

Vol. 23 No. 46

October 24, 2008

NO HARM, NO FOUL IN NEW JERSEY: NO-INJURY MONITORING REBUFFED

by

John T. Chester

In June 2008, the New Jersey Supreme Court in *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008), rejected an ambitious attempt to force pharmaceutical manufacturer Merck to fund a massive, nationwide medical-monitoring program for some 20 million former Vioxx users. Why were the plaintiffs rebuffed? Because they did not allege that they had sustained any physical injury as a result of their Vioxx use and, as such, failed to plead a *prima facie* tort claim under New Jersey law.

Any other outcome would have had the effect of vastly expanding tort liability under New Jersey law, and would have invited a deluge of no-injury medical-monitoring claims with potentially dire consequences.

The Facts of Sinclair. Vioxx was approved by the FDA in 1999 for relief of acute pain, menstrual symptoms, and signs and symptoms of osteoarthritis. On September 30, 2004, the product was withdrawn from the market in light of concerns that it increased the risk of serious cardiovascular events, including myocardial infarction (heart attack). In the wake of market withdrawal, Vioxx users filed tens of thousands of personal-injury product-liability claims asserting that the product had caused them to sustain cardiovascular injuries.

By contrast, the *Sinclair* case was filed on behalf of a putative class of all Vioxx users in the United States who had *not* filed personal injury claims. *Sinclair*, 195 N.J. at 55. The *Sinclair* plaintiffs' complaint alleged that, as a result of their Vioxx use, they were "at a significantly increased risk of having suffered an unrecognized myocardial infarction ('UMI') and require[d] medical screening to determine whether, in fact, [they] suffered a UMI." In short, the *Sinclair* plaintiffs claimed that because *some* members of the putative class *may* have had past UMIs caused by Vioxx use, Merck should be required to offer free screening EKGs to twenty million people to determine whether any of them had had UMIs (which *may* have been caused by Vioxx use).

New Jersey Precedent. The New Jersey Supreme Court has addressed the medical-monitoring remedy (a/k/a "medical surveillance") in three earlier decisions: *Ayers v. Township of Jackson*, 106 N.J. 557 (1987); *Mauro v. Raymark Industries Inc.*, 116 N.J. 126 (1989); and *Theer v. Philip Carey Co.*, 133 N.J. 610 (1993).

In 1987, the Court in *Ayers* first recognized medical monitoring as a special tort remedy. There, 339 plaintiffs established that their town had contaminated the local drinking water with twelve toxic chemicals in a "palpably unreasonable" way. The plaintiffs' expert testified that "the exposure to chemicals had already caused actual physical injury to plaintiffs," putting them at risk of serious disease with a potentially long latency period.

John T. Chester is Counsel at Porzio, Bromberg & Newman P.C., a law firm with offices in Morristown, New Jersey, and New York City. As a member of the firm's Complex Tort and Appellate Practice Groups, Mr. Chester specializes in defending pharmaceutical, medical device, and other companies in product-liability, mass-tort, consumer-fraud, and commercial law matters. He also counsels clients with respect to product warnings, post-marketing safety monitoring, promotion, and marketing issues. Mr. Chester co-authored defense *amicus* briefs on behalf of the Product Liability Advisory Council, Inc. (PLAC) in the *Sinclair v. Merck & Co., Inc.* case discussed herein.

On the unique facts of the case, the *Ayers* Court approved medical monitoring, which it termed a “post-injury, pre-symptom recovery.”¹ The Court held that in a toxic tort case,

the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary. [*Ayers*, 106 N.J. at 606.]

In *Mauro*, the Court also permitted medical monitoring relief for a plaintiff who had developed pleural thickening and was at risk of future disease (cancer) as a result of asbestos exposure.

In *Theer*, however, the Court rejected medical monitoring absent a present physical injury. Mrs. Theer alleged that she was exposed to asbestos in the course of handling her husband’s work clothes. Based upon the jury’s finding that the plaintiff did not prove that she had an asbestos-related injury, the trial court rejected the plaintiff’s prayer for medical-monitoring relief. On appeal, the New Jersey Supreme Court agreed, and clarified that the medical-monitoring remedy is “not easily invoked” and is available only to plaintiffs “who have suffered increased risk of cancer when directly exposed to a defective or hazardous product like asbestos, *when they have already suffered a manifest injury or condition* caused by that exposure, and whose risk of cancer is attributable to the exposure.” *Theer*, 133 N.J. at 627 (emphasis added).

The Sinclair plaintiffs failed to plead a prima facie case. The *Ayers/Mauro/Theer* line of cases makes clear that, under New Jersey law, medical monitoring is not a cause of action but, rather, a special tort remedy available if – and only if – an underlying tort is established.² As such, the *Sinclair* plaintiffs’ claims were rejected because they did not plead the manifest-injury element of their underlying product-liability cause of action.

In *Sinclair*, plaintiffs pled their case as a product-liability action under the New Jersey Products Liability Act (“NJPLA”), N.J.S.A. 2A:58C-1 *et seq.*³ They did not and could not, however, allege that all class members had sustained a *personal physical injury* – as required to plead a *prima facie* case. Consequently, the *Sinclair* Court held:

Here, it is not disputed that plaintiffs do not allege a personal physical injury. Thus, we conclude that because plaintiffs cannot satisfy the definition of harm to state a product liability claim under the [NJ]PLA, plaintiffs’ claim for medical monitoring damages must fail.⁴

¹See *Ayers*, 106 N.J. at 604. *Ayers* is commonly misinterpreted as a no-injury case. Such a reading, however, ignores the Court’s characterization of medical surveillance as “*post-injury*, pre-symptom” relief. That the *Ayers* plaintiffs claimed (and offered expert testimony) that they had “already suffered physical injury” was emphasized by Justice Handler in his separate opinion concurring in the holding that medical-monitoring relief was available, and dissenting from the majority’s rejection of a separate enhanced-risk claim. See *id.* at 614-15.

²See, e.g., *Ayers*, 106 N.J. at 606 (“the cost of medical surveillance is a compensable item of damages”); *Theer*, 133 N.J. at 627 (“*Ayers* indicates that medical-surveillance damages constitute a special compensatory remedy”).

³In 1987, New Jersey codified many aspects of its product-liability law in the NJPLA. Among other things, the NJPLA defines “harm” as “personal physical illness, injury or death.” Before adoption of the NJPLA, New Jersey courts generally adopted the view of the *Restatement (Second) of Torts* § 402A (1965), which defined strict liability in tort for defective products solely in terms of *physical* harm. *Sinclair*, 195 N.J. at 64.

⁴*Sinclair*, 195 N.J. at 65 (citation omitted). Significantly, the *Sinclair* Court rejected plaintiffs’ attempt to cast their claims, in the alternative, as claims to recover an economic loss under the New Jersey Consumer Fraud Act. *Id.* at 65-66. It is now well-established that, under New Jersey law, claims relating to harms caused by products are governed exclusively by the NJPLA. See *id.*; *In re Lead Paint*, 191 N.J. 405, 436-37 (2007).

Medical monitoring law is not uniform across the country. Many courts have addressed medical monitoring, with varying outcomes. Unlike New Jersey, some states view medical monitoring as an independent cause of action; some permit monitoring without proof of a present physical injury; others do not recognize medical monitoring at all. *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 291 (N.D. Ohio 2007). Among states that recognize medical monitoring, New Jersey is among the growing majority that requires proof of a present physical injury.⁵

A month before *Sinclair* was decided, the Oregon Supreme Court in *Lowe v. Philip Morris USA Inc.*, 344 Ore. 403 (2008), affirmed dismissal of a no-injury monitoring action alleging that a putative class of some 400,000 Oregonians were at “significantly increased risk of developing lung cancer” as a result of cigarette use. *Lowe*, 344 Ore. at 407. Because Oregon law has “long recognized” that a threat of future harm is not sufficient in and of itself to constitute an actionable injury, the *Lowe* Court held that an underlying tort claim could not be established absent a present physical injury. *Id.* at 410-11. Moreover, the Court rejected the argument that the alleged necessity of undergoing periodic medical monitoring itself is an actionable “harm.” *Id.* at 413-15.

In 2007, a similar outcome was reached under Mississippi law in *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1 (Miss. 2007).

On the other hand, the Missouri Supreme Court in *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 716-18 (Mo. 2007), recently adopted the minority view that a medical-monitoring claim may be predicated upon an alleged economic harm alone – *i.e.*, the need to incur costs for medical testing – despite the absence of a present physical injury. *Meyer* was brought as a class action on behalf of children exposed to lead released by the defendant’s smelter, and sought ongoing diagnostic testing to determine whether lead exposure “has caused or is in the process of causing an injury or illness.” *Id.* at 714. The Court commented that, in toxic-tort cases where there is often no immediately-diagnosable physical injury or illness, “widely recognized tort law concepts premised upon a present physical injury are ill-equipped to deal with cases involving latent injury.” *Id.* at 716.

“*Unlimited and Unpredictable Liability.*” Tort law has traditionally required a physical injury as an element of a cause of action. The problem with unhooking medical monitoring from this prerequisite – as was done in *Meyer* – is that the logical extension of doing so is virtually boundless. This concern was articulated well in the dissenting opinion in *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W.Va. 1999). The *Bower* majority expressly rejected that a claim for future medical expenses must rest upon a present physical injury, which the dissenting opinion saw as an unauthorized judicial creation of a new cause of action:

The majority rejects the fundamental 200 year old tort law principle that a plaintiff may not recover damages unless he or she has a present injury, and replaces it with the speculative and amorphous showing of “increased risk.” . . . [P]laintiffs will now be compensated when there is no injury, thus providing a windfall for plaintiffs. [L]awyers can now advertise, “Don’t wait until you’re hurt, call now.” In fact, the practical effect of this decision is to make almost every West Virginian a potential plaintiff Those who work in heavy industries such as coal, oil, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all. [*Bower*, 522 S.E.2d at 435 (Maynard, J., dissenting).]⁶

⁵See V. Schwartz, *et al.*, *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. R. 348, 361 (2005) (noting that “the clear trend in the courts has been away from allowing medical monitoring when people have no current injury”).

⁶See also V. Schwartz, *et al.*, *Medical Monitoring – Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059 (1999), noting that, “At times, [the] bright line rule [that a plaintiff cannot recover without proof of a physical injury] may seem harsh, but it is the best filter the courts have been able to develop to prevent a flood of claims, to provide faster access to courts for those with ‘reliable and serious’ claims, and to ensure that defendants are held liable only for genuine harm.”

For similar reasons, the United States Supreme Court rejected no-injury monitoring in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997). The plaintiff in *Buckley* sought medical monitoring after being exposed to asbestos dust on a daily basis over a period of three years; he had no symptoms of disease. The Supreme Court commented that the plaintiff was sympathetic and had “suffered wrong at the hands of a negligent employer” – and acknowledged the seeming-inequity of placing the economic burden of medical care on the plaintiff rather than on the negligent defendant. *Id.* at 443 (citing *Ayers*). Nevertheless, the Supreme Court rejected no-injury monitoring and expressed significant policy concerns over the potential systemic effects that could otherwise result:

[T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related monitoring. . . . And that fact, along with uncertainty as to the amount of liability, could threaten both a “flood” of less important cases (potentially absorbing resources better left available to those more seriously harmed . . .) and the systemic harms that can accompany “*unlimited and unpredictable liability*” (say, for example, vast testing liability adversely affecting the allocation of scarce medical resources). [*Id.* at 442 (emphasis added).]⁷

Likewise, the Kentucky Supreme Court in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), unanimously rejected a medical-monitoring class action because “[w]ith no injury there can be no cause of action.” *Id.* at 855. The Court commented: “[A]ny other outcome would result in inordinate burdens for both the potential victim and the alleged negligent party. . . . If each were actually tested, and the results of the tests showed no physical disease, the negligent party will have paid large sums of money despite having caused no physical injury. . . . *Id.* at 859 (emphasis added).

Conclusion. It is no surprise that enterprising plaintiffs’ attorneys pursue no-injury medical-monitoring class actions: if such cases are viable, plaintiffs’ attorneys stand to collect huge fees attendant to gigantic monitoring programs set up for thousands – or even millions – of people with no known present injury.⁸

As the United States Supreme Court recognized in *Buckley*, permitting no-injury monitoring claims will expand liability exponentially – to the point that liability becomes “unlimited and unpredictable.” This would have dire consequences for our tort system’s ability to deliver prompt justice to those who need it most. Ultimately, limiting medical-monitoring claims to those predicated on physical injuries will prevent a flood of litigation based only on allegations of possible or potential harms, and thereby preserve judicial and corporate resources for those who have actually been injured.

⁷See, similarly, *Ball v. Joy Manufacturing Co.*, 755 F. Supp. 1344, 1372 (S.D. W.Va. 1990) (concluding that a tort system that awards medical monitoring to those who have been exposed to hazardous substances but have suffered no resulting present injury “could potentially devastate the court system as well as defendants”), *aff’d*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

⁸“Members of the plaintiffs’ bar have an obvious and enormous financial stake in [medical monitoring] proceedings.” J. Henderson & A. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 848 (2002) (criticizing medical-monitoring damages in the absence of present injury or illness, and noting that plaintiffs’ attorneys “are almost certainly the major beneficiaries of the successes enjoyed thus far”).