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## Independent Cause of Action for Medical Monitoring Not in the "New York State of Mind"

by Diane Fleming Averell and Eric L. Probst



Courts across the country have long grappled with awarding medical monitoring as a *remedy* in toxic tort claims brought by asymptomatic plaintiffs who *might* develop a disease due to their alleged exposure.

Despite the absence of a present physical injury, some courts have awarded medical monitoring expenses as part of consequential damages where plaintiffs meet their burden of proof under a traditional theory of liability, such as strict liability or negligence. Other courts have been less willing to award this remedy where plaintiffs allege no physical injuries and thus cannot sustain a *prima facie* case in tort.

However, in cases where asymptomatic plaintiffs failed to meet their burden in tort, appellate courts in several states have saved plaintiffs' claims by recognizing medical monitoring as an *independent cause of action*, as opposed to a remedy. See *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 225-227 (2009); *Bower v. Westinghouse Electric Corp.*, 206 W.Va. 133, 140-42 (1999); *Redland Soccer Club, Inc. v. Dept. of the Army and Dept. of Defense of the U.S.*, 548 Pa. 178, 195-96 (1997); *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 380 (Ariz. Ct. App. 1988). Louisiana's highest state court did exactly that, only to have the state legislature later amend the civil code to exclude medical monitoring as a compensable item of damage absent a manifest injury or damage. Compare *Bourgeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355 (1998), with La. Civ. Code Ann. art. 2315.

New York State's highest court recently tackled this issue in *Caronia v. Philip Morris USA, Inc.*, 2013 N.Y. Slip Op. 08372 at \*3 (Dec. 17, 2013), and refused to recognize medical monitoring as an independent cause of action. *Caronia* was a putative class action against cigarette manufacturer Phillip Morris USA, Inc. The plaintiffs, current or former smokers who had not been diagnosed with lung cancer and were asymptomatic, claimed they were at an increased risk for developing lung cancer and demanded that Phillip Morris establish and fund a court-supervised medical monitoring program that would promote early diagnosis and treatment of cancer. The district court first dismissed plaintiffs' negligence, strict liability, and breach of warranty claims as time barred under the statute of limitations. It next dismissed the medical monitoring claim because "plaintiffs failed to state a claim on which relief can be granted because they could not sufficiently plead that their injuries—i.e., their increased risk of cancer from smoking Marlboro cigarettes—were proximately caused by Philip Morris's conduct." *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417, 420 (2d. Cir. 2013).

Plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which found that none of the New York courts had directly addressed the question of whether the State recognizes an independent cause of action for medical monitoring. *Id.* at 449. The court further observed:



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[W]here the plaintiffs have alleged tortious exposure to toxic substances but have not alleged that they suffered physical injury, the New York intermediate appellate courts have ruled that the cost of medical monitoring may be awarded as an item of consequential damages, most of the federal district courts sitting in New York have opined that New York would recognize an independent claim for medical monitoring, and the highest courts of other states have divided as to whether or not the plaintiff may maintain an independent medical monitoring cause of action.

*Id.* at 449. The Second Circuit thus certified the following questions to the New York Court of Appeals:

- (1) Under New York Law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?
- (2) If New York recognizes such an independent cause of action for medical monitoring,
  - A. What are the elements of that cause of action?
  - B. What is the applicable statute of limitations, and when does that cause of action accrue?

*Caronia v. Philip Morris USA, Inc.*, 2013 N.Y. Slip Op. 08372 at \*3 (Dec. 17, 2013).

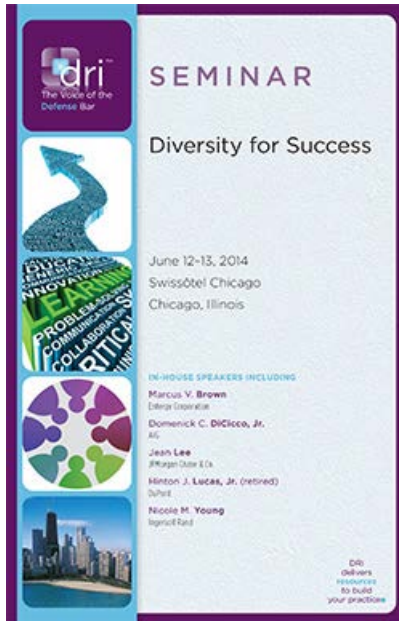
The New York Court of Appeals accepted certification of these questions on May 30, 2013, and on December 17, 2013, refused to recognize an independent equitable medical monitoring cause of action for asymptomatic plaintiffs because (1) such claims would mark a significant deviation from New York tort jurisprudence, and (2) public policy reasons militate against a judicially-created cause of action for medical monitoring.

1. *New York Tort Jurisprudence.*

The Court started its analysis with the "fundamental principle" of New York tort law—"that a plaintiff sustain a physical harm before being able to recover in tort." *Id.* at \*4 (citations omitted). This requirement defines the class of persons who have standing to sue and ultimately protects courts from being overrun with "frivolous and unfounded claims." *Id.* The Court concluded that New York tort law does not impose liability against a defendant for "a threat of future harm," nor does New York currently recognize an independent cause of action for medical monitoring. *Id.*

The Court then dismantled Plaintiffs' argument that the Court *should* create a new tort for medical monitoring because it would be "consistent with existing New York law." *Id.* at \*5. The Court distinguished the alleged toxic exposure cases cited by Plaintiffs, including *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287 (1936) and *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130 (4th Dept. 1984), because both cases required a plaintiff to allege a present physical injury before recovery of consequential damages for medical monitoring. *Id.* at \*6, 9. Not surprisingly, the Court recognized other New York appellate decisions that have imposed a physical injury requirement as a condition precedent to sustaining a medical monitoring claim. *Id.* (citing, e.g., *Abusio v. Consolidated Edison Co. of New York, Inc.*, 238 A.D.2d 454 (2d Dept. 1997)(trial court properly set aside damages award for medical monitoring where

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plaintiffs established exposure to toxins but failed to establish “clinically demonstrable presence of [toxin]-induced disease” or some physical manifestation of contamination”); *Osarczuk v. Associated Universities, Inc.*, 36 A.D.3d 872, 878 (2d Dept. 2007); *Allen v. General Elec. Co.*, 32 A.D.3d 1163, 1165-66 (4th Dept. 2006); *Dangler v. Town of Whitestown*, 241 A.D.2d 290 (4th Dept. 1998)).

### 2. *Public Policy Considerations.*

Against this background, the Court could not justify a judicially-created cause of action for medical monitoring for asymptomatic plaintiffs. *Id.* at \*11. The Court cautioned that exercising its authority to create a cause of action must be done “responsibly,” and with cognizance that a new cause of action will have both “foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability.” *Id.* (citation omitted). The Court explained:

Tort liability...depends on balancing competing interests: the question remains who is legally bound to protect plaintiffs’ right at the risk of liability....To identify an interest deserving protection does not suffice to collect damages from anyone who causes injury to that interest...Not every deplorable act...is redressable in damages.

*Id.* (citation omitted).

The Court conceded that “significant” policy reasons favor the establishment of an independent medical monitoring cause of action, most notably the “important health interest” in providing access to medical testing for those whose exposure has increased their risk of disease. *Id.* at \*11-12. But the Court held that at least three “potential systemic effects of creating this new, full-blown tort law cause of action” outweighed the potential health interest. *Id.* at 12 (relying on *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443-44 (1997))(refusing to recognize a tort claim for medical monitoring costs where the plaintiff was exposed to asbestos but was asymptomatic)). The Court outlined these “systemic effects” as follows:

- *Opening the Floodgates of Litigation.* “[D]ispensing with the physical injury requirement could permit ‘tens of millions’ of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor’s resources for those who have actually sustained damage.” *Id.* at \*12 (citing *Buckley*, 521 U.S. at 442-44).
- *Inequitable Diversion of Resources.* “[I]t is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure.” *Id.* at \* 12-13.
- *Burden on the Court.* “[T]here is no framework concerning how such a medical monitoring program would be implemented and administered. Courts generally lack the technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science...The Legislature is plainly in the better position to study the impact and consequences of creating such a cause of action, including...the burden on the courts in adjudicating such claims.” *Id.* at \*13 (internal citations and quotations omitted).

In the end, the Court held firm to the traditional tort liability requirement that a medical monitoring remedy is available only “so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort

cause of action.” *Id.* at \*14.

For the moment, the *Caronia* court’s decision has allayed product manufacturers’ fears that New York will dispense with the physical injury requirement in a tort action and permit millions of allegedly “exposed” but disease-free and asymptomatic plaintiffs to pursue independent claims for medical monitoring. Some remain wary since the *Caronia* court clearly beckoned the State’s legislature to evaluate the issue and undertake a study regarding the costs of implementation and adjudication of such claims. At this time, however, there is no related legislation currently pending in New York.

Several states still have no binding precedent on whether medical monitoring ought to be recognized as an independent cause of action. For manufacturing defendants, the hope is that these courts will find the *Caronia* analysis and holding both compelling and persuasive.

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