UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARCIA L. CARONIA,
LINDA McAULEY,
ARLENE FELDMAN,

Plaintiffs,

-against-

PHILIP MORRIS USA, INC.

Defendant.
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NOT FOR PUBLICATION
MEMORANDUM & ORDER
06-CV-224 (CBA) (SMG)

AMON, United States District Judge:

INTRODUCTION

Before the Court are three motions in this tobacco medical monitoring action. The plaintiffs, who in their fourth amended complaint seek to have Philip Morris establish a medical monitoring program that involves low dose computed tomography (LDCT) scans for the benefit of certain New York smokers, have moved to certify a class of New York residents who are fifty years of age or older, have smoked Marlboro brand cigarettes for at least twenty pack-years, currently smoke Marlboro cigarettes or quit smoking Marlboros within one year of the date on which the plaintiffs filed this suit, have smoked Marlboros in New York, and are not currently suffering from lung cancer or under active investigation for lung cancer. Defendant Philip Morris has moved to dismiss the medical monitoring claim in the plaintiffs' fourth amended complaint and for summary judgment on the breach of implied warranty claim.

For the reasons that follow, the Court grants both Philip Morris's motion to dismiss the medical monitoring claim and its motion for summary judgment on the breach of implied warranty claim. The motion for class certification is moot.

BACKGROUND

The plaintiffs filed this suit in January 2006. They have amended their complaint more than once, but the central allegation of the no-longer-operative third amended complaint was that Philip Morris designed and marketed Marlboro brand cigarettes that delivered an excessive and dangerous level of what is commonly called "tar." The plaintiffs claimed that at all times relevant to their complaint, Philip Morris could have manufactured and sold cigarettes that delivered significantly less tar by reducing tar yield and preventing smokers from "compensating" by drawing more deeply on each cigarette. (3d Am. Compl. ¶¶ 60–62.) The plaintiffs alleged that Philip Morris deliberately chose not to do that and that its failure to design and sell a safer cigarette exposed the plaintiffs to elevated levels of known carcinogens, substantially increased their likelihood of developing lung cancer in the future, and caused them to require periodic medical monitoring. (Id. ¶¶ 85, 90, 99, 113.) The plaintiffs originally asserted claims under the theories of strict liability (design defect), negligence, and breach of implied warranty. (Id. ¶¶ 80–114.) As a remedy the plaintiffs requested only that Philip Morris create and maintain a comprehensive medical monitoring program that involves the use of LDCT scans for certain smokers. (Id. ¶¶ 72–79.) In support of that request, the plaintiffs alleged that smokers who can identify lung cancer at Stage I have an "excellent" chance of surviving the disease; until recently physicians could only reliably discover lung cancer once it had advanced to Stage II; LDCT scans, which the medical community has only recently accepted, can identify lung cancer at Stage I; and that an LDCT program can be administered at a relatively modest cost per patient (about $500 per year). (Id.)

In February 2010, upon motion of Philip Morris, the Court granted summary judgment against two of the plaintiffs' three claims. Caronia v. Philip Morris USA, Inc., 06-CV-224

(CBA) (E.D.N.Y. Feb. 11, 2010). It concluded that the plaintiffs' strict liability and negligence claims were time barred because those claims accrued when the plaintiffs discovered their injury (which the parties agreed was the increased risk of developing lung cancer) and that the plaintiffs discovered their injuries well before January 2003. That rendered the plaintiffs' claims untimely under any applicable New York statute of limitations. (Id. at 5–9.) The Court rejected the plaintiffs' argument that they could recover for their injury so long as their "date of last exposure" to Marlboro cigarettes occurred within the limitations period. (Id. at 10–11.) The Court denied Philip Morris's motion for summary judgment on the plaintiffs' breach of implied warranty claim. With respect to that claim, the parties agreed that the plaintiffs could only sue for injuries caused by cigarettes that they bought after January 2002, within four years of the filing of the complaint. (Id. at 12.) Philip Morris argued in its papers that even assuming the timeliness of the plaintiffs' implied warranty claim with respect to some recent cigarette purchases, the plaintiffs could not prove that the cigarettes that they bought after 2002 caused an injury over and above the injury that the earlier-purchased cigarettes caused. (Id.) In the light of conflicting expert affidavits, the Court declined to award summary judgment on that ground. (Id.)

The Court did order further briefing on the implied warranty claim, and on another claim that the plaintiffs apparently meant to assert but had not properly pleaded. With respect to the implied warranty claim, the Court observed that at oral argument on the summary judgment motion, Philip Morris had suggested that the plaintiffs could not recover because they knew when they bought cigarettes after 2002 of the dangers that those cigarettes posed. Consequently, it argued, there was no implied warranty that Philip Morris's cigarettes would not elevate their risk of developing lung cancer. Because this argument had at least "superficial appeal," and

because the parties had not sufficiently addressed the argument in their papers, the Court ordered additional briefing. (Id. at 14–15.) The Court also ordered further briefing on the question whether the plaintiffs could timely assert, under New York law, an independent cause of action for medical monitoring. The issue to be addressed was whether the New York Court of Appeals would recognize medical monitoring as a cause of action, not simply a remedy for an existing tort, and whether the Court of Appeals would further conclude that such a cause of action would not accrue until an effective monitoring program (like one that involved LDCT) was available. (Id. at 15–16.)

In March 2010, the plaintiffs amended their complaint again to assert an "equitable cause of action" for medical monitoring under New York law. (4th Am. Compl. ¶¶ 109–18.) That cause of action relied on the same alleged misconduct on which the plaintiffs' other causes of action relied, namely, that Philip Morris manufactured and marketed defective cigarettes that contained and delivered higher levels of tar than they had to. The cause of action, as pleaded by the plaintiffs, further relied on allegations of the plaintiffs': "(a) exposure, (b) to a toxic substance, (c) caused by the Defendant's misconduct, (d) resulting in an increased risk, (e) of a serious disease, illness or injury, (f) for which a medical test for early detection exists, (g) and for which early detection is beneficial, meaning that a treatment exists which can alter the course of the illness, (h) which tests can be prescribed by a qualified physician, (i) and which tests only can be provided through the mechanism of a program rather than through the award of money damages." (Id. ¶ 115.) Again, the plaintiffs requested as a remedy only that Philip Morris create and maintain an LDCT medical monitoring program.

In May 2010, the parties moved again. The plaintiffs renewed their earlier motion to certify a class of New York smokers (described above) under Federal Rule of Civil Procedure

23(b)(2) or, alternatively, to certify certain issues for class treatment under Rule 23(c)(4)(A). Philip Morris renewed its opposition to that motion and also moved to dismiss for failure to state a claim the plaintiffs' newly pleaded medical monitoring cause of action and for summary judgment on the plaintiffs' breach of implied warranty claim on the ground that the plaintiffs' knowledge of the risks of smoking precluded that claim. It is to these motions that the Court now turns.

DISCUSSION

The Court first addresses Philip Morris's motion to dismiss. As set forth below, the Court accepts the plaintiffs' argument that the New York Court of Appeals would recognize an independent claim for medical monitoring, and the Court further predicts that the Court of Appeals would conclude that the statute of limitations for such a claim begins to run on the first date that some medical monitoring program is accepted within the medical community as an effective method of lung cancer screening or surveillance. The Court further finds that to prevail on their medical monitoring claim, the plaintiffs must, as they acknowledge, plead the elements of a claim for strict products liability or negligent design or breach of warranty.[1] The plaintiffs have failed to do this, however, because they have failed to plead that Philip Morris's allegedly tortious conduct is the reason that they must now secure a monitoring program that includes LDCT scans. The Court further grants Philip Morris's motion for summary judgment on the implied warranty claim because the plaintiffs have offered no evidence that Philip Morris breached, as a matter of New York law, an implied warranty with respect to Marlboro cigarettes.

[1] The plaintiffs could have attempted to plead other underlying theories of tort liability as part of their medical monitoring claim, but they have not done so. (4th Am. Compl. ¶¶ 109–18.)

I. Medical Monitoring Claim

As explained above, in their fourth amended complaint, the plaintiffs have asserted, as an independent cause of action under New York law, a claim for medical monitoring and argue that the cause of action is timely because it could not have accrued until a medically accepted monitoring program first came into being, which they contend was shortly before the plaintiffs filed suit. Philip Morris has moved to dismiss that cause of action for failure to state a claim. In support of its motion to dismiss, Philip Morris argues that the New York Court of Appeals has never permitted individuals who, like the plaintiffs, exhibit no symptoms of disease to recover for medical monitoring. It contends, moreover, that the New York Court of Appeals would not permit such a suit if provided the opportunity. Alternatively, it argues that if New York would permit recovery for asymptomatic plaintiffs, it would do so only by recognizing medical monitoring costs as a remedy, having no relevance to the limitations period, for individuals with a valid tort claim premised on the injury of suffering an elevated risk of developing a serious disease. Consequently, Philip Morris argues, the plaintiffs' medical monitoring "claim" is untimely because the plaintiffs knew long ago that Marlboro cigarettes significantly increased their odds of developing cancer. Philip Morris also contends that the plaintiffs have failed to plead a valid claim for medical monitoring because they have not sufficiently alleged that it was the purported defect in Philip Morris's Marlboro cigarettes that caused them to require medical monitoring that includes LDCT scans.

The Court recognizes the question of whether New York law permits a medical monitoring claim as a close one—and a close question on which it will not have the last word[2]—but concludes that the plaintiffs have the better argument with respect to whether New York

[2] This issue will have to be determined ultimately by the New York Court of Appeals. This Court has no authority to certify the question so must do its best to predict the New York Court of Appeals' determination.

would recognize a claim for medical monitoring of the sort that the plaintiffs have asserted. The plaintiffs argue persuasively that such a claim would be timely in this case. Despite these conclusions, the Court nonetheless grants the motion to dismiss because it agrees with Philip Morris that the plaintiffs have failed to properly allege that it was Philip Morris's failure to manufacture and produce a non-defective, less-dangerous cigarette that caused them to require medical monitoring. For that reason, the Court grants the motion to dismiss.

A. Recognition of the Cause of Action

The parties disagree at the outset as to whether New York would permit asymptomatic plaintiffs to recover for medical monitoring. Philip Morris argues that in New York to "state a valid personal injury claim in an exposure-based case, a plaintiff must assert present injury in the form of a manifest medical condition." (Def. Dis. at 5–6.) And the plaintiffs have failed to do so. Moreover, Philip Morris argues that the New York Court of Appeals would not carve an exception to this rule for medical monitoring because of its "long-standing unwillingness to affect sweeping changes in the law when doing so would involve the weighing of policy considerations." (Id. at 6.) Philip Morris also points to the not-insignificant number of state supreme courts that have rejected medical monitoring for asymptomatic plaintiffs. (Id. at 7–8.) The plaintiffs answer that New York's intermediate appellate courts have uniformly permitted recovery for medical monitoring and that several federal courts interpreting New York law have determined that the New York Court of Appeals would permit recovery.

The parties agree that in this diversity action, the Court must apply New York substantive law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Where, as here, applying state substantive law involves the resolution of unsettled legal questions, "the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity."

Phansalkar v. Anderson Weinroth & Co., 344 F.3d 184, 199 (2d Cir. 2003) (internal quotation marks omitted). Moreover, in resolving questions on which the New York Court of Appeals has not spoken, "the decisions of New York State's Appellate Division are helpful indicators" of how the Court of Appeals would resolve those questions. Michalski v. Home Depot, Inc., 225 F.3d 113, 116 (2d Cir. 2000). Similarly, although this Court is "not strictly bound by state intermediate appellate courts, rulings from such courts are a basis for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir. 2005) (internal quotation marks omitted); see also Giordano v. Market Am., Inc., 599 F.3d 87, 92 (2d Cir. 2010) ("Lacking the authority itself to certify questions to the Court of Appeals, the district court was bound to follow the interpretation of the Appellate Division in the absence of persuasive evidence that the New York Court of Appeals would rule differently if presented with the issue." (internal quotation marks omitted)).

Here, New York's intermediate appellate courts have consistently held that asymptomatic plaintiffs can recover for medical monitoring. The seminal case is Askey v. Occidental Chemical Corp., 477 N.Y.S.2d 242 (App. Div., 4th Dep't 1984). There, asymptomatic plaintiffs who alleged that their exposure to certain toxic substances placed them at an elevated risk of developing cancer, genetic disease, and other illnesses sought "to recover the costs of future medical monitoring services to diagnose warning signs of the development of disease." Id. at 244. The appellate division held that although plaintiffs could not recover in tort damages for the increased risk of, among other things, cancer or for cancer not yet realized, "there is a basis in law to sustain a claim for medical monitoring as an element of consequential damage." Id. at 246. The court cited the rule that one who has suffered an "invasion of the body by [a] foreign

substance" can recover for the consequences that "may with reasonable probability be expected to flow" from that invasion. Id. at 247. Consequently, if the plaintiffs could "establish with a degree of reasonable medical certainty through expert testimony that [medical monitoring] expenses [would] be incurred," they could collect them. Id.

New York's intermediate appellate and trial courts have endorsed the result of Askey, although they have explained that result in terms that sometimes differ. See Osarczuk v. Associated Univs., Inc., 830 N.Y.S.2d 711 (App. Div., 2d Dep't 2007) (district court erred in dismissing "cause of action seeking medical monitoring and other injunctive relief" in suit alleging increased risk of disease from exposure to toxic substances); Allen v. Gen. Elec. Co., 821 N.Y.S.2d 692 (App. Div., 4th Dep't 2006) (plaintiffs exposed to toxic substances could recover costs of monitoring if they proved "a rational basis for [their] fear of contracting the disease" by evidence of "the clinically demonstrable presence of [the toxic substance] in the plaintiff's body, or some indication of [toxin]-induced disease, i.e., some physical manifestation of [toxic] contamination" (internal quotation marks omitted) (brackets in original)); Abusio v. Consol. Edison Co. of N.Y., 656 N.Y.S.2d 371 (App. Div., 2d Dep't 1997) (medical monitoring costs if plaintiff exposed to toxic substance and can prove "rational basis" for fear of contracting disease); Gerardi v. Nuclear Util. Servs., Inc., 566 N.Y.S.2d 1002 (Sup. Ct., Westchester Cnty. 1991) (medical monitoring costs recoverable as "consequential damages" flowing from exposure to toxic substance).

Federal courts applying New York law have also determined that plaintiffs may recover for medical monitoring absent symptoms of disease. In Gibbs v. E.I. DuPont De Nemours & Co., plaintiffs who had been exposed to chemicals at their workplace sued and sought "injunctive relief in the form of a court-administered fund paid for by the defendants which could cover the

reasonably anticipated costs of a medical monitoring program for bladder cancer." 876 F. Supp. 475, 477 (W.D.N.Y. 1995). The defendants contended that New York law did not permit recovery for medical monitoring absent "proof of physical injury." Id. at 477–78. The Court rejected that argument and concluded that the New York Court of Appeals would permit such recovery. The Court apparently endorsed a four-part test that the plaintiffs proposed—and which they borrowed from the U.S. Court of Appeals for the Third Circuit, In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 852 (3d Cir. 1990) (applying Pennsylvania law)—in describing the plaintiffs' burden in proving their entitlement to medical monitoring. Gibbs, 876 F. Supp. at 478–79. Under that test, the plaintiffs could recover upon proof that (1) they were significantly exposed to a known toxic substance through the negligence of the defendants; (2) they as a result of that exposure, suffered an increased risk of contracting a serious latent disease; (3) exposure rendered periodic medical testing reasonably necessary; and (4) monitoring and testing procedures existed that made early detection and treatment of the disease possible and beneficial. Id.

Abbatiello v. Monsanto Co. is similar. 522 F. Supp. 2d 524 (S.D.N.Y. 2007). There, the court held that New York would permit recovery for medical monitoring expenses if the plaintiffs could prove (1) exposure to greater than background levels; (2) to a proven hazardous substance; (3) caused by the defendant's tortious conduct; (4) as a proximate result of the exposure, the plaintiff has an increased risk of developing a serious latent disease; (5) a monitoring procedure exists that makes early detection possible; (6) the monitoring program is different than the program normally prescribed in the absence of exposure; and (7) the monitoring program is reasonably necessary according to contemporary scientific principles. Id. at 539. Other federal courts have reached this same result while articulating the plaintiff's

burden in different terms. See, e.g., Sorrentino v. ASN Roosevelt Ctr. LLC, 579 F. Supp. 2d 387, 390 (E.D.N.Y. 2008) (permitting recovery if plaintiffs could prove "rational basis" for fear of contracting disease).

The Court recognizes that the wisdom of these decisions expanding traditional theories of tort liability to permit asymptomatic plaintiffs to recover for medical monitoring is highly debatable. People encounter many things in a given day that are a known carcinogens or otherwise dangerous to one degree or another, which renders the class of potential claimants (and payors) nearly limitless. See Herbert L. Zarov et al., A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?, 12 DePaul J. Health Care L. 1, 18–19 (2009) ("[A] recent study conducted by the Center for Disease Control and Prevention found that every one of the approximately 5000 individuals tested had at least 148 different toxins present in their bodies."). And experts routinely disagree as to how to identify those people who are unusually likely to develop a given disease and whether screening is especially worthwhile for those individuals. These concerns are not lost on the legal commentariat, e.g., James A. Henderson & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C. L. Rev. 815 (2002), the high courts of several states, e.g., Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008) (rejecting medical monitoring without a current physical injury); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 5–6 (Miss. 2007) (same); Henry v. Dow Chem. Co., 701 N.W.2d 684 (Mich. 2005) (same); Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001) (same), or this Court. Given the unknowns, were this Court writing on a clean slate, it might find imposing liability on entities based only on exposure too speculative. But this Court's job here is to

determine with the benefit of intermediate appellate decisions how the New York Court of Appeals would decide the question.

The Court is persuaded that the New York Court of Appeals, given the opportunity, would likely permit asymptomatic plaintiffs to recover the sort of medical monitoring that the plaintiffs are requesting here: a defendant-created and maintained comprehensive monitoring program. This is so for several reasons. First, New York's intermediate appellate and trial courts have uniformly adopted this rule, and the Court cannot lightly disregard that fact. Giordano, 599 F.3d at 92; DiBella, 403 F.3d at 112. Second, the majority of other federal courts that have applied New York law to this question have concluded that the Court of Appeals would permit recovery. Third, the New York Court of Appeals would not be alone, and would not even be at the vanguard, in permitting recovery of this sort. See, e.g., Daigle v. Shell Oil Co., 972 F.2d 1527, 1533 (10th Cir. 1992) ("[A medical monitoring action] has been increasingly recognized by state courts as necessary given the latent nature of many diseases caused by exposure to hazardous materials and the traditional common law tort doctrine requirement that an injury be manifest."); In re Paoli, 916 F.2d at 849–50 ("[I]n an effort to accommodate a society with an increasing awareness of the danger and potential injury caused by the widespread use of toxic substances, courts have begun to recognize claims like medical monitoring, which can allow plaintiffs some relief even absent present manifestations of physical injury."). Fourth, and finally, the Court notes that the fact that the plaintiffs are not asking for recognition of a right to a lump sum damage award to cover the supposed cost of monitoring eliminates some of the reasons to fear permitting asymptomatic plaintiffs a right to relief. See Jamie A. Grodsky, Genomics and Toxic Torts: Dismantling the Risk-Injury Divide, 59 Stan. L. Rev. 1671, 1716 (2007) ("In contrast to lump sum recovery, relief that is confined to reimbursement for actual

checkups, will serve as a deterrent to speculative or frivolous litigation."); see also Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 440–41 (1997). For all of these reasons, the Court concludes that, under New York law, asymptomatic plaintiffs are not foreclosed from pleading a claim for medical monitoring.

Before the Court turns to Philip Morris's remaining arguments in support of dismissal, it must articulate the elements of the medical monitoring claim that it believes the New York Court of Appeals would recognize. Of course, the Court of Appeals, which has not decided a medical monitoring case, has not articulated the elements of the claim that the plaintiffs must plead. Moreover, no New York intermediate appellate court has carefully considered the elements of a claim for medical monitoring of the sort that this Court thinks the New York Court of Appeals would adopt. But other courts have. See Abbatiello, 522 F. Supp. 2d at 539 (applying New York law); Gibbs, 876 F. Supp. at 478 (same). Although these courts have described the elements of a medical monitoring claim in slightly different terms, they agree on the claim's substance. The Court adopts and slightly modifies that substance, with particular reliance on Abbatiello, and holds that, to state a claim for medical monitoring under New York law, plaintiffs must plead: (1) exposure at greater than background levels; (2) to a proven hazardous substance; (3) caused by defendant's tortious conduct; (4) as a proximate result of the exposure, plaintiff faces an elevated risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes early detection possible; (6) the monitoring program is different than the program normally prescribed in the absence of exposure; and (7) the monitoring program is reasonably necessary according to contemporary scientific principles.

With this understanding of the plaintiffs' medical monitoring claim in mind, the Court now turns to Philip Morris's motion to dismiss the claims as untimely or as inadequately pleaded.

B. Timeliness

Philip Morris argues that even if the New York Court of Appeals would permit recovery for medical monitoring, it would permit medical monitoring only as a remedy for an existing tort. It says that the intermediate appellate decisions that the Court has mentioned above "treat medical monitoring as an item of consequential damages." (Def. Dis. at 3.) In its reply, Philip Morris stresses that at most medical monitoring is a form of remedy for the injury of increased risk of contracting a serious illness. (Def. Dis. Reply at 3.) And because the plaintiffs knew of their increased risk of developing cancer long ago, their claims to the medical monitoring remedy are time barred. See Snyder v. Town Insulation, Inc., 81 N.Y.2d 429, 432–33 (1993) (cause of action accrues when injury occurs, i.e. when plaintiffs can allege each "element" of the tort). The plaintiffs answer that the cases permitting medical monitoring under New York law recognize medical monitoring as a cause of action, not simply as a remedy, and they recognize it as a cause of action that accrues only when a viable monitoring program is available. The plaintiffs say that LDCT monitoring for lung cancer is the first viable monitoring program for lung cancer, and that it gained medical acceptance shortly before they filed suit, so their action is timely. Once again, the Court finds this a close question, but decides that the New York Court of Appeals would hold that a claim for medical monitoring accrues when the standard of care of the reasonable physician first calls for monitoring. Consequently, to the extent that Philip Morris contends at this stage of the litigation that the medical monitoring claim is time barred, that argument is not well founded.

Contrary to the arguments of both parties, the Court does not think that the courts that have applied New York law and recognized medical monitoring have resolved the question about accrual. The plaintiffs seem to believe that when those courts listed the proof required to recover medical monitoring (including proof that a monitoring program exist), they were listing "elements" of a cause of action and deciding that that cause of action could not accrue until the plaintiffs could plead all of the elements. But these courts were not obviously distinguishing between elements of the claim and proof of a remedy. And they certainly were not addressing the question of accrual. Similarly, when these courts were describing medical monitoring as damages or consequential damages, they were not, as Philip Morris argues, obviously distinguishing between proof of liability and proof of damages. Instead, these courts were answering the separate question—which lies at the core of the debate about medical monitoring—whether plaintiffs with no present physical injury can recover in tort. Consequently, the Court cannot resolve this question, as the parties have, by quotation of isolated language from the various medical monitoring decisions. See In re Kaiser, 791 F.2d 73, 76 (7th Cir. 1986) ("[T]he cardinal sin of legal reasoning . . . is to take judicial language out of its original context and apply it uncritically in a materially different context.").

Resort to non-New York authority provides more guidance. In Donovan v. Philip Morris USA, Inc., the Supreme Judicial Court of Massachusetts faced the same question that this Court now faces and accepted an argument similar to the one that the plaintiffs offer here. In Donovan, the court announced a seven-element monitoring cause of action that is similar to the claim that the Court has outlined and held that that cause of action did not accrue until "(1) there is a physiological change [in the plaintiff] resulting in a substantial increase in the risk of cancer, and (2) that increase, under the standard of care, triggers the need for available diagnostic testing that

has been accepted in the medical community as an effective method of lung cancer screening or surveillance." 914 N.E.2d 891, 902–03 (Mass. 2009). In explaining its rule, the court observed that the plaintiffs in that case, because of the state of medical science, "had absolutely no remedy until LDCT technology appeared" and recognized that that circumstance was "perhaps unique to medical monitoring claims." Id. at 903–04. The accrual ruling of Donovan was not, however, a complete victory for the plaintiffs. The court acknowledged the possibility that Philip Morris could prevail at summary judgment on the timeliness issue if it was established that prior to the limitations period on which the plaintiffs' timeliness argument relied, "the standard of care of the reasonable physician . . . call[ed] for monitoring of any precancerous condition." Id. at 904. The court ruled that the plaintiffs could not delay the accrual of their claim simply by establishing that the technology that existed earlier "was less effective for monitoring." Id.

The Massachusetts's rule is not without its limitations; most of these limitations flow from the serious medical and scientific uncertainty in this area. Nonetheless, the plaintiffs have persuaded the Court that the New York Court of Appeals would follow the result of Donovan. For the reasons that follow, the Court concludes that the New York Court of Appeals would hold that a claim for medical monitoring does not accrue until two events occur: when a plaintiff knows (or should know) of his increased risk of developing a serious disease and when that increase, under the standard of care, triggers the need for available diagnostic testing that has been accepted in the medical community as an effective method of screening or surveillance.

First, courts that have permitted recovery for medical monitoring have considered a medical monitoring claim to involve a complaint not only about the increased risk of developing disease but also about the economic injury of having to secure periodic medical surveillance. E.g., Buckley, 521 U.S. at 438–41 (describing how other courts have permitted recovery for the

"'injury,' namely, the economic costs of the extra medical checkups that [the plaintiff] expects to incur as a result of his exposure"); Friends for All Children, Inc., v. Lockheed Aircraft Corp., 746 F.2d 816, 826 (D.C. Cir. 1984) ("It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as she has an interest in avoiding physical injury."); Meyer v. Fluor Corp., 220 S.W.3d 712, 717–18 (Mo. 2007); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977–78 (Utah 1993); Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1007 (1993); Ayers v. Jackson Twp., 525 A.2d 287, 304 (N.J. 1987). Viewing the claim in this way, there is nothing conceptually flawed about holding that it accrues only when that economic injury comes about, which is only once the monitoring that must be secured comes to exist. See Ackerman v. Price Waterhouse, 84 N.Y.2d 535, 541 (1994) ("As a general proposition, it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run."). Indeed, courts have recognized this point and stated (although timeliness was not an issue in these cases) that a medical monitoring claim does not accrue for a plaintiff who is asymptomatic and facing a known elevated risk of developing a serious disease, but for whom no accepted monitoring program exists. See Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 433 (W. Va. 1999) ("In the event diagnostic testing later becomes available, then the plaintiff will have a right at such later time to demonstrate the effectiveness of the test, and to be compensated for utilizing it, so long as all the other elements of the cause of action are satisfied."); Hansen, 858 P.2d at 979–80 & n.12 ("Absent the advisability of monitoring for that particular plaintiff, the injury is not complete and no cause of action exists."). This Court acknowledges that at least two other courts have recognized the same medical monitoring claim that this Court is recognizing and held that the claim accrued when the plaintiffs knew of their elevated risk of developing a serious disease. See Barnes v. Am. Tobacco Co., 161 F.3d 127,

139, 149 (3d Cir. 1998); State of W. Va. ex rel. Chemtall Inc. v. Madden, 607 S.E.2d 772, 784–85 (W. Va. 2004). But these courts were not deciding the question of accrual in a case like this one in which the plaintiffs alleged that, when they knew of their elevated risk, no accepted monitoring program was available. Consequently, the Court is aware of no authority that directly rejects the accrual rule that the plaintiffs are advocating here.

Second, the Court does not think that New York would create a right to recovery that might, through no fault of the plaintiff, expire before the plaintiff could avail himself of it. To be sure, legal rights do not guarantee remedies, e.g. Armstrong v. Turner Indus., Inc., 141 F.3d 554, 559 & n.12 (5th Cir. 1998), but it would be odd to develop a right that in some not insignificant number of cases lacks a remedy.

Third, the rule that the Court believes New York would adopt does not permit plaintiffs to stand idle while reasonable monitoring programs exist in the hope that some better program might later come about. That is, the rule dictates accrual at a date certain: when the first accepted monitoring program exists. Barnes v. Am. Tobacco Co., 984 F. Supp. 842, 860 n.13 (E.D. Pa. 1997), aff'd, 161 F.3d 127 (3d Cir. 1998) ("In order to preserve the integrity and validity of medical monitoring claims, there must be a date certain on which an individual's injury occurs, i.e., a person's injury under medical monitoring, like all other causes of action, only accrues at one time.").

For all of the reasons just stated, the Court denies Philip Morris's motion to dismiss on statute of limitations grounds.

C. Failure to Plead Design Defect Theory of Liability

Philip Morris next moves to dismiss on the ground that the plaintiffs have failed to adequately allege "the existence of a feasible design alternative that would have prevented [the

plaintiffs'] injury." (Def. Dis. at 16.) According to Philip Morris, the plaintiffs have alleged that, if Philip Morris had designed a less dangerous cigarette, the plaintiffs would face a reduced, but still significantly elevated, risk of developing lung cancer in the future. It says that is not enough to allege liability on a design defect theory (which undergirds the strict liability and negligence theories in the medical monitoring claim) because "reduction of the risk is not prevention of the risk or avoidance of the alleged need for medical monitoring of long term smokers." (Id.) The plaintiffs' answer to this argument is not entirely clear, but it appears to be that they do not bear the burden of pleading or proving that if Philip Morris had not acted tortiously they would not face an elevated risk of developing cancer sufficient to require medical monitoring that includes LDCT scans.

The Court agrees with Philip Morris that the plaintiffs must plead and prove that Philip Morris's failure to produce and market a non-defective cigarette is the reason that the plaintiffs must now secure medical monitoring that includes LDCT scans. This pleading requirement is most obviously embodied by element (6) of the monitoring claim, which requires that the plaintiffs plead and prove that the medical monitoring they now require is different form the monitoring that physicians would prescribe for individuals who have not been tortiously exposed to defective Marlboro cigarettes. This view of the elements of the medical monitoring claim is consistent with, for example, Hansen, which explained that "under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for the plaintiff, a change that would represent increased costs to the plaintiff." 858 P.2d at 980. It is also consistent with Barnes, 984 F. Supp. at 871–72 (summary judgment for defendant because even without smoking, plaintiff would

require monitoring requested in suit), and Potter, 863 P.2d at 825 n. 27, 826 n. 31. The sensible rule recognized in these cases is that defendants must remedy only those harms that they have wrongly caused. They are not insurers responsible for the healthcare of all who use their products.

The Court further agrees with Philip Morris that the plaintiffs have not met their pleading burden because the fourth amended complaint contains no allegation that, if Philip Morris had conformed its conduct to the law and designed and marketed a reduced tar cigarette, the plaintiffs would not require the same medical monitoring that they are seeking in this suit. Nowhere have the plaintiffs pleaded that if Philip Morris had marketed and designed the non-defective cigarette they describe, they would not have been exposed to harmful levels of tar. Indeed, they concede that even had Philip Morris not acted tortiously and produced this less dangerous cigarette, the plaintiffs would still have been exposed to highly carcinogenic cigarettes. (4th Am. Compl. ¶ 68.) Nowhere have the plaintiffs alleged that if they had smoked what they characterize as a non-defective Marlboro cigarette for twenty pack-years, they would not now require medical monitoring that includes LDCT scans. Indeed, the pleadings concede that, if the plaintiffs had smoked the non-defective Marlboro cigarettes, they would face a risk of developing cancer that is fully half what they now face, which must still greatly exceed the risk facing non-smokers. (Id. ¶¶ 68, 71.) Additionally, although not a part of the pleadings, the affidavits of the plaintiffs' experts do not support a finding that physicians would not recommend monitoring that includes LDCT scans for individuals who have smoked non-defective Marlboro cigarettes for twenty pack-years. All of the expert affidavits to which the plaintiffs have directed the Court compare the plaintiffs to non-smokers, and even then they do not address the question whether physicians

would prescribe LDCT scans for non-smokers (although the answer to that question seems obviously to be no).

To the extent that the plaintiffs contend that the law of tort causation in New York does not require them to plead and prove that they would not require monitoring that includes LDCT scans absent Philip Morris's wrongful conduct, the Court is not persuaded. The plaintiffs seem to believe that the requirement that they prove that Philip Morris's tortious conduct was a "substantial factor" in causing their exposure to enough tar to require monitoring excuses them from having to prove that Philip Morris's tortious conduct was a "but for" cause of that outcome. This, the Court thinks, misunderstands New York tort law, which uses "substantial factor" to refer to the subset of but for causes that will be said to be the proximate or legal cause of an actionable harm. See, e.g., Lee v. New York City Hous. Auth., 803 N.Y.S.2d 538, 542–43 (App. Div., 1st Dep't 2005); Smith v. City of New York, 125 N.Y.S.2d 123, 125 (App. Div., 1st Dep't 1953); see also Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 649 (5th Cir. 1992) ("Under general maritime law, a party's negligence is actionable only if it is a 'legal cause' of the plaintiff's injuries. Legal cause is something more than 'but for' causation, and the negligence must be a 'substantial factor' in the injury." (citation, brackets, and internal quotation marks omitted)). This view of New York tort causation law is consistent with New York product liability cases, which require that the plaintiffs plead and prove that they would not have been injured by the non-defective product. E.g., Mayancela v. Biro Mfg. Co., No. 08 Civ. 245, 2010 WL 774942, at *5 (S.D.N.Y. Mar. 5, 2010); Arbaiza v. Delta Int'l Mach. Corp., No. 96-CV-1224, 1998 WL 846773, at *5–6 (E.D.N.Y. Oct. 5, 1998) (deciding whether flexible blade guard would not have prevented injury because plaintiff was committed to dismantling any guard); Gonzalez v. Morflo Indus., Inc., 931 F. Supp. 159, 168–69 (E.D.N.Y. 1996) (inadequate warning

did not cause burn injury because plaintiff knew of the facts that the warning was supposed to convey). It is also consistent with well-accepted principles of tort causation in tobacco cases. See Prado Alvarez v. R.J. Reynolds Tobacco Co., 405 F.3d 36, 43–44 (1st Cir. 2005); Estate of White ex rel. White v. R.J. Reynolds Tobacco Co., 109 F. Supp. 2d 424, 435 (D. Md. 2000) (plaintiff could not prove that failure to warn of dangers of cigarettes was proximate cause of injury because plaintiff knew of dangers and still smoked); Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1493–95 (D.N.J. 1988) (plaintiff had to prove that safer cigarette would have realistically or likely prevented smoker's cancer and consequent death and evidence that safer cigarette would have reduced chance of developing cancer by 8% to 17% was not enough because "the existence of a possibility of defendant's responsibility for plaintiff's injuries is insufficient to establish proximate cause").

For these reasons, the Court concludes that the plaintiffs must have, and have not, pleaded that Philip Morris's tortious conduct is what caused them to be exposed to harmful smoke sufficient to require medical monitoring that includes LDCT scans.

II. Breach of Implied Warranty

Philip Morris has moved for summary judgment in its favor on the plaintiffs' implied warranty claim on the ground that the plaintiffs have not offered sufficient proof that it breached an implied warranty with respect to Marlboro cigarettes.[3] To establish liability on an implied

[3] It is not clear whether the plaintiffs can press a free-standing warranty claim that seeks only medical monitoring. On the one hand, their medical monitoring claim might subsume the warranty claim and require that the plaintiffs, if they are asymptomatic and seeking only monitoring, plead the warranty theory of liability as an element of the monitoring claim and then plead the other elements of the monitoring claim. On the other hand, their warranty theory may survive the recognition of the monitoring claim because, as a contract theory of recovery, the warranty theory does not obviously depend on a present physical injury; it may require only that the plaintiffs prove that monitoring is necessary as an element of consequential damages. In any event, the distinction does not matter in this case because, as the Court explains, Philip Morris is entitled to judgment in its favor on the warranty claim for reasons that do not turn on the question whether the warranty claim is a free-standing claim or part of the plaintiffs' monitoring claim.

warranty theory, the plaintiffs must prove at trial that Philip Morris's Marlboro brand cigarettes were not "'fit for the ordinary purposes for which such goods are used.'" Denny v. Ford Motor Co., 87 N.Y.2d 248, 258 (1995) (quoting U.C.C. § 2-314 [2] [c]). A product can be fit for the ordinary purposes for which it is used even if it does not "fulfill a buyer's every expectation." Id. at 259 n.4. The product need only provide "for a minimal level of quality" and meet "the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manner." Id. Philip Morris argues that under this "consumer expectations" test, the plaintiffs cannot prove breach of implied warranty because everyone knew, at the time that the Marlboros at issue in this litigation were sold, that cigarettes, when used normally, put people at risk of developing lung cancer. In support of this argument, Philip Morris relies in part on Inzerilla v. American Tobacco Co., which held that because the "carcinogenic danger from cigarettes was common knowledge from at least 1969," an implied warranty would be "contrary to the community's common knowledge" and thus could not exist. No. 11754196, 2000 WL 34016364 (N.Y. Sup. Ct., Queens Cnty. Oct. 27, 2000); see also Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 435 (Tex. 1997) ("Because the general health dangers of cigarettes are commonly known by the community, no expectation of safety arises with respect to cigarettes when they are purchased.").

The Court finds this argument persuasive. The plaintiffs do not contend that, in the years relevant to this complaint, consumers, including the plaintiffs, thought that smoking tobacco was generally safe and did not expose them to a significantly elevated risk of developing cancer. (See Def. Ex. F.) Rather, they argue, consumers did not know that Philip Morris could easily have produced a safer cigarette. (Pl. R. 56.1 ¶ ¶ 11, 32.) As clarified by counsel at oral argument, the plaintiffs' contention is that consumers generally did not know that Marlboro

cigarettes were defective (i.e. unnecessarily dangerous), not that they did not know that they were dangerous, indeed very dangerous. This contention fails because it conflates what New York considers two distinct theories of liability and improperly inserts risk-utility considerations into the law of warranty. See Denny, 87 N.Y.2d at 258 ("It is this negligence-like risk/benefit component of the defect element that differentiates strict products liability claims from UCC-based breach of implied warranty claims in cases involving design defects."); see also Spain v. Brown & Williamson Tobacco Corp., 230 F.3d 1300, 1310–11 (11th Cir. 2000) (claim that defendant violated implied warranty by selling unreasonably dangerous cigarette conflates distinct theories of liability under Arkansas law and is rejected). Indeed, the Court believes that the plaintiffs concede this point about conflation when they argue that they "are not required by law to prove the existence of a feasible alternative design in order to prevail at trial on a warranty theory." (Pl. S.J. Opp. at 8.)

Because the plaintiffs concede their knowledge of the dangers of cigarettes, and the Court thinks it irrelevant whether the plaintiffs thought their cigarettes could not be any safer, the Court rejects the argument that Marlboros contained an implied warranty that Philip Morris breached. See Spain, 230 F.3d at 1310–11 (rejecting a materially similar implied warranty claim for the same reason); Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996) (rejecting implied warranty claim brought under Texas law because the dangers of smoking were common knowledge in the community); Tompkins v. R.J. Reynolds Tobacco Co., 92 F. Supp. 2d 70, 94 (N.D.N.Y. 2000) (rejecting implied warranty theory of liability under New York law because plaintiffs only alleged that Camel cigarettes were carcinogenic, which is a characteristic shared by all cigarettes, and did not allege that "Camel cigarettes were of inferior quality"); Ark. Carpenters' Health & Welfare Fund v. Philip Morris, Inc., 75 F. Supp. 2d 936, 945 (E.D. Ark.

1999) ("[I]t is the plaintiff's claim that a typical cigarette, like all cigarettes, is 'generally defective.' This type of allegation cannot state a claim for breach of implied warranty of merchantability."); cf. Rose v. Am. Tobacco Co., 787 N.Y.S.2d 681 (Sup. Ct., N.Y. Cnty. 2004) (unpublished) (denying summary judgment on the implied warranty claim because of triable issue of fact as to whether plaintiff "expected defendants' cigarettes were neither addictive nor carcinogenic").[4]

In sum, the plaintiffs have not offered sufficient evidence that Philip Morris breached an implied warranty with respect to Marlboro cigarettes and Philip Morris is entitled to summary judgment.

CONCLUSION

For the reasons stated, Philip Morris's motion to dismiss the medical monitoring claim and its motion for summary judgment on the breach of implied warranty claim are granted. The motion for class certification is moot.[5]

SO ORDERED.

Dated: Brooklyn, New York
January 12, 2011

_____/s/_____
Carol Bagley Amon
United States District Judge

[4] The Court also observes that accepting the plaintiffs' implied warranty argument would seem to directly conflict with the New York Court of Appeals' recent decision to uphold an intermediate appellate court's rejection of a plaintiff-favorable verdict in a tort suit that was premised on the allegation that regular cigarette are defectively designed. See Adamo v. Brown & Williamson Tobacco Corp., 11 N.Y.3d 545, 551 (2008) ("To hold, as plaintiffs ask, that every sale of regular cigarettes exposes the manufacturer to tort liability would amount to a judicial ban on the product. If regular cigarettes are to be banned, that should be done by legislative bodies, not by courts."); see also Tuosto v. Philip Morris USA Inc., 672 F. Supp. 2d 350, 366 n.10 (S.D.N.Y. 2009).

[5] In view of the Court's decision to grant Philip Morris's motions, the Court does not address the plaintiffs' motion for class certification, which they filed in June 2007, before the parties briefed the motions just decided. Although the certification motion is no longer before the Court, the Court does note its concern that individual issues, especially questions of comparative fault—a defense that seems to be available to Philip Morris notwithstanding the fact that the plaintiffs are asking only for equitable relief—would likely defeat any effort to certify a class in this litigation. See Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1, 17, 21 (D. Mass. 2010).