Risk of Injury is Not an Injury: New Hampshire Supreme Court Declines to Recognize Medical Monitoring

By Brian D. Gross

March 28, 2023

Last week, the New Hampshire Supreme Court held that state law does not recognize medical monitoring as a remedy or cause of action for plaintiffs who allege that they were exposed to a toxic substance. In *Kevin Brown v. Saint-Gobain Performance Plastics Corporation*, the panel declared, "[w]e have long held that '[t]he possibility that injury may result from an act or omission is sufficient to give the quality of negligence to the act or omission; but possibility [of injury] is insufficient to impose any liability or give rise to a cause of action." *Id*. at 4 (emphasis in original).

The plaintiffs, who live or lived near the defendant's Merrimack, New Hampshire, facility, asserted a number of tort claims, including negligence, nuisance, trespass and negligent failure to warn, alleging that the defendant's manufacturing process released perfluorooctanoic acid (PFOA), which contaminated drinking water sources in Merrimack and nearby towns and exposed them to PFOA. Plaintiffs further alleged that such exposure increased the risk that they would later develop adverse health effects, including some forms of cancer.

Plaintiffs originally filed suit in New Hampshire Superior Court, and the defendant removed the case to federal court pursuant to the Class Action Fairness Act of 2005 (CAFA). In support of their claims, the plaintiffs asserted that the increased risk of adverse health effects creates a present necessity to incur the cost of diagnostic testing for the early detection disease, which constitutes a legal “injury.” As such, there is no need for a present physical injury in order to recover under New Hampshire law. Being an issue of first impression under New Hampshire law, the US District Court certified the question to the New Hampshire Supreme Court.

The New Hampshire Supreme Court disagreed. The court found not only that a cause of action “accrues only when the plaintiff has suffered an injury,” but also that “the mere existence of an increased risk of future development of disease is not sufficient under New Hampshire law to constitute a legal injury.” *Id* at 4-5. New Hampshire, thus, joins other jurisdictions that have declined to recognize common-law medical monitoring claims.

This is an important decision in the context of claims concerning exposure to per- and polyfluoralkyl substances (PFAS). While a number of studies have found it is “possible” or even “probable” that exposure to specific PFAS chemicals can lead to certain adverse health effects, the lack of epidemiological evidence that PFAS exposure is the “cause” of any disease makes it difficult at this time for plaintiffs to meet their burden of proof. Medical monitoring claims are a way around that, allowing plaintiffs to recover, despite no present bodily injury, based on their increased risk of disease. Permitting such claims to proceed could have enormous impacts not only on PFAS manufacturers, but also any downstream company that incorporated PFAS into its products, particularly where the Centers for Disease Control and Prevention reports that greater than 99% of Americans have PFAS in their blood.

Attorney Advertising. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2026 MG+M The Law Firm