

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2011

5 (Argued: March 1, 2012

Decided: May 1, 2013)

6 Docket No. 11-0316-cv

7 \_\_\_\_\_  
8 MARCIA L. CARONIA, LINDA McAULEY, and ARLENE FELDMAN,

9 Plaintiffs-Appellants,

10 - v. -

11 PHILIP MORRIS USA, INC.,

12 Defendant-Appellee.  
13 \_\_\_\_\_

14 Before: KEARSE, LOHIER, and DRONEY, Circuit Judges.

15 Appeal from a judgment of the United States District Court for the Eastern District of  
16 New York, Carol Bagley Amon, Judge, dismissing plaintiffs' claims against cigarette manufacturer  
17 for negligence, strict liability, breach of warranty, and medical monitoring with respect to increased  
18 risk of cancer, see 2010 WL 520558; 2011 WL 338425.

19 AFFIRMED in part; CERTIFIED in part to the Court of Appeals for the State of New  
20 York.

21 VICTORIA E. PHILLIPS, New York, New York (Steven J. Phillips, Stanley  
22 J. Levy, Jerome H. Block, Amber R. Long, Lisa W. Davis, Levy Phillips &  
23 Konigsberg, New York, New York, on the brief), for Plaintiffs-Appellants.

1 SHEILA BIRNBAUM, New York, New York (John H. Beisner,  
2 Jessica D. Miller, Geoffrey M. Wyatt, Skadden, Arps, Slate, Meagher  
3 & Flom Washington, D.C.; Gary R. Long, John K. Sherk, III, Shook,  
4 Hardy & Bacon, Kansas City, Missouri; Tammy B. Webb, Shook,  
5 Hardy & Bacon, San Francisco, California, on the brief), for  
6 Defendant-Appellee.  
7

8 KEARSE, Circuit Judge:

9 Plaintiffs Marcia L. Caronia, Linda McAuley, and Arlene Feldman appeal from a  
10 judgment of the United States District Court for the Eastern District of New York, Carol Bagley  
11 Amon, Judge, dismissing their tort claims alleging negligence, strict products liability, and breach of  
12 the Uniform Commercial Code ("UCC") implied warranty of merchantability in connection with the  
13 design, manufacture, and sale by defendant Philip Morris USA, Inc. ("Philip Morris"), of cigarettes  
14 that allegedly contain unnecessarily dangerous levels of carcinogens when smoked by humans, and  
15 their independent equitable claim seeking to require Philip Morris to fund a program of medical  
16 monitoring for longtime smokers of Marlboro cigarettes who have not been diagnosed with, but are  
17 at risk for, lung cancer. The district court granted Philip Morris's motions for summary judgment  
18 dismissing plaintiffs' negligence and strict liability claims on the ground that they were untimely, and  
19 dismissing the breach-of-implied-warranty claims on the grounds that plaintiffs' earliest such claims  
20 were untimely, see Caronia v. Philip Morris USA, Inc., No. 06-CV-224, 2010 WL 520558 (E.D.N.Y.  
21 Feb. 11, 2010) ("Caronia I"), and that the timely warranty claims were not supported by sufficient  
22 evidence of breach, see Caronia v. Philip Morris USA, Inc., No. 06-CV-224, 2011 WL 338425

1 (E.D.N.Y. Jan. 13, 2011) ("Caronia II"). Pursuant to Fed. R. Civ. P. 12(b)(6), the court granted Philip  
2 Morris's motion to dismiss plaintiffs' free-standing claim for medical monitoring of Marlboro smokers  
3 who lack symptoms of smoking-related disease, ruling that plaintiffs failed to state a claim on which  
4 relief can be granted because they could not sufficiently plead that their injuries--i.e., their increased  
5 risk of cancer from smoking Marlboro cigarettes--were proximately caused by Philip Morris's conduct.  
6 See Caronia II. On appeal, plaintiffs contend principally that their negligence and products liability  
7 claims are timely and that they adequately pleaded proximate cause in their claims for breach of  
8 implied warranty and in their independent claim for medical monitoring. For the reasons that follow,  
9 we affirm the dismissal of plaintiffs' negligence, strict liability, and breach-of-warranty claims; with  
10 respect to plaintiff's free-standing equitable claim for medical monitoring, we certify several questions,  
11 detailed in Part III below, to the Court of Appeals for the State of New York with respect to the  
12 existence of such a claim under New York State law, and, if such a claim is recognized, as to the  
13 elements and accrual of such a claim.

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1 I. BACKGROUND

2 Plaintiffs, who commenced this action on January 19, 2006, seeking to pursue it as a  
3 class action, are residents of New York State ("State") who, within the State, smoked Marlboro  
4 cigarettes--defined in plaintiffs' pleadings as the entire line of cigarettes manufactured and sold by  
5 Philip Morris under the "Marlboro" brand. The claims at issue on this appeal are those asserted in  
6 plaintiffs' Third Amended Complaint (or "3rd Am. Comp.") and Fourth Amended Complaint (or "4th  
7 Am. Comp.") (collectively the "Complaints").

8 A. Plaintiffs' Negligence, Strict Liability, and Warranty Claims

9 Plaintiffs are persons age 50 years or older who currently smoke Marlboro cigarettes,  
10 or ceased smoking them within one year prior to the commencement of this lawsuit, and smoked  
11 Marlboro cigarettes for at least 20 pack-years. (See 4th Am. Comp. ¶¶ 22-27; 3rd Am. Comp.  
12 ¶¶ 23-28.) A "pack[-]year" is defined in the Complaints as "the number of packs of cigarettes smoked  
13 per day multiplied by the number of years," e.g., one pack of cigarettes per day for one year equals one  
14 pack-year, and two packs per day equal two pack-years. (4th Am. Comp. ¶ 26, n.2; 3rd Am. Comp.  
15 ¶ 27, n.2.) "None of the plaintiffs is presently diagnosed with lung cancer" (4th Am. Comp. ¶ 28; 3rd  
16 Am. Comp. ¶ 29) "or under investigation by a physician for suspected lung cancer" (Complaints  
17 ¶ 1(e).) Plaintiffs contend, however, that lung cancer is the leading cause of cancer deaths in the  
18 United States and is responsible for the deaths of 160,000 Americans annually (see id. ¶ 4); that more  
19 than 80 percent of those deaths result from cigarette smoke (see id. ¶ 5); and that plaintiffs "are at  
20 significantly increased risk for developing lung cancer as a consequence of their use of Marlboro

1 cigarettes . . . specifically as a consequence of the excess quantities of carcinogens delivered by  
2 Marlboro cigarettes" (4th Am. Comp. ¶ 29; 3rd Am. Comp. ¶ 30).

3 The Complaints alleged that, during the relevant time period, Marlboro cigarettes  
4 regularly delivered between 6 and 17 milligrams of tar (see Complaints ¶ 53), a substance that  
5 "contains carcinogens which cause lung cancer" (id. ¶ 47), despite the existence of feasible alternatives  
6 for the manufacture of cigarettes delivering one milligram of tar or less (see id. ¶ 61). The Complaints  
7 alleged that Philip Morris had the ability to employ "feasible alternative designs which would have  
8 drastically reduced the cancer causing content of Marlboro cigarettes" (id. ¶ 18), such as by switching  
9 to a tobacco blend that would reduce or eliminate the quantity of "Burley" tobacco--known to contain  
10 high levels of cancer-causing nitrosamines--used in Philip Morris cigarettes (id. ¶¶ 64-67).

11 The Complaints also alleged that although smokers had been found by independent  
12 agencies to have a tendency to "compensate" for lower tar and nicotine levels in "light" cigarettes by  
13 taking "deeper, more intense" puffs (Complaints ¶ 56; see id. ¶ 57), Philip Morris had the  
14 technological ability to use a filter that would thwart such tendencies and deliver low overall levels  
15 of carcinogens simply by increasing its cigarettes' "resistance to draw" (id. ¶ 60; see id. ¶¶ 61-64).  
16 Philip Morris nonetheless allegedly chose to market Marlboro "Light" cigarettes that were  
17 "intentionally designed to permit full compensation" (id. ¶ 60; see also id. ¶¶ 58-59), allowing smokers  
18 of Marlboro Light cigarettes to inhale "approximately the same amount of tar as delivered by regular  
19 Marlboro 'Full Flavor' cigarettes" (id. ¶ 59).

20 In sum, the Complaints alleged that although Philip Morris knew at all relevant times  
21 that it was feasible to lower the carcinogenic content of its cigarettes (see, e.g., Complaints ¶¶ 62-65),  
22 it "purposely designed all of its Marlboro cigarettes to deliver an excessive amount of carcinogens

1 when smoked by humans" (id. ¶ 54; see also id. ¶¶ 63, 65-66).

2 Plaintiffs alleged that as a result of Philip Morris's voluntary, negligent, reckless, and/or  
3 intentional design of Marlboro cigarettes to deliver excessive amounts of carcinogens (see, e.g., 3rd  
4 Am. Comp. ¶¶ 86, 94), when it knew or should have known that such cigarettes caused lung cancer  
5 or increased the risk of lung cancer and thus were defective products not reasonably safe for their  
6 intended use (see id. ¶¶ 84-85), plaintiffs and members of the proposed class--"composed of at least  
7 tens of thousands of persons" (Complaints ¶ 35)--were placed at significantly increased risk of  
8 developing lung cancer (see 4th Am. Comp. ¶ 29; 3rd Am. Comp. ¶ 30). Plaintiffs contended that  
9 Philip Morris was (a) strictly liable for distributing its defective products (see 3rd Am. Comp.  
10 ¶¶ 80-90); (b) liable for negligence in failing to properly design, test, and inspect Marlboro cigarettes,  
11 thereby violating its "legal duty to create a reasonably 'safer' cigarette which delivered substantially  
12 less carcinogens when smoked by a human" (3rd Am. Comp. ¶ 93; see id. ¶¶ 92-99); and (c) liable for  
13 breach of the UCC implied warranty of merchantability, as Marlboro cigarettes were not safe for the  
14 ordinary purposes intended by Philip Morris and used by Marlboro smokers (see 4th Am. Comp.  
15 ¶¶ 105-107; 3rd Am. Comp. ¶¶ 101, 112-113).

## 16 B. The Relief Requested

17 As relief for their claims of negligence, strict liability, and breach of warranty, plaintiffs  
18 stated that they did not seek compensatory or punitive damages but instead sought to have Philip  
19 Morris provide funding for a court-supervised program of medical monitoring for class members who  
20 are at increased risk of lung cancer from smoking Marlboro cigarettes (see, e.g., 3rd Am. Comp. ¶ 19).

21 Plaintiffs alleged that when lung cancer is diagnosed at an early stage, it is usually

1 curable. (See Complaints ¶ 6.) But, they alleged, conventional forms of medical surveillance such  
2 as chest x-rays and sputum cytology are poor tools for identifying lung cancer at an early stage (see  
3 id. ¶ 9); hence, in the past, by the time the cancer was diagnosable, prospects for cure were usually dim  
4 (see id. ¶ 7). The Complaints alleged that a recently established (see id. ¶ 10) medical surveillance  
5 technique known as Low Dose CT Scanning of the chest ("LDCT"), "is a safe, efficacious and  
6 inexpensive technique, which, for the first time, provides a means to identify and diagnose lung  
7 cancers at an early stage, when they are still curable" (id. ¶ 3). LDCT can identify and lead to the  
8 diagnosis of Stage I lung cancers that previously would have remained undiagnosed until the cancer  
9 had reached an advanced, and likely incurable, stage. (See id. ¶ 10.) LDCT screening is currently  
10 unavailable as a benefit in most, if not all, private or public health insurance programs (see id. ¶ 15);  
11 the cost of LDCT is "a modest annual expense [of ]less than five hundred (\$500) dollars per patient  
12 per year[]" and involves "a lower dose of radiation than is associated with an annual mammogram"  
13 (3rd Am. Comp. ¶ 11).

#### 14 C. Philip Morris's First Motion for Summary Judgment

15 After plaintiffs had filed their Third Amended Complaint and discovery had been  
16 completed, Philip Morris moved for summary judgment dismissing the action on statute-of-limitations  
17 and/or causation grounds. Plaintiffs opposed the motion and cross-moved for certification of their  
18 proposed class. The district court in Caronia I granted Philip Morris's motion to the extent of  
19 dismissing as untimely the negligence and strict liability claims in their entirety and the breach-of-  
20 warranty claims in part. The court denied Philip Morris's motion to the extent that the motion sought  
21 dismissal of the breach-of-warranty claims based on lack of evidence of proximate causation, and it



1 reserved decision on the motion for class certification.

2 1. The Strict Products Liability and Negligence Claims

3 Philip Morris contended that plaintiffs' strict liability and negligence claims were  
4 essentially claims for damages and thus were barred by the three-year limitations period provided by  
5 New York Civil Practice Law & Rules ("CPLR") § 214-c(2), which applies to, inter alia, "an action  
6 to recover damages for personal injury . . . caused by the latent effects of exposure to any substance  
7 or combination of substances, in any form." Plaintiffs argued, inter alia, that their claims were not for  
8 damages but for equitable relief, and that the applicable statute of limitations was thus the six-year  
9 period provided by CPLR § 213(1), which generally applies to actions seeking equitable relief,  
10 including injunctive relief, see, e.g., 2004 Commentary CPLR 213(1), or to actions for which no  
11 limitations period is specified.

12 The district court, noting that "[b]oth parties agree that the injury in this action is the  
13 increased risk of developing lung cancer as a result of smoking Marlboro cigarettes for twenty pack-  
14 years," concluded that plaintiffs' strict liability and negligence claims were untimely "under either  
15 statute." Caronia I, 2010 WL 520558, at \*3. Under § 214-c(2), assuming that plaintiffs' claims were  
16 properly characterized as claims for damages, the statute of limitations would have begun "to run upon  
17 the 'date of discovery' of the injury," Caronia I, 2010 WL 520558, at \*3, i.e., the dates on which  
18 plaintiffs discovered that smoking Marlboro cigarettes increased their risk of lung cancer. The court  
19 noted that the record revealed that each of the plaintiffs was over the age of 50 when this suit was  
20 commenced in 2006, see id. at \*1; that each had begun smoking as a teenager, see id.; that it was  
21 "undisputed that each of the named plaintiffs in this action reached twenty pack-years of smoking by

1 the mid 1990s," Feldman by 1992, McAuley by approximately 1980, and Caronia by, at the latest,  
2 1996, see id. at \*5; and that the deposition "testimony of each plaintiff establishe[d her] awareness of  
3 an increased risk of cancer well before January 19, 2003," id. at \*3; see also id. at \*6 n.10 ("Plaintiffs  
4 do not, and cannot, argue that they did not know smoking cigarettes was the cause of their increased  
5 risk of lung cancer."). Accordingly, the court concluded that if the three-year limitations period of  
6 § 214-c(2) applied, plaintiffs' strict liability and negligence claims were time-barred.

7 The district court also rejected plaintiffs' contention that those claims would be timely  
8 under CPLR § 213(1)'s six-year limitations period, i.e., that their claims accrued on or after January  
9 19, 2000. The court pointed out that unlike the three-year statute of limitations provided in § 214-c(2),  
10 "the six-year statute of limitations under 213(1) begins to run" not on the date the injury is discovered  
11 but on the date the cause of action accrues, to wit, "when all of the facts necessary to the cause of  
12 action have occurred so that the party would be entitled to obtain relief in court," Caronia I, 2010 WL  
13 520558, at \*3 (quoting Aetna Life & Casualty Co. v. Nelson, 67 N.Y.2d 169, 175, 501 N.Y.S.2d 313,  
14 316 (1986)), "i.e., when all elements of the tort can be truthfully alleged in a complaint," Caronia I,  
15 2010 WL 520558, at \*3 (quoting Snyder v. Town Insulation, Inc., 81 N.Y.2d 429, 432-33, 599  
16 N.Y.S.2d 515, 516-17 (1993)).

17 The court described the elements of claims for strict liability and negligence. A  
18 plaintiff asserting a claim of strict liability must be able to show that she was injured, that the  
19 defendant produced a product that was not "reasonably safe" for its intended use, and that the  
20 product's "defect was the proximate cause of the injury." Caronia I, 2010 WL 520558, at \*4 (quoting  
21 Voss v. Black & Decker Manufacturing Co., 59 N.Y.2d 102, 107, 109, 463 N.Y.S.2d 398, 402, 403  
22 (1983)). A plaintiff asserting a negligence claim must be able to show that "the defendant owed the

1 plaintiff a cognizable duty of care," that "the defendant failed to exercise that duty," and that "the  
2 plaintiff suffered injury as a proximate result of that failure." Caronia I, 2010 WL 520558, at \*4; see,  
3 e.g., Akins v. Glen Falls City School District, 53 N.Y.2d 325, 333, 441 N.Y.S.2d 644, 648 (1981);  
4 Becker v. Schwartz, 46 N.Y.2d 401, 410, 413 N.Y.S.2d 895, 899 (1978).

5 In light of plaintiffs' assertions that their injuries consisted of being subjected to  
6 increased risk of lung cancer by reason of having smoked Marlboro cigarettes for at least 20 pack-  
7 years, and given that it was undisputed that each plaintiff had reached 20 pack-years of smoking  
8 Marlboro cigarettes by the mid-1990s, the court reasoned that plaintiffs could have truthfully alleged  
9 all of the elements of their claims for strict liability and negligence by then. It concluded that those  
10 claims thus accrued "well outside of the six-year statute of limitations available under 213(1)," Caronia I,  
11 2010 WL 520558, at \*5.

12 The district court rejected plaintiffs' contentions that their strict liability and negligence  
13 claims were timely under § 213(1) either (a) on the theory that such claims accrue anew with each  
14 newly injurious exposure, or (b) because the remedy they sought--medical monitoring via LDCT  
15 scanning--had only become an available and accepted screening tool for lung cancer within a year  
16 prior to the commencement of this action. The court found the former theory untenable because it had  
17 been rejected by the New York Court of Appeals in Snyder v. Town Insulation, Inc., 81 N.Y.2d  
18 at 433-35, 599 N.Y.S.2d at 517-18. The court rejected plaintiffs' newly-available-remedy theory of  
19 timeliness on the ground that, "as is readily apparent from a review of the elements of both causes of  
20 action, neither claim is dependent upon the availability of a specific remedy," and therefore the  
21 availability of LDCT as a remedy "is irrelevant to the accrual" of those claims. Caronia I, 2010 WL  
22 520558, at \*4.

1                   2. The Breach-of-Warranty Claims

2                   Plaintiffs did not dispute that their breach-of-warranty claims were governed by the  
3 four-year statute of limitations set out in N.Y. U.C.C. § 2-725 and were timely only to the extent that  
4 they arose from purchases of Marlboro cigarettes on or after January 19, 2002. See Caronia I, 2010  
5 WL 520558, at \*6. Philip Morris sought summary judgment dismissing the timely warranty claims  
6 on the ground that, even assuming that Marlboro cigarettes bought on or after January 19, 2002, were  
7 not reasonably fit for their intended purpose, plaintiffs could not establish that those cigarettes were  
8 the proximate cause of their injuries because they faced an increased risk of lung cancer well before  
9 January 19, 2002. The district court denied this motion, finding that plaintiffs had adduced evidence  
10 that the smoking of Marlboro cigarettes after that date would have further increased the risk of lung  
11 cancer, and that "[i]n light of such evidence, summary judgment is not warranted on causation  
12 grounds." See id. at \*7.

13                   The court stated, however, that Philip Morris had raised an additional challenge to  
14 plaintiffs' warranty claims to which plaintiffs had not had an appropriate opportunity to respond. The  
15 court invited supplementary briefing as to that challenge, to wit, Philip Morris's contention that the  
16 claims for breach of the implied warranty of merchantability of Marlboro cigarettes purchased after  
17 January 19, 2002, were barred by plaintiffs' knowledge of the risks and dangers of tobacco use, or the  
18 common knowledge of smoking-related health effects, together with the warnings on all packs of  
19 cigarettes. See id. at \*8.

1 D. Plaintiffs' Fourth Amended Complaint

2 The district court noted that plaintiffs had sought medical monitoring as a remedy for  
3 their tort claims of strict liability, negligence, and breach of warranty but had not sought to plead a  
4 free-standing equitable claim for medical monitoring, and neither side had briefed the precise issue  
5 of whether New York recognizes such a cause of action. See Caronia I, 2010 WL 520558, at \*8-\*9.  
6 The court concluded that plaintiffs should be allowed to file a further amended complaint in the  
7 interests of justice.

8 In their Fourth Amended Complaint, plaintiffs repeated virtually all of the factual  
9 allegations of the Third Amended Complaint and added a new "EQUITABLE CAUSE OF ACTION"  
10 for medical monitoring. Plaintiffs reiterated their assertions that Philip Morris had "designed,  
11 produced, manufactured, and sold cigarettes, which, even if used properly, substantially and  
12 unnecessarily elevated Plaintiffs' and the class members' likelihood of developing lung cancer" (4th  
13 Am. Comp. ¶ 110), that plaintiffs' injuries cannot be remedied by an award of money damages (see  
14 id. ¶ 115), and that there exists a medical test for early detection having the potential for altering the  
15 course of the disease, but it is available only through a program of medical monitoring (id.). Plaintiffs  
16 added that Philip Morris,

17 motivated by extreme greed, and a reckless and depraved disregard of the  
18 virtual certainty that the sale of its addictive and deadly products would  
19 condemn hundreds of thousands of its customers to awful disease and lingering  
20 deaths, . . . set out to sell its defective and deadly products to children and  
21 others. For instance, Plaintiffs in this case commenced smoking at the ages of  
22 fifteen (Caronia), sixteen (Feldman) and approximately fifteen or sixteen  
23 (McCauley [sic]).

24 112. To the extent that there is not a legal remedy available to  
25 Plaintiffs, Defendant's egregious conduct and its devastating consequences  
26 impose a duty on the Court under New York Law to fashion an appropriate

1 equitable remedy to redress the grave effects of Philip Morris'[s] misconduct.

2 113. The programmatic medical monitoring through LDCT sought by  
3 Plaintiffs in the instant action is a remedy appropriately tailored to both the  
4 nature of Philip Morris' misconduct, and the injuries that it has inflicted on the  
5 class members.

6 (4th Am. Comp. ¶¶ 111-113.) Plaintiffs also renewed their motion for class certification.

7 Philip Morris moved under Fed. R. Civ. P. 12(b)(6) to dismiss this independent cause  
8 of action for failure to state a claim, arguing that New York would not recognize such a claim. It  
9 argued that even if the State would approve of ordering medical monitoring as a remedy, it would do  
10 so only as a remedy for an existing tort. The district court rejected these contentions.

11 The district court explored cases decided by New York courts and other courts, see  
12 Caronia II, 2011 WL 338425, at \*5-\*6, and predicted

13 that the New York Court of Appeals would recognize an independent claim for  
14 medical monitoring, and . . . further predict[ed] that the Court of Appeals  
15 would conclude that the statute of limitations for such a claim begins to run on  
16 the first date that some medical monitoring program is accepted within the  
17 medical community as an effective method of lung cancer screening or  
18 surveillance.

19 Caronia II, 2011 WL 338425, at \*3. The court also hypothesized that to establish such a claim a  
20 plaintiff would be required to plead the following elements:

21 (1) exposure at greater than background levels; (2) to a proven hazardous  
22 substance; (3) caused by defendant's tortious conduct; (4) as a proximate result  
23 of the exposure, plaintiff faces an elevated risk of contracting a serious latent  
24 disease; (5) a monitoring procedure exists that makes early detection possible;  
25 (6) the monitoring program is different than the program normally prescribed  
26 in the absence of exposure; and (7) the monitoring program is reasonably  
27 necessary according to contemporary scientific principles.

28 Id. at \*7.

29 However, the court concluded that plaintiffs' medical monitoring claim must be

1 dismissed for failure "to plead that Philip Morris's allegedly tortious conduct is the reason that they  
2 must now secure a monitoring program that includes LDCT scans." Id. at \*3. It stated that

3 the plaintiffs must plead and prove that Philip Morris's failure to produce and  
4 market a non-defective cigarette is the reason that the plaintiffs must now  
5 secure medical monitoring that includes LDCT scans. This pleading  
6 requirement is most obviously embodied by element (6) of the monitoring  
7 claim, which requires that the plaintiffs plead and prove that the medical  
8 monitoring they now require is different f[ro]m the monitoring that physicians  
9 would prescribe for individuals who have not been tortiously exposed to  
10 defective Marlboro cigarettes.

11 Id. at \*10. The court concluded that plaintiffs failed to meet this pleading requirement

12 because the fourth amended complaint contains no allegation that, if Philip  
13 Morris had conformed its conduct to the law and designed and marketed a  
14 reduced tar cigarette, the plaintiffs would not require the same medical  
15 monitoring that they are seeking in this suit. Nowhere have the plaintiffs  
16 pleaded that if Philip Morris had marketed and designed the non-defective  
17 cigarette they describe, they would not have been exposed to harmful levels of  
18 tar.

19 Id. at \*11. The court thus granted Philip Morris's Rule 12(b)(6) motion to dismiss the stand-alone  
20 medical monitoring claim.

21 Philip Morris also moved for summary judgment dismissing the breach-of-warranty  
22 claims that had survived its first summary judgment motion, pressing the contention, as the district  
23 court described it, that a "product need only provide 'for a minimal level of quality' and meet 'the  
24 expectations for the performance of the product when used in the customary, usual and reasonably  
25 foreseeable manner,'" Caronia II, 2011 WL 338425, at \*12 (quoting Denny v. Ford Motor Co., 87  
26 N.Y.2d 248, 258-59, 639 N.Y.S.2d 250, 256 (1995)), and "that under this 'consumer expectations' test,  
27 the plaintiffs cannot prove breach of implied warranty because everyone knew, at the time that the  
28 Marlboros at issue in this litigation were sold, that cigarettes, when used normally, put people at risk

1 of developing lung cancer," Caronia II, 2011 WL 338425, at \*12. The court found this argument  
2 persuasive:

3 The plaintiffs do not contend that, in the years relevant to this complaint,  
4 consumers, including the plaintiffs, thought that smoking tobacco was  
5 generally safe and did not expose them to a significantly elevated risk of  
6 developing cancer. (See Def. Ex. F.) Rather, they argue, consumers did not  
7 know that Philip Morris could easily have produced a safer cigarette. (Pl. R.  
8 56.1 ¶¶ 11, 32.) As clarified by counsel at oral argument, the plaintiffs'  
9 contention is that consumers generally did not know that Marlboro cigarettes  
10 were defective (i.e. unnecessarily dangerous), not that they did not know that  
11 they were dangerous, indeed very dangerous. This contention fails because it  
12 conflates what New York considers two distinct theories of liability and  
13 improperly inserts risk-utility considerations into the law of warranty. See  
14 Denny, 87 N.Y.2d at 258, 639 N.Y.S.2d 250, 662 N.E.2d 730 ("It is this  
15 negligence-like risk/benefit component of the defect element that differentiates  
16 strict products liability claims from UCC[-]based breach of implied warranty  
17 claims in cases involving design defects.") . . . . Indeed, the Court believes that  
18 the plaintiffs concede this point about conflation when they argue that they "are  
19 not required by law to prove the existence of a feasible alternative design in  
20 order to prevail at trial on a warranty theory." (Pl. S.J. Opp. at 8.)

21 Because the plaintiffs concede their knowledge of the dangers of  
22 cigarettes, and the Court thinks it irrelevant whether the plaintiffs thought their  
23 cigarettes could not be any safer, the Court rejects the argument that Marlboros  
24 contained an implied warranty that Philip Morris breached.

25 Caronia II, 2011 WL 338425, at \*12-\*13.

26 Judgment was entered dismissing the action in its entirety and denying plaintiffs'  
27 motion for class certification as moot.

## 28 II. DISMISSAL OF THE COMMON-LAW AND UCC CLAIMS

29 Plaintiffs contend that the district court erred in granting summary judgment dismissing  
30 their claims for negligence, strict products liability, and breach of the implied warranty of



1 merchantability, arguing principally (1) that their negligence and strict liability claims are timely under  
2 CPLR § 213(1) either because the limitations period began anew with each harmful exposure to  
3 Marlboro cigarettes or because plaintiffs could not assert those claims until the LDCT remedy they  
4 request became available, and (2) that their breach-of-warranty claims could not properly be dismissed  
5 as a matter of law because there were genuine issues to be tried as to whether Marlboro cigarettes  
6 could have been made safer for their intended purpose.

7 Summary judgment is appropriate only where "there is no genuine dispute as to any  
8 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In  
9 determining whether that standard is met, the court must draw all reasonable factual inferences in  
10 favor of the party against whom summary judgment is sought. See, e.g., Anderson v. Liberty Lobby,  
11 Inc., 477 U.S. 242, 255 (1986); Lyons v. Lancer Insurance Co., 681 F.3d 50, 56 (2d Cir. 2012). The  
12 same standard governs our review of the granting of summary judgment. See, e.g., Kaytor v. Electric  
13 Boat Corp., 609 F.3d 537, 546 (2d Cir. 2010); Petrosino v. Bell Atlantic, 385 F.3d 210, 219 (2d Cir.  
14 2004); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir. 1998). We "will construe the facts  
15 in the light most favorable to the non-moving party and must resolve all ambiguities and draw all  
16 reasonable inferences against the movant," Brod v. Omya, Inc., 653 F.3d 156, 164 (2d Cir. 2011)  
17 (internal quotation marks omitted); we review the "district court's interpretation of law . . . de novo,"  
18 id.

19 Applying these standards--and applying principles of New York law, which governs  
20 this case in which federal jurisdiction is premised on diversity of citizenship--we conclude that  
21 summary judgment dismissing plaintiffs' negligence, strict liability, and breach of warranty claims was  
22 appropriate.

1       A. Untimeliness of the Negligence and Strict Liability Claims

2                     Under New York law, in order to recover on a claim for negligence, a plaintiff must  
3 show "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3)  
4 injury to the plaintiff as a result thereof." Akins v. Glens Falls City School District, 53 N.Y.2d 325,  
5 333, 441 N.Y.S.2d 644, 648 (1981). "In order to establish a prima facie case in strict products liability  
6 for design defects, the plaintiff must show that the manufacturer breached its duty to market safe  
7 products when it marketed a product designed so that it was not reasonably safe and that the defective  
8 design was a substantial factor in causing plaintiff's injury." Voss v. Black & Decker Manufacturing  
9 Co., 59 N.Y.2d 102, 107, 463 N.Y.S.2d 398, 402 (1983); see id. at 109, 463 N.Y.S.2d at 403 ("the  
10 plaintiff is required to show that the defectively designed product caused his injury and that the defect  
11 was the proximate cause of the injury"). Plainly, to recover on either type of claim, a plaintiff must  
12 prove injury.

13                     Preliminarily, we note that plaintiffs, despite having argued before the district court that  
14 the six-year limitations period provided in CPLR § 213(1) applied, appear to argue on appeal that their  
15 negligence and strict liability claims are not subject to any statute of limitations. They point out that  
16 the three-year limitations period provided in CPLR §§ 214(5) and 214-c(2) apply, respectively, to  
17 actions to recover damages for personal injury and to actions seeking damages for latent injuries  
18 caused by exposure to toxic substances (Plaintiffs' brief on appeal at 24); they state, inter alia, that  
19 "Plaintiffs do not allege personal injury in this case" (id. (emphasis added)); and they state that "[i]f  
20 a provision of the CPLR applied to [plaintiffs'] claims, it would be the six-year catch all provision of  
21 N.Y. C.P.L.R. § 213(1) (Plaintiffs' brief on appeal at 25 (emphasis added)).

22                     Although the absence of an allegation of injury in a tort claim could indeed pose a

1 conundrum for identifying the commencement of the limitations period, see, e.g., Kronos, Inc. v. AVX  
2 Corp., 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 934 (1993) ("as a general proposition, a tort cause of  
3 action cannot accrue until an injury is sustained"); Ackerman v. Price Waterhouse, 84 N.Y.2d 535,  
4 541, 620 N.Y.S.2d 318, 321 (1994) ("it is upon injury that a legal right to relief arises in a tort action  
5 and the Statute of Limitations begins to run . . . .") (emphasis added), the inquiry would likely not  
6 reach the affirmative defense stage, for if the complaint failed to allege injury, it would be dismissable  
7 for failure to state a claim.

8 Here, however, plaintiffs had alleged that each plaintiff--and each member of the  
9 proposed class--had smoked a minimum of 146,000 Marlboro cigarettes and as a result had been  
10 "exposed to an excessive amount of carcinogens" (Third Amended Complaint ¶ 68); that the  
11 negligence, design defects, and other misconduct attributed to Philip Morris in its manufacture and  
12 sale of those cigarettes "caus[ed] plaintiffs to be at increased risk of developing lung cancer" (e.g., id.  
13 ¶¶ 90, 99, 113); and that "Plaintiffs and the Class have suffered . . . harm as a result of defendants' [sic]  
14 wrongful conduct" (id. ¶ 38). At oral argument of Philip Morris's first summary judgment motion, the  
15 district court sought and received explicit clarification that plaintiffs were claiming injury in the form  
16 of their increased risk of developing lung cancer:

17 "THE COURT: So the elements of your claim are that it was  
18 defectively designed and that defective design was the proximate cause of an  
19 injury, that injury being an increased risk of getting lung cancer.

20 Mr. BLOCK [counsel for plaintiffs]: That's absolutely right, your  
21 Honor."

22 Caronia I, 2010 WL 520558, at \*5 (quoting Transcript of oral argument of summary judgment motion,  
23 February 7, 2008, at 51) (emphases ours). Accordingly, we see no error in the district court's

1 conclusion that "[b]oth parties agree[d] that the injury in this action is the increased risk of developing  
2 lung cancer as a result of smoking Marlboro cigarettes for twenty pack-years," *id.* at \*3 (emphasis  
3 added).

4 While plaintiffs contend that their claims are timely under the six-year limitations  
5 period and that the three-year limitations period provided in CPLR § 214(5) is inapplicable because  
6 it governs actions to recover "damages," whereas they are seeking a remedy of medical monitoring  
7 rather than damages (Plaintiffs' brief on appeal at 24), Philip Morris argues that plaintiffs' claims are  
8 untimely even under the six-year limitations period. However, Philip Morris contends that those  
9 claims are subject to the three-year limitations period because in reality the request for medical  
10 monitoring is a request for "'consequential damages'" (Philip Morris brief on appeal at 17 n.6) (quoting  
11 Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 135, 477 N.Y.S.2d 242, 247 (4th Dep't 1984)  
12 ("Askey").

13 We, like the district court, need not resolve the question of whether the applicable  
14 statute of limitations is three years or six years. Although the choice between limitations periods may  
15 depend on whether the relief sought by the plaintiff is legal or equitable, *see, e.g., Loengard v. Santa*  
16 *Fe Industries, Inc.*, 70 N.Y.2d 262, 266, 519 N.Y.S.2d 801, 803 (1987), the district court properly  
17 concluded that plaintiffs' claims are time-barred under either statute.

18 In challenging the district court's ruling that their negligence and strict liability claims  
19 were untimely because the injury they alleged--the increased risk of lung cancer resulting from 20  
20 pack-years of smoking Marlboro cigarettes--arose in the mid-1990s, plaintiffs renew their arguments  
21 (a) that Philip Morris's continuing course of conduct in manufacturing and selling Marlboro cigarettes  
22 "inflict[ed] new and continuing injury, or aggravate[d] old injury," thereby causing the limitations

1 period to begin anew with each new exposure (Plaintiffs' brief on appeal at 29-30), and (b) that their  
2 claims did not accrue until approximately one year before they commenced this action, when the relief  
3 they sought--LDCT--became available (see id. at 27-28). Both contentions are contrary to New York  
4 law.

5 1. The Continuing Exposure Theory

6 New York's CPLR provides that "except as otherwise expressly prescribed," limitations  
7 periods "shall be computed from the time the cause of action accrued." CPLR § 203(a) (McKinney  
8 2003). A cause of action has accrued "when all of the facts necessary to the cause of action have  
9 occurred so that the party would be entitled to obtain relief in court." Aetna Life and Casualty Co. v.  
10 Nelson, 67 N.Y.2d 169, 175, 501 N.Y.S.2d 313, 316 (1986).

11 In Snyder v. Town Insulation, Inc., 81 N.Y.2d 429, 599 N.Y.S.2d 515 (1993)  
12 ("Snyder"), the New York Court of Appeals considered the question of when a cause of action accrued  
13 for "damages for [respiratory] injuries [that the plaintiffs] allegedly sustained as a result of emissions  
14 from ureaformaldehyde foam insulation installed in their home in 1977." Id. at 431, 599 N.Y.S.2d  
15 at 515. As the lawsuit sought damages (and the date-of-discovery rule was not at issue, see id., 599  
16 N.Y.S.2d at 516), the three-year limitations period provided by CPLR § 214 applied; however, the  
17 claim was first asserted more than five years after the plaintiffs had begun inhaling the injurious  
18 emissions. Resolution of the timeliness question turned on "whether accrual under CPLR 214 is  
19 measured from the date of injury or from the date of last exposure." Id., 599 N.Y.S.2d at 516  
20 (emphasis added). The court concluded that the claim was barred because it had accrued on the date  
21 of injury:

1                   An action to recover damages for personal injuries must be commenced  
2 within three years from the date of accrual (CPLR 203 [a]; 214 [5]; but see,  
3 214-c). As a general proposition, the cause of action does not accrue until an  
4 injury is sustained . . . . Stated another way, accrual occurs when the claim  
5 becomes enforceable, i.e., when all elements of the tort can be truthfully  
6 alleged in a complaint . . . . The straightforward application of these principles  
7 leads to the conclusion that plaintiffs' causes of action accrued on the date they  
8 were first injured. At that moment, all elements of the tort could be truthfully  
9 alleged, and they had a colorable claim against defendants.

10                   81 N.Y.2d at 432-33, 599 N.Y.S.2d at 516-17 (emphases added).

11                   The court rejected the Snyders' contention that the New York Court of Appeals had,  
12 "in so-called 'toxic tort' cases, where the injury results from injection, ingestion, or inhalation of a  
13 substance," established a date-of-last-exposure rule. 81 N.Y.2d at 433, 599 N.Y.S.2d at 517. The  
14 court stated that no Court of Appeals case stood for such a rule. It noted, for example, that in a case  
15 in which a worker had "commenced a negligence action against his employer, alleging that inhalation  
16 of dust on the job resulted in lung disease several years later," and had argued that the accrual of his  
17 cause of action should be "the date of the onset of the disease," the New York Court of Appeals had  
18 "rejected that proposition and restated the traditional rule: 'There can be no doubt that a cause of  
19 action accrues only when the forces wrongfully put in motion produce injury,'" 81 N.Y.2d at 433, 599  
20 N.Y.S.2d at 517 (quoting Schmidt v. Merchants Despatch Transportation Co., 270 N.Y. 287, 300-01,  
21 200 N.E. 824, 827 (1936)). The Snyder court noted that the lung disease was not the injury: "Disease  
22 [i]s a consequence of the injury, . . . not the injury itself, and the injury was complete at the moment  
23 the dust was inhaled even though plaintiff may not have been aware of it then . . . ." 81 N.Y.2d at 433,  
24 599 N.Y.S.2d at 517.

25                   Thus, the New York Court of Appeals in Snyder observed that "[f]or more than a half  
26 a century, our cases have uniformly held that such causes of action accrue upon injury." Id.; see, e.g.,

1 Rothstein v. Tennessee Gas Pipeline Co., 87 N.Y.2d 90, 93, 637 N.Y.S.2d 674, 675 (1995) ("The  
2 long-standing rule in toxic tort cases in New York has been that when chemical compounds are  
3 injected into a person's body, the injury occurs upon the drugs['] introduction, not when the alleged  
4 deleterious effects of its component chemicals become apparent.") (internal quotation marks omitted).

5 The Snyder Court pointed out that "[d]etermining when limitations begin to run  
6 requires a balancing of policy considerations." 81 N.Y.2d at 435, 599 N.Y.S.2d at 518.

7 On one side of the scale are the interests of injured parties. Unquestionably,  
8 a Statute of Limitations can have a severe impact on their rights when, for  
9 instance, an injury is not discovered until years later. The Legislature has acted  
10 to ameliorate the rule in such cases in recent years (see, CPLR 214-c).  
11 Conversely, defendants are entitled to a fair opportunity to defend claims  
12 against them before their ability to do so has deteriorated . . . .

13 Id. The court thus rejected the contention of Mrs. Snyder that her suit was timely because she was still  
14 living in the house and was continuing to suffer exposure to the insulation. The court declined to  
15 adopt a rule that would give "a plaintiff . . . the power to put off the running of the Statute of  
16 Limitations indefinitely." Id. Cf. Adamo v. Brown & Williamson Tobacco Corp., 11 N.Y.3d 545,  
17 551, 872 N.Y.S.2d 415, 418 (2008) (stating, on an issue other than accrual, that "[t]o hold . . . that  
18 every sale of regular cigarettes exposes the manufacturer to tort liability would amount to a judicial  
19 ban on the product").

20 We conclude that the district court in the present case correctly interpreted Snyder as  
21 establishing that a claim for injury caused by harmful exposure to toxic substances accrues when that  
22 exposure occurs, and does not, as plaintiffs in the present case argue, repeatedly accrue with each new  
23 inhalation. As this action was commenced in 2006, and plaintiffs' depositions established that  
24 plaintiffs had known more than three years earlier that smoking cigarettes was the cause of their

1 increased risk of lung cancer, and that each plaintiff had reached the 20-pack-year level by the mid-  
2 1990s at the latest, the district court properly ruled that their injuries occurred prior to the applicable  
3 limitations period, whether that period was three years or six.

## 4 2. The Newly-Available Relief Theory

5 Notwithstanding the occurrence of the injury of "increased risk of developing lung  
6 cancer" (Third Amended Complaint ¶¶ 90, 99, 113) more than six years prior to their 2006  
7 commencement of this action, plaintiffs contend that their claims did not accrue until 2006, because  
8 "prior to the instant suit's commencement, no efficacious relief," i.e., LDCT, "was available"  
9 (Plaintiffs' brief on appeal at 28). Thus, plaintiffs contend that a cause of action does not accrue until  
10 a form of relief that an injured person prefers has become technologically feasible.

11 In support of this contention, plaintiffs quote snippets from a number of cases; but none  
12 of them stands for such a proposition. For example, plaintiffs cite LaBello v. Albany Medical Center  
13 Hospital, 85 N.Y.2d 701, 706, 628 N.Y.S.2d 40, 42 (1995), for its statement that "the '[s]tatute of  
14 Limitations does not run until there is a legal right to relief' and 'accrual occurs when the claim  
15 becomes enforceable'" (Plaintiffs' brief on appeal at 26). That case, however, involved a claim for  
16 prenatal injury, and the court simply ruled that the claim did not accrue until the child was born. See  
17 85 N.Y.2d at 708, 628 N.Y.S.2d at 44. In Aetna Life & Casualty Co. v. Nelson, 67 N.Y.2d 169, 175,  
18 501 N.Y.S.2d 313, 316 (1986), cited for its statement that "'[t]he Statute of Limitations begins to run  
19 . . . when all of the facts necessary to the cause of action have occurred so that the party would be  
20 entitled to obtain relief in court'" (Plaintiffs' brief on appeal at 26), the court merely held that where  
21 an insurer has paid its insured for a loss and the insured recovers compensation for that loss from



1 another source, the insurer's right to recoup "any [such] recovery obtained by the insured" does not  
2 accrue until that recovery has in fact been obtained, 67 N.Y.2d at 176, 501 N.Y.S.2d at 317 (internal  
3 quotation marks omitted). In Jacobus v. Colgate, 217 N.Y. 235, 245, 111 N.E. 837, 840 (1916), cited  
4 for its statement that "[a] cause of action does not accrue until its enforcement becomes possible"  
5 (Plaintiffs' brief on appeal at 29), the court was discussing the fact that until 1913 no New York court  
6 had jurisdiction to entertain a suit for injury to real property that was outside of the State, see 217 N.Y.  
7 at 239, 111 N.E. at 838. In Vigilant Insurance Co. v. Housing Authority of the City of El Paso, 87  
8 N.Y.2d 36, 43, 637 N.Y.S.2d 342, 346 (1995), cited for its statement that a claim cannot accrue until  
9 "all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain  
10 relief in court" (Plaintiffs' brief on appeal at 25), the court was discussing the unremarkable principle  
11 that the "right to sue on [a] bond's principal debt does not accrue until the debt is 'due and payable,'" 87  
12 N.Y.2d at 44, 637 N.Y.S.2d at 346.

13 Plaintiffs recognize, however, that more than two decades prior to the commencement  
14 of this action it was "clear that New York's courts look with favor on claims for medical monitoring"  
15 (Plaintiffs' brief on appeal at 35-36 (citing, inter alia, Askey, 102 A.D.2d at 135, 477 N.Y.S.2d  
16 at 246)), and on medical monitoring requests by plaintiffs who had been exposed to carcinogenic  
17 substances and feared they would develop cancer (Plaintiffs' brief on appeal at 36 (citing, inter alia,  
18 Dangler v. Town of Whitestown, 241 A.D.2d 290, 294, 672 N.Y.S.2d 188, 190 (4th Dep't 1998)  
19 ("Dangler"), and Abusio v. Consolidated Edison Co., 238 A.D.2d 454, 454, 656 N.Y.S.2d 371, 372  
20 (2d Dep't 1997) ("Abusio")).

21 In Abusio, although the court upheld the dismissal of cancerphobia claims on the  
22 ground that the plaintiffs had not presented sufficient evidence to prevail, it noted, citing cases, the

1 availability of actions for recovery of the cost of future medical monitoring as relief for cancerphobia:

2 Under the prevailing case law, in order to maintain a cause of action for fear  
3 of developing cancer or for future medical monitoring costs following  
4 exposure to a toxic substance like polychlorinated biphenyls (hereinafter  
5 PCBs), a plaintiff must establish both that he or she was in fact exposed to the  
6 disease-causing agent and that there is a "rational basis" for his or her fear of  
7 contracting the disease . . . . This "rational basis" has been construed to mean  
8 the clinically demonstrable presence of PCBs in the plaintiff's body, or some  
9 indication of PCB-induced disease, i.e., some physical manifestation of PCB  
10 contamination . . . .

11 238 A.D.2d at 454-55, 656 N.Y.S.2d at 372 (emphasis added).

12 In Dangler, the appellate court reversed the dismissal of cancerphobia claims that were  
13 based on effluvium emanating from a contaminated landfill, and stated:

14 It is well settled that, to maintain a cause of action for cancerphobia, "[a]  
15 plaintiff must establish both that he was in fact exposed to the disease-causing  
16 agent and that there is a 'rational basis' for his fear of contracting the disease"  
17 . . . . "[W]hen the circumstances of the case provide a guarantee of the  
18 genuineness of the claim", a plaintiff may recover for negligent infliction of  
19 purely mental suffering . . . .

20 241 A.D.2d at 293, 672 N.Y.S.2d at 190. The Dangler court stated that the trial court had "erred in  
21 striking the testimony of plaintiffs' experts regarding . . . future medical monitoring." Id. at 294, 672  
22 N.Y.S.2d at 190 (citing Askey, 102 A.D.2d at 135, 477 N.Y.S.2d at 246).

23 The Dangler court also, in discussing assumption of risk, noted that "smoking" involves  
24 "voluntary exposure to carcinogens," 241 A.D.2d at 294, 672 N.Y.S.2d at 191 (emphasis added), an  
25 observation confirming that the dangers of smoking were common knowledge. And the court in  
26 Inzerilla v. American Tobacco Co., No. 11754/96, 2000 WL 34016364 (N.Y. Sup. Ct. Oct. 27, 2000),  
27 noted that "[t]he carcinogenic danger from cigarettes was common knowledge from at least 1969."  
28 Id. at \*14.

1           It is clear, from Askey and its progeny, that plaintiffs in the present action, by the time  
2 their injuries arose in or before the mid-1990s, could have brought suit to seek relief in the New York  
3 courts. Plaintiffs have not called to our attention any case--nor are we aware of any--holding that a  
4 cause of action for injury that is cognizable in the New York courts does not accrue until a remedy that  
5 the injured person would prefer becomes available.

6           We conclude that the district court properly dismissed plaintiffs' claims for negligence  
7 and strict products liability as barred by the applicable statute of limitations.

8       B. Summary Dismissal of the Breach of Implied Warranty Claims

9           Plaintiffs contend that the district court erred in dismissing their claims for breach of  
10 the UCC implied warranty of merchantability, arguing that they raised a genuine issue of fact to be  
11 tried as to whether Marlboro cigarettes could have been made safer for their intended purpose. The  
12 district court granted summary judgment dismissing these claims on the ground that, because the  
13 dangers of cigarette smoking were well known long before plaintiffs reached the 20-pack-year mark  
14 in or before the mid-1990s, plaintiffs could not have relied on any warranty that Marlboro cigarettes  
15 were safe. Plaintiffs concede that they "had knowledge that Marlboros were dangerous and  
16 carcinogenic," but they assert that "[w]hat [they] did not know, and what Philip Morris concealed from  
17 them, was that [Marlboro cigarettes] were unnecessarily carcinogenic by orders of magnitude."  
18 (Plaintiffs' brief on appeal at 40 (emphasis added).) Citing an expert report that they submitted in  
19 opposition to summary judgment, "describ[ing] in detail a multitude of ways in which Marlboro  
20 cigarettes could have been designed to reduce the product's excessive carcinogenicity" (*id.* at 41),  
21 plaintiffs argue that "[a] defendant who sells a product that is unnecessarily and covertly dangerous

1 will be liable for breach of implied warranty despite the consuming public's or plaintiff's general  
2 knowledge of the product's dangers" (id. at 39). We are unpersuaded that the district court erred.

3 "The implied warranty of merchantability is a guarantee by the seller that its goods are  
4 fit for the intended purpose for which they are used and that they will pass in the trade without  
5 objection." Saratoga Spa & Bath, Inc. v. Beeche Systems Corp., 230 A.D.2d 326, 330, 656 N.Y.S.2d  
6 787, 789 (3d Dep't 1997). Under New York state's version of the UCC, this guarantee is "implied in  
7 a contract for . . . sale if the seller is a merchant," N.Y. U.C.C. § 2-314(1)--that is, if the seller, inter  
8 alia, "deals in" the type of goods sold, id. § 2-104(1). A merchant breaches the UCC implied warranty  
9 of merchantability if it sells goods that are not "fit for the ordinary purposes for which such goods are  
10 used," N.Y. U.C.C. § 2-314(2)(c). This standard does not require that the goods be perfect, see  
11 Saratoga Spa & Bath, Inc. v. Beech Systems Corp., 230 A.D.2d at 330, 656 N.Y.S.2d at 790, or that  
12 they "fulfill [a] buyer's every expectation," Denny v. Ford Motor Co., 87 N.Y.2d 248, 258 n.4, 639  
13 N.Y.S.2d 250, 256 n.4 (1995) ("Denny") (internal quotation marks omitted); it requires only that the  
14 goods sold be of "a minimal level of quality," id. (internal quotation marks omitted). The inquiry

15 focuses on the expectations for the performance of the product when used in  
16 the customary, usual and reasonably foreseeable manners. The cause of action  
17 is one involving true "strict" liability, since recovery may be had upon a  
18 showing that the product was not minimally safe for its expected purpose--  
19 without regard to the feasibility of alternative designs or the manufacturer's  
20 "reasonableness" in marketing it in that unsafe condition.

21 Denny, 87 N.Y.2d at 258-59, 639 N.Y.S.2d at 256 (emphases added).

22 As the Denny quote indicates, the New York Court of Appeals has taken care to  
23 distinguish this merchantability-related strict liability from the liability that is more typically  
24 associated with claims for defective products. The strict products liability cause of action "originates

1 in tort law, which traditionally has concerned itself with social policy and risk allocation," whereas  
2 the breach of implied warranty cause of action "originates in contract law, which directs its attention  
3 to the purchaser's disappointed expectations." Id. at 259, 639 N.Y.S.2d at 256. As a result, "the core  
4 element of 'defect' is subtly different in the two causes of action." Id. at 256, 639 N.Y.S.2d at 255.  
5 In products liability cases, the New York courts will inquire whether, "if the design defect were known  
6 at the time of manufacture, a reasonable person would conclude that the utility of the product did not  
7 outweigh the risk inherent in marketing a product designed in that manner." Id. at 257, 639 N.Y.S.2d  
8 at 255 (internal quotation marks omitted). By contrast, "the UCC's concept of a 'defective' product  
9 requires an inquiry only into whether the product in question was fit for the ordinary purposes for  
10 which such goods are used." Id. at 258, 639 N.Y.S.2d at 256 (internal quotation marks omitted).  
11 Products liability's "negligence-like risk/utility approach is foreign to the realm of contract law." Id.  
12 at 262, 639 N.Y.S.2d at 258.

13           The issue of fact raised by plaintiffs as to whether Philip Morris could have made  
14 Marlboro cigarettes safer, therefore, is not an issue that is material to the claim of breach of implied  
15 warranty of merchantability. That implied warranty is not breached if the cigarettes were minimally  
16 safe when used in the customary, usual, and reasonably foreseeable manner. We conclude that  
17 summary judgment dismissing these claims was appropriate.

### 18           III. MEDICAL MONITORING AS AN INDEPENDENT CLAIM

19           The question of whether a plaintiff may maintain an independent cause of action for  
20 medical monitoring under New York law has not been addressed by the New York Court of Appeals.

1 And although the matter has been dealt with in New York's intermediate appellate courts, in the  
2 federal district courts in New York, and in the highest courts of several other states, the treatments  
3 have varied.

4 A. Decisions of New York State Courts

5 In 1984, the Appellate Division in Askey, dealing with claims of exposure to toxic  
6 discharges from a landfill, considered whether the plaintiffs could recover for anticipated needs for  
7 medical monitoring. The procedural question before that court was whether the plaintiffs' motion for  
8 class action certification had been properly denied; an underlying substantive question concerned the  
9 cognizability of claims for damages or injunctive relief by those plaintiffs who had not yet exhibited  
10 physical injury:

11 The novel issue presented is whether those persons who have an increased risk  
12 of cancer, genetic damage and other illnesses by reason of their exposure to the  
13 toxic chemicals emanating from the landfill, but whose physical injuries are  
14 not evident, should be certified as a class for the purpose of determining their  
15 right to recover the costs of future medical monitoring services to diagnose  
16 warning signs of the development of disease.

17 102 A.D.2d at 131, 477 N.Y.S.2d at 244. The court noted that one group of plaintiffs was solely

18 concerned with injuries which have not surfaced but which may afflict them  
19 in the future. They allege that their exposure has increased their risk of  
20 developing cancer and other chemically induced diseases, and in their  
21 complaint seek as a remedy the imposition of a constructive trust upon the  
22 property owned by defendants in an amount sufficient to pay for the cost of  
23 medical detection services made necessary by the increased hazards, reserving  
24 the right to seek damages for such enhanced risks.

25 Id. at 133, 477 N.Y.S.2d at 245. The court stated that "damages resulting from the enhanced risk of  
26 cancer and the threat of future harm not yet realized are not compensable in a tort action." Id. at 135,

1 477 N.Y.S.2d at 246 (emphasis added). However, the court concluded that recovery "for medical  
2 monitoring" was available "as an element of consequential damage." Id. (emphasis added).

3 [A] plaintiff has a cause of action immediately upon exposure to a foreign  
4 substance and can recover all damages which he can show resulted or would  
5 result therefrom, even though at the time the action is commenced no serious  
6 damage to the plaintiff has developed. The theory of liability grows out of the  
7 invasion of the body by the foreign substance, with the assumption being that  
8 the substance acts immediately upon the body setting in motion the forces  
9 which eventually result in disease . . . . The defendant is liable for "reasonably  
10 anticipated" consequential damages which may flow later from that invasion  
11 although the invasion itself is an injury too slight to be noticed at the time it is  
12 inflicted.

13 Id. at 136, 477 N.Y.S.2d at 247 (other internal quotation marks omitted).

14 The court went on to note that

15 [t]he proof problems are, of course, formidable. In order to recover for  
16 apprehended consequences not presently manifest, there must be such a degree  
17 of probability of their occurrence as to amount to a reasonable certainty that  
18 they will result . . . . Damages for the prospective consequences of a tortious  
19 injury are recoverable only if the prospective consequences may with  
20 reasonable probability be expected to flow from the past harm. Consequences  
21 which are contingent, speculative, or merely possible are not properly  
22 considered in ascertaining damages . . . . If a plaintiff seeks future medical  
23 expenses as an element of consequential damage, he must establish with a  
24 degree of reasonable medical certainty through expert testimony that such  
25 expenses will be incurred . . . .

26 Id. at 136-37, 477 N.Y.S.2d at 247.

27 While the Askey court ultimately ruled that there were a number of individualized  
28 issues that warranted upholding the denial of class certification, it concluded that the record sufficed  
29 to indicate that the

30 persons exposed to toxic chemicals emanating from the landfill have an  
31 increased risk of invisible genetic damage and a present cause of action for  
32 their injury, and may recover all "reasonably anticipated" consequential  
33 damages. The future expense of medical monitoring could be a recoverable

1 consequential damage provided that plaintiffs can establish with a reasonable  
2 degree of medical certainty that such expenditures are "reasonably anticipated"  
3 to be incurred by reason of their exposure. There is no doubt that such a  
4 remedy would permit the early detection and treatment of maladies and that as  
5 a matter of public policy the tort-feasor should bear its cost.

6 Id. at 137, 477 N.Y.S.2d at 247 (emphasis added).

7 Although Askey also opined that the statute of limitations had begun to run from the  
8 date of the plaintiffs' last exposure to the toxic substances, a view that, as discussed in Part II.A.1.  
9 above, was subsequently rejected by the New York Court of Appeals in Snyder, Snyder did not  
10 purport to deal with Askey's views of the availability of damages or of equitable relief in the form of  
11 medical monitoring. Nor are we aware of any other New York Court of Appeals case that has  
12 addressed this issue.

13 Following Askey, New York intermediate appellate courts and trial-level courts have  
14 continued to rule that plaintiffs who have been tortiously exposed to toxic substances and can show  
15 that they have a rational basis for their fear of developing cancer may be allowed to recover the cost  
16 of medical monitoring as an element of reasonably anticipated consequential damages. See, e.g.,  
17 Osarczuk v. Associated Universities, Inc., 36 A.D.3d 872, 877, 830 N.Y.S.2d 711, 715 (2d Dep't  
18 2007) (holding "medical monitoring and other injunctive relief" available as remedies for claims of  
19 negligence and gross negligence in causing exposure to hazardous non-nuclear chemicals and  
20 substances).

21 As indicated in Part II.A.2. above, the "'rational basis'" element means there must be  
22 a "clinically demonstrable presence of [the toxic substance] in the plaintiff's body, or some indication  
23 of [toxin]-induced disease, i.e., some physical manifestation of [toxic] contamination." Abusio, 238  
24 A.D.2d at 455, 656 N.Y.S.2d at 372 (upholding dismissal of claims for future cost of medical



1 monitoring for cancer "[b]ecause the appellants failed to show a 'rational basis' for their fear of  
2 developing the disease"); see, e.g., Allen v. General Electric Co., 32 A.D.3d 1163, 1164-65, 821  
3 N.Y.S.2d 692, 693-95 (4th Dep't 2006) ("Allen") (overturning a judgment that dismissed medical  
4 monitoring claims by plaintiffs who "were exposed to the toxins but exhibit no present illness or injury  
5 as a result of that exposure"); Dangler, 241 A.D.2d at 294, 672 N.Y.S.2d at 190 (finding that, as to  
6 claims of cancerphobia resulting from exposure to toxic emissions from landfill, trial court erred in  
7 excluding evidence as to plaintiffs' need for medical monitoring and in not submitting that issue to the  
8 jury); Gerardi v. Nuclear Utility Services, Inc., 149 Misc.2d 657, 657-59, 566 N.Y.S.2d 1002, 1003-04  
9 (Sup. Ct. West. Co. 1991) ("Gerardi") (although stating that "damages resulting from the enhanced  
10 risk of disease and the threat of future harm not yet realized are not compensable in a tort action,"  
11 ruling that "plaintiffs have stated a cause of action for both reasonably anticipated consequential  
12 damages, to include future medical expenses for lifetime medical monitoring and diagnostic treatment  
13 as a result of the negligence of defendants in causing, or suffering to be caused, exposure of plaintiffs  
14 to toxic asbestos contamination and for negligent infliction of emotional distress").

#### 15 B. Decisions by Federal District Courts in New York

16 In addition, most of the federal district courts sitting in New York State have ruled that  
17 medical monitoring is available as a remedy for tortious exposure to carcinogenic substances even if  
18 the plaintiffs have not exhibited symptoms of cancer, concluding that the New York Court of Appeals  
19 would recognize such a claim. In Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475  
20 (W.D.N.Y. 1995) ("Gibbs"), the plaintiffs alleged that their job duties exposed them to chemical  
21 compounds that were defective and unreasonably dangerous when used in a foreseeable manner; they

1 complained that exposure to those substances subjected them to an excessive risk of developing  
2 bladder cancer. See id. at 476. The plaintiffs had not been diagnosed with bladder cancer and sought  
3 "injunctive relief in the form of a court-administered fund paid for by defendants which would cover  
4 the reasonably anticipated costs of a medical monitoring program for bladder cancer for the lifetime  
5 of the class members." Id. at 477. The defendants moved to dismiss on the ground, inter alia, that  
6 New York State does not recognize a cause of action for medical monitoring damages in the absence  
7 of present physical injury. Relying on Askey and on two decisions of the federal court of appeals for  
8 the Third Circuit in In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829 (3d Cir. 1990) ("Paoli I"), and  
9 35 F.3d 717 (3d Cir. 1994) ("Paoli II"), the district court rejected defendants' argument, stating as  
10 follows:

11           Although the New York courts have not conclusively ruled on the availability  
12           of a claim for medical monitoring in the absence of present injury, I believe  
13           that Askey accurately represents a growing national acceptance of a such a  
14           claim . . . and would be embraced by the New York Court of Appeals. Thus,  
15           the medical monitoring claim shall stand.

16 Gibbs, 876 F. Supp. at 479; see also Paoli I, 916 F.2d at 850 ("[t]he injury in a medical monitoring  
17 claim is the cost"). The Gibbs court also concluded that the request for a "court-administered fund  
18 which goes beyond payment of the costs of monitoring an individual plaintiff's health to establish  
19 pooled resources for the early detection and advances in treatment of the disease" is a request for relief  
20 that "is injunctive in nature rather than 'predominantly [for] money damages.'" Id. at 481.

21           The district court in Abbatiello v. Monsanto Co., 522 F.Supp.2d 524, 536 (S.D.N.Y.  
22 2007) ("Abbatiello"), similarly rejected a defense contention that medical monitoring claims are not  
23 cognizable under New York law.

24           "Medical monitoring is one of a growing number of non-traditional

1 torts that have developed in the common law to compensate plaintiffs who  
2 have been exposed to various toxic substances." In re Paoli R.R. Yard PCB  
3 Liti[g], 916 F.2d 829, 849 (3d Cir. 1990) . . . . The injuries caused by  
4 exposure to toxic substances may take years to manifest themselves physically,  
5 and during this latency period, plaintiffs are burdened with the expense of  
6 regular medical testing. This medical monitoring is intended to detect the  
7 onset of latent injuries or diseases and to facilitate early diagnosis and  
8 treatment. However, plaintiffs may be unable to recover under traditional tort  
9 law, which generally requires a presently existing physical injury. Recognizing  
10 this difficulty, a number of states have allowed plaintiffs to bring claims for the  
11 costs of periodic medical monitoring.

12 Abbatiello, 522 F.Supp.2d at 536. Though noting that there was not uniformity in the views of other  
13 states or the federal district courts, the Abbatiello court, citing principally Askey, Allen, Abusio,  
14 Gerardi, and Gibbs, see, e.g., Abbatiello, 522 F.Supp.2d at 537-39, concluded that "in cases involving  
15 exposure to toxic materials, the New York Court of Appeals would recognize an independent cause  
16 of action for medical monitoring" even "where the present damage is not a physical injury but the  
17 financial burden associated with periodic medical monitoring," id. at 538. As to the elements of such  
18 a cause of action, the court predicted that the New York Court of Appeals would require proof of

19 (1) exposure greater than normal background levels; (2) to a proven hazardous  
20 substance; (3) caused by the defendant's tortious conduct; (4) as a proximate  
21 result of the exposure, plaintiff has a significantly increased risk of contracting  
22 a serious latent disease; (5) a monitoring procedure exists that makes the early  
23 detection of the disease possible; (6) the prescribed monitoring regime is  
24 different from that normally recommended in the absence of the exposure; and  
25 (7) the prescribed monitoring regime is reasonably necessary according to  
26 contemporary scientific principles.

27 Id. at 539; see, e.g., Sorrentino v. ASN Roosevelt Center, 579 F.Supp.2d 387, 390 (E.D.N.Y. 2008)  
28 (concluding that the intermediate appellate courts had "expressly recognized an independent cause of  
29 action for medical monitoring," citing Dangler, Abusio, and Allen, and denying motion to dismiss  
30 claims for exposure to mold where tenants other than the plaintiffs had "developed exposure-related

1 health conditions"); Swearingen v. Long, 889 F. Supp. 587, 590 (N.D.N.Y. 1995) (denying motion  
2 to amend complaint with respect to a claim for medical monitoring where the proffer fell "far short  
3 of the standards articulated in Askey").

4           See also Beckley v. United States, No. 92 Civ. 8137, 1995 WL 590658, at \*4 (S.D.N.Y.  
5 1995) ("In New York, courts recognize a separate cause of action, with a relaxed standard of proof,  
6 for medical monitoring expenses due to exposure to toxic chemicals when the plaintiff cannot show  
7 with reasonable certainty that he will contract a disease as a result of the exposure."); but see In re  
8 World Trade Center Disaster Site, No. 21-MC-100, 2006 WL 3627760, at \*1, \*3 (S.D.N.Y. Dec. 12,  
9 2006) (in actions for, inter alia, respiratory "injuries suffered by workers performing the clean-up  
10 functions at the World Trade Center site and nearby locations in the aftermath of the terrorist-related  
11 aircraft crashes," requests for relief in the form of "medical monitoring" ordered stricken from the  
12 complaints on the ground that although "such relief may perhaps be considered as [an] equitable  
13 remed[y], if causes of action are otherwise proved and if the remedies are held to be appropriate and  
14 in accordance with the law," "[t]hey do not constitute independent causes of action").

### 15 C. Decisions by Other States' Highest Courts

16           Courts in other states considering whether claims for medical monitoring are  
17 cognizable under their respective state laws have reached varying results. Some have recognized an  
18 independent cause of action for medical monitoring; most of those courts have laid out the elements  
19 of such a claim, see Part III.D. below. Other courts have treated medical monitoring as a remedy for  
20 a traditional tort claim in which the risk of disease is considered the injury; and others have refused  
21 to recognize any tort claim where there is no claim of present injury.

1                   In a case paralleling the present action, Donovan v. Philip Morris USA, Inc., 455 Mass.  
2                   215, 914 N.E.2d 891 (2009) ("Donovan"), the plaintiffs were smokers who had reached the age of 50  
3                   years or older, had smoked Marlboro cigarettes within the Commonwealth of Massachusetts, and had  
4                   smoked for at least 20 pack-years. They had "not [been] diagnosed with lung cancer" and were not  
5                   "under investigation by a physician for suspected lung cancer." Id. at 216-17, 914 N.E.2d at 895.  
6                   "The sole remedy" they sought was a court-supervised "medical surveillance program that utilizes a  
7                   specific technology, LDCT screening, which will advise them, at an early stage, whether they have  
8                   developed lung cancer." Id. at 219, 914 N.E.2d at 287. Answering two questions certified to it by a  
9                   federal district court with respect to injuries that are "subclinical," i.e., denoting the presence of a  
10                  disease without manifest symptoms, the Massachusetts Supreme Judicial Court held (1) that "the  
11                  plaintiffs' suit for medical monitoring, based on subclinical effects of exposure to cigarette smoke and  
12                  increased risk of lung cancer, state[s] a cognizable claim and/or permit[s] a remedy under  
13                  Massachusetts state law," id. at 215-16, 221, 914 N.E.2d at 894, 898, and (2) such a claim will be  
14                  considered timely asserted if, prior to an otherwise applicable limitations period, there was "absolutely  
15                  no remedy" available, id. at 229, 914 N.E.2d at 904.

16                  The Donovan court rejected the defense contention that medical monitoring could not  
17                  be ordered without a showing by the plaintiffs of "physical harm manifested by objective  
18                  symptomology," id. at 224, 914 N.E.2d at 901.

19                                Modern living has exposed people to a variety of toxic substances.  
20                                Illness and disease from exposure to these substances are often latent, not  
21                                manifesting themselves for years or even decades after the exposure. Some  
22                                people so exposed may never develop an illness or disease, but some will.  
23                                Subcellular or other physiological changes may occur which, in themselves, are  
24                                not symptoms of any illness or disease, but are warning signs to a trained  
25                                physician that the patient has developed a condition that indicates a substantial

1 increase in risk of contracting a serious illness or disease and thus the patient  
2 will require periodic monitoring. Not all cases will involve physiological  
3 change manifesting a known illness, but such cases should be allowed to  
4 proceed when a plaintiff's reasonable medical expenses have increased (or are  
5 likely to increase, in the exercise of due care) as a result of these physiological  
6 changes. We leave for another day consideration of cases that involve  
7 exposure to levels of chemicals or radiation known to cause cancer, for which  
8 immediate medical monitoring may be medically necessary although no  
9 symptoms or subclinical changes have occurred. Here, the physiological  
10 changes with the attendant substantial increase in risk of cancer, and the  
11 medical necessity of monitoring with its attendant cost, may adequately  
12 establish the elements of injury and damages.

13 Our tort law developed in the late Nineteenth and early Twentieth  
14 centuries, when the vast majority of tortious injuries were caused by blunt  
15 trauma and mechanical forces. We must adapt to the growing recognition that  
16 exposure to toxic substances and radiation may cause substantial injury which  
17 should be compensable even if the full effects are not immediately apparent.  
18 See Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993).  
19 When competent medical testimony establishes that medical monitoring is  
20 necessary to detect the potential onset of a serious illness or disease due to  
21 physiological changes indicating a substantial increase in risk of harm from  
22 exposure to a known hazardous substance, the element of injury and damage  
23 will have been satisfied and the cost of that monitoring is recoverable in tort.  
24 No particular level or quantification of increase in risk of harm is necessary,  
25 so long as it is substantial and so long as there has been at least a  
26 corresponding subcellular change. Id. at 979-980. This should address any  
27 concern over false claims, . . . yet permit a genuinely injured person to recover  
28 legitimate expenses without having to overcome insurmountable problems of  
29 proof in this difficult and complex area. In this respect, medical expenses are  
30 recoverable not only for direct treatment and diagnosis of a present injury or  
31 an injury likely to occur, but for diagnostic tests needed to monitor medically  
32 a person who has been substantially exposed to a toxic substance that has  
33 created physiological changes indicating a substantial increase in risk that the  
34 person will contract a serious illness or disease. The expense of medical  
35 monitoring is thus a form of future medical expense and should be treated as  
36 such.

37 Donovan, 455 Mass. at 225-26, 914 N.E.2d at 901 (emphasis in original).

38 In setting out the elements of such an independent claim for medical monitoring, see  
39 Part III.D. below, the Donovan court stated that there must exist an "effective medical test for reliable

1 early detection" of the disease. 455 Mass. at 226, 914 N.E.2d at 902. Thus, the court rejected the  
2 defense contention that the cause of action accrued when the plaintiffs discovered their increased risk  
3 of cancer, and accepted the plaintiffs' contention that their cause of action for medical monitoring  
4 could not accrue until such a test existed.

5 In this case, it is not merely the risk of cancer of which the plaintiffs  
6 have notice, but the substantial increase in the risk of cancer, as reflected in  
7 their complaint. Because the harm involves subclinical changes that only will  
8 be discovered by a physician, notice most likely will take the form of advice  
9 by a physician, together with a recommendation for diagnostic testing  
10 conformably with the medical standard of care. In short, the statute begins to  
11 run when (1) there is a physiological change resulting in a substantial increase  
12 in the risk of cancer, and (2) that increase, under the standard of care, triggers  
13 the need for available diagnostic testing that has been accepted in the medical  
14 community as an efficacious method of lung cancer screening or surveillance.

15 As previously discussed, medical monitoring expense is the plaintiffs'  
16 only arguably provable damages. They could not have sued for pain and  
17 suffering or lost earning capacity. This is not a case where plaintiffs recovered  
18 damages for pain and suffering, lost earning capacity, but only some medical  
19 expenses based on existing medical technology. These plaintiffs, or so they  
20 allege, had absolutely no remedy until LDCT technology appeared. If they can  
21 establish these circumstances, which are unusual and perhaps unique to  
22 medical monitoring claims, then their claims are timely. This is a question that  
23 cannot be resolved on the record before us; it must be resolved on a motion for  
24 summary judgment or, if genuine issues of material fact remain, by a jury. The  
25 plaintiffs also must show that the standard of care of the reasonable physician  
26 did not call for monitoring of any precancerous condition prior to the statute  
27 of limitations period, not just that the technology at that time was less effective  
28 for monitoring.

29 Id. at 228-29, 914 N.E.2d at 903-04 (emphases added).

30 In dealing with claims of exposure to hazardous substances other than by smoking,  
31 other states too have recognized independent causes of action for medical monitoring in the absence  
32 of evident physical injury. In Ayers v. Township of Jackson, New Jersey, 106 N.J. 557, 565, 525 A.2d  
33 287, 290 (1987) ("Ayers"), the court dealt with claims by plaintiffs who had ingested water from their

1 wells, which had been contaminated by toxic pollutants leaching into an aquifer from the defendant's  
2 landfill. The plaintiffs did not seek recovery for specific illnesses; rather, they requested "the expenses  
3 of annual medical examinations to monitor their physical health and detect symptoms of disease at the  
4 earliest possible opportunity." 106 N.J. at 577, 525 A.2d 297. A jury award to the plaintiffs of some  
5 \$8.2 million for medical monitoring expenses had been set aside by the intermediate appellate court  
6 as too speculative to warrant recognition under the state's tort claims act. The New Jersey Supreme  
7 Court reinstated that award. See id. at 606-07, 525 A.2d at 313.

8 Quoting Askey's statement that the cost of prescribed medical monitoring is  
9 recoverable as consequential damages, see id. at 603, 525 A.2d at 311, the Ayers court also noted that

10 [c]ompensation for reasonable and necessary medical expenses is  
11 consistent with well-accepted legal principles. See C. McCormick, Handbook  
12 on the Law of Damages § 90 at 323-27 (1935). It is also consistent with the  
13 important public health interest in fostering access to medical testing for  
14 individuals whose exposure to toxic chemicals creates an enhanced risk of  
15 disease. The value of early diagnosis and treatment for cancer patients is well-  
16 documented.

17 Ayers, 106 N.J. at 603-04, 525 A.2d at 311. The court stated:

18 Harm in the form of increased risk of future cancer attributable to delay  
19 in diagnosis and treatment has become so widely accepted by the medical  
20 community that the existence of such harm could be reasonably inferred from  
21 this professional common knowledge. A survey of the medical literature  
22 indicates that it is universally agreed within the medical community that delay  
23 in cancer diagnosis and treatment usually increases the risk of metastasis.

24 106 N.J. at 604, 525 A.2d at 311 (internal quotation marks omitted). The court concluded that

25 [a]n application of tort law that allows post-injury, pre-symptom recovery in  
26 toxic tort litigation for reasonable medical surveillance costs is manifestly  
27 consistent with the public interest in early detection and treatment of disease.

28 Id.



1                   In Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 972 (Utah 1993) ("Hansen"),  
2 the court vacated a lower court's summary dismissal of medical monitoring for persons whose work  
3 had exposed them to asbestos but who did not currently suffer from any asbestos-related disease. The  
4 court stated in part as follows:

5                   Allowing recovery for such expenses avoids the potential injustice of  
6 forcing an economically disadvantaged person to pay for expensive diagnostic  
7 examinations necessitated by another's negligence. Indeed, in many cases a  
8 person will not be able to afford such tests, and refusing to allow medical  
9 monitoring damages would in effect deny him or her access to potentially life-  
10 saving treatment. It also affords toxic-tort victims, for whom other sorts of  
11 recovery may prove difficult, immediate compensation for medical monitoring  
12 needed as a result of exposure. Additionally, it furthers the deterrent function  
13 of the tort system by compelling those who expose others to toxic substances  
14 to minimize risks and costs of exposure. . . . Allowing such recovery is also  
15 in harmony with "the important public health interest in fostering access to  
16 medical testing for individuals whose exposure to toxic chemicals creates an  
17 enhanced risk of disease."

18 858 P.2d at 976-77 (quoting Ayers, 106 N.J. at 603, 525 A.2d at 311) (footnote omitted).

19                   In Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965, 863 P.2d 795 (1993)  
20 ("Potter"), the court ruled that "medical monitoring costs[] . . . are a compensable item of damages in  
21 a negligence action where the proofs demonstrate, through reliable medical expert testimony, that the  
22 need for future monitoring is a reasonably certain consequence of the plaintiff's toxic exposure and  
23 that the recommended monitoring is reasonable." Id. at 974, 863 P.2d at 555-56. The court stated that

24 recovery of medical monitoring costs is supported by a number of sound public  
25 policy considerations. First, there is an important public health interest in  
26 fostering access to medical testing for individuals whose exposure to toxic  
27 chemicals creates an enhanced risk of disease, particularly in light of the value  
28 of early diagnosis and treatment for many cancer patients. (Ayers, supra, 525  
29 A.2d at p. 311 . . . .) Second, there is a deterrence value in recognizing medical  
30 surveillance claims--"[a]llowing plaintiffs to recover the cost of this care deters  
31 irresponsible discharge of toxic chemicals by defendants. . . ." (In re Paoli,  
32 supra, 916 F.2d at p. 852; . . . Ayers, supra, 525 A.2d at pp. 311-312; cf.

1 Friends For All Children[, Inc. v. Lockheed Aircraft Corp.], 746 F.2d [816,  
2 825[ (D.C. Cir. 1984)].) Third, "[t]he availability of a substantial remedy  
3 before the consequences of the plaintiffs' exposure are manifest may also have  
4 the beneficial effect of preventing or mitigating serious future illnesses and  
5 thus reduce the overall costs to the responsible parties." (Ayers, supra, 525  
6 A.2d at p. 312 . . . .) In this regard, the early detection of cancer may improve  
7 the prospects for cure, treatment, prolongation of life and minimization of pain  
8 and disability. Finally, societal notions of fairness and elemental justice are  
9 better served by allowing recovery of medical monitoring costs. That is, it  
10 would be inequitable for an individual wrongfully exposed to dangerous  
11 toxins, but unable to prove that cancer or disease is likely, to have to pay the  
12 expense of medical monitoring when such intervention is clearly reasonable  
13 and necessary. (Ayers, supra, 525 A.2d at p. 312 . . . .)

14 Potter, 6 Cal.4th at 1008, 863 P.2d at 824. The Potter court

15 emphasiz[ed] that allowing compensation for medical monitoring costs "does  
16 not require courts to speculate about the probability of future injury. It merely  
17 requires courts to ascertain the probability that the far less costly remedy of  
18 medical supervision is appropriate." (In re Paoli, supra, 916 F.2d at p. 852.)  
19 Indeed, [s]cience may well counsel medical intervention with respect to a  
20 known health risk long before it reaches the point where the law would regard  
21 its occurrence as reasonably certain. . . . We are therefore persuaded that  
22 recovery of medical monitoring damages should not be dependent upon a  
23 showing that a particular cancer or disease is reasonably certain to occur in the  
24 future.

25 Potter, 6 Cal.4th at 1107-08, 863 P.2d at 824 (other internal quotation marks omitted). The court  
26 concluded that "[r]ecognition that a defendant's conduct has created the need for future medical  
27 monitoring does not create a new tort"; such monitoring "is simply a compensable item of damage"  
28 that "may be called for as a result of a defendant's tortious conduct, even in the absence of actual  
29 physical injury." Id. at 1007, 863 P.2d at 823.

30 Accord Meyer v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) ("medical monitoring  
31 costs are recoverable because compensation for necessary medical expenses reasonably certain to be  
32 incurred in the future rests on well-accepted legal principles" of Missouri law that "provide that a

1 plaintiff is entitled to recover for the prospective consequences of the defendant's tortious conduct if  
2 the injury is reasonably certain to occur"); see id. at 718 ("Even though a plaintiff may not have yet  
3 developed a diagnosable physical injury, it is not accurate to conclude that no compensable injury has  
4 been sustained."); id. (declining to impose a physical-injury requirement as "inconsistent with the  
5 reality of latent injury and with the fact that the purpose of medical monitoring is to facilitate the early  
6 diagnosis and treatment of latent injuries caused by exposure to toxins"); Bower v. Westinghouse  
7 Electric Corp., 206 W.Va. 133, 138, 141, 522 S.E.2d 424, 429, 432 (1999) (ruling that "under West  
8 Virginia law, a plaintiff who does not allege a present physical injury can assert a claim for the  
9 recovery of future medical monitoring costs where such damages are the proximate result of  
10 defendant's tortious conduct"); Redland Soccer Club, Inc. v. Department of the Army, 548 Pa. 178,  
11 194-95, 696 A.2d 137, 145 (1997) ("Redland") (citing Ayers and Hansen, and approving a court-  
12 supervised fund for medical monitoring of plaintiffs who did not allege actual injury from exposure  
13 to hazardous substances disposed of in a landfill); Day v. NLO, Inc., 144 F.R.D. 330, 336 (S.D. Ohio  
14 1992) ("In the case at bar, the defendants allegedly caused all of the potential class members to be  
15 overexposed to radioactive materials through negligent or intentional misconduct. If the plaintiffs in  
16 this case ultimately prove their allegations, the class members will be entitled to injunctive relief in  
17 the form of an extensive court-supervised medical monitoring program."); Cook v. Rockwell  
18 International Corp., 778 F. Supp. 512, 514 (D. Colo. 1991) (predicting that "the Colorado Supreme  
19 Court would probably recognize, in an appropriate case, a tort claim for medical monitoring" (internal  
20 quotation marks omitted)).

21 Other courts have rejected the proposition that a plaintiff may recover medical  
22 monitoring costs in the absence of a current physical injury. In Paz v. Brush Engineered Materials,

1 949 So.2d 1 (Miss. 2007) (en banc), the court held that current Mississippi law does not "recognize  
2 a claim for medical monitoring allowing a plaintiff to recover medical monitoring costs for mere  
3 exposure to a harmful substance without proof of current physical or emotional injury from that  
4 exposure." Id. at 5-6.

5 The United States Supreme Court has examined the common law for the  
6 allowance of recovery for negligently caused exposure by a plaintiff who has  
7 yet to suffer from a disease. [Metro-North Commuter R.R. Co. v. Buckley,  
8 521 U.S. [424,] 432 . . . [(1997)] (holding that an employee could not recover  
9 damages and medical monitoring costs under the Federal Employers' Liability  
10 Act unless or until he manifested symptoms of a disease). The Court found  
11 that with few exceptions, "common law courts have denied recovery to those  
12 who are disease and symptom free." Id. The Court concluded that to recognize  
13 medical monitoring costs alone as a separate injury is to go "beyond the bounds  
14 of currently evolving common law." Id. at 439 . . . . Accordingly, as plaintiffs  
15 invite this [Paz] Court to recognize a medical monitoring cause of action, an  
16 act which would require an unprecedented and unfounded departure from the  
17 long-standing traditional elements of a tort action, this Court declines that  
18 invitation.

19 Paz, 949 So.2d at 6 (footnote omitted).

20 The possibility of a future injury is insufficient to maintain a tort claim.  
21 Recognizing a medical monitoring cause of action would be akin to  
22 recognizing a cause of action for fear of future illness. Each bases a claim for  
23 damages on the possibility of incurring an illness with no present manifest  
24 injury. There is no tort cause of action in Mississippi without some identifiable  
25 injury, either physical or emotional.

26 Id. at 5; see id. at 9 ("This Court has continuously rejected the proposition that within tort law there  
27 exists a cause of action or a general category of injury consisting solely of potential future injury.").

28 In Wood v. Wyeth-Ayerst Laboratories Division of American Home Products, 82  
29 S.W.3d 849 (Ky. 2002) ("Wood"), the court stated that under Kentucky law "a cause of action in tort  
30 requires a present physical injury to the plaintiff," 82 S.W.3d at 852, and that "a plaintiff must have  
31 sustained some physical injury before a cause of action can accrue," id. at 853-54.

1            No cause of action accrues until the potentially harmful exposure actually  
2 causes injury that produces loss or damage. . . . With no injury there can be no  
3 cause of action, and with no cause of action there can be no recovery. It is not  
4 the remedy that supports the cause of action, but rather the cause of action that  
5 supports a remedy.

6            Id. at 855 (internal quotation marks omitted) (emphasis in Wood).

7            The court ruled that "mere ingestion of a toxic substance does not constitute sufficient  
8 physical harm upon which to base a claim for damages." Id. at 856 (internal quotation marks omitted).

9            Because Appellant has shown no present physical injury, her cause of  
10 action under theories of negligence and strict liability have yet to accrue. Thus,  
11 Appellant's complaint was correctly dismissed for failure to state a claim upon  
12 which relief can be granted. For the same reasons, the class action must fail.  
13 Where there is no injury, there can be no redress. If and when Appellant  
14 manifests an injury resulting from [the defendant's] conduct, only then will she  
15 have a remedy under the law.

16            Id. at 859.

17            In Henry v. Dow Chemical Co., 473 Mich. 63, 701 N.W.2d 684 (Mich. 2005), the court  
18 held that a claim merely for "an 'equitable remedy' of a medical monitoring program not in order to  
19 redress actual or present injury to their persons but instead to screen for possible future injury," id.  
20 at 78, 701 N.W.2d at 691, "do[es] not present a viable negligence claim under Michigan's common  
21 law," id. at 68, 701 N.W.2d at 687.

22            If plaintiffs' claim is for injuries they may suffer in the future, their  
23 claim is precluded as a matter of law, because Michigan law requires more  
24 than a merely speculative injury. This Court has previously recognized the  
25 requirement of a present physical injury in the toxic tort context.

26            Id. at 72, 701 N.W.2d at 688.

27            However, if plaintiffs' claim is that by virtue of their potential exposure  
28 to dioxin they have suffered an "injury," in that any person so exposed would  
29 incur the additional expense of medical monitoring, then their claim is also  
30 precluded as a matter of law, because Michigan law requires an actual injury

1 to person or property as a precondition to recovery under a negligence theory.

2 Id. at 73, 701 N.W.2d at 689.

3 It is no answer to argue, as plaintiffs have, that the need to pay for  
4 medical monitoring is itself a present injury sufficient to sustain a cause of  
5 action for negligence. In so doing, plaintiffs attempt to blur the distinction  
6 between "injury" and "damages." While plaintiffs arguably demonstrate  
7 economic losses that would otherwise satisfy the "damages" element of a  
8 traditional tort claim, the fact remains that these economic losses are wholly  
9 derivative of a possible, future injury rather than an actual, present injury. A  
10 financial "injury" is simply not a present physical injury, and thus not  
11 cognizable under our tort system. Because plaintiffs have not alleged a present  
12 physical injury, but rather, "bare" damages, the medical expenses plaintiffs  
13 claim to have suffered (and will suffer in the future) are not compensable.

14 Id. at 78, 701 N.W.2d at 691 (emphases in original).

15 Accord Hinton v. Monsanto Co., 813 So.2d 827, 828-29 (Ala. 2001) (A complaint  
16 asserting claims of negligence, wantonness, and strict products liability and alleging that "medical  
17 monitoring (or medical surveillance) . . . is necessary in order to detect injuries or illnesses that may  
18 arise in the future as a result of the exposure" to the toxic substance, but "not alleg[ing] any past or  
19 present personal injury to the plaintiff" does not state a cause of action for medical monitoring.  
20 "Alabama law has long required a manifest, present injury before a plaintiff may recover in tort.");  
21 Lowe v. Philip Morris USA, Inc., 344 Or. 403, 410, 183 P.3d 181, 184 (2008) ("Oregon law has long  
22 recognized that the fact that a defendant's negligence poses a threat of future physical harm is not  
23 sufficient, standing alone, to constitute an actionable injury"); id. at 415, 183 P.3d at 187 ("negligent  
24 conduct that results only in a significantly increased risk of future injury that requires medical  
25 monitoring does not give rise to a claim for negligence").

26 In Henry, the Michigan Supreme Court viewed the question of whether a cause of  
27 action should be recognized for medical monitoring in the absence of present physical injury as one

1 more suitable for resolution by the legislative branch.

2 Plaintiffs have asked us to recognize a cause of action that departs  
3 drastically from our traditional notions of a valid negligence claim. Beyond  
4 this enormous shift in our tort jurisprudence, judicial recognition of plaintiffs'  
5 claim may also have undesirable effects that neither we nor the parties can  
6 satisfactorily predict. For example, recognizing a cause of action based solely  
7 on exposure--one without a requirement of a present injury--would create a  
8 potentially limitless pool of plaintiffs. . . . []Once a showing of present  
9 physical injury is eliminated, as is the case in awards for medical monitoring,  
10 attorneys representing plaintiffs could virtually begin recruiting people off the  
11 street to serve as medical monitoring claimants. . . . Litigation of these  
12 preinjury claims could drain resources needed to compensate those with  
13 manifest physical injuries and a more immediate need for medical care. It is  
14 less than obvious, therefore, that the benefits of a medical monitoring cause of  
15 action would outweigh the burdens imposed on plaintiffs with manifest  
16 injuries, our judicial system, and those responsible for administering and  
17 financing medical care. Because such a balancing process would necessarily  
18 require extensive fact-finding and the weighing of important, and sometimes  
19 conflicting, policy concerns, and because here we lack sufficient information  
20 to assess intelligently and fully the potential consequences of our decision, we  
21 do not believe that the instant question is one suitable for resolution by the  
22 judicial branch.

23 Id. at 83-84, 701 N.W.2d at 694-95 (emphasis in original) (footnote omitted); see id. at 84 n.13, 701  
24 N.W.2d at 695 n.13 ("whether and how to recognize a medical monitoring cause of action should be  
25 made by the people's representatives in the legislative branch of our government").

26 In Badillo v. American Brands, Inc., 117 Nev. 34, 16 P.3d 435 (2001) (en banc), the  
27 plaintiffs and the proposed class members included groups of smokers and groups of "casino  
28 employees (both nonsmokers and former smokers) who claim exposure to environmental or  
29 secondhand tobacco smoke at work." Id. at 38, 16 P.3d at 438. After exploring the factual, scientific,  
30 and legal landscape, the court ruled that "Nevada common law does not recognize a medical  
31 monitoring cause of action but the remedy of medical monitoring may be available." Id., 16 P.3d  
32 at 437. The court reached this conclusion after taking into account, inter alia, "the complex fact

1 pattern of tobacco litigation and causality," the lack of a consensus in other jurisdictions as to "whether  
2 present physical injury is required for a medical monitoring claim," and the lack of uniformity as to  
3 "the elements of medical monitoring as a cause of action[, which vary] from one jurisdiction to  
4 another." Id. at 43-44, 16 P.3d at 441. The Badillo court did not consider whether medical monitoring  
5 costs could be recovered as an item of consequential damages because that question had not been  
6 briefed. See id. at 44, 16 P.3d at 441.

#### 7 D. Elements of an Independent Medical Monitoring Cause of Action

8 Most of the courts that have concluded that a plaintiff who has not suffered physical  
9 injury from tortious exposure to hazardous substances may maintain a cause of action for medical  
10 monitoring have elaborated on the elements necessary to prevail on such a claim. The lists of  
11 elements are similar, but not identical. In Ayers, the court

12 h[e]ld that the cost of medical surveillance is a compensable item of damages  
13 where the proofs demonstrate, through reliable expert testimony predicated  
14 upon the significance and extent of exposure to chemicals, the toxicity of the  
15 chemicals, the seriousness of the diseases for which individuals are at risk, the  
16 relative increase in the chance of onset of disease in those exposed, and the  
17 value of early diagnosis, that such surveillance to monitor the effect of  
18 exposure to toxic chemicals is reasonable and necessary.

19 106 N.J. at 606, 525 A.2d at 312. The court indicated that "the medical surveillance claim seeks  
20 reimbursement for the specific dollar costs of periodic examinations that are medically necessary  
21 notwithstanding the fact that the extent of plaintiffs' impaired health is unquantified." Id., 525 A.2d  
22 at 313.

23 The court in Potter set out a five-factor test for "determining the reasonableness and  
24 necessity of monitoring":



1 (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the  
2 toxicity of the chemicals; (3) the relative increase in the chance of onset of  
3 disease in the exposed plaintiff as a result of the exposure, when compared to  
4 (a) the plaintiff's chances of developing the disease had he or she not been  
5 exposed, and (b) the chances of the members of the public at large of  
6 developing the disease; (4) the seriousness of the disease for which the plaintiff  
7 is at risk; and (5) the clinical value of early detection and diagnosis. Under this  
8 holding, it is for the trier of fact to decide, on the basis of competent medical  
9 testimony, whether and to what extent the particular plaintiff's exposure to  
10 toxic chemicals in a given situation justifies future periodic medical  
11 monitoring.

12 6 Cal.4th at 1009, 863 P.2d at 824-25.

13 In Donovan, the Massachusetts court stated that a plaintiff asserting a medical  
14 monitoring cause of action must show that

15 (1) [t]he defendant's negligence (2) caused (3) the plaintiff to become exposed  
16 to a hazardous substance that produced, at least, subcellular changes that  
17 substantially increased the risk of serious disease, illness, or injury (4) for  
18 which an effective medical test for reliable early detection exists, (5) and early  
19 detection, combined with prompt and effective treatment, will significantly  
20 decrease the risk of death or the severity of the disease, illness or injury, and  
21 (6) such diagnostic medical examinations are reasonably (and periodically)  
22 necessary, conformably with the standard of care, and (7) the present value of  
23 the reasonable cost of such tests and care, as of the date of the filing of the  
24 complaint.

25 455 Mass. at 226, 914 N.E.2d at 902.

26 The court in Hansen set out the following standard for Utah courts to follow in  
27 determining whether to award medical monitoring costs, a standard that includes the requirement--  
28 somewhat like the fifth element described by Donovan--that there exist some effective treatment for  
29 the disease whose early detection is sought. The court stated that a plaintiff must prove

30 (1) exposure

31 (2) to a toxic substance,

1 (3) which exposure was caused by the defendant's negligence,

2 (4) resulting in an increased risk

3 (5) of a serious disease, illness, or injury

4 (6) for which a medical test for early detection exists

5 (7) and for which early detection is beneficial, meaning that a treatment  
6 exists that can alter the course of the illness,

7 (8) and which test has been prescribed by a qualified physician  
8 according to contemporary scientific principles.

9 858 P.2d at 979; see also id. at 979-80 (elaborating on each element). As to its sixth element, which--  
10 like the fourth element described by Donovan--requires proof of an available effective test, the Hansen  
11 court stated

12 the plaintiff must prove that a test exists for detecting the onset of the illness  
13 before it would be apparent to the layperson. If no such test exists, then  
14 periodic monitoring is pointless and no cause of action for monitoring  
15 exists.FN12 In such a situation, the potential plaintiff is not harmed until the  
16 onset of the actual illness. At that time, he or she can bring an action for actual  
17 injury.FN13

18 FN12. Of course, if a test is later developed that will  
19 detect the disease, a plaintiff would retain the right to  
20 demonstrate at some later date the effectiveness of the test and  
21 be compensated for utilizing it, if all other elements of the  
22 cause of action are present.

23 FN13. The statute of limitations certainly will not run  
24 on a cause of action when a critical element of that cause,  
25 actual injury, has yet to evidence itself.

26 979 & nn.12 and 13.

27 In Redland, the court stated that in order to prevail on a common law claim for medical  
28 monitoring, a plaintiff must prove the following:

- 1 (1) exposure greater than normal background levels;
- 2 (2) to a proven hazardous substance;
- 3 (3) caused by the defendant's negligence;
- 4 (4) as a proximate result of the exposure, plaintiff has a significantly
- 5 increased risk of contracting a serious latent disease;
- 6 (5) a monitoring procedure exists that makes the early detection of the
- 7 disease possible;
- 8 (6) the prescribed monitoring regime is different from that normally
- 9 recommended in the absence of the exposure; and
- 10 (7) the prescribed monitoring regime is reasonably necessary according
- 11 to contemporary scientific principles.

12 548 Pa. at 195-96, 696 A.2d at 145-46. See also Abbatiello, 522 F.Supp.2d at 538-39 (predicting that

13 the New York Court of Appeals would adopt the elements set out in Redland).

14 As to Redland's sixth element, *i.e.*, the need for differentiation between the proposed

15 medical monitoring and other medical monitoring, the Pennsylvania court stated that if courts imposed

16 medical monitoring liability without requiring a showing that exposed plaintiffs require a different

17 monitoring regime than unexposed persons, polluters would become "health care insurer[s]." 548 Pa.

18 at 193, 696 A.2d at 144 (internal quotation marks omitted). The Redland court also noted that, unlike

19 Utah law as described by the Hansen court, Pennsylvania law does not require that a plaintiff prove

20 that an effective "treatment" be available. Id. at 196 n.8, 696 A.2d at 146 n.8.

21 All of the above states that recognized a medical monitoring cause of action noted that

22 such a claim cannot be established without reliable expert testimony. See, e.g., Ayers, 106 N.J. at 606,

23 525 A.2d at 312 (requiring "reliable expert testimony predicated upon the significance and extent of

24 exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which

1 individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the  
2 value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals  
3 is reasonable and necessary"); Donovan, 455 Mass. at 227, 914 N.E.2d at 902; Hansen, 858 P.2d  
4 at 980; Redland, 548 Pa. at 196, 696 A.2d at 146; Potter, 6 Cal.4th at 1009, 863 P.2d at 824.

5 Some of the cases have also indicated that a medical monitoring cause of action may  
6 be subject to normal tort defenses such as assumption of risk and contributory negligence. See  
7 Donovan, 455 Mass. at 226 n.11, 914 N.E.2d at 901 n.11 ("[a] plaintiff[ smoker]'s claim would, of  
8 course, remain subject to all available affirmative defenses, such as contributory negligence"); Potter,  
9 6 Cal.4th at 974, 863 P.2d at 801 ("when a defendant in a [toxic landfill] negligence action  
10 demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of cancer  
11 is attributable to the smoking, comparative fault principles may be applied to reduce the amount of  
12 recovery for emotional distress damages based on such fear"). See also Dangler, 241 A.D.2d at 294,  
13 672 N.Y.S.2d at 191 (in a cancerphobia case involving a toxic landfill, a jury may properly consider  
14 the plaintiffs' "voluntary exposure to carcinogens, for example, by smoking").

#### 15 E. Certification of Questions to the New York Court of Appeals

16 In cases such as this one, in which state law controls and the governing principles are  
17 uncertain or ambiguous, we attempt to predict how the highest court of the state would resolve the  
18 uncertainty or ambiguity. See, e.g., Travelers Insurance Co. v. 633 Third Associates, 14 F.3d 114, 119  
19 (2d Cir. 1994). In so doing, we give full weight to the decisions of the state's highest court, and we  
20 give due regard to the decisions of the state's lower courts. See, e.g., Phansalkar v. Andersen  
21 Weinroth & Co., 344 F.3d 184, 199 (2d Cir. 2003); Michalski v. Home Depot, Inc., 225 F.3d 113, 116

1 (2d Cir. 2000). We also remain "free to consider all of the resources to which the highest court of the  
2 state could look, including decisions in other jurisdictions on the same or analogous issues," Leon's  
3 Bakery, Inc. v. Grinnell Corp., 990 F.2d 44, 48 (2d Cir. 1993).

4 As the discussion in Parts III.A., B., C., and D. above indicates, where the plaintiffs  
5 have alleged tortious exposure to toxic substances but have not alleged that they suffered physical  
6 injury, the New York intermediate appellate courts have ruled that the cost of medical monitoring may  
7 be awarded as an item of consequential damages, most of the federal district courts sitting in New  
8 York have opined that New York would recognize an independent claim for medical monitoring, and  
9 the highest courts of other states have divided as to whether or not the plaintiff may maintain an  
10 independent medical monitoring cause of action.

11 None of the New York courts has directly addressed the question of whether the State  
12 recognizes an independent cause of action for medical monitoring, and the answer to this question,  
13 which has the capacity to resolve this litigation, is unclear. The question is material in the present  
14 action because the statute of limitations bars plaintiffs' pursuit of their traditional claims for negligence  
15 and strict products liability; the principle evinced in cases such as Askey, Allen, and Abusio, that the  
16 cost of medical monitoring may be recovered as an element of consequential damages, would be  
17 immaterial to claims that are time-barred.

18 If, however, New York recognizes an independent cause of action for medical  
19 monitoring, and if, as recognized, that claim is viewed as accruing when an effective monitoring test  
20 becomes available--and if plaintiffs' allegations as to the availability and effectiveness of LDCT and  
21 as to the lack of effectiveness of prior tests are proven--the statute of limitations likely will not have  
22 run on that independent cause of action. We also note our uncertainty as to how New York would

1 regard claim accrual in the event of further technological advances that may from time to time improve  
2 on the effectiveness of existing tests. We frame the certified questions as we have in order to facilitate  
3 the weighing of competing policy considerations, including various gradations of health concerns and  
4 the potential for preventive or early-detection measures, in light of the scope of plaintiffs' claims on  
5 behalf of a putative class of persons who not only have not been diagnosed with a smoking-related  
6 disease but also are not under investigation by a physician for such a suspected disease.

7           This Court's Local Rule 27.2 allows certification of such questions "where the New  
8 York Court of Appeals has not spoken clearly on an issue and we are unable to predict, based on other  
9 decisions by New York courts, how the Court of Appeals would answer a certain question." Giordano  
10 v. Market America, Inc., 599 F.3d 87, 100 (2d Cir. 2010). Certification is particularly desirable where  
11 a "decision reflects value judgments and important public policy choices that the New York Court of  
12 Appeals is better situated than we are to make," id. at 101; see, e.g., Hall v. United Parcel Service,  
13 Inc., 76 N.Y.2d 27, 33, 556 N.Y.S.2d 21, 25 (1990) ("Whether we should . . . recogniz[e] a remedy  
14 in tort is a question that is best resolved by reference to the relevant judicial and social policy  
15 considerations."). The Local Rules of the New York Court of Appeals permit certification of  
16 questions by this Court when we encounter "determinative questions of New York law . . . for which  
17 no controlling precedent of the Court of Appeals exists." N.Y. Court of Appeals Local Rule  
18 500.27(a).

19           In light of (a) the lack of controlling precedent of the New York Court of Appeals, (b)  
20 the absence of clear guidance by New York's intermediate appellate courts, (c) the importance of the  
21 questions presented as to the availability of medical monitoring as an independent cause of action, and  
22 (d) the value judgments and important policy considerations that must be balanced in resolving these

1 questions, we conclude that the New York Court of Appeals is better suited than this Court to  
2 determine whether New York recognizes such a cause of action. Accordingly, we certify the  
3 following questions of New York law:

4 (1) Under New York law, may a current or former longtime heavy  
5 smoker who has not been diagnosed with a smoking-related disease, and who  
6 is not under investigation by a physician for such a suspected disease, pursue  
7 an independent equitable cause of action for medical monitoring for such a  
8 disease?

9 (2) If New York recognizes such an independent cause of action for  
10 medical monitoring,

11 (A) What are the elements of that cause of action?

12 (B) What is the applicable statute of limitations, and when does  
13 that cause of action accrue?

14 We do not intend this articulation of the above specified questions to limit the scope  
15 of the analysis by the Court of Appeals, and we invite the Court of Appeals to expand upon or alter  
16 these questions as it deems appropriate.

## 17 CONCLUSION

18 We have considered all of the plaintiffs' remaining arguments on appeal and have found  
19 them to be without merit. Accordingly, we affirm the judgment of the district court to the extent that  
20 it dismissed plaintiffs' claims of negligence, strict liability, and breach of the implied warranty of  
21 merchantability.

1                   With respect to the plaintiffs' independent claim seeking medical monitoring, we  
2 hereby instruct the Clerk of Court for the Second Circuit to transmit to the Clerk of the New York  
3 Court of Appeals this opinion as our certificate, together with a complete set of all filings in this Court  
4 by the parties. This panel will retain jurisdiction of the present appeal for resolution after disposition  
5 of the certified questions by the New York Court of Appeals.