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Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring

James A. Henderson Jr.
Cornell Law School

Aaron D. Twerski
Brooklyn Law School

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ASBESTOS LITIGATION GONE MAD: EXPOSURE-BASED RECOVERY FOR INCREASED RISK, MENTAL DISTRESS, AND MEDICAL MONITORING

JAMES A. HENDERSON, JR.*
AARON D. TWERSKI**

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* Frank B. Ingersoll Professor of Law, Cornell Law School. A.B., 1959, Princeton University; LL.B., 1962, LL.M. 1964, Harvard University.

** Newell DeValpine Professor of Law, Brooklyn Law School. A.B., 1962, Beth Medrash Elyon Research Institute; B.S. 1970, University of Wisconsin-Milwaukee; J.D., 1965, Marquette University.

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I. INTRODUCTION

The asbestos litigation in its many forms has been, by all accounts, a blight on the American judicial system.¹ Few observers believe that our tort system was

1. See JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 2 (1991) (stating that the asbestos situation is a “disaster of major proportions to both the victims and producers of asbestos products”). The report further notes that:

[D]ockets in both Federal and State courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over again; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Id. at 2-3; see also *Oritz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (noting that the tort system is beset by an “elephantine mass of asbestos cases” that “defies customary judicial administration”); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541, 541 (1992) (“Most commentators agree that tort litigation today is a highly unsatisfactory system for resolving claims arising out of workers’ exposure to asbestos.”); Steven L. Schultz, Comment, In re *Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 590 (1992) (“The traditional tort system, in connection with asbestos litigation, has been marked by high transaction costs, excessive delays in providing compensation to injured plaintiffs, unequal recoveries among identically injured victims, litigious parties and a judicial system clogged

designed to deal with a national tragedy engendered by a product that has caused and will cause serious harm to thousands of Americans over a period of at least seven decades. What is most disturbing is that some aspects of the legal problems associated with asbestos have been exacerbated needlessly. Giving in to enormous pressure, some courts have recognized theories of recovery that are both substantively unfair and certain to favor claimants whose suffering is minor over claimants who will suffer serious harm in the future.² Most courts have rid themselves of such myopia,³ but bad law tends to hang on.⁴ It is high time that the courts cleansed themselves entirely of illegitimate doctrine.

Asbestos litigation's final descent into madness has come in the form of judicial recognition of anticipatory claims on behalf of persons who have not yet suffered injury. Departing from long-standing tradition in tort law, courts have sought to provide immediate compensation to plaintiffs who are asymptomatic and in good health for consequences that they may suffer in the future as a result of either exposure to asbestos⁵ or the development of asymptomatic biological changes in their lungs.⁶ Plaintiffs have devised three stratagems for receiving "pay me now" compensation. First, they argue that those exposed to asbestos should be entitled to immediate recovery based on the fact that, upon exposure, plaintiffs are at increased risk of contracting asbestosis, mesothelioma, or lung cancer.⁷ These claims seek recovery for the value of physical harms based on the possibility that plaintiffs may

by an avalanche of cases.").

2. For a detailed description of the various manifestations resulting from exposure to asbestos see Schuck, *supra* note 1, at 544-549. The range of consequences arising from exposure to asbestos vary significantly and include: (1) Asbestos Fibres in Lung. Any exposure to asbestos may result in asbestos fibers lodging in the lung. The mere lodging of such fibers in the lung is asymptomatic and need not result in pulmonary harm. (2) Pleural plaque or pleural thickening. Subsequent to asbestos exposure, calcified tissue may form on the pleura, the membranes surrounding the lung. Most often those experiencing pleural plaque and thickening are asymptomatic. They can lead active, normal lives free of any pain and suffering. (3) Asbestosis. When inhaled, asbestos fibers may begin a scarring process that destroys air sacs in the lung where oxygen is transferred into the blood. This disease is non-malignant, but nevertheless, may result in decreased pulmonary function. Asbestosis sufferers may encounter shortness of breath, a dry cough, weight loss, and chest pain. (4) Mesothelioma. The most serious of the diseases that may follow asbestos exposure is a malignant tumor in the membranes lining the lungs, abdomen, and chest. Mesothelioma is an incurable form of cancer resulting in the victim's death within seven to fifteen months after its onset. Mesothelioma is almost always caused by asbestos. (5) Lung Cancer. General lung cancer can be caused by asbestos but may be unrelated to asbestos. There may also be a symbiotic relationship between asbestos and smoking in causing lung cancer. *Id.*

3. *See infra* text accompanying notes 27-99.

4. *See, e.g.,* Bonnette v. Conoco, Inc., 801 So. 2d 501, 514 (La. Ct. App. 2001), *cert. granted*, 804 So. 2d 649 (La. 2002).

5. *Id.* at 511.

6. *See, e.g.,* Herber v. Johns-Manville Corp., 785 F.2d 79, 83-85 (3d Cir. 1986) (applying New Jersey law and allowing recovery for fear of cancer based on plaintiff having developed pleural thickening); Mauro v. Raymark Indus., Inc., 561 A.2d 257, 263 (N.J. 1989) (same).

7. For cases in which plaintiffs sought immediate compensation for increased risk of developing cancer in the future, see, for example, Burns v. Jaquays Mining Corp., 752 P.2d 28, 30 (Ariz. Ct. App. 1987); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 523-26 (Fla. Dist. Ct. App. 1985); Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 189 (Ky. 1994).

develop these diseases in the future. Second, plaintiffs claim that quite apart from any physical consequences that they may actually suffer in the future, they are entitled to damages for the present fear that they experience concerning their future well-being.⁸ These claims are premised on the tort of negligent infliction of emotional distress and seek to draw on that theory for recovery.⁹ Third, claimants contend that those exposed to asbestos are *ipso facto* entitled to medical surveillance to determine whether they are experiencing changes in their health that might be related to the development of some asbestos-related disease over the course of time.¹⁰

All of these theories are superficially plausible, if not downright appealing. However, any attempt to embrace them within the mainstream of traditional tort law is manifestly unwise. In truth, they constitute radical departures from longstanding norms of tort law, advanced in recent years to bludgeon a disfavored group of defendants. But the wrongdoing of a defendant, or defendants, does not justify creating legal doctrine that is substantively unfair, especially when doing so strikes mercilessly at another group of plaintiffs who, when the funds to pay damages run dry, will be denied recovery for real, rather than anticipated, ills.

This Article chronicles the development of these “front-loaded” theories of tort recovery and how the courts have dealt with them. We argue that these theories are wrong not only for asbestos claims, but also for all forms of toxic tort litigation. We are aware that some of the positions we take in this Article will be unpopular. However, we draw strength from the fact that we are writing in a Symposium dedicated to the memory of our late friend and colleague, Gary Schwartz. To the best of our knowledge, Gary never addressed the subject under discussion. But those who knew him and followed his work must know that Gary was prepared to take on an unpopular cause when he believed that he was defending the integrity of tort law. His brilliant article attacking the hysteria surrounding the Ford Pinto

8. For cases in which plaintiffs exposed to asbestos or who developed asymptomatic pleural thickening have made claims for mental distress based on their fear of developing cancer in the future, see, for example, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 427 (1997); *In re Asbestos Litig. Leary Trial*, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 at *3-5 (Del. Super. Ct. June 14, 1994); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 233 (Pa. 1996); *Temple-Inland Forest Prod. Corp. v. Carter*, 993 S.W.2d 88, 89 (Tex. 1999).

9. The asbestos cases that deal with the right to recover for mental distress rarely explain whether the underlying theory of recovery is strict liability or negligence. For the most part asbestos cases are premised on the failure to warn about the danger associated with the use of asbestos. See, e.g., *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973); *Anderson v. Owens-Corning Fibreglas Corp.*, 810 P.2d 549, 551 (Cal. 1991). In failure to warn cases, strict liability and negligence tend to merge into a single theory. See, e.g., *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994). In any event, whether the theory be negligence or strict liability, the policy questions as to whether and when there should be a duty to protect the right of mental tranquility is the same. See JAMES A. HENDERSON & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 223-226 (4th ed. 2000).

10. For cases in which asbestos claimants have sought medical monitoring, see, for example, *Burns*, 752 P.2d at 30; *Simmons*, 674 A.2d at 239.

litigation comes to mind as one example.¹¹ And his unrelenting opposition to the unprincipled consumer expectations test as the standard for defining defective design in products liability is another.¹² We hope that our work here continues in that tradition.

II. PREINJURY CLAIMS IN A NUTSHELL

A. *Asbestos Exposure and the Single-Action Rule*

In most tort cases, the law provides a plaintiff one indivisible cause of action for all damages arising from a defendant's breach of duty.¹³ This hoary rule against splitting a cause of action is designed to prevent vexatious and repetitive litigation of a single underlying claim when plaintiff's injuries eventually result in damages that are more serious than originally contemplated.¹⁴ Classic damages rules allow a plaintiff who has suffered physical injury to recover damages for future injuries only if it can be established with reasonable medical probability that such injuries will actually develop.¹⁵ It is well understood that, in any individual case, the likelihood that a plaintiff may be either undercompensated or overcompensated is real.¹⁶ Many plaintiffs who subsequently suffer additional injury are not able at the time of trial to prove with reasonable medical probability (more probably than not)

11. See Gary T. Schwartz, *The Myth of The Ford Pinto Case*, 43 RUTGERSL. REV. 1013, 1035-47 (1991).

12. Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435, 476 (1979); Letter from Gary T. Schwartz on behalf of the Product Liability Advisory Council, to Professor Richard Speidel Professor of Law, Northwestern University School of Law (June 4, 1996) (criticizing the consumer expectation test as a standard for defective design in products liability and arguing that it should not be the test for liability in Article 2 of the Uniform Commercial Code) (letter on file).

13. See, e.g., *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-37 (5th Cir. 1985); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 11.13, at 557 (2d ed. 1977).

14. See *McKibben v. Zamora*, 358 So. 2d 866, 868 (Fla. Dist. Ct. App. 1978) (explaining that the rule "promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single tort incident, and is consistent with the absolute necessity of bringing litigation to an end"); *Galveston, H. & S. A. Ry. Co. v. Dowe*, 7 S.W. 368, 371 (Tex. 1888) ("The reason for the rule lies in the necessity for preventing vexatious and oppressive litigation, and its purpose is accomplished by forbidding the division of a single cause of action so as to maintain several suits when a single suit will suffice."); see also *Murphy v. Campbell*, 964 S.W.2d 265, 273 (Tex. 1997) ("The fact that the plaintiff's actual damages may not be fully known until much later does not affect the determination of the accrual date . . .").

15. 22 AM. JUR. 2D *Damages* § 677 (1988) ("Plaintiffs who have submitted proof of prospective damages to a reasonable degree of certainty are entitled to submit the question to the jury . . ."); C.S. Wheatley, Jr., Annotation, *Future Pain and Suffering as Element of Damages for Physical Injury*, 81 A.L.R. 423, 424 (1932) ("It is well settled that in an action for a personal injury, future pain and suffering on the part of the injured person in consequence of the injury constitute a proper element of the damages . . . provided there is the requisite certainty or probability that such pain and suffering will result.").

16. See RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. c (1982) (stating that a judgment may be insufficient because the plaintiff's "damages turned out in fact to be unexpectedly large and in excess of the judgment").

that such future injuries will develop. Conversely, medical predictions of future injury may never eventuate. However, the specter of repetitive litigation and the lack of finality to litigation present unacceptable costs to the legal system. Thus, the single-action rule is deeply embedded in the jurisprudence of this country.

With the onset of the asbestos litigation in the 1960s, the need to re-examine the single-action rule became manifest. The problem was basic. The statute of limitations for most tort actions begins to run when the plaintiff discovers his injury.¹⁷ If pleural plaque or asbestosis constitutes physical injury sufficient to trigger the running of the statute of limitations for all future asbestos-related harms, plaintiffs are placed in a no-win situation. Asbestosis, lung cancer, and mesothelioma all have long latency periods.¹⁸ If a plaintiff who has developed pleural plaque waits to file suit until he develops either asbestosis or mesothelioma, or if a plaintiff who has contracted asbestosis waits to file suit until he develops mesothelioma, his cause of action will be long-ago barred by the typical tort statute of limitations.¹⁹ On the other hand, if a plaintiff files suit immediately upon the discovery of some asbestos-related change in his body, such as pleural thickening or asbestosis, and in this initial action seeks to recover for the possibility that he will develop an asbestos-related malignancy, he will be unable to recover for such future losses. As noted earlier, recovery in an initial action for future injury is allowed only if the plaintiff can prove through competent expert testimony a substantial (more probable than not) medical probability of developing such a malignant disease in the future.²⁰ Neither those diagnosed with pleural plaque or pleural thickening, nor even those who develop asbestosis, can establish that it is more probable than not that they will ultimately manifest some form of asbestos-related malignancy.²¹

17. See DANB. DOBBS, *THE LAW OF TORTS* § 218 (2000) (explaining the discovery rule); see also *Louisville Trust Co. v. Johns-Manville Prods. Co.*, 580 S.W.2d 497, 500 (Ky. 1979) (“[W]hen an injury does not manifest itself immediately the cause of action should accrue not when the injury was initially inflicted, but when the plaintiff knew or should have known that he had been injured by the conduct of the tortfeasor.”). Clearly when x-rays show pleural plaque or thickening, or a physician makes a diagnosis of asbestosis, the statute would begin to run and bar a later claim for mesothelioma or lung cancer unless these diseases are recognized as separate injuries that constitute different causes of action.

18. See *Hamilton v. Asbestos Corp.*, 998 P.2d 403, 405-08 (Cal. 2000) (noting that the average latency period of asbestosis is twenty years, the average latency period of mesothelioma is thirty to forty years, and that plaintiff had been diagnosed with peritoneal mesothelioma more than thirty years after his last exposure to asbestos).

19. See *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 648 (Tex. 2000) (“[T]he single action rule is a catch 22 for victims of multiple latent diseases [because] “[a] plaintiff who sues for asbestosis is precluded from any recovery for a later-developing lethal mesothelioma. But the discovery rule would preclude a plaintiff with asbestosis from waiting to see if an asbestosis-related cancer later develops”).

20. See *id.* at 649 (citing *Ins. Co. of N. Am. v. Myers*, 411 S.W.2d 710, 713-14 (Tex. 1966)).

21. See *id.* (stating that since only fifteen percent of asbestosis victims actually develop mesothelioma, no asbestosis plaintiff can satisfy the “reasonable medical probability” requirement). The likelihood that those who have developed pleural thickening will develop mesothelioma or some other form of cancer is even more remote. See *infra* text accompanying note 107.

Given the harshness of the single-action rule, something had to give. Ultimately, the overwhelming majority of courts abandoned the single-action rule and now allow separate causes of action later, when a plaintiff actually develops asbestosis, lung cancer, or mesothelioma.²² However, to assist exposed plaintiffs in the interim, before the legal enlightenment finally arrived, some courts developed stopgap causes of action to allow asbestos plaintiffs to escape the single-action rule dilemma. Thus, some courts took the position that recovery for increased risk could be predicated on proof of less than reasonable medical probability that the plaintiff would actually develop cancer.²³ At the same time, a number of courts recognized

22. See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120-21 (D.C. Cir. 1982) (holding that diagnosis of asbestosis did not trigger the statute of limitations for other injuries caused by the same exposure to asbestos); *Hamilton*, 998 P.2d at 413-14 (holding that under California statute, the single action rule no longer applied to asbestos plaintiffs); *Wagner v. Apex Marine Ship Mgmt. Corp.*, 100 Cal. Rptr. 2d 533, 539 (Ct. App. 2000) (holding that a plaintiff's discovery of one asbestos-related disease does not trigger the running of the statute of limitations on all separate and distinct asbestos-related diseases caused by the same exposure to asbestos); *Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111, 112 (Colo. 1991) (en banc) (holding that the statute of limitations on a claim for damages from malignant asbestosis did not begin to run upon plaintiff's earlier knowledge of existence of benign pleural thickening and pleural calcification); *Sheppard v. A.C. & S. Co.*, 498 A.2d 1126, 1134 (Del. Super. Ct. 1985) (adopting *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982)) *aff'd sub nom Keene Corp. v. Sheppard*, 503 A.2d 192 (Del. 1986); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 519-23 (Fla. Dist. Ct. App. 1985) ("[P]laintiff may bring a second action for damages if and when he actually contracts cancer."); *VaSalle v. Celotex Corp.*, 515 N.E.2d 684, 687 (Ill. App. Ct. 1987) (holding that asbestosis was a legal injury separate and distinct from lung cancer and action for damages resulting from lung cancer thus accrued when insulator discovered he had lung cancer, not when he learned he was suffering from asbestosis); *Parks v. A.P. Green Indus., Inc.*, 754 N.E.2d 1052, 1058 (Ind. Ct. App. 2001) (holding that plaintiff's suit for asbestosis did not trigger the statute of limitations for lung cancer since they are separate diseases); *Wilber v. Owens-Corning Fiberglass Corp.*, 476 N.W.2d 74, 78 (Iowa 1991) ("The manifestation of asbestosis does not trigger the running of the statute of limitations on all separate, distinct, and later-manifested diseases which may have stemmed from the same asbestos exposure."); *Carroll v. Owens-Corning Fiberglass Corp.*, 37 S.W.3d 699, 703 (Ky. 2000) (holding that although Kentucky has never been a "two disease" state, an action for cancer will accrue on the date of the diagnosis of cancer and not the date of diagnosis of asbestosis since they are separate and distinct diseases); *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1028 (Md. 1983) (holding that plaintiff's claim for lung cancer was not time barred despite a prior diagnosis of asbestosis); *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 9 (Mich. 1986) (holding that actions for cancer and mesothelioma were not time barred by a previous asbestosis diagnosis); *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856, 860 (N.Y. Sup. Ct. 1989) (holding that a claim for mesothelioma was not time barred by an earlier asbestosis diagnosis); *Marinari v. Asbestos Corp.*, 612 A.2d 1021, 1028 (Pa. Super. Ct. 1992) (articulating the "two-disease rule" later adopted by the Pennsylvania Supreme Court in *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996)); *Potts v. Celotex Corp.*, 796 S.W.2d 678, 685 (Tenn. 1990) (holding that an earlier diagnosis of asbestosis did not bar plaintiff's suit for mesothelioma); *Pustejovsky*, 35 S.W.3d at 653 (holding that the single-action rule did not apply to asbestos litigation); *Sopha v. Owens-Corning Fiberglass Corp.*, 601 N.W.2d 627, 642 (Wis. 1999) ("The diagnosis of a malignant asbestos-related condition creates a new cause of action and the statute of limitations governing the malignant asbestos-related condition begins when the claimant discovers, or with reasonable diligence should discover, the malignant asbestos-related condition.")

23. *Bonnette v. Conoco, Inc.*, 801 So. 2d 501, 511 (La. Ct. App. 2001), *cert. granted*, 804 So. 2d 649 (La. 2002); see also *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17-18 (D. Colo. 1984) (denying defendant's motion for partial summary judgment on plaintiff's claim for increased risk of

a cause of action on behalf of asymptomatic plaintiffs for mental distress arising from the fear that they would develop cancer in the future.²⁴ Unlike the increased-risk claim in which damages are based directly on the risk of developing cancer in the future, the mental distress claim avoids dealing with the reasonable medical probability standard, since the cause of action is based on a plaintiff's currently existing fear of future injury.

B. *The Post Single-Action Era: Bringing Actions Sequentially*

As noted earlier, most American jurisdictions have done away with the single-action rule in asbestos litigation.²⁵ Plaintiffs who are diagnosed with asymptomatic pleural plaque, pleural thickening, or asbestosis need not rush to the courthouse to file actions for fear that they will be barred by the statute of limitations from doing so later if they develop asbestosis or asbestos-related malignancies. In most states, the successful prosecution of one action will not bar plaintiffs from bringing a later action if they develop a more serious asbestos-related disease.²⁶ Thus, a plaintiff who has contracted asbestosis can sue immediately to recover damages for the ills associated with that disease. If ten or fifteen years later he contracts mesothelioma, he may bring a new action for damages caused by that virulent form of cancer. The question for the courts, now that plaintiffs enjoy the benefit of waiting until they have a fully developed disease to bring suit, is whether the law should mandate that plaintiffs exposed to asbestos *must* wait until the onset of these diseases to seek recovery, or whether plaintiffs can pursue pre-injury claims for increased risk, mental distress, or medical monitoring based on the possibility that they may develop cancer in the future.

III. WHEN PLAINTIFFS' PREINJURY CLAIMS ARE NOT EVEN SUPERFICIALLY PLAUSIBLE: RECOVERY FOR INCREASED RISK

Courts that have abolished the single-action rule have flatly rejected claims based on increased risk.²⁷ They have done so with regard to both plaintiffs who

contracting cancer).

24. *See, e.g., Herber v. Johnson-Manville Corp.*, 785 F.2d 79, 85 (3d Cir. 1986); *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 467-68 (5th Cir. 1985).

25. *See* cases cited *supra* note 22. It remains a mystery to the authors why some asbestos defendants continue to defend asbestosis and mesothelioma claims on the ground that plaintiff is precluded from raising these claims when they develop based on the single-action rule. *See, e.g., Carroll*, 37 S.W.3d at 700. The single-action rule forced plaintiffs to seek front-loaded damages for increased risk of cancer or for mental distress based on the fear of developing cancer. *See Pustejovsky*, 35 S.W.3d at 649. Only with the recognition that the single-action rule does not apply to asbestos claims have the courts been able to delay claims for the more serious asbestos-related diseases until they actually come to fruition.

26. *See, e.g., Eagle-Picher*, 481 S.W.2d at 519-523.

27. *See id.* at 520; *see also In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 & n.8 (D. Haw. 1990); *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257, 264-265 (N.J. 1989) (providing exhaustive listing of cases addressing increased risk claims); *Simmons*, 674 A.2d at 237.

have asymptomatic pleural plaque or thickening and plaintiffs who have actually contracted asbestosis. Having preserved the right for plaintiffs to bring actions if and when they actually develop asbestosis or some form of asbestos-related malignancy, these courts see no reason to allow speculation about future injuries. It might be interesting to consider whether a court would bar recovery for increased risk if faced with a plaintiff manifesting pleural thickening or asbestosis who could offer credible testimony that he faces a substantial medical probability of developing a malignancy. Few such cases are likely to arise because plaintiffs exposed to asbestos who develop pleural plaque or asbestosis rarely present such a strong probability of contracting a malignancy.²⁸ However, even if such testimony were available, it is our view that courts would not, and should not, allow recovery. The reported decisions reflect no judicial tolerance for guessing at future results. Claims for increased risk have no place in the post single-action era.

IV. WHERE PLAINTIFFS' PREINJURY CLAIMS ARE SUPERFICIALLY PLAUSIBLE, BUT TRADITION DENIES RECOVERY: RECOVERY FOR MENTAL DISTRESS

By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who have been exposed to asbestos but who, with rare exceptions, are completely asymptomatic.²⁹ Because they cannot claim damages for present injury (they have none) or for future injury (increased risk claims are barred), these plaintiffs present claims for mental distress predicated on their present

28. See *infra* notes 84-90 and accompanying text. In two cases, plaintiffs with asbestosis offered evidence that there was a greater than fifty percent probability that they would develop cancer. See *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413 (5th Cir. 1986); *Gideon v. Johns-Manville Sales Corp.* 761 F.2d 1129, 1138 (5th Cir. 1985).

29. See JENNIFER L. BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS 3 (Dec. 2001), available at http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf (estimating that more than ninety percent of current claimants are alleging nonmalignant injuries); Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people"); *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the Comm. on the Judiciary House of Representatives*, 102d Cong. 1st & 2d Sess. 81, 100 (Oct. 24, 1991) (testimony of Professor Lester Brickman). Professor Brickman testified:

[P]leural plaque claims account for approximately 80% of new asbestos claim filings and represent a substantial percentage of previously filed claims. The existence of tens of thousands of such claims is accounted for by mass screenings of industrial workers financed by plaintiffs' lawyers and usually done with active assistance of local union officials. Often, mobile x-ray vans brought to plant sites are used for the screenings.

Id.; see also Schuck, *supra* note 1, at 564 ("Another probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs' lawyers who engage in aggressive claim-solicitation campaigns on a mass basis designed to multiply the number of filed cases, thereby increasing the pressure on defendants to settle cases wholesale.").

fear that they may develop a malignancy in the future.³⁰ At first glance, asbestos plaintiffs who claim mental distress make a plausible argument for recovery. Those who have been exposed to asbestos, and certainly those whose lungs evidence some physiological changes such as pleural plaque or thickening, do have a small increased risk of developing cancer in the future.³¹ This reality, coupled with the widespread concern surrounding the asbestos problem, gives facial credence to plaintiffs' claims that they experience genuine fear that they may develop cancer in the future. Whether they will develop such a disease in the future or not, the mere possibility causes current mental distress. Thus, plaintiffs assert that this distress, caused by the negligence of the defendant, warrants current compensation.

A. *Traditional Limitations on the Tort of Mental Distress*

Before examining the validity of these claims brought by asbestos plaintiffs and the special problems attendant to emotional distress claims arising from exposure to toxic substances, it is important to consider more generally the limitations that courts have traditionally placed on the tort of negligent infliction of emotional distress. In contrast to the tort of intentional infliction of emotional distress that swept the country after the adoption by the American Law Institute of the *Restatement (Second) of Torts* § 46,³² the tort of negligent infliction of emotional distress has had a checkered history. To this very day, American courts have expressed the view that the "negligent infliction" tort must be substantially limited. Judges have expressed concern that allowing recovery for mental upset based on inadvertent conduct is an invitation to open-ended and uncontrollable litigation.³³

We note at the outset that compensating for mental distress in most tort cases based in negligence is noncontroversial. When a defendant negligently harms a plaintiff, and the plaintiff suffers pain and mental anguish as a result of his physical injuries, recovery for such parasitic mental distress damages has always been a staple of American tort law.³⁴ However, a subject of controversy is whether a plaintiff should recover for mental distress that follows upon the heels of defendant's conduct that places the plaintiff in physical danger but does not actually cause harm. For many years courts required, at the very least, that defendant's negligent conduct result in physical impact upon the plaintiff.³⁵ Once a physical

30. See, e.g., *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986); *In re Moorenovich*, 634 F. Supp. 634, 637 (D. Me. 1986); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987); *Simmons*, 674 A.2d at 235; *Temple Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 89 (Tex. 1999).

31. See *infra* notes 102-08 and accompanying text.

32. See RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46 has been widely adopted. See, e.g., *Harris v. Jones*, 380 A.2d 611, 613 n.1 (Md. Ct. App. 1977) (listing states that adopted § 46).

33. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 54, at 360 (5th ed. 1984); DOBBS, *supra* note 17, § 308.

34. DOBBS, *supra* note 17, § 302.

35. See, e.g., *Brisboise v. Kans. City Pub. Serv. Co.*, 303 S.W.2d 619, 627 (Mo. 1957) (en banc) ("[W]here the defendant is not charged with knowledge that the person involved is other than normal, [his conduct] should not be made the basis of an action for abnormal damages having their foundation

impact was established, it was not necessary that the impact have caused physical harm. If the plaintiff suffered only emotional distress once impact was shown, recovery was allowed.³⁶ Most courts have now rejected the impact requirement and allow recovery for mental distress when the defendant's negligence has demonstrably threatened the plaintiff with imminent physical harm.³⁷ Many jurisdictions still require that the mental distress result in some form of physical injury to the plaintiff to guarantee the genuineness of the claim.³⁸ Others dispense with this requirement and allow for mental distress damages even if unaccompanied by physical injury.³⁹ Finally, the courts have struggled with the problem of when to allow recovery when the defendant causes a plaintiff-bystander to suffer mental distress from witnessing injury to a third party.⁴⁰ Courts disagree regarding the conditions imposed as a predicate for bystander recovery.⁴¹ In any event, while the question of how the courts have dealt with negligent infliction of mental distress arising from the direct threat of imminent physical injury to the plaintiff is of great importance to the discussion of the right to recovery for mental distress in toxic tort cases, the right of bystanders to recover for peril to others has no direct relevance. In the toxic tort context, no one has yet claimed that family members have a right to recover for witnessing the physical anguish of asbestos victims who are suffering from cancer. No American court would countenance such a claim.⁴²

in mental distress or fright alone."); *Bosley v. Andrews*, 142 A.2d 263, 264 (Pa. 1958) ("The rule is long and well established in Pennsylvania that there can be no recovery of damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress, unless they are accompanied by physical injury or physical impact.").

36. *Morton v. Stack*, 170 N.E. 869, 869 (Ohio 1930) (finding inhalation of smoke during fire constitutes impact); *Zelinsky v. Chimics*, 175 A.2d 351, 354 (Pa. Super. Ct. 1961) (holding that plaintiff need only establish "any degree of a physical impact, however slight").

37. *See, e.g., Daley v. LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970) ("[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff . . . may recover in damages . . . notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock."); *Battalla v. State*, 176 N.E.2d 729, 730-32 (N.Y. 1961) (holding that emotional distress resulting from fear of falling out of an unsecured chair lift was recoverable even without the occurrence of physical impact).

38. *Daley*, 179 N.W.2d at 395; *see also Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 4-5 (Ill. 1983); *Payton v. Abbott Labs*, 437 N.E.2d 171, 175 (Mass. 1982); *Reilly v. United States*, 547 A.2d 894, 896 (R.I. 1988). For an extensive review of the authorities holding that emotional distress must bring about some type of physical manifestation or physical consequence before recovery is allowed *see Jones v. CSX Transp.*, Nos. 01-14786, 01-14787, 2002 U.S. App. LEXIS 6692, at *17-*25 (11th Cir. Apr. 11, 2002).

39. *See, e.g., Mollen v. Kaiser Found. Hosp.*, 616 P.2d 813, 821 (Cal. 1980) (en banc); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772 (Mo. 1983) (en banc).

40. *See DOBBS, supra* note 17, § 309.

41. *See, e.g., Thing v. La Chusa*, 771 P.2d 814, 815-29 (Cal. 1989) (en banc) (allowing recovery to plaintiff who was not in the zone of danger); *Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984) (limiting recovery in bystander cases to plaintiffs who are in the zone of danger).

42. Perhaps the most far-reaching case allowing recovery for witnessing the suffering of a relative is *Ochoa v. Sup. Ct.*, 703 P.2d 1 (Cal. 1985). *See infra* note 47 and accompanying text. In that case, however, the court allowed recovery because the parents witnessed the negligent medical treatment of their child. *Ochoa*, 703 P.2d at 2-4. The court stated:

[A] distinction between distress caused by personal observation of the

In reviewing the development of the cause of action for negligent infliction of emotional distress, it is important to reflect on the kinds of fact patterns in which courts have allowed recovery. The cases are legion. In *Daley v. La Croix*, as a result of negligent driving, defendant's car left the highway, traveled 63 feet in the air and 209 feet beyond the edge of the road.⁴³ The car hit a high voltage utility pole, resulting in a great electrical explosion in the plaintiffs' home.⁴⁴ Plaintiffs suffered severe emotional distress with accompanying physical manifestations of injury.⁴⁵ The Michigan court abandoned the requirement that physical impact was a necessary predicate to a mental distress claim and allowed a claim based on the mental shock to the plaintiffs that resulted in physical harm.⁴⁶ Similarly, in *Battalla v. State*, a young girl was placed in a ski lift chair by a state employee who failed to properly lock the safety belt intended to protect the occupant.⁴⁷ As a result of the defendant's negligence, the plaintiff became hysterical upon the descent from the mountain and suffered severe emotional distress with resultant physical manifestations.⁴⁸ Once again the court departed from the physical impact rule and allowed plaintiff to recover for her emotional distress, which manifested itself in physical injuries, caused by being in danger.⁴⁹

To be sure, not all emotional distress cases are based on events that overtly threaten direct physical harm. In two rather well known California cases, the court allowed recovery for serious emotional distress arising from events that were simply traumatic in nature. In *Ochao v. Superior Court*, plaintiffs were parents of a child who was being held in custody at juvenile hall.⁵⁰ While there, the child became very ill with bilateral pneumonia.⁵¹ The parents witnessed the child in agony and pleaded for the right to bring in their own physician to treat the child.⁵² All their requests to

injury and by hearing of the tragedy from another is justified because compensation should be limited to abnormal life experiences which cause emotional distress. While receiving news that a loved one has been injured or has died may cause emotional distress, it is the type of experience for which in a general way one is prepared, an experience which is common. By contrast few persons are forced to witness the death or injury of a loved one or to suddenly come upon the scene without warning in situations where tortious conduct is involved. In the present case, for example, while it is common to visit a loved one in a hospital and to be distressed by the loved one's pain and suffering, it is highly uncommon to witness the apparent neglect of the patient's immediate medical needs by medical personnel.

Id. at 5 n.6.

43. *Daley v. La Croix*, 179 N.W.2d 390, 391-92 (Mich. 1970).

44. *Id.* at 392.

45. *Id.*

46. *Id.* at 395-96.

47. *Battalla v. State*, 176 N.E.2d 729, 729 (N.Y. 1961).

48. *Id.*

49. *Id.* at 730-32 (allowing recovery when plaintiff alleged neurological disturbances and residual physical manifestations).

50. *Ochao v. Sup. Ct.*, 703 P.2d 1, 3 (Cal. 1985) (en banc).

51. *Id.*

52. *Id.* at 3-4.

have the child properly treated went on deaf ears.⁵³ The youngster ultimately died as a result of his illness.⁵⁴ He was never transferred from the juvenile hall infirmary to a hospital facility, nor were x-rays or blood tests taken. The child's mother heard her child's agonized screaming and saw his convulsing and vomiting.⁵⁵ On these special facts the court recognized a cause of action for negligent infliction of emotional distress.⁵⁶

In an earlier case, *Molien v. Kaiser Foundation Hospitals*, plaintiff was the husband of a wife who had been negligently diagnosed as suffering from syphilis.⁵⁷ As a result of the negligently erroneous diagnosis, plaintiff's wife became upset because she believed that the plaintiff had been engaged in extramarital sexual activities.⁵⁸ The tension caused by the negligent diagnosis was alleged to have caused the break-up of the marriage and the initiation of divorce proceedings.⁵⁹ The California Supreme Court held that recovery could be allowed for emotional distress even though such distress was not accompanied by physical injury.⁶⁰

A fair review of the cases allowing recovery for negligent infliction of emotional distress reveals that this cause of action is quite limited in scope. It was never designed to allow for compensation for general malaise that follows upon the heels of negligent conduct. Rather, it allows recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature. With this historical perspective in mind, we now turn to the asbestos-related mental distress cases. The overwhelming majority of courts that have confronted the question of whether to allow recovery for mental distress when the plaintiff claims only exposure to asbestos or the onset of pleural plaque have denied such claims.⁶¹ We shall first survey the reasons courts have relied on to deny recovery and then turn to the underlying policies that support the denial of these claims.

53. *Id.*

54. *Id.* at 4.

55. *Id.* at 3-4.

56. *Ochao*, 703 P.2d at 6-9.

57. *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 814 (Cal. 1980).

58. *Id.* at 814-15.

59. *Id.*

60. *Id.* at 820-21.

61. *See, e.g.*, *Ball v. Joy Tech., Inc.*, 958 F.2d 36, 38-39 (4th Cir. 1991) (applying Virginia and West Virginia law); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (applying Pennsylvania law); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1568-70 (D. Haw. 1990) (applying Hawaii law); *Amendola v. Kans. City So. Ry. Co.*, 699 F. Supp. 1401, 1410 (W.D. Mo. 1988) (applying FELA); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31-32 (Ariz. Ct. App. 1987); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984); *In re Asbestos Litig. Leary Trial Group*, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 at *5 (Del. Super. Ct. June 14, 1994); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 526-28 (Fla. Dist. Ct. App. 1985); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 194 (Ky. 1994); *Payton v. Abbott Labs*, 437 N.E.2d 171, 174 (Mass. 1982); *Simmons v. Philadelphia Asbestos Corp.*, 674 A.2d 232, 237 (Pa. 1996); *see also Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993) (en banc) (no recovery for fear of cancer in a negligence action unless plaintiff is "more likely than not" to develop cancer).

B. What Courts Have Done in Response to Preinjury Toxic Exposure Claims for Mental Distress

1. Utilizing Existing Doctrine to Deny Recovery

A significant number of courts that limit recovery for negligent infliction of mental distress to cases where the plaintiff has suffered either a physical impact or physical injury have denied recovery for mental distress arising from asymptomatic pleural thickening on the ground that exposures to toxics that do not bring with them symptoms of disease do not constitute sufficient “impact” or “physical injury” to bring them within the rules allowing recovery.⁶² The most celebrated case taking this position is *Metro-North Commuter R.R. Co. v. Buckley*,⁶³ a recent United States Supreme Court decision. In an action brought under the Federal Employers’ Liability Act⁶⁴ (FELA), a plaintiff who had been employed as a pipe-fitter by the Metro-North Railroad sought recovery for negligent infliction of mental distress arising from his exposure to asbestos dust over a period of three years.⁶⁵ In an earlier case, the Court had held that FELA allows recovery for negligent infliction of mental distress only by “those plaintiffs who sustain a physical impact as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct.”⁶⁶ Plaintiff contended that his long-term exposure to the asbestos dust that infiltrated his lungs was a sufficient “physical impact” to bring him within the scope of the traditional rule allowing recovery for mental distress.⁶⁷ The Supreme Court disagreed. Relying on a large body of common law decisions that refuse asymptomatic plaintiffs recovery for negligent infliction of mental distress,⁶⁸ the Court held that even long-term exposure to asbestos, absent symptoms of disease from that exposure, does not qualify as a physical impact and denied plaintiff recovery.⁶⁹

62. See, e.g., *Burns*, 752 P.2d at 31-32; *Temple-Inland Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999).

63. 521 U.S. 424 (1997).

64. 45 U.S.C. §§ 51-60 (1994).

65. *Metro-North*, 521 U.S. at 427.

66. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48 (1994).

67. *Metro-North*, 521 U.S. 428-30.

68. *Id.* at 431.

69. *Id.* at 432-38. Although the Court specifically addressed the issue of a plaintiff who was exposed to asbestos and had manifested no physical changes in his lungs, it is clear that a FELA action for mental distress cannot be predicated on asymptomatic pleural plaque or thickening. At several points, the Court noted that it would not allow an action for mental distress to plaintiffs who are “disease and symptom free.” *Id.* at 432. More importantly, the policy reasons cited by the court for denying mental distress recovery for those exposed to asbestos apply equally to plaintiffs who have developed some “trivial” physical change in their bodies. *Id.* at 433.

2. *Creating New Doctrine to Deny Recovery*

Several courts have gone beyond existing rules to deny plaintiffs' claims of mental distress. In an early case, *Eagle-Picher Industries v. Cox*, plaintiff, who had developed asbestosis, sought damages for an increased risk of developing cancer and for his present fear that he would develop cancer in the future.⁷⁰ In its rejection of the single-action rule, the court found that asbestosis and mesothelioma are separate diseases.⁷¹ Having decided that the asbestos litigation required a departure from the traditional single-action rule, the court turned to the plaintiff's claim that he should be entitled to mental distress damages arising from his current fear of developing cancer in the future. The court first set forth the Florida rules governing negligent infliction of mental distress.⁷² In Florida, the right to recover depends on whether the plaintiff suffers "a physical impact from an external force."⁷³ When there has been such an impact, the plaintiff may recover for mental distress arising from that impact without any manifestation of physical injury.⁷⁴ In the absence of physical impact, plaintiff cannot recover unless the mental distress causes physical injury.⁷⁵ Although several courts had held that the ingestion of harmful chemicals or drugs does not constitute an impact⁷⁶ the Florida court found that the embedding of asbestos fibers in the plaintiff's lungs qualified as an external physical impact even though the effects were not immediately deleterious.⁷⁷

One would have thought that, once the court decided that the lodging of asbestos fibers in the lungs constitutes an external impact, the court would have simply endorsed the right for all plaintiffs who could prove inhalation of asbestos fibers into their lungs to recover for emotional distress without proof of physical injury. But such was not the case. Instead, the court undertook a separate inquiry as to whether and when it should allow recovery for fear of cancer.⁷⁸ It found that fear of cancer claims are genuine since the plaintiff lives with the sword of Damocles over his head.⁷⁹ But it then observed that "[i]f Damocles supplies the reason for permitting recovery, Pandora supplies the reason for at least limiting recovery."⁸⁰ The court then stated that it would recognize recovery for mental distress in fear of cancer cases only when the plaintiff had suffered physical injury as a result of exposure to asbestos.⁸¹ In the case before the court, the plaintiff had

70. *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985).

71. *Id.* at 522.

72. *Id.* at 526.

73. *Id.*

74. *Id.* (citing *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974)).

75. *Id.* (citing *Champion v. Gray*, 478 So. 2d 17, 19 (Fla. 1985)).

76. *Eagle-Picher*, 481 So. 2d at 526 (citing *Plummer v. Abbot Labs*, 568 F. Supp. 920, 927 (D.R.I. 1983); *Pazo v. Upjohn Co.*, 310 So. 2d 30 (Fla. Dist. Ct. App. 1975)).

77. *Id.*

78. *Id.* at 527.

79. *Id.*

80. *Id.*

81. *Id.* at 528-29.

developed asbestosis and thus suffered real physical harm.⁸² Asbestosis, though non-malignant, is characterized by such symptoms as shortness of breath, dry cough, weight loss, and chest pain.⁸³ The court justified allowing recovery for mental distress because it believed that those who contract asbestosis have a well-founded reason to fear that they will contract cancer.⁸⁴ The court noted that fifteen percent of those who develop asbestosis will develop cancer.⁸⁵ Furthermore, the asbestosis sufferer faced with “a chronic, painful and concrete reminder that he has been *injuriouly* exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear,”⁸⁶ thus has a bona fide claim for mental distress.

Under the reasoning of *Eagle-Picher*, an asymptomatic plaintiff with only pleural thickening is in no position factually to anger that he has a significantly increased risk of developing cancer or that he is suffering current pain that serves as a constant reminder that a more serious disease may come upon him. His likelihood of developing cancer is minuscule,⁸⁷ and he does not face the daily reminder of such fear in the form of any physical discomfort whatsoever.⁸⁸ The *Eagle-Picher* court said that requiring a physical injury as a predicate to recovery for mental distress was “both necessary and fair.”⁸⁹ Permitting an action for fear of cancer where there has been no physical injury from the asbestos “would likely devastate the court system as well as the defendant manufacturers.”⁹⁰

In a case of singular importance, *Potter v. Firestone Tire & Rubber Co.*, the California Supreme Court confronted the problem of liability for negligent infliction of emotional distress based on the fear of developing cancer from exposure to a toxic substance.⁹¹ The claimants in *Potter* were property owners living adjacent to a landfill into which the defendant Firestone had dumped a host of chemicals known to be human carcinogens.⁹² These chemicals found their way into wells that provided the plaintiffs with drinking water.⁹³ Plaintiffs alleged physical symptoms which they attributed to the toxic chemicals in the water and also claimed damages for present mental distress arising from fear that they would develop cancer in the future.⁹⁴ The trial court found that “it was ‘not possible to demonstrate with sufficient certainty a causal connection between these symptoms and well water contamination.’”⁹⁵ Nonetheless, the trial court awarded the plaintiffs \$800,000 for

82. *Eagle-Picher*, 481 So. 2d at 519.

83. *See supra* note 2.

84. *Eagle-Picher*, 481 So. 2d at 528.

85. *Id.* at 522.

86. *Id.* at 529.

87. *See infra* notes 102-08 and accompanying text.

88. *See supra* note 2.

89. *Eagle-Picher*, 481 So. 2d at 528.

90. *Id.*

91. *Potter v. Firestone Tire & Rubber Co.* 863 P.2d 795, 802 (Cal. 1993).

92. *Id.* at 801-02.

93. *Id.* at 802.

94. *Id.* at 803.

95. *Id.*

their lifelong fear of cancer and the resultant mental distress.⁹⁶

California is one of a handful of states allowing recovery for negligent infliction of mental distress even absent physical injury or harm arising from the mental distress.⁹⁷ Nonetheless, the California Supreme Court reversed the award for mental distress damages, holding that in the absence of present physical injury, plaintiffs exposed to toxic substances could recover for mental distress based on the fear of developing cancer in the future only if “future physical injury or illness is more likely than not to occur as a direct result of the defendant’s conduct.”⁹⁸ The California Supreme Court declined to express an opinion as to whether cellular changes in a plaintiff’s body would constitute physical injury that would trigger parasitic damages for mental distress.⁹⁹ However, what is significant is that the court recognized that emotional distress toxic tort cases require special treatment and cannot be subsumed under the general rules for negligent infliction of emotional distress.

C. Why the Overwhelming Majority of Courts Have Rejected Mental Distress Recovery for Preinjury Asymptomatic Asbestos Plaintiffs

Utilizing a variety of limited-duty rules, the courts have denied asymptomatic asbestos plaintiffs recovery for negligent infliction of mental distress. Whether by declaring that asbestos infiltration into the body does not constitute a physical impact, by finding that pleural plaque or thickening is not a sufficient physical injury, or by creating separate rules for fear-of-cancer cases when the fear is caused by exposure to a toxic substance, courts have found ways to deny recovery. The formal contours of the mental distress limited-duty rules provide no insurmountable obstacles to recovery. Courts could just as easily have concluded that exposure to asbestos constitutes a physical impact to the body¹⁰⁰ or that pleural thickening qualifies as a physical injury.¹⁰¹ Most courts have not so concluded because they view the imposition of such liability as unwise. No single reason predominates. Courts and commentators have identified a host of policy concerns for denying these mental distress claims.

1. These Mental Distress Claims Are Significantly Different From Traditional Emotional Distress Claims

Plaintiffs seeking recovery for mental distress generally allege that asymptomatic plaintiffs who have developed some pleural thickening are five times

96. *Id.*

97. The *Potter* decision contains an extensive discussion of California law that allows recovery for mental distress without requiring proof of physical injury. *Potter*, 863 P.2d at 808-10.

98. *Id.* at 807.

99. *Id.*

100. See, e.g., *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 526-27 (Fla. Dist. Ct. App. 1985).

101. See, e.g., *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 85 (3d Cir. 1986).

more likely to contract cancer¹⁰² and 300 times more likely to develop mesothelioma than had they not been exposed to asbestos.¹⁰³ Defendants argue that mere citation of the statistics that indicate the greater likelihood of contracting cancer or mesothelioma without assessing the baseline risk of cancer in the general population is highly misleading.¹⁰⁴ Where the baseline risk is very low, even a very high multiple can result in a very small likelihood that an asymptomatic plaintiff will ever develop lung cancer or mesothelioma. For example, the baseline risk of lung cancer in the general population is approximately 10 out of 100,000.¹⁰⁵ The increased risk for a plaintiff with pleural thickening is five times the general risk or 50 out of 100,000.¹⁰⁶ Thus, the annual risk of a plaintiff developing cancer is 1/20 of 1%.¹⁰⁷ The baseline risk of developing non-asbestos related mesothelioma is infinitesimal. The annual risk to an asymptomatic plaintiff who was exposed to asbestos is 1/32 of 1%.¹⁰⁸

No technologically advanced society can realistically consider compensating for mental distress when the likelihood of contracting cancer or mesothelioma is so remote.¹⁰⁹ Pollutants of all sorts fill the air. Regularly we learn through the media that these pollutants are potential carcinogens and that they increase the risk of

102. See *Simmons v. Pacor, Inc.*, 674 A.2d 232, 233 (Pa. 1996).

103. See *id.* at 233-34.

104. See *id.* at 234 n.1.

105. See *id.*

106. See *id.*

107. See *id.*

108. See *Simmons*, 674 A.2d at 234 n.1; see also *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1570 n.10 (D. Haw. 1970) (citing study that evidence of lung cancer among shipyard workers would be approximately sixty seven per million men per year); *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 90 (Tex. 1999) (noting that plaintiffs' risk of cancer increased one percent.) Notably, *Temple-Inland* left open the question of whether one who suffered from an asbestos related-disease might recover for the fear of developing another more serious asbestos-related disease. *Temple-Inland*, 993 S.W.2d at 94. However, in *Pustejovsky*, decided one year later, the court intimated that it would not allow recovery for mental distress in this setting. *Pustejovsky v. Rapid Am. Corp.*, 35 S.W.3d 643, 650 (Tex. 2000).

It should be noted that scientific opinion is divided. Although exposure to asbestos increases the risk of cancer, some studies conclude that "there is no evidence of an increased risk in subjects with pleural plaques compared with subjects without plaques but an equivalent asbestos exposure." E. Chailleux & M. Letourneux, *Impact médical du dépistage des lésions pleurales bénignes liées à l'inhalation de poussières d'aminante*, 16 MALADIES RESPIRATOIRES 1286, 1286 (1999). See also C. Peacock et al., *Asbestos-Related Benign Pleural Disease*, 55 CLINICAL RADIOLOGY 422, 425 (2000) (stating that there is no evidence that pleural plaques undergo malignant degeneration into mesothelioma).

109. See, e.g., *Temple-Inland*, 993 S.W.2d at 91 (refusing to recognize an action for mental distress arising from exposure to asbestos). The court quoted *City of Tyler v. Likes*:

Without intent or malice on the defendant's part, serious bodily injury to the plaintiff, or a special relationship between the two parties, we permit recovery for mental anguish in only a few types of cases involving injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result.

Id. at 92 (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997)).

developing cancer.¹¹⁰ Having been exposed to them, they are part of our physical makeup and may lie dormant for decades. The notion that tort law should provide recovery for tiny increments in risk has no traditional basis in the law of torts.

In an earlier discussion, we set forth the rules that generally govern the tort of negligent infliction of mental distress.¹¹¹ All of the traditional cases allowing recovery for emotional distress are characterized by a discrete event that brought about a serious and clearly identifiable immediate emotional response that radically altered the emotional well-being of the plaintiff. One simply cannot project from the traditional emotional distress cases a right of recovery for asymptomatic plaintiffs who have an annualized 1/20 of 1% chance of developing cancer. The law has not and should not seek to protect the right to be free from general malaise arising from some small increase in the background risk of contracting cancer. Even courts that advocate recovery for pure mental distress absent physical harm do so only in cases that are light years removed from the claims of mental distress alleged by asymptomatic plaintiffs in the asbestos cases.

2. *Remote-Risk Cases Present Serious Problems in Separating Meritorious From Non-meritorious Claims*

Putting aside the question of whether asbestos mental distress claims are inherently valid, courts have expressed deep concern about their ability to distinguish meritorious claims from those that are trivial. As the United States Supreme Court noted in *Metro-North*, asbestos is only one of a smorgasbord of

110. See *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 811-12 (Cal. 1993) (en banc). The court noted:

As a starting point in our analysis, we recognize the indisputable fact that all of us are exposed to carcinogens every day. As one commentator has observed, "[i]t is difficult to go a week without news of toxic exposure. Virtually everyone in society is conscious of the fact that the air they breathe, water, food and drugs they ingest, land on which they live, or products to which they are exposed are potential health hazards. Although few are exposed to all, few also can escape exposure to any."

Id. (quoting Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 *FORDHAM L. REV.* 527, 576 (1984) (footnotes omitted)). See also *Metro-North Commuter R.R. Co. v. Buckley*, where the Court made a similar observation:

[C]ontacts, even extensive contacts, with serious carcinogens are common. See, e.g., Nicholson, Perkel & Selikoff, *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980-2030*, 3 *Am. J. Indust. Med.* 259 (1982) (estimating that 21 million Americans have been exposed to work-related asbestos); U.S. Dept. of Health and Human Services, 1 *Seventh Annual Report on Carcinogens* 71 (1994) (3 million workers exposed to benzene, a majority of Americans exposed outside the workplace); Pirkle, et al., *Exposure of the U.S. Population to Environmental Tobacco Smoke*, 275 *JAMA* 1233, 1237 (1996) (reporting that 43% of American children lived in a home with at least one smoker, and 37% of adult nonsmokers lived in a home with at least one smoker or reported environmental tobacco smoke at work).

Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 434-35 (1997).

111. See *supra* Part III.A.

toxic pollutants that are potential carcinogens to which we are daily exposed.¹¹² Are courts capable of deciding the emotional distress created by the “increased risk of dying” for each carcinogen? Justice Breyer puts it well:

An external circumstance—exposure—makes some emotional distress more likely. But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say from 23% to 28%) is reasonable and genuine, rather than overstated—particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? The evaluation problem seems a serious one.¹¹³

3. *Allowing Recovery for Mental Distress Gives Precedence to Those Less Seriously Injured*

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.¹¹⁴ All plaintiffs exposed to asbestos have potential *immediate* mental distress claims. Asbestosis and mesothelioma have very long latency periods. When plaintiffs actually develop these serious diseases for which they are clearly entitled to compensation, they may find that there are no assets left to compensate them for their injuries.¹¹⁵ To place claims of doubtful

112. See *Metro-North*, 521 U.S. at 434.

113. *Id.* at 435.

114. See, e.g., *Metro-North*, 521 U.S. at 435-36; *Potter*, 863 P.2d at 814; *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999); see also Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001). The landmark article describing this problem is Peter H. Schuck's *The Worst Should Go First*. See Schuck, *supra* note 1.

115. See Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 155, 155. Parloff states:

Because of the dwindling number of plausible, solvent asbestos defendants, tension has built between the firms that represent only very sick plaintiffs, like Steve Kazan's, and larger firms that represent all plaintiffs, including the unimpaireds. "I happen to believe," says Kazan, "that the interests of the unimpaired clients in fact are better served by giving them nothing or very little now, but making sure that if they were to get sick later on there will be money for them."

In February 2000, when the most recent waive of bankruptcies began, Kazan and others with practices like his decided that their clients' interests could no longer be adequately protected by plaintiffs creditors' committees composed predominantly of lawyers like Baron [who represents both injured and

validity ahead of serious injury claims because the former are by definition first in time is simply unjust. No one has a good word to say about this practice. In several jurisdictions where plaintiffs legitimately fear that failure to bring immediate action may mean that they will later be barred by the statute of limitations if they develop asbestosis or an asbestos related malignancy, courts have established inactive docket plans.¹¹⁶ Under these plans, plaintiffs who have asymptomatic pleural thickening are listed in a pleural registry, and their claims are deferred until they suffer true physical impairment.¹¹⁷ The statute of limitations is tolled and discovery is stayed until objective evidence of physical impairment is forthcoming.¹¹⁸ The net effect of such plans is to disallow recovery for mental distress based on the fear of developing more serious asbestos-related diseases in the future.¹¹⁹

4. *Mental Distress Claims Against Second Generation Asbestos Defendants are Manifestly Unfair*

When considering the validity of mental distress claims for asymptomatic plaintiffs, one must take into account the impact of such causes of action against the second generation of “peripheral” asbestos defendants. These defendants are not manufacturers of asbestos, but are, for the most part, companies that purchased asbestos for use as a component in a larger general product. Automobile and truck manufacturers who used asbestos in brake linings and boiler manufacturers who used asbestos as an insulator are recent examples of this new generation of peripheral defendants¹²⁰ who have been targeted once the prime defendants—the asbestos companies—have been driven into bankruptcy and are no longer a source of funds to compensate asbestos plaintiffs.

To understand the injustice of allowing an action for mental distress on behalf of asymptomatic plaintiffs against the second generation of asbestos defendants, it is necessary to provide some context for this cause of action. Actions brought against asbestos manufacturers on behalf of plaintiffs who have contracted asbestosis or mesothelioma have the greatest claim to validity. Manufacturers who, because of their expertise, either knew or should have known of the dangers associated with exposure to asbestos may face legitimate negligence claims for failure to warn of the risks of harm. When such negligence results in physical injury, the plaintiff has a claim for traditional tort damages. As we have seen, if the plaintiff cannot demonstrate illness or disease and claims only mental distress, the courts generally deny recovery for the reasons set forth above.¹²¹ On the other hand,

unimpaired plaintiffs]. They formed a committee of their own to make sure that their point of view would be heard.

Id. at 170.

116. *See* Behrens & Parham, *supra* note 114, at 13-16.

117. *See id.* at 8-9.

118. *See id.* at 8.

119. *See id.* at 18.

120. *See* Parloff, *supra* note 115, at 162.

121. *See supra* notes 102-19 and accompanying text.

cases brought against the non-manufacturer second generation “peripheral” defendants are of questionable validity. These defendants had neither the expertise nor the access to research and data that characterize the claims against defendant manufacturers.¹²² Even if claims against these defendants are facially valid, they represent fault different not only in degree, but in kind, from that alleged against asbestos manufacturers. Whether such tenuous fault should support recovery for injuries such as asbestosis or mesothelioma can be debated. But what clearly should be beyond the pale is allowing a claim based on tenuous fault to support a cause of action for suspect mental distress damages.

Courts that are considering whether to allow recovery for mental distress for asymptomatic plaintiffs against manufacturers should be aware that such an action, once recognized, will be utilized against second, third, and fourth generation defendants whose fault, if any, is marginal. Ideally, tort law, through the medium of proximate cause, is supposed to deny recovery when harm is wildly disproportional to fault.¹²³ As a practical matter, case by case proximate cause determinations cannot be managed in the context of the huge volume of asbestos cases. Claims based on marginal fault that result in damages based on fear created by tiny increments of increased risk will come to dominate the asbestos litigation scene. The madness must come to an end.

V. WHERE PLAINTIFFS’ CLAIMS ARE SUPERFICIALLY PLAUSIBLE AND TRADITION IS NONEXISTENT: RECOVERY FOR MEDICAL MONITORING

A. *Why Medical Monitoring Claims Are Superficially Plausible, if Not Downright Appealing*

As earlier discussions make clear, claims for increased risk are manifestly implausible because no good reason exists for allowing unimpaired plaintiffs to pursue recovery prematurely, based on inherently speculative claims about future possibilities, when they will most assuredly be allowed to come into court later if and when they actually suffer injury.¹²⁴ Quite simply, speculative claims for future injuries should be deferred to such a time when certainty replaces speculation. And while claims for mental anguish caused by increased risk are comparatively more plausible—the mental anguish represents a current, not a future, injury—strong traditions in Anglo-American law cut against allowing such claims for intangible losses in the absence of physical impact or injury.¹²⁵ In contrast, claims for medical monitoring appear to combine currency and tangibility. A plaintiff exposed to asbestos or other toxic substances may argue that she requires surveillance quite

122. See Informational Brief of Babcock & Wilcox Co. at 3-12, *In re The Babcock & Wilcox Co.* (Bankr. E.D. La. filed Feb. 22, 2000) (No. 00-10992).

123. See generally DOBBS, *supra* note 17, §§ 180-86.

124. See *supra* notes 27-28 and accompanying text.

125. See *supra* notes 62-113 and accompanying text.

independently of whether she eventually suffers injury.¹²⁶ Furthermore, medical monitoring is designed to commence immediately, in the physical world, and its economic costs are demonstrably real and calculable. Indeed, the costs of medical surveillance resemble, at least superficially, the costs of medical treatment for tortiously-caused physical injury, which courts have properly recognized since our tort system began.¹²⁷ As shall be made clear, this apparent similarity masks important differences between medical treatment for actual injuries and medical monitoring for the possibility of future injuries.¹²⁸ But, it helps to explain why exposure-based medical monitoring claims are superficially attractive.

Another reason for the intuitive appeal of medical monitoring claims is that asbestos and other toxic substances have come to epitomize the evils of ruthless industrial technology in the public eye,¹²⁹ and the plaintiffs are quintessentially innocent victims of wrongdoing.¹³⁰ In this setting of heightened sensitivities, if not passions, the plaintiffs may come to be seen in the collective judicial mind as analogous to beleaguered victims of natural disasters, seeking funding for public health programs aimed at preventing future outbreaks of disease.¹³¹ On the other hand, plaintiffs seeking to recover for alleged emotional upset following exposure to asbestos may appear to be overreaching, looking for a monetary windfall after the event.¹³² But who can doubt the motives of plaintiffs who seek merely the opportunity to undergo unpleasant, often invasive medical examinations to attempt to detect the early onset of disease? Claims for mental anguish are inherently suspect; claims for medical monitoring, by contrast, seem justified. It follows that even if a substantial portion of what defendants are required to spend on monitoring does not actually redress a significant social problem, these liabilities are believed to be warranted because they respond to wrongdoing in a symbolically satisfying manner.

126. See, e.g., *Betts v. Manville Pers. Injury Settlement Trust*, 588 N.E.2d 1193, 1218 (Ill. App. Ct. 1992) (“Here, the incurring of medical expenses for future monitoring of plaintiffs’ conditions is reasonably certain to occur, although the contracting of cancer is not.”).

127. See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 615-629 (5th ed. 1999).

128. See *infra* note 183 and accompanying text.

129. Even in the context of the recent World Trade Center tragedy, the media raised the spectre of asbestos contamination. See, e.g., Tracy Watson, *Uncertainty Surrounds Asbestos*, U.S.A. TODAY, Feb. 7, 2002, at 6A; David France & Erika Check, *Asbestos Alert*, NEWSWEEK, at <http://www.newsweek.com> (Sept. 14, 2001).

130. See, e.g., Eric Planin & Michael A. Fletcher, *Many Schools Built Near Toxic Sites, Study Finds*, WASH. POST, Jan. 21, 2002, at A2 (reporting that hundreds of thousands of children throughout the country attend schools built near toxic sites and are thereby endangered); cf. *infra* note 178 and accompanying text.

131. See *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W.Va. 1999) (“[T]here is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease . . .” (quoting *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993))).

132. See, e.g., *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 434, 435 (1997) (“[H]ow can one determine from the external circumstance of exposure whether . . . a claimed strong emotional reaction . . . is reasonable and genuine, rather than overstated . . . ?”).

To these admittedly impressionistic observations may be added another explanation for the superficial appeal of medical monitoring claims—one rooted in the judicial decisions allowing recovery. Awarding preinjury plaintiffs exposed to asbestos and other toxic substances the costs of medical monitoring may serve as something of a consolation prize, helping to soften the negative impact of judicial rejection of the same plaintiffs' claims increased risk and mental anguish.¹³³ The pattern repeats itself in the reported decisions. Plaintiffs alleging exposure to asbestos or other toxic substances, without any resulting physical injury, come before courts asserting claims for relief on the three bases being examined in this Article. The judges fairly routinely reject their claims for increased risk and mental anguish, for the reasons outlined earlier, impliedly admonishing the plaintiffs for having imagined that relief might be forthcoming in the absence of physical injury.¹³⁴ However, these same judges, when they address the claims for medical monitoring, reverse direction and take pains to explain why this third basis of liability does not raise the same concerns as did the first and second.¹³⁵ On a fair reading of these decisions, one gets the impression that the medical monitoring claims provide judges with an opportunity to give the plaintiffs something, without seeming to break totally with the traditional requirement that negligence plaintiffs demonstrate tangible physical harm. In this respect, allowing recovery for medical monitoring may seem to judges like the least they can do for plaintiffs placed at increased risk by modern technology.

B. The Case Law to Date Is Mixed, Leaning Toward Acceptance but With Recent Signs of Stiffening Resistance

Published judicial opinions began to focus on medical monitoring in the early to mid-1980s, with judicial attention increasing steadily since then. The earliest cases involved classic examples of traumatic impacts and physical injuries in which the plaintiffs sought to recover for the future costs of continued medical surveillance.¹³⁶ The medical monitoring aspects of these cases were consistent with traditional remedies for negligence-based tort recovery, and they cannot be said to

133. See generally 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, 521 (2000) ("With its lower standards of proof, a medical monitoring award often represents plaintiffs' strongest chance of success.")

134. See, e.g., *Burns v. Jaquays Mining Corp.*, 752 P.2d 29, 32 (Ariz. Ct. App. 1987) ("The psychosomatic injuries diagnosed by Dr. Gray . . . are not the type of bodily harm which would sustain a cause of action for emotional distress.")

135. *Id.* at 33 ("[D]espite the absence of physical manifestations of any asbestos-related diseases . . . the plaintiffs should be entitled [to recover the costs of medical monitoring].")

136. See, e.g., *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 316 (5th Cir. 1986) (involving plaintiff who was soaked in carcinogenic chemicals); *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 818 (D.C. Cir. 1984) (involving a flying accident which killed and injured hundreds of orphans).

have broken new ground.¹³⁷ The seminal decision allowing recovery for medical monitoring in the absence of traumatic impact or manifested physical injury is *Ayers v. Township of Jackson*, decided in 1987.¹³⁸ In that case, the New Jersey Supreme Court held that a group of plaintiffs who had been exposed to a toxin in their residential drinking water could recover medical surveillance costs from their municipality, which was found responsible for their predicament.¹³⁹ The *Ayers* court held that the plaintiffs, none of whom had developed symptoms of exposure-related disease, could recover medical monitoring expenses if such monitoring were found to be reasonably necessary in light of five articulated criteria.¹⁴⁰ In so holding, the court relied on earlier decisions involving traumatic impacts and physical injuries, and purported merely to be countenancing the extension of a traditional remedy for a traditional tort.¹⁴¹ Over the next several years other courts, relying on *Ayers*, allowed recovery for medical monitoring in cases involving persons who, having been exposed to toxic substances, had not yet manifested physical injuries.¹⁴² For example, in *In re Paoli R. R. Yard PCB Litigation*, decided in 1990, the Third Circuit Court of Appeals, applying Pennsylvania law, recognized medical monitoring claims.¹⁴³ The *Paoli* opinion sets forth four prerequisites to recovery that have played a role in guiding subsequent developments.¹⁴⁴ To date, courts in about twenty jurisdictions, including the highest courts in at least seven states, purport to recognize these claims.¹⁴⁵ Several academic commentators have approved of these developments.¹⁴⁶ Some of these commentators, including the author of a recent law

137. See Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 6 (1998) (noting that *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, the seminal case involving traumatic impacts of an airplane crash, broke no new ground in allowing medical surveillance claims).

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

139. See *id.* at 312-13.

140. See *id.* at 312.

141. See *id.* at 311 ("Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles.").

142. See, e.g., *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 978-82 (Utah 1993). See generally Klein, *supra* note 137, at 9-10.

143. *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3rd Cir. 1990) (applying Pennsylvania law).

144. See *id.* Other courts have adopted these criteria. See, e.g., *In re Marine Asbestos Cases*, 265 F.3d 861, 866 (9th Cir. 2001).

145. See THOMAS M. GOUTMAN, *MEDICAL MONITORING: HOW BAD SCIENCE MAKES BAD LAW* 39-55 (2001) (listing states that recognize medical monitoring claims).

146. See, e.g., Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 716 (1992); Linda A. Elfenbein, Note, *Future Medical Surveillance: An Award for Toxic Tort Victims*, 38 RUTGERS L. REV. 795, 811 (1986); Leslie S. Gara, Note, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 303-04 (1988); Allan T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 851 (1988); Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 COLO. LAW. 1533, 1534-35 (1994). But see 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

review article that may prove to be influential,¹⁴⁷ explicitly base their analysis on the fact that allowing recovery in these cases does not represent a new cause of action but merely the recognition of an evolving remedy for a traditional tort.¹⁴⁸

What makes medical monitoring interesting from a precedential standpoint is the fact that at least four courts—including the United States Supreme Court—have rejected medical monitoring claims in the last several years. In *Metro-North Commuter R.R. Co. v. Buckley*, the United States Supreme Court considered these developments and rejected medical monitoring claims under FELA as unwise and uncalled for.¹⁴⁹ The soundness of this conclusion will be considered in a subsequent discussion in this Article.¹⁵⁰ Suffice it to say that Justice Breyer's majority opinion penetrates the superficial appeal described earlier and finds the claims to lack sufficient substantive merit to warrant their recognition in FELA cases.¹⁵¹ Moreover, within the last year, supreme courts in two states—Nevada¹⁵² and Alabama¹⁵³—have rejected medical monitoring claims in the absence of physical injury. The most recent decision rejecting medical monitoring claims is *Duncan v. Northwest Airlines, Inc.*, in which the federal district court, applying Washington law, held that no cause of action exists to recover the costs of medical monitoring.¹⁵⁴ Referring to such claims as “a novel, nontraditional tort and remedy,”¹⁵⁵ the district court noted that “[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.”¹⁵⁶ The court concluded that, under Washington law, the plaintiff could pursue medical monitoring as part of her claim to recover for existing injury, but could not pursue that claim independent of such injury.¹⁵⁷

Importantly, these decisions rejecting preinjury medical monitoring recovery support the conclusion that the case law is mixed regarding whether medical monitoring claims should be allowed where personal injury is not present. A majority of the relevant decisions to date recognize such claims, although a number of these jurisdictions insist that no new cause of action—rather, only a question of

(1993).

147. See Klein, *supra* note 137, at 10-11.

148. See *supra* note 146.

149. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443-44 (1997).

150. See *infra* Part V.C.

151. *Metro-North*, 521 U.S. at 438-44.

152. See *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 441 (Nev. 2001).

153. See *Hinton v. Monsanto Co.*, No. 1000599, 2001 WL 1073699 at *4 (Ala. Sept. 14, 2001).

154. *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 608-09 (W.D. Wash. 2001) (“In light of Washington’s hesitation to recognize new torts, its reluctance to allow damages for enhanced risk without an accompanying present injury, and the ambiguity in case law from other states, this Court holds that there is no cause of action for medical monitoring as an independent tort under Washington law.”).

155. *Id.* at 607.

156. *Id.*

157. *Id.* at 609.

remedy—is involved.¹⁵⁸ But at least four courts, including the United States Supreme Court and the highest courts of two states, have rejected this position.¹⁵⁹ On any fair assessment of the relevant precedent, American courts have not reached consensus regarding the legitimacy of these medical monitoring claims. The question remains unanswered, to be considered on the merits.

C. On the Merits: Recovery in Tort for Preinjury Medical Monitoring Claims Should Be Rejected

1. Clearing Away the Underbrush: The Issue Is Substantive, Not Merely Remedial

As the foregoing discussion of legal precedent makes clear, many courts and commentators who support medical monitoring claims insist that the issue is whether to allow a somewhat novel remedy (some even dispute the novelty of the remedy) in the context of a traditional, mainstream tort.¹⁶⁰ These courts and commentators assert that nothing really new is happening substantively if a court imposes medical monitoring liability on a defendant when the plaintiff has not yet manifested physical injury. Regardless of whether recovery should be allowed in these cases, characterizing the issue as essentially remedial is wrong. The view that medical monitoring involves nothing new rests, explicitly or implicitly, on the questionable premise that the plaintiffs in these cases have been “injured”—that their exposures to asbestos and other toxins have placed them at greater risk of future injury, and that this fact of increased risk, or the fact of the exposure itself, constitutes an “injury” similar to a broken leg suffered in an automobile accident.¹⁶¹ Simply stated, this premise is false. From the beginnings of our negligence

158. See *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440 (Nev. 2001) (“Courts have recognized medical monitoring more often as a remedy than as a cause of action.”).

159. See *supra* notes 149-57; see also Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1074 (1999).

160. See *supra* notes 141, 148, 158 and accompanying text.

161. See *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W.Va. 1999). The court held: “We now reject the contention that a claim for future medical expenses must rest upon the existence of present physical harm. The ‘injury’ that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is ‘the invasion of any legally protected interest.’ *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 7(1) (1965)). The court then quoted the United States Court of Appeals for the District of Columbia Circuit, one of the first courts to grapple with this subject:

It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.

Id. (quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984). For a helpful explanation of how flexible the concept of “injury” can be in this context, see Matthew D. Hamrick, Comment, *Theories of Injury and Recovery for Post-Exposure, Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look*, 29 CUMB. L. REV. 461, 468-85 (1999).

jurisprudence, “injury” has been synonymous with “harm” and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm.¹⁶² This definition is not drily logical; it serves as a linchpin in determining the duties of care owed by defendants and both the validity and timeliness of plaintiffs’ claims for fault-based recovery.¹⁶³

As explained earlier, a great majority of American courts have rejected exposure-based claims to recover for increased risk of future injury in the absence of current injury.¹⁶⁴ It follows that judicial and academic commentary categorizing medical monitoring claims as merely a question of appropriate remedy or measurement of recovery serves as an analytical smoke screen to hide the fact that a substantive departure from tradition is being implemented. It may turn out that recognizing these claims makes sense in light of the relevant policy considerations. But the “only remedies are involved” rhetoric represents analytical underbrush that must be cleared away before the substantive policy issues can be addressed on the merits. The substantive question to be answered is this: Should courts allow plaintiffs to recover based on the possibility of future injuries by imposing on defendants the current costs of medically monitoring those persons placed at increased risk? Framing the question in this manner makes clarifies what many advocates of recovery for medical monitoring seek to obfuscate: that to recognize these claims is to allow current recovery in the absence of current injury. A reasonable court might choose to allow these claims; but such a decision would be neither “only remedial” nor “business as usual.”

2. *The Arguments in Support of Recovery for Medical Monitoring Tend to Beg the Questions of Whether Plaintiffs Have Suffered Injury and Whether the Claims Could Be Fairly Adjudicated*

A recent Supreme Court of West Virginia decision, *Bower v. Westinghouse Electric Corp.*,¹⁶⁵ relying on an earlier California Supreme Court decision,¹⁶⁶ outlines four public policy considerations that favor recognizing a right to recover medical monitoring costs: (1) allowing recovery serves “an important public health interest in fostering access to medical testing,” especially in light of the value of early diagnosis and treatment for insidious diseases such as cancer;¹⁶⁷ (2) recognizing these claims promotes deterrence by discouraging the irresponsible

162. Section 282 of the *Restatement (Second) of Torts* defines negligence as conduct “which falls below the standard established by law for the protection of others against unreasonable risk of harm.” RESTATEMENT (SECOND) OF TORTS § 282 (1965). Section 7 defines “harm” as denoting “the existence of loss or detriment in fact of any kind to a person.” *Id.* at § 7(1).

163. See generally Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1272 (2001) (noting that historically, “the evil against which tort law was directed was the doing of harm, rather than the infringement of rights or the violation of duties”).

164. See *supra* note 27 and accompanying text.

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

166. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993) (en banc).

167. See *Bower*, 522 S.E.2d at 431.

distribution of toxic substances;¹⁶⁸ (3) early monitoring may prevent or mitigate future illnesses and thus reduce the eventual liability costs to the defendants;¹⁶⁹ and (4) allowing recovery serves “societal notions of fairness and elemental justice” by assuring that plaintiffs “wrongfully exposed to dangerous toxins,” but unable to prove that cancer or other disease is likely, may recover when medical surveillance is shown to be reasonable and necessary.¹⁷⁰ The West Virginia Supreme Court concluded that recovery for medical monitoring is appropriate “where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant’s tortious conduct.”¹⁷¹

A detailed critique of this reasoning is unnecessary to our purpose.¹⁷² The important point here is that the court’s policy analysis assumes that courts are equipped to resolve the issues of proximate causation and measurement to which the court alluded in its above excerpted conclusion and that the relevant social costs of medical surveillance are significant. The *Bower* court’s second policy argument regarding deterrence, for example, is valid only if one assumes that the social costs of any given exposure to asbestos or other toxic substance can, in the absence of physical injury, be determined fairly and accurately. However, given the unavoidable difficulties of measurement and assessment, together with the great number of claims involved, the possibility of significant overdeterrence is very real in this context.¹⁷³ Additionally, the court’s fourth argument—that allowing medical monitoring claims will provide compensation to plaintiffs who cannot prove that they have been or are likely to be injured—clearly begs the question of why justice is necessarily served by allowing, through the back door, recoveries that courts will not allow in through the front.¹⁷⁴ In the end, the policy issues that really count are the ones that the West Virginia Supreme Court’s policy analysis¹⁷⁵ begs: Are courts institutionally capable of determining the true social costs, in the form of increased needs for medical surveillance, of public exposures to toxic substances? Are those social costs substantial enough to warrant inviting massive litigation, involving potentially millions of exposed plaintiffs, as a kind of judicially-sponsored public health program? These important issues are taken up in the discussion that follows.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. For example, the first and third reasons are redundant. The point of substance in both is that monitoring helps prevent disease, which simultaneously benefits the patients, society, and the defendants who must pay when disease occurs.

173. *See Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997) (noting that recoverable costs are difficult to identify and tens of millions of individuals may have suffered exposure that justifies monitoring); *see also Klein, supra* note 137, at 27 (“Forcing defendants to internalize unmaturred risk in the nature of medical monitoring expenses . . . raises serious concerns of overdeterrence.”).

174. *See Klein, supra* note 137, at 15 (“[E]nhanced risk itself is not compensable, but if you demonstrate an increased risk of disease, you can recover medical monitoring costs . . .”).

175. *See supra* notes 165-74 and accompanying text.

3. *Powerful Arguments Support Rejection of Recovery for Preinjury Medical Monitoring*

No one has yet advocated for the proposition that tort-based funding of medical surveillance serves a significant social need. Available evidence strongly suggests that many, if not most, persons exposed to toxic substances do not want to be monitored. Obviously, rational persons would like to be paid money “in the name” of receiving surveillance; but they apparently have a lot better ways to spend the money than on monitoring, once they receive it.¹⁷⁶ Thus, it is hardly surprising that many proponents of tort liability insist that recoveries go not to the claimants directly in money payments, but to fund court-administered programs from which claimants may benefit only by actually undergoing medical monitoring.¹⁷⁷ Moreover, even if it were somehow possible to determine which monitoring costs are attributable to which toxic sources, most monitoring systems established to accomplish marginal improvements would duplicate systems set up for similar purposes.¹⁷⁸ A large majority of Americans (admittedly not all) are covered by one form or another of general health insurance which presumably is in place to carry the lion’s part (admittedly not all) of the financial burden of medical monitoring.¹⁷⁹ Even if marginal social benefits were generated by recognizing tort claims for medical monitoring, they are almost certainly smaller than proponents of tort recovery anticipate in their arguments. Furthermore, such monitoring—especially excessive monitoring—is not only wasteful of scarce resources, but often places those being monitored at risk of surveillance-related harm.¹⁸⁰

But if the social benefits derived from court-sanctioned medical monitoring are questionable to the point of being dubious, the serious negative impacts of such liability on the business firms involved cannot be doubted. Given that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world,¹⁸¹ and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless.¹⁸² When courts require plaintiffs to prove that they have been, or are likely to become,

176. See Klein, *supra* note 137, at 24 (“[F]ew (if any) medical monitoring proponents suggest that courts award lump-sum damages to plaintiffs, presumably because they fear that plaintiffs will spend the money on goods and services other than medical surveillance.”); see also Maskin et al., *supra* note 133, at 541-42 & nn.101-13 (2000) (describing relevant data on plaintiffs’ use of medical monitoring awards).

177. See Maskin et al., *supra* note 133, at 543 (advocating limiting recovery to a medical fund); see also Blumenberg, *supra* note 146, at 665-66 (explaining the periodic payment approach to dispersing medical monitoring funds).

178. See *Metro-North*, 521 U.S. at 442.

179. Robert Pear, *Number of Uninsured Drops for 2nd Year*, N.Y. TIMES, September 28, 2001, at A20 (reporting that 177 million people have employer-sponsored health insurance).

180. See generally GOUTMAN, *supra* note 145, at 13-16; McCarter, *supra* note 146, at 276-80.

181. See Klein, *supra* note 137, at 13-14 & nn.60-61; McCarter, *supra* note 146, at 245-46 & n.102.

182. See *Metro-North*, 521 U.S. at 433 (referring to “unlimited and unpredictable liability”); see generally Maskin et al., *supra* note 133, at 528-29 & nn. 34-46.

physically injured as a result of exposures to asbestos or other toxic substances, defendants' potential liabilities are contained within natural boundaries. In contrast, in the medical monitoring context there are no such natural boundaries. Especially when medical surveillance is seen as conferring significant public health benefits, proponents may be hard-pressed to see the need for boundaries. After all, what could be wrong with having unpopular defendants pay for making America a healthier place?

The accuracy of these observations regarding potentially crushing liabilities is revealed by the concern that advocates of medical monitoring liability have expressed regarding the need to set meaningful requirements that plaintiffs must meet before imposing such liability. The most often recognized requirements clearly reflect these concerns. Thus, the West Virginia Supreme Court in *Bower* adopted six such prerequisites to medical monitoring liability.¹⁸³ These include *significant* exposure to "a *proven* hazardous substance,"¹⁸⁴ creating an increased risk of "a *serious* latent disease,"¹⁸⁵ requiring monitoring that is "*different* from what would be prescribed in the absence of the exposure."¹⁸⁶ Observe that the court self-consciously relied on a series of quantitative modifiers, italicized above, in an effort to reserve liability for truly deserving cases. Anyone familiar with modern American trial practice will understand that, however well-meaning, this reliance on superlatives will not prevent most well-prepared cases from reaching triers of fact.¹⁸⁷ There is no escaping the conclusion that defendants in these medical monitoring cases face potentially crushing liabilities.¹⁸⁸

Another inescapable implication of the inherent vagueness and open-endedness of medical monitoring litigation is that the courts will face, in the long run, an overwhelming flood of litigation in this area.¹⁸⁹ If the past decade of asbestos litigation has taught us anything, it is that the appetites of the plaintiff's bar know no limits in the ongoing search for secondary and even tertiary generations of defendants against whom to bring massive collective actions on new and expanding legal theories.¹⁹⁰ The West Virginia Supreme Court may believe that it "did justice"

183. See *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432-33 (W.Va. 1999).

184. *Id.* (emphasis added) (Elements one and two).

185. *Id.* (emphasis added) (Element four).

186. *Id.* (emphasis added) (Element five).

187. All that plaintiffs must do to satisfy the first requirement, for example, is to have their medical expert testify that the exposure is "significant" and that the substance—e.g., asbestos—is a "proven" hazard. The disease—cancer, in most instances—is indisputably "serious." *Bower's* six prerequisites may make academics feel good, but they should make any competent trial lawyer smile.

188. See *supra* note 182 and accompanying text.

189. See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433 (1997) (noting that medical monitoring claims could threaten a "flood" of less important cases).

190. See generally Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1. The article describes how plaintiffs' lawyers are bringing actions, including preinjury exposure claims, against everyone who had any connection—even tangential—with asbestos. For example, MetLife Insurance Company recently settled asbestos claims based on its having sold group life insurance policies to the employees of asbestos companies, thereby playing a role as "part of the foundation to put asbestos everywhere." *Id.*

in *Bower* by adopting an ostensibly sensible rule of liability with which lower courts will be able to render medical monitoring decisions that are fair, rational, and manageable. But surely *Bower* has unwittingly brought upon the West Virginia judiciary the potential for a plague of future litigation of questionable substantive benefit with which it is institutionally incapable of dealing. Manifestly the Supreme Court of West Virginia has set upon a course that will prove just as unworkable and unmanageable as would recognition of the emotional upset claims.¹⁹¹ The possible reasons why the *Bower* court succumbed to temptation regarding medical monitoring are explained below.¹⁹² But the institutional costs to the courts in that state will, almost certainly, be very great.

Finally, it must be understood that judicial recognition of claims for preinjury medical surveillance threatens the conceptual integrity of the American common law of torts. When one reflects objectively on what is happening in jurisdictions like West Virginia, at the conceptual level these medical monitoring claims combine elements of failure to rescue and pure economic loss. In effect, the plaintiffs in these cases want to force the defendants to pay the purely economic costs of rescuing them from a medical predicament. In both of these areas of the common law of torts courts have traditionally proceeded with great caution, perceiving correctly that, however superficially appealing plaintiffs' claims may appear in the short run, the open-endedness of robust liability regimes would prove highly problematic in the long run.¹⁹³ In these medical monitoring cases the plaintiffs' predicaments are allegedly caused by the defendants' wrongful acts in distributing or discharging asbestos or other toxic substances.¹⁹⁴ But the fact remains that from a legal process perspective the tasks of sorting out how much of that predicament can fairly be attributed to defendants' behavior, and what, exactly, to require by way of rescue efforts, are no less onerous here than in other duty-to-rescue contexts.¹⁹⁵ Moreover, the conclusion is inescapable that the plaintiffs are seeking to recover pure economic loss in the absence of either personal injury or property damage.¹⁹⁶ Recognizing these claims represents an important conceptual extension that is obfuscated in the judicial decisions and academic commentary characterizing the

The article quotes a leading plaintiffs' lawyer as saying in a lunchtime interview, "The asbestos companies are going bankrupt faster than you and I can eat the food." . . . "We need to find someone else to pay the victims." *Id.*

191. See *supra* notes 61-123 and accompanying text.

192. See *infra* Part D.

193. See generally HENDERSON, JR. ET AL., *supra* note 127, at 267-97, 392-409.

194. Thus, technically the plaintiffs' medical monitoring claims come within an exception to the no-duty-to-rescue rule for cases in which the defendant's conduct has created the need for rescue. See, e.g., *Tubbs v. Argus*, 225 N.E.2d 841, 842-43 (Ind. Ct. App. 1967) (explaining the no-duty-to-rescue rule and its exceptions).

195. See generally James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 901-02 (1982) (arguing that since tort law guides behavior, the restraints it imposes explain much of its substantive content).

196. See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 439 (1997) (referring to medical monitoring costs as "a separate negligently caused economic 'injury'").

recoveries as being merely remedial in nature.¹⁹⁷

D. Suggestions Regarding Why Courts in Twenty Jurisdictions Have Recognized Medical Monitoring Claims

To the extent that the preceding analysis may persuade objective readers that the West Virginia Supreme Court and approximately twenty other jurisdictions¹⁹⁸ have erred in recognizing these causes of action, it is interesting to speculate why this is happening. Part of the answer lies in the earlier discussion of the superficial attractiveness of these claims.¹⁹⁹ But one might have expected that courts would have penetrated beyond the surface of first impressions. American courts have resisted similar temptations in other areas—the rejection of exposure-based claims for mental anguish is a good example.²⁰⁰ Acknowledging the speculative nature of these musings, the authors suggest that a combination of exogenous factors (factors outside traditional legal precedents and recognized policy objectives) may have combined to help persuade a surprising number of courts to allow recovery for preinjury medical monitoring. We begin with the popular culture surrounding and presumably influencing judicial behavior. Our modern world, quite literally, is full of risks of invidious disease from exposure to a host of toxic substances.²⁰¹ Culturally, our tendency is to seize upon a relatively few, often relatively minor risks from among the many that exist and focus our collective energies on “solving” those problems.²⁰² One such risk is the increased risk of cancer from certain selected contaminants in our living and working environments. Make no mistake—the risk of contracting cancer in America today is certainly not “minor.”²⁰³ But much of that risk is not related to contaminants in the environment;²⁰⁴ and of that part of the cancer risk that is so related, a substantial portion can fairly be described as “background” levels of contaminants that have nothing directly to do with the discharge or distribution of potentially harmful substances by toxic tort

197. See *supra* notes 141, 148, 158 and accompanying text.

198. See *supra* notes 138-45, 165-71, and accompanying text.

199. See *supra* Part V.A.

200. See *supra* notes 62-113 and accompanying text.

201. See *supra* note 181 and accompanying text.

202. See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999). The authors define “availability cascades” as self-reinforcing processes of collective belief formation by which expressed perceptions trigger massive chain reactions that give those perceptions increasing plausibility. *Id.* Once started, these cascades of perceptions can escalate rapidly to dominate the attention of the media. *Id.* at 685-87. These cascades can be helpful but they can also prompt regulators, including courts, to implement socially harmful responses. *Id.* at 685.

203. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF UNITED STATES: 1996 94 (1996) (noting that 23.5% of Americans who died in 1994 died of cancer).

204. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A ‘Public Law’ Vision of the Tort System*, 97 HARV. L. REV. 849, 855-56 (1984) (citing epidemiological studies indicating that disease is caused both by specific substances as well as “background risk”). Professor Rosenberg notes that researches have even associated mesothelioma, which had been “linked exclusively to asbestos exposure, with exposure to other sources.” *Id.* at 856 n.31.

defendants.²⁰⁵ One approach to achieving solutions to the toxic tort problem is to promote ambitious, post-hoc ameliorative programs of some type, including aggressive medical surveillance, to “heal the wounds.”²⁰⁶ The authors suspect, but obviously cannot prove, that courts have been encouraged by these cultural biases to allow medical monitoring recoveries.²⁰⁷

Moreover, the fact that so many of these toxic exposure cases have environmental implications—carcinogens such as asbestos, for example, are seen to pollute the natural environment—invokes the sizeable and presumably influential apparatus of the environmental movement.²⁰⁸ The authors suspect that some of the judges who approve of court-mandated medical surveillance may be attracted by the prospect of enlisting the deterrent potential of tort law in wider efforts aimed at cleaning up the environment. More generally, academic tort law commentators—especially authors of student notes—have traditionally tended to applaud judicial innovations aimed at increasing the liabilities of corporate defendants perceived to be harming helpless plaintiffs.²⁰⁹ We submit that at least some of the judges who have recognized the rights of plaintiffs to insist on medical surveillance regimes of dubious personal and social value may have been encouraged by cheerleaders—environmentalists and legal academics—registering their enthusiastic approval from the sidelines.

And finally, it should be noted that these medical monitoring claims are an important component in the evolving phenomena commonly referred to as “mass torts” and “toxic tort litigation.” Members of the plaintiffs’ bar have an obvious and enormous financial stake in these proceedings; they are almost certainly the major beneficiaries of the successes enjoyed thus far. Significantly these medical monitoring claims may turn out to be uniquely suited to class action treatment. In general, courts have been hostile toward nationwide class certification in cases involving classic tort claims for monetary damages flowing from physical injuries.²¹⁰ In contrast, court-ordered programs designed to provide claimants with

205. See generally McCarter, *supra* note 146, at 245-46 & nn.102-104.

206. A proponent of recovery in these cases concludes her analysis by observing that “[re]cognition [of medical monitoring claims] by all courts would go a long way toward healing the wounds inflicted when individuals are unwittingly exposed to toxic substances.” See Blumenberg, *supra* note 146, at 716.

207. See Kuran & Sunstein, *supra* note 202, at 758 (observing that courts may be influenced by the cultural pressures of collective concerns over risks and that courts “have a role to play in preventing excessive reactions to availability cascades”).

208. It is no coincidence that at least half of the proponents of recovery for medical monitoring have approached the subject from an environmental perspective. See, e.g., Blumenberg, *supra* note 146, at 661-62, 675-78.

209. See *supra* note 146. The authors cannot verify this observation empirically, and certainly intend no criticism of the authors. We opine from our experience that judicial innovation is, understandably, more intriguing to legal academics than are defenses of the status quo. We confess to being old-fashionedly skeptical of innovation. See, e.g., James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467, 514-24 (1976).

210. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (overturning certification of class consisting of individuals exposed to asbestos who had reached settlement with defendant). See generally Maskin et al., *supra* note 133, at 546 (“[I]t is clear that 23(b)(3) [class

nonmonetary relief, preferred by the academic proponents of medical monitoring,²¹¹ may be viewed as injunctive and equitable relief under Rule 23(b)(2) of the Federal Rules of Civil Procedure and similar state rules.²¹² And while courts have denied class certification in medical monitoring cases under Rule 23(b)(3),²¹³ advocates favoring expansion of class action practice continue to insist that even medical monitoring claims seeking monetary recoveries are inherently susceptible to class treatment, essentially on the ground that factual variations among claimants and variations in applicable law are not so troubling here as in other areas of tort.²¹⁴ The authors do not think it merely coincidental that the major thrust of the expansionary, prerecovery movement afoot in twenty American jurisdictions and widely applauded by legal commentators may also lend itself to being handled through the class action mechanism. Even if the cases recognizing claims for exposure-based medical surveillance to date have not necessarily involved class certification,²¹⁵ judicial acceptance of the substantive aspects of these cases will very likely be aided and abetted in the future by the availability of procedural mechanisms with which to consider—and settle—massive numbers of claims in a single judicial proceeding.

VI. CONCLUSION

Asbestos litigation has been plagued by the willingness of some courts to front-load damages and allow recovery for “injuries” that in all likelihood will never eventuate. In the early days of asbestos litigation when the single-action rule still

actions are] an avenue which has been closed to many future mass-tort plaintiffs.”).

211. Even skeptics agree that court-ordered programs are the only sensible approach. *See, e.g.,* McCarter, *supra* note 146, at 283 (“Some form of equitable relief, such as the trust fund endorsed in *Ayers* for governmental defendants, is the sole valid objective of future medical monitoring claims.”).

212. *See, e.g.,* Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475, 476-77 (W.D.N.Y. 1995). *But see* Cook v. Rockwell Int’l Corp., 181 F.R.D. 473, 480 (D. Colo. 1998) (stating that medical monitoring case was essentially a suit for damages); Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D. Ohio 1991) (noting that plaintiffs’ medical monitoring claims are “poorly-disguised money damage claims”).

213. *See, e.g.,* Lockheed Martin Corp. v. Sup. Ct., 94 Cal. Rptr. 2d 652, 656 (Ct. App. 2000).

214. *See* Elizabeth J. Cabraser & Fabrice N. Vincent, *Class Certification of Medical Monitoring Claims in Mass Tort Product Liability Litigation*, SE01 ALI-ABA, 10-19 (1999) (pointing out that several courts have certified state-wide class actions).

The authors do not subscribe to the view that factual variations in medical monitoring cases are insubstantial. It will be recalled that the United States Supreme Court in *Amchem* refused class treatment for asbestos claims because it found the variation among claimants to be so substantial that commonality was lacking. *Amchem*, 521 U.S. at 629. In cases where medical monitoring is sought, the factual variations may be even more substantial. Since the claims are not based on any manifestation of an asbestos-related disease, but only on exposure to asbestos, the court must confront factual variations among claimants regarding whether any given plaintiff was exposed to asbestos and the level of any such exposure. Furthermore, questions as to the type of medical monitoring sought and whether such monitoring would confer a benefit on any plaintiff in allowing early detection of a curable disease will vary depending on the plaintiff. These highly individualized factual variations seriously question the appropriateness of class treatment.

215. *See supra* notes 138-45.

held sway, the reason for front-loading damages was understandable. If plaintiffs were not able to recover for all ensuing harms when they first discovered some physical indication that they might contract an asbestos-related disease in the future, they might be barred if they actually developed such a disease in the future. The long latency period for asbestos diseases made it almost certain that statutes of limitations would bar them from bringing their fully matured causes of action. Now that the overwhelming majority of courts have held that the single action-rule does not apply to latent toxic tort cases, plaintiffs can wait to see whether they actually develop a serious asbestos-related injury in the future.

Not willing to wait on the morrow, plaintiffs have sought to convince courts that they should be compensated for present suffering. They have argued that even though they are asymptomatic, they are entitled to recover for mental distress arising from their present fear that they will develop future injury and that they are entitled to medical monitoring awards so that they can determine whether they will need to be treated for some disease that may develop in the future. The huge majority of claims made under both of the above theories have been made on behalf of plaintiffs who have been exposed to asbestos or have developed some minor changes in their lungs evidenced by pleural plaque or pleural thickening. The likelihood that these plaintiffs will develop a malignancy in the future is very remote. Recovery for mental distress for fear of such remote harms has no support in the case law recognizing the tort of negligent infliction of mental distress.

The medical monitoring claims are equally attenuated. To respond to such claims it is necessary to provide medical surveillance for all plaintiffs who have only a slight increase in risk of developing malignancies in the future. The specter of a massive, never-ending que of claimants is very real. Moreover, as the massive number of uninjured claimants presenting anticipatory claims devours the defendants' resources, those defendants are forced into bankruptcy leaving nothing for those whose ills, when they eventually manifest themselves, are not the least bit speculative. This problem has already pitted lawyers who represent the seriously injured against their cohorts who represent the unimpaired. The asbestos saga has been a tragic chapter in American social history. It need not have become a tragic chapter in American jurisprudence. But it has and it will remain so unless courts put an end to the madness.