HUNTON& WILLIAMS

EMERGING ISSUES IN CONSUMER LITIGATION

ALERT FROM THE LITIGATION TEAM

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New York Federal Court Holds New York Law Allows Medical-Monitoring Claim

A federal court in New York has held that New York law recognizes a claim for medical monitoring, although the New York Court of Appeals has never held that such a claim is available. The court, in *Sorrentino v. ASN Roosevelt Center LLC*, 2008 WL 4410369 (E.D.N.Y. Sept. 29, 2008), denied the defendants' motion to dismiss a class action making a claim for medical monitoring based on the plaintiffs' exposure to mold. The defendant landlord had told the plaintiffs that mold had been found in their apartment complex and that they would have to vacate during remediation. The tenants sued, claiming that their leases had been wrongfully terminated and separately asserting a claim for medical monitoring, alleging that defendants' negligence had caused them a reasonable apprehension of serious illness from mold exposure.

The defendants moved to dismiss, arguing that under New York law medical monitoring is a remedy, not an independent cause of action. Further, they argued that even if such a claim existed, plaintiffs had not alleged sufficient exposure to allow that claim to proceed. *Id.* at *2.

The district court denied the defendants' motion. Although acknowledging that the New York Court of Appeals has never expressly recognized a cause of action for medical monitoring, the court cited New York intermediate appellate court decisions that, the court held, had allowed such a claim. *See Allen v. General Elec. Co.*, 32 A.D.3d 1163 (4th Dep't 2006); *Dangler v. Town of Whitestown*, 241 A.D.2d 290 (4th Dep't 1998); *Abusio v. Consolidated Edison Co. of N.Y.*, 238 A.D.2d 454 (2d Dep't 1997). The court also noted that another New York federal court had recently predicted that the New York Court of Appeals would recognize an independent cause of action for medical monitoring. *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 538 (S.D.N.Y. 2007).

The court also rejected the defendants' contention that the plaintiffs had not adequately alleged exposure. Citing the Fourth Judicial Department's decision in *Allen*, the court held that in medical-monitoring cases, a plaintiff must plead two

elements: (1) that she was actually exposed to the disease-causing agent and (2) that there was a "rational basis" for her concern that she would contract a disease. A plaintiff can plead such a rational basis by alleging a "clinically demonstrable presence" of the substance in the plaintiff's body or "some physical manifestation of toxic contamination." *See Allen*, 32 A.D.3d at 1165.

The *Sorrentino* court held that the plaintiffs had pleaded both elements. The exposure requirement was met by the allegation that mold was detected in and around the plaintiffs' apartments, and the plaintiffs pleaded a rational basis for their concern by alleging that some persons exposed to the mold had developed exposure-related health conditions.

Despite the court's reliance on decisions from New York intermediate appellate courts, those decisions do not unequivocally support the conclusion that New York law recognizes an independent cause of action for medical monitoring — i.e., a cause of action that does not first require a showing of an injury caused by the exposure. *See Allen*, 32 A.D.3d at 1164 (class making monitoring claim included two members alleging physical harm); *Dangler*, 241 A.D.2d at 293 (monitoring claim based on claim for negligent infliction of mental suffering); *Abusio*, 238 A.D.2d at 454 (recognizing monitoring damages recoverable on claim for emotional distress).

Moreover, despite the court's citation to a 2007 S.D.N.Y. case predicting that the New York Court of Appeals would recognize a medical-monitoring claim, other New York federal courts have held to the contrary. *E.g.*, *In re World Trade Center Disaster Site Litig.*, 2006 WL 3627760, at *3 (S.D.N.Y. Dec. 12, 2006) (holding monitoring "do[es] not constitute [an] independent cause[ ] of action").

The debate over medical monitoring in New York presents similar issues to those being considered in courts across the country. *Compare, e.g.*, *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 429 (W.Va. 1999) (recognizing monitoring as independent cause of action), *with Sinclair v. Merck & Co.*, 948 A.2d 587, 588-89 (N.J. 2008) (holding monitoring expenses not available under New Jersey's Product Liability Act when no manifest injury alleged), *Lowe v. Philip Morris USA Inc.*, 183 P.3d 181, 182 (Ore. 2008) (denying monitoring claim when no physical injury was alleged), *and Hinton ex rel. Hinton v. Monsanto Co.*, 813 So.2d 827, 828 (Ala. 2001) (same). Until the New York Court of Appeals addresses the issue, or the issue is carefully and thoughtfully addressed in a decision from an intermediate appellate court, it is likely that courts applying New York law will continue to be split on the existence and elements of a medical-monitoring claim.