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FEDERAL COURT FINDS MEDICAL MONITORING TORT UNAVAILABLE IN TEXAS

by
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Since the Supreme Court's decision in *Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997), most courts that have considered the issue have refused to recognize medical monitoring as a cause of action. On January 17, 2006, in *Bund zur Unterstützung Radargeschädigter e. V. v. Raytheon*, 414 F. Supp. 2d 659 (W.D. Tex. 2006), the United States District Court for the Western District of Texas continued that trend by predicting that the Texas Supreme Court would not recognize a cause of action for medical monitoring. The plaintiffs had sought certification of a medical monitoring class under Texas law, comprised of former military servicemen which allege exposure to ionizing radiation emitted from radar equipment manufactured by various defendants.

In response to defendants' motion to dismiss the medical monitoring claims, Judge Philip R. Martinez predicted "that the Texas Supreme Court is not likely to adopt medical monitoring if confronted with the issue." He further noted that "recognizing medical monitoring as an independent tort would represent a radical extension of currently existing Texas law." In so ruling, Judge Martinez relied heavily on the Supreme Court's opinion in *Buckley*. In *Buckley*, a railroad worker who lacked any present physical injury sued under the Federal Employers' Liability Act ("FELA"), seeking damages for emotional distress and medical monitoring stemming from exposure to asbestos that he alleged was caused by his employer's negligence. The Supreme Court declined to recognize that claim under FELA, based on three principal policy concerns: (1) the difficulty faced by judges and juries in evaluating such claims; (2) the unlimited and unpredictable nature of the damages; and (3) the potential for a flood of trivial claims should such damages be recognized.

While the *Buckley* Court did not decide the viability of medical monitoring causes of action under other bodies of law, Judge Martinez found the Court's analysis persuasive, particularly in light of a Texas Supreme Court opinion, *Temple-Inland Forest Products Corp. v. Carter*, 933 S.W.2d 88 (Tex. 1999), rejecting mental anguish damages. Judge Martinez noted that medical monitoring claims and mental anguish claims are similar in that both involve plaintiffs who lack a present physical injury but argue they are at an increased risk of suffering an injury in the future. Because *Temple-Inland* rejected medical anguish claims based in large part on the *Buckley* analysis, Judge Martinez predicted that the Texas Supreme Court would likewise rely on *Buckley* to reject medical monitoring.

Every state court to consider the question since 1999 has declined to recognize medical monitoring as an independent cause of action. And at least one state that had previously been hospitable

to such claims has signaled a retreat from that position. *See Vitanza v. Wyeth, Inc.*, No. ATL-2093-04-MT, 2006 WL 462470 (N.J. Super. Ct. Law Div. Jan. 24, 2006).

This growing trend against recognition of medical monitoring as an independent cause of action is a positive one, signifying a return to the traditional tort law requirement that plaintiffs present proof of a present physical injury in order to recover damages.

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