

THE RESTATEMENT (THIRD) OF TORTS PROPOSES ABANDONING TORT LAW'S PRESENT INJURY REQUIREMENT TO ALLOW MEDICAL MONITORING CLAIMS: SHOULD COURTS FOLLOW?

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I. INTRODUCTION

After decades of development, the American Law Institute's (ALI) Restatement of Torts, Third, is nearing completion. This multi-volume work includes more than a half dozen standalone restatements covering virtually every subject of tort law.¹ The final part of the project, the *Restatement (Third) of Torts: Miscellaneous Provisions*, captures issues not covered in other parts of this latest Restatement of Torts. The project also includes several new topics that were not addressed in earlier Restatements.

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1. The Third Restatement of Torts includes standalone restatements on the following topics: Products Liability (1998), Apportionment of Liability (2000), Liability for Physical and Emotional Harm (2010), Liability for Economic Harm (2020), Intentional Torts to Persons (completed in 2021), Remedies, Medical Malpractice, Defamation and Privacy, and Miscellaneous Provisions. The Remedies, Medical Malpractice, Defamation and Privacy, and Miscellaneous Provisions parts of the Third Restatement of Torts have not been completed.

One of the new rules recommends allowing tort claimants to recover medical monitoring expenses in the absence of a present physical injury.²

The existence of an injury has traditionally served as the linchpin for tort liability.³ The proposed Miscellaneous Provisions Restatement, however, breaks with that tradition so that unimpaired claimants can obtain a tort recovery where they have been exposed to a “significantly increased risk of a particular serious future bodily harm.”⁴ This article examines the wisdom of the proposal to answer a question that arises whenever the ALI gives its imprimatur to a restated rule, namely, should courts follow it?

To help answer that question, Part II of the article discusses the purpose, history, and influence of restatements in the development of American law, particularly tort law. Part II also discusses concerns that have been raised about modern restatement provisions that go beyond “restating” the law and appear aspirational. Part III examines the development of the Miscellaneous Provisions medical monitoring rule and how the proposal squares with existing law. Part IV discusses the public policy implications of the proposed rule. The article concludes that courts should adhere to the traditional present injury requirement in medical monitoring cases. As the Illinois Supreme Court explained in 2020 when it rejected a medical monitoring claim for the unimpaired:

[The present injury] requirement establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability.⁵

II. THE PURPOSE, DESIGN, AND INFLUENCE OF ALI RESTATEMENTS

Founded in 1923, the ALI is one of the most influential private organizations in the development of American law.⁶ The ALI promotes clarity and uniformity in the law, and has accomplished its mission

2. See RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS, at 1 (unnumbered section) (AM. L. INST., Tentative Draft No. 3, 2024) (on file with authors) [hereinafter TD 3].

3. See *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 855 (Ky. 2002) (“With no injury there can be no cause of action, and with no cause of action there can be no recovery.”); see also Victor E. Schwartz & Christopher E. Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality*, 74 S.C. L. REV. 1, 16–21 (2022) (discussing courts’ disparate treatment of medical monitoring).

4. TD 3, *supra* note 2.

5. *Berry v. City of Chicago*, 181 N.E.3d 679, 688 (Ill. 2020).

6. See *About ALI*, AM. L. INST., <https://www.ali.org/about-ali/> (“The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.”) [<https://perma.cc/5EYE-72ZF>].

primarily through the development of educational resources.⁷ The organization leverages the collective expertise of a membership comprised of many of the nation's most distinguished judges, law professors, and practitioners to develop a variety of publications with different objectives and audiences.⁸ The ALI is perhaps best known for developing restatements of the law addressed to judges to aid the development of common law. ALI restatements are cited thousands of times each year by courts, and courts in every state have relied on a restatement at some point when developing state common law.⁹

The ALI's torts restatements have been especially influential. For example, section 402A of the Restatement (Second) of Torts, published in 1965, helped usher in the doctrine of strict products liability.¹⁰ This Restatement continues to be cited by courts more than a half-century after its publication, and has informed the development of many of the provisions of the Restatement of Torts, Third. A core purpose of the Miscellaneous Provisions Restatement is to address doctrines recognized by courts since the Restatement (Second) of Torts was published. A claim to recover medical monitoring expenses in the absence of a physical injury falls into this category, as no court recognized such a claim until the 1980s.¹¹

7. *See id.* (stating the organization's projects are "enormously influential in the courts and legislatures, as well as in legal scholarship and education"); *see also* Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at the Cross Road: With Power Comes Responsibility*, 2 NAT'L FOUND. FOR JUD. EXCELLENCE (2017) (discussing ALI's influence).

8. The ALI publishes three basic works: (1) Restatements; (2) Model Laws; and (3) Principles. Each has a specific purpose and audience for the development of the law. *See About ALI, supra* note 6.

9. *See, e.g.*, *Bassichis v. Flores*, 189 N.E.3d 640, 646 (Mass. 2022) (noting that "[n]early every State . . . has adopted the formulation of the [litigation] privilege set forth in the Restatement (Second) of Torts"); *Miller v. Miller*, 956 P.2d 887, 900 (Okla. 1998) ("The tort of intentional infliction of emotional distress has now been adopted in almost every state, and the vast majority of those states have adopted the Restatement formulation.") (citation omitted).

10. *See* Dominick Vetri, *The Integration of Tort Law Reforms and Liability Insurance Ratemaking in the New Age*, 66 OR. L. REV. 277, 284 n.34 (1987) ("After the American Law Institute adopted section 402A in the RESTATEMENT (SECOND) OF TORTS, virtually every state has adopted some version of strict products liability."); *see also* Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 553-54 (2011) ("When the Restatement (Second) of Torts section 402A was finalized in 1965, it represented a major shift in legal theory regarding the manufacture and sale of products.").

11. *See* *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 827 (D.C. Cir. 1984).

ALI restatements propose to set forth “clear formulations of common law . . . as it presently stands or might appropriately be stated by a court.”¹² “A Restatement thus assumes the perspective of a common-law court” to accomplish what a “busy common-law judge, however distinguished, cannot,” namely, to “engage the best minds in the profession” and “scan an entire legal field and render it intelligible by a precise use of legal terms.”¹³ To fulfill this objective, the ALI’s Style Manual instructs restatement Reporters (law professors who are appointed to draft restatements) to adhere to four “principal elements” in developing a restatement: (1) “ascertain the nature of the majority rule”; (2) “ascertain trends in the law”; (3) choose the “specific rule [that] fits best with the broader body of law and therefore leads to more coherence in the law”; and (4) “ascertain the relative desirability of competing rules.”¹⁴

Restatement Reporters are not required to endorse the “majority rule” on an issue, but “are constrained by the need to find support in sources of law.”¹⁵ Restatements can adopt a minority rule provided the Reporters explain the rationale for that purported “better rule.”¹⁶ The Style Manual cautions, however, that the ALI, as an unelected body, “has limited competence and no special authority to make major innovations in matters of public policy.”¹⁷ Reporters are further instructed that “[w]ild swings [in law] are inconsistent with the work of . . . a Restatement.”¹⁸

Over the past decade, the ALI has come under criticism for departing from its historic mission to promote clarity and uniformity in the law, and from the Style Manual’s requirements and cautions.¹⁹ Instead of “restating”

12. AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 3 (rev. ed. 2015) [hereinafter ALI STYLE MANUAL]. Over the past decade, the ALI has taken a broader approach regarding the subject matter of restatements. In 2015, the ALI commenced a Restatement of the Law, Copyright, which restates judicial interpretations of the federal Copyright Act. See AM. L. INST., *Restatement of the Law, Copyright*, <https://www.ali.org/projects/show/copyright/> [<https://perma.cc/QW8N-YQJF>]. In 2022, the ALI commenced a Restatement of the Law, Constitutional Torts, focused on “individual rights to sue government employees and others ‘acting under color of state law’ under 42 U.S.C. § 1983 and *Bivens* actions.” See AM. L. INST., *Restatement of the Law, Constitutional Torts*, <https://www.ali.org/projects/show/constitutional-torts/> [<https://perma.cc/FZW3-PLND>].

13. ALI STYLE MANUAL, *supra* note 12, at 5, 6.

14. *Id.* at 5.

15. *Id.* at 6.

16. *Id.* at 7.

17. *Id.* at 6.

18. *Id.*

19. See Kim V. Markkand, *How a Broken Process, Broken Promises, and Reimagined Rules Justify the Bench and Bar’s Skepticism Regarding the Reliability of the Restatement of the Law, Liability Insurance*, 50 THE BRIEF 20, 22 (2020); see also Lisa A. Rickard, Commentary, *Is The*

prevailing common law, projects have increasingly put forth novel legal rules for courts to adopt.²⁰ The late U.S. Supreme Court Justice Antonin Scalia recognized this trend in 2015, stating:

[M]odern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was ‘to present an orderly statement of the general common law.’ Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.²¹

Justice Scalia added that where restatement provisions endeavor to revise rather than restate existing law, they “should be given . . . no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.”²²

The ALI continues to endorse some legal rules that lack common law support,²³ moving consistently in the direction of liability expansion.²⁴ This

American Law Institute About To ‘Jump The Shark’?, INVESTOR’S BUS. DAILY (Jan. 15, 2019), <https://www.investors.com/politics/commentary/ali-american-law-institute-summaries/> [https://perma.cc/T2F6-25N5] (stating that proposed Restatement of the Law, Consumer Contracts proposes to “create an entirely new body of law for contracts between businesses and consumers”); David A. Logan, *When the Restatement Is not a Restatement: The Curious Case of the “Flagrant Trespasser,”* 37 WM. MITCHELL L. REV. 1448, 1481–82 (2011) (examining a novel land possessor duty of care recommended in the Restatement of Torts, Third: Liability for Physical and Emotional Harm). The authors of this article have also criticized restatements that fail to faithfully restate existing law. See Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PA. J. BUS. L. 718, 743–66 (2020); see also Christopher E. Appel, *The American Law Institute’s Unsound Bid to Reinvent Contract Law in the Proposed Restatement of the Law, Consumer Contracts*, 32 LOY. CONSUMER L. REV. 339, 344 (2020).

20. See *supra* note 19 and accompanying text; see also Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595, 596 (2014) (“[I]t is an open question whether the Restatements will . . . unify and improve the common law.”).

21. *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring and dissenting in part) (citations omitted).

22. *Id.* at 476; see also *Ostrowsky v. Jengo*, No. A-4069-18T1, 2020 WL 1488674, at *3 (N.J. Ct. App. Div. Mar. 25, 2020) (unpublished decision) (observing that “Restatements’ reporters occasionally assert positions that lack legal authority and scholarship”).

23. See generally Schwartz & Appel, *supra* note 19 (examining multiple aspirational provisions in the Restatement of the Law, Liability Insurance, which, if adopted by courts, would dramatically change liability insurance law); Appel, *supra* note 19, at 362 (discussing the “remarkable extent to which [the proposed Restatement of the Law, Consumer Contracts] fails to satisfy the ALI’s most basic standards for a developing a Restatement” and the project’s “one-sided purpose of increasing a consumer’s ability to challenge and invalidate . . . agreements” between businesses and consumers”).

24. See *supra* note 19; see also James M. Beck, “ALI” Should Not Mean “Always Liability Increases”—*Apportionment Misadventures*, DRUG & DEVICE L. (Oct. 14, 2019), <https://www.druganddevicelawblog.com/2019/10/ali-should-not-mean-always-liability-increases-apportionment-misadventures.html> [https://perma.cc/UGC3-E6TA] (article by ALI member).

shift has produced additional criticisms that some restatements no longer reflect a balanced perspective.²⁵ These concerns have surfaced again in the context of the medical monitoring rule in the Miscellaneous Provisions Restatement.²⁶

III. THE ALI'S PROPOSED APPROACH TO MEDICAL MONITORING IN THE RESTATEMENT OF TORTS, THIRD

A. *The Initial Proposed Medical Monitoring Rule and Its Development*

The ALI initiated the Miscellaneous Provisions Restatement in 2019 to be developed concurrently with several final parts of the Restatement (Third) of Torts.²⁷ The initial draft of what was then called the Concluding Provisions Restatement proposed the following medical monitoring rule:

A person can recover for medical monitoring expenses, even absent present bodily harm, if:

- (a) an actor's tortious conduct has exposed a person to a significant risk of serious future bodily harm;
- (b) the exposure makes medical monitoring reasonable and necessary in order to prevent or mitigate the future bodily harm;
- (c) the person has incurred the monitoring expense, will incur the monitoring expense, or would incur the monitoring expense if he or she could afford it; and
- (d) the actor's liability is not indeterminate.²⁸

The Restatement's Reporters described this proposed rule as "chart[ing] a middle path" on the topic of medical monitoring in light of the

25. See generally Laura A. Foggan & Rachel Padgett, *Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI's Restatement of the Law, Liability Insurance*, 50 THE BRIEF 26 (2020) (article co-authored by ALI-appointed insurer liaison to Restatement of the Law, Liability Insurance); see also Logan, *supra* note 19, at 1467, 1484 (noting that Restatement provision imposing duty on land possessors to exercise reasonable care for the safety of all entrants but "flagrant trespassers" was "made without grounding in the product of many judges working on a problem on a case-by-case basis, the core strength of the common law process").

26. See generally James M. Beck, *Always Liability Increases (ALI)? Not Yet with Medical Monitoring*, DRUG & DEVICE L. (May 25, 2023), <https://www.druganddevicelawblog.com/2023/05/always-liability-increases-ali-not-yet-with-medical-monitoring.html> [<https://perma.cc/LWU5-66XU>] (article by ALI member).

27. See Memorandum from Nora Freeman Engstrom and Michael D. Green, Reporters of the Third Restatement of Torts: Miscellaneous Provisions Project to ALI Annual Meeting Attendees (May 18, 2023) at 6 [hereinafter 2023 Memorandum from Nora Freeman Engstrom & Michael D. Green] (on file with authors) (stating work began on the medical monitoring provision "early in 2019, soon after the project's inception"); RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS, at xv (AM. L. INST., Preliminary Draft No. 1, 2020) [hereinafter PD 1].

28. PD 1, *supra* note 27, at 81.

“fractured landscape” of state common law.²⁹ They recognized that jurisdictions are divided on whether to allow asymptomatic claimants to recover medical monitoring expenses, yet asserted (incorrectly) that a “slim majority of courts accept ‘pure’ medical monitoring claims . . . while a narrow minority of courts reject this cause of action.”³⁰ They also asserted that the split among courts revealed no “clear trend” in favor of, or against, recognition of a medical monitoring remedy for the non-sick.³¹ Nevertheless, the Reporters reasoned that their proposed rule was more “consistent with tort’s twin aims of compensation and deterrence,” and that “many of the drawbacks courts and commentators associate with medical monitoring can be ameliorated, or even avoided altogether, by carefully defining the cause of action.”³²

The proposed rule marked the first time in the ALI’s 100-year history that a restatement provision endorsed a tort recovery for uninjured claimants. The ALI did not need to go down this path.³³ There is far more uniform agreement among courts to allow recovery of medical monitoring expenses when a claimant *has* a physical injury. The ALI could have restated well-settled law endorsing an injured claimant’s ability to recover medical monitoring expenses and explained in comments elaborating the rule that some jurisdictions allow medical monitoring awards in the absence of manifest injury.³⁴

The decision to proceed with a medical monitoring rule focused solely on endorsing recoveries for uninjured claimants has proven highly controversial. ALI provisions require approval by both the organization’s governing Council and general membership. The ALI’s governing Council withheld its tentative approval of the proposed rule for nearly three years.³⁵ During this unusually long period, more than a half dozen versions of the medical monitoring rule were presented, all of which endorsed a recovery

29. *Id.* at 86 (Reporters’ Note to comment *a*).

30. *Id.*

31. *Id.* at 85.

32. *Id.* at 86.

33. *See* Letter from ALI Members Victor Schwartz and Christopher Appel to Reporters regarding “Medical Monitoring in the Restatement (Third) of Torts: Concluding Provisions” (June 12, 2020), at 1 (on file with author) [hereinafter 2020 Letter from ALI Members Schwartz & Appel] (stating the ALI need not endorse an “All or Nothing” approach to medical monitoring absent present injury).

34. *See id.* at 2.

35. The medical monitoring provision was introduced in February 2020 in the Preliminary Draft No. 1 of the RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS. The ALI Council tentatively approved a version of the rule in October 2022. *See* 2023 Memorandum from Nora Freeman Engstrom & Michael D. Green, *supra* note 27, at 6 (summarizing process that led to ALI Council’s tentative approval of medical monitoring provision).

for asymptomatic claimants.³⁶ The different iterations of the rule generated numerous critiques by the Restatement's advisers and other ALI members,³⁷ as well as appointed members of the ALI's governing Council.³⁸ The Council also convened to consider versions of the proposed rule on several occasions.³⁹

The controversy surrounding the proposed rule has centered on a handful of core considerations, several of which implicate the four "principal elements" for restatements.⁴⁰ An early concern was that the proposed rule and its supporting commentary did not accurately characterize the common law, which could mislead judges as to the proposal's underlying support. As indicated, the proposed Restatement rule initially described a recovery of medical monitoring costs absent present injury as a "slim majority" rule.⁴¹ But, even the Restatement's generous count could identify only around one-third of states (sixteen) as at least appearing to recognize some form of medical monitoring remedy absent physical injury.⁴² Other surveys find that only about a dozen jurisdictions

36. Different versions of the medical monitoring provision were put forth in Preliminary Draft No. 1 (dated Feb. 2020), Council Draft No. 1 (dated Aug. 2020), Preliminary Draft No. 2 (dated Aug. 2021), Council Draft No. 2 (dated Dec. 2021), Preliminary Draft No. 3 (dated Aug. 2022), Council Draft No. 3 (dated Sept. 2022), and Tentative Draft No. 2 (dated Mar. 2023).

37. *See, e.g.*, Letter from ALI Member Harold Kim to ALI Director Richard Revesz and Council Members regarding Medical Monitoring Provision (Oct. 19, 2022) (on file with author); Letter from ALI Member James Beck to ALI Members regarding "Restatement (Third) of Torts, Concluding Provisions, Council Draft No. 3" (Oct. 17, 2022) (on file with author); *see also* 2020 Letter from ALI Members Schwartz & Appel, *supra* note 33.

38. *See, e.g.*, Letter from ALI Council Member John H. Beisner to Council Members and Reporters regarding "Comments on Restatement (Third) of Torts, Concluding Provisions, Council Draft No. 3" (Oct. 17, 2022) [hereinafter Oct. 2022 Letter from ALI Council Member Beisner] (on file with author); Letter from Emeritus ALI Council Member Sheila Birnbaum to Council Members and Reporters regarding "Comments on Restatement (Third) of Torts, Concluding Provisions, Section on Medical Monitoring" (Feb. 28, 2022) [hereinafter 2022 Letter from Emeritus ALI Council Member Birnbaum] (on file with author); Letter from ALI Council Member John H. Beisner to Council Members and Reporters regarding "Comments on Restatement (Third) of Torts, Concluding Provisions, Council Draft No. 2" (Jan. 14, 2022) (on file with author).

39. 2023 Memorandum from Nora Freeman Engstrom & Michael D. Green, *supra* note 27, at 6.

40. ALI STYLE MANUAL, *supra* note 12, at 5.

41. 2020 Letter from ALI Members Schwartz & Appel, *supra* note 33.

42. The Miscellaneous Provisions Restatement includes a state-by-state Appendix that categorizes jurisdictions generally based on whether they authorize or appear to authorize medical monitoring absent present injury, reject or appear to reject such claims, or have unclear or divided case law. This Appendix lists 16 states and the District of Columbia as at least appearing to authorize medical monitoring absent present injury, although this listing comes with asterisks for three states, Massachusetts, Minnesota, and New York, as jurisdictions requiring a plaintiff to demonstrate a cellular, subcellular, or subclinical injury. *See* TD 3, *supra* note 2, at 40–42. The

recognize such claims,⁴³ as contrasted with as many as twenty-eight states that reject them.⁴⁴

Whatever method is used to classify and count jurisdictions, more states reject medical monitoring claims by the unimpaired than allow them.⁴⁵ A remaining group of states either lack clear case law or have no case law on the topic⁴⁶—a fact that at least in the latter group could suggest the unavailability of medical monitoring for the unimpaired given that such claims have been pursued nationally for four decades. Regardless, with a maximum of around one-third of states recognizing medical monitoring for the unimpaired in some form, this remedy is plainly not the rule in most states.

A related criticism of the Restatement's initial proposed rule was that it endorsed judicial recognition of an independent cause of action for medical monitoring where only five states have done so—a minority approach within a minority rule.⁴⁷ Recognition of a “new, full blown, tort law cause of action”⁴⁸ is on the most broad and permissive end of the medical monitoring spectrum, in contrast to the Reporters' claim of charting a “middle path.”⁴⁹ Among the minority of jurisdictions that allow a medical

list also includes Vermont, which adopted a statutory medical monitoring action. *See* Vt. Stat. Ann. tit. 12, § 7202.

43. Oct. 2022 Letter from ALI Council Member Beisner, *supra* note 38, at 6–25 (providing state law survey that identifies Arizona, California, Florida, Maryland, Missouri, Nevada, New Jersey, Ohio, Pennsylvania, Utah, and West Virginia as recognizing a common law medical monitoring remedy absent present physical injury).

44. John H. Beisner, Proposed Amendments to Medical Monitoring Section of Restatement of the Law Third Torts: Miscellaneous Provisions Tentative Draft No. 2, at 7–22 (motion presented at 2023 Annual Meeting) [hereinafter Motion of John H. Beisner] (providing state survey that identifies Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin as states rejecting “no-injury medical monitoring”); James M. Beck, Proposed Amendments to Comment B of the Proposed Medical Monitoring Section of Restatement of the Law Third Torts: Miscellaneous Provisions Tentative Draft No. 2, at 4–20 (motion presented at 2023 Annual Meeting) [hereinafter Motion of James M. Beck] (same).

45. *See supra* note 44; *see also* TD 3, *supra* note 2, at 43–44 (listing nineteen states as rejecting or appearing to reject medical monitoring absent present injury).

46. *See supra* notes 42–44 (listing jurisdictions with unclear or no apparent case law).

47. *See* Mark A. Behrens & Christopher E. Appel, *American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement*, 87 DEF. COUNSEL J. 1, 6 (Oct. 2020).

48. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443 (1997) (rejecting medical monitoring cause of action for claims brought under the Federal Employers' Liability Act (FELA)).

49. *See supra* note 29 and accompanying text.

monitoring remedy absent present physical injury, most appear to award monitoring costs as an element of damages for an existing tort.⁵⁰

Another fundamental concern reiterated throughout the rule's development is the lack of a trend in the common law to recognize a medical monitoring remedy.⁵¹ To the extent a trend can be discerned, it is *against* the adoption of such claims since the U.S. Supreme Court's 1997 opinion in *Metro-North Commuter R.R. Co. v. Buckley*.⁵² In *Buckley*, the Court rejected a proposed medical monitoring remedy as a matter of federal common law under the Federal Employers' Liability Act, a tort-based remedy for occupationally injured railroad workers that serves as a substitute for state worker's compensation law.⁵³ The decision marked an inflection point in medical monitoring jurisprudence because several state high courts had authorized asymptomatic claimants to recover medical monitoring during the preceding decade.⁵⁴ After *Buckley*, most state high courts to consider the issue—including each of the three state high courts to decide the issue since 2020—have rejected such claims.⁵⁵ These courts have relied upon public policy considerations detailed by the U.S. Supreme

50. See Behrens & Appel, *supra* note 47, at 6; see also *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 76 (Md. 2013) (“[O]ur sister jurisdictions that allow recovery for medical monitoring, more often than not, allow such recovery as a remedy, rather than as an independent cause of action.”).

51. See Oct. 2022 Letter from ALI Council Member Beisner, *supra* note 38, at 5; 2022 Letter from Emeritus ALI Council Member Birnbaum, *supra* note 38, at 4.

52. 521 U.S. 424 (1997).

53. *Id.* at 443–45.

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

55. See *Baker v. Croda Inc.*, 304 A.3d 191 (Del. 2023); *Brown v. Saint-Gobain Performance Plastics Corp.*, 300 A.3d 949 (N.H. 2023); *Berry v. City of Chicago*, 181 N.E.3d 679 (Ill. 2020); *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013); *Lowe v. Philip Morris USA, Inc.*, 183 P.2d 181 (Or. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Hinton v. Monsanto*, 813 So. 2d 827 (Ala. 2001); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001); see also *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008) (limiting effect of earlier ruling allowing medical monitoring). Post-*Buckley* decisions adopting a medical monitoring cause of action include *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891 (Mass. 2009) (cause of action for subcellular changes); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717–18 (Mo. 2007); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999); see also 12 Vt. Stat. Ann. § 7202; cf. *Sadler v. PacifiCare of Nev., Inc.*, 340 P.3d 1264, 1272 (Nev. 2014) (item of damages); *Exxon Mobil Corp. v. Albright*, 71 A.3d 30 (Md. 2013) (same).

Court for exposures ranging from chemicals and toxins⁵⁶ to cigarette smoke,⁵⁷ prescription drugs,⁵⁸ and various types of water contamination.⁵⁹

Further, regardless of any post-*Buckley* trend, the sharp case law divide alone counsels against the ALI adopting a restatement rule that endorses a medical monitoring cause of action or remedy for the unimpaired. There are numerous examples where the ALI has declined to adopt a rule in the face of divided case law and the absence of a trend toward one position.⁶⁰ The ALI's rationale for pressing ahead on medical monitoring is that a purported middle ground approach could ameliorate the policy concerns raised by courts that have rejected medical monitoring claims.⁶¹ The flaw in this rationale, however, is that there is no middle ground: unimpaired claimants either are permitted to obtain a tort recovery or they are not.

The Restatement Reporters set out to chart a middle path where courts have not done so by borrowing limiting elements and concepts from case law to piece together a tailored medical monitoring rule. For example, the initial proposed rule sought to address the U.S. Supreme Court's concern in *Buckley* that allowing lawsuits by unimpaired claimants could lead to "unlimited and unpredictable liability"⁶² by providing as an express element of the proposed tort action that a medical monitoring claim is only available when "the actor's liability is not indeterminate."⁶³ Subsequent versions of the proposed rule tried to capture this abstract concept by modifying the element to say that the actor's liability must be "neither wholly indeterminate nor overwhelming."⁶⁴ Although well-intentioned as a limiting principle, no court has articulated such an element of a medical monitoring claim.

56. See *Baker*, 304 A.3d 191, 194–97 (discussing *Buckley*); *Hinton*, 813 So. 2d at 830–31 (same); *Paz*, 949 So. 2d at 53–58 (same).

57. See *Caronia*, 5 N.E.3d at 18 (discussing *Buckley*); see also *Lowe*, 183 P.2d at 181.

58. See *Wood*, 82 S.W.3d at 857–58 (discussing *Buckley*); see also *Sinclair*, 948 A.2d at 587.

59. See *Henry*, 701 N.W.2d at 695–96 (discussing *Buckley*); *Berry*, 181 N.E.3d at 679 (citing *Buckley*).

60. An example discussed during the Restatement's development was the ALI's treatment of joint and several liability, in which the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (AM. L. INST. 2000) restated separate rules for jurisdictions with respect to joint and several liability. This approach allowed the ALI to examine the contours of each rule in light of sharply divided case law while remaining neutral with respect to endorsing a particular view. See 2020 Letter from ALI Members Schwartz & Appel, *supra* note 33, at 2.

61. PD 1, *supra* note 27 and accompanying text.

62. 521 U.S. at 433.

63. PD 1, *supra* note 27, at 81.

64. RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS, at 369 (unnumbered section) (AM. L. INST., Preliminary Draft No. 2, 2021) [hereinafter PD 2].

Other versions of the proposed medical monitoring rule similarly displayed futile attempts to chart a middle ground approach supported by case law. At various times, even after years of development, the proposed tort claim included as many as five elements and as few as two.⁶⁵ Some iterations of the proposed rule would have added a requirement that monies for medical monitoring cannot be awarded if the cost of the relevant diagnostic testing has, or will be, borne by the claimant's insurance or a government fund such as Medicare or Medicaid.⁶⁶ Ultimately, this proposed element, as with the element directed at curbing "indeterminate" liability—provisions the Reporters conceded were "indeed quite novel"⁶⁷—were abandoned.

That the ALI seriously considered such elements for a restatement rule in spite of their lack of support, all in an effort to manufacture a medical monitoring rule that could credibly be called a middle ground approach, is telling. It suggests the precise means of restating a medical monitoring rule may have been less important than the end result of the ALI endorsing *an* approach that would allow unimpaired claimants access to the tort system. But the restatement process, at least historically, has relied on case law and trends to inform the "specific rule [that] fits best with the broader body of law and therefore leads to more coherence in the law."⁶⁸ It is not supposed to start from a predetermined position and work backwards by fashioning novel elements to devise a new rule for courts to adopt.

B. The Proposed Medical Monitoring Rule Debated by the Full ALI Membership

The ALI membership considered a medical monitoring rule at the ALI's 2023 Annual Meeting, but did not finish the discussion or vote on the proposal during the allotted time, even though virtually the entire debate on the Miscellaneous Provisions Restatement was devoted to this provision. The following rule was proposed:

65. Compare RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS, at 372 (unnumbered section) (AM. L. INST., Preliminary Draft No. 3, 2022) [hereinafter PD 3] (five elements), with 2023 Memorandum from Nora Freeman Engstrom and Michael D. Green, *supra* note 27 (two elements).

66. See PD 2, *supra* note 64, at 369, 375 cmt. h.

67. 2023 Memorandum from Nora Freeman Engstrom & Michael D. Green, *supra* note 27, at i.

68. ALI STYLE MANUAL, *supra* note 12, at 53–56.

§ __. Medical monitoring

An actor is subject to liability for the expenses of medical monitoring, even absent manifestation of present bodily harm, if all of the following requirements are satisfied:

- (1) the actor has exposed a person or persons to a significantly increased risk of serious future bodily harm;
- (2) the actor, in exposing the person or persons to a significantly increased risk of serious future bodily harm, has acted tortiously, the tortious conduct is a factual cause of the person's need for medical monitoring, and the monitoring is within the actor's scope of liability;
- (3) a monitoring regime exists that makes expedited detection and treatment of the future bodily harm both possible and beneficial;
- (4) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and
- (5) the prescribed monitoring regime is reasonably necessary, according to generally accepted contemporary medical practices, to prevent or mitigate the future bodily harm.⁶⁹

Similar to earlier drafts, the proposal was characterized as “endeavor[ing] to chart a middle and sensible path” to allow uninjured claimants to recover medical monitoring costs.⁷⁰ A Comment supporting the rule states that although “there is some disagreement as to the particulars” in the jurisdictions that have allowed recovery, the rule “ensures that medical monitoring is available only in an appropriately narrow range of circumstances.”⁷¹ Accordingly, a Comment describes the rule as “following the lead of those courts that have imposed meaningful limits.”⁷²

The proposed rule and its supporting comments provide some modest improvements on flaws identified in earlier versions of the provision, yet they do not address some of the proposal's novel features. The proposed rule also does not resolve, or in some instances even acknowledge, the thorny, most consequential issues associated with allowing unimpaired claimants access to the tort system.

A revised Comment to the proposed rule more accurately states that of the jurisdictions that have “squarely considered” recognition of medical monitoring claims absent physical injury, “approximately half endorse

69. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS, at 30 (unnumbered section) (AM. L. INST., Tentative Draft No. 2, 2023) [hereinafter TD 2].

70. *Id.* at 31 cmt. b.

71. *Id.*

72. *Id.*

medical monitoring, while approximately half do not.”⁷³ Even that revised case law description, though, remains a hotly debated topic.⁷⁴ The same Comment also continues to disclaim any “clear trend either for or against acceptance” of medical monitoring for the unimpaired,⁷⁵ which may discount the more frequent judicial reliance on the U.S. Supreme Court’s decision in *Buckley* rejecting medical monitoring absent present injury.⁷⁶

The revised rule also dispenses with endorsing the extreme minority approach of a “freestanding” tort cause of action in favor of endorsing “[w]hichever conceptual approach” a court prefers that will allow unimpaired claimants to recover medical monitoring costs.⁷⁷ As a Comment explains, “[s]ome courts characterize medical monitoring claims as stand-alone causes of action” while others “characterize medical monitoring claims as remedies,” and the Restatement “takes no position as to which approach is preferable.”⁷⁸ The Comment acknowledges that the selection of a particular approach may have implications regarding issues such as jury instructions or class action certification, but does not endeavor to clarify the “better” common law rule.⁷⁹ Rather, the Restatement treats its failure to articulate the basic nature of the tort claim—*i.e.*, whether a claim constitutes a cause of action or a remedy for an existing action—as one of the many “disagreement[s] as to the particulars” for courts to solve on their own.⁸⁰

Another particular the proposed rule identifies is whether medical monitoring is limited to toxic exposures or is available for other claims.⁸¹ Here, the proposed Restatement takes a clear position, stating a plaintiff asserting a medical monitoring claim “need not show that the defendant has exposed the plaintiff to a toxic or hazardous agent.”⁸² “What matters,” a Comment explains, is only that “tortious conduct subjects the plaintiff to a significantly increased risk of serious future bodily harm.”⁸³ In adopting this position, however, the Restatement places itself at odds with jurisdictions used to support the proposed rule that have expressly limited

73. *Id.* at 30 cmt. b.

74. *See supra* notes 42–44 and accompanying text.

75. TD 2, *supra* note 69, at 30.

76. *See supra* note 52 and accompanying text.

77. TD 2, *supra* note 69, at 39–40 cmt. k.

78. *Id.*

79. ALI STYLE MANUAL, *supra* note 12, at 7.

80. TD 2, *supra* note 69, at 31 cmt. b.

81. *See id.* at 34 cmt. e.

82. *Id.*

83. *Id.* at 35.

the scope of medical monitoring recoveries to toxic exposure cases.⁸⁴ This approach also moves the Restatement rule further away from a purported middle ground by endorsing a broad remedy.

Notwithstanding these particulars, the rule discussed at the ALI's 2023 Annual Meeting includes several provisions intended to limit the scope of the proposed remedy to address certain concerns. Perhaps most notably, the rule provides that medical monitoring is available only to individuals "exposed to a significantly increased risk of serious bodily harm," as distinguished from lower thresholds adopted by some courts.⁸⁵ This "significance" requirement serves to preclude recovery where an individual is exposed to a *de minimis* or inconsequential increased risk of future injury.⁸⁶ A Comment explains that "[n]o particular level of quantification is necessary to satisfy this 'significance' requirement" and posits that "a doubling or tripling of risk is properly considered 'insignificant' if . . . the probability of the occurrence remains minuscule."⁸⁷ These statements, however, are undercut by the Restatement's inclusion of an illustration in which a chemical exposure increases an individual's risk of cancer from 0.8% to 2%, a 1.2% increase the Restatement describes as "well above the threshold" needed to create an issue for a factfinder.⁸⁸

The requirement that increased risk pertain to "serious bodily harm" provides a less ambiguous limit on the scope of the proposed remedy. A Comment states that bodily harm is serious when it "may result in significant impairment or death."⁸⁹ The Restatement provides an illustration where no recovery of medical monitoring expenses would be allowed for an individual's potentially significantly increased risk of male pattern baldness because the condition is not sufficiently "serious."⁹⁰

The scope of the proposed rule is additionally limited by requirements that "a monitoring regime[n] exists that makes expedited detection and treatment of the future bodily harm both possible and beneficial," that it is "different from that normally recommended in the absence of the exposure," and that it is "reasonably necessary . . . to prevent or mitigate the

84. See *infra* note 110 and accompanying text; see also Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712, 717–18 (Mo. 2007); Ratliff v. Mentor Corp., 569 F. Supp. 2d 926, 928–29 (W.D. Mo. 2008) (noting that "*Meyer* does not support medical monitoring claims in garden variety products liability cases").

85. TD 2, *supra* note 69, at 35 cmt. f.

86. *Id.*

87. *Id.*

88. *Id.* at 36 illus. 3.

89. *Id.* at 35.

90. See *id.* at 36–37 illus. 6.

future bodily harm.”⁹¹ Collectively, these provisions stand for the unremarkable proposition that courts should not order a proposed monitoring regimen of little or no value; a somewhat self-evident limitation for any tort remedy, albeit one courts have not always made explicit.⁹²

Another limitation, added to the rule’s Comment shortly before the 2023 ALI Annual Meeting, endorses the establishment of a court-administered fund to oversee medical monitoring payments.⁹³ Previous drafts provided a tepid endorsement of a court-administered fund as an optional “preferred approach” courts might take in contrast with “lump-sum payments” to prevailing claimants with no oversight over how the awards are spent.⁹⁴ The Restatement’s belated endorsement of a mandatory fund (except in unspecified “exceptional circumstances”) helps ensure “the defendant pays no more than actually necessary to defray the costs of reasonable and necessary medical monitoring”⁹⁵ and responds to situations in which successful claimants have not used medical monitoring awards for monitoring purposes.⁹⁶ As commenters have explained with respect to lump-sum payments,

The incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible. The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation.⁹⁷

A Comment to the proposed rule further identifies *optional* “additional steps” courts might adopt “to more tightly control a defendant’s liability for medical monitoring.”⁹⁸ These suggestions repurpose ideas previously included as requirements in the proposed rule but jettisoned given their lack of case law support. The Comment posits that a court might modify the traditional application of the collateral source rule to foreclose a defendant’s liability for monitoring costs that have been, or will be fully

91. *Id.* at 30 (quoting rule subsections (3)–(5)).

92. *See* Schwartz & Appel, *supra* note 3, at 18–21 (discussing different approaches taken by courts regarding medical monitoring and some minimum reasonable steps that can help cabin unsound liability).

93. *See* TD 2, *supra* note 69, at 41 cmt. n.

94. *Compare* PD 3, *supra* note 65, at 188 cmt. n, *with* TD 2, *supra* note 69, at 41 cmt. n.

95. *See* TD 2, *supra* note 69, at 41 cmt. n.

96. *See* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer Ex Rel. Coplin v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135, 154–56 (2007) (discussing case examples where claimants who received lump sum monitoring awards did not use award for monitoring purposes).

97. 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, 540–41 (2000).

98. TD 2, *supra* note 69, at 39 cmt. j.

borne, by the plaintiff's insurer, employer, or a government fund.⁹⁹ It also suggests a court "may hold that a defendant whose conduct exposes a vast number of people to risk-creating agents or behaviors is not subject to liability for medical monitoring if the defendant" can demonstrate "that the imposition of liability would be wholly indeterminate and virtually unlimited or, alternatively, if the defendant is able to show that liability would so far diminish the defendant's resources and insurance coverage as to significantly jeopardize eventual recovery by those exposed persons who ultimately develop bodily harm."¹⁰⁰ In other words, the Comment suggests courts might adopt a rule in which the more widespread the potential universe of claimants, the greater the potential for that defendant to be excused from liability altogether. Although the Comment acknowledges such limitations are not "well supported in existing case law"¹⁰¹—or at all for that matter¹⁰²—their inclusion may do more to show how the proposed rule is straining to arrive at a purported middle ground.

So, how does the revised proposed rule comport with existing common law in the minority of jurisdictions that authorize a recovery for unimpaired medical monitoring claimants? As part of the Restatement's development and approval process, ALI Council member John H. Beisner went through the painstaking exercise of analyzing the "particulars" of each jurisdiction's treatment of medical monitoring.¹⁰³ His initial survey found that the proposed rule resembled the law of only Florida, Pennsylvania, and West Virginia.¹⁰⁴ According to this analysis:

The remainder of the states vary considerably with regard to such fundamental questions as: (1) whether medical monitoring is recognized in any form; (2) if so, whether it is an independent claim or remedy; (3) whether medical monitoring is cognizable absent present physical injury and, if so, whether that requirement can be satisfied by a showing of subcellular damage; (4) what are the relative risk considerations (i.e., to what extent must the exposure increase the plaintiff's risk of developing the disease); (5) whether a plaintiff must demonstrate the existence of a treatment that can alter the course of the illness; and (6) whether medical monitoring is limited to environmental exposure cases?¹⁰⁵

99. *See id.*

100. *Id.*

101. *Id.*

102. *See* 2023 Memorandum from Nora Freeman Engstrom & Michael D. Green, *supra* note 27, at 1 (recognizing that such provisions would be "quite novel"); *see also supra* notes 62–67 and accompanying text.

103. *See* Oct. 2022 Letter from ALI Council Member Beisner, *supra* note 38, at 6–25.

104. *See id.* at 25.

105. *Id.*

The analysis submitted that these substantial state law variations demonstrate the “impossibility” of a cohesive restatement of common law on the topic of medical monitoring, a consideration that threatens to undermine the ALI’s credibility and feed into criticisms that modern restatements are “far more devoted to crafting new law than to accurately restating existing law.”¹⁰⁶

In the lead up to the 2023 Annual Meeting, Mr. Beisner and ALI member James M. Beck each supplemented that initial case law survey with motions seeking to amend the proposed Restatement rule.¹⁰⁷ They found that twenty-eight jurisdictions have rejected no-injury medical monitoring claims versus fourteen that have adopted the concept in some form.¹⁰⁸ More importantly, they found that the proposed Restatement rule does not actually restate the law of *any* jurisdiction.¹⁰⁹ Mr. Beisner refined his earlier determination that the proposed rule resembled the law of Florida, Pennsylvania, and West Virginia by recognizing that each of these states provides more limited relief than the proposed Restatement rule. For example, these states require medical monitoring claimants to demonstrate exposure “to a proven hazardous substance,”¹¹⁰ which stands at odds with the broader proposed application of the Restatement rule to any risk-increasing tortious conduct.¹¹¹

The conclusion by ALI members Beisner and Beck that the Restatement proposes a novel medical monitoring rule undercuts the ALI’s unambiguous Style Manual instruction that restatements set forth “clear formulations of common law . . . as it presently stands or might

106. *Id.* at 25-26.

107. *See* Motion of John H. Beisner, *supra* note 44, at 7–22; Motion of James M. Beck, *supra* note 44, at 4–20. The ALI membership rejected these motions, and several other motions by ALI members, seeking substantive changes to the proposed medical monitoring provision. The membership ran out of time to consider all motions filed in advance of the Annual Meeting.

108. *See id.*

109. *See id.*

110. The Pennsylvania and West Virginia high courts, and the Florida Court of Appeals, have set forth the specific elements for a medical monitoring claim. *See* *Redland Soccer Club, Inc., v. Dep’t of the Army*, 696 A.2d 137, 145–46 (Pa. 1997) (identifying seven elements for a medical monitoring claim, including tortious exposure “to a proven hazardous substance”); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432–33 (W. Va. 1999) (identifying six elements, including tortious exposure “to a proven hazardous substance”); *Petito v. A.H. Robins Co. Inc.*, 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999) (identifying seven elements, including tortious exposure “to a proven hazardous substance”); *see also* *Walter v. Magee-Womens Hosp. of UPMC Health Sys.*, 876 A.2d 400, 405 (Pa. Super. Ct. 2005) (rejecting medical monitoring claim by patients against hospital alleging negligence in reviewing Pap smear reports because patients failed to demonstrate they were exposed to a hazardous substance).

111. *See* TD 2, *supra* note 69, at 34 cmt. e (stating that “a plaintiff need not show that the defendant has exposed the plaintiff to a toxic or hazardous agent”).

appropriately be stated by a court.”¹¹² That said, the proposed rule does not seek “to make major innovations in matters of public policy” or recommend “[w]ild swings” that have no basis in common law.¹¹³ Rather, the proposed rule offers a novel take on a distinct minority approach in line with what at least some courts have adopted.¹¹⁴

In early 2024, the Restatement Reporters made further revisions to the proposed medical monitoring rule. Some of the proposed changes, which at the time of this writing have not been considered by either the ALI Council or membership, appear designed to tighten the language of the proposed rule without substantively changing the rule’s endorsement of medical monitoring claims by the unimpaired.¹¹⁵ Added commentary to the version of the medical monitoring rule scheduled to be considered at the ALI’s 2024 Annual Meeting dismisses or downplays concerns that the proposed rule “will open the floodgates to liability.”¹¹⁶ Additional comments also take issue with the characterization of the rule as authorizing so-called “no-injury” medical monitoring claims.¹¹⁷ This proposed final version of this novel take on a minority rule will likely be voted on at the 2024 Annual Meeting.

As discussed in Part II, restatements may endorse a minority approach provided they explain the rationale for that purported “better rule.”¹¹⁸ The question then, and topic of the next section, is whether allowing medical monitoring absent a present injury is the “better rule.”

IV. MEDICAL MONITORING PUBLIC POLICY CONSIDERATIONS

For more than 200 years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has sustained an injury.¹¹⁹ This bright-line rule exists to (1) prevent a flood of claims after an exposure that are either unripe (because the plaintiff is not sick yet) or

112. ALI STYLE MANUAL, *supra* note 12, at 3.

113. *Id.* at 6.

114. For example, according to ALI member James Beck’s case law survey, only Nevada allows no-injury medical monitoring beyond the context of toxic exposure cases. *See* Motion of James M. Beck, *supra* note 44, at 2.

115. *See* REVISED MEDICAL MONITORING RULE (AM. L. INST., Preliminary Draft No. 1, 2024) (unpublished) (on file with authors).

116. *See* TD 3, *supra* note 2. This draft was issued as this article was being finalized for publication.

117. *Id.* at 11–12 cmt. j.

118. ALI STYLE MANUAL, *supra* note 12, at 7.

119. *See* WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS § 54, at 330–33 (4th ed. 1971); *see also* W. PAGE KEETON ET AL., THE LAW OF TORTS § 30, at 165 (5th ed. 1984) (“The threat of future harm, not yet realized, is not enough.”) (footnote omitted).

meritless (because the plaintiff will never become sick); (2) provide faster access to courts for those with “reliable and serious” claims,¹²⁰ and (3) ensure that defendants are held liable only for objectively verifiable, genuine harm. Medical monitoring cases brought by asymptomatic plaintiffs propose to abandon the present injury requirement by permitting recovery based on the mere possibility of a future injury.

In *Buckley*, the U.S. Supreme Court recognized the physical injury requirement as a mainstay of common law and closely considered the policy concerns that weigh against adoption of a medical monitoring cause of action.¹²¹ The Court appreciated that “tens of millions of individuals” could justify “some form of substance-exposure-related medical monitoring.”¹²² Defendants could be subjected to unlimited liability and a “flood of less important cases” that would drain the pool of resources available for meritorious claims by plaintiffs with serious injuries.¹²³ The Court rejected the argument that medical monitoring awards do not impose substantial costs, explaining how even modest annual monitoring costs can add up to significant sums over time, especially where claimants assert the need for lifetime monitoring.¹²⁴ In addition, the Court expressed concern that allowing medical monitoring claims could create double recoveries because alternative sources of monitoring are often available, such as employer-provided health plans.¹²⁵

The Court further acknowledged practical difficulties inherent in any judicial effort to “redefine ‘physical impact’ in terms of a rule that turned on . . . [the] nature of a contact that amounted to an exposure, whether to contaminated water, or to germ-laden air, or to carcinogen-containing substances.”¹²⁶ These concerns include the difficulty in identifying which monitoring costs exceed the preventive medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each

120. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997).

121. *See id.*

122. *Id.* at 442.

123. *Id.*

124. *See id.*

125. *See id.* at 443–44; *see also* Maskin et al., *supra* note 97, at 528 (noting that medical monitoring “may be an extremely redundant remedy for those who already have health insurance”); Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 *MISS. L.J.* 1, 23 (2001) (emphasizing that “medical monitoring awards are often totally unnecessary,” “[m]ost workers today already receive access to medical check-ups through a health plan” and a “tort award would simply provide a windfall recovery”).

126. *Buckley*, 521 U.S. at 437.

plaintiff's unique medical needs.¹²⁷ All of these considerations, the Court concluded, supported rejecting a “new, full-blown, tort law cause of action.”¹²⁸

As indicated, since *Buckley*, most state high courts to consider the issue of medical monitoring for the unimpaired have rejected such claims. They have found the Court's reasoning persuasive and provided other rationales for rejecting medical monitoring absent present injury.

The Alabama Supreme Court, in *Hinton v. Monsanto Co.*,¹²⁹ rejected a medical monitoring claim brought by a claimant exposed to a toxin allegedly released into the environment because of the absence of a “manifest, present injury.”¹³⁰ 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”—a voyage on which the court was “unprepared to embark.”¹³¹ The court concluded, “we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiff's] concerns about what might occur in the future That law provides no redress for a plaintiff who has no present injury or illness.”¹³²

The Kentucky Supreme Court rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*,¹³³ where plaintiffs sought a court-supervised medical monitoring fund to detect the possible onset of primary pulmonary hypertension from ingesting the “Fen-Phen” diet drug combination. “To find otherwise,” the court stated, “would force us to stretch the limits of logic and ignore a long line of legal precedent.”¹³⁴ The court concluded, “[t]raditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles.”¹³⁵

The Michigan Supreme Court, in *Henry v. Dow Chemical Co.*,¹³⁶ rejected a request to establish a medical screening program for possible negative effects from dioxin exposure. The court concluded that a medical monitoring cause of action would “depart[] drastically from [the]

127. *See id.* at 441–42.

128. *Id.* at 443.

129. 813 So. 2d 827 (Ala. 2001).

130. *Id.* at 829.

131. *Id.* at 830.

132. *Id.* at 831–32.

133. 82 S.W.3d 849 (Ky. 2002).

134. *Id.* at 853–54.

135. *Id.* at 859.

136. 701 N.W.2d 684 (Mich. 2005).

traditional notions of a valid negligence claim” and that “judicial recognition of plaintiffs’ claim may also have undesirable effects that neither [the court] nor the parties can satisfactorily predict.”¹³⁷ The court further opined that this type of claim would “drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care,” and questioned whether purported benefits of allowing a remedy “would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial system, and those responsible for administering and financing medical care.”¹³⁸

The Mississippi Supreme Court rejected medical monitoring in *Paz v. Brush Engineered Materials, Inc.*,¹³⁹ where a class of workers exposed to beryllium sought the establishment of a medical monitoring fund. The court held: “The possibility of a future injury is insufficient to maintain a tort claim,” and “it would be contrary to current Mississippi law to recognize a claim for medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure.”¹⁴⁰

The Oregon Supreme Court, in *Lowe v. Philip Morris USA, Inc.*,¹⁴¹ held that a smoker’s allegation that her accumulated exposure to cigarette smoke required her to undergo periodic medical monitoring was insufficient to give rise to a claim. The court held that “negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence.”¹⁴²

The New Jersey Supreme Court, in *Sinclair v. Merck & Co.*,¹⁴³ rejected medical monitoring for a proposed national class of individuals who ingested the prescription drug Vioxx. The court held that the definition of “harm” under New Jersey’s Products Liability Act did not include the remedy of medical monitoring when no manifest injury is alleged.¹⁴⁴

New York’s highest court rejected a medical monitoring cause of action in *Caronia v. Philip Morris USA, Inc.*,¹⁴⁵ where current and former smokers sought the establishment of a program to monitor for smoking-related disease. The court explained that the “physical harm requirement

137. *Id.* at 694.

138. *Id.* at 694–95.

139. 949 So. 2d 1 (Miss. 2007).

140. *Id.* at 5.

141. 183 P.3d 181 (Or. 2008).

142. *Id.* at 187.

143. 948 A.2d 587 (N.J. 2008).

144. *See id.* at 588–89.

145. 5 N.E.3d 11 (N.Y. 2013).

serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims.”¹⁴⁶ The court reasoned, because it “is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure.”¹⁴⁷ The court further highlighted the challenges and lack of framework for implementing a medical monitoring program, “including the costs of implementation and the burden on the courts in adjudicating such claims.”¹⁴⁸

The Illinois Supreme Court, in *Berry v. City of Chicago*,¹⁴⁹ dismissed a proposed class action against the City of Chicago on behalf of all city residents seeking the establishment of a trust fund to monitor for potential injuries related to lead exposure from the city’s antiquated water lines. The court said, “an increased risk of harm is not an injury.”¹⁵⁰ It also acknowledged the “practical reasons for requiring a showing of actual or realized harm before permitting recovery in tort,” including that “such a requirement establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability.”¹⁵¹

In 2023, the New Hampshire Supreme Court, in *Brown v. Saint-Gobain Performance Plastics Corp.*,¹⁵² rejected a medical monitoring remedy for plaintiffs alleging exposure to perfluorooctanoic acid (PFOA) released by a manufacturing facility. The court stated that the “mere existence of an increased risk of future development of disease is not sufficient under New Hampshire law to constitute a legal injury for

146. *Id.* at 14.

147. *Id.* at 18.

148. *Id.* Some courts interpreting *Caronia* have allowed medical monitoring as consequential damages associated with a separate tort. *See, e.g.,* *Ivory v. Int’l Bus. Machs. Corp.*, 983 N.Y.S.2d 110, 118 (N.Y. App. Div. 2014). *But see* *Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 508 (2d Cir. 2020) (casting doubt on such interpretations). The Restatement’s state law Appendix, relying on lower state court and federal cases, categorizes New York as a jurisdiction authorizing medical monitoring, but with the caveat that a plaintiff is required to submit proof of cellular, subcellular, or subclinical injury or the clinically demonstrable presence of toxins in the bloodstream. *See* TD 3, *supra* note 2, at 42 (Appendix).

149. 181 N.E.3d 679 (Ill. 2020).

150. *Id.* at 689.

151. *Id.* at 688.

152. 300 A.3d 949 (N.H. 2023).

purposes of stating a claim for the costs of medical monitoring as a remedy or as a cause of action in the context of plaintiffs who were exposed to a toxic substance but have no present physical injury.”¹⁵³

Most recently, the Delaware Supreme Court, in *Baker v. Croda, Inc.*,¹⁵⁴ rejected a medical monitoring remedy for plaintiffs alleging exposure to ethylene oxide released by a chemical plant. The court stated that “an increased risk of illness without present manifestation of a physical harm is not a cognizable injury under Delaware law.”¹⁵⁵ “To hold otherwise,” the court explained, “would constitute a significant shift in our tort jurisprudence” with “far reaching” policy implications.¹⁵⁶ The court discussed the policy considerations expressed by the U.S. Supreme Court in *Buckley*, finding the “reality 26 years later remains much the same, and courts have rightfully expressed concern that recognizing an increased risk of illness, without more, as a cognizable injury could open the floodgates to ‘endless and limitless’ litigation.”¹⁵⁷ The court also reiterated that “[d]ispensing with the physical injury requirement could . . . diminish resources that are presently used for those who have suffered physical injury.”¹⁵⁸

To summarize, policies articulated by the U.S. Supreme Court and other state high courts against recognition of medical monitoring claims by the unimpaired include: (1) preventing an influx of claims that are either unripe or meritless; (2) providing faster access to courts for those with reliable and serious claims; (3) ensuring defendants are held liable only for objectively verifiable, genuine harm; (4) preserving financial resources to promote full compensation to those who are or become sick (and averting inequitable payments of money to the non-sick); (5) reducing the threat of unlimited and unpredictable liability; (6) avoiding double recoveries where alternative sources of monitoring are available; (7) maintaining a bright-line rule and workable standard for judges and juries to apply; (8) foreclosing a need to overhaul or re-write a state’s tort rules; (9) intruding on the legislature’s policy setting function; and (10) burdening the judiciary with respect to the design, implementation, and administration of medical monitoring systems.¹⁵⁹

153. *Id.* at 952.

154. 304 A.3d 191 (Del. 2023).

155. *Id.* at 192.

156. *Id.* at 196.

157. *Id.*

158. *Id.* at 196–97.

159. *See supra* notes 119–158 and accompanying text.

The Restatement's proposed rule, by comparison, articulates five reasons why courts should allow medical monitoring claims by the unimpaired: (1) "medical monitoring fosters access to beneficial diagnostic testing, which, in turn, promotes cost savings traceable to the early detection and timely treatment of disease"; (2) "shifting the cost of harm (here, in the form of reasonable and necessary monitoring) to the tortfeasor furthers tort's twin aims of compensation and deterrence"; (3) furtherance of the tort doctrine of avoidable consequences by "transferring the cost of certain necessary testing to the tortfeasor"; (4) greater consistency with the "pure" economic loss principles set forth in the Restatement of Torts, Third: Liability for Economic Harm; and (5) greater consistency with the Restatement (Second) of Torts definition of "injury" as "the invasion of any legally protected interest of another."¹⁶⁰

Of these proffered rationales, only the first three relate to public policy considerations. Promoting greater consistency with other ALI restatement provisions, generally speaking, is unlikely to be of concern to courts, especially where the referenced provisions have not been formally adopted as part of that state's common law. The Restatement's first stated reason provides a legitimate policy consideration for courts weighing adoption of medical monitoring absent present injury. Monitoring for disease (or any ailment) carries a *potential* to lead to earlier detection and, in turn, more timely treatment, particularly if the alternative is doing nothing. Such monitoring, of course, also carries a *potential*—and typically a far greater potential—of doing nothing where no injury ever manifests.

Further, while making a tortfeasor pay for harm it caused comports with tort law's goals of compensation and deterrence, medical monitoring does not seek payment for harm that has been caused in the traditional sense. Medical monitoring for asymptomatic claimants seeks payment for an increased risk of harm based on exposure to a substance or other conduct that is only *potentially harmful*. It represents a more attenuated remedy than tortious conduct that causes bodily harm, and one that should be weighed against the competing public policies discussed.

The Restatement's third policy reason that authorizing medical monitoring absent present injury furthers the tort doctrine of avoidable consequences by transferring testing costs to a tortfeasor appears to implicate the same general tort law aim of having a tortfeasor provide compensation rather than a blameless party. Perhaps because of this duplication, courts do not appear to have discussed this policy rationale in

160. TD 2, *supra* note 69, 32–34 cmt. b (quoting RESTATEMENT (SECOND) OF TORTS § 7 (AM. L. INST. 1965)).

either adopting or rejecting medical monitoring, and indeed, the Restatement's Reporters' Notes do not identify any case law discussing this rationale in the context of a medical monitoring claim by an unimpaired plaintiff.¹⁶¹

In light of the competing policies, the Restatement's path endeavors to ameliorate the concerns articulated by courts that have rejected medical monitoring absent present injury. As discussed, the proposed rule endorses a remedy to those exposed to a "significantly increased risk of serious bodily harm" where a "reasonably necessary" medical monitoring regimen different from "normally recommended" monitoring "exists that makes expedited detection and treatment of the future bodily harm both possible and beneficial."¹⁶² This approach, however, does not meaningfully address many of the fundamental concerns expressed by courts, especially the practical concerns inherent in implementing and administering medical monitoring systems.

Specifically, nothing in the proposed rule would prevent mass filings by unimpaired individuals that may exhaust resources needed to compensate those who are or will become sick. Instead of addressing this fundamental issue, the Restatement resorts to proposing in a Comment the optional step courts might take of fashioning a novel affirmative defense where a defendant is able to show that the imposition of liability would be "wholly indeterminate and virtually unlimited" or that it would drain the defendant's resources to the point of jeopardizing the "eventual recovery by those exposed persons who ultimately develop bodily harm."¹⁶³ How a defendant might make such a showing and its effect are not addressed. The only guidance the proposed Restatement provides is that a class action involving numerous plaintiffs "may be relevant to this inquiry," guidance which is immediately undercut in the same Comment with the caveat that "the fact that plaintiffs are seeking medical monitoring on a class-wide basis would not be determinative" of potentially unbounded liability.¹⁶⁴

As courts have appreciated, a medical monitoring remedy for the unimpaired fosters potentially unbounded litigation given the "reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis."¹⁶⁵ For example, according to the Environmental Protection Agency, around 73 million people, or roughly twenty-two percent of the U.S. population, live within

161. *See id.* at 46–47 Reporters' Note a (discussing avoidable consequences doctrine).

162. *Id.* at 30.

163. *Id.* at 39 cmt. j.

164. *Id.*

165. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 696 n.15 (Mich. 2005).

three miles of a Superfund site.¹⁶⁶ There is a potentially limitless number of products or materials that could be argued warrant medical monitoring relief,¹⁶⁷ and the Restatement proposes courts extend that scope beyond hazardous exposures.¹⁶⁸

As the Texas Supreme Court observed, “[i]f recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk.”¹⁶⁹ As a result, the truly injured could be adversely impacted by the diversion of resources to the non-sick. As one court rejecting medical monitoring summarized,

There is little doubt that millions of people have suffered exposure to hazardous substances There must be a realization that such defendants’ pockets or bank accounts do not contain infinite resources. Allowing today’s generation of exposed but uninjured plaintiffs to recover may lead to tomorrow’s generation of exposed and injured plaintiff’s [sic] being remediless.¹⁷⁰

The asbestos litigation provides an example. Asbestos-related liabilities have bankrupted over 140 companies, so far,¹⁷¹ shows little sign of abating, and may last several more decades.¹⁷² If the remaining available resources are directed to medical monitoring of the “[t]ens of millions of Americans [who] were exposed to asbestos in the workplace over the past several decades,” the result could be devastating for courts, defendants, and deserving claimants with injuries.¹⁷³

166. See U.S. ENV’T. PROT. AGENCY, OFF. LAND AND EMERGENCY MGMT., OFF. COMM’NS, P’SHPIS, AND ANALYSIS, POPULATION SURROUNDING 1,857 SUPERFUND REMEDIAL SITES (updated Sept. 2020), <https://www.epa.gov/system/files/documents/2023-08/FY22%20Population%20Estimates%20Superfund%20Final.pdf> [<https://perma.cc/CG9U-AEB2>].

167. See Maskin et al., *supra* note 97, at 528.

168. See *supra* notes 81–84 and accompanying text.

169. Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 93 (Tex. 1999).

170. Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff’d*, 958 F.2d 36 (4th Cir. 1991); see also Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 857 (Ky. 2002) (recognizing “defendants do not have an endless supply of financial resources” and that, in the absence of an injury, medical monitoring “remedies are economically inefficient, and are of questionable long term public benefit”).

171. See Crowell & Moring LLP, History of Asbestos Bankruptcies, Chart 1: List of Asbestos Bankruptcy Cases (Chronological Order), <https://www.crowell.com/en/services/practices/insurance-reinsurance/history-of-asbestos-bankruptcies> [<https://perma.cc/B6CL-QP7X>].

172. See Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 504–13 (2009).

173. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 2 (RAND Inst. for Civ. Just. 2005); see also James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 816–17 (2002).

The experience of some states that have permitted medical monitoring absent present injury also demonstrates concerns left unresolved in the Restatement's proposed rule. As discussed, the proposed rule does not precisely reflect the law of any jurisdiction, but most closely resembles the law of three states, including West Virginia.¹⁷⁴ In 1999, West Virginia's highest court, in *Bower v. Westinghouse Electric Corp.*,¹⁷⁵ established a medical monitoring cause of action. As explained in a strongly worded dissent:

[The] practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action. Those who work in heavy industries such as coal, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all.¹⁷⁶

After *Bower*, thousands pursued medical monitoring awards in West Virginia, often as part of a class.¹⁷⁷ Later, "medical monitoring cases in West Virginia became less attractive"¹⁷⁸ after the state high court held that "punitive damages may not be awarded on a cause of action for medical monitoring."¹⁷⁹ The court "basically reasoned that in such actions plaintiffs have not suffered any actual, present physical injuries from their alleged

174. See *supra* note 104 and accompanying text.

175. 522 S.E.2d 424 (W. Va. 1999).

176. *Id.* at 435 (Maynard, J., dissenting).

177. See *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 828–29 (W. Va. 2010) (upholding \$130 million medical monitoring award to class of approximately 8,500 people exposed to hazardous substances); *Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 887 (W. Va. 2005) (Starcher, J., concurring) ("[W]e have dumped an additional pile of medical monitoring cases into the circuit judge's lap."); *State ex rel. E.I. duPont de Nemours & Co. v. Hill*, 591 S.E.2d 318, 322 n.5 (W. Va. 2003) (upholding the decision to make blood testing available to approximately 50,000 individuals possibly exposed to material used to make fluoropolymers); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 61, 68 (W. Va. 2003) (medical monitoring class of approximately 5,000 users of pharmaceutical); *Bibb v. Monsanto Co.*, No. 04-C-465, 2013 WL 358886, at *183 (W. Va. Cir. Ct. Putnam Cnty. Jan. 1, 2013) (settlement of medical monitoring class action for dioxin exposure). *But see In re Tobacco Litig. (Medical Monitoring Cases)*, 600 S.E.2d 188, 191 n.1 (W. Va. 2004) (affirming verdict denying medical monitoring claim); *Acord v. Colane*, 719 S.E.2d 761 (W. Va. 2011) (dismissing medical monitoring class).

178. *Bibb*, 2013 WL 358886, at *171; see also *Guinan v. A.I. duPont Hosp. for Children*, 597 F. Supp. 2d 517, 540 n.10 (E.D. Pa. 2009) (stating that "[l]imiting the remedy to compensatory damages and expressly excluding non-economic and punitive damages serves as a disincentive to the hordes of plaintiffs' attorneys who the Supreme Court feared might be tempted to bring an onslaught of medical monitoring litigation").

179. *Perrine*, 694 S.E.2d at 881.

exposure to [chemicals], [therefore] punitive damages simply should not be available[.]”¹⁸⁰

Louisiana provides another example. In *Bourgeois v. A.P. Green Industries, Inc.*,¹⁸¹ the Louisiana Supreme Court recognized medical monitoring as a cause of action. Claims flooded in.¹⁸² In response, the legislature swiftly reversed *Bourgeois*, requiring a manifest injury to support monitoring claims.¹⁸³

The proposed Restatement rule also fails to address the serious practical difficulties in implementing medical monitoring systems and the burdens of administering such programs. Courts are designed to adjudicate disputes concerning discrete issues and parties. A medical monitoring system, in contrast, involves myriad complex scientific, medical, economic, and policy-laden questions. Devising such a system may require, at a minimum, identifying the types of exposures and health conditions that may be monitored; the tests to be conducted as part of the program; the procedures for determining eligibility for monitoring, including the level of increased risk of an adverse health condition that may trigger monitoring and the measure of that increase; the likelihood that monitoring will detect the existence of disease and deciding how treatable the disease must be; when eligible parties may join the program; the length of time the program will last; the frequency of any periodic monitoring and the circumstances in which the frequency can be changed based on individuals' unique medical situations; whether the benefit of the screening outweighs its risks, including health risks posed by proposed tests and the risk of false positives; whether testing will be formal or informal; whether the service provider is to be designated by the court or chosen by the claimant; how funds for monitoring will be administered, and whether unused funds will be returned.¹⁸⁴ Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments,

180. *Bibb*, 2013 WL 358886, at *125 (alteration in original) (quoting *Perrine*, 694 S.E.2d at 880).

181. 716 So. 2d 355 (La. 1998).

182. *See, e.g.*, *Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. Ct. App. 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Scott v. American Tobacco Co.*, 725 So. 2d 10 (La. Ct. App. 1998) (certifying as a medical monitoring class all Louisiana residents who were cigarette smokers on or before May 24, 1996, provided that each claimant started smoking on or before Sep. 1, 1988).

183. *See* La. Civ. Code § 2315.

184. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 AM. J.L. & MED. 251, 267–72 (1994).

particularly if the program's designers erroneously estimate funding needs or the number of eligible participants.¹⁸⁵

As the Michigan Supreme Court explained in rejecting medical monitoring for the unimpaired, courts simply do not possess the "technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry and environmental science."¹⁸⁶ It further recognized that the "day-to-day operation of a medical monitoring program would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime."¹⁸⁷ These considerations led the court to conclude that "[t]he court system . . . is simply not institutionally equipped to establish, promulgate operative rules for, or administer such a program."¹⁸⁸

The Restatement's proposed medical monitoring rule does not address any of these "real-world ramifications."¹⁸⁹ Instead, it simply recommends courts adopt "[w]hichever conceptual approach" allows uninjured claimants to bring lawsuits related to any type of tortious conduct said to significantly increase a risk of serious bodily harm, while suggesting a couple novel optional ideas courts might try out.¹⁹⁰ The Restatement punts on the thorny issues that have led most courts to reject claims by the unimpaired, such as how the rule would actually prevent court dockets from becoming "clogged with comparatively unimportant or trivial claims"¹⁹¹ or how a medical monitoring system can be designed and administered to address the many inherent complexities involved. The Restatement's failure to answer, or even attempt to answer, some of the most essential questions surrounding

185. One commentator discussing the complexities of medical monitoring programs and misconceptions about the benefits of medical monitoring has said:

[M]edical monitoring is far from the unmitigated benefit many believe it to be. To be sure, medical monitoring plays a useful role in detecting some diseases in asymptomatic patients. But courts must move beyond the conventional wisdom that medical monitoring is always useful and take a more realistic view of the costs and benefits of monitoring when deciding whether to adopt a medical monitoring claim for asymptomatic plaintiffs.

Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 34 (2009).

186. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 699 (Mich. 2005).

187. *Id.*

188. *Id.*

189. Oct. 2022 Letter from ALI Council Member Beisner, *supra* note 38, at 2.

190. TD 2, *supra* note 69, at 39 cmt. j.

191. *Berry v. City of Chicago*, 181 N.E.3d 679, 688 (Ill. 2020); *see also* Oct. 2022 Letter from ALI Council Member Beisner, *supra* note 38, at 2 (stating that the Restatement's proposed rule, if adopted by courts, would entail the provision of medical monitoring services to millions of unimpaired persons and "may cost billions").

medical monitoring demonstrates why recognition of a remedy for those with no present injury remains so problematic.

V. CONCLUSION

The Miscellaneous Provisions Restatement's proposed medical monitoring remedy for unimpaired claimants fails at virtually every turn to make a convincing case for why courts should adopt it. The rule reflects a distinct minority approach that does not technically "restate" the law of any jurisdiction. It jettisons the bright-line present injury requirement that has historically defined tort liability in favor of an open-ended expansion of tort liability. Far from charting a purported "middle and sensible path," the proposed Restatement rule ducks many of the most consequential issues with which courts have grappled, such as how to design and implement a medical monitoring system that could adequately address substantial scientific, medical, economic, and policy-laden questions and minimize heavy burdens on the court system. More fundamentally, the proposed rule never explains how it would prevent the adverse public policy consequences articulated by the U.S. Supreme Court and other state high courts with respect to giving uninjured individuals access to the tort system. Because the proposed Restatement rule's deficiencies do more to underscore problems than offer sound solutions, courts considering whether to allow medical monitoring for the unimpaired and follow this Restatement's proposed approach should answer "no."