State Courts’ Rulings On Medical Monitoring Claims Have Broad Implications For Toxic Exposure Class Actions

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Commentary

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[Editor’s Note: Peter C. Condron and Michael L. Williams are partners with the law firm of Sedgwick LLP in Sedgwick’s Washington, D.C. office. Both are experienced toxic tort and class action litigators. Any commentary or opinions do not reflect the opinions of Sedgwick LLP or Mealey Publications. Copyright © 2014 by Peter C. Condron and Michael L. Williams. Responses are welcome.]

State courts increasingly have addressed the propriety of medical monitoring claims in recent years, and often have framed the controlling issue in terms of whether a state’s common law tort principles could support recognizing the right to medical monitoring in the absence of a physical injury to the plaintiff. Although state courts are not positioned to address federal class action issues, rulings on the viability of medical monitoring claims have significant implications for toxic exposure class actions.

I. New York Rejects A Cause Of Action For Medical Monitoring

The New York Court of Appeals recently weighed in on the issue and declined to adopt an independent equitable cause of action for medical monitoring in cases in which the plaintiff had experienced no otherwise actionable personal injury or property damage. Caronia v. Philip Morris USA, Inc., No. 227, slip op. (N.Y. Dec. 17, 2013). Ruling on certified questions from the U.S. Court of Appeals for the Second Circuit, the Court of Appeals, in a 4-2 decision, held that recognizing an independent cause of action for medical monitoring in the absence of a present, actual injury to person or property would be a “significant deviation” from longstanding principles of New York jurisprudence and could potentially overwhelm the judicial system with a host of “frivolous and unfounded claims.” Slip op. at 4, 14.

The plaintiffs in Caronia were putative representatives of a class of Marlboro smokers who sought class-wide relief consisting of a defendant-funded, court-supervised program that would provide Low Dose CT scanning of the chest to assist in the early detection of lung cancer. None of the plaintiffs had been diagnosed with lung cancer or were under investigation by a physician for suspected lung cancer, but asserted that they were at an “increased risk” for developing the disease. Slip op. at 2. The U.S. District Court for the Eastern District of New York dismissed the claim, holding that although it believed that the New York Court of Appeals would likely recognize an independent claim for medical monitoring, the plaintiffs had failed to plead causation adequately. Id. at 3. On appeal, the Second Circuit certified the question of whether New York would recognize an independent claim for medical monitoring in the absence of a present physical injury to the New York Court of Appeals. Id.

In considering the question, the Court of Appeals began its analysis with what it deemed the “fundamental principle” that a plaintiff must sustain physical harm before being able to recover in tort. Slip op. at 4. The Court explained that “[a] threat of future harm is insufficient to impose liability against a defendant in a tort context.” Id., citing Prosser & Keeton, Torts § 30 at 165 (5th ed. 1984). The Court further noted that although New York courts had awarded medical monitoring damages in other cases, the plaintiffs in those cases had met the predicate element of establishing the
existence of a present physical injury. Slip op. at 7-8. The Court observed that a number of federal court decisions had allowed medical monitoring relief in the absence of actual injury, but determined that these courts had misapplied New York law. Id. at 8.

The Court cited a number of policy reasons for refusing to recognize a new tort cause of action for medical monitoring in the absence of physical injury or property damage; the longstanding physical injury requirement "defines the class of persons who actually possess a cause of action, provides a basis for the fact-finder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims." Id. at 4. The Court expressed concern that dispensing with the physical injury requirement in the medical monitoring context could lead to "tens of millions" of claims, many of which would be without merit and which would result in the diversion of defendants’ resources toward defending such claims rather than having those resources available for paying meritorious claims of plaintiffs with actual injuries, and that the potential claims could overwhelm the court system. Id. at 12. Additionally, the Court noted the lack of any practical framework for administering a medical monitoring program through the courts. Id. at 13. Although the Court recognized that there were compelling policy reasons for recognizing a medical monitoring cause of action, including "an important health interest in fostering access to medical testing" for individuals whose exposure may have resulted in an increased risk of disease and that early detection of a disease could mitigate both future illness and treatment costs to the tortfeasor, it deferred to the Legislature to determine whether establishing such a cause of action might be advisable. Id.

II. The Status Of Medical Monitoring Claims In Other States

Like New York, the highest courts of a number of states have refused to recognize medical monitoring as a separate cause of action in the absence of a demonstrable physical injury. Henry v. Dow Chem. Co., 473 Mich. 63, 75, 701 N.W.2d 684, 690 (2005); Lowe v Philip Morris USA, Inc., 344 Ore. 403, 414-415, 183 P.3d 181, 187 (2008). On the other hand, medical monitoring has been recognized as a separate cause of action in some states, like Pennsylvania, Redland Soccer Club, Inc. v. Dep’t of the Army, 696 A.2d 137, 142 (Pa. 1997), and West Virginia, Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 522 S.E.2d 424 (1999). Other states have permitted recovery of medical monitoring expenses as an element of damages rather than as a cause of action, but the level of proof required to recover such damages has not been uniform. Compare Donovan v. Philip Morris USA, Inc., 455 Mass. 215 (2009), with Exxon Mobil Corp. v. Albright, 433 Md. 303, modified on reconsideration on other grounds, 433 Md. 502 (2013).

In Donovan, the Supreme Judicial Court of Massachusetts responded to certified questions from a federal district court concerning a claim for future expenses for medical monitoring for former Marlboro smokers. 455 Mass. 215, at 215-16. The court framed the controlling issue in terms of the potential limits of damages that may be recovered as part of a tort claim. The plaintiffs alleged that they had suffered subcellular and other physiological changes that were asymptomatic but were warning signs to a trained physician that the patient had a substantial increase in risk of contracting a serious illness or disease, and thus required periodic monitoring. The court ruled cognizable tort damages may be established with expert testimony that establishes that medical monitoring is necessary to detect the potential onset of a serious illness due to physiological changes indicating a substantial increase in risk of harm from exposure to a known hazardous substance. The court observed that "so long as there has been at least a corresponding subcellular change, ... [t]his should address any concern over false claims." Id. at 226.

In Albright, the Maryland Court of Appeals determined that Maryland would recognize a claim for medical monitoring damages, finding that "‘exposure itself and the concomitant need for medical testing’ is the compensable injury for which recovery of damages for medical monitoring is permitted.” 433 Md. at 378 quoting Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993). Like the New York Court of Appeals, the court stopped short of recognizing an independent tort claim for medical monitoring, instead holding that medical monitoring was a remedy allowable in tort claims. Unlike the New York Court of Appeals, however, the Maryland Court of Appeals
dispensed with any requirement for the plaintiff to prove a present physical injury. Rather, the court determined that the plaintiff bore the burden to show that the monitoring was necessary and reasonable, that the defendant’s conduct caused the injury (i.e., the need for future medical testing), and perhaps most importantly, that the plaintiff suffered a significantly increased risk of contracting a latent disease. 433 Md. at 380-85. Thus, merely demonstrating exposure to an allegedly toxic substance is insufficient; rather, the plaintiff must demonstrate, through qualified expert testimony, that exposure has led to a quantifiable and significant increased risk of developing a serious illness or disease. To meet that standard, the court held that plaintiffs would need to show that their exposure would make their chances of contracting a latent disease higher than the chances a member of the public at large would contract the disease, and that monitoring and testing procedures exist that make the early detection and treatment of the disease possible and beneficial. 433 Md. at 385. Moreover, any damages awarded for medical monitoring, the court held, should ordinarily be paid into a fund administered by a trustee. 433 Md. at 386-87.

Unlike the Massachusetts Supreme Judicial Court, the Maryland Court of Appeals declined to allow claims to proceed based on allegations of “subcellular” injury without more, holding that “subcellular change produced by exposure to toxic chemicals — without manifested symptoms of a disease or actual impairment — is not a compensable ‘injury’ under Maryland law.” 433 Md. at 361. Ultimately, in Albright, the Court of Appeals, despite recognizing the viability of medical monitoring under Maryland law, denied recovery to the plaintiffs, who did not prove that their exposure to levels of various gasoline chemicals placed them at any greater risk of developing a latent disease than the public at large. 433 Md. at 389-93.

III. Implications For Toxic Exposure Class Actions

Even though Caronia directly addressed the question of whether New York would recognize a substantive independent cause of action for medical monitoring, it also has significant implications for class action litigation in New York – specifically, whether plaintiffs in toxic exposure cases can seek to certify cases under Fed. R. Civ. P. 23(b)(2), which pertains to class claims for injunctive or equitable relief, rather than Fed. R. Civ. P. 23(b)(3), which pertains to damages classes. The Court of Appeals noted in Caronia that the Appellate Divisions in New York had consistently characterized medical monitoring as a form of consequential damages rather than equitable relief. Abusio v. Consol. Edison Co., 238 A.D.2d 454 (2d Dep’t 1997); Askey v. Occidental Chem. Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep’t 1984). Caronia agreed with that characterization, and rejected a number of federal decisions that had suggested that New York would recognize medical monitoring as an independent “equitable” cause of action.

The Supreme Judicial Court of Massachusetts in Donovan was acutely aware that its rulings could impact that plaintiffs’ prospect of certifying a class action in federal court. The plaintiffs in Donovan argued that that they “seek not a remedy, but a court-ordered, court-supervised program of medical surveillance for early detection of lung cancer...” 455 Mass. at 221. The court noted that “[n]o class has been certified, and the first certified question asks only if the complaint states a cognizable claim under Massachusetts law...[and]...[w]e therefore consider the question in the context of a dispute between to individuals, and leave the idea of a ‘program’ to consideration of the question of class certification.” Id.

Courts throughout the country have vigorously debated whether “medical monitoring” constitutes injunctive relief or damages. A number of courts have held that requiring a defendant to pay into a medical monitoring fund was functionally equivalent to awarding money damages. Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir. 1995); Cook v. Rockwell Int’l Corp., 181 F.R.D. 473, 479-480 (D. Colo.1998); Arch v. Am. Tobacco Co., 175 F.R.D. 469, 483-485 (E.D. Pa. 1997). Other courts have determined that the answer may depend on how the medical monitoring relief is structured; if the plaintiff class seeks a lump sum award for the costs of future monitoring, the relief is likely damages, but if the relief is administered and monitored under the auspices of a court, then the relief may be considered injunctive. See Wilson v. Brush Wellman, Inc., 103 Ohio St. 538, 817 N.E.2d 59 (2004).
The issue is more than mere semantics. Plaintiffs in toxic exposure cases frequently seek certification of classes by requesting relief in the form of “injunctive” medical monitoring, based on the belief that Rule 23(b)(2) injunctive classes are easier to certify than Rule 23(b)(3) damages classes. Rule 23(b)(2) permits a class to be certified where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” The rule was “designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.” *Baby Neal v. Kanter*, 43 F.3d 48, 58 (3d Cir. 1994), but in recent years, plaintiffs in toxic tort cases have sought to avoid the hurdles posed by the Rule 23(b)(3) “predominance” and “superiority” requirements by purporting to ask for “injunctive” relief – that is, relief in the form of a court order rather than an award of money damages – and seek class certification under Rule 23(b)(2). In most instances, however, the “injunctive” relief sought looks a lot like money damages: for example, an order that the defendants be required to contribute to a fund that would pay for testing class members’ private wells, *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002), or that defendants be required to pay funds into a court-supervised medical monitoring fund. *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 538, 817 N.E.2d 59 (2004). However, where the injunctive relief sought is merely incidental to a claim for damages, certification under Rule 23(b)(2) is inappropriate: Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

But regardless of whether various states recognize medical monitoring, or whether it is deemed to be injunctive in nature, certification of a medical monitoring class under Rule 23(b)(2) or its state equivalents is difficult at best. Even though Rule 23(b)(2) lacks the “predominance” and “superiority” requirements articulated in Rule 23(b)(3), courts have grafted on to Rule 23(b)(2) a requirement that an injunctive class be “cohesive” – in other words, that the interests of all in the class must be so aligned that representative litigation is appropriate, because all members of the class will be bound by the outcome of the litigation. *Gates v. Rohm & Haas Co.*, No.10-2108 (3d Cir. 2011). One reason for this stringent requirement is that, unlike Rule 23(b)(3) class members who have the option of opting out of class litigation and pursuing their own claims, Rule 23(b)(2) class members have no “opt out” right. *Dukes*, 131 S. Ct. at 2558-59; *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 538, 817 N.E.2d 59 (2004). In fact, a court does not even need to provide members of a Rule 23(b)(2) class with notice of the lawsuit’s existence. *Dukes*, 131 S. Ct. at 2558-59. Thus, courts have determined that Rule 23(b)(2) classes require more cohesion than a Rule 23(b)(3) damages class, rather than less.

Because of the highly individualized questions involved in personal injury and medical monitoring claims, they have been deemed particularly inappropriate for class treatment:

Courts have generally denied certification of medical monitoring classes when individual questions involving causation and damages predominate over (and are more complex than) common issues such as whether defendants released the offending chemical into the environment.

exposure to toxins from smelting operations over a period of decades); Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1, 27 (D. Mass. 2010) (certifying a class and stating that "[t]he medical monitoring remedy that the plaintiffs seek here will be uniform for all members and does not require individual tailoring"); Donovan v. Philip Morris USA, Inc., No. 06-12234-DJC, at 8-9 (D. Mass. Mar. 21, 2012) (denying motion to decertify the class and concluding that the guidance provided in Dukes would not change the outcome where the relief sought by a class is wholly injunctive).

Similarly, even though the Maryland Court of Appeals in Albright recognized the existence of a claim for medical monitoring damages, the proof requirements it placed on such a claim make it unlikely that class treatment would be appropriate in most instances. Albright was a mass, rather than a class, action. Nevertheless, the court’s requirement that plaintiffs present evidence that they have a “particularized, significantly increased risk of developing a disease in comparison to the general public” (433 Md. at 392) and the individualized proof that standard requires would seem to make claims for medical monitoring damages particularly unsuited to class treatment in Maryland.

The potential abuse of the medical monitoring device in the class action context remains a concern for courts and plainly troubled the New York Court of Appeals, which specifically cited West Virginia’s experience in the wake of Bower. As the court observed, “shortly after the state’s highest court decided Bower, a class action lawsuit was filed against cigarette manufacturers on behalf of 250,000 West Virginia smokers seeking damage for medical monitoring notwithstanding the fact that they had not been diagnosed with any smoking-related disease.” Caronia, slip op. at 12 n.3.

IV. Implications of Caronia’s Reaffirmation Of The Physical Injury Requirement

The Court of Appeals’ reaffirmation of New York’s physical injury requirement in tort litigation also has important implications that go beyond the medical monitoring context. For example, in recent years, plaintiffs have often sought to recover damages in environmental cases even when they admittedly could not demonstrate the existence of any physical injury to themselves or to their property, relying instead on claims of an alleged future threat of physical injury to their property from nearby contaminants. See, e.g., Plainview Water Dist. v. Exxon Mobil Corp., 236 N.Y.L.J. 110 (Sup. Ct. Nassau Cty. Nov. 27, 2006) (allowing damages claim premised on alleged imminent threat to water supply wells to proceed to trial), claims dismissed, 18 Misc. 3d 1121A, 856 N.Y.S.2d 502 (Sup. Ct. Nassau Cty. 2008), dismissal aff’d, 66 A.D.3d 754 (2d Dep’t 2009), appeal denied, 14 N.Y.3d 708 (2010); In re MTBE Prods. Liab. Litig., 578 F. Supp. 2d 519, 530 (S.D.N.Y. 2008) (suggesting that plaintiffs may be able to recover money damages where water production wells face “threatened with imminent contamination”). In allowing such claims to proceed, courts often focused on the “injury-in-fact” test that applies to standing, particularly under Article III, for which an imminent threat of injury can suffice for standing to bring suit for injunctive relief. The standard for establishing threshold standing to assert a claim, however, is not coextensive with the elements of a tort cause of action. In Caronia, the New York Court of Appeals made it clear that an actual injury, rather than simply the threat of future harm, is required for purposes of a tort claim seeking money damages.

This holding is consistent with longstanding New York law requiring personal injury or property damage as a prerequisite for tort recovery. See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2001) (requiring actual physical injury for tort claims for negligence and nuisance because “limiting the scope of defendants’ duty to those who have...suffered personal injury or property damage – as historically courts have done – affords a principled basis for reasonably apportioning liability”); Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers, Inc., 201 AD2d 902, 904, 607 N.Y.S.2d 808 (4th Dep’t 1994) (rejecting “plaintiff’s invitation to broaden tort relief to allow recovery for potential harm in the absence of actual injury”); Catalano v. Heraeus Kulzer, Inc., 305 A.D.2d 356, 357 (2d Dep’t 2003) (negligence and strict liability claims properly dismissed where plaintiff “suffered no personal injury or property damage as a result of the alleged [product] failures”); Halliday v. Norton Co., 265 A.D.2d 614, 617
Caronia is a significant decision for both class action litigation and substantive New York tort law. As the debate on the efficacy and desirability of the class action device plays out in courts and legislatures throughout the country, the decision in Caronia demonstrates the Court of Appeals’ reluctance – despite a vigorous dissent from Chief Judge Lippman – to expand the scope of tort liability and the use of the class action device.

Endnote
