

Class Action Defense Cases—Donovan v. Philip Morris: Massachusetts Federal Court Certifies Class Action Seeking Medical Monitoring For Lung Cancer Of 20-Year Marlboro Smokers

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Class Action Against Tobacco Company Alleging Unfair Trade Practices and Breach of Implied Warranty and Seeking Medical Monitoring for Lung Cancer on Behalf of Class of Smokers who have not been Diagnosed with Lung Cancer and who are Asymptomatic Warranted Class Action Certification under both Rule 23(b)(2) and (b)(3) Massachusetts Federal Court Holds

Plaintiffs filed a putative class action against Philip Morris alleging “unfair or deceptive” trade practices in violation of Massachusetts state law, breach of implied warranty, and negligence; specifically, the class action complaint “allege[d] that Philip Morris designed, marketed, and sold Marlboro cigarettes that delivered an excessive and dangerous level of carcinogens.” *Donovan v. Philip Morris USA, Inc.*, ___ F.Supp.2d ___ (D.Mass. June 24, 2010) [Slip Opn., at 1]. According to the allegations underlying the class action complaint, “plaintiffs have no apparent symptoms of lung cancer, and as such, are not seeking damages.” *Id.* Thus, this class action “diverges from a typical tobacco suit,” *id.* Instead of seeking damages, the class action sought to compel Philip Morris to pay for medical monitoring – “that is, regular screenings to determine whether they have early signs of the disease” based on the argument that “if [class members] do eventually develop lung cancer, these screenings will increase their likelihood of survival almost six-fold.” *Id.*, at 1-2. Plaintiffs sought certification of a class action “on behalf of Massachusetts residents, age fifty and older, who have smoked Marlboro cigarettes for at least twenty pack-years.” *Id.*, at 1. Further, “No class member may be diagnosed with lung cancer or be under a physician’s care for suspected lung cancer, and all must have smoked Marlboro cigarettes within the Commonwealth of Massachusetts.” *Id.*, at 2. Defense attorneys opposed class action treatment. In a 56-page order, the district court granted plaintiffs’ motion for class action certification.

In analyzing whether to grant class action treatment, the district court noted that “the motion was not easily resolved because it raised threshold issues of Massachusetts products liability law.” *Donovan*, at 2. First, the class action certification motion presented a set of issues tied to “the unusual remedy plaintiffs seek, a supervised medical monitoring program using Low-Dose Computed Tomography (‘LDCT’) scans.” *Id.* Plaintiffs argued that unlike x-rays, which could only detect lung cancer “when it

had reached an advanced stage,” the new LDCT-scanning technology allowed for much earlier detection “significantly increasing survival rates from about fifteen percent to eighty-five percent.” *Id.* (Plaintiffs argued that monetary damages would not adequately compensate class members for the cost of medical monitoring, *id.*, at 3.) Second, the class action certification motion presented the question of whether the named plaintiffs had standing to prosecute the class action because “[b]y definition, plaintiffs who seek medical monitoring to determine whether they have cancer are asymptomatic.” *Id.* And third, the class action presents a “novel issue [that] pertains to the timing of plaintiffs’ claims and the related issue of claim preclusion.” *Id.* “Typically, toxic tort exposure cases put the plaintiffs on the horns of a dilemma. If they bring a claim when they are aware of their exposure – assuming the standing issues are resolved – they take the risk that they cannot recover if they develop cancer in the future under the ‘single controversy rule.’ If they wait until they develop cancer to bring a claim, the statute of limitations will have expired because they knew of the risks at an earlier time.” *Id.* Here, plaintiffs argued that this dilemma was avoided because “The statute of limitations should run from the date that plaintiffs develop subcellular changes that substantially increase their risk of cancer and where that increase triggers a medically-accepted form of screening.” *Id.*, at 4.

The district court noted that, in light of these novel issues, it certified two questions to the Supreme Judicial Court of Massachusetts: “(1) Does the plaintiffs’ suit for medical monitoring, based on the subclinical effects of exposure to cigarette smoke and increased risk of lung cancer, state a cognizable claim and/or permit a remedy under Massachusetts state law? (2) If the plaintiffs have successfully stated a claim or claims, has the statute of limitations governing those claims expired?” *Donovan*, at 4. In a unanimous opinion, the Supreme Judicial Court answered “yes” to the first question, and “no” to the second. *Id.*; see *Donovan v. Philip Morris*, 914 N.E.2d 891, 894-95 (Mass. 2009). The federal court summarized that opinion at pages 4 and 5 as follows:

On the first question, the court held that subclinical effects on lung tissue constituted a legally cognizable injury on which plaintiffs’ medical monitoring claim could be based and outlined what comprised proof of such a claim. On the second question, the court held that the statute of limitations began to run only after the plaintiffs suffered “physiological change[s] resulting in a substantial increase in the risk of cancer” due to their smoking and “that increase, under the standard of care, triggers the need for available diagnostic testing . . .” *Id.* at 903. Finally, the Supreme Judicial Court held that there would be no claim preclusion under the “single controversy rule.” Litigation of the plaintiffs’ medical monitoring claim in this action would not preclude a future action for damages if plaintiffs eventually contract lung cancer.

Armed with the Supreme Judicial Court’s decision on the novel issues presented by the class action certification motion, the federal court granted class action treatment under **both** Rule 23(b)(2) and Rule 23(b)(3) to plaintiffs’ unfair trade practices and implied warranty claims, but denied class action treatment as to plaintiffs’ negligence claim. *Donovan*, at 6. Moreover, in light of Seventh Amendment concerns, the federal court held that the class action would proceed as a jury trial. *Id.*

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