

## Medical Monitoring Complaint Held Insufficient

February 15, 2012 by Sean Wajert

A federal trial court last week dismissed a medical monitoring claim by an employee of a pipe cleaning company pursuant to *Twombly*. [Royal v. Exxon Mobil Corp.](#), No. 12-00081 (E.D. La., 2/6/12).

Junius Royal sued several oil companies for damages in connection with oil pipe cleaning services that he allegedly performed. Plaintiff asserted that the oil pipes he cleaned contained carcinogenic radioactive materials commonly referred to as naturally occurring radioactive material, or "NORMS." Plaintiff claimed that the defendants knew about the radioactive material in the pipes, but failed to warn. He thus became exposed to dangerously high levels of radiation during his work, and he now has a substantially increased risk of developing cancer. He sought medical monitoring. Defendants moved to dismiss plaintiff's medical monitoring claim for failure to state a claim on which relief could be granted.

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007)). Factual allegations must be enough to raise a right to relief above the speculative level. In deciding whether dismissal is warranted, the court will not accept conclusory allegations in the complaint as true. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

To prove common law medical monitoring claim under Louisiana law (there is a separate statutory claim), a plaintiff must show: (1) Significant exposure to a proven hazardous substance, (2) As approximate result of this exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease, (3) Plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease, (4) A monitoring procedure exists that makes the early detection of the disease possible, (5) The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles, (6) The prescribed monitoring regime is different from that normally recommended in the absence of exposure, and (7) There is some demonstrated clinical value in the early detection and diagnosis of the disease. *Bourgeois v. A.P. Green Indus.*, 716 So. 2d 355, 360-61 (La. 1998).

Here, plaintiff failed to allege or urge that he had a manifest physical injury or mental injury or disease, as required by the statute. The fact that he may have been exposed to radiation was not, in and of itself, sufficient. Further, the plaintiff failed to plead facts which bear directly on several of the common law factors. For example, plaintiff made no mention of what type of monitoring he was looking for, who prescribed him the monitoring, or what the efficacy of the monitoring might be.

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