

News Briefs

SJC: smokers can sue for cancer tests

By Diane R. Rubin

In what it calls a “unique” case, the Supreme Judicial Court has ruled that a group of smokers who do not have lung cancer can proceed with a class-action lawsuit against Philip Morris that would require the tobacco company to pay for medical monitoring for early detection of lung cancer.

The would-be class, which has not been certified, consists of smokers over 50 who for decades smoked Marlboro cigarettes. The plaintiffs are not seeking any monetary damages; rather, they are asking the U.S. District Court to compel Philip Morris to offer a court-certified program of medical surveillance for early detection of lung cancer using a recently developed technique known as low-dose computer tomography, or LDCT, scans of the chest.

The question of whether the plaintiffs’ suit states a cognizable claim and/or permits a remedy under Massachusetts law was certified to the SJC by a U.S. District Court judge. The SJC ruled that the plaintiffs had alleged a cause of action in tort for future medical expenses and that the statute of limitations on the claims had not expired.

“It is important to realize that the plaintiffs are suing only for medical expenses reasonably to be incurred because of the

alleged negligence of Philip Morris,” Justice Francis X. Spina wrote in the decision.

The defendant argued that Massachusetts law requires proof of physical harm as a necessary proof of damages. But the SJC disagreed.

“There can be no doubt that an infant negligently and violently shaken by someone may recover expenses for diagnostic tests determined to be medically necessary under the standard of care to ascertain whether the child suffered a brain injury, even if those test results are negative,” Spina said. “Similarly, a pedestrian negligently struck by a ... motorist may recover expenses for diagnostic tests determined to be medically necessary under the standard of care to ascertain the existence of internal injuries ...”

On the issue of the statute of limitations, Spina said the plaintiffs should be allowed to argue in court that they could not have filed their lawsuit earlier because LDCT testing only recently became available.

“These plaintiffs, or so they allege, had absolutely no remedy until LDCT technology appeared. If they can establish these



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circumstances, which are unusual and perhaps unique to medical monitoring claims, then their claims are timely,” Spina said.

“This is a question that cannot be resolved on the record before us; it must be resolved on a motion for summary judgment or, if genuine issues of material fact remain, by a jury. The plaintiffs also must show that the standard of care of the reasonable physician did not call for monitoring of any precancerous condition prior to the statute of limitations period, not just that the technology at that time was less effective for monitoring,” Spina added.

The 23-page decision is *Donovan, et al. v. Philip Morris USA, Inc.*, Lawyers Weekly No. 10-177-09. The full text of the ruling can be found at www.masslawyersweekly.com.

— NOAH SCHAFFER