



Alerts

Wisconsin Rejects Medical Monitoring Requests, Holds Toxic Tort Claims Cannot Arise out of Increased Risk of Cancer

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Hinshaw Alert

The Wisconsin Court of Appeals recently rejected a medical monitoring claim, holding that “[i]ncreased risk of future harm is not an actual injury under Wisconsin law.” *Alsteen v. Wauleco*, Appeal No. 2010AP1643, 2011 WL 2314988, (Wis. App. June 14, 2011).

In *Alsteen*, 70 plaintiffs alleged that they were exposed to carcinogenic chemicals that Wauleco improperly released from a nearby window factory. Plaintiffs did not allege that they suffered from any present health problems due to this exposure. Instead plaintiffs contended that they were at an increased risk of developing cancer in the future and sought damages for future medical monitoring expenses.

Wauleco moved to dismiss, contending that Wisconsin law requires a plaintiff to allege actual injury in order to state a tort claim and that because plaintiffs only alleged future harm, they had not alleged an actual injury. The trial court granted the motion, concluding that plaintiffs had failed to state a claim.

The appellate court affirmed, holding that “Wisconsin law requires actual injury before a plaintiff may recover in tort and [plaintiffs had] not alleged any actual injury.” Moreover, the court stated:

we are persuaded by the United States Supreme Court’s decision in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), which held that an asymptomatic railroad worker who had been exposed to asbestos could not recover medical monitoring expenses under the Federal Employees’ Liability Act, and by several other jurisdictions that have articulated compelling reasons not to recognize medical monitoring claims in the absence of actual injury.

Specifically, the court followed the lead of courts in Alabama, Kentucky, Michigan, Mississippi, Nevada and Oregon requiring a plaintiff to allege actual, present injury in order to state a tort claim. In doing so, the court refused to “stand tort law on its head” and “depart from well-settled principles” by allowing claims for medical monitoring of asymptomatic plaintiffs.

In summary, the court held that increased risk of cancer, the mere possibility of future harm, mere exposure to a dangerous substance, and medical monitoring are not actual injuries under Wisconsin law and not actionable in courts.

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Hinshaw & Culbertson LLP attorney, [Thomas R. Schrimpf](#) represented Wauleco in this lawsuit and appeal.

For further information, please contact [Craig T. Liljestrand](#), [Thomas R. Schrimpf](#) or your regular [Hinshaw attorney](#).

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