Medical Monitoring Plaintiffs and Subsequent Claims for Disease

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Tort claims based solely on exposure to toxins fit poorly within traditional tort doctrines,¹ which usually require a showing of present physical harm before awarding a remedy for injury.² But since the 1980s, many plaintiffs have sued based on their exposure to carcinogenic chemicals even though they have not yet exhibited any cancer symptoms.³ In order to provide plaintiffs a remedy and to deter the producers of toxins, courts have created new causes of action.⁴ These include (1) claims based on an increased risk of disease, which courts allow when a plaintiff can prove a greater than 50 percent chance of disease; (2) claims based on fear of disease, which are similar to emotional distress claims; and, most recently, (3) claims for medical moni-

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¹ Because of the long period between exposure to toxic torts and the physical harms that may develop, toxic tort plaintiffs bringing claims solely on the basis of exposure often are unable to show present physical injury. See Palma J. Strand, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 Stan L Rev 575 (1983). See also *Martinez-Ferrer v Richardson-Merrell, Inc.*, 105 Cal App 3d 316, 164 Cal Rptr 591, 595 (1980) (observing that "[t]he simple fact is that rules developed against the relatively unsophisticated backdrops of bar-room brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their . . . unintended, unanticipated and frequently long-delayed side effects").

² See W. Page Keeton, et al, *Prosser and Keeton on the Law of Torts* § 30 at 165 (West 5th ed 1984) (Actual loss or damage is required to award damages; "the threat of future harm, not yet realized, is not enough."). See also *Alhino v Starr*, 112 Cal App 3d 158, 169 Cal Rptr 136, 147 (1980) ("If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort Speculative harm or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence.").

³ See, for example, *Bocook v Ashland Oil Inc.*, 819 F Supp 530, 532 (S D W Va 1993) (plaintiffs exposed to toxic pollution but manifesting no other symptoms sought recovery from oil refinery operator); *Potter v Firestone Tire and Rubber Co.*, 25 Cal Rptr 2d 550, 863 P2d 795, 801-02 (1993) (landowners brought an action based solely on exposure against a tire manufacturer responsible for hazardous waste dumped at next door landfill).

⁴ The courts have recognized the barriers plaintiffs face when required to wait until a disease manifests itself. Plaintiffs find it hard to prove causation in toxic tort cases because there is scientific uncertainty about the development of diseases, and often there is a long period of time between exposure and manifestation of symptoms. Additionally, when a disease is finally manifested and litigation begins, the plaintiff may be unable to locate the defendant or the defendant may be insolvent. See Allan T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 Ind L J 849, 852-56 (1988).

toring,⁵ which compensate presently healthy plaintiffs for the cost of the medical testing necessary to facilitate the early detection of diseases caused by toxic substances. These new claims provide remedies to a plaintiff who has yet to suffer any physical injury, raising the issue of whether claim preclusion should bar a second claim for subsequent damages if and when the plaintiff actually contracts a disease.⁶ As medical monitoring plaintiffs age, more plaintiffs likely will contract diseases and attempt to bring second claims. As a result, courts soon will be forced to decide whether claim preclusion should apply to medical monitoring plaintiffs attempting to bring second causes of action based on the same exposure.

In deciding whether to apply claim preclusion, courts must examine a number of competing factors. A plaintiff will not bring an exposure-based suit if she fears a second claim will be precluded if and when she actually contracts a disease. If the exposure does not eventually lead to manifested physical harm, this wait-and-see attitude may mean that defendants will not be sued and hence will not be deterred from producing dangerous toxins. On the other hand, a blanket allowance of second suits might undermine policies of judicial economy and finality of judgments.

Because medical monitoring is the most recent development in the field of toxic torts, this Comment examines medical monitoring claims in particular. The Comment argues that the reasons for allowing subsequent claims are much stronger in the context of medical monitoring than in the context of traditional claims to which claim preclusion is applied. To bring increased risk and fear of disease claims, for example, plaintiffs must show present or probable physical injury; accordingly, courts craft damage awards to cover both present and future harms. In risk cases, the ability to bring a second claim when sickness occurs would lead to double recovery. Indeed, in most cases the damages awarded are intended to compensate for present and future harms. The medical monitoring context is different. Courts intend damage awards to medical monitoring plaintiffs to embody only the cost of medical surveillance—*not* compensation for future

⁵ The terms medical surveillance damages, medical monitoring damages, and diagnostic damages all refer to the costs of medical observation following toxic exposure and are used by courts interchangeably.

⁶ These new remedies also pose statute of limitations problems. Congress has largely resolved these problems by enacting statutes that provide that latent effects of exposure to toxic substances accrue only when the victim discovers the injury. See Superfund Amendments and Reauthorization Act of 1986, Pub L No 99-499, § 203(a), 100 Stat 1695-96, codified at 42 USC § 9658 (1994 & Supp 1997) (preempting state statutes of limitation with a discovery-based standard retroactive to 1980). See also note 89.

harm. Moreover, precluding second claims in the medical monitoring context leads to perverse results. Plaintiffs should be encouraged—not discouraged—to sue first for medical monitoring and later for actual injury (if it develops) rather than to sue preemptively for damages from a disease that may or may not occur. In this way, the damage award(s) more accurately compensate the plaintiff's actual harm and better deter toxic polluters. For these reasons, claim preclusion should not bar subsequent claims after the entry of a medical monitoring award.

Part I of this Comment briefly explains the nature of increased risk and fear of disease claims and their required burdens of proof. It then examines medical monitoring awards, demonstrating that the unique nature of monitoring claims (compared to other toxic tort-related claims) justifies allowing second claims upon the disease's manifestation. Part II examines the claim preclusion doctrine in general. Part III discusses courts' application of this doctrine to toxic tort claims for increased risk and fear of disease claims. It then considers the application of claim preclusion to medical monitoring claims and argues that the traditional justifications for requiring preclusion do not apply. This Comment concludes that, even if claim preclusion does apply to medical monitoring claims, courts may find various grounds for exceptions.

I. NEW CLAIMS FOR TOXIC TORT PLAINTIFFS

As toxic tort claims based solely on exposure have increased, courts have fashioned new remedies for toxic tort plaintiffs. These remedies allow recovery for increased risk of disease, fear of disease, and medical monitoring costs. Each category of remedy requires a different burden of proof and hence should have a different claim preclusive effect.

A. Increased Risk and Fear of Disease Claims

Courts treat increased risk and fear of disease as claims for the anticipated disease itself. Courts require plaintiffs claiming increased risk to prove to a "reasonable medical probability,"⁷ or

⁷ See, for example, *Sterling v Velsicol Chemical Corp.*, 855 F2d 1188, 1204 (6th Cir 1988) (holding, in an increased risk of cancer claim, that "[w]here the basis for awarding damages is the potential risk of susceptibility to future disease, the predicted future disease must be medically reasonably certain to follow from the existing present injury"); *Herber v Johns-Manville Corp.*, 785 F2d 79, 82 (3d Cir 1986) (holding that, in order to stay consistent with traditional tort doctrine, "a future injury, to be compensable, must be shown to be a reasonable medical probability").

greater than 50 percent,⁸ that the disease will occur as a consequence of exposure. The claim must be based on reliable scientific evidence and statistics.⁹ In only a few increased risk cases have courts departed from this "reasonable probability" rule.¹⁰

A claim for fear of disease, sometimes pejoratively called "cancerphobia," covers an alleged present injury—emotional distress or apprehension—due to the possibility of future disease caused by the defendant's negligence.¹¹ A claim for fear differs from a claim for increased risk in that fear plaintiffs generally do not need to prove that the disease is more likely than not to occur.¹² However, most courts require a fear plaintiff to show objective physical symptoms of emotional distress.¹³ Additionally,

⁸ See, for example, *Hagerty v L & L Marine Services, Inc.*, 788 F2d 315, 319 (5th Cir 1986) (requiring prospective damages to be more probable than not); *Pierce v Johns-Manville Sales Corp.*, 296 Md 656, 464 A2d 1020, 1026 (1983) (holding that damages based on future consequences can only be recovered when "there is more evidence in favor of a proposition than against it"; in other words, "when there is a greater than 50 [percent] chance that a future consequence will occur. Mere possibility exists when the evidence is anything less").

⁹ See *Mauro v Owens-Corning Fiberglas Corp.*, 225 NJ Super 196, 542 A2d 16, 20-21 (1988) (rejecting increased risk of cancer claim because medical expert was unable to quantify increased risk or to predict probability of cancer).

¹⁰ See, for example, *Valori v Johns-Manville Sales Corp.*, 1985 US Dist LEXIS 12921, *8-9 (D NJ) (concluding that plaintiff, claiming to suffer from asbestosis, showed reasonable probability of contracting cancer by offering statistical evidence that he was a member of a class of which 43 percent would contract cancer); *Brafford v Susquehanna Corp.*, 586 F Supp 14, 17-18 (D Colo 1984) (concluding that plaintiffs could recover for increased risk because proof of probable injury from exposure demonstrated that they had "suffered a definite, present physical injury").

¹¹ See, for example, *Hagerty*, 788 F2d at 318 (allowing reasonable anxiety damages as long as plaintiff can prove proximate cause); *In re Moorenovich*, 634 F Supp 634, 637 (D Me 1986) (same); *Mauro v Raymark Industries, Inc.*, 116 NJ 126, 561 A2d 257, 263 (1989) (allowing recovery where fear is reasonable and causally related to the defendant's negligence).

¹² Consider the court's statement in *Sterling*:

[T]he central focus of a court's inquiry in [a fear] case is not on the underlying odds that the future disease will materialize. To this extent, mental anguish resulting from the chance that an existing injury will lead to the materialization of a future disease may be an element of recovery even though the underlying prospect for susceptibility to a future disease is not, in and of itself, compensable inasmuch as it is not sufficiently likely to occur.

855 F2d at 1206. See also *Clark v United States*, 660 F Supp 1164, 1175 (W D Wash 1987) (finding fears to be reasonable although plaintiffs "were not exposed to any actual risk greater than 1 in 1 million"), *affd*, 856 F2d 1433 (9th Cir 1988); *Dartez v Fibreboard Corp.*, 765 F2d 456, 468 (5th Cir 1985) (finding plaintiff "entitled to compensation for mental anguish proximately caused by his asbestos exposure, even if such distress arises from fear of diseases that are a substantial concern, but not medically probable"); *Clark v Taylor*, 710 F2d 4, 13-14 (1st Cir 1983) (upholding compensatory damages for fear even though future damages were very speculative).

¹³ See, for example, *Friedman v F.E. Myers Co.*, 706 F Supp 376, 381 (E D Pa 1989) (holding that, "[i]n the absence of any evidence beyond mere exposure, . . . [plaintiffs']

many courts further limit the availability of relief by allowing an emotional distress claim only if the plaintiff is suffering from other physical injury or compensable harm.¹⁴ While plaintiffs often argue that mere exposure meets this physical injury requirement, only a few courts awarding damages for fear of disease have agreed.¹⁵

B. Medical Monitoring Awards

Recognizing plaintiffs' difficulty in successfully proving increased risk or fear claims, courts have made it easier for plaintiffs to recover for costs of preventive medical monitoring.¹⁶ Medi-

claims for emotional distress cannot stand"); *Ironbound Health Rights Advisory Commission v Diamond Shamrock Chemicals Co*, 243 NJ Super 170, 578 A2d 1248, 1250 (1990) (requiring objective manifestation when emotional distress is not severe and substantial); *Woyke v Tonka Corp*, 420 NW2d 624, 627 (Minn App 1988) (requiring medical proof of objective physical manifestation of emotional distress; personal testimony was not sufficient). But see *Bennett v Mallinckrodt, Inc*, 698 SW2d 854, 866-67 (Mo App 1985) (holding that, under Missouri law, "[p]laintiffs no longer need to allege a contemporaneous physical injury to plead a tort action for emotional distress").

¹⁴ See *Wisniewski v Johns-Manville Corp*, 759 F2d 271, 274 (3d Cir 1985) (refusing to allow a fear of disease claim because although plaintiffs alleged that they had suffered headaches due to their fear of cancer, they "alleged no injuries that stem from exposure to the asbestos itself"); *Maddy v Vulcan Materials Co*, 737 F Supp 1528, 1536 (D Kan 1990) (denying plaintiffs recovery for emotional distress in absence of physical injury); *In re Hawaii Federal Asbestos Cases*, 734 F Supp 1563, 1569 (D Hawaii 1990) (stating that the court was "unaware of any authority in Hawaii which permitted the award of emotional damages in the absence of some underlying compensable harm"); *McAdams v Eli Lilly & Co*, 638 F Supp 1173, 1178 (N D Ill 1986) (allowing plaintiff to establish genuineness of her fear by establishing a physical injury); *Sypert v United States*, 559 F Supp 546, 548 (D DC 1983) (stating that under Virginia law, physical injury is generally required, unless defendant's actions were "willful, wanton, and vindictive").

¹⁵ See *Herber*, 785 F2d at 83-85 (finding that exposure to asbestos was a sufficient basis for fear claim); *Plummer v United States*, 580 F2d 72, 74-76 (3d Cir 1978) (holding that infection of plaintiffs by tubercle bacilli was sufficient physical impact to substantiate a mental affliction claim for fear of developing active tuberculosis).

In contrast, most courts have held that mere exposure to a harmful substance does not constitute "injury." See, for example, *Adams v Johns-Manville Sales Corp*, 783 F2d 589, 593 (5th Cir 1986) (rejecting plaintiff's claim for mental distress damages under Louisiana law because he failed to establish that he sustained an injury from his exposure to asbestos products); *Plummer v Abbott Laboratories*, 568 F Supp 920, 925-27 (D RI 1983) (finding that plaintiff's ingestion of diethylstilbestrol, which allegedly increased the risk of contracting cancer, did not constitute a physical injury under Rhode Island law); *Sypert*, 559 F Supp at 548 (concluding that because the plaintiff had suffered no physical injury from his exposure to tubercle bacilli, he could not recover mental distress damages under Virginia law); *Burns v Jaquays Mining Corp*, 156 Ariz 375, 752 P2d 28, 31 (App 1987) (finding that, although plaintiff had been exposed to asbestos, "[t]here can be no claim for damages for the fear of contracting asbestos-related diseases in the future without the manifestation of a bodily injury"); *Eagle-Picher Industries, Inc v Cox*, 481 S2d 517, 528-29 (Fla App 1985) (noting that Florida law requires both impact and injury to recover for emotional distress, and holding that inhalation of asbestos constitutes an impact, but asbestosis is necessary to establish injury).

¹⁶ See *Friends for All Children, Inc v Lockheed Aircraft Corp*, 746 F2d 816 (DC Cir

cal monitoring damages are designed to pay for plaintiffs' costs of medical examinations to facilitate early detection of any toxin-caused conditions.¹⁷ Payments to medical monitoring plaintiffs usually are paid out of a fund as the examinations take place.¹⁸ Because medical monitoring claims require less scientific proof of the probability of actually contracting a disease than increased risk or fear claims, this avenue of recovery is becoming more and more popular.¹⁹

1984). *Friends for All Children* was one of the first cases in which a court provided a medical monitoring award. The court recognized the difficulty in "quantify[ing] the amount of increased risk imposed on an individual who does not yet have a disease." Id at 826. Similarly, "emotional distress caused by potential risk may also be thought too speculative to support recovery." Id. Ultimately, the court stated that "[t]he inability of normal legal channels to provide plaintiffs with the necessary relief to prevent their suffering irreparable harm provides under these circumstances the classic case [for a medical monitoring award]." Id at 830.

¹⁷ See Slagel, Note, 63 Ind L J at 850 (cited in note 4).

¹⁸ Most courts providing medical monitoring awards have decided that the proper method of recovery is the establishment of a "medical surveillance" fund from which payments are made for periodic screenings, rather than lump sum payments to individual plaintiffs. See, for example, *Ayers v Township of Jackson*, 106 NJ 557, 525 A2d 287, 314 (1987) (holding that a fund limits the liability of defendants to the expenses actually incurred); *Hansen v Mountain Fuel Supply Co*, 858 P2d 970, 982 (Utah 1993) (suggesting insurance mechanism or court-supervised fund as proper remedy); *Burns*, 752 P2d at 34 (holding that lump sum damages are not appropriate in medical monitoring cases).

¹⁹ While the soundness of medical monitoring awards is beyond the scope of this Comment, a short discussion may be appropriate. Courts allowing medical monitoring claims believe that this new remedy satisfies a number of policy concerns: (1) the public health interest in encouraging early medical testing; (2) possible economic savings realized by early detection and treatment of disease; (3) deterrence of polluters; and (4) simple fairness—if the defendant has caused the need for check-ups, the defendant ought to be the one to pay for them. See *In re Paoli Railroad Yard PCB Litigation*, 916 F2d 829, 852 (3d Cir 1990); *Ayers*, 525 A2d at 311-12.

However, medical experts believe that medical monitoring for asymptomatic plaintiffs will aggravate already escalating health costs. See Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 Colum L Rev 942, 973 (1988). Abraham notes that "liability for fear of contracting disease and for medical monitoring expenses[] are themselves sufficiently open-ended to contribute to the uncertainty now troubling the insurance market." Id. Other critics believe that defendants' resources will run out, leading to an inability to provide remedies to future plaintiffs who were exposed and injured. See, for example, *Ball v Joy Manufacturing Co*, 755 F Supp 1344, 1372 (S D W Va 1990) (noting that "[a]llowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless"), aff'd, 958 F2d 36 (4th Cir 1991). Other critics are concerned that, because the general public is regularly exposed to all sorts of unhealthy contaminants in the environment, the recognition of medical monitoring damages will result in a flood of litigation. See, for example, John J. Kalas, *Medical Surveillance Damages in Toxic Tort Litigation: A Half Hearted Embrace*, 2 U Balt J Envir L 126, 141 (1992) (recognizing that the cost of medical surveillance damages "could easily amount to industry providing systematic diagnostic medical care to virtually all Americans").

1. History and development.

Since the first medical monitoring award in 1980,²⁰ courts have awarded medical monitoring costs in several types of cases including plane crashes,²¹ toxic chemical spills,²² prenatal exposure to diethylstilbestrol ("DES"),²³ and exposure to asbestos,²⁴ insecticides,²⁵ groundwater contaminants,²⁶ landfill toxins,²⁷ polychlorinated biphenyls ("PCBs"),²⁸ radiation,²⁹ and human immunodeficiency virus ("HIV").³⁰ Most courts allowing medical monitoring claims have viewed such claims as an independent cause of action; they do not require another compensable injury.³¹ However, not all courts have been receptive to this creative remedy. Some courts have refused medical monitoring claims by adhering to the traditional tort requirement of showing present physical injury.³²

Courts that allow medical monitoring claims have used two separate justifications. First, some courts have held that mere exposure to hazardous substances, combined with a significantly increased risk of harm, constitutes the physical injury usually required in tort cases.³³ Second, arguing that a medical monitoring

²⁰ *Friends for All Children, Inc v Lockheed Aircraft Corp*, 87 FRD 560 (D DC 1980).

²¹ See *Friends For All Children*, 746 F2d 816 (involving a claim on behalf of infant survivors of a plane crash seeking medical monitoring damages based on increased risk of brain development problems).

²² See *Hagerty*, 788 F2d 315.

²³ See *Payton v Abbott Laboratories*, 386 Mass 540, 437 NE2d 171 (1982).

²⁴ See, for example, *Patton v General Signal Corp*, 984 F Supp 666 (W D NY 1997); *Bourgeois v A.P. Green Industries, Inc*, 716 S2d 355 (La 1998).

²⁵ See *Villari v Terminix International, Inc*, 677 F Supp 330 (E D Pa 1987).

²⁶ See *Merry v Westinghouse Electric Corp*, 684 F Supp 847 (M D Pa 1988).

²⁷ See *Ayers v Township of Jackson*, 202 NJ Super 106, 493 A2d 1314 (1985), *aff'd in part and rev'd in part*, 106 NJ 557, 525 A2d 287 (1987); *Habitants Against Landfill Toxicants v City of York*, 15 Env'tl L Rep 20937 (Pa Ct CP York County 1985).

²⁸ See *In re Paoli*, 916 F2d 829.

²⁹ See *Cook v Rockwell International Corp*, 755 F Supp 1468 (D Colo 1991).

³⁰ See *Doe v City of Stamford*, 241 Conn 692, 699 A2d 52 (1997).

³¹ See *In re Paoli*, 916 F2d at 851-52 (deciding that, under Pennsylvania law, medical monitoring alone is a valid cause of action); *Elam v Alcolac, Inc*, 65 SW2d 42, 209 (Mo App 1988) (finding that "[c]ompensation for necessary medical expenses reasonably certain to be incurred in the future rests on well-accepted legal principles").

³² See, for example, *Ball v Joy Technologies, Inc*, 958 F2d 36, 39 (4th Cir 1991) (holding that plaintiffs could not recover medical monitoring damages because they failed to demonstrate that they were suffering from a present physical injury); *Catasauqua Area School District v Eagle-Picher Industries, Inc*, 1988 US Dist LEXIS 11316, *2 (E D Pa) (holding that victims of exposure to toxic tort substances could not seek medical monitoring absent some present manifestation of a disease or some reasonable likelihood of contracting such a disease); *Theer v Philip Carey Co*, 133 NJ 610, 628 A2d 724, 733 (1993) (holding that victim who was indirectly exposed to asbestos did not suffer injury and was therefore not entitled to medical surveillance damages).

³³ See, for example, *Friends For All Children*, 746 F2d at 825 (stating that because

claim is not a traditional tort, other courts have not required any physical injury at all.³⁴

Of the courts that allow medical monitoring claims, most require medical monitoring plaintiffs to show only: (1) exposure to hazardous substances; (2) the potential for injury; (3) the need for early detection and treatment; and (4) the existence of monitoring and testing procedures that make early detection and treatment possible and beneficial.³⁵

To prevail in a medical monitoring suit, plaintiffs are not required to prove that the probability of disease is greater than 50 percent. For example, in *Ayers v Township of Jackson*,³⁶ the defendants contended that a claim for medical monitoring could not be sustained if the plaintiff's risk of injury was not sufficiently likely.³⁷ The court disagreed, holding that for a medical monitoring claim to be recognized, the plaintiff is not required to meet the same burden as that required for an increased risk claim.³⁸

2. Current status.

While the Supreme Court has ruled neither in favor nor against medical monitoring claims in general, it recently refused to allow a medical monitoring claim in a Federal Employers' Liability Act ("FELA")³⁹ case. In *Metro-North Commuter Railroad Co v Buckley*,⁴⁰ a railroad employee sought medical monitoring damages to pay for the extra medical check-ups he expected to

plane crash caused by defendant exposed plaintiff to risk of serious brain damage, "even in the absence of physical injury [plaintiff] ought to be able to recover the cost for the various diagnostic examinations proximately caused by [defendant's] negligent action"; *Bocook v Ashland Oil, Inc*, 819 F Supp 530, 537 (S D W Va 1993) (holding that Kentucky does not always require a plaintiff to prove a demonstrable physical injury in order to recover damages—exposure, combined with a significantly increased risk of harm, is sufficient); *Doe*, 699 A2d at 54-57 (concluding that a claimant who has suffered actual exposure to life threatening infectious diseases in a work-related incident should be able to recover expenses associated with reasonable medical testing and treatment).

³⁴ See, for example, *Patton*, 984 F Supp at 673-74 (holding that New York recognizes a cause of action for medical monitoring even in the absence of medical evidence showing presence of asbestos in plaintiff's body); *Burns*, 752 P2d at 33 (holding that, despite the absence of any physical manifestation of disease, plaintiffs should be entitled to medical monitoring). For a thorough overview of judicial treatment of medical monitoring costs, see Kalas, 2 U Balt J Envir L 126 (cited in note 19).

³⁵ *Merry*, 684 F Supp at 850 (providing the first three requirements); *In re Paoli*, 916 F2d at 852 (adding the fourth requirement).

³⁶ 106 NJ 557, 525 A2d 287 (1987).

³⁷ 525 A2d at 304.

³⁸ *Id.*

³⁹ FELA is a statute that permits a railroad worker to recover for a physical injury resulting from his employer's negligence. See Federal Employers' Liability Act, 53 Stat 1404 (1939), codified at 45 USC §§ 51 et seq (1994).

⁴⁰ 521 US 424, 117 S Ct 2113 (1997).

have as a result of his exposure to asbestos-laden insulation dust.⁴¹ The Supreme Court refused to allow this separate cause of action, expressing concern that determining monitoring costs “will sometimes pose special ‘difficult[ies] for judges and juries,’”⁴² due to “uncertainty among medical professionals about just which tests are most usefully administered and when.”⁴³ While the Court acknowledged that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring,” it emphasized that uncertainty as to liability could cause the courts to be flooded with minor cases, and defendants would be subjected to the threat of unpredictable and possibly unlimited liability.⁴⁴ Also, the Court pointed out that for many plaintiffs the costs of medical monitoring might already be covered by employers or outside insurance.

Metro-North is not binding on state courts because in the usual toxic tort case—where a federal statute is not implicated—the decision of whether or not to allow medical monitoring damages depends on state law.⁴⁵ Nonetheless, some commentators claim that *Metro-North* demonstrates that courts are moving away from common law medical monitoring claims.⁴⁶ In fact, however, lower courts have continued to allow medical monitoring claims to be brought after *Metro-North*, suggesting that they have not found the Supreme Court’s reasoning persuasive. For example, the Louisiana Supreme Court recently allowed shipyard employees who were allegedly exposed to asbestos to bring an action to collect the costs of future medical monitoring.⁴⁷ In another case decided after *Metro-North*, the Supreme Court of Connecticut allowed a workers compensation claimant to recover expenses associated with medical testing after being exposed to HIV and

⁴¹ *Metro-North*, 117 S Ct at 2121-24.

⁴² *Id* at 2123, quoting *Consolidated Rail Corp v Gottshall*, 512 US 532, 557 (1994).

⁴³ *Metro-North*, 117 S Ct at 2123.

⁴⁴ *Id*.

⁴⁵ See, for example, *Patton*, 984 F Supp at 674 (allowing a claim for medical monitoring subsequent to the Supreme Court’s decision in *Metro-North*); *Bourgeois*, 716 S2d at 360 (same); *Doe*, 699 A2d at 54-57 (same).

⁴⁶ See, for example, Shawn A. Copeland, Joseph C. Kearfott, and D. Alan Rudlin, *Current Issues in Toxic Tort Litigation*, SC 64 ALI-ABA 33, 68 (1998) (claiming that “the overall picture painted by the [*Metro-North*] decision is not a bright one for the future of the medical monitoring cause of action—at least under federal common law”); Andrew R. Klein, *Rethinking Medical Monitoring*, 64 Brooklyn L Rev 1 (1998) (claiming that the *Metro-North* decision places medical monitoring “at a crossroad” and arguing that medical monitoring claims should be required to meet increased risk standards).

⁴⁷ *Bourgeois*, 716 S2d at 360.

tuberculosis, even though he had not yet contracted either disease.⁴⁸

These cases tend to refute the argument that *Metro-North* represents a general trend away from recognizing a cause of action for medical damages. Moreover, *Metro-North* can be distinguished from usual toxic tort cases in two respects. First, it involved a cause of action based on a particular federal statute, whereas most medical monitoring cases involve state law; and second, it considered a lump sum payment, whereas most medical monitoring awards require an account from which medical expenses are deducted as they are incurred.⁴⁹ For these reasons, it is unlikely that the persuasive effect of the decision represents a death knell for medical monitoring claims nationwide.

II. TRADITIONAL CLAIM PRECLUSION DOCTRINE

Because courts award increased risk, fear, and medical monitoring damages before a plaintiff actually exhibits any symptoms of actual disease, these new remedies create serious questions as to whether a court may recognize a second cause of action if and when a plaintiff actually becomes ill. Generally in tort law, a second claim based on the same occurrence or transaction as the first cause of action is barred by the claim preclusion doctrine.⁵⁰

Claim preclusion (referred to historically as “res judicata”⁵¹) prevents the litigation of a second claim arising out of the same transaction or occurrence as a previously litigated claim. If a claim arising out of the occurrence was available in the first cause of action, the plaintiff does not have a second chance to bring that claim, even if the plaintiff did not actually litigate it at

⁴⁸ *Doe*, 699 A2d at 54-57. See also *Sinclair Oil Corp v Dymon, Inc*, 988 F Supp 1394, 1399 (D Kan 1997) (allowing plaintiff's claim for medical monitoring damages against a former lessee who produced hazardous waste on his property); *Gutierrez v Cassiar Mining Corp*, 64 Cal App 4th 148, 75 Cal Rptr 2d 132, 134-36 (1998) (awarding medical monitoring costs to a cement plant worker exposed to asbestos fibers); *Dragon v Cooper/T. Smith Stevedoring Co, Inc*, 1999 La App LEXIS 48, *19 (allowing plaintiff class's medical monitoring claims based on exposure to asbestos).

⁴⁹ The *Metro-North* court condemned the use of lump sum awards in the medical monitoring context, noting an “expressed uneasiness with a traditional lump-sum damages remedy” and several courts’ express limitations on such a remedy. 117 S Ct at 2122. See also note 18.

⁵⁰ See Restatement (Second) of Judgments §§ 17-19 (ALI 1982) (“Second Restatement”).

⁵¹ The term “res judicata” has largely been supplanted in modern usage by “claim preclusion,” the term favored by the Second Restatement. Use of “claim preclusion” accords with the modern system of notice pleading and reduces confusion stemming from the use of “res judicata” to refer either to claim preclusion singly or to claim and issue preclusion together. See *Moore's Federal Practice (3d)* § 131.10[1][b] at 131-16–131-17 (Matthew Bender 1997).

that time.⁵² The Supreme Court expressed this doctrine in *Cromwell v County of Sac*:⁵³

[T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.⁵⁴

Thus, in order for claim preclusion to apply, three requirements must be met. First, there must have been a final judgment on the merits.⁵⁵ Second, the prior action must have involved the same parties or those in privity with them.⁵⁶ Third, the prior action could have involved the claim subsequently being brought.⁵⁷ While the claim in the second litigation may be based on a different legal theory or may seek a different kind of relief than the claim in the first litigation, claim preclusion turns on the *right* to join the claim in the original action. The claim need not have been actually litigated; it need only have been *available* to the plaintiff in the first suit.⁵⁸

Defining what rights and remedies are to be considered part of the same "claim" as an earlier cause of action is the critical inquiry for purposes of claim preclusion analysis. Most courts follow the Restatement (Second) of Judgments ("Second Restatement") and find all rights and remedies with respect to any part of a particular "transaction" to be within the same cause of action.⁵⁹ In

⁵² See generally id § 131.10[1][a] at 131-15.

⁵³ 94 US (4 Otto) 351 (1876).

⁵⁴ Id at 352.

⁵⁵ See *Moore's* § 131.30-131.32 at 131-84-131-127 (cited in note 51).

⁵⁶ See id § 131.40-131.41 at 131-128-131-167.

⁵⁷ See id § 131.20-131.24 at 131-33-131-84.

⁵⁸ See id § 131.10[3][c] at 131-19-131-20. See also Second Restatement §§ 17-18, 24-25; *Brown v Felsen*, 442 US 127, 131 (1979) (Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

⁵⁹ See, for example, *Nevada v United States*, 463 US 110, 130 n 12 (1983) (citing Second Restatement § 24 comment b, as support for the doctrine that causes of action are the same if they arise from the same transaction). The Supreme Court has long accepted the equation of claim and transaction. See, for example, *United Mine Workers v Gibbs*, 383 US 715 (1966); *Lawlor v National Screen Service Corp*, 349 US 322 (1955); *American Fire & Casualty Co v Finn*, 341 US 6 (1951); *Reeves v Beardall*, 316 US 283 (1942). A small minority of courts still use old tests such as whether the same wrong infringed on the same legal right in both suits. See *Gonsalves v Amoco Shipping Co*, 733 F2d 1020, 1023 (2d Cir 1984) (In a single cause of action, there is "but a single wrongful invasion of a single primary right of the plaintiff. . . . A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."), quoting *Baltimore Steamship Co v Phillips*,

explaining what constitutes a transaction, the Second Restatement notes that the definition is pragmatic and that courts should give weight to such considerations as "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."⁶⁰

Under the transaction test, plaintiffs usually cannot "split" a cause of action into two or more separate claims, regardless of the number of theories or forms of relief, the number of primary rights that have been invaded, or the variations in evidence needed to support the different legal theories.⁶¹ Of particular relevance to medical monitoring claims, a transaction includes all harms—past, present, and future.

The Second Restatement also states that a plaintiff must recover all of her damages in the first action, including future damages that are reasonably likely to ensue: "It is immaterial that in trying the first action he was not in possession of enough information about the damages, past or prospective, or that the damages turned out in fact to be unexpectedly large and in excess of the judgment."⁶² An example demonstrates this point:

A brings an action against B for negligently causing injury to A [in a collision]. . . . Verdict is given for A for \$100 and judgment is entered thereon. Thereafter it appears that A's injuries are more serious than proved at trial. A is precluded by the judgment from maintaining a second action against B for the collision.⁶³

According to this traditional view, a plaintiff must claim all of her damages resulting from the same transaction in one suit—she cannot bring a later claim when further damages develop. Hence, traditional application of claim preclusion would seem to bar a suit based on actual development of the disease when the plaintiff has already brought a suit for medical monitoring damages resulting from the same exposure, because the same underlying transaction—exposure to the toxin—provides the basis for both claims.

This claim preclusion is not absolute. In a toxic tort case, a judge may choose to depart from the traditional preclusion rules

274 US 316, 321 (1927).

⁶⁰ Second Restatement § 24.

⁶¹ *Id.* § 25 comment a.

⁶² *Id.* § 25 comment c.

⁶³ *Id.* § 18 comment b, illus 1.

based on fairness concerns.⁶⁴ However, a decision based on fairness is subject to the strong criticism laid out by the Supreme Court in *Federated Department Stores, Inc v Moitie*,⁶⁵ in which the Court reversed a Ninth Circuit decision that claim preclusion must give way to "overriding concerns of public policy" and "simple justice."⁶⁶ The Court held that the claim preclusion doctrine was *not* left to the discretion of the courts and stated:

Public policy dictates that there be an end of litigation. . . . [The] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts.⁶⁷

Moitie prevents federal courts, at least, from attempting to avoid claim preclusion on the grounds that its application is unfair or too harsh.⁶⁸

The *Moitie* Court upheld the power of lower courts to influence the later claim preclusive effect of their judgments, as long as the exception is based on grounds other than simple fairness.⁶⁹ Courts can achieve this by stating as part of their judgment in the first suit that the decision does not preclude a second claim when injury develops.⁷⁰ The effectiveness of a judge's reservation of the plaintiff's right to a subsequent claim may "conceivably be impaired by statutes or rules regarding dismissals of actions, which should be consulted."⁷¹ However, a close look at the language of case law and secondary authorities reveals a strong argument that claim preclusion may not apply in medical monitoring cases, even in the absence of a reservation by the first court. Furthermore, even if claim preclusion does apply, courts hearing the initial exposure claim may have grounds other than fairness on which to reserve the right to a future claim based on actual

⁶⁴ See text accompanying notes 105-11.

⁶⁵ 452 US 394 (1981).

⁶⁶ *Moitie v Federated Department Stores, Inc*, 611 F2d 1267, 1269-70 (9th Cir 1980).

⁶⁷ *Moitie*, 452 US at 401.

⁶⁸ *Id* ("The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'"), quoting *Heiser v Woodruff*, 327 US 726, 733 (1946).

⁶⁹ For examples of grounds other than fairness on which courts have declined to find claim preclusion, see Part III.B.2.c-d.

⁷⁰ Second Restatement § 26(c). See also *Ayers*, 525 A2d at 300 (hearing an exposure claim and reserving the plaintiffs' right to bring a second claim when disease is manifested); *Burns v Jaquays Mining Corp*, 156 Ariz 375, 752 P2d 28, 31 (App 1987) (same).

⁷¹ Second Restatement § 26 comment b, Rep Notes.

development of disease. The next Part considers these arguments.

III. CLAIM PRECLUSION IN THE TOXIC TORT CONTEXT

This Part examines the application of traditional claim preclusion analysis to medical monitoring cases, showing that the unique nature of medical monitoring claims, coupled with policy considerations about adequate compensation for plaintiffs and deterrence for defendants, weigh in favor of allowing medical monitoring plaintiffs to bring second suits for damages if disease develops. It then identifies several exceptions to the traditional claim preclusion doctrine that courts can employ to deny the claim preclusive effect of medical monitoring claims.

A. Claim Preclusion in the Increased Risk and Fear of Disease Context

Because medical monitoring claims are somewhat similar to increased risk and fear of disease claims, it might seem promising to examine judicial application of claim preclusion to increased risk and fear of disease claims. Unfortunately, courts awarding recovery for increased risk or fear of disease rarely discuss whether future claims would be precluded.

The few courts that have considered the claim preclusion question explicitly in increased risk and fear of disease cases have provided that a suit for the actual development of disease is an action separate and distinct from one based on mere exposure.⁷² These courts usually state that they are not choosing to make an exception to the claim preclusion doctrine but rather that claim preclusion simply does not apply in latent disease cases.⁷³ For example, in *Devlin v Johns-Manville Corp.*,⁷⁴ a New

⁷² See, for example, *Hagerty v L & L Marine Services, Inc.*, 788 F2d 315, 320 (5th Cir 1986) (denying increased risk claim while suggesting that any future developments of cancer be treated as a separate cause of action); *In re Moorenovich*, 634 F Supp 634, 637 (D Me 1986) (allowing present recovery for fear of cancer and predicting that this recovery would not preclude a future claim for actual cancer); *Anderson v W.R. Grace & Co.*, 628 F Supp 1219, 1231-32 (D Mass 1986) (rejecting claim for increased risk and holding that recovery for future illnesses that stem from the same disease as existing ailments must be brought in the present case whereas future suits for illnesses resulting from different disease will not be precluded); *Mauro v Owens-Corning Fiberglas Corp.*, 225 NJ Super 196, 542 A2d 16, 19-20 (1988) (reaching the same conclusion as *Anderson* under New Jersey law); *Eagle-Picher Industries, Inc v Cox*, 481 S2d 517, 520 (Fla App 1985) (refusing to allow increased risk action but expressly providing a second cause of action if plaintiff actually contracts cancer due to exposure to asbestos).

⁷³ See, for example, *Ayers*, 525 A2d at 300 (stating that the claim preclusion rule is "literally inapplicable" to toxic tort claims). For commentary proposing allowing second suits in increased risk and fear of disease cases, see Note, *Claim Preclusion in Modern La-*

Jersey court found that exposure and cancer were two separate claims, based on an affidavit from the Chief Medical Examiner of Maryland stating that “[i]t is a medically accepted fact that an individual who has been diagnosed with the disease of asbestosis [because of exposure] will not inevitably contract [cancer].” Hence, because the cancer may or may not result, the actual manifestation of disease allows for a cause of action separate from the earlier exposure claim.⁷⁵

The Fifth Circuit has allowed a subsequent claim based on the plaintiff's difficulty in winning the earlier exposure-based suit. In *Hagerty v L & L Marine Services, Inc.*,⁷⁶ the court expressed its concern that if the plaintiff was unable to prove injury based solely on exposure and was later precluded from bringing suit once cancer actually developed, he would be left completely without remedy.⁷⁷ Many other courts simply reserve the plaintiff's right to a subsequent claim without explaining their reasoning.⁷⁸

B. Claim Preclusion in the Medical Monitoring Context

As with increased risk and fear of disease claims, most courts hearing medical monitoring claims have failed to discuss the later claim preclusive effects of those claims. Courts that have discussed the issue have usually determined that claim preclusion should not apply—that is, the plaintiff may bring a second cause of action if and when she contracts a disease.⁷⁹ In *Ayers*, the New Jersey Supreme Court stated that claim preclusion

tent Disease Cases: A Proposal for Allowing Second Suits, 103 Harv L Rev 1989 (1990).

⁷⁴ 202 NJ Super 556, 495 A2d 495 (1985).

⁷⁵ 495 A2d at 502 (finding exposure and exposure-related cancer to be separate because “each may exist apart from the other”).

⁷⁶ 788 F2d 315 (5th Cir 1986).

⁷⁷ Id at 320-21. See also *Mauro*, 542 A2d at 19-20 (reserving the plaintiff's right to a second claim because of the plaintiff's potential difficulties in proving a claim based solely on exposure).

⁷⁸ See *Eagle-Picher*, 481 S2d at 529 (stating that “[t]he plaintiff's right to sue for cancer damages if and when he contracts the disease is reserved, and such a suit will not be subject to the rule against splitting causes of action,” without giving any reasons for the reservation); *In re Moorenovich*, 634 F Supp at 637 (stating only that any recovery for emotional distress is for “present damages” and hence does not bar a cause of action for cancer, should it ultimately develop).

⁷⁹ See, for example, *Hagerty*, 788 F2d at 320 (holding that “[a]t least in the toxic chemical or asbestos cases, the disease of cancer should be treated as a separate cause of action for all purposes,” after awarding damages for medical monitoring and denying claim for increased risk); *Burns v Jaquays Mining Corp.*, 156 Ariz 375, 752 P2d 28, 31 (App 1987) (holding that second cause of action for future damages is not precluded by prior litigation based on exposure).

cannot sensibly be applied to a toxic tort claim filed when disease is manifested years after the exposure, merely because the same plaintiff sued previously to recover for . . . other injuries. In such a case, the rule is literally inapplicable since . . . the second cause of action does not accrue until the disease is manifested; hence it could not have been joined with the earlier claims.⁸⁰

In the cases in which courts have indicated their judgments would not preclude future claims if an illness develops, the courts have also awarded "quality of life,"⁸¹ property damage,⁸² and fear awards.⁸³ Because these courts have not considered medical monitoring claims in isolation, other courts may have difficulty finding clear guidance from these cases.

1. A simple view: Applying traditional claim preclusion doctrine in the medical monitoring context.

The problems with applying claim preclusion in the medical monitoring context may not be immediately apparent to courts, and they may be tempted simply to follow classic claim preclusion doctrine and end their analysis there. Indeed, there is some weight behind an argument in favor of applying general claim preclusion doctrine in the medical monitoring context, based either on the policy of encouraging finality of judgments or on the persuasive power of claim preclusion rulings from federal courts. As will be developed in Part III.B.2, however, this argument is ultimately not compelling, as there are several reasons to treat medical monitoring claims differently from other kinds of claims.

a) Finality of judgments. The Supreme Court has repeatedly emphasized that claim preclusion serves "vital public interests"⁸⁴ and is a "rule of fundamental and substantial justice, of public policy and private peace, which should be cordially regarded and enforced by the courts."⁸⁵ Strict claim preclusion fosters finality

⁸⁰ 525 A2d at 300.

⁸¹ *Id.* at 293-94.

⁸² *Burns*, 752 P2d at 32.

⁸³ *Hagerty*, 788 F2d at 317-19.

⁸⁴ *Moitie*, 452 US at 401. See also *Heiser v Woodruff*, 327 US 726, 733 (1946) (holding that there is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata"); *Reed v Allen*, 286 US 191, 201 (1932) (explaining that anything other than a strict application of claim preclusion would result in uncertainty and confusion and undermine the conclusive character of judgments).

⁸⁵ *Hart Steel Co v Railroad Supply Co*, 244 US 294, 299 (1917) (internal quotation marks omitted). See also *Kessler v Eldred*, 206 US 285, 289 ("If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by

and thus reduces the possibility of harassment by litigation. Plaintiffs are forced to take "one shot" at recovery rather than dragging out litigation by bringing several separate suits based on a single event or occurrence. Finality also conserves judicial resources.⁸⁶ Court dockets are overcrowded, and courts can ill afford to provide second and third chances to plaintiffs who have already had a first.⁸⁷ Finally, promoting finality of judgments provides defendants with some (eventual) peace of mind.⁸⁸ If plaintiffs can bring second (and third and fourth) claims on the same underlying conduct, defendants remain potentially liable forever.⁸⁹

b) *Federal claim preclusion case law.* Several federal cases, in addition to the Second Restatement, seem to support application of the traditional claim preclusion analysis in the medical monitoring context. As developed in Part III.B.2, however, these cases do not conclusively determine that plaintiffs who make medical monitoring claims should be subsequently barred from bringing claims based on development of the disease.

In *Gideon v Johns-Mansville Sales Corp.*,⁹⁰ the Fifth Circuit outlined the prohibition against splitting a cause of action:

those who are bound by it."). The Court in *Kessler* went on further to state that allowing second suits destroys rights determined in the first action. *Id.*

⁸⁶ See *Allen v McCurry*, 449 US 90, 94 (1980) (stating that claim preclusion relieves parties of the cost of multiple lawsuits, conserves judicial resources, and encourages reliance on adjudication by preventing inconsistent decisions).

⁸⁷ See *Brown v Felsen*, 442 US 127, 131 (1979) (noting that claim preclusion "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes"); *Car Carriers, Inc v Ford Motor Co*, 789 F2d 589, 596 (7th Cir 1986) ("It would undermine the basic policies protected by the doctrine of res judicata to permit the appellants to once again avail themselves of judicial time and energy while another litigant, who has yet to be heard even once, waits in line behind them.").

⁸⁸ See *Reed*, 286 US at 198-99 ("[T]he interest of the state requires that there be an end to litigation.").

⁸⁹ However, note that in a "discovery rule" jurisdiction, the defendant would similarly face an infinite period of liability because the statute of limitations does not begin until the plaintiff discovers, or has reason to know of, her injury. See note 6. But even in such a jurisdiction, the court's determination of the statute of limitations depends on whether the court views the disease as a cause of action separate and distinct from the actual exposure. See text accompanying notes 72-75. If the disease is viewed as a separate cause of action, then the statute of limitations will not accrue until the disease develops. If the claim for disease is inseparable from the claim for exposure, the statute of limitations will accrue at the time the exposure is discovered. Under the latter regime, the statute of limitations may severely limit a toxic tort plaintiff's recovery if she is required to wait until she can prove her damages with a reasonable certainty. For a good discussion of the interplay between the discovery rule and claim preclusion in toxic tort cases, see Note, 103 Harv L Rev at 1990-98 (cited in note 73). See also *Louisville Trust Co v Johns-Manville Products Corp*, 580 SW2d 497, 500-01 (Ky 1979) (holding that a tort action for injury from latent disease caused by exposure accrues on date disease is discovered); *Harig v Johns-Manville Products Corp*, 284 Md 79, 394 A2d 299, 304-05 (1978) (same).

⁹⁰ 761 F2d 1129 (5th Cir 1985).

[The plaintiff] has but one cause of action for all the damages caused by the defendants' legal wrong; the diseases that have developed and will in probability develop are included within this cause of action, for they are but part of the sequence of harms resulting from the alleged breach of legal duty. [The plaintiff] could not split his cause of action and recover damages for asbestosis, then later sue for damages caused by such other pulmonary disease as might develop, then still later sue for cancer should cancer appear.⁹¹

In *Gideon*, the plaintiff brought suit alleging that he suffered from asbestosis and was likely to develop cancer as a result of his exposure to asbestos fibers. He also brought claims based on anxiety. Although the court recognized that he might develop injuries in the future, it stated that his cause of action included all damages that he had already suffered *and* those he would suffer in the future.⁹²

The case may be offered as authority for applying traditional claim preclusion doctrine, as it emphasizes the importance of considering all claims arising from the same factual occurrence. However, its application in the medical monitoring context is limited; the plaintiff was already suffering one disease—asbestosis—and seeking present damages. This is usually not the case in medical monitoring claims.

Courts may point to the Supreme Court's decision in *Moitie* to justify a strict application of the traditional claim preclusion analysis. *Moitie*, however, only criticized reliance on fairness in denying the claim preclusive effect of a prior suit. Part III.B.2 discusses several grounds other than fairness on which courts may rely in allowing second suits by medical monitoring plaintiffs.

A court applying claim preclusion to medical monitoring claims could also rely on comment b to Section 18 of the Second Restatement.⁹³ Comment b states that if a plaintiff recovers a judgment against a defendant for injuries suffered in an automobile accident, the plaintiff cannot bring another action against the same defendant if it is later discovered that the plaintiff's injuries

⁹¹ Id at 1137 (internal citation omitted). See also *Albertson v T.J. Stevenson & Co, Inc*, 749 F2d 223, 229 n 3 (5th Cir 1984) ("[A] plaintiff may not split his cause of action and institute one suit for the damages attributable to past and present harm and institute a second suit to recover for future damages when the full extent of the future damages from the tort becomes known.").

⁹² *Gideon*, 761 F2d at 1137.

⁹³ Second Restatement § 18 comment b illus 1.

were more serious than originally determined.⁹⁴ According to the Restatement, a cause of action for potential injury is still “available” even if the injury has not yet occurred; a plaintiff—perhaps a medical monitoring plaintiff—cannot bring a second claim even though the injury had not yet occurred at the time of the first trial. While the Second Restatement is influential, it is important to note that the Restatement seems to anticipate a tort in which the plaintiff is already injured at the time the first suit commences. As will be discussed in more detail in Part III.B.2, because a medical monitoring plaintiff is not bringing a claim for present physical injury, the Restatement is not necessarily dispositive in this context.

2. A better view: Treating medical monitoring claims differently.

While it is possible for a court to find some justification for the application of traditional claim preclusion principles, there is a strong argument against the blind application of claim preclusion to every newly developed tort claim, including claims for medical monitoring damages suffered as a consequence of exposure.⁹⁵ This argument is based on several important policy goals and finds considerable support in the decisions of numerous courts.

a) *The special nature of medical monitoring claims.* Perhaps the strongest argument against claim preclusion in the medical monitoring context—and the one that requires the least deviation from traditional preclusion doctrine—stems from the unique nature of the medical monitoring award. As the Third Circuit recognized in *In re Paoli Railroad Yard PCB Litigation*:⁹⁶ “The injury in an enhanced risk claim is the anticipated harm itself. The injury in a medical monitoring claim is the cost of the medical care that will, one hopes, detect that injury.”⁹⁷ A court permitting medical monitoring damages expressly decides *not* to compensate for future injury but instead to compensate only for the cost of monitoring. Therefore, when a medical monitoring plaintiff brings a second claim, there is no risk of double recovery. The first recovery compensates only the cost of medical examinations

⁹⁴ *Id.* cited in *Moore's* § 131.10[2] at 131-17 (cited in note 51).

⁹⁵ For commentary arguing for a split cause of action rule in latent disease cases, see David G. Poston, Note, *Gone Today and Here Tomorrow: Damage Recovery for Subsequent Developing Latent Diseases in Toxic Tort Exposure Actions*, 14 Am J Trial Advoc 159, 161-76 (1991); Note, 103 Harv L Rev at 1998-99 (cited in note 73).

⁹⁶ 916 F2d 829 (3d Cir 1990).

⁹⁷ *Id.* at 850.

aimed at detecting the onset of disease. The second recovery compensates for the losses incurred when the disease actually develops.

This avoidance of double recovery is a critical difference between medical monitoring recovery and recovery for increased risk or fear of disease. Judges hearing increased risk and fear of disease claims require either a present injury or a high probability of injury in the future. The judge or jury essentially awards compensation for future injuries, so long as the injuries are not too speculative.

In contrast, since medical monitoring courts do not require a 50 percent probability of eventual disease, courts do *not* limit recovery to those cases in which the disease is likely to actually occur. They do not consider future injuries that may result if and when the plaintiff develops a disease. In fact, they expressly recognize that the plaintiff may or may not contract a disease; the relative chances of either are irrelevant. Instead, the court recognizes a separate and discrete injury: the plaintiff's present costs of medical monitoring that have resulted from the defendant's negligence.

Because of the unique nature of medical monitoring claims, courts can reconcile allowing subsequent claims once the disease develops with the traditional Restatement approach. The Second Restatement states that claim preclusion usually prohibits a second cause of action because the award in the first action is intended to encompass the entire damage award for the entire injury:

Typically, even when the injury caused by an actionable wrong extends into the future and will be felt beyond the date of judgment, the damages awarded by the judgment are nevertheless *supposed to embody the money equivalent of the entire injury*. . . . It is immaterial that in trying the first action [the plaintiff] was not in possession of enough information about the damages, past or prospective.⁹⁸

In contrast, medical monitoring costs are not "supposed to embody the money equivalent of the entire injury." Medical monitoring awards cover the costs of monitoring and nothing more. Because medical monitoring awards are not supposed to include the damages for the entire injury, they do not fit within the Second Restatement's justification for refusing a second cause of action for future damages.

⁹⁸ Second Restatement § 25 comment c (emphasis added).

b) Policy arguments for a claim preclusion exception. Society benefits in several ways when courts allow medical monitoring plaintiffs to bring a second cause of action. In a successful medical monitoring case, the court awards the plaintiff only the costs of medical examinations. Because these payments usually come out of a fund as the examinations take place,⁹⁹ the plaintiff receives an amount exactly equal to the costs of the current injury (the need for examination). When a plaintiff actually becomes ill, she can sue for a damage award equal to her *new* injury (the cost of treating the disease). This process ensures that at all times the damage award equals the actual injury.

If plaintiffs know they will also be able to bring a second claim if and when they contract a disease, they are probably more likely to bring medical monitoring claims based on exposure. Medical monitoring claims in general further an important public health interest in fostering access to medical testing for those with an increased risk of disease. Early diagnosis usually means better, and less costly, treatment, as well as better chances for survival. Lower medical costs benefit all health care consumers and health insurance subscribers.¹⁰⁰ Although some individuals exposed to toxins may seek regular medical monitoring whether or not the cost is reimbursed, the "lack of reimbursement will undoubtedly deter others from doing so."¹⁰¹ Although there are costs associated with allowing litigation of a second claim, they are trivial in comparison to the societal (and human) costs avoided due to early detection of disease.¹⁰²

Finally, deterrence principles support allowing a second cause of action. Refusing second suits when a condition actually is contracted (and when the largest sums of damages are incurred) may cause plaintiffs to take a "wait and see" attitude to their claims. As a result, potential defendants may avoid paying all of the costs resulting from their negligence (namely, the costs of medical testing for plaintiffs they put at risk); in this way, potential defendants may be underdeterred. The Third Circuit justified its affirmance of a medical monitoring award by calling on this deterrence principle. "[I]n a toxic tort age, significant harm

⁹⁹ See note 18.

¹⁰⁰ For a discussion of the medical benefits of early detection, see Freddy Homburger, John A. Hayes, and Edward W. Pelikan, *A Guide to General Toxicology* 201 (Karger 1983).

¹⁰¹ *Ayers*, 525 A2d at 311.

¹⁰² See Michael Dore, *Law of Toxic Torts: Litigation/Defense/Insurance* § 7.05 at 7-18 (West 1998) (advising defendants in cases where the need for medical surveillance is conceded to offer to pay for the necessary testing regardless of whether the plaintiff has requested medical surveillance damages in order to reduce the defendant's possible future damages).

can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. . . . Allowing plaintiffs to recover the cost of [medical monitoring] deters irresponsible discharge of toxic chemicals by defendants."¹⁰³ Because of the difficulties of proving causation where the disease has manifested itself years after exposure, many commentators have suggested that tort law has no "capacity to deter polluters because the costs of proper disposal are often viewed by polluters as exceeding the risk of tort liability."¹⁰⁴ By allowing subsequent claims for disease and thereby promoting initial medical monitoring claims, courts subject polluters to significant liability at a time when proof of the causal connection between the defendant's tortious conduct and the plaintiff's exposure is more readily available.

c) *Claim preclusion exceptions at common law.* The common law exceptions to claim preclusion provide several grounds on which courts may base denials of the claim preclusive effects of medical monitoring awards. First, courts often apply a "fairness exception," holding that policies of equity and fairness can outweigh former adjudication concerns. For example, when faced with the appeal of a second claim brought to settle a dispute in which both parties to a botched land deal sought title, the Illinois Supreme Court refused to give the earlier decision preclusive effect in order to avoid an inequitable result and unclear title to the land.¹⁰⁵ In the original cause of action, the plaintiff had requested specific performance. The court held that its jurisdiction did not permit such a remedy.¹⁰⁶ But because the first case did not ultimately decide who owned the land, it left the title to the land unclear. In allowing the second claim to go forward, the court was especially influenced by the fact that the policies underlying claim preclusion—protection of the defendant from harassment and the public from excessive litigation—were not present in the case. Similarly, the New York Court of Appeals allowed a second claim when the case included a "grave legal question" as to the defendants' liability to bank stockholders.¹⁰⁷

It clearly seems unfair to apply claim preclusion with respect to a medical monitoring plaintiff when she becomes ill as a consequence of exposure. However, as noted above, the fairness exception to claim preclusion has recently come under fire from the

¹⁰³ *In re Paoli*, 916 F2d at 852.

¹⁰⁴ *Ayers*, 525 A2d at 311. See also Note, *Developments in the Law—Toxic Waste Litigation*, 99 Harv L Rev 1458, 1630 (1986).

¹⁰⁵ *Adams v Pearson*, 411 Ill 431, 104 NE2d 267, 271-73 (1952).

¹⁰⁶ 104 NE2d at 273.

¹⁰⁷ *White v Adler*, 289 NY 34, 43 NE2d 798, 801 (1942).

Supreme Court in *Moitie*, in which the Court held that federal courts must enforce claim preclusion strictly, even if the consequences seem unduly harsh.¹⁰⁸ The Court seemed most afraid of an erosion of the claim preclusion doctrine that might result if judges could choose not to honor it at their whim. But despite *Moitie*'s influence, state courts¹⁰⁹ and even federal courts bound by its command¹¹⁰ have tended not to interpret its language to create an ironclad claim preclusion rule. Without explicitly saying so, courts have continued to look at fairness when determining the application of claim preclusion.¹¹¹

State courts have applied a second exception to claim preclusion for cases in which evidence discovered after trial could have had a substantial effect on the final judgment. In *Louisville & N.R. Co v Whitley County Court*,¹¹² for example, the court granted the losing defendant a new trial based on new evidence. In the first trial, the judge ordered the defendant railroad to pay \$10,000 in damages to compensate for causing earth to slide continuously onto a county highway. After trial, however, the county was able to remedy the problem by spending only \$300. The court held that the difference between the estimated and actual cost of repair constituted sufficient evidence upon which to base a new trial: "[N]ewly-discovered evidence . . . applies to any character of evidence competent and allowable to illustrate and determine an issue of fact involved."¹¹³ Because the verdict was based on incomplete evidence, the court granted the defendant's motion for a new trial:

¹⁰⁸ See text accompanying notes 65-68.

¹⁰⁹ See, for example, *Arkansas Louisiana Gas Co v Taylor*, 31 Ark 62, 858 SW2d 88, 90 (1993) (considering possibility of unfairness and injustice in its application of claim preclusion doctrine); *Ayers*, 525 A2d at 300 (holding that claim preclusion cannot sensibly be applied to toxic tort claims); *Shelton v Fairley*, 72 NC App 1, 323 SE2d 410, 414 (1984) (stating that "the doctrine of res judicata is to be applied in particular situations as fairness and justice require") (internal citation omitted).

¹¹⁰ See, for example, *Thompson v Schweiker*, 665 F2d 936, 940 (9th Cir 1982) (recognizing the "importance of res judicata," but stating that "enforcement of [claim preclusion] policy must be tempered by fairness and equity"); *In re Moorenovich*, 634 F Supp at 637-38 (holding that claim preclusion cannot sensibly be applied to toxic tort claims). Additionally, a court may still have some flexibility in determining what constitutes a single claim. See Second Restatement § 26(1)(d), (f) (stating that a claim may be split if "plainly consistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim," or if "it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason").

¹¹¹ See, for example, *Burns*, 752 P2d at 30-31.

¹¹² 100 Ky 413, 38 SW 678 (App 1897).

¹¹³ 38 SW at 679.

The unusually large verdict . . . was rendered because the jury believed, and were induced by the evidence to believe, the highway could not be reclaimed and preserved without the expenditure of that sum of money. If the newly-discovered evidence shows it to be practicable to accomplish such object at greatly less than that amount, [the damages verdict should be changed].¹¹⁴

The same court made a similar decision in *Anshutz v Louisville Railway Co.*¹¹⁵ The plaintiff was injured in a railway accident. She brought a claim against the railway company based on a surgeon's report that the accident rendered her barren and caused a tumor in her abdomen, necessitating expensive surgery. After the jury awarded her \$7,000 in damages, Anshutz gave birth to the "tumor," which was actually a baby boy. The defendant requested a new trial based on the newly discovered evidence, which clearly contradicted the basis of the original judgment. The court granted the new trial:

From an examination of all these cases, the rule is to be deduced that where the newly discovered evidence is of such conclusive nature, or even of such decisive or preponderating character as that it would, with reasonable certainty, have changed the verdict, or materially reduced the recovery, a new trial should be granted, if it is satisfactorily shown why the same was not discovered and produced at the trial.¹¹⁶

In another case, the Minnesota Supreme Court extended the newly discovered evidence exception to allow the reopening of a final judgment once it determined that at the time the judgment was entered, both parties were laboring under a mutual mistake of fact. In *Simons v Schiek's, Inc.*,¹¹⁷ the plaintiff, Simons, fell while visiting the defendant's business. Although Simons saw a doctor, no X-rays were taken of his visibly bruised left hip. Four years after the fall, the parties agreed upon a settlement of the case for \$1,850. However, shortly after the settlement was reached, Simons began experiencing pain in his hip. A year after the settlement, he again consulted a doctor and underwent surgery, resulting in medical expenses exceeding \$1,850. He brought a second action, seeking damages for the expenses of the surgery, loss of income, impairment of future earning capacity, and severe

¹¹⁴ *Id.*

¹¹⁵ 152 Ky 741, 154 SW 13 (App 1913).

¹¹⁶ 154 SW at 15.

¹¹⁷ 275 Minn 132, 145 NW2d 548 (1966).

pain and suffering. The plaintiff argued that the settlement was entered into without any knowledge on his part of the future extent of his injuries.

In response, the defendants made a simple claim preclusion argument. But the *Simons* court found a mutual mistake of fact—neither party knew the actual extent of injury at the time of settlement—and allowed vacation of the first judgment.¹¹⁸ The court stated that “even though the release expressly covered unknown injuries, it was not a bar to an action for such unknown injuries if it can be shown that the unknown injuries were not within the contemplation of the parties when the settlement was agreed upon.”¹¹⁹

In *Simons*, a mutual mistake regarding the extent of the plaintiff's injury was a sufficient basis for hearing the case a second time. Similarly, in *Louisville & N.R.* and *Anshutz*, the court allowed a second claim because the original verdicts failed to compensate for the actual injury. There are also various other categories of judgments specifically subject to future modification in light of post-judgment changes in conditions. Judgments awarding custody and support of children in connection with divorce and injunctions regulating a future course of continuing conduct are prime examples.¹²⁰ In the words of the Second Restatement, “In some instances, a judgment may avowedly be experimental, to be modified if implementation of its original terms is impractical.”¹²¹

This same reasoning can be applied in medical monitoring cases. At the time the original claim is brought, the parties cannot know the true extent of the injury. When evidence later arises demonstrating a difference in the extent of the presumed injury and a need for adjustment in compensation, a court should allow

¹¹⁸ The defendant denied the existence of any kind of a mistake. He claimed that the plaintiff suffered a known injury to his hip which was visible shortly after the time of the accident and that the hip condition was just an unknown consequence of a known injury. 145 NW2d at 551.

¹¹⁹ Id at 552. Courts have created other exceptions to res judicata's preclusive effect. For example, when the first judgment was obtained by the use of fraud, courts generally will not consider it binding. See, for example, *McCarty v First of Georgia Insurance Co*, 713 F2d 609 (10th Cir 1983) (holding that although initial claim against insurance company for breaching insurance contract by failing to pay insured had been dismissed, a second claim would be allowed because the company had wrongfully concealed evidence of the existence of the insurance contract in the first suit). “Similarly, when there was a . . . jurisdictional defect that should have prevented the first court from hearing the suit, courts often will hold that the judgment has no preclusive effect.” John J. Cound, et al, *Civil Procedure: Cases and Materials* 1198 (West 7th ed 1987).

¹²⁰ See Roger C. Cramton, et al, *Conflicts of Laws* 453-57 (West 5th ed 1993).

¹²¹ Second Restatement § 73. These judgments may be subject to post-judgment change either by their own terms or by provisions of law governing such judgments in general. Id.

a second claim in order to compensate the plaintiff properly. In this way, medical monitoring claims differ from increased risk and fear of disease cases, as well as traditional cases to which claim preclusion is applied: there, the award of damages includes compensation for both present and future injuries. In medical monitoring cases, however, damages are limited to the present costs of necessary medical testing. There is no attempt to compensate the plaintiff for the development of a disease.

d) *Using FRCP 60 as a bar to claim preclusion.* Federal and state courts seeking to deny preclusive effect to medical monitoring awards may rely on numerous legal and policy arguments, in addition to traditional common law exceptions to the claim preclusion doctrine. Federal courts, however, have still another weapon in their arsenal. Rule 60 of the Federal Rules of Civil Procedure is a possible means of relief for plaintiffs who suffer from increased damages after a final judgment has been entered in a suit based on exposure.¹²²

Rule 60(b)(2) provides that a court may relieve a party from a final judgment on the basis of newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."¹²³ The newly discovered evidence must be material to issues tried¹²⁴ and must be likely to change the outcome of the case.¹²⁵ A new trial can be granted based on newly discovered evidence where it appears that such

¹²² This option has been advanced in *Moore's*: "[D]amages which have increased dramatically in scope through no fault of the plaintiff might be the subject of a motion or independent action for relief from judgment under the Federal Rules of Civil Procedure." § 131.23[3][b] at 131-63 (cited in note 51).

¹²³ FRCP 60(b)(2).

¹²⁴ *Moore's* § 60.42[7] at 60-124 (cited in note 51); *Longden v Sunderman*, 979 F2d 1095, 1103 (5th Cir 1992) (concluding that the existence of agreement between attorneys in class action regarding reimbursement for fees and expenses was not material to appeal from court's award of 40 percent of requested legal fees because the court was the final judge of fees).

¹²⁵ *Moore's* § 60.42[9] at 60-125-60-126 (cited in note 51); Second Restatement § 13 comment c ("The res judicata consequences of [judgments granting or denying continuous relief] follow normal lines while circumstances remain constant, but those consequences may be affected when a material change of the circumstances occurs after the judgment. . . . [I]f there has been a later material change of conditions, a new claim may arise upon the later facts . . . and that claim will be held not barred by the previous judgment."); *Farm Credit Bank of Texas v Guidry*, 110 F3d 1147, 1155 (5th Cir 1997) (finding that no relief from trial judgment was warranted because the party could not establish the probability that new evidence would have changed the trial outcome); *Harris v Owens-Corning Fiberglas Corp*, 102 F3d 1429, 1434 (7th Cir 1996) (holding that evidence of asbestos exposure could not have changed the trial outcome because plaintiff still would not have been able to link asbestos products to defendant manufacturer); *Hoult v Hoult*, 57 F3d 1, 5-6 (1st Cir 1995) (denying relief from the trial judgment because newly discovered published article would not have changed the outcome of the trial for the defendant).

evidence was unavailable, but in existence, at time of trial.¹²⁶ A new trial will not be granted when the newly discovered evidence was the result of changed conditions since the trial.¹²⁷ Rule 60(b)(2) has been used often by plaintiffs in federal court, but without much success. Courts have usually found lacking the requirement that the newly discovered evidence be likely to have changed the outcome of the case.¹²⁸

At the time a medical monitoring claim is tried, the toxins are in the plaintiff's body. It can thus be said that the "evidence" of disease already exists, but is simply not immediately evident or "discovered" at the time of trial. Under Rule 60(b)'s "newly discovered evidence" provision, then, the eventual development of disease may constitute the "discovery" of evidence necessary to deny the medical monitoring judgment claim preclusive effect.

Even if evidence of disease is not considered "newly discovered," however, Rule 60(b)(6) also allows relief from a final judgment on the basis of "any other reason justifying relief from the operation of the judgment." The Restatement proposes a similar form of relief, providing that "a judgment may be set aside or modified if . . . [t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust."¹²⁹ However, courts will grant a Rule 60(b)(6) motion only in "extraordinary circumstances and only when such action is necessary to accomplish justice."¹³⁰

The Tenth Circuit found such "extraordinary circumstances" in *Gledhill v Gledhill*,¹³¹ a case involving a plaintiff bank and a

¹²⁶ See *Wagner v Loop River Public Power District*, 150 Neb 7, 33 NW2d 300, 303 (1948) ("Newly discovered evidence . . . is evidence in existence at the time of the trial, but which could not, by reasonable diligence, have been procured."); *Johnson v Johnson*, 18 Colo App 493, 72 P 604, 604-05 (1903) ("Admitting the allegations of the affidavit to be true, it cannot be made the basis of a motion for a new trial, as, from the very nature of the case, such testimony could not have been produced at the trial, as the fact complained of did not exist at that time.").

¹²⁷ *Johnson v City of Waterloo*, 140 Iowa 670, 119 NW 70, 72 (1909) (refusing relief although conditions had changed since the trial because "[i]t is manifest then that the so-called newly discovered evidence was of matters occurring subsequent to the trial, and that no new evidence available then had been discovered").

¹²⁸ See *Mitchell v United States*, 141 F3d 8, 19 (1st Cir 1998) (finding that new expert testimony would not have been sufficient to change the outcome of a medical malpractice case); *Mumford v Bowen*, 814 F2d 328, 331 (7th Cir 1986) (finding that new evidence would not change the statute-based outcome). But see *Good v Ohio Edison Co*, 149 F3d 413, 423-24 (6th Cir 1998) (finding that new evidence did create a material fact that would have changed summary judgment ruling); *Alpern v Utilicorp United, Inc*, 84 F3d 1525, 1538 (8th Cir 1996) (same).

¹²⁹ Second Restatement § 73(2).

¹³⁰ *Lyons v Jefferson Bank & Trust*, 994 F2d 716, 729 (10th Cir 1993).

¹³¹ 76 F3d 1070 (10th Cir 1996).

defendant trustee. The bank received an order allowing it to foreclose on the trustee's property that it held in lien. However, shortly before the foreclosure sale, the trustee made a Rule 60(b)(6) motion requesting that the court vacate the order and instead allow the trustee to liquidate the property for the benefit of all creditors. The court granted the motion because the property had increased in value by \$750,000; the estate could distribute more money to other creditors if the trustee liquidated the property in a commercially reasonable manner than if the bank had sold it at a foreclosure sale.¹³²

The D.C. Circuit found an "extraordinary circumstance" when a party brought forth evidence that would have been "central to the litigation."¹³³ In *Computer Professionals for Social Responsibility v United States Secret Service*,¹³⁴ the defendants brought forth new evidence of underlying facts that were central to the legal determinations in the first suit.¹³⁵ In the first suit, the court forced the Secret Service to disclose reports regarding the Service's involvement in a computer fraud investigation. This judgment was based upon the Service's failure to show a basis for confidentiality of expectation of privacy of its source.¹³⁶ However, when the defendants later provided that evidence of confidentiality, the court applied Rule 60(b)(6) to allow the Service relief from that judgment.¹³⁷

Trial courts retain great discretion in deciding a Rule 60(b)(6) motion; appellate courts will reverse the lower court determination only if they find "a complete absence of reasonable basis."¹³⁸ Hence, the definition of "extraordinary circumstances" is subject to great court discretion. In *Gledhill*, the court looked mostly to the economic interests of the plaintiff—it was more remunerative to liquidate the property than to foreclose it. *Computer Professionals*, on the other hand, decided that new evidence "central" to the previous litigation that may have changed the original outcome may be the basis for 60(b)(6) relief.

While Rule 60(b)(6) is used only rarely, it may provide a textual hook for a court seeking to allow a second suit based on development of disease. The actual development of cancer can be

¹³² Id at 1081.

¹³³ *Computer Professionals for Social Responsibility v United States Secret Service*, 72 F3d 897, 903 (DC Cir 1980).

¹³⁴ 72 F3d 897 (DC Cir 1980).

¹³⁵ Id at 903.

¹³⁶ Id at 902.

¹³⁷ Id at 903.

¹³⁸ See *Pelican Products Corp v Marino*, 893 F2d 1143, 1146 (10th Cir 1990).

logically described as a "substantial change in circumstances" or an "extraordinary circumstance" under this provision. Cancer not only alters economic considerations but also provides evidence central to questions of injury and compensation.

CONCLUSION

Tort law aims to provide compensation to the victim while deterring the wrongdoer. To ensure that these purposes are achieved in toxic tort cases, courts have created new causes of action, including most recently the awarding of damages for medical monitoring. Applying traditional claim preclusion doctrine to these innovative tort remedies, however, may substantially affect the completeness of the remedy for injured plaintiffs and the adequacy of deterrence for culpable defendants.

While there is superficial appeal in a strict application of claim preclusion to medical monitoring claims, a more sophisticated analysis leads to the conclusion that an exception to claim preclusion is consonant with the legal principles and policy goals underlying the doctrine. To refuse a plaintiff a second claim for harm actually manifested leaves the victim inadequately compensated and the wrongdoer underdeterred. Courts should therefore use the common law exceptions to claim preclusion to deny preclusive effect to awards of medical monitoring damages.