Legal Opinion Letter

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Nevada Supreme Court Adopts Medical Monitoring Remedy in Negligence Actions

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In a decision quietly issued on New Year's Eve, the Nevada Supreme Court in *Sadler v. PacifiCare of Nevada, Inc.*, 340 P.3d 1264 (Nev. 2014), held that medical monitoring is available as a remedy to plaintiffs who have no present physical injury and who cannot even show actual exposure to a known hazardous substance. Now, in Nevada, a plaintiff can recover the costs of medical monitoring "by alleging that he or she is reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent *act* of the defendant."[1] The court's decision opens wide a door that it left ajar in *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001). In *Badillo*, the court rejected a cause of action for medical monitoring for what it then termed a "novel, non-traditional tort and remedy."[2] The court, however, did not decide whether medical monitoring was available as a viable remedy to a tort claim generally.

Sadler Authorizes Medical Monitoring without Proof of Actual Exposure

Sadler arose following an outbreak of hepatitis C linked to unsafe injection practices at certain healthcare facilities in southern Nevada. Patients at those facilities who had received injections, but did not allege actual exposure to contaminated blood, sought the establishment of a court-supervised medical monitoring program for blood-borne diseases at the defendant's expense. The plaintiffs alleged that the defendant health maintenance organization negligently oversaw the medical providers in its network.

The Nevada Supreme Court first stated that the economic loss doctrine did not bar plaintiffs' remedy because their potential exposure to contaminated blood and increased risk of blood-borne diseases from unsafe injections were "noneconomic detrimental changes in circumstances" that plaintiffs would not have experienced but for the defendant's alleged negligence.[3]

Next, the court addressed plaintiffs' lack of a present physical injury. The court noted that "[s]everal courts that have considered [the availability of medical monitoring] have rejected [such] claims primarily on the ground that a physical injury must be shown, in order to state such a claim."[4] The court, however, said it was "not convinced that such a restricted view of an injury [wa]s appropriate in the present context."[5]

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[1] *Sadler*, 340 P.3d at 1272 (emphasis added).
[2] 16 P.3d at 438.
[3] *Sadler*, 340 P.3d at 1268.
[4] *Id*. at 1269.
[5] *Id*.

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Opening the Floodgates to Litigation?

As the Nevada Supreme Court appreciated, "some of the courts that have declined to recognize medical monitoring claims" for asymptomatic individuals—including the Supreme Court of the United States in the Federal Employers Liability Act (FELA) context—"have expressed concern that allowing such claims will open the floodgates to litigation because 'tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.'"[6] Commentators have raised the same concerns.[7] If medical monitoring is permissively awarded to plaintiffs who are not sick and may never become sick, compensation to claimants with actual injuries could be threatened.

The court downplayed these concerns where medical monitoring is awarded as a remedy, because defendants can raise defenses to the underlying negligence claim. Examples of such defenses would be the lack of a legal duty owed to the plaintiff or proof that the defendant acted reasonably. Furthermore, the court said, successful plaintiffs will be required to show that "the medical monitoring at issue is something greater than would be recommended as a matter of general health care for the public at large."[8] Time will tell whether these meager restrictions will be adequate to curb frivolous or excessive claims.

Sadler Leaves Important Questions Unanswered

The Nevada Supreme Court "decline[d] to identify specific factors that a plaintiff must demonstrate to establish entitlement to medical monitoring as a remedy."[9] Consequently, the court's decision will give rise to litigation over the many issues left unanswered. How these issues are ultimately addressed will play a large role in determining the extent to which the *Sadler* decision will spawn new litigation.

For example, medical monitoring claims have proliferated in states where plaintiffs have been allowed to recover lump-sum awards. Nevada courts should ensure that any money that is awarded is actually spent on monitoring. In addition, plaintiffs should be required to prove that the proposed monitoring procedure makes the early detection of the potential disease possible. If no such test exists, then monitoring is of no assistance. There should be some demonstrated clinical value in the early detection and diagnosis of the disease sought to be monitored. Furthermore, the disease sought to be monitored should be serious. Medical monitoring should not be permitted to detect trivial or nonimpairing conditions. Courts also should utilize a cost-benefit analysis to determine whether medical monitoring is appropriate. As the Utah Supreme Court has said, "if a reasonable physician would not prescribe [medical monitoring] for a particular plaintiff because the benefits of monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed."[10]

If lower courts in Nevada fill the gaps in the *Sadler* decision as just outlined, then they will go a long way to containing the damage a wide-open medical monitoring rule would otherwise impose.

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[6] *Id*. at 1271 (quoting *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997)).
[7] *See, e.g*., Victor E. Schwartz *et al.*, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349 (2005); *see also* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After* Meyer Ex Rel. Coplin v. Fluor Corp.*: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135 (2007).
[8] *Sadler*, 340 P.3d at 1271.
[9] *Id*. at 1271-72.
[10] *Hensen v. Mountain Fuel Supply Co*., 858 P.2d 970, 980 (Utah 1993).

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