



Law and the Fear of Cancer

52

By Phil Cha and Dan Farino

Increasing numbers of plaintiffs are seeking damages for emotional distress engendered by a fear of contracting cancer. In the toxic tort field, many fear-of-cancer lawsuits have involved complex claims of exposure to carcinogenic or potentially carcinogenic compounds, such as asbestos or petroleum additives. However, only a few jurisdictions have established prima facie standards for this complex cause of action, and in arriving at those standards the courts have been challenged with the task of balancing competing public policy interests.

Despite improving medication and treatment, cancer remains a life-threatening illness and legitimate fear of developing of cancer can cause emotional distress. One person may develop cancer from a different level of exposure than another, and the latency period of cancer varies, so post-exposure distress can occur prior to actual diagnosis of cancer.

Therefore, consistent with tort law's goal of making plaintiffs whole, courts have been challenged with providing a means for individuals who experience legitimate emotional distress as a result of exposure to carcinogenic compounds to obtain compensation, while setting reasonable standards to prevent meritless claims.

Nevertheless, because of the confounding characteristics of cancer, the potential for misapplication or abuse of this claim exists. A plaintiff's claimed emotional distress may be meritless or wholly speculative. Aside from the usual challenges of evaluating the veracity of an individual's claimed emotional distress, because of cancer's inconsistent genesis and latency period it is challenging for a fact finder to evaluate whether a toxic exposure will cause the plaintiff to develop cancer at some point in time, which in turn makes it difficult to evaluate whether a plaintiff's emotional distress claim is reasonable.

An opportunistic or disingenuous plaintiff could use this uncertainty to advantage, feigning emotional distress in order to secure a financial windfall. Due to the scientific uncertainty surrounding what exactly causes cancer in humans, any person who has been exposed to a carcinogen could theoretically be entitled to fear-of-cancer damages in the absence of a legal standard providing guidance and limits for this cause of action.

The courts that have ruled on emotional distress claims have set standards for a plaintiff to

prove an objectively reasonable fear of cancer, but those standards vary from jurisdiction to jurisdiction. *Potter v. Firestone Tire and Rubber Co.*, a Supreme Court of California decision, and *Exxon Mobil Corp. v. Albright*, a Maryland Court of Appeals decision, present two significant precedents for proving a prima facie case of fear of cancer.

In 1993, the Supreme Court of California in *Potter* set what is widely regarded as the seminal standard regarding fear of cancer claims, by requiring proof, in the absence of a present physical injury or illness, that the plaintiff was exposed to a toxic substance which threatens cancer; and that the plaintiff's fear stems from knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that he or she will develop cancer due to the toxic exposure.

In striving to ensure that a plaintiff's fear of cancer claim is genuine and reasonable, the *Potter* court specifically rejected the argument that an exposure – or even a significant increase in the risk of cancer – is enough to recover fear of cancer damages where there is no showing of the actual likelihood of developing cancer due to the exposure. The court explained, for example, that “nearly everybody is exposed to carcinogens which appear naturally in all types of foods. Yet ordinary consumption of such foods is not substantially likely to result in cancer. Nor is the knowledge of such consumption likely to result in a reasonable fear of cancer.”

In 2013, the Maryland Court of Appeals set the most recent standard for fear-of-cancer claims in the *Albright* case. Until this litigation no legal standard existed under Maryland law, but the lower courts had awarded significant financial damages to numerous plaintiffs with respect to their claims stemming from alleged contamination of their well water as a result of a significant gasoline leak from a nearby gasoline station.

Making the court's task difficult was the fact that the chemical at issue was considered a potential carcinogen rather than a known carcinogen. Still, plaintiffs contended through an expert witness that since the compound is known to be mutagenic, no safe level of exposure to this compound exists and therefore any exposure increases the risk of cancer.

On appeal, the *Albright* court asserted a significant interest in applying a measure of objective reasonableness to fear of cancer

continued on page 57

Law and Cancer

continued from [page 53](#)

Courts have been challenged with providing a means for individuals who experience emotional distress as a result of exposure to carcinogenic compounds to obtain compensation, while setting reasonable standards to prevent meritless claims.

claims. With this in mind, the court held that to recover emotional distress damages for fear of contracting a latent disease in Maryland a plaintiff must show (1) that he was actually exposed to a toxic substance due to the defendant's tortious conduct, (2) which led him to fear objectively and reasonably that he would contract a disease and (3) as a result of that fear he manifested a physical injury capable of objective determination.

Under Maryland tort law "physical injury" would not mean the plaintiff manifested cancer, but that the injury for which recovery is sought is capable of objective determination, meaning testimony "must contain more than mere conclusory statements" and be sufficiently detailed "to give the jury a basis upon which to quantify the injury."

Applying this new standard, the Albright court overturned emotional damage awards for all residents who failed to present evidence of detectable contamination in their well water, as they could not meet the first prong of its fear of cancer standard.

To ensure that the plaintiffs' fears were reasonable and objective, the court determined that even those plaintiffs who demonstrated detectable contamination in their well water had to show exposure above the concentration level of a particular contaminant at which treatment of contaminated water is required by the State of Maryland. Finally, to ensure against the possibility of feigned claims, and to prove a causal relationship to the alleged tor-

tious conduct, the court examined whether the plaintiffs had presented sufficient evidence of a "physical injury" resulting from their objectively reasonable fear.

Of the eighty-eight plaintiffs who were originally awarded emotional damages for fear of cancer, only one plaintiff's fear of cancer claim survived judicial scrutiny, based upon expert testimony attributing the plaintiff's depression, anxiety, headaches, and nausea to the defendant's tortious conduct.

The prima facie standards set by the Potter and Albright courts are not without critics. The uncertain science regarding the genesis and latency of cancer means a person exposed to carcinogenic compounds might experience some level of emotional distress from fear of developing cancer. Plaintiffs' advocates would argue that victims of toxic torts do not choose to be exposed to carcinogenic compounds, and therefore deserve a means of compensation for any genuine emotional distress that results.

Critics of the Potter and Albright standards would also argue that the prima facie standards require plaintiffs to expend significant amounts of money for toxicology and epidemiology experts, and are too stringent and difficult to meet.

Nevertheless, a clear message has been sent. In the eyes of the judiciary, a standard which ensures that plaintiffs' fear of cancer claims are genuine and objectively reasonable is prudent and necessary, and satisfies competing public policy interests. ■



Phil Cha is a shareholder at Archer & Greiner, P.C. His environmental law practice includes environmental litigation and transactions, regulatory compliance, oil and gas and toxic torts. He has extensive experience representing clients in the remediation, sale and development of contaminated properties.
pcha@archerlaw.com



Dan Farino is an associate at Archer & Greiner, P.C., in the firm's Environmental Litigation practice group and Petroleum Industry Practices group. He is a member of the firm's E-Discovery Standing Committee.
dfarino@archerlaw.com