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MEDICAL MONITORING IN MISSOURI AFTER *MEYER EX REL. COPLIN V. FLUOR CORP.*: SOUND POLICY SHOULD BE RESTORED TO A VAGUE AND UNSOUND DIRECTIVE

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

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INTRODUCTION

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

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

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

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

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

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

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

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

A. *The Meyer Opinion*

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

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4. *Id.* at 716.

5. *Id.* at 719.

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

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

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

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

As a threshold matter, the court had to determine whether Missouri permits a medical monitoring action or remedy for plaintiffs with no present physical injury. For more than 200 years, a fundamental tort law principle has been that a plaintiff must have a present, actual injury to obtain a recovery.[10] At times, this bright line rule may seem harsh, but courts developed this filter to prevent a flood of claims, provide faster access to courts for those with reliable and serious claims, and ensure that defendants are held liable only for objectively verifiable, genuine harm.[11] As explained below, the United States Supreme Court, most recent state courts of last resort, and numerous other state and federal courts have rejected medical monitoring claims absent physical injury. Some courts, however, have permitted a medical monitoring action or remedy as an exception to the traditional physical injury rule.[12]

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

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9. *Id.*

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

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

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

13. *Id.* at 716.

14. *Id.* at 718.

15. *Id.* at 717.

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

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

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

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

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

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

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18. *Id.* at 719.

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

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

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

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

23. *Id.* at 716.

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

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

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

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

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

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

29. *See Meyer*, 220 S.W.3d at 716 n.3 (citing Doe v. City of Stamford, 699 A.2d 52 (Conn. 1997)). *But see* Goodall v. United Illuminating, No. X04CV 950115437S, 1998 WL 914274, at *10 (Conn. Super. Ct. Dec. 15, 1998) (unreported) (holding that medical monitoring damages could not be recovered when plaintiffs demonstrated no physical manifestation of an asbestos-related disease, distinguishing *Doe*); Bowerman v. United Illuminating, No. X04CV 94011536S, 1998 WL 910271, at *10 (Conn. Super. Ct. Dec. 15, 1998) (unreported) (same). *Cf.* Martin v. Shell Oil Co., 180 F. Supp. 2d 313, 323 (D. Conn. 2002) ("The court accepts [plaintiff's] representation and does not construe [plaintiff's] complaint and subsequent pleadings as requesting medical monitoring based on exposure as the sole injury and cause of action.").

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

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

In *Buckley*, the Supreme Court ruled 7–2 against allowing negligent infliction of emotional distress or medical monitoring claims brought by an asymptomatic pipefitter against his employer for occupational exposure to asbestos under the FELA, a statute that has often been construed in favor of plaintiffs.[33] The Court concluded that a worker "cannot recover unless, and until, he manifests symptoms of disease."[34] The Court carefully considered the policy concerns militating against adoption of a medical monitoring cause of action, including the difficulty in identifying which medical monitoring costs are over and above the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs.[35] The Court appreciated that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring."[36] The Court also rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because

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

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

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

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

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

35. *Id.* at 441–42.

36. *Id.* at 442.

alternative, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.[37]

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

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

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

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

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

39. *Id.* at 438.

40. *Id.*

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

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

43. *Id.* at 440–41.

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

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

46. *Id.* at 439.

47. *Id.* at 440.

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

Later in 2001, the Alabama Supreme Court in *Hinton v. Monsanto Co.* considered a medical monitoring claim in the context of a putative class action brought by asymptomatic plaintiffs allegedly exposed to toxins released into the environment by the defendant.[49] The court began its analysis by stating that "Alabama has long required a manifest, present injury before a plaintiff may recover in tort,"[50] and that "[n]oted commentators have agreed with this approach."[51] The court then summarized the complex legal issues raised by medical monitoring claims, including the impact on other areas of the law that would be caused by "such a drastic departure from [the] traditional tort law" physical injury rule.[52] The court stated, "To recognize medical monitoring as a distinct cause of action . . . would require this Court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide."[53] The court said it was "unprepared to embark on such a voyage."[54]

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

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

48. *Id.* at 440 (emphasis added).
49. Hinton v. Monsanto Co., 813 So. 2d 827, 828 (Ala. 2001).
50. *Id.* at 829.
51. *Id.*
52. *Id.* at 830.
53. *Id.*
54. *Id.*
55. *Hinton*, 813 So. 2d at 831 (citing Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 441–43 (1997)).
56. *Id.* (quoting *Buckley*, 521 U.S. at 442).
57. *See id.*

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

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

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

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

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58. *Id.* at 831–32.
59. Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002).
60. *Id.* at 851.
61. *Id.* at 852.
62. *Id.* at 853–54.
63. *Id.* at 856.
64. *Id.* at 857.
65. *Wood*, 82 S.W.3d at 856.
66. *Id.* at 857.
67. *Id.* (quoting Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442 (1997)).