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MEDICAL MONITORING CLAIM PURSUED IN NEW YORK STATE

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In the latest round of the ongoing battle over the issue of medical monitoring for healthy smokers, plaintiffs have filed a proposed class action in federal court in New York. *See Caronia, et al. v. Philip Morris, USA*, No.06-0224 (E.D.N.Y. January 19, 2006). Plaintiffs in *Caronia* appear undaunted by the fact that class certification is not appropriate under the federal rules for medical monitoring claims by smokers, e.g., *Thompson v. The American Tobacco Co*., 189 F.R.D. 544 (D. Minn. 1999), or that the tobacco industry has been able to defeat medical monitoring claims in two previous class action jury trials in state courts. *See Scott v. American Tobacco Co.*, 725 So.2d 10 (La. App. 1998); *see also In re Tobacco Litigation (Medical Monitoring Cases)*, 600 S.E.2d 188 (2004) (affirming jury verdict rejecting medical monitoring claims of a class of West Virginia smokers) (case generally known as *Blankenship)*.

Plaintiffs purport to represent a class of New York state residents who a) are aged 50 or older; b) have smoked Marlboro cigarettes at a rate equivalent to one pack a day for twenty years; c) have not been presently diagnosed with lung cancer; and d) currently smoke Marlboros or have quit within the last year. They seek "equitable" relief in the form of medical surveillance for early detection of lung cancer. In particular, plaintiffs seek medical monitoring in the form of Low Dose CT chest scans as a means to early detect lung cancer. The complaint alleges the class is at an increased risk for contracting lung cancer, as an alleged result of defendant's wrongful design, manufacturing, and marketing of Marlboro cigarettes. Plaintiffs assert strict liability, negligence, and breach of implied warranty counts. The complaint alleges that the proposed medical monitoring is capable of early detection of lung cancer, which will in turn improve prospects for cure and survival of those class members who do contract lung cancer.

Medical monitoring claimants seek compensation now for costs of future medical tests or surveillance procedures reasonably necessary to early detect a disease that the claimant does not have, but is at increased risk of contracting, allegedly because of defendant's wrongful conduct. Medical monitoring claims have become a favorite of plaintiff attorneys because of the perception that it is easier to get a class certified for medical monitoring relief than for personal injuries. The argument has been advanced that plaintiffs are suing for the increased risk of future disease, as opposed to the contracting of the actual disease. Thus, the individual issues relating to injury and causation of that injury — which would show common issues do not predominate and the class is not cohesive — supposedly are not present.

Plaintiffs' claim for medical monitoring as equitable relief, presumably under Federal Rule of Civil Procedure 23(b)(2), appears merely to be artful pleading of a simple-pass-through mechanism in which class members seek money for the payment of medical testing bills: essentially a suit for damages. *See Thomas v. F.A.G. Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994); *see also Zinser v. Accufix Research Co*., 273 F.3d

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Sean Wajert is a partner at Dechert LLP, and the chair of its Mass Torts & Product Liability practice group. Dechert was part of the team representing the defendants in the *Blankenship* case. The views expressed herein are solely those of the author and not of any client of the firm.

1266 (9th Cir. 2001). Even if the medical monitoring claim is not properly seen as a claim for damages, plaintiffs will have to demonstrate cohesiveness and homogeneity within the proposed class. *See Barnes v. The American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999). The same individual issues that predominate in a Rule 23(b)(2) setting typically defeat class certification in the (b)(3) context by undermining that necessary cohesiveness.

Exactly what those individual issues may be is unclear, because New York's highest court has never adopted medical monitoring, either as a cause of action or form of available relief. The lower courts have split on the issue. *Compare Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984) (allowing monitoring under specified circumstances); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (N.Y. Sup.1991) (same), with, *Jones v. Utilities Painting Corp.*, 198 A.D.2d 268, 603 N.Y.S.2d 546 (N.Y. App. Div.1993) (questioning monitoring); *Abusio v. Consolidated Edison Co.*, 238 A.D.2d 454, 656 N.Y.S.2d 371 (N.Y. App. Div. 1997) (requiring present physical disease or manifestation).

A federal district court in *Gibbs v. E.I. Dupont de Nemours & Co.*, 876 F. Supp. 475 (W.D.N.Y. 1995) predicted that New York would adopt medical monitoring, and further predicted that the state would require proof that: 1) plaintiff was significantly exposed to a proven hazardous substance; 2) through the negligence of the defendant; 3) and that as a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; 4) the increased risk makes periodic diagnostic medical exams reasonably necessary; and 5) that monitoring and testing procedures exist that make the early detection and treatment of the disease possible and beneficial.

Based on those elements of a claim, individual issues abound. For example, smokers who choose to start to smoke, choose to continue smoking, or refuse to quit smoking, were not exposed through any conduct of the defendant. Medical monitoring simply should not be available to plaintiffs who voluntarily encounter the increased risks. Only individual discovery and individual evidence can identify such class members. The putative class includes former smokers. Will the risk of cancer in twenty years be the same for former smokers as for those that have continued to smoke? Levels of risk faced by class members may vary significantly then, if not now. To the extent plaintiffs allege that the wrongful conduct that caused their increased risk includes the "marketing" of cigarettes, it implicates what each class member knew, heard, and relied on individually. By raising the design defect claim, and implicating a time frame that stretches back for decades, the complaint raises the individual, time-dependent issue of state of the art, and the differing availability of alleged feasible alternative designs over that long time period. Moreover, whether any given class member is at increased risk because of smoking, or is already at an increased risk because of, for example, exposure to asbestos in the workplace, requires individual analysis. Whether or not periodic medical exams are necessary may depend on a class member's medical history and other risk factors. If, because of such factors, an individual class member would already need to undergo medical monitoring, then the increased risk from smoking did not make that periodic medical examination necessary.

Beyond the class certification issue, plaintiffs confront an uphill battle, even assuming New York recognizes medical monitoring. In *Scott* and *Blankenship*, the jury found that the alleged increased risk of lung cancer did not make it reasonably necessary for all class members to undergo periodic diagnostic medical exams different from what would be prescribed in the absence of exposure. The West Virginia Supreme Court affirmed that the jury was free to reject plaintiffs' proposed CT scans in light of the evidence that no federal or state agency, and no national or international health organization, had ever recommended such a monitoring regimen for past or current smokers. It was thus not reasonably necessary. Scientific studies continue to show that just because a test can detect a smaller lung lesion, it remains unproven that there will be any change in the course of the disease. Patz, et al., *Estimate of Lung Cancer Mortality from Low-Dose Spiral Computed Tomography Screening Trial*, J. CLIN. ONC. (June 1, 2004). Absent a proven benefit that outweighs all costs, such mass screening plans remain the product of plaintiffs' counsel and their hired experts.

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