Legal Backgrounder

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MICHIGAN COURT RULING ADVANCES TREND ON MEDICAL MONITORING

by

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Before 1997, several state courts allowed plaintiffs who were not injured to bring lawsuits for "medical monitoring." The U.S. Supreme Court's decision in *Metro-North Commuter Railroad Co. v. Buckley*, 525 U.S. 424 (1997), began to reverse that trend. The last four state supreme courts to consider the issue have held that the common law does not permit those claims. The Michigan Supreme Court's decision last month in *Henry v. Dow Chemical Company*, No. 125205 (July 13, 2005), highlights the growing resistance in the state courts to claims for medical monitoring.

The Genesis of Medical Monitoring. "Medical monitoring" claims typically involve allegations that a defendant's negligence caused exposure to a hazardous substance that increased the plaintiff's risk of contracting a disease. Despite not yet showing any symptoms, the plaintiffs seek recovery for the costs of periodic, diagnostic medical examinations that are supposed to detect the onset of the disease, if it occurs at all, at an early stage. Because they show no symptoms, virtually limitless numbers of plaintiffs can often be roped into a putative plaintiff class. Beginning in the late 1980s, plaintiffs succeeded in convincing several courts to recognize medical-monitoring claims.

Most commentators point to the U.S. Court of Appeals for the District of Columbia's decision in *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), as the genesis of medical-monitoring claims. As is often the case when courts recognize novel claims, *Friends* involved compelling facts: a small and readily identifiable group of sympathetic plaintiffs were exposed to an event that might plausibly have injured them. *Friends* was brought on behalf of 149 orphans who survived the crash of a Lockheed airplane during evacuation from Vietnam. Friends For All Children, which had organized the evacuation, sued Lockheed on behalf of the children, alleging that they suffered a neurological disorder called "Minimal Brain Dysfunction" from the crash. Although the children displayed no symptoms, plaintiffs sought to create a fund to pay for the costs of one-time diagnostic examinations. Lockheed argued that there could be no claim without proof of actual injury.

The D.C. Circuit disagreed. Noting that the *Restatement (Second) of Torts* § 7 defined "injury" as "'the invasion of any legally protected interest of another,'" the court found that "[i]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in

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avoiding physical injury." *Friends*, 746 F.2d at 826 (citations omitted). The court concluded that, if faced with the question, it would recognize a medical-monitoring claim.

Picking up where the D.C. Circuit left off, the New Jersey Supreme Court formally recognized a medical-monitoring claim in the toxic-tort context in *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987). *Ayers* involved 339 plaintiffs who claimed that toxic waste from a nearby landfill contaminated their well water. The jury awarded over eight million dollars in damages for annual monitoring costs for cancer and other diseases. In concluding that this expansion of traditional tort liability was warranted, the *Ayers* Court identified several public-policy goals that medical monitoring serves, including the early detection and treatment of disease; the deterrence of polluters; and shifting the economic cost of monitoring from a wrongfully-exposed plaintiff to a negligent defendant. *Ayers*, 525 A.2d at 311-12. Some later cases recognizing medical-monitoring claims have cited these same public-policy justifications. *See, e.g., Burns v. Jacquays Min. Corp.*, 752 P.2d 28, 33 (Ariz. App. 1987) (quoting *Ayers*).

Three years after *Ayers*, the U.S. Court of Appeals for the Third Circuit predicted that Pennsylvania would permit a claim for medical monitoring and established four elements needed to state that claim, including exposure to a "proven hazardous substance" and the existence of procedures "which make the early detection and treatment of the disease possible and beneficial." *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990). Decisions by other state courts recognizing medical-monitoring claims soon followed, often drawing on the elements established in *Paoli*. *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137 (Pa. 1997); *Bower v. Westinghouse Elec. Corp.*, 522 S.E. 2d 424 (W. Va. 1999); *Petito v. A.H. Robins Co.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 2000).

Federal courts were sometimes less willing to follow the example of *Friends* and *Ayers* and interpreted state laws not to permit medical-monitoring claims. *See, e.g., Ball v. Joy Technologies*, 958 F.2d 36 (4th Cir. 1991) (interpreting Virginia and West Virginia laws); *Thomas v. F.A.G. Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994) (interpreting Missouri law). Even where these claims were recognized, some courts found them unsuitable for class treatment or dismissed them on summary judgment. *See, e.g., Harding v. Tambrands, Inc.*, 165 F.R.D. 623 (D. Kan. 1996) (denying class certification); *Abuan v. General Elec. Co.*, 3 F.3d 329 (9th Cir. 1993) (granting summary judgment).

Nonetheless, there was a significant trend of state supreme courts recognizing medical-monitoring claims through the late 1990s. As the Louisiana Supreme Court described it in 1998: "*Friends for All Children* has provided the dominant framework within which a majority of state supreme courts faced with the issue have since authorized recovery for medical monitoring in the absence of physical injury." *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 359-60 (La. 1998) (citations omitted). That trend would soon change.

The U.S. Supreme Court Speaks. In 1997, the issue of medical monitoring reached the U.S. Supreme Court, and its decision rejecting these claims laid the groundwork for a counter-trend. In *Metro-North Commuter Railroad Co. v. Buckley*, 525 U.S. 424 (1997), the Court rejected a medical-monitoring claim brought by a pipefitter against his employer under the Federal Employers' Liability Act ("FELA") for occupational exposure to asbestos. One of the Court's main concerns was that medical-monitoring claims could open a flood-gate of litigation by permitting "tens of millions of individuals" to seek "some form of substance-exposure-related medical monitoring." *Buckley*, 525 U.S. at 442. This could drain the pool of resources available for claims by plaintiffs with serious present injuries. The Court was also concerned that allowing medical-monitoring claims could create double recoveries because alternative sources of payment, like health insurance, are often available.

Ultimately the Court concluded that a tort claim was not an appropriate way to resolve the competing interests implicated by the medical monitoring debate: "The reality is that competing interests are at stake — and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action." *Buckley*, 525 U.S. at 443-44. While *Buckley* limited its holding to the

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question whether a "full-blown" tort remedy was available for medical monitoring, the policy concerns it articulated have been influential in recent state court decisions rejecting all types of medical-monitoring schemes.

Buckley did not immediately turn the tide on medical-monitoring liability. In addition to Louisiana, courts in West Virgina and Florida recognized claims for medical monitoring shortly after *Buckley* was decided. *See Bower* 522 S.E.2d 424 (West Virginia); *Petito*, 750 So. 2d 103 (Florida). But things began to change in 2000. First, a Kentucky court of appeals held that Kentucky law did not recognize medical monitoring as a distinct cause of action in *Wood v. Wyeth-Ayerst Labs.*, No. 1999-CA-001717-MR, 2000 WL 1610658 (Ky. App. Oct. 27, 2000), and the Kentucky Supreme Court eventually affirmed that result. *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002). In the meantime, two other state supreme courts — those of Alabama and Nevada — rejected medical-monitoring claims, citing many of the same reasons identified in *Buckley*. *See Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001); *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001).

Last month, Michigan joined the modern trend with the Michigan Supreme Court's decision in *Henry v. Dow Chemical Company*, No. 125205 (Mich. July 13, 2005).

Henry. In *Henry*, a group of 173 named plaintiffs sought to certify a putative class of thousands in a suit against The Dow Chemical Company. The plaintiffs' main claim was that one of Dow's Michigan plants negligently released dioxin, a synthetic chemical associated with certain health problems, into the Tittabawasee flood plain, where plaintiffs lived and worked. The plaintiffs did not allege that Dow's negligence caused any actual dioxin-related disease in class members, only that they were exposed to an increased *risk* of injury in the future. As relief, the plaintiffs sought to create a Dow-funded, court-supervised program to monitor class members for possible future manifestations of dioxin-related disease.

The Michigan Supreme Court rejected the plaintiffs' claims: "Because plaintiffs do not allege a *present* injury, plaintiffs do not present a viable negligence claim under Michigan's common law." *Henry*, slip op. at 3. The Court first found that medical-monitoring claims lack the elements of injury and causation, which are required for all other forms of negligence. Injury is absent because negligence requires not merely present *harm* but present *injury*. While the costs of monitoring might qualify as a present harm, by definition, those costs "are wholly derivative of a *possible, future* injury rather than an *actual, present* injury." *Id.* at 13-14 (emphasis added). According to the court, the absence of a present injury also means that causation is lacking in a medical-monitoring claim. As a matter of logic, a defendant cannot have caused an injury that does not yet exist. *Id.* at 15.

Citing a mix of practical and prudential problems, the Court then refused to expand Michigan common law to recognize medical-monitoring claims. First, the Court found that a medical-monitoring claim might have unanticipated consequences, such as creating "a potentially limitless pool of plaintiffs." *Id.* at 20. The Court singled out West Virginia as an example of this problem. Shortly after the West Virginia Supreme Court recognized a claim for medical monitoring in *Bower*, two large class actions were filed on behalf of asymptomatic plaintiffs, including one involving healthy plaintiffs from seven different states. *Id.* at 20 n.15.

In addition, the Michigan Court noted that litigation of pre-injury claims could divert resources from plaintiffs with present injuries to those who might never actually suffer an injury. Weighing those and other potential consequences of recognizing medical-monitoring claims against the possible benefits of such claims, the Court found, was beyond its institutional capacity.

Finally, the Court discussed separation-of-powers considerations that also militated against courts recognizing this "new and potentially societally dislocating change to the common law." *Id.* at 27. The Court expressed concern that medical-monitoring claims "may lead to dramatic reallocation of societal burdens and benefits," and that recognizing these claims would force it to "craft public policy in the dark." *Id.* at 28. The Court cited Louisiana as a cautionary example because the legislature there effectively reversed the Louisiana Supreme Court's decision to recognize medical-monitoring claims. From this, the Michigan court concluded that

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the lack of information about the effects of these claims alone was enough "to make any reasonably prudent jurist extremely wary of granting the relief sought by the plaintiffs." *Id.* at 28. Understanding the "sweeping effects for Michigan's citizens and its economy" that medical-monitoring claims might have was best left to "the people's representatives in the Legislature." *Id.* at 44.

Future Prospects for Medical-Monitoring Claims. There are good reasons to think that *Henry* will not be the last decision in this growing counter-trend against recognizing medical-monitoring claims. To begin with, the experience of states that have recognized those claims has been, at best, mixed. The onslaught of litigation in West Virginia after the *Bower* decision, and Louisiana's legislative response to *Bourgeois*, may influence future state courts asked to recognize a medical-monitoring cause of action.

More broadly, as *Henry* emphasized, medical-monitoring claims push courts into new and difficult areas because of the policy choices that recognizing these claims involve and the practical requirements of enforcing them. Consider the policy justifications cited in *Avery* and repeated in many other decisions recognizing these claims: (1) early detection and treatment of disease; (2) deterrence of polluters; and (3) shifting costs from wronged plaintiffs to culpable defendants. Preventive health care policies are undeniably important, but courts are poorly equipped to make the choices needed to set those policies. And, while deterring negligence and allocating costs are certainly functions that courts regularly perform, medical-monitoring claims add an entirely different dimension to these functions. Courts do not typically engage in the balancing of competing policies necessary to determine at what point the mere potential for harm is significant enough to warrant deterrence. Nor do courts normally decide which parties are better situated to bear the costs of preventing unmanifested harm. As the Kentucky Supreme Court put it in *Wyeth*: "This Court is not prepared to part ways with the system of remedies in favor of cash advances as proposed by Appellant." *Wyeth*, 82 S.W.2d at 855.

For similar reasons, enforcing medical-monitoring programs, particularly the kind of long-term, indefinite programs often sought in toxic-tort cases, falls outside the scope of a court's regular functions. The Michigan Supreme Court described these problems in *Henry*: "The day-to-day operation of a medical monitoring program would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime." *Henry*, slip. op., at 31.

Even ignoring these issues of institutional competence, medical-monitoring claims raise serious questions of fairness. As the Supreme Court noted in *Buckley*, "contacts, even extensive contacts, with serious carcinogens are common." *Buckley*, at 434. But resources to compensate victims of such exposure are not unlimited. Using present injury as the criteria for entitlement to compensation ensures that limited resources are preserved for those that most need them.

As *Ayers*, *Paoli*, and their progeny demonstrate, tort liability can exist without injury, as long as a court says it does. *Henry* and the cases it follows, however, show that the better question is whether it makes sense to take that step, and, more specifically, whether it is proper for a court to do so.

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