

STATE JURY DEMONSTRATES DEEP FLAWS IN “MEDICAL MONITORING”

by

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On November 14, 2001, a West Virginia jury rejected a request made in a class action law suit that the four major U.S. tobacco companies pay for periodic medical tests for all healthy smokers in the state to identify the onset of smoking related illnesses. The class members, estimated to number about 250,000, demanded the fund for medical monitoring, but made no promises that they would stop or even consider quitting smoking.

Even the *Washington Post* said the lawsuit seeking medical monitoring for healthy smokers "can't be justified no matter how reprehensible the target." *In Sickness and in Health*, W. POST, Jan. 15, 2001, at A20. The *Post* pointed out that the healthy smokers obviously knew about the potential harm of smoking, "their knowledge . . . is displayed by their decision to file suit." It denounced the plaintiffs for "not promising to take care of [their health] themselves" since plaintiffs planned to continue smoking. It criticized the decision to certify the case as a class action "even though there are huge differences in the risks faced by smokers with different lifestyles, genetic predispositions, and so on."

After issuing the verdict, jury foreman Mark Burris said, "If you smoke, stop. If you don't smoke, don't start. This is medical monitoring, it doesn't do anything to stop it. The only way to stop latent disease is stop smoking. That was the bottom line for all the jurors." *A Victory for Common Sense over W. Va. 'Grievance Industry'*, CHARLESTON DAILY MAIL, Nov. 15, 2001, at A4.

Background. *Blankenship* was every General Counsel's worst nightmare. First, it was brought in West Virginia, one of the few states that permit lawsuits for medical monitoring. A former Chief Justice of the state proudly bragged that he believed in allowing the courts to be used against large, out-of-state corporate defendants in order to redistribute out-of-state wealth to West Virginia citizens. See Joani Nelson-Horschler, *Lobby the Courts, State Judge Says, But Critics Balk*, IND. WK., Nov. 7, 1988, at 36. West Virginia jurors are often very tough on corporations. They fail to see them as a source of jobs, growth, and the state's

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economic tax base. Jurors are all too willing to "send a message" in the form of a huge verdict. The procedural regularity and predictability that are the hallmark of due process and the civil justice system in most states are often found to get in the way of West Virginia "justice."

Second, the claims were for future medical monitoring. No medical monitoring case had ever gone to trial. The defendants had acknowledged the health risks associated with their product and the West Virginia medical monitoring standard is the most pro-plaintiff in the country. The key question was whether an admitted health risk was enough to create an obligation to provide medical monitoring to healthy smokers under West Virginia's liberal medical monitoring standard. Arguably, the defendants should have been able to assert that the plaintiffs assumed the risk. But there was no precedent to indicate whether affirmative defenses were available. Moreover, it was hotly contested whether any medical monitoring tests existed that would benefit healthy smokers.

The plaintiffs themselves were in the better position to help eliminate the risk of future harm by simply quitting today than a future medical monitoring program could achieve. In truth, awarding medical monitoring benefits to healthy smokers might have had the perverse effect of creating a false sense of security in the smokers. Their motivation to quit might have been drastically reduced by the erroneous belief that testing alone would somehow decrease the risk of their conduct, without recognizing that testing had none of the preventative benefits that quitting would have.

Third, *Blankenship* was a nightmare because the court had certified the lawsuit for litigation as a class action. Certification as a class entirely undercut any opportunity to differentiate among absent class members according to their present health status, employment history, personal habits, living conditions, and family history. It also precluded defendants' ability to make arguments about: the future impact on absent class members of individualized risk factors; the probability that intervening events might make the medical tests unnecessary; the actual willingness of absent class members to receive medical monitoring if awarded; and, whether absent class members might prefer other types of medical monitoring than those suggested by the class representatives.

Moreover, the class certification created a presumption that there were no differences among the cigarette manufacturer defendants within the industry or differences among their products. What little opportunity did remain for a defendant to raise defenses had to be done in the context of the defenses raised by the rest of the industry representatives. Although the tobacco companies are accustomed to being co-defendants in litigation more so than most industries, when bound together as undifferentiated co-defendants in a class action, they lose the ability to develop individualized defenses and to distinguish themselves and their products from one another.

The nightmare is over for now and the jury made the correct decision. It used its common sense to place responsibility where it belonged — on the healthy plaintiffs who chose to use a product that is well known to be inherently risky. Plaintiffs have not yet decided whether to appeal. If they do, the West Virginia nightmare may return. A similar medical monitoring case, referred to as *Scott*, is pending against the tobacco industry in Louisiana, another jurisdiction that recognizes medical monitoring under limited circumstances. *Bourgeois v. A.P. Green Indus.*, 716 So.2d 355 (1998), *ltd. by* 2001 WL 316005 (La. 2001). The opponents of the tobacco industry appear to be preparing for additional onslaughts along similar lines in other jurisdictions. Another suit was filed recently in Oregon. *See Tobacco Class Actions Fire Up*, TRIAL, Nov. 2001, at 18-25.

The precedent *Blankenship* sets, even with a complete defense verdict, does violence to the very fabric of our legal system. If repeated elsewhere, it can send an entire industry into bankruptcy. It mocks cherished values, such as personal freedom, by suggesting that individuals should be absolved of personal responsibility for informed choices they have made. *Blankenship* needs to be studied carefully by those who are concerned about the fairness of the civil justice system and its impact on society.

The case is a precursor of what lies ahead for other industries if courts, legislators, industries, and lawyers fail to recognize the writing on the wall. Underneath it all, *Blankenship* is about allowing healthy people to place legal responsibility on the manufacturer for a consumer's voluntary choice to use a product that is known to pose some inherent risk. Medical monitoring extends the manufacturer's traditional liability for actual harm that results from product use to include liability for the mere risk of harm that the consumer experiences while using a product, even if harm never occurs.

Blankenship Illustrates the Profound Flaws in Medical Monitoring Litigation. The case illustrates nearly all of the troublesome issues that medical monitoring claims implicate. It sends a loud warning to states that have not yet recognized medical monitoring that they should not embrace it. In fact, the two states asked to recognize medical monitoring claims most recently, Nevada and Alabama, both declined. *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001); *Hinton v. Monsanto*, 2001 WL 1073699 (Ala. Sept. 14, 2001).

Blankenship reveals the implausible nature of the medical monitoring plaintiff's claim. Someone who is not hurt comes before a court to ask a defendant to pay for medical tests which might detect a future injury that he or she may never have. American law has always required a plaintiff to have a *present* injury in order to file a lawsuit. The plaintiff has always been required to prove that the defendant caused the present injury before he or she was permitted to recover any damages. Medical monitoring cases turn this bedrock principle of American law on its head. Without a present injury, establishing a causal link between defendant's present conduct and a future event that is not certain to occur is extraordinarily difficult, if not impossible. It is this gross deviation from the norm that was largely responsible for the Alabama and Nevada courts' decisions to reject medical monitoring as either a cause of action or a remedy. See *Badillo*, 16 P.3d at 441; *Hinton*, 2001 WL 1073699 at *4-*5.

Individuals who voluntarily choose to use products that are widely known to have inherent risks should be required to bear the costs of their risky behavior. The party in the best position to control whether or not there are consequences from the voluntary use of a product with well-known inherent risks is the person who uses the product. Since the law generally imposes the costs on the persons best able to prevent or control the risk, allowing medical monitoring claims against the manufacturers of products with well-known inherent risks will almost never be justified. It is the end user who should pay the price as the cost of the freedom to choose to use the product.

Medical monitoring claims are predictive about what will happen in the future, yet they must be decided based on information available in the present. At a minimum, they involve scientific knowledge about a product and health and background information about the plaintiff, all of which are limited to what is known at the time of the lawsuit. Based on this present knowledge, the court attempts to project into the future to decide whether medical monitoring benefits may be necessary in the future. This is an unreasonable prediction to ask a court to make even as to one person.

While this highly complex, factual inquiry about an individual who is already known and present before the court stretches the court's adjudicatory abilities to the limit, there is no way a similar inquiry can be made in a class action in which most of the members of the class are absent and unknown. It is not reasonable or realistic to suggest that one or two named class representatives can adequately represent questions of law and fact that are typical, common, or representative of most members of the absent class. Indeed, the only way a court can certify most medical monitoring claims as class actions is to generally ignore or eviscerate the requirements of most class action rules. Each class member will have his or her own unique health history and background information that must be explored separately. That is the only way for the court to understand how that individual's interaction with the product harmed a protected legal right that merits medical monitoring. These decisions must necessarily be made on an individualized basis. For example, this might occur when all plaintiffs are exposed to a single explosion of a gas at the same time and place for the same length of time. However, even in those types of cases the pre-existing health status

of the plaintiffs, relief efforts immediately during and after exposure to ameliorate the harm, as well as other factors, still might militate in favor of individual adjudication of claims.

It bears repeating that *Blankenship* is not just about tobacco. It establishes a pattern that could be applied to dozens, perhaps hundreds, of industries that manufacture or market products that pose inherent risks to product consumers. Take the dairy industry, for example. A class of healthy consumers of high-fat dairy products, such as butter, ice cream, whole milk, and whipped cream could file a class action against the dairy industry seeking medical monitoring to detect the onset of coronary heart disease because it is well established that dairy products high in fat are also high in cholesterol, which causes coronary heart disease. The class could be defined as all citizens of West Virginia who have consumed a quart of dairy products a month for the last ten years.

Following the *Blankenship* model, the court would not permit any distinction to be made among the class plaintiffs. Those who were thin and exercised daily would be treated the same as those who were obese and never exercised. Those with a family history of heart disease would not be differentiated from those with no such history. It would make no difference whether some plaintiffs were vegetarians and others ate red meat every day. By treating the claims as a class action, the *Blankenship* court essentially nullified all relevant differences among the plaintiffs. Also in line with the *Blankenship* model, all the defendants would be treated the same. A dairy that produced milk only, of which whole milk was 10% of the product line and the remainder was reduced fat milk, would be treated the same as a dairy that produced nothing but butter and whipped cream.

Once the plaintiff has introduced evidence that high-fat dairy products are high in cholesterol, which causes coronary heart disease, and that the defendants produce high-fat dairy products, there is no way for defendants to rebut that evidence or disprove the underlying scientific fact. Under the *Blankenship* model, there also is no way for the defendants to rebut or disprove the risk as to any particular individuals in the plaintiffs' class or to present individual defenses in the defendants' class. The mere fact that the product creates a risk, by itself, seemingly becomes the proposition that governs the whole case. As a matter of law then, should the plaintiffs be entitled to a medical monitoring fund from the dairy industry?

If the answer is yes, then most product manufacturers are either going to go into the health insurance business, they will drop product lines, or go out of business altogether. The fast food industry, cookie manufacturers, the candy industry, most sports equipment manufacturers, alcohol manufacturers and distributors, the beef industry, makers of electrical appliances and devices, all are at risk under the model established in *Blankenship*, and the list could go on and on. Courts intent on setting social policy can use medical monitoring lawsuits as the ideal tool.

Conclusion. The only way to avoid the absurd result that medical monitoring claims invite is to follow the reasoning of the *Blankenship* jurors. Individuals have the personal freedom to chose to use products or not. Along with personal freedom comes responsibility to exercise freedom carefully. When individuals are informed about the risks associated with products available for their use, they must be responsible for assuming the risks of the choices they make.

It is important to distinguish between the mere risk a product creates — which is what a medical monitoring lawsuit is about — and the situation where a product has already harmed an individual, which is the case of the traditional tort. That is not what *Blankenship* concerned. It is not what this article concerns. If a person is harmed, tort law provides a means by which that person may recover for the actual harm.

When a person has not been harmed, but only has concerns about the possible risk that he or she may be harmed, the individual is still free to act to avoid the harm. The responsibility for avoiding the risk is properly placed on the individual and not on the manufacturer. That responsibility is a part of the individual's freedom.