



Products Liability Alert

Developments in products liability law

A publication of Nixon Peabody LLP

October 23, 2009

Donovan v. Philip Morris USA, Inc.: Massachusetts Supreme Judicial Court recognizes “medical monitoring” claims in limited circumstances

By Joshua Barlow, Christopher Allen, Joseph J. Leghorn

On October 19, 2009, the Massachusetts Supreme Judicial Court (the “SJC”) issued its decision in *Donovan v. Philip Morris USA, Inc.*, a closely watched case addressing whether a claim for medical monitoring, absent manifest illness or disease, is recognized in Massachusetts. The SJC held that the cost of medical monitoring is recoverable in tort where it is established that there exist subclinical¹ changes with an attendant increase in the risk of contracting a serious illness or disease from exposure to a known hazardous substance. The decision is a compromise between the law of those jurisdictions requiring a present manifest physical injury before finding a claim for medical monitoring and those that have allowed plaintiffs to proceed without physical injuries on the basis of exposure to known hazardous substances. Nevertheless, *Donovan* creates a whole new type of claim that may be pursued in Massachusetts and adds Massachusetts to the minority of jurisdictions that recognize forms of “medical monitoring” claims.

The plaintiffs’ claims

Donovan involves assertions by a putative class of Massachusetts residents who, among other things, share a history of chronically smoking Marlboro cigarettes, but have not been diagnosed with lung cancer and are not under investigation by a physician for suspected lung cancer. Further, the plaintiffs do not allege any present manifest smoking-related disease resulting from their use of Marlboro cigarettes. Rather, they report that, due to smoking, they have physiological changes in lung tissue that puts them at higher risk for cancer. The plaintiffs allege that Philip Morris wrongfully

¹ The court defines “subclinical” as follows: “denoting the presence of a disease without manifest symptoms; may be an early stage in the evolution of a disease.”

designed, marketed, and sold Marlboro cigarettes and that smoke from Marlboro cigarettes caused damage and injury to the tissues and structures of their lungs.² Rather than money damages, the plaintiffs seek to compel Philip Morris to provide them with a program of medical surveillance for early detection of lung cancer using a technique known as low-dose computed tomography (“LDCT”) chest scans.

The question certified

Plaintiffs brought their action in federal court in Boston. Philip Morris sought dismissal of the action pursuant to Fed. R. Civ. P. 12(c), arguing that Massachusetts tort law requires a plaintiff to allege and prove a present physical injury coupled with objective symptoms; therefore, because plaintiffs could not make such a showing, their claims were not cognizable. The United States District Court for the District of Massachusetts certified to the SJC the question of whether “the plaintiffs’ suit for medical monitoring, based on subclinical effects of exposure to cigarette smoke and increased risk of lung cancer, state a cognizable claim and/or permit a remedy under Massachusetts law.” The SJC answered in the affirmative.³

Outward manifestation of physical harm is not required

At first blush, *Donovan* appears in line with those cases requiring only exposure to a hazardous substance before finding a claim for medical monitoring. Indeed, the Court expressly declined to entirely relax the requirement of proof of physical harm manifested by objective symptomatology, announced in *Payton v. Abbot Labs*, 386 Mass. 540 (1982), to claims for medical monitoring. The *Payton* court held that Massachusetts did not recognize a right of action for emotional distress caused by a defendant’s negligence, in the absence of any evidence of physical harm, where such distress was the result of an increased statistical likelihood that the plaintiff will suffer serious disease in the future. *Id.* at 545.

The *Payton* plaintiffs were the female children of women who had been proscribed the drug diethylstilbestrol (“DES”), marketed as a preventative for miscarriages, while pregnant with the plaintiffs. *Id.* at 542. DES was later identified as a cause of a rare but highly malignant form of cervical cancer and other reproductive organ abnormalities in female offspring of the women who ingested it. *Id.* Many of the plaintiffs had not contracted cervical cancer and did not exhibit clinical signs of anatomical abnormalities. *Id.* However, certain studies suggested that all were at statistically significant increased risk for these conditions as compared with the general population. *Id.* at 542-543. The *Payton* plaintiffs sought recovery for the emotional distress they suffered in the face of these risks and preventative treatments they were required to undergo. *Id.* at 543. The *Payton* Court

² Specifically, the plaintiffs alleged injuries including gross changes to their lung tissues, such as byproducts of inflammatory response, impairment of mucus clearance, and bronchoconstriction as well as subcellular changes within their lungs, such as genetic damage of their airway cells and impairment of mechanisms that repair such genetic damage.

³ The United States District Court for the District of Massachusetts also certified the question of whether the statute of limitations barred plaintiffs’ claims. Answering this question in the negative, the SJC noted that the statute of limitations begins to run only when the plaintiffs’ increased risk of cancer triggers a need for available and generally accepted diagnostic testing. Because the record before the SJC did not establish when LDCT technology appeared or whether any other remedy was available to the plaintiffs before that time, the SJC qualified its answer by stating that the issue must be resolved on a motion for summary judgment or at trial.

declined to allow recovery for the negligent infliction of emotional distress absent proof that: (1) the plaintiff suffered physical harm that was caused by, or caused, the emotional distress alleged; (2) the alleged emotional distress is reasonably foreseeable; and (3) the physical harm is “manifested by objective symptomatology and substantiated by expert medical testimony.” *Id.* at 556.

Central to the SJC’s rationale in *Payton* was a desire to safeguard against false claims. In *Donovan*, the SJC acknowledged this core principle. However, it found those concerns to be allayed given plaintiffs’ evidence of physiological changes caused by smoking and expert medical testimony that, because of these changes, they are at greater risk of cancer due to the negligence of Philip Morris. In particular, the SJC noted that, unlike the plaintiffs in *Payton* who offered no evidence of any physiological changes due to DES exposure, the *Donovan* plaintiffs offered proof of gross changes to their lung tissues, impairment of normal lung function, and subcellular changes, such as genetic damage. On this basis, the *Donovan* court concluded that the plaintiffs had stated a viable claim. Thus, *Donovan* appears to posit that objective evidence of subclinical changes that cause substantial increase in the risk of contracting a particular serious illness or disease is sufficient to establish “injury” in tort.

Exposure to a known hazardous substance is insufficient

It should be noted, however, that the requirement of subclinical injury/change with a corresponding increase in the risk of disease likely distinguishes *Donovan* from those decisions that have allowed plaintiffs’ medical monitoring claims to proceed without evidence of physical injuries on the basis of exposure to known hazardous substances. Several jurisdictions, for example, allow recovery for medical monitoring, presuming a defendant’s negligence and the merits of the monitoring modality, where the plaintiff “has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.” *See e.g. Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133 (W. Va. 1999) (recognizing claim for plaintiffs exposed to toxic substances, including PCB compounds, as a result of defendants maintaining a cullet pile containing debris from the manufacture of light bulbs); *Meyer v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007) (recognizing claim for children exposed to lead due to defendant smelter operators); *see also* Samuel Goldblatt & Laurie Styka Bloom, “A Primer on Medical Monitoring,” 48 A.L.I. A.B.A. 499 (2000). In addition, the Supreme Court of California, in *Potter v. Firestone Tire & Rubber Co.*, held that plaintiffs need only demonstrate that “the need for future monitoring is a reasonably certain consequence of a plaintiff’s toxic exposure and that the recommended monitoring is reasonable” to recover medical monitoring costs. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (recognizing claim for plaintiffs who lived adjacent to landfill). Although the *Donovan* court did not squarely address this issue—stating it should be “left for another day”—the SJC’s continued concern about false claims, particularly those involving purported emotional injury, may temper any move by the court to an exposure-based remedy.

Conclusion

In recent years, the SJC has demonstrated a pattern of interpreting plaintiffs’ rights more expansively in cases involving cigarette manufacturers as defendants. *See, e.g., Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381 (2001) (broadly interpreting rights under the Massachusetts consumer protection statute); *Haglund v. Philip Morris, Inc.*, 446 Mass. 741 (2006) (significantly limiting the “unreasonable misuse” defense). Consequently, the impact of *Donovan*, and the likelihood of its application beyond tobacco litigation, will greatly depend on future cases interpreting the decision. While the Court sets

forth clear requirements for medical monitoring claims in Massachusetts, open questions certainly remain. Because these issues were evaluated in the context of a motion to dismiss, the Court necessarily presumed the existence of alleged “subcellular changes” to the plaintiffs’ lung tissues and a causal connection between those changes and increased risks of serious disease. What specific proof of physiological change and attendant risk of disease is required, and whether such traditional requirements of tort law will be stringent enough to quell fears of a potentially limitless pool of claimants, remains to be seen. In addition, the SJC strongly suggests that resolution of these issues requires an analysis on an individualized basis,⁴ which would seem to make class certification of Massachusetts-based medical monitoring claims untenable. *See, e.g. In Re Fosamax Products Liability Litigation*, 248 F.R.D. 389 (S.D.N.Y. 2008); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 405 (E.D. La. 2006). Those wary of a slippery slope will undoubtedly warn of claims for indefinite prophylactic monitoring by those suffering from “subclinical changes” as innocuous as high cholesterol or hypertension. However, the *Donovan* court is mindful of the policy concerns aroused by claims for medical monitoring and sets forth a logical compromise between the risk of encouraging frivolous claims and allowing genuinely injured persons to recover expenses without overcoming the “insurmountable problems of proof” imposed by precedent.

For further information on the information contained in this *Alert*, please contact your regular Nixon Peabody attorney or:

- Joshua Barlow at 617-345-6123 or jbarlow@nixonpeabody.com
- Christopher Allen at 617-345-1261 or callen@nixonpeabody.com
- Joseph J. Leghorn at 617-345-1114 or jleghorn@nixonpeabody.com

⁴ The SJC states that “*each plaintiff* must prove ... subcellular changes that substantially increase the risk of disease or illness ...” with “competent expert testimony” (emphasis supplied).