ALI's Medical-Monitoring Proposal May Encourage Claims

By **David Fusco, Jackie Celender and Mick Pence** (June 28, 2023)

David Fusco

Jackie Celender

Mick Pence

Whether the Third Restatement of Torts will recognize a claim for medical monitoring absent a present, manifested bodily harm will remain an open question for at least another year, after members of the American Law Institute failed to ratify a proposed rule at the ALI's May 22 annual meeting.

Substantial debate over motions concerning the proposed rule dominated most of the session time, which prevented a vote on the proposal and ultimately postponed any final action on the proposed rule until next year's annual meeting.

If passed, the Restatement, which courts nationwide cite regularly, would embrace a minority view that could significantly increase the number of medical-monitoring claims filed nationwide, even in instances where there is no obvious or manifested bodily harm.

Companies have seen an uptick in personal injury claims based on low-level alleged exposures to various chemicals.[1] There has also been an increase in medical-monitoring claims seeking payment for diagnostic procedures to screen for an alleged increased risk of disease developing in the future, even though no harm has yet manifested, and no harm may ever manifest.[2]

We expect that the inclusion of medical-monitoring claims in the Restatement would only serve to accelerate the already increasing rate of such claims.

While most states do not recognize independent causes of action for medical monitoring, the proposed rule to the Restatement could change that landscape going forward. The text of the proposal is:

> § __. Medical monitoring
>
> An actor is subject to liability for the expenses of medical monitoring, even absent manifestation of present bodily harm, if all of the following requirements are satisfied:
>
> (1) the actor has exposed a person or persons to a significantly increased risk of serious future bodily harm;
>
> (2) the actor, in exposing the person or persons to a significantly increased risk of serious future bodily harm, has acted tortiously, the tortious conduct is a factual cause of the person's need for medical monitoring, and the monitoring is within the actor's scope of liability;
>
> (3) a monitoring regime exists that makes expedited detection and treatment of the future bodily harm both possible and beneficial;

(4) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and

(5) the prescribed monitoring regime is reasonably necessary, according to generally accepted contemporary medical practices, to prevent or mitigate the future bodily harm.

The proposed rule raises several issues.

First, the rule is not a restatement of the law in the majority of jurisdictions. Courts in 28 states have rejected medical-monitoring claims in instances where there is no present, manifested bodily harm,[3] as has the U.S. Supreme Court for the federal common law.[4]

Second, while 13 states and Washington, D.C., acknowledge to some degree medical-monitoring claims in instances where no discernable bodily harm has developed, none of them go as far as the proposed rule.

For example, Vermont's statute authorizing medical-monitoring claims limits them to exposure to a proven toxic substance.[5]

A medical-monitoring claim without manifested bodily harm in Pennsylvania requires proof of "exposure greater than normal background levels to a proven hazardous substance caused by a defendant's negligence."[6] And West Virginia recently passed legislation eliminating medical-monitoring claims where exposure to asbestos or silica is alleged, but no bodily harm has yet manifested.[7]

The remaining nine states have not sufficiently addressed the merits of stand-alone medical-monitoring claims, which preclude a definitive statement on how specific claims would be treated in those jurisdictions.[8]

Third, the proposed rule could reduce determinable harm — an axiomatic tort element — to the mere risk of harm, which could open the door to much more speculative forms of evidence to prove a much more speculative alleged harm.[9]

For example, in the absence of direct evidence of causation, Texas requires plaintiffs asserting chemical exposure claims to show through "scientifically reliable epidemiological studies" that their exposure to the defendant's product more than doubled the plaintiff's risk of contracting disease.[10]

Similarly, various jurisdictions exclude expert opinions in asbestos cases, asserting that every occupational exposure to asbestos contributes substantially to mesothelioma.[11] The generalized nature of the proposed rule does not capture how courts across the country consider proffered proofs for causation and harm.

Fourth, adoption of the proposed rule into the Restatement could expand the potential liability profile for defendants across various business sectors. Taken as written, adherence to the generalized nature of the proposed rule could mean that a company may be liable even in instances where alleged exposures cannot be measured.

For example, plaintiffs regularly allege that there are no safe levels of exposure to carcinogens, such that any increase in exposure caused by a defendant should be considered significant.

Experience in other contexts confirms that these arguments can become quite protracted, which presents the risk that even the most tenuous claims could survive summary judgment and become costly to defendants.

For these reasons, the proposed rule has the potential to usher in a shift in tort litigation that could result in claims that would otherwise be dismissed in most jurisdictions.

This possibility could accelerate medical-monitoring claims premised on low-level exposures to alleged toxic substances, even where there is no scientific consensus on whether exposure to that substance at the levels alleged is likely to cause some injury to develop.

This means, of course, that companies using chemicals that could be toxic at any dose potentially face increased litigation risk if ALI's vote next year causes the proposed rule to be adopted into the Restatement.

While only time will tell if that will come to pass, companies should assess their litigation risks in the interim to best position themselves in the face of this proposed rule moving forward.

David Fusco and Jackie Celender are partners, and Mick Pence is an associate, at K&L Gates LLP.

K&L Gates associate Wesley Prichard contributed to this article.

[1] See PFAS Litigation: Who's Next? (13 Apr. 2023); Litigation Minute: Ethylene Oxide–– What It Is and Why You Should Care (7 Feb. 2023); Litigation Minute: Ethylene Oxide–– Could Your Company Be a Litigation Target? (22 Feb. 2023).

[2] Of course, what constitutes a compensable harm under tort law principles does not determine whether the harm pled may constitute "bodily injury" such as would be covered under a general liability insurance policy, the latter of which presents a different set of considerations.

[3] The 28 states that have rejected medical-monitoring claims in the absence of some present, manifested bodily harm are Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin.

[4] See Metro-N. Commuter R.R. Co., v. Buckley, 521 U.S. 424, 425 (1997).

[5] Vt. Stat. tit. 12, § 7201.

[6] Redland Soccer Club v. Dep't of the Army, 696 A.2d 137, 145 (Pa. 1997).

[7] W. Va. Code § 55-7G-4(a).

[8] The nine states without a clear position on whether medical-monitoring claims are cognizable absent a presently manifested bodily injury are Alaska, Hawaii, Idaho, Indiana, Kansas, Montana, New Mexico, South Dakota, and Wyoming.

[9] This would pose an additional issue for cases in federal court, where a cognizable injury-in-fact must exist to satisfy Article III's standing requirement. See Where's the Harm in Class Certification? The United States Supreme Court Confirms: It Must Be in Plaintiffs' Evidence (29 June 2021).

[10] See Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 708 (Tex. 1997) ("The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.").

[11] E.g., Betz v. Pneumo Abex, LLC, 44 A.3d 27 (Pa. 2012).