

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Engrossed

Committee Substitute

for

Senate Bill 236

BY SENATORS TRUMP AND WELD

[Originating in the Committee on the Judiciary;

reported on February 22, 2017]

1 A Bill to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §55-7-31, relating to claims or damages for medical monitoring; providing for
3 certain elements for a claim for medical monitoring damages in addition to the underlying
4 cause of action that must be shown in order to recover; establishing requirements for an
5 order for payment of medical monitoring expenses; declaring that medical monitoring is
6 not available in certain civil actions; prohibiting awards of punitive damages with respect
7 to medical monitoring awards; establishing a defense if the benefits of medical monitoring
8 are outweighed by the costs of the monitoring; detailing factors that may be considered in
9 assessing the defense established; and requiring any civil action for medical monitoring
10 be brought in the county where the alleged exposure occurred.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
2 section, designated §55-7-31, to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-31. Limitations on medical monitoring damages.

1 (a) In any civil action where a plaintiff who does not allege a present physical injury or
2 disease seeks to recover future medical monitoring costs as damages, a defendant cannot be
3 required to pay as damages or provide any other type of legal, injunctive or equitable relief for a
4 plaintiff's future medical surveillance, screening tests or monitoring procedures only unless the
5 plaintiff proves to a reasonable degree of certainty all of the requirements for the underlying cause
6 of action and that:

- 7 (1) He or she has been significantly exposed;
8 (2) To a proven hazardous substance;
9 (3) Through the tortious conduct of the defendant;

10 (4) As a proximate result of the exposure, the plaintiff has suffered a significantly increased
11 risk of contracting a serious latent disease relative to the general population of more than one
12 hundred percent;

13 (5) The increased risk of disease makes it objectively medically necessary for the plaintiff
14 to undergo periodic diagnostic medical examinations and such periodic diagnostic medical
15 examinations are different from what would be prescribed in the absence of the exposure;

16 (6) Monitoring procedures exist that make the early detection of a disease possible; and

17 (7) Early detection is beneficial, meaning that a treatment exists that can significantly
18 decrease the risk of death or the severity of the disease, according to contemporary scientific
19 principles.

20 (b) In any civil action in which a court orders a defendant to pay for a plaintiff's future
21 medical surveillance, screening tests or monitoring procedures in the absence of a present
22 physical injury or disease, no plaintiff shall be awarded or paid any moneys to cover the cost of
23 his or her future medical surveillance, screening tests or monitoring procedures until such
24 surveillance, tests or monitoring procedures have been completed. With respect to payments for
25 such damages in the future, the court shall order that the liable defendant make periodic payments
26 into a fund established sufficient to timely pay the cost of future medical surveillance, screening
27 tests or monitoring procedures that are required by the judgment of the court. The court shall
28 determine how such fund will be administered. The court shall also determine the date after which
29 such future medical surveillance, screening tests or monitoring procedures are no longer required
30 and, after that date, any moneys remaining in the fund that are not needed to pay for medical
31 surveillance, screening tests or monitoring procedures completed prior to such termination date
32 shall be repaid to the liable defendant who paid such amounts into the fund. If there are multiple
33 such defendants, then repayments shall be made in proportion to the total contributions of each
34 defendant into the fund.

35 (c) The damage award authorized by this section is not available in a civil action brought
36 against an employer pursuant to paragraph (B), subdivision (2), subsection (d), section two, article
37 four, chapter twenty-three of this code.

38 (d) No award of punitive damages shall be made with respect to damages awarded under
39 this section.

40 (e) It is a defense to the award of damages authorized in this section that the benefits of
41 medically monitoring the exposed population are outweighed by the costs of the monitoring. In
42 making this determination, the finder of fact may consider:

43 (1) The number of people likely to benefit from the monitoring in relation to the population
44 to be monitored;

45 (2) Whether early diagnosis of the latent disease is likely to lead to better treatment
46 outcome;

47 (3) Whether treatment currently exists for the disease that is the subject of medical
48 monitoring or whether the condition diagnosed is an irreversible and untreatable disease; and

49 (4) Whether the assets of the defendant are limited such that the available funds should
50 be reserved to compensate those who have or develop injury.

51 (f) Notwithstanding any provision of this code to the contrary, the venue for any civil action
52 brought pursuant to the provisions of this section shall lie in the county where the significant
53 exposure allegedly occurred.