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Toxic Tort and Environmental Litigation

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New York Court Of Appeals Rejects Medical Monitoring Cause Of Action

The New York Court of Appeals released a decision yesterday, December 17, 2013, that has created significant barriers to plaintiffs seeking to recover "medical monitoring" damages based on a not-yet-manifested heightened risk of future illness or disease. The Court refused to recognize a new, independent cause of action for medical monitoring, ruling that medical monitoring may be available only as a remedy for a traditional tort claim where there is proof of existing personal injury or property damage.

The plaintiffs in *Caronia v. Phillip Morris USA* are a group of current and/or former smokers of Marlboro cigarettes with histories of smoking at least one pack a day for 20 years. In a federal action asserting claims sounding in negligence, strict liability and breach of the implied warranty of merchantability, the plaintiffs seek the creation of a court-administered fund for Low Dose CT Scanning of the chest (LDCT), a medical monitoring program that plaintiffs allege will result in the earlier detection of lung cancers for which they face a heightened risk. The United States District Court dismissed the plaintiffs' tort claims, as well as the medical monitoring claims, explaining that although the New York Court of Appeals would likely recognize a medical monitoring claim, plaintiffs "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."[1] The Second Circuit affirmed dismissal of the tort claims, but 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, what are the elements of that cause of action, and what is the applicable statute of limitations, and when does that cause of action accrue?[2]

The Court answered the first question in the negative, and declined to answer the second question as academic. In so holding, the Court cited the black letter principle that a threat of future harm is insufficient to impose liability against a defendant in the tort context. Since the plaintiffs had not alleged that they sustained any "physical injury" or "damage to property" sufficient to sustain damages under a traditional tort theory, the Court noted that the plaintiffs' "only pathway to relief is for this Court to recognize a new tort, namely an equitable medical monitoring cause of action."

The Court reasoned that allowing a medical monitoring remedy absent proof of present injury or illness would "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." The Court noted that to the extent prior cases from the Appellate Divisions could be read as recognizing an independent cause of action for medical monitoring absent any physical injury or property damage, "they should not be followed."

Caronia is undoubtedly a victory for toxic tort defendants, but the decision nonetheless raises many questions. For example, while the decision is clear that a heightened risk of future injury is insufficient to sustain a claim for medical monitoring, the decision also recognizes that medical monitoring damages may be recovered as consequential damages flowing from an actual injury to person or property. What level of "physical injury" will be sufficient to meet this threshold remains to be seen. Defendants will no doubt argue that the Court has effectively adopted the standard recognized in *Allen v. General Electric*,[3] in which the Appellate Division, Fourth Department held that in order to recover medical monitoring damages, plaintiffs must establish at least a "clinically demonstrable presence" of toxins in the body or evidence of toxin-induced disease. However, the decision is unclear whether an asymptomatic plaintiff could nonetheless establish a compensable "injury" through proof that he or she sustained genetic or cellular damage, notwithstanding the absence of a current disease. *Caronia* also provides little guidance regarding the circumstances under which medical monitoring damages should be awarded as consequential damages. For example, the decision does not address: (1) whether exposure to a toxic substance at greater than normal background levels is required to sustain an award of medical monitoring as consequential damages; (2) how significant a heightened risk of disease is required; or (3) whether the prescribed medical monitoring regime must be distinct from the regime normally recommended in the absence of exposure.

Also concerning for toxic court defendants is the Court's suggestion that medical monitoring may be awarded as consequential damages where a plaintiff proves injury to "property." The implications of this language are particularly troubling in the groundwater contamination context, where plaintiffs often rely on traditional property-damage tort theories, such as public nuisance, private nuisance, and trespass. Defendants will be watching the pending appeal in *Ivory v. International Bus. Machines Corp*,[4] in which the lower court dismissed medical monitoring claims in a trichloroethylene (TCE) ground water contamination case, for more clarity on this issue.

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1 *Caronia v. Philip Morris USA, Inc.*, 2011 WL 338425, *3, 2011 U.S. Dist. LEXIS 12601, *8-9 (E.D.N.Y. Jan. 13, 2011).

2 *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417 (2d Cir. 2013).

3 *Allen v. Gen. Elec. Co.*, 32 A.D.3d 1163, 1165-66 (4th Dep't 2006).

4 *Ivory v. International Bus. Machines Corp.*, 37 Misc. 3d 1221(A), 964 N.Y.S.2d 59 (Sup. Ct. Broome County Nov. 15, 2012).