

Medical Monitoring: Gone With The '90s?

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In the 1980s and 1990s, courts began recognizing a cause of action for medical monitoring, particularly in cases involving toxic torts or asbestos exposure. Since 2000, the trend has been in the opposite direction, with courts refusing to recognize or extend the cause of action.

This guest column summarizes the current landscape, including recent opinions from the Supreme Courts of New Jersey, Oregon and Mississippi rejecting medical monitoring claims.

The Medical Monitoring Cause Of Action

“Medical monitoring” sometimes refers to a cause of action and sometimes to an aspect of damages. This article examines the cause of action, which — in the absence of a present physical injury — seeks to recover the costs of periodic medical examinations designed to detect the onset of future harm.

This is distinct from the situation in which plaintiff has a present physical injury and, under traditional causes of action, may be entitled to medically appropriate monitoring as a future medical cost.

In jurisdictions recognizing a medical monitoring cause of action, a plaintiff must generally show:

- (1) Plaintiff was significantly exposed to a proven hazardous substance through the negligent action of the defendant.
- (2) As a proximate result, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

- (3) That increased risk makes periodic diagnostic medical examinations reasonably necessary.
- (4) Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.
- (5) The monitoring and testing procedures are “different than the one that would have been prescribed in the absence of that particular exposure.”

E.g., *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), modified by *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (applying Pennsylvania law).

The Trend Rejecting Medical Monitoring

Since 2000, an increasing number of jurisdictions — Alabama, Kentucky, Michigan, Mississippi, Nevada, Oregon, and New Jersey in the products liability context — have rejected the medical monitoring cause of action.

This has occurred in a variety of cases, from toxic tort to smoking to pharmaceuticals. See *Hinton v. Monsanto Co.*, 813 So. 2d 827, 832 (Ala. 2001) (toxic tort); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 856-59 (Ky. 2002) (alleged ingestion of Fen-Phen); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 693 (Mich. 2005) (toxic tort); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 9 (Miss. 2007) (beryllium exposure); *Badillo v. Am. Brands, Inc.*, 117 Nev. 34, 41-43, 16 P.3d 435, 440-41 (2001) (smoking-related illnesses); *Lowe v. Philip Morris USA, Inc.*, 344 Ore. 403, 413-14 (2008) (smoking-related illnesses);

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Sinclair v. Merck & Co., Inc., No. A-117-06, 2008 N.J. Lexis 565, at *9-10 (N.J. June 4, 2008) (alleged ingestion of Vioxx).

Federal courts applying the laws of Georgia, Nebraska, South Carolina, Texas and Washington have predicted that those jurisdictions would likewise reject medical monitoring claims. See *Parker v. Wellman*, 230 F. App'x 878, 883 (11th Cir. 2007) (applying Georgia law; affirming dismissal of medical monitoring claim in beryllium exposure case); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962-63 (8th Cir. 2000) (applying Nebraska law), abrogated on other grounds by *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572 (2005); *Rosmer v. Pfizer, Inc.*, No. 9:99-2280-18RB, 2001 U.S. Dist. LEXIS 6678, at *15 (D.S.C. Mar. 30, 2001) (alleged pharmaceutical ingestion; no medical monitoring cause of action recognized under South Carolina law); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 668 (D. Tex. 2006) (alleged radiation exposure; “the Texas Supreme Court is not likely to adopt medical monitoring”); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 608-09 (W.D. Wa. 2001) (alleged exposure to second-hand smoke; “there is no cause of action for medical monitoring as an independent tort under Washington law”).

Courts in Arkansas and Indiana also have held that those jurisdictions do not recognize a medical monitoring cause of action.

In *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 569 (E.D. Ark. 2005), the court concluded that “Arkansas has rejected medical monitoring as a cause of action,” but it relied on *Baker v. Wyeth-Ayerst*, 992 S.W. 2d 797, 799 (Ark. 1999), in which the Arkansas court did not expressly rule on this issue.

In Indiana, two courts have rejected medical monitoring, but in unpublished decisions of limited precedential value. See *Johnson v. Abbott Labs.*, No. 06C01-0203-PL-89, 2004 WL 3245947, at *6 (Ind. Cir. Ct. Dec. 31, 2004) (unpublished opinion) (citing *Hunt v. Am. Wood Preserves Inst.*, No. IP-02-0389-C-M/S (S.D. Ind. July 30, 2002) (unpublished opinion).)

Why Courts Have Rejected Medical Monitoring Claims

The jurisdictions that have rejected medical monitoring have done so on the ground that there is no cause of action without a present injury. See, e.g., *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007) (“Creating a medical monitoring action would be contrary to Mississippi common law, which does not allow recovery for negligence without showing an identifiable injury”); *Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001) (requiring a present injury under Alabama’s “long-standing tort law”).

Some courts have also suggested that creating a medical monitoring cause of action is a task reserved for the legislature. See, e.g., *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686 (Mich. 2005) (rejecting plaintiffs’ request to “effect a change in Michigan law that, in our view, ought to be made, if at all, by the Legislature”); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 859 (Ky. 2002) (“this Court has little reason to allow such a remedy without a showing of present physical injury ... we are not prepared to step into the legislative role and mutate otherwise sound legal principles”); *Badillo v. Am. Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial function.”).

The New Jersey Supreme Court recently interpreted New Jersey’s Product Liability Act (“PLA”) to preclude a medical monitoring cause of action for claims within its ambit.

In *Sinclair v. Merck & Co., Inc.*, No. A-117-06, 2008 N.J. Lexis 565 (N.J. June 4, 2008), plaintiffs sought to represent a class of Vioxx users who had suffered no injuries, but sought medical monitoring for undetected myocardial infarctions and other latent or unrecognized injuries. *Id.* at *12-13.

The Appellate Division had held that New Jersey’s medical monitoring jurisprudence did not necessarily preclude plaintiffs’ cause of action.

The Supreme Court reversed, based on the PLA: “The essential question is whether plaintiffs’ effort to recover monitoring damages is limited by the definition of ‘harm’

in the PLA.” Id. at *24. Finding that harm required a “personal physical injury,” the Court concluded that plaintiffs’ claims failed. Id. at *28-30.

Absent legislation, other state supreme courts have held that there is no basis in common law for a medical monitoring cause of action. In *Lowe v. Philip Morris USA, Inc.*, 344 Ore. 403, 407-08 (2008), plaintiff sought medical monitoring for herself and other Oregon smokers who alleged no present physical harm but a “significant increased risk of developing lung cancer in the future.”

The Oregon Supreme Court rejected plaintiff’s claims as failing to meet both negligence and economic harm requirements under Oregon law. With regard to the former, the Court held that its precedents “establish that the threat of future harm that plaintiff has alleged is not sufficient to give rise to a negligence claim.” Id. at 413.

Acknowledging that plaintiff may have in fact suffered the economic harm of having to undergo medical testing, the Court stated: “This court repeatedly has recognized that one ordinarily is not liable for negligently causing a stranger’s purely economic loss without injuring his person or property.” Id. (internal quotation marks omitted).

The Mississippi Supreme Court also rejected a medical monitoring cause of action under the common law, and did so in the toxic tort context under which such actions once flourished. *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 2 (Miss. 2007).

The Court certified a question from the Fifth Circuit in a beryllium exposure case, and concluded that “[c]reating a medical monitoring action would be contrary to Mississippi common law, which does not allow recovery for negligence without showing an identifiable injury, and further strongly indicates that a claim for medical monitoring, as Plaintiffs present it, lacks an injury.” Id. at 3.

Conclusion

To have standing to sue, bedrock principles require an injury in fact. The recent trend in medical monitoring cases is fully consistent with these principles and should therefore continue.

Given that these decisions already span multiple jurisdictions and contexts, as well as the difficulty of convincing courts to certify medical monitoring class actions, the plaintiffs’ bar might be better served by focusing its attention elsewhere. Who knows? In the absence of a present physical injury, the medical monitoring cause of action may one day become an artifact of the 1980s and 1990s.

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