit.[9] See, supra at p.8. Neither that black letter of that section, nor any of the comments, justify deviation from the famous maxim of one of ALI's founders, Justice

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[8] See also Restatement (Third) of Torts: Liability for Physical & Emotional Harm §4, comment c (2010) (medical monitoring claims "are beyond the scope of the physical-harm Chapters in this Restatement").

[9] See, e.g., C. Joyce, "Keepers of the Flame: Prosser & Keeton on the Law of Torts," 39 VANDERBILT. L. REV. 851, 852 (1986) (discussing Prof. Prosser's role in the 1960s as the ALI's reporter for the Second Restatement of Torts).

Benjamin Cardozo, that "[p]roof of negligence in the air, so to speak, will not do." Palsgraf v. Long Island Railroad Co., 162 N.E. 99, 99 (1928) (citation omitted).[10]

Neither New Hampshire law nor the Restatement of Torts provides any basis for abandoning the time-tested tort element of present injury, or for adopting any version of no-injury medical monitoring.

## II. BETTER-REASONED PRECEDENT NATIONWIDE PROPERLY REJECTS ACTIONS FOR MEDICAL MONITORING EXPENSES IN THE ABSENCE OF PRESENT PHYSICAL INJURY.

Cases nationwide reject the inefficiencies inherent in litigation over mere unrealized risks. The United States Supreme Court held in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997), that medical monitoring was not recoverable without present physical injury. Metro-North was "troubled" by the implications of abandoning the present injury requirement, including: (1) a "flood" of claims based on fear and speculation; (2) allowing claims that are "unreliable and relatively" trivial; (3) "diminish[ing]" resources available to who are actually injured; (4) unpredictable and unlimited liability; and (5) "higher prices" born by the public. Id. at 435-36, 443-45. After canvassing state-law medical monitoring precedents, Metro-North concluded that such claims were

[10] This Court adheres to the tort principles established in Palsgraf. Goodwin v. James, 134 N.H. 579, 583-84, 595 A.2d 504, 507 (1991); see Libbey v. Hampton Water Works Co., 118 N.H. 500, 502, 389 A.2d 434, 435 (1978) (quoting Justice Cardozo on "negligence in the air").

"beyond the bounds of currently evolving common law." 521 U.S. at 439-40.

The Supreme Court reiterated its holding that no-injury medical monitoring claims were neither good policy nor good law in Norfolk & Western Railway Co. v. Ayers, 538 U.S. 135 (2003):

> Metro-North stressed that holding employers liable to workers merely exposed to [an alleged toxin] would risk "unlimited and unpredictable liability" … [and] sharply distinguished exposure-only plaintiffs from "plaintiffs who suffer from a disease." … The categorical approach endorsed in Metro-North serves to reduce the universe of potential claimants to numbers neither "unlimited" nor "unpredictable"…. [O]f those exposed …, only a fraction will develop [actual injury].

Id. at 156-57 (citations omitted).[11]

Like Metro-North and Norfolk & Western, numerous state high courts reject medical monitoring claims based on only supposed exposure to a toxic substance or an "increased risk" of developing cancer or some other future medical condition.

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[11] While Metro-North and Norfolk & Western both interpreted a specific statute, federal courts have extended rejection of no-injury medical monitoring to other federal causes of action. See June v. Union Carbide Corp., 577 F.3d 1234, 1249-51 (10th Cir. 2009); In re Hanford Nuclear Reservation Litigation, 534 F.3d 986, 1009 (9th Cir. 2007); Syms v. Olin Corp., 408 F.3d 95, 105 (2d Cir. 2005).

The Illinois Supreme Court recently held that "increased risk" from claimed toxic exposure "does not allege a cognizable injury for purposes of a negligence action." Berry v. City of Chicago, 181 N.E.3d 679, 689 (Ill. 2020). Asserting a need for "medical monitoring" merely restated an insufficient injury because "[w]ithout an increased risk of future harm, plaintiffs would have no basis to seek medical monitoring." Id. Thus,

> [P]laintiffs' allegation that they require "diagnostic medical testing" is simply another way of saying they have been subjected to an increased risk of harm. And, in a negligence action, an increased risk of harm is not an injury.

Id. (citation omitted). Thus, the entire population of the City of Chicago could not seek medical monitoring for the City's alleged negligence in supposedly increasing the risk of lead-contaminated drinking water. "[A]n increased risk of future harm is an *element of damages* that can be recovered for a present injury" but such future risk "is *not* the injury itself." Id. at 688 (quoting Williams v. Manchester, 888 N.E.2d 1, 13 (Ill. 2008) (emphasis original)). The longstanding present injury prerequisite to tort liability "establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability." Berry, 181 N.E.3d at 688 (citations omitted).

Similarly, the New York Court of Appeals rejected "increased risk" of possible future physical harm from cigarette smoking as a basis for medical monitoring suits, where the plaintiff was "not claim[ing] to have suffered physical injury or damage to property." Caronia v. Philip Morris

USA, Inc., 5 N.E.3d 11, 14 (N.Y. 2013). Caronia expressly retained the "physical harm requirement" for tort cases:

> The physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.

Id. "[M]edical monitoring [a]s an element of damages ... may be recovered only after a physical injury has been proven." Id. at 16.

The Caronia plaintiffs "asked [the Court of Appeals] to follow … Donovan[12] in particular." Id. at 17. Donovan is a Massachusetts decision that allowed recovery of medical monitoring based on "subcellular changes that substantially increased the risk" of future injury. Donovan, 914 N.E.2d at 902. Instead of starting New York down that slippery slope, the Caronia court recognized:

- "[T]hat there has been an interference with an interest worthy of protection has been the beginning, not the end, of our analysis."
- "[P]otential systemic effects of creating a new, full-blown, tort law cause of action cannot be ignored."

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[12] Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891 (Mass. 2009). Cf. Benoit v. Saint-Gobain Performance Plastics Corp., 959 F.3d 491, 501 (2d Cir. 2020) (ignoring Caronia's rejection of "subcellular" damage as "injury" and allowing medical monitoring claim on evidence of mere exposure).

- "[I]t is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease."

Caronia, 5 N.E.3d at 17-18 (citations and quotation marks omitted). Thus, the New York high court "conclude[d] that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring." Id. at 18.

Courts of last resort across the nation have held similarly.

***Oregon.*** Lowe v. Philip Morris USA, Inc., 183 P.3d 181 (Or. 2008), rejected medical monitoring recovery where "[t]his is not a case in which plaintiff has alleged that she has suffered any present physical harm as a result of defendants' negligence." Id. at 183. "One ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property." Id. at 186 (citations omitted). The plaintiffs' policy arguments "d[id] not provide a basis for overruling [the jurisdiction's] well-established negligence requirements." Id. at 187.

***Mississippi.*** Paz v. Brush Engineered Materials Inc., 949 So.2d 1 (Miss. 2007), held that recovery for medical monitoring required a present physical injury. "Recognizing a medical monitoring cause of action would be akin to recognizing a cause of action for fear of future illness. Each bases a claim for damages on the possibility of incurring an illness with no present manifest injury." Id. at 5. The court reached this result having reviewed state and federal court decisions nationwide regarding medical monitoring claims. Id. at 6 nn. 3-5 (collecting cases).

***Michigan.*** In Henry v. Dow Chemical Co., 701 N.W.2d 684 (Mich. 2005), a class action seeking monitoring for alleged environmental

exposure to toxins failed. While "the common law is an instrument that may change as times and circumstances require," Henry declined "plaintiffs' invitation to alter the common law of negligence liability to encompass a cause of action for medical monitoring." Id. at 686. "Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns," which was beyond the court's resources and capacity. No-injury medical monitoring "would create a potentially limitless pool of plaintiffs" that "could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." Id. at 694.

***Kentucky.*** In Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849, 851 (Ky. 2002), another class of plaintiffs sought a court-supervised medical monitoring fund. The court rejected any cause of action absent present physical injury. Id. "In the name of sound policy," the Kentucky court declined "to depart from well-settled principles of tort law." Id. at 856. The court agreed with Metro-North and "a persuasive cadre of authors from academia" that recovery for bare increased risk could create "significant public policy problems." Id. "[H]aving weighed the few potential benefits against the many almost-certain problems of medical monitoring," the court was "convinced" that there was "little reason to allow such a remedy without a showing of present physical injury." Id. at 859. "Traditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles." Id.

***Alabama.*** Hinton v. Monsanto Co., 813 So.2d 827 (Ala. 2001), refused to permit an environmental class action for medical monitoring

without plaintiffs having a "manifest, present injury." Id. at 829. "To recognize medical monitoring as a distinct cause of action … would require this Court to completely rewrite [the] tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide. We are unprepared to embark upon such a voyage." Id. at 830. Following Metro-North, Hinton "f[ou]nd it inappropriate … to stand [state] 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 (emphasis original). See Houston County Health Care Authority v. Williams, 961 So. 2d 795, 810-11 (Ala. 2006) (reaffirming Hinton).

***Nevada.*** In Badillo v. American Brands, Inc., 16 P.3d 435, 440-441 (Nev. 2001), the Nevada Supreme Court rejected an independent claim for medical monitoring absent present physical injury, holding that the recognition of such a novel cause of action is "not a judicial[] function," and that courts exercise their inherent judicial powers to develop common law "narrowly" and "cautiously." Allowing recovery of medical monitoring absent present physical injury was novel, contrary to law, and raised many complex and difficult issues of law and policy. Id. at 440-41 (noting that "lack of consensus in other jurisdictions" concerning the elements of the proposed cause of action and complex issues of legal causality and proof concerning increased risks or future harm).[13]

[13] In Sadler v. PacifiCare, Inc., 340 P.3d 1264, 1270-71 (Nev. 2014), the same court permitted medical monitoring as damages in the context of a traditional negligence claim.

In two other states, adventurous courts bit off more medical monitoring liability than other branches of government could digest.

***Louisiana.*** Louisiana's experience demonstrates the danger of precipitous recognition of no-injury medical monitoring claims. In Bourgeois v. AP Green Industries, 716 So.2d 355, 360-61 (La. 1998), the court chose to resolve sensitive and complex issues in favor of allowing no-such claims. Less than a year later, the Louisiana legislature overruled Bourgeois with a statute requiring proof of present physical injury. La. Civ. Code art. 2315 (excluding costs for medical treatment or surveillance unless directly related to a "manifest physical or mental injury or disease"). See Burmaster v. Plaquemines Parish Government, 982 So.2d 795, 806 (La. 2008) (recognizing abolition).

***New Jersey.*** Medical monitoring recovery is also statutorily restricted in New Jersey. After the New Jersey Supreme Court allowed no-injury medical monitoring expenses as a remedy—not as an independent action—in Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987), legislators statutorily mandated present physical injury in product liability litigation. N.J. Stat. §2A:58C-1(b). Sinclair v. Merck & Co., 948 A.2d 587, 593 (N.J. 2008), recognized that the statute prohibited medical monitoring claims for product-based exposures.

Numerous other decisions agree with these courts' reasoning that recovery of medical monitoring by uninjured plaintiffs is an unwarranted expansion of tort liability that creates many troubling issues.

**Arkansas**: In re Prempro, 230 F.R.D. 555, 569 (E.D. Ark. 2005).

**Connecticut**: McCullough v. World Wrestling Entertainment, Inc., 172 F. Supp.3d 528, 567 (D. Conn. 2016); Goodall v. United

Illuminating, 1998 WL 914274, at *10 (Conn. Super. Dec. 15, 1998); Bowerman v. United Illuminating, 1998 WL 910271, at *10 (Conn. Super. Dec. 15, 1998) (identical opinions).[14]

**Delaware**: Merganthaler v. Asbestos Corp. of America, 480 A.2d 647, 651 (Del. 1984); Baker v. Croda, Inc., 2021 WL 7209363, at *2 (D. Del. Nov. 23, 2021); In re Asbestos Litigation, 1994 WL 16805917, at *1-2 (Del. Super. Aug. 5, 1994); see M.G. v. A.I. Dupont Hospital for Children, 393 F. Appx. 884, 892-93 & n.7 (3d Cir. 2010) (reversing prediction that Delaware would allow no-injury medical monitoring).

**District of Columbia**: Witherspoon v. Philip Morris, Inc., 964 F. Supp. 455, 467 (D.D.C. 1997).

**Georgia**: Cure v. Intuitive Surgical, Inc., 2017 WL 498727, at *3 (N.D. Ga. Jan 30, 2017), aff'd, 705 F. Appx. 826 (11th Cir. 2017); Parker v. Brush Wellman, Inc., 377 F. Supp.2d 1290, 1302 (N.D. Ga. 2005), aff'd, 230 F. Appx. 878, 883 (11th Cir. 2007).

**Iowa**: Pickrell v. Sorin Group USA, Inc., 293 F. Supp.3d 865, 868 (S.D. Iowa 2018).

**Indiana**: Pisciotta v. Old National Bancorp, 499 F.3d 629, 639 & n.10 (7th Cir. 2007); Hunt v. American Wood Preservers Institute, 2002 WL 34447541, at *1 (S.D. Ind. July 31, 2002); Johnson v.

[14] Cf. Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583, 593 (Conn. 2020) (affirming dismissal of no-injury medical monitoring claims while "assum[ing], without deciding, that Connecticut law recognizes a claim for subclinical cellular injury").

Abbott Laboratories, 2004 WL 3245947, at *6 (Ind. Cir. Dec. 31, 2004).[15]

**Kansas**: Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1523 (D. Kan. 1995).

**Maine**: Higgins v. Huhtamaki, Inc., 2022 WL 2274876, at *10-11 (D. Me. June 23, 2022) (rejecting medical monitoring in PFAS case).

**Minnesota**: Thompson v. American Tobacco Co., 189 F.R.D. 544, 552 (D. Minn. 1999); Paulson v. 3M Co., 2009 WL 229667 (Minn. Dist. Jan. 16, 2009); Palmer v. 3M Co., 2005 WL 5891911 (Minn. Dist. April 26, 2005).

**Montana**: In re Zantac (Ranitidine) Products Liability Litigation, 546 F. Supp.3d 1152, 1167 (S.D. Fla. 2021) (predicting Montana law).

**Nebraska**: Trimble v. ASARCO, Inc., 232 F.3d 946, 962-63 (8th Cir. 2000),[16] aff'g, 83 F. Supp.2d 1034 (D. Neb. 1999); Schwan v. Cargill, Inc., 2007 WL 4570421, at *1-2 (D. Neb. Dec. 21, 2007); Avila v. CNH America LLC, 2007 WL 2688613, at *1-2 (D. Neb. Sept. 10, 2007).

[15] Contra In re Zantac (Ranitidine) Products Liability Litigation, 546 F. Supp.3d 1152, 1166-67 (S.D. Fla. 2021) (predicting Indiana would permit no-injury medical monitoring).

[16] Abrogated on other grounds Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005) (federal supplemental jurisdiction).

**North Carolina**: Curl v. American Multimedia, Inc., 654 S.E.2d 76, 81 (N.C. App. 2007); Priselac v. Chemours Co., 2022 WL 909406, at *3 (E.D.N.C. March 28, 2022).

**North Dakota**: Mehl v. Canadian Pacific Railway Ltd., 227 F.R.D. 505, 518-19 (D.N.D. 2005).

**Oklahoma**: Taylor v. Michelin North America, Inc., 2018 WL 1569495, at *6-7 (N.D. Okla. March 30, 2018); McCormick v. Halliburton Co., 895 F. Supp.2d 1152, 1155-56 (W.D. Okla. 2012); Cole v. Asarco, Inc., 256 F.R.D. 690, 695 (N.D. Okla. 2009).

**Ohio**: Elmer v. S.H. Bell Co., 127 F. Supp.3d 812, 825 (N.D. Ohio 2015).

**Rhode Island**: Miranda v. DaCruz, 2009 WL 3515196, at *8 (R.I. Super. Oct. 26, 2009).

**South Carolina**: Easler v. Hoechst Celanese Corp., 2014 WL 3868022, at *5 n.5 (D.S.C. Aug. 5, 2014); Rosmer v. Pfizer, Inc., 2001 WL 34010613, at *5 (D.S.C. March 30, 2001).

**Tennessee**: Bostick v. St. Jude Medical, Inc., 2004 WL 3313614, at *14 (W.D. Tenn. Aug. 17, 2004); Jones v. Brush Wellman Inc., 2000 WL 33727733, at *8 (N.D. Ohio Sept. 13, 2000) (applying Tennessee law).

**Texas**: Norwood v. Raytheon Co., 414 F. Supp.2d 659, 664-668 (W.D. Tex. 2006).

**Virginia**: Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (4th Cir. 1991); In re All Pending Chinese Drywall Cases, 2010 WL 7378659, at *9-10 (Va. Cir. March 29, 2010).

**Virgin Islands**: Purjet v. Hess Oil Virgin Islands Corp., 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986); Louis v. Caneel Bay, Inc., 2008 WL 4372941, at *5-6 (V.I. Super. July 21, 2008).

**Washington**: DuRocher v. Riddell, Inc., 97 F. Supp.3d 1006, 1014 (S.D. Ind. 2015) (applying Washington law); Krottner v. Starbucks Corp., 2009 WL 7382290, at *7 (W.D. Wash. Aug. 14, 2009), aff'd in part on other grounds, 628 F.3d 1139 (9th Cir. 2010); Duncan v. Northwest Airlines, 203 F.R.D. 601, 607-09 (W.D. Wash. 2001).

**Wisconsin**: Alsteen v. Wauleco, Inc., 802 N.W.2d 212, 221 (Wis. App. 2011) (citing "concerns regarding the difficulty of assessing damages, unlimited and unpredictable liability, and secondary sources of payment").[17]

## III. THE COURT SHOULD DECLINE TO RECOGNIZE NO-INJURY MEDICAL MONITORING ABSENT PRESENT PHYSICAL INJURY.

### A. Medical Monitoring Creates The Potential For Expansive And Costly Liability Over A Wide Range Of Situations.

Other courts and commentators have recognized that medical monitoring claims entail significant policy-laden legal innovations with widespread ripple effects. Although the present case involves the manufacture and use of industrial chemicals, this Court's recognition of no-injury medical monitoring absent present physical injury would risk a flood

[17] See In re Allergan Biocell Textured Breast Implant Products Liability Litigation, 537 F. Supp.3d 679, 762-64 (D.N.J. 2021) (collecting cases); Barraza v. C. R. Bard Inc., 322 F.R.D. 369, 374 (D. Ariz. 2017) ("only 16 states permit claims for medical monitoring").

of class-action litigation, as well as unpredictable and unlimited liability, for many entities both small and large that manufacture, distribute, use, or process numerous products currently available for legal purchase.

In other jurisdictions, uninjured plaintiffs bringing medical monitoring claims have sued over a wide array of products and activities, "from toxins present in [plaintiffs'] blood to traumatic brain injuries." Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583, 591-92 (Conn. 2020). These medical monitoring claims—almost invariably class actions—most notably involve products containing asbestos[18] and tobacco,[19] but have also targeted radiation emitting materials,[20] prescription drugs,[21] soft drinks,[22]

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[18] E.g., Norfolk & Western, 538 U.S. 135; Metro-North, 521 U.S. 424; Temple-Inland Forest Products Corp. v. Carter, 993 S.W.2d 88 (Tex. 1999); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993).

[19] E.g., Caronia 5 N.E.3d 11; Donovan, 914 N.E.2d 891; Badillo, 16 P.3d 435; Lowe, 183 P.3d 181; Thompson, 189 F.R.D. 544; Burton, 884 F. Supp. 1515.

[20] E.g., Norwood, 414 F. Supp.2d 659 (radar); Cook v. Rockwell International Corp., 755 F. Supp. 1468 (D. Colo. 1991) (nuclear fuel).

[21] E.g., Sinclair, 948 A.2d 587 (analgesic); Wood, 82 S.W.3d 849 (appetite suppressants); In re West Virginia Rezulin Litigation, 585 S.E.2d 52 (W. Va. 2003) (diabetes medication); Jensen v. Bayer AG, 862 N.E.2d 1091 (Ill. App. 2007) (cholesterol medication); Zantac, 546 F. Supp.3d 1152 (over-the-counter drugs); In re Valsartan, Losartan, & Irbesartan Products Liability Litigation, 2021 WL 364663 (D.N.J. Feb. 3, 2021) (generic drug).

[22] Riva v. Pepsico, Inc., 82 F. Supp.3d 1045 (N.D. Cal. 2015).

biological substances,[23] medical devices,[24] aerospace,[25] building materials,[26] metalworking,[27] electrical equipment,[28] gas stations,[29] cosmetics,[30] sporting goods,[31] and even (by analogy) financial services.[32]

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[23] E.g., In re Prempro Products Liability Litigation, 230 F.R.D. 555 (E.D. Ark. 2005) (hormone replacement therapies); Wyeth, Inc. v. Gottlieb, 930 So. 2d 635 (Fla. App. 2006) (same).

[24] E.g., M.G., 393 F. Appx. 884 (pediatric device); Allergan Biocell, 537 F. Supp.3d 679 (breast implants); Pickrell, 293 F. Supp.3d 865 (surgical monitoring device); Baker v. Deutschland GmbH, 240 F. Supp.3d 341 (M.D. Pa. 2016) (same); Sutton v. St. Jude Medical, Inc., 292 F. Supp.2d 1005 (W.D. Tenn. 2003) ("aortic connector"), rev'd, 419 F.3d 568 (6th Cir. 2005).

[25] E.g., Dougan, 251 A.3d 583 (facility maintenance); Parker, 377 F. Supp.2d 1290 (aircraft components).

[26] E.g., Berry, 181 N.E.3d 679 (lead in pipes); Lewis v. Lead Industries Ass'n, Inc., 793 N.E.2d 869, 877 (Ill. App. 2003) (lead in paint); Baker v. Westinghouse Electric Corp., 70 F.3d 951 (7th Cir. 1995) (insulation); Chinese Drywall, 80 Va. Cir. 69 (2010) (drywall).

[27] Trimble, 232 F.3d 946.

[28] Ball, 958 F.2d 36.

[29] Exxon Mobil Corp. v. Albright, 71 A.3d 30 (Md.), partial reconsideration, 71 A.3d 150 (Md. 2013).

[30] E.g., Stella v. LVMH Perfumes & Cosmetics USA, Inc., 564 F. Supp.2d 833 (N.D. Ill. 2008) (lipstick).

[31] McCullough, 172 F. Supp.3d 528; DuRocher, 97 F. Supp.3d 1006.

[32] So-called "credit monitoring" cases include: Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010); Pisciotta, 499 F.3d 629; Griffey v. Magellan Health, Inc., 2022 WL 1811165 (D. Ariz. June 2,

Plaintiffs' claims here demand medical monitoring of asymptomatic individuals for a wide range of medical conditions and illnesses that could potentially occur—from cancer to thyroid disease, vaccine efficiency, and elevated cholesterol. Indeed, because society's knowledge of the risks from exposure to many substances is constantly evolving, it is impossible to predict what types of conduct and products could be subject to litigation and possible liability for medical monitoring. Possibilities for such claims are limited only by the imaginations of plaintiffs' attorneys.[33] Indeed, medical monitoring litigants could sue both diet and sugary soda manufacturers simultaneously, alleging, on the one hand, that sugar substitutes increase cancer risk, and on the other, that using high fructose corn syrup contributes to an increased risk of obesity and diabetes.

This potential for unlimited and unpredictable litigation and liability was recognized in Metro-North, 521 U.S. at 434, 442, where the Supreme Court acknowledged that "contacts, even extensive contacts, with serious carcinogens are common," and that "tens of millions of individuals may have suffered exposure to substances that might justify some form of

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2022); Hendricks v. DSW Shoe Warehouse, Inc., 444 F. Supp.2d 775, 783 (W.D. Mich. 2006).

[33] E.g., Berry, 181 N.E.3d 679 (lead poisoning); Wood, 82 S.W.3d 849 (heart valve abnormalities); Paz, 949 So.2d 1 (non-cancerous lung disease); West Virginia Rezulin, 585 S.E.2d 52 (liver disease); Jensen, 862 N.E.2d 1091 (muscle deterioration) In re Fosamax Products Liability Litigation, 248 F.R.D. 389 (S.D.N.Y. 2008) (osteonecrosis of the jaw); Prempro, 230 F.R.D. 555 (cardiovascular disease, stroke, venous thromboembolism, and pulmonary embolism, Alzheimer's disease, and dementia).

substance-exposure-related medical monitoring." Given this potentially broad scope, the Court was "troubled … by the potential systemic effects of creating a new, full-blown, tort law cause of action[,]" including (1) a "flood" of claims based on fear and speculation; (2) blurring claims that are "reliable and serious" with claims that are "unreliable and relatively trivial"; (3) the "diminish[ing]" of resources available to provide relief to persons actually suffering present physical injury from tortious conduct; (4) unpredictable and unlimited imposition of liability; and (5) "higher prices" born by the public. Id. at 435-36, 443-45. The Court held that medical monitoring absent present physical injury was "beyond the bounds of the 'evolving common law'" and thus not available. Id. at 425.

Similarly, in Caronia, the New York Court of Appeals cautioned that "dispensing with the physical injury requirement could permit tens of millions of potential plaintiffs … effectively flooding the courts." 5 N.E.3d at 18. It was "speculative, at best, whether asymptomatic plaintiffs will ever contract a disease." Id. Berry found "little justification for imposing civil liability on one who only creates a *risk* of harm to others," citing "practical reasons" for not letting every resident of a city sue over increased risks from drinking water contamination. 181 N.E.3d at 688 (emphasis original).

> Almost anything that a person does while living and working in the world can create a risk of harm to others. The long-standing and primary purpose of tort law is not to punish or deter the creation of this risk but rather to compensate victims when the creation of risk tortiously manifests into harm.

Id. (citation omitted).

Likewise, the Michigan Supreme Court in Henry rejected no-injury medical monitoring—balancing benefits against costs for individuals already injured, the judicial system, and "those responsible for administering and financing medical care." 701 N.W.2d at 695. "To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm." Id. at 703; see also Bower v. Westinghouse Electric. Corp., 522 S.E.2d 424, 435 (W. Va. 1999) (Maynard, J., dissenting) ("the practical effect" of creating an independent medical monitoring action "is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action").

**B. Medical Monitoring Claims May Deplete Defendants' Finite Resources To The Detriment Of Those Who Actually Become Ill.**

Caronia acknowledged another inherent problem with no-injury medical monitoring—the likelihood of "depleting the purported tortfeasor's resources for those who have actually sustained damage." 5 N.E.3d at 18 (citation omitted). Allowing masses of uninjured persons to recover for bare increased risk "without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure." Id.

The Supreme Court in Metro North similarly recoiled from the prospect of presently uninjured plaintiffs suing over "medical monitoring"

and thereby diminishing funds available for anyone who eventually developed the disease at issue. By then, many allegedly liable companies could be bankrupted by the costs of litigating claims brought by asymptomatic plaintiffs and classwide payouts for medical monitoring. 521 U.S. at 435-36, 442 (citing the possibility of "a 'flood' of less important cases potentially absorbing resources better left available to those more seriously harmed").

Likewise, in Henry, the court declined to allow medical monitoring liability because "[l]itigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." 701 N.W.2d at 694. The court in Hinton voiced similar concerns that it would be "inappropriate … to stand [traditional] tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what *might* occur in the future." 813 So.2d at 831 (emphasis original).

Asbestos litigation is a case in point. Early asbestos decisions deviated from accepted legal principles and allowed novel recoveries for asymptomatic pleural thickening. Ever-expanding litigation created a "judicial disaster of major proportions." Judicial Conference of the United States, Ad Hoc Committee on Asbestos Litigation, Report of the Ad Hoc Committee, at 2 (1991). "[T]he 'asbestos litigation crisis' would never have arisen and would not exist today" without claims brought by individuals who were uninjured. L. Brickman, "Lawyers' Ethics & Fiduciary Obligation in the Brave New World of Aggregative Litigation," 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001); see P. Schuck, "The Worst Should Go First: Deferral Registries in Asbestos Litigation,"

15 HARV. J.L. & PUB. POL'Y 541, 567 (1992) (discussing the "considerable waste" associated with "litigation by plaintiffs who are presently unimpaired and who will never become impaired").

As a result, "[t]he resources available to persons injured by asbestos have been depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating.… The continued hemorrhaging of available funds deprives current and future victims of rightful compensation." In re Mary Nell Collins, 233 F.3d 809, 812 (3d Cir. 2000). "Almost every judge and scholar who has addressed the issue of recovery for mental distress arising from exposure to asbestos has noted the irony that the huge volume of mental distress claims can devour the assets of defendants at the expense of more seriously injured plaintiffs." J. Henderson & A. Twerski, "Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, & Medical Monitoring," 53 S.C. L. REV. 815, 834 (2002)[34]; M. Behrens & M. Parham, "Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs," 33 TEX. TECH. L. REV. 1, 6, 11 (2001). Recognition of no-injury medical monitoring would ensure that the same perverse trend of the uninjured crowding out the injured that has plagued asbestos litigation will spread generally through mass torts. "Asbestos Litigation Gone Mad," 53 S.C. L. REV. at 844-46.

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[34] Citing, Metro North, 521 U.S. at 435-36; Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 814 (Cal. 1993); and Temple-Inland Forest, 993 S.W.2d at 93.

## IV. COURTS HAVE BEEN UNABLE TO ARTICULATE RULES FOR NO-INJURY MEDICAL MONITORING CLAIMS THAT PREVENT EXCESSIVE LITIGATION AND AVOID POTENTIALLY UNLIMITED LIABILITY.

Plaintiffs invite this Court into a jurisprudential swamp where other courts have floundered for decades. Simply put, no one form of "medical monitoring" exists. Rather, medical monitoring has about as many variants as courts that purport to allow it. See Almond v. Janssen Pharmaceuticals, Inc., 337 F.R.D. 90, 95-97 (E.D. Pa. 2020) (discussing numerous differences in medical monitoring claims in various jurisdictions). This rampant inconsistency covering a host of subsidiary questions is yet another reason this Court should not unleash no-injury medical monitoring claims on New Hampshire law and litigants.

Courts that have permitted no-injury medical monitoring, either as a remedy for a traditional tort action or as an independent cause of action, have failed miserably at reaching a consensus definition of such claims. Indeed, Plaintiffs here advocate looser standards than any other state—urging this Court to forgo multiple limits recognized elsewhere, such as: (1) "physical presence," (2) any particular exposure level, even above background, (3) any particular "quantification," or "probability" of increased risk, (4) that monitoring needs be "different from" the general population, and (5) that "treatment currently exists" for monitored conditions. PB at 32, 35-39.

No clear set of consistent elements that might rationally control the expense and expanse of no-injury medical monitoring litigation exists. Courts cannot even agree on the most basic issue: the number of elements

of medical monitoring claims. See, e.g., Exxon Mobil Corp. v. Albright, 71 A.3d 30, 81-82 (Md.) (four element test for the reasonableness and necessity of medical monitoring), on reconsideration in part, 71 A.3d 150 (2013); Potter, 863 P.2d at 824-25 (five elements); Bower, 522 S.E.2d at 432 (six elements); Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145-46 (Pa. 1997) (seven elements); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (eight elements).

Widespread judicial discord over the essential elements of no-injury medical monitoring claims is only the beginning. "Among [states] that have considered medical monitoring, there is a lack of consensus whether to recognize it as a separate cause of action or only as a remedy to an existing tort." Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 607 (W.D. Wash. 2001). To the extent uninjured plaintiffs may recover at all for medical monitoring expenses, the largest "category of states allows recovery for medical monitoring in the absence of physical injury not as a cause of action, but as a remedy." Almond, 337 F.R.D. at 96. California, for example "d[id] not create a new tort … simply a compensable item of damage when liability is established under traditional tort theories of recovery." Potter, 863 P.2d at 823. "[A] medical monitoring claim may perhaps more accurately be deemed a remedy rather than a distinct cause of action." Exxon Mobil v. Albright, 71 A.3d at 76 (citation and quotation marks omitted).[35] And then there is Massachusetts, where a medical

[35] See also Sadler, 340 P.3d at 1270 (allowing "a cause of action for negligence with medical monitoring as the remedy" in no-injury cases); Meyer v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) ("medical monitoring does not create a new tort. It is simply a compensable item of

monitoring plaintiff need not show actual physical injury, but must show at least "subcellular changes that substantially increased the risk of serious disease, illness, or injury." Donovan, 914 N.E.2d at 902.

As a means of limiting liability, some jurisdictions impose on plaintiffs seeking medical monitoring "the burden of proving each element of a negligence claim." Donovan, 914 N.E.2d at 899. See also Sadler, 340 P.3d at 1270; Redland Soccer, 696 A.2d at 145; Potter, 863 P.2d at 816; Hansen, 858 P.2d at 979. Other jurisdictions allow medical monitoring predicated on strict liability theories. Meyer, 220 S.W.3d at 717; Bower, 522 S.E.2d at 433.

States also reach conflicting results on the degree of exposure and increase in risk necessary for recovery of medical monitoring expenses. In West Virginia, an uninjured medical monitoring plaintiff need only show that "he or she has, relative to the general population, been significantly exposed" and "is not required to show that a particular disease is certain or even likely to occur as a result of exposure." Bower, 522 S.E.2d at 432-33

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damage"); Simmons v. Pacor, Inc., 674 A.2d 232, 239 (Pa. 1996) (following "rationale and findings" of Burns); Ayers, 525 A.2d at 312 ("the cost of medical surveillance is a compensable item of damages"); Burns v. Jaquays Mining Corp., 752 P.2d 28, 33 (Ariz. App. 1987) ("cost [of medical monitoring] is a compensable item of damages"); Sutton, 419 F.3d at 572 ("medical monitoring is more properly considered one of a number of possible remedies to an underlying tort, rather than a separately actionable tort"); Duncan, 203 F.R.D. at 607 ("[m]ost of the states that have considered the issue have chosen to recognize a remedy rather than create a separate, new cause of action"); Burton, 884 F. Supp. at 1523 (a "'medical monitoring' claim does not properly state a separate claim, rather it is merely a component of plaintiff's damages").

("no particular level of quantification is necessary"). Conversely, in Pennsylvania, such a plaintiff must show a "significantly increased risk of contracting a serious latent disease" as a result of "exposure greater than normal background levels." Redland Soccer, 696 A.2d at 145. A third standard requires medical monitoring plaintiffs to establish that the prospective "injury is reasonably certain to occur." Meyer, 220 S.W.3d at 717; see Duncan, 203 F.R.D. at 606 ("show with reasonable certainty that they will contract the disease").

States also diverge on whether medical monitoring must be medically justified. West Virginia merges subjective and objective criteria: while there "obviously must be some reasonable medical basis" for medical monitoring, that claim can also be "based, at least in part, on a plaintiff's subjective desires … for information concerning the state of his or her health." Bower, 522 S.E.2d at 433. Pennsylvania demands that any "prescribed monitoring regime [be] reasonably necessary according to contemporary scientific principles." Redland Soccer, 696 A.2d at 146. Proof of danger to humans has been required, but elsewhere proof of danger to animals has sufficed.[36] In Arizona plaintiffs must claim monitoring beyond "what would normally have been prudent for them based on their individual circumstances." DeStories v. City of Phoenix, 744 P.2d 705, 711 (Ariz. App. 1987). Some states limit medical

[36] Hansen, 858 P.2d at 979 (under Utah law, "the substance must be toxic to humans rather than to other forms of life"); In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 779 (3d Cir. 1994) (finding an abuse of discretion not to rely on animal studies) (applying Pennsylvania law).

monitoring to illnesses that are curable, but others do not.[37] Some states limit no-injury medical monitoring claims to environmental torts, as here, while others permit such claims against consumer products.[38]

Defenses likewise vary from state to state. As discussed, Pennsylvania and Utah both require plaintiffs to prove exposure "caused by defendant's negligence," supra, p.33, but those states' comparative negligence principles work differently.[39] In Florida and Utah, compliance with governmental labeling standards creates a rebuttable presumption against liability, but no similar presumption exists in Pennsylvania or most other states permitting no-injury medical monitoring claims.[40]

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[37] Hansen, 858 P.2d at 979 (requiring a monitoring regime actually to cure or limit the disease); but see Bower, 522 S.E.2d at 434 (rejecting Hansen's requirement that monitoring must increase a plaintiff's chances of survival).

[38] Sinclair, discussed, supra, at p.22; Ratliff v. Mentor Corp., 569 F. Supp.2d 926, 928-29 (W.D. Mo. 2008) (medical monitoring "carefully" limited "to include only claims resulting from exposure to toxic substances"; the law "does not support medical monitoring claims in garden variety products"); contra Donovan, 914 N.E.2d at 902; Petito v. A.H. Robins Co., 750 So.2d 103, 104-05 (Fla. App. 1999).

[39] Compare Utah Code §78B-5-818(2) (barring recovery if the plaintiff's negligence exceeds that of all possible responsible other persons whether or not sued); 42 Pa. C.S. §7102(a) (barring recovery only if the plaintiff's negligence exceeds that of all "defendants against whom recovery is sought").

[40] See Fla. Stat. §768.1256(1) ("rebuttable presumption" for compliance "with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury"); Utah Code §78B-6-703 ("rebuttable presumption" for compliance "with government standards established for that industry which were in existence at the

Moreover, the no-injury claims of these plaintiffs are even more radical—as they rest wholly on minimal bloodstream PFAS levels, without regard to anyone's likelihood of actually suffering any disease, or even anyone's exposure to PFAS chemicals above environmental background levels. Even states that allow no-injury medical monitoring require far more than that. In Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011) (applying West Virginia law), the court affirmed dismissal of essentially identical medical monitoring allegations:

> The presence of [an allegedly harmful chemical] in the public water supply or in the plaintiffs' blood does not, standing alone, establish harm or injury for purposes of proving a negligence claim under West Virginia law. In such situations, a plaintiff also must produce evidence of a detrimental effect to the plaintiffs' health that actually has occurred or is reasonably certain to occur due to a present harm.

Id. at 95 (citations omitted). See Bell v. 3M Co., 344 F. Supp.3d 1207, 1227 (D. Colo. 2018) (dismissing PFAS case for failure to establish "that monitoring and testing procedures exist which make the early detection and treatment of the diseases possible and beneficial").

In sum, "[o]n any fair assessment of the relevant precedent, American courts have not reached consensus regarding the legitimacy of …

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time"). Cf. Mohler v. Jeke, 595 A.2d 1247, 1251 (Pa. 1991) (compliance with administrative regulations only relieves the defendant of liability for negligence per se, and does not establish exercise of due care). New Hampshire has yet to address the effect of such compliance on tort liability.

medical monitoring claims." Asbestos Litigation Gone Mad, 53 S.C. L. REV. at 841. That the precedent allowing no-injury medical monitoring is a morass further counsels restraint in considering these plaintiffs' essentially unbounded no-injury cause of action. Lack of judicial consensus on what "medical monitoring" is and what it requires only underscores the wisdom of this Court's existing precedent requiring present injury as an essential tort element.

## CONCLUSION

For all of the above reasons, *amicus curiae* Product Liability Advisory Council respectfully submits that the Court should not recognize causes of action for medical monitoring in the absence of any present injury.

Respectfully submitted,

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Dated: July 8, 2022

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## ORAL ARGUMENT

Amicus Curiae Product Liability Advisory Counsel, Inc. respectfully waives oral argument.

## STATEMENT OF COMPLIANCE

I hereby certify that this Brief of *Amici Curiae* Product Liability Advisory Council, Inc. complies with word limitation set out in Supreme Court Rule 16(11).

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Dated: July 8, 2022

## **DELIVERY CERTIFICATION**

I certify that the foregoing brief will be served on this date to all counsel via the Court's e-file system.

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