

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

March 2014

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*Martin J. Healy and Kristie A. Tappan of Sedgwick LLP discuss recent developments in medical monitoring case law from several jurisdictions, including New York, Pennsylvania, Massachusetts, and Louisiana.*

## Recent Developments in Medical Monitoring Case Law (2013-2014)

### ABOUT THE AUTHORS



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Over the last 30 years, state and federal courts have grappled with how best to address claims filed by plaintiffs who do not currently suffer from an actual injury or illness, but rather seek damages for their risk of developing an illness from past exposure to some hazardous substance or product. See e.g., *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984) (discussing damages for diagnostic exams before physical conditions developed). Plaintiffs, in matters such as these, typically file claims for “medical monitoring” and seek damages for the costs associated with monitoring them for the possible development of an illness or condition related to their claimed exposure to the hazardous substance or product.

The viability of medical monitoring claims varies greatly from jurisdiction to jurisdiction. Some states, including Michigan, Oregon, and most recently, New York, have rejected these claims. See *Henry v. The Dow Chem. Co.*, 473 Mich. 63, 75, 701 N.W.2d 684, 690 (2005); *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403, 414-15, 183 P.3d 181, 187 (2008); *Caronia v. Philip Morris USA, Inc.*, 2013 N.Y. Slip Op. 08372, 2013 WL 6589454. Whereas other states, including California, Louisiana, Massachusetts, and Pennsylvania, allow these claims and continue to refine what constitutes a medical monitoring claim in their jurisdictions. See *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1009, 863 P.2d 795, 824 (1993); La. Rev. Stat. § 2315; *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 915 N.E.2d 891 (2009); *Redland Soccer Club, Inc. v. Department of the Army and Dept. of*

*Defense of the U.S.*, 548 Pa. 178, 196, 696 A.2d 137, 146 (1997).

This article summarizes developments in medical monitoring case law from the past year. Six cases have been published that clarify how medical monitoring claims are treated in New York, Pennsylvania, Massachusetts, and Louisiana. The most significant decision came from New York, where the state’s highest court rejected an independent tort for medical monitoring. *Caronia*, 2013 N.Y. Slip Op. 08372. New York’s intermediate court of appeal later refined the decision and explained that plaintiffs can still seek damages for medical monitoring, but only if they establish the existence of actual physical injury or property damage related to the exposure. *Ivory v. International Business Machines Corporation*, 2014 N.Y. Slip Op. 01230, 2014 WL 641883 (N.Y. App. Div. 2014).

The Eastern District of Pennsylvania also issued two medical monitoring decisions. In one, the federal district court held that Pennsylvania medical monitoring claims satisfy the injury-in-fact requirement necessary for a plaintiff to have standing in federal court. *Brown, et al. v. C.R. Bard, Inc., et al.*, 942 F.Supp.2d 549 (E.D. Pa. 2013). In the second, the court dismissed claims for medical monitoring for failing to sufficiently plead that the plaintiffs were at risk of contracting a serious latent disease and that a monitoring procedure existed that would make early detection possible. *Slemmer v. McGlaughlin Spray Foam Insulation, Inc.*, 955 F. Supp.2d 452, 465 (E.D. Pa 2013).

In Massachusetts, a federal district court rejected a medical monitoring claim where

the plaintiffs could not show they suffered subcellular changes – a requirement for a medical monitoring claim in Massachusetts. *Genereux, et al. v. Hardric Laboratories Inc., et al.*, 950 F.Supp.2d 329, 331 (D. Mass. 2013). Last, in Louisiana, a court of appeal affirmed an award for medical monitoring damages, concluding there was sufficient evidence that five out of eight plaintiffs had a physical manifestation of increased risk of developing cancer. *Lester v. Exxon Mobil Corp.*, 120 So.3d 767, 771 (La. Ct. App. 2013). Each of the six cases is summarized in more detail below.

### ***New York's Highest Court Rejects Independent Cause Action for Medical Monitoring***

The U.S. Court of Appeals for the Second Circuit asked New York's highest court to answer whether a heavy smoker who has not been diagnosed with a smoking-related disease may pursue a claim against a tobacco company for "medical monitoring." In response, the New York Court of Appeals said "no" in the December 2013 case *Caronia v. Philip Morris USA, Inc.*, 2013 N.Y. Slip Op. 08372, 2013 WL 6589454.

In rejecting recovery for medical monitoring, the court explained, "[a] threat of future harm is insufficient to impose liability against a defendant in a tort context." This means that even though a plaintiff may have an increased likelihood of developing a disease, such as lung cancer, New York will not require defendants to pay for medical monitoring of that plaintiff to identify diseases that may develop in the future. *Caronia* makes it clear that, in New York, a plaintiff must establish the existence of an actual injury

before recovering damages. It is not enough to allege an increased risk of developing a disease.

### ***New York Refines When Medical Monitoring Damages Are Available***

In February 2014, a New York intermediate appellate court applied the *Caronia* decision to a case involving the contamination of soil and groundwater with trichloroethylene (TCE), finding that plaintiffs who presented evidence of actual property damage from the contamination could seek recovery for medical monitoring. *Ivory v. International Business Machines Corporation*, 2014 N.Y. Slip Op. 01230, 2014 WL 641883 (N.Y. App. Div. 2014).

In *Ivory*, the owner of a machine manufacturing plant was the subject of a class action alleging negligence, private nuisance, and trespass. The plaintiffs sought medical monitoring damages for their alleged exposure to TCE. The court concluded that the claims for medical monitoring damages were properly dismissed for all but two plaintiffs. Those two plaintiffs had presented evidence of property damage (contaminated soil under their property), and were allowed to pursue medical monitoring damages consequential to their trespass claims. The *Ivory* court relied upon language in *Caronia* that requires "evidence of present physical injury or damage to property" before medical monitoring damages can be pursued. *Id.* at \*8 (emphasis added). *Ivory* emphasizes that, in New York, property damage alone can be sufficient to allow a plaintiff to pursue medical monitoring damages. Bodily injury is not required. See *id.* at \*9.

***Pennsylvania Federal District Court Rules Medical Monitoring Claims Satisfy the Injury-in-Fact Requirement for Federal Standing***

In *Brown, et al. v. C.R. Bard, Inc., et al.*, the plaintiffs brought a putative class action against the manufacturer of inferior vena cava (IVC) filters. 942 F.Supp.2d 549 (E.D. Pa 2013). The plaintiffs were not experiencing problems with their IVC filters, but they alleged the filters were at risk of fracturing, requiring them to undergo regular CT scans to check the filters. *Id.* at 549-50.

The manufacturer removed the case to federal court, and the plaintiffs filed a motion to remand. The plaintiffs argued that their medical monitoring claims alleged an injury sufficient to create standing under Pennsylvania law, but they hoped to avoid federal jurisdiction by arguing that medical monitoring alone does not satisfy the “injury-in-fact” requirement for federal standing. *Id.* at 550.

The U.S. District Court for the Eastern District of Pennsylvania denied the motion to remand and held that the plaintiffs had alleged an injury-in-fact. *Id.* at 552. Following the Third Circuit, the court explained that once “a defective device has been implanted into the human body with a quantifiable risk of failure...the damage has been done.” *Id.* (relying on and quoting *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011)). *Brown* establishes that defendants are not prevented from removing Pennsylvania medical monitoring claims to federal court.

***Pennsylvania District Court Grants Motion to Dismiss Medical Monitoring Claim for Failure to Identify a Latent Disease and Monitoring Procedures***

In another Eastern District of Pennsylvania decision, the U.S. District Court granted a motion to dismiss medical monitoring claims for failure to identify a serious latent disease and for failure to identify a suitable medical monitoring procedure. *Slemmer v. McGlaughlin Spray Foam Insulation, Inc.*, 955 F. Supp.2d 452, 465 (E.D. Pa. 2013). In *Slemmer*, homeowner plaintiffs brought a putative class action against a manufacturer and installer of spray polyurethane foam insulation. *Id.* at 455. The plaintiffs alleged they had suffered physical injuries, including eye irritation, sore throats, nausea, and fatigue from their exposure to the insulation. The plaintiffs also alleged a need for medical monitoring. The Eastern District agreed that the physical injury claims and medical monitoring claims were mutually exclusive, but allowed the claims to be pled in the alternative. *Id.* at 464. Despite this ruling, the court dismissed the plaintiffs’ medical monitoring claims because they failed to sufficiently plead two elements of the claim under Pennsylvania law: (1) that the plaintiffs had a significantly increased risk of contracting a serious latent disease; and (2) that a monitoring program procedure exists that makes early detection of the disease possible. *Id.* at 464-65 (citing *Lewis v. Bayer AG*, 66 Pa. D. & C. 4th 470 (Pa. Com. Pl. 2004) for the elements of a medical monitoring claim in Pennsylvania). The court dismissed the medical monitoring claim without prejudice. This case stands for the

proposition that a medical monitoring claim cannot be included in just any case involving the alleged exposure to a toxic or hazardous substance. The absence of sufficient facts to substantiate the detailed requirements of a medical monitoring claim provides the defense with an opportunity to seek dismissal of the claim in the early stages of a case.

***Massachusetts Federal District Court Rejects Medical Monitoring Claim Where Plaintiffs Could Not Show Subcellular Changes***

In the Massachusetts case, *Genereux, et al. v. Hardric Laboratories Inc., et al.*, Raytheon employees and their family members brought suit alleging exposure to beryllium and seeking medical monitoring for beryllium-related diseases. 950 F.Supp.2d 329, 331(D. Mass. 2013). The plaintiffs, however, did not have any symptoms of beryllium-related diseases. Raytheon filed a successful motion for summary judgment, arguing that plaintiffs could not prove they had suffered “subcellular changes” from their alleged exposure to beryllium. *Id.* at 331. In granting the motion for summary judgment, the U.S. District Court for the District of Massachusetts relied upon the Massachusetts Supreme Judicial Court’s decision in *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 914 N.E.2d 891 (2009). In *Donovan*, Massachusetts recognized medical monitoring claims, but limited these claims to situations where exposure to a hazardous substance “produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury.” *Genereux*, 950 F.Supp.3d at 339 (quoting *Donovan*, 914 N.E.2d at 902).

In *Genereux*, the plaintiffs only had evidence that their alleged exposure to beryllium increased their risk of suffering subcellular harm. *Id.* at 341. Even the plaintiffs’ own expert testified that he could not determine whether the plaintiffs had actually suffered subcellular changes. *Id.* at 340.

The U.S. District Court concluded the increased risk of subcellular change was insufficient to prove the plaintiffs’ claim for medical monitoring, and the court entered judgment in favor of the defense. *Id.* at 341. Assuming the federal district court correctly interpreted Massachusetts law, *Genereux* stands for the proposition that Massachusetts medical monitoring claims require some manifestation of physical harm, even if that harm is at the subcellular level. The increased risk of developing a disease or condition alone is not enough.

***Louisiana Court of Appeal Affirms Award for Medical Monitoring Damages***

In *Lester, et al. v. Exxon Mobil Corporation, et al.*, the Court of Appeal of Louisiana upheld a trial court’s judgment against Exxon and in favor of eight plaintiffs who sought damages for exposure to naturally occurring radioactive material while cleaning pipes and tubing. 120 So.3d 767, 770 (La. Ct. App. 2013). The Court of Appeal affirmed the award of medical monitoring damages to five of the eight plaintiffs. The court concluded that these five plaintiffs had satisfied the requirement of Louisiana Civil Code article 2315 that states a plaintiff must show that the claimed medical monitoring treatment is “directly related to a manifest physical or

mental injury or disease.” *Id.* at 779. Four of the plaintiffs had blood in their stools and one had elevated levels of an enzyme suggesting health problems. Experts from both sides recommended more frequent cancer screening as a result of these test results. *Id.* at 779-80. For the remaining three plaintiffs, the Court of Appeal affirmed the trial court’s

conclusion that the plaintiffs lacked sufficient medical testimony or evidence to support a causal relationship between their claimed abnormalities and their exposure to radiation. *Id.* at 780. This decision helps clarify what is required under Louisiana law to establish a “manifest physical injury,” but also, what does not.

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