Fifth Consecutive State High Court Rejects Medical Monitoring

*By Mark A. Behrens**

Recently, the Mississippi Supreme Court, in *Paz v. Brush Engineered Materials, Inc.*, became the fifth consecutive state court of last resort to reject a cause of action for medical monitoring in the absence of an identifiable injury.[1] The case came to the court on a certified question from the Fifth Circuit Court of Appeals and involved employee claims of beryllium exposure while working at defendants' manufacturing facilities. Class action plaintiffs sought the creation of a court-supervised medical monitoring fund to detect the possible development of Chronic Beryllium Disease, typically a latent disease which impairs the lungs and often causes death. The court held that adoption of a medical monitoring action for asymptomatic plaintiffs "would require an unprecedented and unfounded departure from the long-standing traditional elements of a tort action."[2] The Alabama, Nevada, Kentucky, and Michigan Supreme Courts—the four other courts of last resort to recently consider the issue—have all rejected medical monitoring absent a present physical injury.

Other High Courts

The Alabama Supreme Court in *Hinton v. Monsanto Co.* rejected a medical monitoring claim brought by a claimant exposed to a toxin allegedly released into the environment.[3] The court stated: "To recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide"—a voyage on which the court stated it was "unprepared to embark."[4] After discussing a number of public policy concerns, such as a potential flood of claims that could swamp defendants, the court concluded, "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiff's] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury or illness."[5]

In *Badillo v. American Brands, Inc.*, the Nevada Supreme Court rejected claims by smokers and casino workers who sought a court-supervised medical monitoring program to diagnose alleged tobacco-related illnesses.[6] The court described medical monitoring as "a novel, non-traditional tort and remedy,"[7] and concluded that, "[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function."[8]

The Kentucky Supreme Court rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, where plaintiffs sought a court-supervised medical monitoring fund to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen" diet drug combination.[9] The court stated that, "a cause of action in tort requires a present physical injury to the plaintiff."[10] "To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent."[11] The court concluded: "Traditional tort law militates against recognition of such claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles."[12]

The Michigan Supreme Court in *Henry v. The Dow Chemical Co.* rejected a request to establish a medical screening program for possible negative effects from dioxin exposure.[13] The court said that adoption of a medical monitoring cause of action would create a "potentially limitless pool of plaintiffs" and "could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care."[14] The court concluded that recognition of medical monitoring was not suitable for resolution by the judicial branch.[15]

The U.S. Supreme Court Position

These decisions draw support from the United States Supreme Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, where the Court rejected a medical monitoring claim under the Federal Employers' Liability Act.[16] The *Metro-North* Court explained that serious policy concerns militate against adoption of "a new, full-blown tort law cause of action."[17] These policy concerns include the difficulty of identifying which medical monitoring costs exceed the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs.[18] The Court also considered that defendants would be subject to unlimited liability and a "flood of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury.[19] Finally, the Court rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative sources of monitoring are often available, such as employer-provided health plans.[20]

CONCLUSION

A fundamental tort law principle has been that a plaintiff must have an identifiable injury to obtain a recovery. The courts have developed this filter to prevent a flood of claims, provide faster access to courts for those with legitimate and serious claims, and ensure that defendants are held liable only for genuine harm. Medical monitoring claims brought by asymptomatic plaintiffs conflict with the traditional rule.[21] Judicial adoption of medical monitoring claims also would be likely to foster litigation.[22] Almost everyone comes into contact with a potentially limitless number of materials that could be argued to warrant medical monitoring relief. Courts would be

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forced to decide claims that are premature (because there is not yet any physical injury) or actually meritless (because there never will be). The truly injured might be adversely impacted by a diversion of resources to the non-sick, and courts would face the difficult and time-consuming task of developing a system for the administration of medical monitoring claims. More courts will be asked to decide medical monitoring claims in the future. They may follow the Supreme Court and the numerous state courts that have recently declined to adopt these novel claims.

Endnotes

1 2007 WL 14891 (Miss. Jan. 4, 2007).

2 *Id.* at *4.

3 813 So. 2d 827 (Ala. 2001).

4 *Id.* at 830.

5 *Id.* at 831-32.

6 16 P.3d 435 (Nev. 2001).

7 *Id.* at 441.

8 *Id.* at 440.

9 82 S.W.3d 849 (Ky. 2002).

10 *Id.* at 852.

11 *Id.* at 853-54.

12 *Id.* at 859.

13 701 N.W.2d 684 (Mich. 2005).

14 *Id.* at 689.

15 *See id.* at 694-95.

16 521 U.S. 424 (1997).

17 *Id.* at 440.

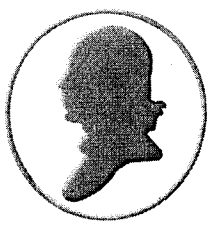
18 *See id.* at 441-42.

19 *Id.* at 442.

20 *See id.* at 443-44.

21 *See* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057 (1999); Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349 (2005).

22 *See* James A. Henderson, Jr. & 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).



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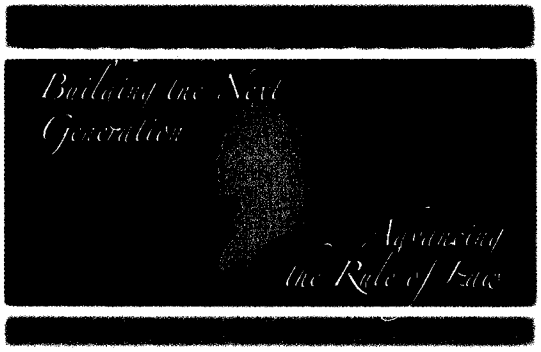

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