

Circuit Certifies Questions on Medical Monitoring to State Court of Appeals

This month, we discuss *Caronia v. Philip Morris USA*,¹ in which the U.S. Court of Appeals for the Second Circuit certified two questions to the New York State Court of Appeals that seek to determine whether New York recognizes an independent cause of action for medical monitoring. The decision, authored by Judge Amalya L. Kears and joined by Judges Raymond J. Lohier Jr. and Christopher F. Droney, dismissed plaintiffs' traditional product liability claims as time-barred, but left open the possibility that their claims could be brought as a new type of action. That possibility hinges on whether there exists an independent cause of action under New York law for the medical monitoring of plaintiffs whose risk for serious illness was increased by a defendant's product. The Second Circuit will revisit the opinion once the Court of Appeals has answered the certified questions.

Background

Plaintiffs are a group of smokers aged 50 and over who either currently smoke Marlboro cigarettes, a product manufactured by defendant Philip Morris, or



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

ceased smoking them within one year before filing their lawsuit on Jan. 19, 2006. Plaintiffs all smoked Marlboro cigarettes for at least 20 pack-years; their complaints explained that a pack-year is "the number of packs of cigarettes smoked per day multiplied by the number of years."² Smoking one pack of cigarettes per day for one year would equate to one pack-year, smoking two packs per day for one year would be two pack-years, and so on.

Although none of the plaintiffs had yet developed any illnesses as a consequence of their smoking, plaintiffs' complaint alleged that their smoking placed them at significantly greater risk of developing lung cancer. Plaintiffs accused Philip Morris of designing cigarettes that delivered excessive amounts of carcinogens, even though it knew or should have known that such cigarettes would cause or increase the risk of lung cancer, and could have been made safer. Plaintiffs asserted multiple claims against Philip Morris, including:

(a) a strict liability claim for distributing defective products; (b) a negligence claim for failing properly to design, test and inspect its cigarettes and thus violating its duty to create reasonably safer alternatives; and (c) a claim for breach of the implied warranty of merchantability under the Uniform Commercial Code, on the theory that Marlboro cigarettes were not safe for their intended ordinary purposes.

Plaintiffs did not seek compensatory or punitive damages. Instead, they sought to require Philip Morris to provide funding for a court-supervised program of medical monitoring, so that plaintiffs at an increased risk of developing lung cancer could have the disease diagnosed early and thus improve their chances for survival. Although conventional forms of medical surveillance like chest X-rays have not been helpful for early diagnoses, plaintiffs asserted that a procedure called Low Dose CT Scanning of the chest (LDCT) was a simple and effective technique that could identify lung cancer in time to treat it. Plaintiffs stated that the cost of LDCT is less than \$500 per year per patient, but, for various reasons, including its relatively recent development, the treatment is not currently available under most health insurance programs.

Once discovery was completed, Philip Morris moved for summary judgment dismissing the action, argu-

MARTIN FLUMENBAUM and BRAD S. KARP are members of Paul, Weiss, Rifkind, Wharton & Garrison. They specialize in complex commercial litigation and white-collar criminal defense matters. JAYME J. HERSCHKOPF, a litigation associate at the firm, assisted in the preparation of this column.

ing that plaintiffs' claims were untimely. The district court accepted that argument and dismissed the negligence and strict liability claims in their entirety. The district court dismissed the breach of warranty claims in part, finding that at least some of plaintiffs' Marlboro cigarette purchases fell within four years of their filing suit, the statute of limitations cut-off for such claims. The district court noted that neither side had considered whether New York law would recognize an independent cause of action for medical monitoring, as opposed to medical monitoring being a damages option for the traditional product liability claims the court had just found time-barred. The district court decided to allow plaintiffs to file another amended complaint so that both sides could address the issue.³

Plaintiffs filed a fourth amended complaint and used the same factual allegations in support of a new "equitable cause of action" claim for medical monitoring. They alleged (1) that Philip Morris designed and sold cigarettes that, even used properly, substantially and unnecessarily elevated plaintiffs' likelihood of developing lung cancer; (2) that plaintiffs' injuries could not be remedied by a monetary damages award; and (3) that there existed a medical test that could detect lung cancer early and potentially alter their prognoses for the disease. Plaintiffs argued that these circumstances imposed a duty on the court to design an appropriate equitable remedy.

Philip Morris filed a motion to dismiss the medical monitoring claim for failure to state a claim, arguing that this newly created cause of action was contrary to New York law. The district court rejected this assertion. After examining both New York and other case law, the district court concluded that the New York State Court of Appeals would recognize such a claim, and hypothesized seven elements that would be required. However, the district court ultimately dismissed plaintiffs' new claim, finding that plaintiffs had failed to plead that Philip Morris' tortious manufacturing of a defective cigarette specifically caused the need

for medical monitoring.⁴ In response to Philip Morris' second motion for summary judgment, the district court also dismissed the remaining breach of warranty claims.

The Second Circuit's Decision

On appeal, the Second Circuit began by upholding the district court's dismissal of the negligence and strict products liability claims. It held that, under any theory offered by plaintiffs, the claims were untimely.

The court pointed out that New York law requires a showing of injury caused by the defendant as an element of both negligence and design defect claims. Focusing on a plaintiff's need to prove injury, the panel agreed with the district court that plaintiffs explicitly identified their injury to be "an increased risk of getting lung cancer."⁵ According to plaintiffs' submissions, it was smoking Marlboro cigarettes for 20 pack-years that led to their developing this increased risk. Each of the named plaintiffs reached the 20-pack-year mark no later than the mid-1990s. Therefore, more than 10 years elapsed between when the injury materialized and when the suit was filed, which under any potential statute of limitations was too long.

The questions seek to determine whether New York recognizes an independent cause of action for medical monitoring.

The court rejected plaintiffs' arguments against a finding of untimeliness. First, plaintiffs argued that Philip Morris' continued manufacturing of Marlboro cigarettes "inflicted new and continuing injury, or aggravated old injury," such that the limitations period recommenced every time a plaintiff smoked another Marlboro cigarette.⁶ The court pointed to New York case law that expressly rejected this date-of-last-exposure rule in "toxic tort cases, where the injury results from injection, ingestion, or inhalation of a substance."⁷ Rather, the cause of action accrues from

the date of the injury, which in this case would be no later than the mid-1990s. Second, plaintiffs argued that their claims could not accrue until 2006, when LDCT first became technologically feasible and available. The court said it was aware of no case "holding that a cause of action for injury that is cognizable in the New York courts does not accrue until a remedy that the injured person would prefer becomes available," and rejected the argument.⁸

The Second Circuit upheld the dismissal of the implied warranty of merchantability claims on the same grounds as the district court. The district court found that the risks and dangers of smoking were well known long before the mid-1990s, when the last of the plaintiffs reached the 20-pack-year mark. As a result, plaintiffs could not claim to have relied on any warranty that the cigarettes were safe at any point within the limitations period. The Second Circuit agreed with the district court's reasoning, and pointed out that the implied warranty of merchantability is a guarantee only that a seller's goods are fit for their intended purpose, which Marlboro cigarettes presumably are. The possibility of a better or safer design is irrelevant for implied warranty claims.

Medical Monitoring. The court then addressed the medical monitoring claim to examine whether it could be maintained as an independent cause of action under New York law. The court performed an extensive review of decisions in New York state and federal courts. It pointed out that, in a 1984 case, *Askey v. Occidental Chem.*, New York's Appellate Division concluded that recovery for medical monitoring could be available as consequential damages for a present injury of increased disease risk.⁹ That case has formed the basis for several New York trial and intermediate appellate courts to rule that medical monitoring is a potential remedy in certain causes of action, but none has addressed whether New York would recognize medical monitoring as an independent cause of action (though a number of federal

district courts sitting in New York have concluded that the New York Court of Appeals would recognize such a claim).

The court also performed an extensive review of decisions by other states' highest courts to disparate handling of medical monitoring claims. Some states, like Massachusetts, New Jersey, Utah and California, have either recognized an independent cause of action for medical monitoring and set out the elements of such a claim, or have allowed medical monitoring as a remedy for traditional tort claims, defining the injury as the developed risk of disease.¹⁰ Others, like Mississippi, Kentucky and Michigan, have refused to recognize medical monitoring because there is no present injury alleged by such suits.¹¹

In considering the viability of a medical monitoring claim, state courts confronted several issues. Some questioned whether creating a new cause of action was more a legislative task than a judicial one. Others pointed out the need to balance the desire to make the injured whole against creating a virtually limitless pool of potential claimants. The Second Circuit analyzed the cases from those states that allowed medical monitoring claims, and noted that all of these states required reliable expert testimony to establish the claim, as well as some analysis by the court to determine whether the monitoring was both reasonable and necessary. The court added that many of the decisions pointed out that a medical monitoring claim would still be subject to established defenses like assumption of risk and contributory negligence.

The Second Circuit ultimately concluded that it is unclear whether there is an independent cause of action for medical monitoring under New York law. The New York state court cases do not address the question directly, and other state courts are divided. Because of this ambiguity, and the materiality of the question to plaintiffs' case, the Second Circuit elected to certify two questions to the New York Court of Appeals:

(1) Under New York law, may a current or former longtime heavy smok-

er who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?

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(2) If New York recognizes such an independent cause of action for medical monitoring,

(A) What are the elements of that cause of action?

(B) What is the applicable statute of limitations, and when does that cause of action accrue?¹²

The Second Circuit invited the New York Court of Appeals to expand or alter the questions as it saw fit.

Conclusion

The Second Circuit's *Caronia* decision is significant both for strictly construing the law on limitations periods in the traditional product liability realm and for opening the door to a new type of claim in New York courts. The Second Circuit confirmed that for negligence and strict liability claims in the toxic tort context, a claim accrues when the injury first occurs and is not renewed every time plaintiffs are exposed to the same harm. The court also created an opportunity for the New York Court of Appeals to determine whether an independent cause of action for medical monitoring exists under New York law, and, if so, to define its contours.

On May 30, the New York Court of Appeals agreed to consider the Sec-

ond Circuit's questions.¹³ The Court of Appeals' ultimate decision likely will have a significant impact on a wide swath of product liability litigation in New York courts, both state and federal.

Interestingly, on May 31, in a separate concurrence in *Terra Firma Investments v. Citigroup*, Circuit Judge Raymond Lohier Jr. (a member of the *Caronia* panel), suggested that the state law certification procedure be broadened so that "federal courts may certify an unsettled and important question of foreign law to the courts of a foreign country."¹⁴ In that case, the Second Circuit vacated a jury verdict in a multibillion-dollar commercial dispute, despite determining "that both parties have had a fair bite at the proverbial apple," based on its interpretation of a question of English law dating back 130 years.¹⁵

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1. *Caronia v. Philip Morris USA*, No. 11-0316-cv, 2013 WL 1810843 (2d Cir. May 1, 2013).

2. *Id.* at *2 (quoting 4th Am. Comp. ¶26 n.2).

3. *Caronia v. Philip Morris USA*, No. 06-cv-224, 2010 WL 520558, at *3-9 (E.D.N.Y. Feb. 11, 2010) (*Caronia I*).

4. *Caronia v. Philip Morris USA*, No. 06-cv-224, 2011 WL 338425, at *3-11 (E.D.N.Y. Jan. 13, 2011).

5. 2013 WL 1810843, at *10 (quoting *Caronia I*, 2010 WL 520558, at *5 (quoting Transcript of oral argument of summary judgment motion, Feb. 7, 2008, at 51)).

6. *Id.* at *11 (internal quotation marks and alterations omitted).

7. *Id.* at *12 (quoting *Snyder v. Town Insulation*, 81 N.Y.2d 429, 433, 599 N.Y.S.2d 515, 517 (1993)).

8. *Id.* at *15.

9. *Id.* at *16-17 (citing *Askey v. Occidental Chem.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dept. 1984)).

10. *Id.* at *21-25 (discussing, inter alia, *Donovan v. Philip Morris USA*, 455 Mass. 215, 914 N.E.2d 891 (2009); *Ayers v. Twp. of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970 (Utah 1993); *Potter v. Firestone Tire & Rubber*, 6 Cal.4th 965, 863 P.2d 795 (1993)).

11. *Id.* at *26-27 (discussing, inter alia, *Paz v. Brush Engineered Materials*, 949 So.2d 1 (Miss. 2007) (en banc); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Henry v. Dow Chem.*, 473 Mich. 63, 701 N.W.2d 684 (2005)).

12. *Id.* at *33.

13. *Caronia v. Philip Morris USA*, No. 171, NYLJ 1202602235078, at *1 (Ct. of App., May 30, 2013).

14. *Terra Firma Investments (GP) 2 v. Citigroup*, No. 11-126-cv, 2013 WL 2360679, at *4 (2d Cir. May 31, 2013) (Lohier, C.J., concurring). Co-author Brad Karp and the authors' firm represented Citigroup in the underlying trial and on appeal.

15. *Id.* at *1, *8 n.6.