

Insurance and Reinsurance Alert: *Donovan v. Philip Morris*

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In a ground-breaking decision that has troubling implications for tort defendants and insurers alike, Massachusetts' highest court has found that a group of plaintiffs may proceed with a suit against Philip Morris for future medical expenses incurred in monitoring for lung cancer, and that the plaintiffs' claims may not be barred by the statute of limitations if the plaintiffs can show monitoring was not, as the plaintiffs allege, previously feasible and a reasonable physician would not call for monitoring of any precancerous condition prior to the statute of limitations period. See *Donovan v. Philip Morris USA*, SJC-10409 (October 19, 2009) (Slip Opinion). Though the decision does not address insurance nor whether the plaintiffs should be certified as a class, it may give rise to a wave of medical monitoring cases related not only to tobacco, but to other latent-disease-causing products, where defendants named in these cases may look to their commercial general liability insurers for coverage for these unique claims.

The suit was filed in the United States District Court for the District of Massachusetts by a putative class of Massachusetts residents who, among other things, are each 50 years of age or older, have cigarette smoking histories of 20 pack years or more, and have not been diagnosed or suspected of having lung cancer. But the plaintiffs do allege that they have experienced physiological changes to their lungs.

The plaintiffs allege that Philip Morris wrongfully designed, marketed, and sold Marlboro cigarettes, and assert claims for breach of implied warranty based on design defect, negligent design and testing, and violations of G.L. c. 93A (Massachusetts' Consumer Protection Statute). Instead of seeking money damages, the plaintiffs seek solely to compel Philip Morris to provide them with a court-supervised program of medical surveillance for early detection of lung cancer utilizing low-dose computed tomography (LDCT), which, the plaintiffs allege, is based on a technology that has only just become available as an effective screen for the disease.

Philip Morris filed motions to dismiss and for summary judgment, arguing that Massachusetts law requires a plaintiff to plead and prove a present physical injury with objective symptoms to recover in tort, and that the plaintiffs' claims are barred by the statute of limitations because each plaintiff knew that he or she was at increased risk of lung cancer at least four years prior to the commencement of this action.

The federal court certified two questions to the Supreme Judicial Court (SJC):

1. Does the plaintiffs' suit for medical monitoring, based on subclinical effects of exposure to cigarette smoke and increased risk of lung cancer, state a cognizable claim and/or permit a remedy under Massachusetts state law?
2. If the plaintiffs have successfully stated a claim or claims, has the statute of limitations governing those claims expired?

The SJC first concluded that the plaintiffs stated a claim under Massachusetts law for medical monitoring. Philip Morris contended that Massachusetts law requires proof of physical harm manifested by objective symptomology as a necessary part of damages. The Court disagreed, finding that the Court 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 found that a plaintiff may establish injury and damages by proving 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 hazardous substance.” The Court stressed that, while no particular level or increase in risk of harm is necessary, it must be substantial, and there must be a corresponding cellular change.

Thus, to make out a claim for medical monitoring, the SJC held that a plaintiff must prove seven elements:

(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 found in *dicta* that a plaintiff “may” be entitled to reasonable attorneys’ fees and costs out of a fund created by a defendant to be drawn down by the plaintiff as he or she actually incurs expenses, but did not clearly state the basis for such an award. The Court also ruled that plaintiffs who assert a medical monitoring claim will not be barred from asserting a future action for damages in the event he or she contracts a disease. The single controversy rule, which requires a plaintiff to include in a lawsuit all related claims against the defendant, would simply not make sense in this context.

With respect to the second question before the SJC—whether the plaintiffs’ claims were barred by the statute of limitations—the plaintiffs argued that their claims could not have accrued until the LDCT scans became available. Philip Morris argued for application of the discovery rule, which provides that the statute of limitations begins to run when “an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.” The SJC again ruled against the cigarette manufacturer, noting that, on the record, the Court could not determine if the plaintiffs’ claims were timely. Recognizing that the plaintiffs had alleged that they had “absolutely no remedy until LDCT technology appeared,” the SJC concluded that, if the plaintiffs proved their allegations, which are “unusual and perhaps unique to medical monitoring claims,” then their claims are timely. The Court added, however, that the plaintiffs also must show that “the standard of care of the reasonable physician did not

call for monitoring of any precancerous condition prior to the statute of limitations period, not just that the technology at that time was less effective for monitoring.”

In short, the Court held that the statute of limitations begins to run for a medical monitoring claim 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 of a reasonable physician, triggers the need for available diagnostic testing that has been accepted in the medical community as an efficacious method of lung cancer screening or surveillance.

In addition to tort defendants, the SJC’s decision has serious implications for insurers. The SJC’s express reference to a growing recognition that exposure to toxic substances and radiation may cause latent injury is likely to have implications well beyond tobacco litigation. Similarly, the SJC’s reference to payment of attorneys’ fees may provide additional incentive to potential plaintiffs—and their lawyers—to bring these cases arising from other products. Defendants sued for medical monitoring may look to their commercial general liability insurers for coverage, and the SJC’s requirement that plaintiffs demonstrate a cellular change will likely lead defendants to argue that medical monitoring claims constitute covered bodily injury. Insurers, on the other hand, are likely to argue that there is no coverage because, for example, by definition, a medical monitoring claim is not seeking damages on account of bodily injury, as required by the policy. While it is too early to predict the ramifications of this decision, it is safe to say that the SJC has changed the litigation landscape in Massachusetts for plaintiffs filing medical monitoring claims.

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