



STATE FOCUS

Vol. 14 No. 27

December 17, 2004

WEST VIRGINIA SUPREME COURT SETS HIGH BAR FOR PLAINTIFFS IN MEDICAL MONITORING CASES

by

Sean Wajert

In a decision of importance to members of the pharmaceutical, chemical, and consumer product industries — any company that makes a product with a potential toxic effect — the Supreme Court of Appeals of West Virginia in *In re Tobacco Litigation (Medical Monitoring Cases)*, 600 S.E.2d 188 (2004), affirmed a jury verdict rejecting the medical monitoring claims of a class of West Virginia smokers. Medical monitoring claimants seek compensation now for costs of future medical tests or surveillance procedures reasonably necessary to early detect a disease that the claimant does not have, but is at increased risk of contracting, allegedly because of defendant's wrongful conduct.

In this case, originally known as *Blankenship v. R.J. Reynolds Tobacco, et al.*, the trial court had certified a class consisting of approximately 250,000 currently healthy smokers in the state of West Virginia. The class sought from the major domestic cigarette makers, including Phillip Morris USA, Inc. and R.J. Reynolds, medical monitoring for smoking-related diseases under the doctrine enunciated in *Bower v. Westinghouse Electric Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999), the case in which West Virginia first recognized a claim for medical monitoring. Under *Bower*, a medical monitoring plaintiff must prove that he or she has, relative to the general population, been significantly exposed to a proven hazardous substance through the tortious conduct of the defendant and that, as a proximate result of the exposure, plaintiff suffered an increased risk of contracting a serious latent disease. That increased risk of disease must make it reasonably necessary for the plaintiff to undergo periodic diagnostic medical testing different from what would be prescribed in the absence of exposure, and monitoring procedures must exist that make the early detection of disease possible.

West Virginia's version of the doctrine is typical, in many respects, of the minority of jurisdictions which recognize medical monitoring claims. Notably, however, West Virginia's test does not require that the detection of disease benefit the plaintiff: there is no requirement that a cure or effective treatment be available for the problem detected.

Sean Wajert is a partner at Dechert LLP, and the chair of its Mass Torts & Product Liability practice group. Dechert was part of the team representing the defendants in the *Blankenship* case. The views expressed herein are solely those of the author and not of any client of the firm.

The trial court bifurcated the trial with a first phase consisting primarily of the *Bower* elements and punitive damages.¹ The first trial ended in a mistrial. In the three-month retrial, the jury rejected the medical monitoring claim despite finding that cigarette smoke contained a proven hazardous substance, all class members had a significant exposure to it, all members of the class had an increased risk of contracting a smoking related disease, and plaintiffs' proposed medical monitoring procedures make early detection of lung cancer and chronic obstructive pulmonary disease (COPD) possible. The jury found that the increased risk of lung cancer and COPD did not make it reasonably necessary for all class members to undergo periodic diagnostic medical exams different from what would be prescribed in the absence of exposure. The jury also rejected plaintiffs' claim of tortious conduct by defendants.

Because a plaintiff has to prove each and every *Bower* element, the Supreme Court focused on the plaintiffs' failure to prove that the proposed monitoring was reasonably necessary. Indeed, the appellants failed to mount a "serious challenge to the jury's conclusion," on this element. *Id.* at 193. *Bower* holds that in order for a plaintiff to establish a cause of action for medical monitoring, the testing sought by the plaintiff must be something that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent. The Supreme Court observed that the jury was free to reject plaintiffs' proposed CT scans and spirometry testing in light of the evidence that "no federal or state agency, no national or international health organization, and no authoritative group of physicians had ever recommended such a monitoring regimen for past or current smokers." *Id.* Thus, it was not reasonably necessary.

The Court went out of its way to respond to the numerous "critics of medical monitoring" who in the view of the Court "obviously do not understand the rationale for such a cause of action.... Common sense should suggest that these medical monitoring costs be borne by the negligent [defendant] and not the innocent victim of the toxic exposure." *Id.* at 194 n.3. Nevertheless, the Court suggested that "*Bower* establishes an extremely high bar for a plaintiff to overcome before there can be any recovery for medical monitoring." *Id.* at 194.

The dissent of Chief Justice Maynard speculated that the trial court's exclusion of evidence about defendant's alleged conduct would somehow have altered not only the finding on the conduct element, but also the jury finding on the reasonable necessity of medical testing. In so arguing, the dissent misunderstood that the plaintiffs had chosen to not pursue these evidentiary theories because they potentially raised predominating individual issues which would jeopardize class certification. The dissent ignored the fact that the reasonable necessity prong raises a scientific issue, was tried as a scientific question, and was charged to the jury as a battle of the scientific experts.

In re Tobacco (Medical Monitoring) is noteworthy as the first substantive decision on medical monitoring in West Virginia since the cause of action was recognized. Moreover, it is one of the first appellate decisions analyzing the medical monitoring claim after a jury verdict. The decision is one of the first appellate pronouncements in the context of a jury verdict on a medical monitoring class action claim. Importantly, the Court recognized that each element of the medical monitoring cause of action is distinct; the fact that a medical test can detect a disease early does not automatically make that test reasonably necessary for all class members. It affirmed the requirement that plaintiffs prove each and every element of the medical monitoring claim, and that failure on any one would support a defense verdict. The Supreme Court of Appeals recognized that in a class context, each element has to be proven as to all class members. While reaffirming the existence of this problematic cause of action for plaintiffs without traditional injuries, it at least postulated an "extremely high bar" for a future plaintiff seeking medical monitoring in the state of West Virginia.

¹On appeal, the Supreme Court of Appeals made a preliminary observation, somewhat surprising given the mass tort trials held in the state, that while bifurcation of issues in a trial plan "may present a superficial appeal," unitary liability and damages proceedings are "in most cases both more fair and more efficient." 600 S.E.2d at 191, n.2.