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Ill. Ruling Bolsters Trend Against No-Injury Monitoring Claims

By **John Ewald and Matthew Bush** (October 16, 2020, 4:20 PM EDT)

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Courts have been divided for decades on whether to allow claims for medical monitoring, even when a plaintiff is not suffering a present physical injury. But many jurisdictions have not yet definitively ruled on the issue. And in some jurisdictions, no court — state or federal — has weighed in on the question at all.

This can be particularly challenging for federal courts in such jurisdictions, which must follow the Erie doctrine — established in the U.S. Supreme Court's 1938 decision in Erie Railroad Co. v. Tompkins — and predict how the state's highest court will rule.[1]

Such "Erie guesses" are particularly complex in the context of nationwide class actions, where a court may be asked to predict how not just one state supreme court would rule, but how all of them would.

The Illinois Supreme Court recently picked sides on the issue in Berry v. City of Chicago.[2] The court prohibited no-injury medical monitoring claims. The Sept. 24 decision puts even further weight on the modern trend toward rejecting these kinds of claims, and could pull more jurisdictions into that camp — making certification of nationwide medical monitoring classes even more difficult.

No-Injury Medical Monitoring Claims

No-injury medical monitoring claims are typically brought when a plaintiff alleges that they were exposed to a toxic substance that can cause a latent disease. Immediately after the exposure, the plaintiff doesn't have any symptoms. So instead of suing for harm that hasn't happened yet — and may never happen — the plaintiff files a claim for medical monitoring.

The claim seeks the costs of medical expenses associated with monitoring for the onset of the disease. These kinds of cases are often brought as class action. The financial risk to companies can be significant if a class is certified and the company is ordered to pay monitoring costs for thousands of class members.

The Modern Trend to Reject No-Injury Medical Monitoring Claims

In order to present arguments regarding whether a court should or should not permit no-injury medical monitoring claims, it is important to understand the historical context of how these claims have been handled over the past 35 years. For a time, courts tended to permit these claims, but the trend has since swung the other way.

In 1984, the U.S. Court of Appeals for the D.C. Circuit ruled that, under Washington, D.C., law, a plaintiff could bring "a cause of action for diagnostic examinations in the absence of proof of actual injury" in the case Friends for All Children Inc. v. Lockheed Aircraft Corp.[3]

After Friends for All Children, a number of courts in the late 1980s and the 1990s permitted these kinds of claims. To date, state supreme courts have permitted them in California, Maryland, Missouri, Nevada, Pennsylvania, Utah and West Virginia.[4]

For example, the West Virginia Supreme Court ruled that "[t]he 'injury' that underlies a claim for medical monitoring — just as with any other cause of action sounding in tort — is the invasion of any legally protected interest," and so the "the exposure itself and the concomitant need for medical testing constitute the injury."[5] These courts vary with respect to the circumstances in which a medical monitoring claim can be brought, the elements necessary to bring the claim, and whether it is even an independent claim at all, or simply an element of damages based on a normal tort.

It seemed at one time that many more states might follow suit.[6] Parties argued that the "trend is to accept such claims."[7] That trend, however, not only never materialized over the last 20 years, it changed directions. Now, the "trend among courts that have taken up the issue has been to reject such claims."[8]

This shift began after the U.S. Supreme Court's 1997 decision rejecting no-injury medical monitoring claims in Metro-North Commuter Railroad Co. v. Buckley, a Federal Employers' Liability Act case.[9] Following Buckley, state supreme courts and legislatures have rejected no-injury medical monitoring claims in Alabama, Kentucky, Louisiana, Michigan, Mississippi, New York and Oregon.[10]

For example, the Michigan Supreme Court held that "present harm to person or property is a necessary prerequisite to a negligence claim," stating that no-injury medical monitoring claims represent a "departure from fundamental tort principles and a cavalier disregard of the inherent limitations of judicial decision-making."[11] The majority of lower state courts and federal courts applying state law have similarly prohibited the claims, particularly since 2000.[12]

States do not always fall neatly into one camp or the other. Massachusetts does not require physical symptoms, but does require "at least a corresponding subcellular change" in order to establish a medical monitoring claim.[13] New Jersey in 1987 permitted no-injury medical monitoring claims brought under its Tort Claims Act.[14] But then — reflecting the changing tides — it rejected them in 2008 for claims brought under its Products Liability Act.[15]

Berry v. Chicago

Enter Berry v. City of Chicago. This case was a class action brought by residents of Chicago who claimed they were exposed to lead from Chicago's water supply. The plaintiffs' complaint did not allege that they or the class members were suffering from symptoms of lead poisoning.[16] They instead brought a claim for negligence, seeking the establishment of a trust fund to pay for the medical monitoring of all the class members.[17]

The Illinois Supreme Court rejected the claim as a matter of law, joining the ranks of state supreme courts to prohibit no-injury medical monitoring claims. The court stated that the "long-standing and primary purpose of tort law is not to punish or deter the creation of [a] risk but rather to compensate victims when the creation of risk tortuously manifests into harm."[18]

The court also reasoned that there are "practical reasons for requiring a showing of actual or realized harm" because it "establishes a workable standard for judges and juries," "protects court dockets from becoming clogged with comparatively unimportant or trivial claims," and "reduces the threat of unlimited and unpredictable liability."[19]

The court held that "an increased risk of harm is not an injury," and so a "plaintiff may not recover solely for the defendant's creation of an increased risk of harm."[20] As a result, the plaintiffs' negligence claim was not viable: "[C]ount I of plaintiffs' complaint [negligence] alleges only that the City caused an increased risk of harm and, therefore, does not allege a cognizable injury for purposes of a negligence action. Accordingly, the circuit court properly dismissed count I."[21]

Berry represents the latest in a trend of courts largely, though not uniformly, prohibiting no-injury medical monitoring claims.

Erie Guesses

The trend against no-injury medical monitoring claims is particularly important for cases in federal court. Under Erie, a federal court must predict how a state's highest court would rule.[22] As part of making that prediction, courts will sometimes look to "the general weight and trend of authority."[23]

It's often said that federal courts should act conservatively and not expand liability when making these Erie guesses, especially when no court in the state has weighed in on the issue.[24] But those predictions can be difficult.

The New York federal court experience is a good example. A number of courts predicted that the New York Court of Appeals would recognize an independent claim for medical monitoring.[25] In 2011, a federal district court again made this prediction.[26] On appeal, the U.S. Court of Appeals for the Second Circuit certified the question to the New York Court of Appeals, which rejected those claims.[27]

The Illinois Supreme Court's decision in Berry adds more weight to the modern trend against no-injury medical monitoring claims, which could influence Erie guesses going forward. It is also a cautionary tale about predicting how state supreme courts will rule. Multiple federal courts had predicted that the Illinois Supreme Court would recognize non-injury medical monitoring claims.[28] That prediction, of course, turned out to be incorrect.

Applying Erie in Nationwide Class Actions

Applying Erie is particularly fraught in the context of nationwide class actions. In that setting, a court must apply an individualized choice-of-law analysis to each class member's claim.[29]

Depending on the applicable choice-of-law principles, each class member's home state law would likely apply to his/her claims: New York law for New York class members, Illinois law for Illinois class members, etc. The trend against no-injury medical monitoring claims renders claims applying the law of all 50

states increasingly difficult.

As the U.S. Court of Appeals for the Fifth Circuit has said: "In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."[30] The differences in the laws just among the states that actually recognize no-injury medical monitoring claims can prevent class certification in and of itself.[31]

But particularly problematic is how to handle all the states that have not yet weighed in. Even prior to Berry, courts recognized this issue. One court for example explained that since "[m]any states never have recognized a claim for medical monitoring," a nationwide class "would force this Court into the undesirable position of attempting to predict how their courts of last resort would resolve that issue."[32]

For courts in that position, the modern trend to reject medical monitoring claims — as most recently represented by Berry — makes it even more difficult to conclude that any state supreme court that has yet to address the issue would buck that trend to permit such claims, much less every one.

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[1] Colonial Oaks Assisted Living Lafayette LLC v. Hannie Dev. Inc., 972 F.3d 684, 692 (5th Cir. 2020).

[2] Berry v. City of Chicago, 2020 IL 124999.

[3] Friends for All Children Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824 (D.C.Cir. 1984).

[4] Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1006 (1993); Exxon Mobil Corp. v. Albright, 433 Md. 303, 378 (2013); Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007); Sadler v. PacifiCare of Nev., 130 Nev. 990, 999 (2014); Redland Soccer Club Inc. v. Dep't of the Army, 548 Pa. 178, 195-96 (1997); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993); Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 139 (1999).

[5] Bower, 206 W. Va. at 139.

[6] See, e.g., Susan L. Martin & Jonathan D. Martin, Tort Actions for Medical Monitoring: Warranted or Wasteful?, 20 Colum. J. Envtl. L. 121, 142 (1995) (collecting cases and law review articles expressing support for the trend).

[7] Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109, 1118 (N.D. Ill. 1998).

[8] See Dougan v. Sikorsky Aircraft Corp., 2017 WL 7806431, at *6 (Conn. Super. Mar. 28, 2017).

[9] Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424, 441-44 (1997).

[10] Hinton ex rel. Hinton v. Monsanto Co., 813 So. 2d 827, 828 (Ala. 2001); Wood v. Wyeth-Ayerst Labs.,

Div. of Am. Home Prod., 82 S.W.3d 849, 859 (Ky. 2002); La. Civ. Code Ann. art. 2315 (1998); Henry v. Dow Chem. Co., 473 Mich. 63, 96 (2005); Paz v. Brush Engineered Materials Inc., 949 So. 2d 1, 9 (Miss. 2007); Caronia v. Philip Morris USA Inc., 22 N.Y.3d 439, 452 (2013); Lowe v. Philip Morris USA Inc., 344 Or. 403, 415 (2008).

[11] Henry, 473 Mich. at 76, 96.

[12] Lower state courts in Connecticut North Carolina, Rhode Island, Virginia and Wisconsin have precluded no-injury medical monitoring claims, as have federal courts applying the laws of Georgia, Iowa, Minnesota, Nebraska, Oklahoma, South Carolina, Tennessee, Texas and Washington. See Dougan v. Sikorsky Aircraft Corp., 2017 WL 7806431, at *7 (Conn. Super. Mar. 28, 2017); Curl v. Am. Multimedia Inc., 187 N.C. App. 649, 657 (2007); Miranda v. Dacruz, 2009 WL 3515196, at *8 (R.I. Super. Oct. 26, 2009); In re All Pending Chinese Drywall Cases, 80 Va. Cir. 69, 2010 WL 7378659, at *10 (2010); Alsteen v. Wauleco Inc., 335 Wis. 2d 473, 494 (Ct. App. 2011); Parker v. Brush Wellman Inc., 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005); Pickrell v. Sorin Group USA Inc., 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018); Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 552 (D. Minn. 1999); Trimble v. ASARCO Inc., 232 F.3d 946, 963 (8th Cir. 2000) (applying Nebraska law); Cole v. ASARCO Inc., 256 F.R.D. 690, 695 (N.D. Okla. 2009); Rosmer v. Pfizer Inc., 2001 WL 34010613, at *5 (D.S.C. Mar. 30, 2001); Jones v. Brush Wellman Inc., 2000 WL 33727733, at *8 (N.D. Ohio Sept. 13, 2000) (applying Tennessee law); Norwood v. Raytheon Co., 414 F. Supp. 2d 659, 667 (W.D. Tex. 2006); Duncan v. Nw. Airlines Inc., 203 F.R.D. 601, 609 (W.D. Wash. 2001). Lower state courts in Arizona and Florida have permitted no-injury medical monitoring claims, as has a federal court applying Colorado law. See Burns v. Jaquays Min. Corp., 156 Ariz. 375, 380 (Ct. App. 1987); Petito v. A.H. Robins Co., 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999); Bell v. 3M Co., 344 F. Supp. 3d 1207, 1224 (D. Colo. 2018). Sometimes decisions can point in opposite directions. Compare Johnson v. Abbott Labs., 2004 WL 3245947, at *6 (Ind. Cir. Ct. Dec. 31, 2004) and Hunt v. Am. Wood Preservers Inst., 2002 WL 34447541, at *1 (S.D. Ind. July 31, 2002) with Allgood v. Gen. Motors Corp., 2005 WL 2218371, at *7 (S.D. Ind. Sept. 12, 2005).

[13] Donovan v. Philip Morris USA Inc., 455 Mass. 215, 226 (2009).

[14] Ayers v. Jackson Twp., 106 N.J. 557, 606 (1987).

[15] Sinclair v. Merck & Co., 195 N.J. 51, 64 (2008).

[16] Berry, 2020 IL 124999 at ¶30.

[17] Id. at ¶16.

[18] Id. at ¶33.

[19] Id. at ¶34.

[20] Id. at ¶¶ 36-37.

[21] Id.

[22] See, e.g., Michalski v. Home Depot Inc., 225 F.3d 113, 116 (2d Cir. 2000) ("Absent law from a state's highest court, a federal court sitting in diversity has to predict how the state court would resolve an ambiguity in state law").

[23] Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A LP, 888 F.3d 455, 468 (10th Cir. 2017).

[24] See, e.g., Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 253 (3d Cir. 2010) ("[W]here two competing yet sensible interpretations of state law exist, we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of [the state] decides differently"); City of Philadelphia v. Lead Indus. Ass'n Inc., 994 F.2d 112, 123 (3d Cir. 1993). ("Absent some authoritative signal from the legislature or the state courts, [there is] no basis for even considering the pros and cons of innovative theories"); Todd v. Societe Bic SA, 21 F.3d 1402, 1412 (7th Cir. 1994) ("When given a choice between an interpretation of Illinois law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path"); In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig., 756 F.3d 917, 937 (6th Cir. 2014) (same).

[25] See, e.g., 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. U.S., 1995 WL 590658, at *4 (S.D.N.Y. Oct. 5, 1995).

[26] Caronia v. Philip Morris USA Inc., 2011 WL 338425, at *3 (E.D.N.Y. Jan. 13, 2011).

[27] Caronia v. Philip Morris USA Inc., 22 N.Y.3d 439, 452 (2013).

[28] See, e.g., Gates v. Rohm & Haas Co., 618 F. Supp. 2d 362, 368 (E.D. Pa. 2007); Muniz v. Rexnord Corp., No. 04-cv-2405, 2006 WL 1519571, at *7 (N.D. Ill. May 26, 2006) Carey, 999 F. Supp. at 1119.

[29] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985); Georgine v. Amchem Prod. Inc., 83 F.3d 610, 627 (3d Cir. 1996).

[30] Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996).

[31] See, e.g., In re FEMA Trailer Formaldehyde Products Liability Litigation, 2008 WL 5423488, at *17 (E.D. La. 2008) (involving the laws of four states).

[32] In re Rezulin Prod. Liab. Litig., 210 F.R.D. 61, 74 (S.D.N.Y. 2002).