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New York's Highest Court Does Not Recognize Claims for Medical Monitoring — *For Now*: Using "Phobia" Claims as a Backdoor to "Medical Monitoring?"

By Carl J. Schaerf and Allison N. Fihma

In *Caronia v. Philip Morris USA, Inc.*, 2013 N.Y. LEXIS 3476, 2013 N.Y. Slip. Op. 8372 (December 17, 2013), the New York Court of Appeals, in a 4-2[1] decision with sharp and barbed contrasts between majority and dissent, ruled that New York ***does not*** recognize an independent medical monitoring cause of action. No state decision had ever gone as far as to recognize such a claim under New York law (at least not as an independent claim in the absence of proven physical injury or property damage), but there were a myriad of Federal decisions (incorrectly) predicting that New York would recognize an ***independent*** claim for medical monitoring. *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 538-539 (S.D.N.Y 2007); *Gibbs v. E.I. DuPont De Nemours & Co.*, 876 F. Supp. 475, 478-479 (S.D.N.Y. 1995); *Beckley v. United States*, 1995 WL 590658, *4, 1995 US. Dist. LEXIS 14599, *9 (W.D.N.Y. 1995), *but see, In re World Trade Center Disaster Site Litig.*, 2006 WL 3627760, *3 (S.D.N.Y. 2006).

The word "independent" is significant. As discussed below, New York has allowed "medical monitoring" claims to attach as elements of consequential damage to ordinary negligence and property damage claims. It also allows for "medical monitoring" in the limited instances where a "phobia" claim is allowable (cancer "phobia," asbestos "phobia," etc.). The sharp split between majority and minority, as well as the conciliatory nature of the majority opinion, suggests as much.

The thrust of this article is that the law on "phobia" is likely to become a major focus of the plaintiff's bar's efforts to convince the New York Courts to adopt a medical monitoring claim. It may well prove the exception that becomes the rule.

Caronia was styled as a class action in Federal Court involving "current and/or former smokers of Marlboro cigarettes with histories of 20 pack-years or more."[2] Ultimately, the Second Circuit opted to certify the question of whether medical monitoring is recognized, as a stand-alone claim, under New York law to the Court of Appeals, as well as related questions concerning accrual which turned out to be academic given the conclusion by the Court of Appeals that no such claim exists.

The *Caronia* majority admitted having the power to find a claim of medical monitoring, and acknowledged that there are policy reasons to do so. However, they were afraid of opening the floodgates, and were also concerned that defendant resources best committed to paying those with actual injuries would instead be diverted to paying for costs of monitoring (and, by extension, sizeable fees for lawyers bringing said claims).

The dissent was vigorous:

> Rarely are we presented with a case more worthy of the age-old maxim that equity will not suffer a wrong without a remedy. Where, as here, it is within the Court's power to provide a vehicle for plaintiffs to seek equitable relief capable of forestalling profound suffering and death, judicial hesitance and legislative deference only serve to thwart the ends of justice. Because I believe that overall fairness demands that New York recognize an independent equitable medical monitoring cause of action for smokers who can prove that their enhanced risk of cancer was caused by the wrongful conduct of tobacco companies, I dissent and would answer the first certified question in the affirmative.

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1. Justice Smith did not take part in the decision.

2. A pack-year is the equivalent of smoking one pack of Marlboro cigarettes a day for a year.

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While no New York State Court had ever previously recognized "medical monitoring" as an independent tort, the law as it exists currently allows "medical monitoring" without proof of a physical injury or property damage under the rubric of "phobia." *Allen, et. al. v. General Electric Company and Black & Decker*, 32 A.D. 3d 1163, 1165, 821 N.Y.S.2d 692 (4th Dep't. 2006).

A phobia claim is not easy to plead or prove in New York, and demonstrating a "rational basis" for the phobia is most assuredly not a facile task. The Second Department in *Wolff v. A-One Oil, Inc., et. al.*, 216 A.D. 2d 291, 627 N.Y.S.2d 788 (2d Dep't. 1995) held:

> [i]n order to maintain a cause of action for fear of developing cancer following exposure to a toxic substance like asbestos, a plaintiff must establish both that he was in fact exposed to the disease causing agent and that there is a "rational basis" for his fear of contracting the disease. This "rational basis" has been construed to mean the clinically demonstrable presence of asbestos fibers in the plaintiff's body, or some indication of asbestos induced disease.

Id., at 292.

The Third Department has held that — particularly in the area of asbestos contamination — "proof of mere exposure to the fibers and even evidence of contamination of the lungs thereby, does not necessarily indicate that the contaminated party will eventually develop any asbestos-related disease." *Doner v. Ed Adams Contracting, Inc.*, 208 A.D.2d 1072, 617 N.Y.S.2d 565 (3d Dep't. 1994). In *Doner*, the plaintiff's fear of cancer was not reasonable where the medical proof demonstrated that the plaintiff did not currently suffer any physical ailment as a result of exposure to asbestos, and his test results revealed no signs that pointed to likelihood of developing an asbestos cancer.

None of the plaintiffs in *Caronia* had been diagnosed with lung cancer, nor were they currently "under investigation by a physician for suspected lung cancer." Presumably, therefore, based on the class definition, none could have asserted a plausible claim for "cancer phobia" under the standards set forth above.

The leading New York case on fear of disease, *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958), established a claim for fear of developing cancer where a plaintiff can tie fears of developing cancer to a distinct event which could cause a reasonable person to develop a fear of cancer. In that case, a plaintiff had a fear of developing cancer after she was burned during radiation therapy. There, however, a plaintiff had an actual physical injury, and a claim could be brought on a showing of a rational connection between the physical injury and the fear of developing cancer.

Despite *Ferrara*, "New York Courts have rejected cancer phobia and cancer-like phobia claims … where there were no chemical manifestations of the disease and no reasonable basis that the disease would develop… [However] where medical proof is sufficient, phobia claims are compensable." *Tischler v. Dimenna as Executrix of the Estate of Robert. L. Lawson*, 160 Misc. 2d 525, 609 N.Y. S. 1002 (N.Y. Sup. Ct., Westchester Co., 1994).

Courts in New York, while consistently rejecting medical monitoring as to those with no physical injury, do regularly allow it as a remedy consequential to a "phobia" claim:

> In order to recover medical monitoring costs following exposure to a toxic substance…, a plaintiff must establish both that he and she was in fact exposed to the disease causing agent and that there is a rational basis for his or her fear of contracting the disease. The rational basis has been construed to mean the clinically demonstrable presence of the toxic substance in the plaintiff's body or some indication of toxin induced disease…

Allen, et. al. v. General Electric Company and Black & Decker, 32 A.D. 3d 1163, 1165, 821 N.Y.S.2d 692 (4th Dep't. 2006). *See also Baity v. General Electric Co.*, 86 A.D.3d 948 (4th Dep't. 2001).

The Court of Appeals was not blind to the "phobia" line of cases, and tried to anticipate the argument, citing *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130 (4th Dep't. 1984), a case involving a motion by the plaintiffs seeking class certification to bring toxic exposure claims against a landfill owner, and, in particular, seeking recovery of future medical monitoring costs (*Id.*, at 131). The Court's distinction of *Askey* is that the decision dealt with accrual rather than whether the claim itself is recognized:

> Given that the injuries in *Askey* and *Schmidt* were deemed (for accrual purposes) to have been sustained at the time of exposure, it is understandable why the courts in those cases would have concluded that any and all damages flowing from

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> those 'injuries,' including damages for medical monitoring, would be potentially recoverable as consequential damages.

This is not much of a distinction, and the real question is whether medical monitoring will now be allowed as an adjunct to an otherwise viable "fear" or "phobia" claim. The Court of Appeals does not answer this question, and sets this up as a potential exception to swallow the newly announced rule that "medical monitoring" will not be accepted as a stand-alone claim.

The stakes in "medical monitoring" litigation are too big for this to be the last effort. The Court has left numerous openings, including a conciliatory majority opinion, a vigorous dissent, and most critically a "phobia" jurisprudence that is open to much interpretation and expansion. The victory felt by the defense bar in the wake of *Caronia* may be short lived, and it is important to continue to monitor the phobia cases and to prepare to combat any new arguments seeking to create a successful path to medical monitoring relief. ◆

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