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## Medical Monitoring Claims Are Not Cognizable Under Michigan Law In the Absence of a Present Physical Injury

Authors:

Edward J. Higgins  
Direct: (313) 983-4919  
[ehiggins@plunkettcooney.com](mailto:ehiggins@plunkettcooney.com)

Michael K. Sheehy  
Direct: (313) 983-4721  
[msheehy@plunkettcooney.com](mailto:msheehy@plunkettcooney.com)

David R. Stechow  
Direct: (313) 983-4306  
[dstechow@plunkettcooney.com](mailto:dstechow@plunkettcooney.com)

The Michigan Supreme Court recently issued an opinion rejecting the viability of a negligence claim seeking to hold a defendant responsible for the costs of medically monitoring a class of plaintiffs for future illnesses related to their exposure to dioxins because the plaintiffs were unable to allege any present physical injury as a result of such exposure.

In doing so, the Court clarified a prior holding in a medical monitoring case, which the plaintiffs had relied upon as implicitly recognizing the viability of such a claim.

In *Henry v Dow Chemical Company*, 2005 Mich LEXIS 1131 (July 13, 2005), the Michigan Supreme Court, in a 5-2 decision, has held that a cause of action for medical monitoring is not cognizable under Michigan law where the plaintiffs concede that they have not yet experienced any physical injuries. In its opinion, the majority observed that it had never before had to specifically articulate a fundamental rule of law that it had always assumed: “present harm to person or property is a necessary prerequisite to a negligence claim.”

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**“Present Harm To Person or Property Is a Necessary Prerequisite to a Negligence Claim.”**

**-MSC, *Henry v Dow Chemical Company***

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The practical ramifications of the *Henry* decision is that “toxic tort” defendants in Michigan cannot be held liable for exposure claims until and unless any such claimants can demonstrate physical injury or property damage as a result of the exposure.

In *Henry*, 173 plaintiffs asked the court to be granted class certification to represent the thousands of people who were potentially exposed to dioxin that was discharged into the Tittabawassee River flood plain from the Dow Chemical plant in Midland, Michigan.

Dioxin, a synthetic chemical that is the byproduct of the production of trichlorophenol and has been shown through animal studies to be a “potent carcinogen,” was discovered in the soil around the Tittabawassee and Saginaw Rivers in 2000. In 2001, the Michigan Department of Environmental Quality (MDEQ) confirmed the presence of dioxin in the soil. Subsequent MDEQ investigations concluded that the Dow Chemical plant was the principal source of the dioxin.

In 2003, the plaintiffs filed suit against Dow Chemical in Saginaw County Circuit Court, alleging that Dow Chemical had negligently released dioxin into the river and seeking the creation of a court-supervised medical monitoring program to cover the increased medical costs that the plaintiffs may incur as a result of the exposure. The trial court denied Dow Chemical's motion for summary disposition of the medical monitoring claim. The Michigan Court of Appeals thereafter denied Dow Chemical's motion for peremptory reversal and emergency application for leave to appeal.

In reversing the lower courts, the Michigan Supreme Court observed that the plaintiffs' claim was, "at its core," one of negligence. The court noted that it first must decide whether the plaintiffs' claim was for future or present injuries. The court held that, if the claim was for future injuries, it was precluded because Michigan negligence law requires more than merely speculative injuries.

The court further held that if the claim was premised on the fact that exposure to dioxin was itself an injury in that people so exposed would incur the costs of medical monitoring, this claim was also precluded "because Michigan law requires an actual injury to person or property as a precondition to recovery under a negligence theory." While the plaintiffs (and the dissent) argued that the cost of medical monitoring constituted injury, the court stated that a "plaintiff must demonstrate a present physical injury to person or property *in addition to* economic losses that result from that injury in order to recover under a negligence theory."

The court reasoned that the economic losses suffered by the plaintiffs were derivative of a possible future injury and not an actual present injury. Therefore, the plaintiffs had failed to state a valid claim under existing Michigan law.

The court then declined the plaintiffs' request to modify the common law of negligence in order to permit their medical monitoring claim to proceed for fear that such a radical departure from the traditional notions of a valid negligence claim could ultimately result in a limitless flood of litigation and leave the courts with little in the way of discernible standards for determining which claims were legitimate if plaintiffs could pursue such claims with no evidence of present injury.

The court also emphasized that the court system was ill-prepared to undertake the administration of a medical monitoring program. The legislative branch was infinitely better positioned to do so through the creation of administrative bodies to oversee such a system. Furthermore, the court noted that, because the Michigan Legislature had already empowered the MDEQ to take remedial actions, including health assessments, to protect public health, it would be violative of the separation of powers doctrine for the court to create a competing remedy.

The court also clarified its prior decision in *Meyerhoff v. Turner Constr Co*, 456 Mich 933 (1998), a case in which Plunkett & Cooney defended the claims of a group of construction workers exposed to asbestos but lacked any present symptoms from such exposure. In vacating a court of appeals opinion, the *Meyerhoff* court's order of remand stated that the factual record had not been sufficiently developed to allow a claim for medical monitoring damages.

The plaintiffs in *Henry* had cited that language from *Meyerhoff* as implicitly recognizing a claim for medical monitoring in Michigan. While acknowledging the ambiguity of this language the *Henry* court clarified this by stating that *Meyerhoff* "should properly be read to hold that the factual record in that case was insufficiently developed to support a medical monitoring claim *if such a claim exists in Michigan*. As we clarify today, such a claim does *not* exist in Michigan."

Finally, the court addressed the plaintiffs' argument that its claim for medical monitoring was not subject to summary disposition because it was a claim for equitable, not legal, relief. The court rejected this argument, holding that even equitable remedies must be supported by a valid claim.