

Medical Monitoring Claim Rejected in Rail Spill

September 13, 2011 by [Sean Wajert](#)

The Sixth Circuit recently rejected the medical monitoring claims of a putative class of residents of a small Ohio town who alleged exposure to chemicals released after a CSX Transportation Inc. train accidentally derailed. [Jonathan Hirsch et al. v. CSX Transportation Inc.](#), No. 09-4548 (6th Cir. Sept. 8, 2011).

On October 10, 2007, thirty-one cars of a CSX train derailed and caught fire near the town of Painesville, Ohio. As a precaution, emergency personnel removed about 1,300 people from the surrounding half-mile radius. Most of what burned in this fire was non-toxic, but nine of the cars were carrying potentially hazardous materials. The plaintiffs claimed that 2,800 tons of burning material were sent into the surrounding atmosphere, and that, as a result, the level of dioxin in their town was significantly elevated.

While the fire was still burning, several residents of the town brought suit against CSX; the district court did not allow the plaintiffs to pursue an independent cause of action for medical monitoring, but decided a court-supervised medical monitoring was available as an equitable remedy under Ohio law. See *Wilson v. Brush Wellman*, 817 N.E.2d 59, 63-65 (Ohio 2004); see also *Day v. NLO*, 851 F. Supp. 869, 880 (S.D. Ohio 1994). Defendant then moved for summary judgment, which was granted. The district court held that the plaintiffs had failed to meet their burden to show that (1) the dioxin released into the air by the fire is a known cause of human disease; and (2) that the named plaintiffs were exposed to dioxin in an amount sufficient to cause a significantly increased risk of disease such that a reasonable physician would order medical monitoring. The plaintiffs timely appealed.

The court of appeals focused on the issues of causation and injury. Rather than traditional personal injuries, the alleged injuries consisted solely of the increased risk of—and corresponding cost of screening for—certain diseases that, according to plaintiffs, were more likely to occur as a result of the train crash. Assuming that Ohio would recognize such an injury, the remedy would be a medical monitoring program that would spare the Plaintiffs these expenses. But were plaintiffs actually at such an increased risk of disease that they were entitled to a medical monitoring program? Not every exposure, not every increased risk of disease warrants increased medical scrutiny. For the plaintiffs to prevail, there must be evidence that a reasonable physician would order medical monitoring for them.

Plaintiffs hired several experts to try to meet this burden. (No *Daubert* issue raised; the issue was sufficiency, not admissibility.). They offered a chemical engineer who tested the community for levels of dioxin. He assumed a normal background level of dioxin at 4 parts per trillion and took measurements around Painesville to compare with this baseline. His measurements showed elevated levels near the crash site. Plaintiffs had a chemist who speculated about train cargo, nature and amounts; then, a physicist who plotted the dispersion and concentration of the chemicals from the fire on a map for the purpose of showing which members of the community were exposed to what levels of dioxin. Then a medical doctor used

this map to determine who in the community was likely exposed to levels of dioxin above what the EPA considers acceptable—levels at which the risk of cancer increases by "one case in one million exposed persons."

The court of appeals saw at least two problems with this offer. One issue was the use of the regulatory level. The expert not only accepted the risk of one in a million as the threshold for monitoring, but appeared to have halved it. "One should be afforded the benefit of medical monitoring, if one has sustained a dose equal to or in excess of 50% of the EPA maximum." There was little explanation as to why he believed that reasonable physicians would order expensive and burdensome testing for such a small risk, but he explained he wanted "to err on the side of patient safety." However, a one-in-a-million chance is small. Indeed, it is proverbially small. If something has a one-in-a-million chance of causing cancer in an individual, then it will not cause cancer in 999,999. For some perspective, the National Safety Council estimates a person's lifetime risk of dying in a motor vehicle accident as 1 in 88. The lifetime risk of dying in "air and space transport accidents" is roughly 1 in 7,000. The risk of being killed by lightning is roughly 1 in 84,000, while the risk of being killed in a "fireworks discharge" stands at around 1 in 386,000. So, a small risk and no basis to say it called for medical monitoring. Certainly the EPA didn't base its standard on any medical monitoring analysis.

Second, the doctor based his assessment on the exposure map. But the map was unreliable. The estimate of the total material burned was speculative. The expert admitted that "the fire temperature, particle size distribution, and fire area were not established." And there were other sources of exposure not accounted for.

Plaintiffs thus alleged only a risk that bordered on legal insignificance, and failed to produce evidence establishing with any degree of certainty that they had even this hypothetical risk.

Summary judgment affirmed.