

Medmarc Loss Control Podcast Transcript:

Medical Monitoring

Erlisa King: Welcome to the Medmarc Broadcast Network. My name is Erlisa King, Medmarc's loss control advisor. Today I will be speaking with attorney, William Savino about medical monitoring. Bill serves as Rivkin Radler's managing partner and is chair of the firm's executive committee. He is an expert in the area of medical monitoring and has recently presented workshops on medical monitoring non-injury suits. Today we're going to discuss the fundamentals of medical monitoring including remedies plaintiff attorneys seek to recover and what role insurance plays in handling these types of claims. Welcome Bill.

William Savino: Good afternoon Erlisa. Thank you very much for having me. I'm delighted to participate in today's broadcast.

Erlisa King: Let's just start with the basics. For those who may not be familiar with this topic, can you describe medical monitoring and no-injury claims?

William Savino: Certainly and I think in order to do so and give justice to these emerging claims, I think a little context is in order. In American jurisprudence, courts have long wrestled with the question of whether a compensable tort can be sustained in the instance where the claimant has no present physical injury. Let me give you an example.

Let's assume a claimant has been exposed to a hazardous substance or the claimant has been the recipient of a medical implant device or even that there has been the administration of a particular pharmaceutical for a particular ailment. And again, there's no physical injury in these examples that I've just given, but significantly the claimants alleged that, "because I have been exposed to these substances or to this device", the claimant further states that she or he might be subject to some future disease or disability. So there is an exposure and then very simply a claim that, "I am now exposed." As a result of the exposure, "I am now susceptible to some future disease or disability."

Now various causes of action have been alleged by what I will call “exposure claimants” ranging from the fear of cancer from the exposure or the susceptibility or risk of disease from the administration of a pharmaceutical and then claims, separate kinds of claims for medical monitoring. And recently, it has been claims for medical monitoring that have populated the dockets of both state and federal courts across the United States. Thus, among the constituents in the new challenge that medical monitoring claims lay out in front of us in corporate America are general industry, pharmaceutical industry, government and indeed insurance. And attention to these claims from those constituents is growing at a remarkable rate again, with regard to no-injury class action suits.

Class action suits where the plaintiffs allege, as I mentioned a moment ago, harmful exposures without present physical injury and then seek often times injunctive relief directing that the defendants arrange for the appropriate medical monitoring procedures to monitor their health condition because of the exposure to the harmful substance. And plaintiffs therefore have predicated their suits, their class action suits, on the emerging tort theory again, of medical monitoring.

The plaintiffs seek a recovery not for injuries and I must emphasize this – not for injuries that they have in fact sustained, but instead, they seek to recover the costs associated with determining if they have sustained harm. And the relief sought in a phrase is medical monitoring. Perhaps stated differently, plaintiffs will seek a medical monitoring program that will detect the onset of latent injuries caused by exposures again to some potentially harmful substance.

The medical monitoring is aimed at the early diagnosis and medical treatment of the particular disease that might be at hand sometime in the future: lung cancer in the instance of tobacco smokers. Now these plaintiffs generally do not seek a lump sum payment or damage award. Instead what they seek is some type of injunctive relief that will impose on the defendants the obligation to medically monitor, in some quantifiable way, the health condition of these exposed claimants. That, I think is a fairly accurate overview and statement of these emerging claims.

Erlisa King:

Is this an emerging legal trend and if so, why now?

William Savino:

Well, medical monitoring claims I think apropos to the question that you just posed add new meaning to the old adage that the trouble with the future is simply that it simply is not what it used to be. And the workshop that we will conduct later in this month will take a look at the future; will take a look frankly at just tomorrow. Indeed, a future that will see more of these attention-getting, challenging and unique suits seeking medical monitoring and the associated insurance coverage issues.

So when asking the questions why now, what has prompted these emerging suits: frankly, in return I pose this further inquiry: to those who are involved in protecting their companies' interests in the context of an ever changing liability landscape in America permit me then for a moment just to ramble and pose some questions that are perhaps rhetorical in response to the one that you've put to me, but is it advances in medical and other scientific technologies? Is it the natural evolution of a sophisticated and dare I say compassionate legal system? Or are these medical monitoring claims just junk science at work and yet another tortured expansion of tort law? Is it simply modern society's response as some have said to a fear that we now live in a completely toxic environment? And of course, the question that you asked included an inquiry regarding insurance. So I pose, if you will, the parallel question: does insurance apply to cover the medical monitoring claims that could be asserted by hundreds of thousands who have been exposed to hazardous substances, but don't claim that they have sustained diagnosable physical bodily injury?

So yes, attention is clearly growing with regard to no-injury class action suits again, where the claimants are alleging harmful exposures without present physical injury and then seek as I said a moment ago injunctive relief directing that the defendants arrange for the appropriate medical procedures to monitor their health condition. So this, I think in part responds to the question that you've asked, but it is not just an interesting if you will factual content. It's not just are we living in a toxic environment? It is matched by an equally powerful question about how will our system of jurisprudence, the American tort system, how will it respond to this new phenomenon?

In other words, is the American tort system experiencing – and this is what the workshop will touch upon – a fundamental shift. Some academicians giving helpful hints to the practitioner have said that

this new and emerging area of the law is resulting in a distortion of the law veering from – this is most important – veering from the historical and traditional compensation for actual injuries that are sustained to compensation for mere exposure to a hazardous substance. Just think about that. And maybe it’s the lawyer in me that’s coming out much too much, but just think about that. Compensation not for actual injuries sustained, but compensation because the plaintiffs allege, “I’ve been exposed to a hazardous substance or the medical device that has been implanted within me may cause me to have heart failure. I don’t have an injury yet, but maybe some time in the future I will.” Is our tort system going to compensate for the mere exposure again, as opposed to the actual injury? And if this is what is occurring out there in the courtrooms across the United States, then we must ask the parallel question, the coordinate question of what are the insurance coverage implications?

Do medical monitoring claims and payments associated with them or a court administered medical monitoring fund constitute damages? Will courts, under the general liability policy trigger a duty to defend for pre-diagnosis, pre-injury medical monitoring suits? So these are some powerful questions and please make no mistake about it. This is a true shifting, a true change, an equivalent change if you will that took place at the turn of last century when we were developing tort law to respond to product liability. Now tort law, the courts are grappling – now tort law, it will be determined whether it will be adaptable to changes in technology and the different society in which we live.

So that, I think provides I hope some interest to your listeners as to what is a most contemporary, most challenging and very new – new in the sense by the way that it’s becoming more frequent. I think medical monitoring claims have been around for – oh gosh, at least since the late ‘70s, but certainly as the courts’ dockets become more populated with these claims insurance that policy holders, corporate America are going to have to sit down and grapple with them.

Erlisa King:

Okay, we’ll end it all on that note. I want to thank you for your time today Bill.

William Savino: You are very welcome. I'm looking forward to July 14th when we have the webinar where on the various topics that we've just very broadly mentioned this afternoon we'll get into in greater detail.

Erlisa King: Okay, great. And listeners, if you'd like to learn more about this topic I encourage you to visit MedmarcProtect.com and that's M – E – D – M – A – R – C – Protect.com and here you will be able to access the companion webinar presented by Bill where he elaborates on medical monitoring and provides additional details about this growing legal issue. Thank you for joining us and be sure to check back for additional broadcasts on other related products liability loss control topics from Medmarc.