

Massachusetts Supreme Judicial Court Recognizes Cause of Action for Projected Medical Monitoring Costs Based on Subclinical Physiological Effects of Exposure to Cigarette Smoke, Increased Risk of Lung Cancer and Medical Necessity of Monitoring

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In a decision rendered in the context of a cigarette product liability case but with broad implications for product manufacturers and sellers, the Massachusetts Supreme Judicial Court (“SJC”) has recognized a cause of action for the projected costs of medical monitoring when a product has not caused any actual disease or illness but solely subclinical physiological changes associated with an increased risk of disease. Plaintiffs in *Donovan v. Philip Morris, USA, Inc.*, SJC-10409 (Mass. October 19, 2009), filed suit in the United States District Court for the District of Massachusetts seeking to pursue a class action on behalf of all Massachusetts residents age 50 or older with histories of having smoked defendant’s cigarettes for twenty or more pack-years, asserting claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), negligence and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) based on the cigarettes’ allegedly defective design in delivering unreasonably high levels of carcinogens.

None of the plaintiffs or putative class members suffered from any manifest smoking-related illness or disease. Rather, they alleged subclinical physiological damage to their lung tissues and structures and a significantly increased risk of developing lung cancer. Plaintiffs sought what they characterized as equitable relief in the form of a court-supervised program of medical surveillance, requiring facilities, equipment and medical personnel, in which low-dose CT scans would be used for the early detection of any lung cancers that the class members might develop. Faced with defendant’s motions to dismiss and for summary judgment based on plaintiffs’ failure to state a claim and the statute of limitations, the district court certified questions to the SJC concerning whether Massachusetts recognized a cause of action for medical monitoring under the circumstances alleged and, if so, when the cause of action accrued for statute of limitations purposes.

On the first question, the court rejected defendant’s argument that longstanding tort law required plaintiffs to prove physical harm manifested by objective symptomatology in order to recover. Rather, the court held that plaintiffs’ subclinical physiological changes and the attendant substantial increase in the risk of cancer “adequately establish[ed] the element[] of injury” required by Massachusetts tort law, and “the medical necessity of monitoring” adequately established the required element of damages. In so holding, the court relied upon out-of-state authority holding that “an infant negligently and violently shaken” or a “pedestrian negligently struck by a . . . motorist” could recover the costs of medically necessary diagnostic tests even if the tests were negative for any further injuries. The court found plaintiffs’ allegations to involve a comparable claim of “impact,” asserting that while tort law “developed in the late Nineteenth and early Twentieth centuries,

when the vast majority of tortious injuries were caused by blunt trauma and mechanical forces[,] [w]e must adapt to the growing recognition that exposure to toxic substances and radiation may cause substantial injury which should be compensable even if the full effects are not immediately apparent.”

Accordingly, the court held that a plaintiff states a claim for medical monitoring if he or she proves: “(1) The defendant’s negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint.” The court noted it would “leave for another day consideration of cases that involve exposure to levels of chemicals or radiation *known* to cause cancer, for which immediate medical monitoring may be medically necessary although no symptoms or subclinical changes have occurred.”

In reaching its conclusion, the court did not address many of the arguments raised by the defendant, including that the United States Supreme Court expressly rejected a cause of action for medical monitoring under federal law in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), and that since that date the overwhelming majority of jurisdictions had done the same, including seven of the last eight state supreme courts to have addressed the issue. Nor did the court address any of the substantial public policy concerns implicated by medical monitoring claims, such as that the claims could involve massive costs which would be passed on to consumers or deplete assets needed to compensate persons who actually suffered from disease, or that the novel claim should be recognized, if at all, only by the legislature. All of the other high courts that have addressed such claims have considered these policy concerns.

On the second question, the court held that the statute of limitations on plaintiffs’ claims had not expired because they could not reasonably have discovered their injury until after they became aware of their subclinical physiological changes and the need for diagnostic testing, which usually could be conveyed only by a physician. Accordingly, the statute would begin to run only when “(1) there is a physiological change resulting in a substantial increase in the risk of cancer, and (2) that increase, under the standard of care, triggers the need for available diagnostic testing that has been accepted in the medical community as an efficacious method of lung cancer screening.” The court also expressly noted that the “single controversy rule,” which normally requires a party to include in a single action all related claims against the opposing party, would not bar a future action by a medical monitoring plaintiff for damages in the event that he or she subsequently contracted cancer, as “[t]his rule was never intended to address the problem of toxic torts, where a disease may be manifested years after the exposure.”