Legal Opinion Letter

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MICHIGAN HIGH COURT REJECTS CLAIM FOR NO-INJURY MEDICAL MONITORING

by
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The Michigan Supreme Court recently became the fourth state supreme court to bar plaintiffs from filing claims for medical monitoring when they are not actually injured. The other three state courts were in Alabama, Kentucky, and Nevada. The Court's opinion clarified Michigan law that has been used by litigants, scholars, and other courts to support both sides of the current medical monitoring argument, and ruled that it was for the state Legislature to decide whether to allow such a "potentially societally dislocating" cause of action.

The issue of whether to allow medical monitoring absent present physical injury is still relatively new. The United States Supreme Court rejected medical monitoring in 1997, in the context of railroad worker claims under the Federal Employers' Liability Act, and most state supreme courts have not yet considered the issue. While those that have done so have essentially split, no state supreme court has approved medical monitoring since 1999, when the Supreme Court of Appeals of West Virginia created an expansive and controversial medical monitoring cause of action.

The West Virginia case, Bower v. Westinghouse Electric Corp., 522 S.E.2d 424 (W. Va. 1999), dispensed with a cost-benefit analysis approach and rejected the professional medical perspective that medical monitoring should only be implemented where the early detection of potential future symptoms could prevent, treat, or cure disease. Instead, focusing on "the subjective desires of a plaintiff for information concerning the state of his or her health," id. at 434, the court held that a suit could be filed even if the level of exposure to a toxic substance does not correlate with a level sufficient to cause injury or if no effective treatment for the disease exists. Id. at 433-34. The court also endorsed cash payments to go directly to plaintiffs in a lump sum, without follow up to ensure that the money was in fact used for medical monitoring, or was instead spent on consumer items such as cars or flat-screen television sets. Id. at 434. Recognizing the numerous public policy problems spawned by the Bower ruling, state supreme courts subsequently backed away from medical monitoring. Even the West Virginia Supreme Court rejected efforts to certify a multi-state class action for medical monitoring claims. Chemtall, Inc. v. Madden, 607 S.E.2d 772 (W. Va. 2004).

The Michigan case, Henry v. Dow Chemical Co., 2005 WL 1639326 (Mich. July 13, 2005), involved claims that Dow's plant in Midland, Michigan, negligently released dioxin into the Tittabawassee flood plain, where the 173 plaintiffs live and work. The plaintiffs did not allege present physical injury. They sought a court-supervised, Dow-funded trust fund to provide medical monitoring for possible future manifestations of dioxin-related disease. Plaintiffs also asked the trial court to certify their claims for class action treatment, potentially expanding the case to thousands of class members. Dow moved for summary

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judgment, arguing that the medical monitoring claim was not recognized in Michigan. The trial court denied Dow's motion. The Michigan Supreme Court ruled 5-to-2 to reverse the trial court's decision and remand the case for entry of summary judgment in the defendant's favor.

Following the reasoning of earlier state supreme courts, the Michigan Supreme Court ruled that the Michigan Legislature, not the Court, should decide whether to allow a cause of action for medical monitoring absent present physical injury. Fundamental tort law principles require actual physical injury in order to recover. Plaintiffs' proposed claims were a substantial departure from these principles — so substantial, the Court said, that creating a new cause of action as requested would be a "potentially societally dislocating change to the common law." Id. at *9. In considering this move, numerous public and private interests compel "requiring extensive fact-finding and the weighing of important, and sometimes conflicting policy concerns." Id. at *7.

As a result, the Court said, "the people's representatives in the Legislature are better suited to undertake the complex task of balancing the competing societal interests at stake." In fact, the Court ruled, the Michigan Legislature already has established policy in this area by delegating the responsibility for dealing with health risks from pollution to the Michigan Department of Environmental Quality. Id. at **1, 10. The Michigan Supreme Court recognized that the problems likely to arise from a court-created medical monitoring cause of action that dispenses with the basic requirement to prove injury include:

A "potentially limitless pool of plaintiffs." Without an actual injury requirement, personal injury lawyers "could virtually begin recruiting people off the street" to act as monitoring plaintiffs. Id. at *7. Everyone in society has been exposed in some way to potential health hazards — in the air they breathe, the water they drink, the food they eat, the drugs they take, and the land on which they live — so without a threshold standard of actual injury, anyone could sue.

Less compensation for people with actual injuries. Lawsuits by plaintiffs who are not hurt have the potential to "create a stampede of litigation" and "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." Id. The Court said that this "well-founded" concern has already been illustrated by "[o]ur nation's experience with asbestos litigation," which has led to at least 78 bankruptcies and fewer resources for the "truly sick." Id. at *14.

A burden on court personnel and finances. "The court system, in our view, is simply not institutionally equipped to establish, promulgate operative rules for, or administer such a program," the Court said. Id. at *9. The Court would move into unfamiliar territory in operating a court-administered medical monitoring trust fund, one for which it lacks the technical and scientific skills to direct effectively. Day-to-day operations would impose huge clerical burdens on an already strapped court system. Id.

In what is an important point for litigants, commentators, and courts who have relied on an earlier Michigan Supreme Court case to sanction medical monitoring claims, the Michigan Court cleared up what it termed the "confusion" surrounding that case. In Meyerhoff v. Turner Construction Co., 575 N.W.2d 550 (Mich. 1998), the Michigan appellate court had ruled medical monitoring damages were allowed for workplace asbestos exposure claims. The Michigan Supreme Court then vacated that part of the appellate decision because "[t]he factual record is not sufficiently developed to allow a[sic] medical monitoring damages." Id. at 550. In Henry, the Court said its language in Meyerhoff was "perhaps not a model of clarity" but "nonetheless is an exceedingly thin reed on which to rest arguments in favor of a medical monitoring cause of action — a reed that must give way under the vastly greater weight of Michigan precedent" requiring manifest physical injury for negligence claims. 2005 WL 1639326 at *6 & n.14.

The Michigan Court's opinion in Henry echoed post-Bower opinions rejecting medical monitoring by the Nevada, Kentucky and Alabama Supreme Courts, all of which noted the longstanding requirement of actual physical injury and declined to, as the Alabama court put it, "stand … tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what might occur in the future." Hinton v. Monsanto Co., 813 So. 2d 827, 831 (Ala. 2001); see Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Badillo v. American Brands, Inc., 16 P.3d 435 (Nev. 2001).

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