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MEDICAL MONITORING: INNOVATIVE NEW REMEDY OR MONEY FOR NOTHING?

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INTRODUCTION

Medical monitoring claims are growing more and more popular among plaintiffs and their lawyers, and for understandable reasons: They defy the typical tort requirement of proving an actual injury and, in essence, allow plaintiffs to recover "personal injury" damages in the form of medical expenses, but with attenuated proof. It therefore comes as no surprise that plaintiffs and their lawyers are increasingly filing medical monitoring class actions, especially in medical device and pharmaceutical cases. Medical monitoring class actions pose certain potential advantages for plaintiffs, but most compelling is the potential for recovering substantial amounts of money for an entire class of prescription drug users or medical device patients who have no apparent injury. In the modern world of medical treatment, the numbers get very big, very fast, which obviously makes medical monitoring class actions attractive to attorneys

seeking court-awarded fees.

Fortunately for medical device and drug manufacturers, the law both on medical monitoring itself and on class actions erects several valuable safeguards against potential abuse. This WORKING PAPER will discuss these topics, beginning with a brief history of medical monitoring and its uncertain status throughout the country. It will then discuss the certification of multi-state and/or nationwide medical monitoring class actions and examine issues that these kinds of class actions present.

I. THE ORIGIN OF MEDICAL MONITORING AND ITS STATUS TODAY

A. Medical Monitoring, the Non-Injured Plaintiff's Tort

What exactly is medical monitoring? As one court explained, "A claim for medical monitoring seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances." *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 429 (W.Va. 1999). Medical monitoring cases are a relatively new breed of tort, where plaintiffs are seeking damages for testing to detect an injury that may or may not happen. Even though a claim for medical monitoring may resemble an "increased risk" claim, they are not identical. One court explained the difference in this manner: "[T]he injury which is alleged, and for which compensation is sought, in a claim seeking damages for an

increased risk of harm is the anticipated harm itself. The injury which is alleged, and for which compensation is sought, in a claim seeking damages for a medical examination to detect a possible physical injury is the cost of the examination." *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 874 (Ill. App. 2003). This is important because the tort is aimed at protecting a plaintiff's interest in freedom from paying for medical costs, as opposed to freedom from actual physical injury.

Thus, medical monitoring, also termed "medical surveillance," represents a plaintiff's recovery of future medical costs. The idea of future medical expenses as compensation is not by any means novel – plaintiffs in personal injury cases often can recover provable future medical costs, upon sufficient proof of injury. The crucial distinction is that in many medical monitoring cases, plaintiffs have not sustained a discernible injury. In allowing such "non-injured" plaintiffs to bring medical monitoring causes of action, courts have lifted the lid on a proverbial Pandora's Box. Not only can plaintiffs potentially recover damages without proving that they sustained any actual injury, but there is also the risk that medical monitoring litigants will not be held to the same standard of proving medical causation as are traditional personal injury claimants. It is not an exaggeration to state that a plaintiff who has no symptoms of illness or injury, and perhaps never will, can recover damages for medical monitoring in some states.

The *Friends for All Children* case is often cited as the origin of the medical monitoring tort. In *Friends for All Children, Inc. v. Lockheed Aircraft*, 746 F.2d 816, 819 (D.C. Cir. 1984), the plaintiffs sued on behalf of children who survived an "explosive" airplane decompression, a loss of oxygen, and an airplane crash in which hundreds died. The court held that diagnostic testing was recoverable for the survivors under the circumstances, even though the survivors (unlike those who died) suffered no discernible physical injury. *Id.* at 824-25. The court ruled that plaintiffs had stated a cause of action because it found that, when a defendant negligently invades a plaintiff's interest in avoiding "expensive diagnostic examinations" and when injury to that interest is "neither speculative nor resistant to proof," a defendant should compensate the plaintiff. *Id.* at 824-25. Numerous courts have cited the decision for the proposition that a defendant who, through tortious conduct, has caused the plaintiff to be exposed to a known hazard, can be liable for the medical expenses plaintiff incurred, though there has been no actual injury.

Another opinion issued in 1984, also instrumental in the development of medical monitoring, revolved around exposure to toxic chemicals from a landfill. In *Askey v. Occidental Chemical Corp.*, a New York court recognized a cause of action for medical monitoring in the absence of injury as long as the plaintiffs could demonstrate such expenses were "reasonably anticipated" to be incurred as a result of exposure to a harmful substance. 102 A.D.2d 130, 137

(N.Y.A.D. 1984). Although more recent cases in New York suggest that medical monitoring in that state is still somewhat in flux, it was cases such as *Friends* and *Askey* that set the stage for the growing number of medical monitoring actions today. Because of the inherently vexing problems associated with establishing that a person with no discernible injury is, in fact, "injured," courts have struggled to conceptualize the notion of medical monitoring. Therefore, as discussed below, states have not come to any consensus on how to handle medical monitoring claims and have treated medical monitoring claims in significantly different ways.

B. Medical Monitoring Is Not Uniformly Recognized in All States

Unlike other tort claims (such as negligence), medical monitoring cannot be easily characterized across the nation. Though the substantive law of negligence differs from state to state in important ways, its basic description is recognizable: One can describe the classic claim with the familiar elements of duty, breach, causation, and damages. The same cannot be said for medical monitoring, which some states treat as a cause of action, others as a mere remedy, and others do not recognize at all, either because they have ruled against it or failed to address it. Additionally, some states allow a non-injured plaintiff to pursue a medical monitoring claim, while others mandate that a plaintiff must be injured. We will describe examples of states that fall into each

of these categories, but the analysis is neither exhaustive nor inflexible. Although the examples below illustrate the divergence among jurisdictions, there is still considerable uncertainty in the law in a number of states.

Certain states recognize medical monitoring as a *stand-alone cause of action*, absent any proof of injury. Many of these states were among the first jurisdictions to recognize medical monitoring in any form. Generally, plaintiffs in those states are required to prove enumerated elements, such as those set forth by the Supreme Court of Pennsylvania in *Redland Soccer Club v. Department of the Army*: (1) exposure greater than normal background levels, (2) to a proven hazardous substance, (3) caused by the defendant's negligence, (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease, (5) a monitoring procedure exists that makes the early detection of the disease possible, (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure, and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. 696 A.2d 137, 146 (Pa. 1997). Thus, it is necessary for plaintiffs to demonstrate their entitlement to medical monitoring through medical expert testimony.

Authorities from states other than Pennsylvania treat medical monitoring as a stand-alone cause of action, although some of those authorities are questionable (for example, isolated or unpublished trial court opinions that

have not been tested on appeal). Examples of these states include Arizona, Florida, New York, Utah, and West Virginia. Although authorities in these states recognize medical monitoring claims, they do not have identical legal schemes for treating them. In Arizona and Florida, for instance, medical monitoring is available exclusively through a court-administered fund. *See Burns v. Jaquays Min. Corp.*, 752 P.2d 28, 33-34 (Ariz. Ct. App. 1987); *Petito v. A.H. Robins*, 750 So. 2d 103, 107-08 (Fla. Ct. App. 2000) The Supreme Court of Utah requires a plaintiff to prove that a treatment exists which makes the early detection of the disease beneficial, whereas Pennsylvania expressly rejects this element. See *Redland*, 696 A.2d at 146. State supreme courts have ruled in favor of medical monitoring in Pennsylvania, Utah, and West Virginia, while only intermediate appellate courts have spoken on the issue in Arizona, Florida, and New York. These illustrations are significant because they demonstrate not only the novelty of medical monitoring, but also the diversity among the various states.

Other states appear to view medical monitoring *only as a remedy* for an underlying tort such as negligence or strict liability. In other words, courts in those states require a plaintiff to demonstrate that the defendant has committed a tort, and the provable cost of medical surveillance is a potential item of damages. This category includes such states as Alaska, California, the District of Columbia, Louisiana, Missouri, New Jersey, Virginia, and Washington.

Among these states, the variation in how they handle medical monitoring damages again is considerable. For example, in California, a plaintiff need not have a present injury to recover for medical monitoring, but courts in Washington do require proof of injury. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 606 (W.D. Wash. 2001). In Washington and Virginia, the only authority supporting a medical monitoring remedy are federal district courts *predicting* that the states would recognize such a remedy. *See Duncan*, 203 F.R.D. at 606; *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (applying Virginia and West Virginia law). There are still myriad issues about medical monitoring to resolve in these jurisdictions before the legal dust settles. However, in at least a few of the states, plaintiffs potentially can prevail absent any injury, or with minimal proof of one. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993); *Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987).

Other states *do not allow any form of medical monitoring*, whether as a cause of action or a remedy, because they do not recognize a tort claim without an actual injury. In some states, such as Alabama, Kentucky, Michigan and Nevada, the supreme courts have expressly rejected the tort of medical monitoring, instead retaining the physical injury requirement as a prerequisite to a tort claim. *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 831-832

(Ala. 2001); *Wood v. Wyeth-Ayerst Laboratories, Div. of American Home Products*, 82 S.W.3d 849, 851-852 (Ky. 2002), *Henry v. Dow Chemical Co.*, No. 125205, 2005 WL 1869555, *1 (Mich. July 13, 2005), *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001). Federal courts in Mississippi, Nebraska, North Dakota, and Tennessee have come to the same conclusion in predicting those states' stances on the issue. *See Paz v. Brush Engineered Materials, Inc.*, No. 1:04CV597, 2005 WL 78292, *5 (S.D. Miss. Jan. 7, 2005); *Trimble v. Asarco, Inc.*, 232 F.2d 946, 962-63 (8th Cir. 2000); *Mehl v. Canadian Pacific Railway Ltd.*, No. A4-02-009, 2005 WL 1027158, *5 (D.N.D. May 4, 2005); *Jones v. Brush Wellman, Inc.*, No. 1:00 CV 0777, 2000 WL 33727733, at *5-*8 (N.D. Ohio Sept. 13, 2000) (applying Tennessee law).

Finally, many states *have not considered medical monitoring* at all. In fact, there are at least twenty such states, making the undecided states the largest group of any of those listed above. In other words, courts in nearly forty percent of the jurisdictions in the nation have yet to take a stance on medical monitoring, attesting to both the novelty and uncertainty encompassing the issue.

II. THE VIABILITY OF CERTIFICATION OF MEDICAL MONITORING CLASSES IN MEDICAL DEVICE AND PHARMACEUTICAL CASES

With increasing frequency, plaintiffs have filed multi-state and nationwide medical monitoring class actions against medical device and

pharmaceutical manufacturers. *See, e.g.*, Daniel L. Martens and Ernest J. Getto, *Medical Monitoring & Class Actions*, 17-SPG NAT. RESOURCES & ENV'T 225 (2003); Kenneth S. Abraham, *Liability for Medical Monitoring & the Problem of Limits*, 88 VA. L. REV.1975 (2002); Note, Pankaj Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659 (2002). The potential for a substantial judgment is as enticing to plaintiffs as it is worrisome to defendants. The use of the class action as a bargaining chip for settlement is well-known, and the advance of medical monitoring presents a new landscape that is problematic for several reasons.

First, as described above, plaintiffs may bring medical monitoring claims in a handful of states, even without proof of an injury, thus eliminating the need for proof that the plaintiff has been damaged. This represents a drastic change from the readily familiar negligence and strict liability standards in products liability actions. Second, plaintiffs will assert that there is no reason to prove medical causation in medical monitoring cases, because they have no apparent injury. At least one court has arguably given credence to this view (although it was reversed on appeal). *In re St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation*, No. MDL 01-1396 JRTFLN 2004 WL 45504, *4 (D. Minn. January 5, 2004). In the Silzone Heart Valves litigation, the district court certified a multi-state medical monitoring class consisting of heart valve patients from 17 states, purporting to apply the substantive law of all 17 of those

states. Perhaps reflecting the unprecedented and unsupported nature of such a class, the United States Court of Appeals for the Eighth Circuit reversed the 17-state medical monitoring class as an abuse of discretion, holding that the class presented diverse legal and factual issues that precluded class certification. *In re St. Jude Medical, Inc. Silzone Heart Valve Products Liability Litigation*, 425 F.3d 1116 (8th Cir. 2005). The court first noted that classes seeking injunctive relief – which is how the district court characterized the medical monitoring class – must be cohesive. The court then described the trend against certifying medical monitoring classes, noting that they suffer from "cohesion difficulties" and citing cases from the U.S. Supreme Court and the Sixth, Ninth, and Tenth Circuits – courts that weighed in against certifying medical monitoring classes. Thus, the Eighth Circuit fell in line with its sister circuits and rejected the Silzone medical monitoring class based on the numerous individual issues that the plaintiffs' medical monitoring class action presented. Needless to say, the need to prove medical causation in drug and medical device personal injury cases is a due process safeguard of constitutional dimensions. Third, there is a potential that medical monitoring plaintiffs may later develop an injury or disease and then bring another lawsuit, subjecting a defendant to duplicative litigation and potential double recovery.

Yet, defendants should be encouraged that both state and federal law continue to provide safeguards against the abuse of medical monitoring,

including against the inappropriate certification of medical monitoring class actions.

A. Rule 23 Provides a Framework to Protect Defendants and Class Members Against Abusive Medical Monitoring Classes

Federal Rule of Civil Procedure 23 and its state-law analogs provide the ground rules for class actions, and they provide considerable protection for defendants and absent class members alike. Rule 23(a) sets forth the familiar four prerequisites to all class actions: (1) numerosity of claims, (2) commonality of an issue of fact or law, (3) typicality of the class representative's claims, and (4) adequacy of class representation. *See* FED. RULES CIV. PRO. 23(a). Given that personal injury claims, by their very nature, usually involve diverse individual claimants with diverse individual injuries and diverse needs for future medical care, there is much in Rule 23(a) to exploit in opposing medical monitoring class actions. How, for example, can a class representative with a unique medical history and unique life experience adequately represent class representatives with different circumstances, different claims, and potentially different incentives? By that same virtue, how can such a class representative say that his or her idiosyncratic medical experience and needs are typical of the diverse class? Can a medical monitoring class representative establish a common issue of fact or law when it is uncertain whether class members will ever require additional medical care?

Rule 23(b) also creates significant burdens for a proponent of a medical monitoring class. Under Rule 23(b)(3), the class proponent must show that common issues predominate over individual issues and that a class action is the superior method for resolving the class members' claims. FED. R. CIV. PRO. 23(b)(3). Again, given the diversity that is typical for personal injury, product liability claims, this is a difficult burden for plaintiffs to meet.

It thus comes again as no surprise that courts have invoked Rule 23(b)(3) to deny certification of medical monitoring classes. *See Perez v. Metabolife Intern., Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003); *Baker v. Wyeth-Ayerst Labs*, 992 S.W.2d 797 (Ark. 1999); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001). Most courts addressing the issue have found that in cases dealing with medical products, class actions are not appropriate in large part because individual issues will swamp common questions. *See, e.g., In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1987) (individual health conditions and diverse state law); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987) (individual causation and diverse state law); *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996) (individual causation, comparative fault, and damages issues); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (individual issues and diverse state law); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (individual issues); *In re American Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996) (individual issues on defect, strict liability, negligence,

failure to warn, and warranties); *In re Bridgestone/Firestone Inc.*, 288 F.3d 1012 (7th Cir. 2002) (individual issues and diverse state law). One highly individualized issue is, of course, medical causation, which can hinge on many factors, including preexisting medical conditions, age, gender, life style, and the like. *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 66-67 (D.N.Y. 2002). With medical monitoring claims, the monitoring regime that each patient requires will necessarily depend on similar factors, and will vary from patient to patient. *Id*. Though class proponents may try to minimize the causation issue for a class made up of uninjured patients, courts have noted it as a problem in medical monitoring class actions. *Thompson v. The Am. Tobacco Co.*, 189 F.R.D. 544, 554 (D. Minn. 1999); *Goasdone v. American Cyanamid*, 808 A.2d 159 (N.J. Super. Ct. 2002); *Lockheed Martin Corp. v. Superior Court*, 63 P.3d 913 (Cal. 2003). Furthermore, where prescription drugs or medical devices are concerned, the learned intermediary doctrine is important, and any physician-issued warnings must also be determined on an individual basis, making certification inappropriate. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (recognizing that the physician who treated each class member would be required to testify as to warnings, if any, he or she received and the warnings, if any, provided to the patient).

Differences among the states' substantive law on medical monitoring make multi-state or nationwide class actions even more unmanageable and

therefore contrary to Rule 23(b)(3). Some courts confronted with significant differences in state law have held that those variations present insurmountable obstacles to certification of a multi-state medical monitoring class. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (diverse state law); *Zinser v. Accufix Research Inst.*, 253 F.3d 1180 (9th Cir. 2001), as amended, 273 F.3d 1266 (9th Cir. 2001) (individual issues and diverse state law); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996) (same); *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (diverse state law). State law reinforces these decisions. As described above, some states consider medical monitoring to be a separate, stand-alone cause of action; others treat medical monitoring as a mere element of damages; most states have not yet considered the issue. States that have separate medical monitoring claims define the elements differently in some instances, and in states treating medical monitoring as a mere remedy, discrepancies in the states' underlying tort laws add to the complexity.

To avoid the demands of Rule 23(b)(3), many plaintiffs have sought certification of medical monitoring classes under Rule 23(b)(2), which authorizes class actions seeking primarily injunctive relief. Federal Rule of Civil Procedure 23(b)(2) states "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the

class as a whole." As the argument goes, the medical monitoring "program" that plaintiffs seek is in the nature of an injunction, and not damages. A defendant's first response is to call a spade a spade: A class action lawsuit demanding that a defendant pay for future medical surveillance is, in reality, seeking pecuniary damages, which are anything but "injunctive" relief. *See, e.g., Zinser v. Accufix Research Ins*, 253 F.3d 1180 (9th Cir. 2001); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133 (E.D. La. 2002); *Mehl v. Canadian Pacific Railway Ltd.*, No. A4-02-009, 2005 WL 1027158, *5 (D.N.D. May 4, 2005). And the only way to certify a class action claiming primarily damages is through Rule 23(b)(3) and its predominance and superiority requirements.

Moreover, even though 23(b)(2) does not have a predominance or superiority inquiry, it does have a "cohesiveness" element, under which the class proponent must show that the class is cohesive enough to make class treatment appropriate. *See Thompson*, 189 F.R.D. at 554; *Goasdone*, 808 A.2d at 167-168; *Lockheed Martin Corp.*, 63 P.3d at 918-921. This is similar to the predominance inquiry under Rule 23(b)(3) and will constitute a bar to certification of a medical monitoring class under (b)(2) if the class is not cohesive. Not all courts impose the cohesiveness requirement upon Rule 23(b)(2) classes. *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 412 (C. D. Cal. 2000).

Another significant problem with a medical monitoring class action under Rule 23(b)(2) is that the rule does not give class members the right to opt out. Where the relief sought is monetary, as it is in medical monitoring class actions, the lack of opt-out rights potentially causes prejudice to absent class members, who are subject to the class judgment whether they like it or not. *Barnes v. The Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999). It also robs the defendant of any semblance of finality, since unhappy absent class members will attempt to avenge their rights through separate lawsuits *against the defendant*. This result is the opposite of what a class action is supposed to provide.

B. Courts in States Recognizing Medical Monitoring Have Refused to Certify Medical Monitoring Classes

Even in states where the courts have accepted medical monitoring as a tort, courts have resisted certification of medical monitoring classes, citing such problems as overwhelming numbers of individual issues, inability to determine nature and amount of exposure, choice of law issue, and a lack of cohesiveness. For example, although the *Askey* court was one of the first to rule that non-injured plaintiffs could state a medical monitoring cause of action, it also denied certification of a medical monitoring class. The court discussed the lack of common facts to support class certification, noting that there was "no proof whatever of the nature and extent" of contamination. *Askey*, 102 A.D. 2d at

140.

New Jersey is another state that took the lead in recognizing claims for medical monitoring, yet also has indicated that they may not be suited for class treatment. In *Goasdone v. American Cyanamid*, plaintiffs tried to certify a medical monitoring class against a textile manufacturer for exposure to toxic chemicals, which the court denied based on lack of cohesiveness of the class. 808 A.2d at 170-171. The court found that there were "so many individual factors" such as nature and extent of each plaintiff's exposure, the type of medical monitoring needed, and affirmative defenses, that they destroyed class cohesion. *Id*.

California also has long supported recovery of medical monitoring expenses as an item of damages. Nonetheless, the California Supreme Court refused to certify a class of persons allegedly exposed to toxic chemicals in drinking water because "individual issues of causation and damages predominated over common issues." *See Lockheed*, 63 P.3d at 918-922. Specifically, plaintiffs had not demonstrated that they could resolve on a classwide basis numerous issues, including the difference in dosage levels, the distinct types of toxins to which they were exposed, and the monitoring program each plaintiff required. *Id*. Notably, each of these cases involved only plaintiffs from one state, and still, individual issues overwhelmed the common ones. In cases with plaintiffs from multiple states, and even more so in those

with nationwide reach, differences in state medical monitoring law make certification exponentially more complicated.

Pennsylvania is yet another state that declined the opportunity to certify a nationwide medical monitoring class. *Lewis v. Bayer AG*, No. 002353 AUG.TERM 2001, 2004 WL 1146692, *11 -12 (Pa.Com.Pl. Nov. 18, 2004). Though the court in *Lewis* granted plaintiffs' motion for certification of a statewide class, it denied certification of nationwide personal injury and medical monitoring classes, citing issues such as overwhelming individual factual and legal questions and irreconcilable variations in state laws.

Finally, although West Virginia is one of the few states to create a cause of action for medical monitoring, the Supreme Court of Appeals encountered such a situation and refused to uphold certification. *In State of West Virginia ex rel. Chemtall Inc. v. Madden*, 607 S.E. 2d 772, 780-81 (W. Va. 2004), the defendants challenged certification of a multi-state medical monitoring class under West Virginia law, claiming that the trial court improperly applied West Virginia law to the entire class. The Supreme Court agreed and reversed certification, holding that under *Shutts*, the trial court was "bound to compare West Virginia law on strict liability, medical monitoring, punitive damages, and statutes of limitation with the applicable laws of the other states herein." *Id.* The trial court thus committed "clear error in failing to consider [the forum state's] conflict of law doctrine and in failing to conduct a meaningful analysis

of variations in the laws of the several states included in the proposed class action." *Id*.

C. Other Obstacles to Certification of Medical Monitoring Classes

In addition to the aforementioned potholes that plague certification of medical monitoring claims, there are other issues that may render certification of medical monitoring claims unworkable. One potential problem is that courts certifying medical monitoring classes run the *risk of violating the rule against claim-splitting*. Should any class members attempt to sue at a later date for personal injuries arising out of the same transaction that led to the medical monitoring claim, they might be precluded from doing so.

Generally speaking, a plaintiff suing over an injury must bring all claims arising from that injury, or else risk being precluded from bringing additional claims in a later action. *See, e.g.*, REST. (2ND) JUDGMENTS §§ 18, 24 (1982). Applying this rule against claim splitting, the Kentucky Supreme Court recently described the dilemma facing the uninjured plaintiff seeking medical monitoring in a state that demands proof of present injury. *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 858 (Ky. 2002). The court held that Kentucky does not recognize a cause of action for medical monitoring (or any other tort) without a present injury, noting that *res judicata* would present an "impasse" to any plaintiff suing for medical monitoring and then in a second suit for later injuries because a plaintiff "may bring only one claim for a given

cause of action." *Id.* This *res judicata* issue raises questions about the adequacy of a class representative pursuing medical monitoring on behalf of absent class members. If the class action can possibly result in class members being precluded from raising claims in future individual actions, doesn't the class representative have a conflict of interest with the class? If so, how can he or she be an adequate representative?

Another potential problem with medical monitoring classes, particularly multi-state or nationwide classes, relates to the limitations that *Erie Railroad v. Tompkins* and the federal Rules Enabling Act place on federal courts applying state law, as they do when sitting in diversity jurisdiction. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 2072(b). As the Supreme Court has said, "no reading of [Rule 23] can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right [under state law]."'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1998). This rule and the *Erie* Doctrine that it reflects are paramount in multi-state and nationwide medical monitoring class actions brought in federal court because such actions seek the application of multiple states' laws on medical monitoring.

In that situation, federal district courts are "bound to accept the interpretation of [state] law by the highest court of the State." *Hillside Enters., Inc. v. Continental Carlisle, Inc.*, 147 F.3d 732, 735 n.4 (8th Cir. 1998). Even

where there is no controlling state law, a federal court applying state law cannot apply the rule it considers "best," but must predict how the state's highest court would decide the issue. *First Colony Life Ins. Co. v. Berube*, 130 F.3d 827, 829 (8th Cir. 1997).

As described above, medical monitoring is an area of substantive law that is, to say the least, still developing and by no means uniform. When brought in federal court, as medical monitoring class actions often are, the court has no power to alter, amend, round off, or supplement state medical monitoring law to meet the demands of Rule 23. As one circuit states, the task of a federal court sitting in diversity is to "apply existing . . . law, not to adopt innovative theories for the state." *Holden v. Connex-Metalna Mgmt. Consulting GMBH*, 302 F.3d 358, 364-65 (5th Cir. 2002); *see also Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050, 1057 (1st Cir. 1995) (reversing district court for improper application of state law, stating that "federal courts must take great caution when blazing new state-law" trails). Put another way, if a state has yet to recognize a particular claim or remedy, federal courts should not ignore that fact and proceed to render a decision that is contrary to the state's weight of authority. *Karas v. American Family Ins. Co.*, 33 F.3d 995, 999-1001 (8th Cir. 1994) (court declined to permit plaintiff to recover damages for mental suffering in breach of contract action when state's highest court had not ruled on the issue).

In a recent case involving this exact issue, whether to create a medical monitoring remedy while sitting in diversity, the Eighth Circuit held that federal courts could not implement a medical monitoring remedy in Nebraska because "recognition of such a cause of action would, in effect, expand substantive liability under Nebraska law." *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000). Recognizing the remedy in contravention of *Erie*, the circuit court said, "would be both imprudent and improper." *Id*.

The *Erie* rule therefore circles back to the predominance and superiority requirements of Rule 23(b)(3). Diversity among the states' treatment (or non-treatment) of medical monitoring is one factor making multi-state and nationwide medical monitoring classes unmanageable and therefore uncertifiable. Under the *Erie* Doctrine, federal courts have no prerogative to condition state law to overcome this factor.

CONCLUSION

Medical monitoring is a still-developing tort, and the frequency of claims will undoubtedly increase. Among those actions will be an increasing number of medical monitoring class actions. Controlling authorities, however, give defendants and absent class members substantial protection against the many problems that medical monitoring class actions present and against the potential abuse of this relatively new area of the law.