

Presented for

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“No Injury” Class Actions & Emerging Medical Monitoring Claims

July 14, 2010

Presented by

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 **RIVKIN RADLER**
ATTORNEYS AT LAW

Medical Monitoring Claims

Medical monitoring claims add new meaning to the old adage that, “*the trouble with our times is that the future is not what it used to be.*”



Elements of a Tort Claim

1. **A Basis of Liability** (negligence, strict liability, intentional acts, to name a few) sometimes this is known as “Duty Owed”;
2. **Dereliction or Breach of that Duty**;
3. **Proximate Cause**; sometimes known as “Due Cause”; and
4. **“Present Injury.”**

Definition

A medical monitoring claim would, “seek to recover the anticipated costs of long term diagnostic testing necessary to detect latent diseases that many develop as a result of tortious exposure to toxic substances.”

Source: *Bower v. Westinghouse Elec. Corp.* 522 S.E. 2d 424 (W. Va. 1999).



Medical Monitoring Awards

1. **“Lump Sum Payment”**
2. **“Court ordered and administered Trust Fund”**
3. **A court order directing that the defendant establish a program to provide the agreed upon medical monitoring.**

A W.Va. Supreme Court Judge said

“If we do not modify or abolish our medical monitoring law the plaintiffs’ lawyers from the DuPont case will wreck enormous economic harm on West Virginia’s economy. They will collect millions in fees and return to their out of state residence leaving the West Virginia economy in shambles. It reminds me of the out of state coal barons who raked out coal resources in the early 1900’s and used the untaxed money from our coal to live opulent life styles in far away states. The lawyer fees in the DuPont case, for our new out of state coal barons, may be over \$100 million.”

Source: *Perrine v. DuPont*, 2010 W. Va. LEXIS 19 (W. Va. Sup. Ct. March 26, 2010).



The New Vernacular

- A “*Chemophobic*” atmosphere
- “*Monetization*” of irrational fears of chemical exposure



Factors Leading to Claims

- **Advances in medical technology**
- **Governmental assessment of risks posed by chemical exposure (the EPA's "Chemicals of Concern" List)**

Factors Leading to Claims

- **Other Triggers:**
 - ***Center for Disease Control's National Report on Human Exposure to Environmental Chemicals***
 - ***Consumer Product Safety Improvement Act of 2008***
 - ***Toxic Release Inventory and the National Toxicology Program's Report on Carcinogens***

The Situation

- 1. Historic Origins**
- 2. The “Scorecard”**
- 3. Elements or Prerequisites to Establish a Cause of Action for Medical Monitoring**
- 4. Insurance Coverage Implications**

Historic Origins

- ***Friends for All Children, Inc. v. Lockheed***
- ***Ayers v. Township of Jackson***
- ***Metro-North Commuter R.R. Co. v. Buckley***

The Scorecard

There is some law identified with and concerning the viability of no injury medical monitoring claims in 37 states:

- **In terms of “binding law”, only 14 State Supreme Courts have ruled on the issue; 7 permitting a claim, 7 rejecting a claim.**
- **Louisiana is the only state to have legislated the matter (legislating that such claims are not permitted, overruling the Louisiana Supreme Court that they were permitted).**

The Scorecard

There is some law identified with and concerning the viability of “no injury” medical monitoring claims in 37 states:

- **Rulings on the topic have come from 19 states, either by a lower state court or by a federal court and 6 states permit medical monitoring claims; 13 do not.**
- **The courts in three states (NY, IL, and IN) are split.**
- **The United States Supreme Court under Federal Tort Law (the FELA) in *Buckley*.**

Requirements to Establish a Cause for Medical Monitoring

The elements of a Medical Monitoring claim all appear to include the following:

- (i) Exposure to a toxic substance;**
- (ii) An increased risk of disease; and**
- (iii) An appropriate test for early detection.**

Elements for a Medical Monitoring Action

The recent October 2009 decision by the Massachusetts Supreme Judicial Court in *Donovan v. Phillip Morris USA, Inc.*, sets forth the elements for a medical monitoring cause of action:

- 1) The defendant's negligence;
- 2) Caused;
- 3) The plaintiff to become exposed to a hazardous substance that produced, at least, sub-cellular changes that substantially increased the risk of serious disease, illness, or injury;
- 4) For which an effective medical test for reliable early detection exists;

Elements for a Medical Monitoring Action

The recent October 2009 decision by the Massachusetts Supreme Judicial Court in *Donovan v. Phillip Morris USA, Inc.*, sets forth the elements for a medical monitoring cause of action:

- 5) And early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of disease, illness or injury;
- 6) That 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.

Insurance Coverage

General liability insurance typically provides that there must be an accident that results in either bodily injury or property damage. In turn, “bodily injury” is usually defined as “bodily injury, sickness or disease.”

The 3 Buckets of Injury

- 1. Allegations of subcellular, subclinical or biological change**
- 2. “No Injury” Plaintiffs**
- 3. “No Injury” Plaintiffs and environmental contaminants or toxic chemicals**

Policy Language

“We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.”

For More Information:



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Webinars & Podcasts

- Podcast Pharmacovigilance in a Post-Wyeth v. Levine World
- FDA Outlook 2010 Webinar
- FDA Outlook for 2010 Podcast



Publications

- Protecting PMA Devices
- Federal Preemption
- The Basics of Contractual Risk Transfer



Training Courses

- Sales Reps in the OR
- Writing Defensively
- Warnings and Instructions

About Medmarc Protect

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Identify and prevent products liability exposures before they arise.

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Train your staff to recognize and mitigate products liability risks.

Integrated Risk Management

Incorporate products liability risk management into your quality management system.

Latest Tweets

- MedmarcIns: Problems with heparin suppliers have led to nationwide shortages. To reduce supplier risk see <http://tinyurl.com/yctujtr>. #losscontrol #devis
- MedmarcIns: Drug & device execs in FDA's crosshairs. FDA announces it will increase criminal prosecutions <http://tinyurl.com/yfba3mh> #losscontrol #dysan
- MedmarcIns: After 18 recalls of insulin pumps over the past 5 years, the FDA is taking note. <http://tinyurl.com/ybyp12x> #losscontrol #devis

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Ask an Expert

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- FDA Compliance

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Medmarc's webinars and podcasts address important issues relevant to the medical technology and life sciences industry. Our 50-minute webinars discuss these issues in depth and our podcasts provide general overviews and brief insights. **Presenters are experts** in the industry and the information provided is designed to educate our policyholders on **preventive products liability practices** and **current industry concerns**.

UPCOMING WEBINAR

"No Injury" Class Actions and Emerging Medical Monitoring Claims July 14, 2010 2:30 PM EDT

In this upcoming webinar, Attorney William Savino will discuss "no injury" class action claims in which plaintiffs who have been exposed to harmful substances seek money to monitor their medical conditions even though they do not have any present physical injuries.



William M. Savino serves as Rivkin Radler's Managing Partner and is Chair of the Firm's Executive Committee. Mr. Savino's practice concentrates on commercial and insurance coverage litigation and related counseling. He has served as counsel for insurers in the defense of class actions involving interest charges and numerous insurance coverage claims and suits ranging from intellectual property liabilities and business torts to national environmental, antitrust and fiduciary claims.

Off-Label Promotion: Allergan's Pre-emptive Strike Against the FDA

- Webinar, Slides (coming soon)
- Podcast (15 minutes)

Products Risk and Professional Liability

- Webinar, Slides
- Podcast (12 minutes)

Introduction to the CE Mark

- Webinar, Slides

Legislative Outlook for 2010

- Webinar, Slides
- Podcast (20 minutes)

Warnings & Instructions

- Webinar, Slides
- Podcast (9 minutes)

Managing the Risk of Off-Label Promotion

- Webinar, Slides

Top Picks

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"NO INJURY" CLASS ACTIONS AND EMERGING MEDICAL MONITORING CLAIMS

Increasingly, "no injury" class action lawsuits are getting attention from the Plaintiffs' Bar and U.S. courts. Plaintiff classes allege harmful exposures without present physical injuries and seek money to monitor their medical conditions. This is **a fundamental shift of the law, veering from compensation for actual injury to compensation for possible exposure**. The resources on this page will deal with this issue in depth and discuss whether exposure to a known harmful substance is sufficient, by itself, to constitute bodily injury.

Top Picks

Access some of our educational resources that have been organized by topic for your convenience. These resources contain comprehensive and current information about a variety of topics relevant to the medical technology and life sciences industry.

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