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Feature Article

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Illinois Courts Should Reject Medical Monitoring Claims for Uninjured Plaintiffs

Defense counsel frequently encounter the standard allegations or prayers for relief claiming severe, permanent, disabling, and life-altering injuries alleged to be caused by their client's negligence. Some plaintiffs, however, allege that they are currently perfectly healthy. They claim that, although the defendant's negligence has not yet caused them an actual injury of any kind, the defendant caused them to be exposed to a substance that could lead to a future injury or disease. These "medical-monitoring-only" plaintiffs seek to hold the defendant liable for life-long medical testing to determine if the feared conditions have become reality.

For example, residents sought to recover for medical monitoring after a train derailed near their New Jersey homes, allegedly resulting in their ingestion of vinyl chloride. *In re Paulsboro Derailment Cases*, No. 13-784, 2013 WL 5936991, at *1–3 (D.N.J. Nov. 4, 2013) [hereinafter *In re Paulsboro*]. New Jersey law permits medical-monitoring-only claims and, therefore, these plaintiffs were not required to allege that they had existing symptoms or a medical diagnosis as a result of their claimed exposure to vinyl chloride in order to sufficiently allege a negligence claim. *In re Paulsboro*, 2013 WL 5936991, at *2–3.

Whether the medical-monitoring-only claim exists under Illinois law is an issue that has not been addressed by the Supreme Court of Illinois. As discussed below, a handful of Illinois appellate court cases address the issue, but there is no clear authority in Illinois for allowing medical monitoring claims in the absence of a present injury. Defendants faced with such claims should challenge them as contrary to fundamental principles of Illinois negligence law and urge Illinois courts to reject such claims as several courts outside Illinois have done.

Illinois Cases Do Not Resolve the Issue

The Illinois case authorities that plaintiffs might claim supports "medical-monitoring-only" claims are two related opinions, *Lewis v. Lead Industries Association, Inc.*, 342 Ill. App. 3d 95 (1st Dist. 2003) [hereinafter *Lewis I*], and *Lewis v. NL Industries, Inc.*, 2013 IL App (1st) 122080 [hereinafter *Lewis II*]. *Lewis I* is a civil action filed by parents and guardians of minor children against manufacturers of lead paint. *Lewis I*, 342 Ill. App. 3d at 98. The backdrop to the plaintiffs' claims is the Lead Poisoning Prevention Act, 410 ILCS 45/1–17 (Act), which *requires* physicians to screen children between the ages of six months and six years for lead poisoning, or assess those children for the risk of lead poisoning, depending on if the children live in high risk or low risk areas. *Lewis I*, 342 Ill. App. 3d at 99, 102 (citing 410 ILCS 45/6.2(a)). After two appeals to the Illinois Appellate Court First District and a second remand, the plaintiffs sought and obtained class certification, with the class consisting of parents and legal guardians of children whom the Act required to

undergo either lead testing or a lead assessment. *Lewis II*, 2013 IL App (1st) 122080, ¶ 4. In *Lewis II*, which is the third appeal in the case's procedural history, the parties agreed that the Act "mandates lead screening and contains no cost-shifting provisions." *Lewis II*, 2013 IL App (1st) 122080, ¶ 8. Thus, the First District noted that, in general, "the Act may cause a parent to assume the costs of lead screening." *Id.* The appellate court was cautious to add that the Act is not the sole cause of all lead screening or the cause of the plaintiffs' lead screening costs; only that the Act can be such a cause. *Id*.

The plaintiffs in *Lewis I* were attempting to recover the cost of this statutorily mandated screening, claiming that the actions of the defendants created the risk of lead poisoning, which culminated in the requirement for the screening. *Lewis I*, 342 Ill. App. 3d at 98–99. The defendants moved to dismiss on the grounds, among others, that the plaintiffs failed to allege a present injury. *Id.* at 99. "They argued that the cost of screening a child for lead poisoning, absent any allegation that the child suffered a physical injury, is not a compensable present injury that will satisfy the damage element of a tort claim." *Id.* at 100. The trial court agreed with the defendants, "characterizing the relief sought by the plaintiffs as damages for an increased risk of future harm." *Id.*

On appeal, the plaintiffs stated the trial court "misconstrued" the relief they sought and made clear that they are *not* seeking damages for an increased risk of future harm. Instead, they are seeking compensation only for the cost of the medical testing made necessary by the defendants' manufacturing of a dangerous product. *Id.* at 100–01. The plaintiffs argued that "the cost of testing to detect an injury or disease is a compensable injury, even in the absence of any present physical injury." *Lewis I*, 342 Ill. App. 3d at 101.

The First District agreed with the defendants that, "in order for plaintiffs to recover damages for an increased risk of future harm in a tort action, he or she must establish, among other things, that the defendant's breach of duty caused a present injury which resulted in that increased risk." *Id.* The court further held that "[a]n increased risk of harm standing alone is insufficient to support an award of damages" under various theories,

including negligence. *Id.* The court ruled, however, that the issue to be decided was whether "the cost of diagnostic testing to detect a possible injury, which testing was made necessary by a defendant's breach of duty, is in itself a present injury compensable in a tort action." *Id.* As to this issue, the plaintiffs argued that "an action seeking recovery for the cost of such examinations is distinct from a claim seeking recovery for an increased risk of harm of developing an injury or disease in the future." *Id.*

In resolving the issue presented in *Lewis I*, the First District reasoned that:

> There is a fundamental difference between a claim seeking damages for an increased risk of future harm and one which seeks compensation for the cost of medical examinations. The injury which is alleged, and for which compensation is sought, in a claim seeking damages for an increased risk of harm is the anticipated harm itself. The injury which is alleged, and for which compensation is sought, in a claim seeking damages for a medical examination to detect a possible physical injury is the cost of the examination. Unlike a claim seeking damages for an increased risk of future harm, a claim seeking damages for the cost of a medical examination is not speculative and the necessity for such an examination is capable of proof within a "reasonable degree of medical certainty." If a defendant's breach of duty makes it necessary for a plaintiff to incur expenses to determine if he or she has been physically injured, we find no reason why the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty.

Id. at 101–02. The court thus ruled that "the trial court erred in concluding that the injury claimed by the plaintiffs was not compensable in a tort action." *Id.* at 102.

Defendants can take the position that *Lewis I* should be limited to its facts. In *Lewis I*, unlike the typical personal injury case, the plaintiffs alleged that there exists a statute that *mandates* them to obtain an additional physical examination and that the genesis of that statute was the defendants' conduct. The entire basis of the plaintiffs' claim in *Lewis* is that the legislature has mandated parents to incur a cost, and the defendants' allegedly dangerous products caused the need for the legislation, so the defendants should have to pay for that *one* screening. Further, in *Lewis I*, the plaintiffs only sought the cost of the testing and did not seek any damages for increased risk of future physical harm. In the typical exposure case, the plaintiffs will not only seek to recover the cost of any testing but also will seek damages for an increased risk of future physical harm (such as an increased risk that they will develop cancer).

The Supreme Court of Illinois has held that "as a matter of law, an increased risk of future harm is an *element of damages* that can be recovered for a present injury—it is *not* the injury itself." *Williams v. Manchester*, 228 Ill. 2d 404, 425 (2008) (italics in original; underlining added). In fact, Illinois has adopted pattern jury instructions to this effect. I.P.I. (Civil) 30.04.03 ("The increased risk of future [specific condition_____] [harm] *resulting from the [injury] [injuries] [condition] [conditions]*.") (emphasis added).

The alleged need for future medical care is not a *present injury*; future medical care is a potential remedy for present injuries, but alleging this need alone, while expressly denying any present injury, cannot itself constitute a present injury. See *Wood v. Wyeth-Ayerst Lab., Div. of Am. Home Prods.*, 82 S.W.3d 849, 855 (Ky. 2002) ("With no injury there can be no cause of action, and with no cause of action there can be no recovery. It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy."); see also *Alsteen v. Wauleco, Inc.*, 2011 WI App 105, ¶¶ 19–20 (holding that the argument that the necessity to undergo medical examinations in the future is an actual, present injury "turns tort law on its head by using the remedy sought—compensation for future medical monitoring—to define the alleged injury . . . [and] simply does not make sense, as it conflates the damages the plaintiffs seek with their alleged injury"). Accordingly, *Lewis I* can be distinguished from the typical medical-monitoring-only claim.

Other First District opinions further suggest that *Lewis I* should be limited to its facts. Prior to *Lewis I*, the First District rejected medical monitoring claims. In *Morrissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753 (1st Dist. 1979), a claim was brought on behalf of daughters of mothers who took the drug Diethylstilbestrol (DES). The plaintiff and represented classes were claimed to have developed various symptoms from DES indicating an increased risk that they would contract cancer in the future. *Morrissy*, 76 Ill. App. 3d at 755–56. The court stated that the plaintiff "is essentially alleging the existence of a latent disease as a present injury," ruled that the "nexus thus suggested between exposure to DES *in utero* and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury," and concluded that, under Illinois law, "possible future damages in a personal injury action are not compensable unless reasonably certain to occur." *Morrissy*, 76 Ill. App. 3d at 761. The Illinois Supreme Court has favorably cited *Morrissy* for the premise that "mere exposure to potentially toxic product does not prove that the substance caused disease." *Kessinger v. Grefco, Inc.*, 173 Ill. 2d 447, 467 (1996).

The First District also recognized that the *Lewis I* decision did not address the issue of future medical monitoring. *Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 693 (1st Dist. 2007). In *Jensen*, the plaintiffs argued that taking a medication for cholesterol increased their risk of developing a disease in the future and sought damages for medical monitoring without alleging a present injury. *Jensen*, 371 Ill. App. 3d at 691. The plaintiffs

attempted to rely upon *Lewis I* in arguing that a present injury was not required, but the First District rejected the plaintiffs' argument, ruling that "the [*Lewis I*] court did not address the question posed by plaintiff here; namely, whether a plaintiff may bring a claim for medical monitoring for potential *future* harm, where no

present injury is shown." *Jensen*, 371 Ill. App. 3d at 693. Thus, the First District itself has held that *Lewis I* does not support the viability of true medical-monitoring-only claims.

Two decisions from the Illinois Appellate Court Fourth District support rejection of medical-monitoring-only claims. In *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 898 (4th Dist. 1992), the Fourth District adopted the *Morrissy* opinion and rejected medical monitoring damages for those plaintiffs without a present injury. In affirming a directed verdict in an asbestos and diatomaceous earth case arising from the Bloomington UNARCO plant, the Fourth District stated that "the medical testimony does not establish that [one of several plaintiffs] suffered a present injury from asbestos exposure. There must be a present injury to warrant recovery under Illinois law." *Betts*, 225 Ill. App. 3d at 889–90. The court found that costs of future medical monitoring for three plaintiffs who proved an *existing* disease could be recovered because compensable damages include the reasonable expense of necessary medical care, treatment, and services reasonably certain to be received in the future. *Id.* at 920–21 (citing I.P.I. (Civil) 30.06). Because each of the three plaintiffs with a *present* condition proved with reasonable certainty the cost of that future care, it was appropriately awarded as an element of damages. *Id.* at 920–21.

Furthermore, subsequent to *Betts*, the Fourth District indicated that it has not recognized a claim for medical monitoring in the absence of a present injury: "[t]he question of the sufficiency of damages as would support the causes of action in this case is not discussed herein, and *this disposition should not be construed as recognizing a cause of action to recover expenses for medical monitoring without a current physical injury being present*." *Campbell v. A.C. Equip. Serv. Corp., Inc.*, 242 Ill. App. 3d 707, 711 (4th Dist. 1993) (emphasis added). Although plaintiffs may rely upon *Lewis I* in attempting to pursue medical-monitoring-only claims, all of the other Illinois cases addressing the issue, while not dispositive, support rejecting such claims.

Federal Court "Predictions"

The Northern District of Illinois addressed medical monitoring and predicted that the Supreme Court of Illinois would permit a medical-monitoring-only claim. *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1117–20 (N.D. Ill. 1998). The court, however, did not cite to any prior Illinois decisions supporting the adoption of medical monitoring claims and instead considered only one case—an opinion from the U.S. Circuit Court of Appeals for the Third Circuit—to distinguish the *Morrissy* and *Betts* decisions. *Carey*, 999 F. Supp. at 1117–20 (citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850 (3d Cir. 1990)). Further, the prediction was made with little at stake, as the court concluded that any medical monitoring claim in its case would be barred by the statute of limitations. *Id.* at 1120.

The same court acknowledged that "it is far from clear whether Illinois recognizes medical monitoring as an independent cause of action." *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603, at *7 (N.D. Ill. Mar. 20, 2001). The court did not decide the issue of the medical monitoring claims as it denied a motion for class certification. *Guillory*, 2001 WL 290603, at *7–10.

In 2008, the U.S. District Court, Northern District of Illinois stated that, assuming medical monitoring is a viable claim for damages under Illinois law, a plaintiff must "prove either a present physical injury or a reasonable certainty of contracting the disease in the future." *Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 958 (N.D. Ill. 2008). The court concluded that the plaintiff's vague allegations that she used lipstick with lead in it, and thus was more likely to develop lead poisoning in the future, were "woefully deficient of any allegations as to the amount or extent of her 'exposure' to lead," and accordingly, the plaintiff's claim for medical monitoring was dismissed. *Frye*, 583 F. Supp. 2d at 958–59.

In 2007, the U.S. District Court, Eastern District of Pennsylvania predicted that the Supreme Court of Illinois would allow a medical-monitoring-only claim. *Gates v. Rohm & Haas Co.*, 618 F. Supp. 2d 362, 368 (E.D. Pa. 2007). The parties, however, disputed whether to apply Illinois law or Pennsylvania law (which

unequivocally recognized medical-monitoring-only claims). *Gates*, 618 F. Supp. 2d at 364 n.5. The district court found that it did not need to decide the choice of law issue; rather, it elected instead to predict Illinois law, thereby rendering moot the conflict of law issue. *Id.* On appeal, however, the U.S. Court of Appeals for the Third Circuit applied Pennsylvania law, which allows medical monitoring claims, instead of Illinois law. *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 & n.14 (3d Cir. 2011). These federal opinions are not binding on Illinois state courts and, for the above reasons, defendants can argue that they provide little persuasive support for allowing medical-monitoring-only claims.

No Injury Means No Claim

Plaintiffs seeking medical monitoring in the absence of a present injury fail to allege an essential element of their claims under existing Illinois law. To state a cause of action for negligence, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, *an actual injury* proximately caused by the breach, and damages. See *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 194–96 (1995); *Cunis v. Brennan*, 56 Ill. 2d 372, 374 (1974). Actual damages must be alleged. A threat of future harm, not yet realized, is not actionable. *Boyd*, 166 Ill. 2d at 197. Indeed, as noted above, "[t]here must be a present injury to warrant recovery under Illinois law." *Betts*, 225 Ill. App. 3d at 898; see also *Yu v. Int'l Bus. Mach. Corp.*, 314 Ill. App. 3d 892, 897 (1st Dist. 2000) ("Failure to state sufficient facts to constitute a legally cognizable present injury or damage mandates dismissal of the action.") (citing *Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 471 (1st Dist. 1996)); see also *Anderson v. Golden*, 279 Ill. App. 3d 398, 400–01 (3d Dist. 1996).

Plaintiffs failing to allege a present injury, but attempting to recover medical monitoring under a negligence theory, have failed to allege a fundamental, required element of any negligence claim—a present injury. Accordingly, alleging no present injury while seeking medical monitoring fails to state a negligence cause of action under Illinois law.

Moreover, a person who has no current injury has no claim that has accrued under Illinois law. Medical monitoring claims are inherently personal injury claims seeking recovery before an injury has occurred. "Actions for damages for an injury to the person . . . shall be commenced within 2 years next after the cause of action accrued . . . ." 735 ILCS 5/13-202. The Supreme Court of Illinois has explained that "[a] cause of action 'accrues' when facts exist that authorize the bringing of a cause of action. Thus, a tort cause of action accrues when all its elements are present, *i.e.*, duty, breach, *and resulting injury or damage*." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20 (emphasis added).

"As a general rule, a cause of action for personal injuries accrues when the plaintiff suffers injury." *Golla v. Gen. Motors Corp.*, 167 Ill. 2d 353, 360 (1995). "Without accrual there can be no cause of action, and there is no cause of action until injury or damage has occurred." *Doe v. Montessori Sch. of Lake Forest*, 287 Ill. App. 3d 289, 297 (2d Dist. 1997) (citing *West Am. Ins. Co. v. Sal E. Lobianco & Son Co., Inc.*, 69 Ill. 2d 126, 131 (1977)).

A claim for medical monitoring in the absence of a present injury is an attempt to plead a claim that has not yet accrued. As the Illinois Supreme Court explained, a tort claim accrues only when *all* elements, including *injury*, are present. Without accrual, there is no cause of action; there is no cause of action until injury or damage has occurred. Thus, alleging medical monitoring without an injury fails fundamentally on two levels: (1) it fails to allege the essential element of an injury; and (2) it fails to allege a claim that has accrued under Illinois law. These two fundamental failures alone should preclude medical-monitoring-only claims.

Other Courts Reject Medical-Monitoring-Only Claims

Many other courts across the country have ruled that those who seek medical monitoring without alleging a present injury fail to state a claim. In 1997, the Supreme Court of the United States rejected medical-monitoring-only claims under the Federal Employers' Liability Act. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 444 (1997).

Although some states have allowed medical monitoring claims in the absence of a present injury, many states have refused to allow such claims. See Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DePaul J. Health Care L. 1 (2009); see also *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 376–86 (2013) (holding that medical-monitoring-only claims will be allowed). The Delaware Supreme Court has long disallowed claims for medical "surveillance" without "present physical disease." *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984). New York's highest court very recently rejected "medical-monitoring-only" claims in response to a certified question from the U.S. Court of Appeals for the Second Circuit. *Caronia v. Phillips Morris USA, Inc.*, 2013 N.Y. Slip Op. 08372, 2013 WL 6589454 (Ct. App. Dec. 17, 2013). In addition, the supreme courts of Mississippi, Kentucky, Alabama, Oregon, and Michigan have refused to allow such claims. See *Hinton* ex rel. *Hinton v. Monsanto Co.*, 813 So. 2d 827, 832 (Ala. 2001); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 856 (Ky. 2002); *Henry v. Dow Chem. Co.*, 473 Mich. 63, 73 (2005); *Paz v. Brush Eng'red Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007); *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403, 415 (2008). The Supreme Court of Nevada also has refused to create a cause of action for medical monitoring. *Badillo v. Am. Brands, Inc.*, 117 Nev. 34 (2001). Although the Washington Supreme Court has not spoken on the issue, the Wisconsin Court of Appeals has declined to allow medical monitoring claims in the absence of injury. *Alsteen v. Wauleco, Inc.*, 2011 WI App 105. The same is true for North Carolina. *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 655–56 (2007).

Many other courts have rejected the viability of medical-monitoring-only claims. Although the high courts in Georgia, Nebraska, North Carolina, Tennessee, Texas, Virginia, and Washington have not ruled on the issue, federal courts sitting in diversity have predicted that, if the issue was considered, the supreme courts of those states would reject medical monitoring claims in the absence of injury. *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000), overruled on jurisdictional grounds by *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (Nebraska law); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (Virginia law); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 665–68 (W.D. Tex. 2006) (Texas law); *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1296 (N.D. Ga. 2005), *aff'd*, 230 F. App'x. 878 (11th Cir. 2007) (Georgia law); *Bostick v. St. Jude Med., Inc.*, No. 03-2626 BV, 2004 WL 3313614, at *14 (W.D. Tenn. Aug. 17, 2004) (Tennessee law); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 608–09 (W.D. Wash. 2001) (Washington law); *Jones v. Brush Wellman, Inc.*, No. 00 CV 0777, 2000 WL 33727733, at *8 (N.D. Ohio Sept. 13, 2000) (Tennessee law); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at *51 (W.D. N.C. Oct. 29, 1990), *report and recommendation adopted by* 1991 WL 187277 (W.D. N.C. July 15, 1991), *aff'd in part, rev'd in part on other grounds*, 47 F.3d 1164 (4th Cir. 1995) (North Carolina law) (unpublished table decision). Thus, the Supreme Court of the United States, United States courts of appeals, United States district courts, the supreme courts of various states, and the appellate courts of at least two states all have ruled that medical-monitoring-only claims should not be allowed to proceed. The fact that numerous courts have denied medical monitoring to plaintiffs without injuries supports Illinois courts' rejection of such claims.

While there are several persuasive reasons to reject medical-monitoring-only claims (see Zarov et al., *supra*, for a thorough discussion), one recurring theme is the long-standing requirement of an actual, present injury for a negligence claim. Many states rely on this fundamental legal requirement in refusing to allow medical-monitoring-only. *Hinton* ex rel. *Hinton v. Monsanto Co.*, 813 So. 2d 827, 829–32 (Ala. 2001) (noting

that "Alabama law has long required a manifest, present injury before a plaintiff may recover in tort" and that allowing medical monitoring claims in the absence of physical injury "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," and concluding that it would not "stand Alabama tort law on its head" to allow medical monitoring claims because Alabama law "provides no redress for a plaintiff who has no present injury or illness"); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 856 (Ky. 2002) (noting that the Supreme Court of Kentucky "has consistently held that a cause of action in tort requires a present physical injury to the plaintiff" and, while recognizing that some states "are venturing into uncharted territory" in allowing medical monitoring without requiring a showing of a present physical injury, declining to depart from well-settled principles of tort law"); *Henry v. Dow Chem. Co.*, 473 Mich. 63, 73–75, 83 (2005) (stating that "Michigan law requires an actual injury to person or property as a precondition to recovery under a negligence theory," and that "the injury requirement has always been present in our negligence analysis. It has simply always been the case in our jurisprudence that plaintiffs alleging negligence claims have also shown that their claims arise from present physical injuries."; and refusing to allow a medical monitoring claim without an injury because such a claim "departs drastically from our traditional notions of a valid negligence claim" and would be an "enormous shift in our tort jurisprudence"); *Paz v. Brush Eng'red Materials, Inc.*, 949 So. 2d 1, 6–7 (Miss. 2007) (recognizing that medical-monitoring-only claims "would require an unprecedented and unfounded departure from the long-standing traditional elements of a tort action" and declining "to recognize medical monitoring as a cause of action"); *Caronia v. Phillips Morris USA, Inc.*, 2013 N.Y. Slip Op. 08372, 2013 WL 6589454 (Ct. App. Dec. 17, 2013) ("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 fact-finder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims."); *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403, 414–15 (2008) (holding that, under Oregon precedent, "the present economic harm that defendants' actions allegedly have caused—the cost of medical monitoring—is not sufficient to give rise to a negligence claim," after noting that "[t]he decisions from other jurisdictions are divided," but also that "the differing decisions from the other jurisdictions do not provide a basis for overruling Oregon's well-established negligence requirements"); *Alsteen v. Wauleco, Inc.*, 2011 WI App 105, ¶¶ 9, 37 ("Wisconsin law requires actual injury before a plaintiff may recover in tort"; thus, "allowing a medical monitoring claim absent present injury would constitute a marked alteration in the common law").

As discussed above, the Illinois Supreme Court also consistently has required a present injury for a cause of action to be viable. Other states have held that allowing medical monitoring claims without a present injury would: (1) be inconsistent with this fundamental principle of tort law that has been in existence for over 200 years; (2) be an unprecedented and unfounded departure from the long-standing elements of a tort action; (3) be "venturing into uncharted territory;" and (4) "stand tort law on its head." The same is true in Illinois.

Other courts' rejection of medical-monitoring-only claims could be persuasive in urging Illinois courts to reject them. Unless Illinois appellate courts or the Illinois Supreme Court provide guidance, however, the issue of whether medical-monitoring-only claims may proceed under Illinois law is subject to debate. Until then, defendants should challenge medical-monitoring-only claims as inconsistent with the fundamental requirements of Illinois law.

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