AMERICAN LAW INSTITUTE VOTE ON MEDICAL MONITORING COULD SPUR INCREASED "NO-INJURY" CLAIMS

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US Litigation and Dispute Resolution Alert

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The American Law Institute is scheduled to vote shortly on a new proposed rule for its Restatement (Third) of Torts that would recognize a claim for medical monitoring, even in the absence of physical injury. Companies in all industries should be aware of the proposed rule and consider how it may affect their profile in tort litigation.

If ratified, the rule would see the Restatement, which courts nationwide cite regularly, embrace a minority view of no-injury medical-monitoring claims that could significantly increase the number of such claims filed. As we recently discussed, unsuspecting defendants have seen an uptick in claims based on low-level alleged exposures to various chemicals.[1] There has also been an increase in medical-monitoring claims seeking payment for diagnostic procedures to screen for an alleged increased risk of future harm, even though no injury has manifested (and no injury may ever manifest).

While most states do not recognize independent medical-monitoring causes of action—as compared to medical-monitoring costs as a form of damages from another tort claim, which can be recoverable—the proposed rule to the Restatement could change that landscape significantly going forward. The text of the proposed rule to the Restatement is as follows:

§ __. Medical monitoring

An actor is subject to liability for the expenses of medical monitoring, even absent manifestation of present bodily harm, if all of the following requirements are satisfied:

1. the actor has exposed a person or persons to a significantly increased risk of serious future bodily harm;
2. the actor, in exposing the person or persons to a significantly increased risk of serious future bodily harm, has acted tortiously, the tortious conduct is a factual cause of the person's need for medical-monitoring, and the monitoring is within the actor's scope of liability;
3. a monitoring regime exists that makes expedited detection and treatment of the future bodily harm both possible and beneficial;
4. the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and
5. the prescribed monitoring regime is reasonably necessary, according to generally accepted contemporary medical practices, to prevent or mitigate the future bodily harm.

The proposed rule raises several issues.

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First, the rule is not a "restatement" of the law in the majority of jurisdictions. Courts in 28 states have rejected no-injury medical-monitoring claims,[2] as has the US Supreme Court for the federal common law.[3]

Second, while 13 states and the District of Columbia acknowledge no-injury medical-monitoring claims to some degree, none of them goes as far as the proposed rule. For example, Vermont's statute authorizing no-injury medical-monitoring claims limits the claims to exposure to a "proven toxic substance."[4] A no-injury medical-monitoring claim in Pennsylvania requires proof of "exposure greater than normal background levels to a proven hazardous substance caused by a defendant's negligence."[5] And West Virginia recently passed legislation that eliminates no-injury medical-monitoring claims alleging exposure to asbestos or silica.[6]

The remaining nine states have not sufficiently addressed the issue of no-injury medical-monitoring claims, which precludes a definitive statement of their view on the topic.[7]

Third, the proposed rule would reduce the determinable injury—an axiomatic tort element—to the mere risk of harm, which opens the door to much more speculative forms of evidence.[8] As noted above, courts in the majority of states have already rejected no-injury medical-monitoring claims. Most of them have reasoned, at least in part, that permitting no-injury medical-monitoring claims would eliminate any limiting principle on a defendant's scope of potential tort liability. Because of the esteem courts have for the Restatement, however, the proposed rule could significantly alter how courts across the country analyze injury and risk.

For these reasons, the proposed rule has the potential to result in a dramatic shift in tort litigation that could result in claims that would otherwise be dismissed in most jurisdictions. Because of this potential outcome, all interested parties should continue to closely monitor developments surrounding the vote on the proposed rule.

FOOTNOTES

[1] *See* PFAS Litigation: Who's Next? (13 Apr. 2023); Litigation Minute: Ethylene Oxide—What It Is and Why You Should Care (7 Feb. 2023); Litigation Minute: Ethylene Oxide—Could Your Company Be a Litigation Target? (22 Feb. 2023).

[2] The 28 states that have rejected no-injury medical-monitoring claims are Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin.

[3] *See Metro-N. Commuter R.R. Co., v. Buckley*, 521 U.S. 424, 425 (1997).

[4] VT. STAT. TIT. 12, § 7201.

[5] *Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 145 (Pa. 1997).

[6] W. VA. CODE § 55-7G-4(a).

[7] The nine states without a clear position on whether no-injury medical-monitoring claims are cognizable are Alaska, Hawaii, Idaho, Indiana, Kansas, Montana, New Mexico, South Dakota, and Wyoming.

[8] This would pose an additional issue for cases in federal court, where a cognizable injury-in-fact must exist to satisfy Article III's standing requirement. *See* Where's the Harm in Class Certification? The United States

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Supreme Court Confirms: It Must Be in Plaintiffs' Evidence (29 June 2021).

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