IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA
NO. 31743

CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT MCKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INCL., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,

Defendant-Petitioners

v.

THE HONORABLE JOHN T. MADDEN; AND ALL PLAINTIFFS IN *STERN, ET AL. V. CHEMTALL, INCORPORATED, ET AL.*, Civil Action No. 03-c-49M.

Plaintiff-Respondents

BRIEF OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN CHEMISTRY COUNCIL, COALITION FOR LITIGATION JUSTICE, INC, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-PETITIONERS

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

Amici adopt by reference the defendant-petitioners' statement of the Kind of Proceeding and Nature of the Ruling Below.

STATEMENT OF INTEREST

The West Virginia Manufacturers Association ("WVMA") is an organization, chartered in 1915, that seeks to represent the collective voice of West Virginia manufacturers in the West Virginia legislative and regulatory process. WVMA addresses the interests of its members on issues of taxation, wages and benefits, workers' compensation, safety and health, economic development, public education, and environmental issues. WVMA's primary goal is to focus on protecting West Virginia's manufacturing base and work toward a business climate that stimulates investment and job growth.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its

members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 800 *amicus curiae* briefs in federal and state courts.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Coalition for Litigation Justice, Inc. ("CLJ") was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing 1,003 property and casualty insurance companies. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member

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[1] The Coalition includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General

companies account for $154 billion in direct written premiums. They account for 48.2% of all personal auto premiums written in the United States, and 36.9% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2002, PCI members accounted for 32.8% of the homeowners' insurance premiums in West Virginia, 33.5% of the personal automobile insurance policies issued in West Virginia and wrote $611, 903,000 of direct written premiums in West Virginia. One PCI member is domiciled in West Virginia. In light of its involvement in West Virginia, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Amici seek to address the practical and public policy implications of the circuit court's certification of a medical monitoring class action when the class includes individuals who live and work outside of West Virginia, who suffered no alleged exposures or injuries in West Virginia, and who have no contacts with West Virginia or its laws, and when there are many substantive differences and conflicts between the laws of the several states at issue. Under governing legal principles, significant differences in legal theory on medical monitoring in state laws preclude the class from meeting the fundamental requirements of commonality, typicality, and adequacy of representation under Rule 23 of the West Virginia Rules of Civil Procedure. There are key differences between West Virginia's law on medical monitoring and that of the states of other class members. These differences prevent the class representatives' claims from being typical of those of class members. Allowing this class action to continue despite vast

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Cologne Re, Liberty Mutual Insurance Group, St. Paul Travelers Companies, Inc., Everest Re, and the Great American Insurance Company.

differences in state law will promote improper forum shopping, something to which the West Virginia legislature has clearly stated its opposition in recently enacted venue reform.

STATEMENT OF THE FACTS

Amici adopt by reference the defendant-petitioners' Statement of the Facts.

SUMMARY OF THE ARGUMENT

In this case, the trial court abused its discretion when it certified a multi-state medical monitoring class action despite wide variations in each state's laws governing medical monitoring. Indeed, three of the seven jurisdictions have not even recognized such claims. Under governing legal principles, significant differences in legal requirements for medical monitoring preclude the class from meeting the fundamental requirements of commonality, typicality, and adequacy of representation in Rule 23(a) of the West Virginia Rules of Civil Procedure. These fundamental requirements are neglected when claims arise under a multiplicity of different legal theories.

Specifically, in making its typicality analysis under W. Va. Rule 23(a)(3), the trial court failed to seriously consider the material differences between the medical monitoring laws of West Virginia – the state of the overwhelming majority of the named plaintiffs – and the laws of the states of non-forum class members. These differences include the fact that unlike various non-forum states, West Virginia allows medical monitoring claims in the absence of present physical injury; has a broader trigger for how significant the risk must be before allowing a claim; does not require medical monitoring to have the potential to prevent disease; requires a lower medical basis for claims for medical monitoring than other states; allows class actions for medical monitoring, and allows lump-sum awards.

Moreover, the trial court failed to give any consideration to the public policy interests of the six non-forum states whose residents were allegedly injured. Medical monitoring claims are controversial, in part because they depart from the fundamental tort law rule that parties cannot recover unless they are actually injured.[2] Scientists and lawmakers have grappled with questions about the efficacy of medical monitoring for various health conditions and how and under what circumstances such monitoring should be performed.

While West Virginia and three of the non-forum states at issue in this case have adopted some form of medical monitoring, each state has shaped its laws to reflect the legal needs and the public policy concerns of particular interest to its own citizens. Key differences among these laws of these states prevent the named plaintiffs from asserting "typical" claims on behalf of residents of non-forum states. Three other non-forum states – Virginia, Indiana, and Tennessee – do not even recognize medical monitoring. By refusing to acknowledge the critical differences in the laws of these states, and ruling that the West Virginia plaintiffs' claims are "typical" of the rest of the purported class, the trial court has overstepped its bounds and essentially named itself the public policy arbiter of these states. Class certification of these claims is clearly inappropriate.

Allowing this class action to continue despite vast differences in state laws will promote improper forum shopping of multi-state medical monitoring class action lawsuits to West Virginia. While the West Virginia Legislature has enacted legislation to bar forum shopping, the statute's language does not explicitly bar *class actions* involving out-of-state class members. The Legislature's intent for this statute is clear, however. To prevent West Virginia from

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2 *See generally* Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999).

generating many out-of-state class action lawsuits in the future, this Court should affirm that this statute applies to out-of-state class members as well as individual out-of-state plaintiffs.

ARGUMENT

The trial court's class certification must be overturned if this Court finds that the trial court abused its discretion. *See In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 61, 585 S.E.2d 52, 61 (W. Va. 2003). The question of whether the trial court correctly applied Rule 23(a) of the West Virginia Rules of Civil Procedure in reaching its certification decision is to be reviewed *de novo*. *See id.*

I. RULE 23(A) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE REQUIRES TYPICALITY OF CLAIMS, WHICH REQUIRES THAT CLAIMS BE BASED ON "THE SAME LEGAL THEORY"

To obtain class certification in this case, the plaintiffs must first establish four threshold requirements: (1) the class is so numerous that joinder of all members is impracticable (numerosity), (2) there are questions of law or fact common to the class (commonality), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality), and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *See* W. Va. R. Civ. P. 23(a). Here, the circuit court abused its discretion when it found that plaintiffs met their burden to establish that the Rule 23(a)(3) typicality requirement is satisfied.

In order for a class representative's claims to satisfy the Rule 23(a)(3) "typicality" requirement, the claims must "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and ... [be] based on the *same* legal theory." *In re W. Va. Rezulin Litig.*, 214 W. Va. at 68, 585 S.E.2d at 68 (citing Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:13 at 328 (4th ed. 2002)) (emphasis added). While

minor fact differences may not preclude class certification, "it is a *necessary element* of the typicality requirement that all class members have the *same legal theory*... ." *West Virginia v. Sec'y of Educ. of the United States*, 1993 WL 545790, *8 (S.D. W. Va. Nov. 15, 1993) (emphasis added). Thus in the *Rezulin* litigation, where the class members all sought medical monitoring under the law of one state, West Virginia, the Court found that the Rule 23(a) requisites, including typicality, were satisfied. *See In re W. Va. Rezulin Litig.*, 214 W. Va. at 68, 585 S.E.2d at 68. In the case currently before this Court, however, the circuit court will be required to apply the laws of seven different states, as the class members reside and were allegedly exposed in those seven states. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy ... [Rule 23] procedural requirement[s]. ... The forum state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair."). Those seven different states have very different legal requirements governing medical monitoring claims.

These interstate differences plainly affect typicality. If the elements and defenses controlling recovery by claimant "A" differ materially from those controlling recovery by claimant "B," then the claims clearly are not "based on the same legal theory" as typicality requires. Material differences in laws necessarily defeat typicality because the elements of proving the "claim" are defined differently. *See Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 158 (1982) ("Falcon would need to prove much more than the validity of his own claim in order to prove the claims of the absentee class members, and thus his claims were not typical of the class.").

This problem springs not just from Rule 23's requirements but from the due process rights those requirements were created to protect. The typicality requirement is intended to protect an absent class member's due process rights by ensuring that:

> a class representative with typical claims 'will pursue his or her own self-interest in the litigation, and in so doing, will advance the interests of the class members.' ... '[M]ere anticipation that all class members will benefit from the suit ... is not enough. But interests sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief should satisfy Rule 23(a)(3).'

In re W. Va. Rezulin Litig., 214 W. Va. at 68, 585 S.E.2d at 68 (citations omitted) (upholding circuit court's denial of class certification; there was an "insufficient guarantee that the due process rights of the non-appearing [class members] would be sufficiently protected in a class action."). As West Virginia courts are charged with "the important role of protector of the absentees' interests, in a sort of fiduciary capacity," it is of "utmost importance" that courts faced with a class certification request ensure the Rule 23(a) requirements, including the typicality requirement, are met. *Ways v. Imation Enters. Corp.*, 214 W. Va. 305, 316, 589 S.E.2d 36, 47 (W. Va. 2003).

Indeed, with regard to the parallel federal rule, the United States Supreme Court has repeatedly emphasized the necessity of conducting a "rigorous analysis" of the Rule 23 prerequisites before certifying a class. *Falcon*, 457 U.S. at 161. *See also State ex rel. Ball v. Cummings*, 208 W. Va. 393, 399, 540 S.E. 2d 917, 923 (W. Va. 1999) (decisions interpreting Federal Rule 23(a), which is identical to West Virginia Rule 23(a), are persuasive authority for West Virginia courts) Courts in other states have taken a similar approach. *See, e.g., Ex Parte Green Tree Fin. Corp.* 723 So. 2d 6, 9 (Ala. 1998) ("Every class certification order must, at a minimum, identify each of the four elements of Rule 23(a) [of the Alabama Rules of Civil Procedure] and explain in detail how the proponents of the class have proven each of these

elements, as well as at least one of the additional elements of Rule 23(b)."); *Creveling v. Gov't Employees Ins. Co.*, 828 A. 2d 228, 238-39 (Md. 2003) ("A trial court must conduct a 'rigorous analysis' of these prerequisites before certifying a class" under Rule 23 of the Maryland Rules of Civil Procedure.).

The circuit court's ruling on typicality conflicts with these rules in at least two ways. First, rather than analyzing Rule 23(a)(3)'s "same legal theory" requirement under the laws of the seven states interested in this action, the court impermissibly presumed, without analysis, that West Virginia law governs all the medical monitoring claims – an insupportable presumption. *Compare Stern v. Chemtall, Inc.*, No. 03-C-49M, 15, 10-18 (Marshall County Cir. Ct., class certification order filed Sept. 26, 2003) (hereinafter "Class Certification Order") (conducting Rule 23(a) analysis with regard to plaintiffs' medical monitoring claims under "the elements required for [medical monitoring] relief under *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999)") *with Shutts*, 472 U.S. at 821 ("While a State may ... [in certain circumstances] assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law.").

Second, even when the circuit court purported to analyze the conflicts of law issue – under plaintiffs' now-withdrawn claim for class certification under W. Va. Rule 23(b)(3) – the court never even purported to address what the Indiana, Tennessee and Virginia high courts might hold as to the availability of a claim for medical monitoring absent present injury! Nor did the court analyze the impact of the vastly different elements required to prove a medical monitoring claim absent physical injury in the class members' states that recognize such a claim, West Virginia, Pennsylvania, Illinois and Ohio. Instead, the circuit court concluded that in its

own view – *i.e.*, under West Virginia law – "common questions predominate in this action." Class Certification Order at 22-23 (citing elements of medical monitoring claim under *Bower*). While the circuit court's peremptory discussion of the potential impact of the non-forum states' medical monitoring laws was limited to the now-defunct Rule 23(b)(3) claim, its failure to conduct a thorough analysis of this issue clearly infected its decision-making on typicality as well. A proper review of the applicable legal theories for the Rule 23(a)(3) typicality analysis would have considered what each relevant state's own law actually *is*, rather than – as the circuit court apparently did – imposing its view of what it apparently believes those other states' laws *should* be.

II. THERE ARE KEY AREAS IN WHICH WEST VIRGINIA'S MEDICAL MONITORING LAW MATERIALLY DIFFERS FROM THE LAW IN CLASS MEMBERS' STATES, SO THAT THE NAMED PLAINTIFFS' CLAIMS CANNOT MEET THE "TYPICALITY" REQUIREMENT OF RULE 23(A)

The seven states at issue in this action have taken materially different approaches to medical monitoring. Some states allow medical monitoring claims absent present physical injury, some do not. The states that allow claims for medical monitoring use widely varying standards to determine the circumstances under which claims are allowed and awarded.

West Virginia recognizes an independent cause of action for future medical monitoring costs absent present physical injury. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 140-42, 522 S.E.2d 424, 430-34 (W. Va. 1999) (adopting independent cause of action and formulating a standard governing medical monitoring claims in response to certified question from the United States District Court for the Northern District of West Virginia). In *Bower*, this Court said that in order to obtain medical monitoring, the plaintiff must prove that:

> (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate

> result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

206 W. Va. at 141-42, 533 S.E.2d at 432-33. The court ruled that plaintiffs could be compensated for medical monitoring through lump-sum damage awards, through a court-administered fund, or otherwise. 206 W. Va. at 143, 533 S.E.2d at 434.

In this case, West Virginia class representatives argue that their medical monitoring claims are "typical" of the claims of putative class members from the six other states. Yet three of those states do not recognize claims for medical monitoring absent present physical injury, and three other states have materially different legal standards for medical monitoring claims. We discuss these key differences below.

A. Key Difference Number One: Three States Do Not Recognize Medical Monitoring Claims Absent Present Physical Injury

1. The United States Circuit Court Of Appeals For The Fourth Circuit Has Held That Medical Monitoring Absent Present Physical Injury Is Not Available Under Virginia Law

The Virginia Supreme Court has not addressed the availability of medical monitoring absent physical injury Applying Virginia law, two federal courts have considered this issue and ruled that Virginia would not allow plaintiffs to recover medical monitoring costs unless they had a present physical injury. *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law) ("*Ball I*"), *aff'd sub nom. Ball v. Joy Techs. Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) ("*Ball II*"), *cert. denied*, 502 U.S. 1033 (1992).

The federal courts' rulings arose out of claims by eighteen former employees of Joy Technologies, Inc. that while employed at the defendant's corporate facilities in Bluefield,

Virginia and Bluefield, West Virginia, they were wrongfully exposed to various toxic chemicals. On motion for summary judgment by the defense, the district court analyzed Virginia law and determined that, absent an intentional nonphysical tort by the defendant, plaintiffs needed to establish an actual physical injury in order to recover. *See Ball I*, 755 F. Supp. at 1364 (citing *Locke v. Johns-Manville*, 275 S.E.2d 900, 904 (Va. 1981) (plaintiff's cause of action does not accrue until he is actually injured; mere exposure to asbestos does not constitute injury); *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974) (recovery for emotional distress absent present physical injury can occur only when defendant engages in intentional or reckless conduct); *Hughes v. Moore*, 197 S.E.2d 214 (Va. 1973) (holding "where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone.").

The district court granted summary judgment for the defense, finding that because plaintiffs had no present physical injuries, they had no "actionable injury" under Virginia law to support their claims for future costs of medical monitoring and for emotional distress damages. *Ball I*, 755 F. Supp. at 1371 (citing *Hailes v. Gonzales*, 151 S.E.2d 388 (Va. 1966) (presently injured plaintiff seeking future medical expenses must demonstrate the amount of future damages "with reasonable certainty"); *Minnix v. Hall*, 178 S.E.2d 519 (Va. 1971) (future medical expenses not recoverable where presently injured plaintiff presented "no indication that he would incur future nursing expenses"). The district court also analyzed then-current West Virginia law and reached the same conclusion. *See id.* (citing, *e.g.*, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (W. Va. 1982); *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (W. Va. 1974)).

In its opinion, the federal district court explained that it is important to consider the need to conserve the resources of defendants and courts to allow access to justice and ensure financial recovery for those with present, serious physical injuries:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . There must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.

Ball I, 755 F. Supp. at 1372.

On appeal, the Fourth Circuit conducted a similar analysis of applicable state law in both Virginia and West Virginia and upheld the district court's order, concluding that "[p]laintiffs have not demonstrated that they are suffering from a present physical injury that would entitle them to recover medical surveillance costs under West Virginia and Virginia law." *Ball II*, 958 F.2d at 39 (citing *Hughes*, 197 S.E.2d at 219; *Hailes*, 151 S.E.2d 388). Both federal courts said that the ultimate decision of whether to adopt medical monitoring absent physical injury should be left to the lawmakers of each state. *Ball I,* 755 F. Supp. at 1372; *Ball II*, 958 F.2d at 39.

In the dozen years since the Fourth Circuit's decision in *Ball II*, neither the Virginia Legislature nor the Virginia Supreme Court has deemed it necessary to revisit the issue of whether Virginia law allows medical monitoring in the absence of physical injury. Virginia lawmakers' apparent satisfaction with the Fourth Circuit's decision rejecting medical monitoring claims by uninjured plaintiffs makes sense in light of Virginia's decades-old tradition of not allowing recovery of future damages in the absence of present physical injury. *See Hailes*, 151 S.E.2d at 390.

On the other hand, in regard to West Virginia law, this Court subsequently considered the issue on a certified question and ruled in *Bower* that West Virginia allows medical monitoring claims absent physical injury. 206 W. Va. at 140, 522 S.E.2d at 431. The Court explained its reasons were based on fostering access to medical testing for exposed persons and mitigating or preventing future illness, deterring the negligent discharge of chemicals, and serving societal notions of fairness and justice. The Court explained: "it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary." *Id.* (citation omitted).

The state of the law of West Virginia and Virginia on medical monitoring absent physical injury could not be more diametrically opposed. West Virginia recognizes such an action; Virginia has not. The public policy goals underlying each approach conflict. West Virginia seeks to provide funds for uninjured persons who wish to monitor developments in their health due to exposure to potentially hazardous substances; Virginia wishes to conserve funds to ensure that actually injured persons receive compensation. There can be no credible argument that claims for medical monitoring by putative class members in these states arise under "the same legal theory," as required for Rule 23(a) typicality. *See In re W. Va. Rezulin Litig.*, 214 W. Va. at 68, 585 S.E.2d at 63.

2. Indiana and Tennessee Have Not Ruled On The Issue, But They Are Likely To Follow Recent Trends And Find That Plaintiffs Cannot Recover Medical Monitoring Absent Present Physical Injury

The Indiana and Tennessee courts have not considered whether to allow claims for medical monitoring absent physical injury. However, the United States Supreme Court expressed strong public policy reasons against such claims in 1997, when it rejected medical

monitoring claims for mere exposure under a federal statute, and state courts are increasingly refusing to recognize such claims. *See infra.* Indiana and Tennessee would most likely follow suit.

a. The Trend Against Allowing Medical Monitoring Claims For Exposed But Uninjured Persons

In 1997, the United States Supreme Court ruled 7-2 against allowing a medical monitoring claim brought under the Federal Employers' Liability Act by a railroad employee for occupational exposure to asbestos. In *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 444 (1997), the Court reasoned that medical monitoring absent actual physical injury could permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring," exposing defendants to potentially unlimited liability. *Id.* at 442. If this were allowed to happen, a "flood of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury. *Id.* The Court also considered the practical problems inherent in adopting a medical monitoring cause of action, including the difficulty of identifying which medical monitoring costs exceed the costs of preventative medicine ordinarily recommended for everyone, which particular tests or treatments are appropriate in a given case, and which adjustments need to be made based upon an individual plaintiff's unique medical needs. *Id.* at 441-42.

Since then, state supreme courts that have considered medical monitoring absent physical injury have agreed with the U.S. Supreme Court's public policy statements and rejected such a claim. These state courts have noted the dramatic upheaval in fundamental tort law that would be caused by judicial adoption of this cause of action. For example, the Supreme Court of Alabama in *Hinton v. Monsanto Co.,* 813 So. 2d 827, 829 (Ala. 2001), recently refused to

recognize a medical monitoring cause of action by a person allegedly exposed to polychlorinated biphenyls ("PCBs") in the absence of a "manifest, present injury." *Hinton*, 813 So. 2d at 829. The Alabama court held that "recogniz[ing] medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide" – a voyage upon which the court was "unprepared to embark." *Id.* at 830. Instead, the court determined:

> [W]e find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what *might* occur in the future. We believe that Alabama law ... provides no redress for a plaintiff who has no present injury or illness.

Id. at 831-32.

Similarly, in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), the Kentucky Supreme Court rejected claims for the creation of a court-supervised medical monitoring fund for claimants who had ingested the "Fen-Phen" diet drug combination. Citing cases dating as far back as 1925, the Kentucky court recognized that "[t]his Court has consistently held that a cause of action in tort requires a present physical injury to the plaintiff." *Id.* at 852. The court concluded that "all of these cases lead to the conclusion that a plaintiff must have sustained some physical injury before a [medical monitoring] cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id.* at 853-54.

Noting that medical monitoring is "a novel, non-traditional tort remedy," the Nevada Supreme Court rejected medical monitoring absent present physical injury in *Badillo v. American Brands, Inc.*, 16 P.3d 435, 438 (Nev. 2001) (responding to certified question from the United States District Court for the District of Nevada). The Nevada court explained that changing fundamental tort law rules raises important public policy choices that should be left to

legislatures to decide. *Id.* at 440 ("[a]ltering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial function").

b. Indiana And Tennessee Would Not Recognize Such Claims

Many putative class members in the instant case reside in Indiana and Tennessee. Neither state has ruled on the validity of medical monitoring claims absent present physical injury. However, courts in both states are likely to follow the trend of courts rejecting such claims.

Indiana recently reaffirmed its longstanding requirement that plaintiffs establish a present injury in order to obtain damages. *See, e.g.*, *Alexander v. Scheid*, 726 N.E.2d 272, 283 (Ind. 2000) (holding that to recover for negligent infliction of emotional distress under Indiana law, a plaintiff must show present physical injury, a requirement not satisfied by a showing of "real mental stress"); *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991) (same). In light of this longstanding precedent, the United States District Court for the Southern District of Indiana dismissed without prejudice a medical monitoring claim arising under Indiana law, giving the plaintiffs the option to refile their case after amending the complaint to include an allegation of present physical injury. *See Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951, 953-54 (7th Cir. 1995) (discussing unpublished decision of federal district court below but not ruling on the issue because plaintiffs waived their appeal rights on that issue).

Tennessee courts have not recognized a cause of action for medical monitoring absent present injury, and it is unlikely that they will do so. Tennessee courts have deferred to the state Legislature when it comes to adopting new causes of action. Recently, for example, the Tennessee Supreme Court declined to recognize a cause of action for loss of parental consortium

in personal injury cases. In *Taylor v. Beard*, 104 S.W.3d 507 (Tenn. 2003), the court held that creating a new cause of action is a matter for the Legislature:

> [A]ppellants do not simply request that we remove an impediment to the continual development of the common law, nor do they ask us to interpret an ambiguous statutory or constitutional provision. Rather, the appellants ask this Court to declare the public policy of this State by creating a previously unrecognized common law cause of action in an area where the legislature has taken action. This Court has long recognized that it has a limited role in declaring public policy ... Our concern about our limited role is particularly relevant in this case where we are being asked to further develop the law of consortium by adopting a common law cause of action for loss of parental consortium in personal injury cases that presently does not exist. To do so would require us to create a cause of action with potentially far-reaching social and legal consequences....

Id. at 510-11.

Since neither Indiana nor Tennessee has recognized claims for medical monitoring by uninjured plaintiffs, claims by putative class members in Indiana and Tennessee law cannot possibly arise under the "same legal theory" as medical monitoring claims under West Virginia law. The Rule 23(a) typicality requirement cannot be met.

B. Key Difference Number Two: How Significant A Risk Of Future Injury Is Required To Support A Medical Monitoring Claim?

Courts adopting medical monitoring claims have grappled with the criteria for when recovery is allowed, since open-ended recovery could deluge the courts with claims.[3] Courts have not articulated consistent eligibility requirements for medical monitoring; the criteria to establish a claim vary from state to state. Differences among these *threshold* requirements for

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[3] *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824-25 (Cal. 1993) (listing five factors to determine the reasonableness and necessity of medical monitoring); *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 360-61 (La. 1998) (establishing seven criteria necessary for recovery of medical monitoring damages); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997) (setting

medical monitoring claims in states at issue in this case defeat typicality. If the putative class members from Pennsylvania, Illinois and Ohio must make different threshold showings to support a claim for medical monitoring than the named plaintiffs in West Virginia, the claims of the named plaintiffs cannot be considered typical.

One such criterion is how significant a risk of future injury must be before the plaintiff can bring a medical monitoring claim under a particular state's law. Examples of how these "triggers" vary from state to state can be seen in the states involved in this action.

In West Virginia, the plaintiff must show that he or she "has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure." *Bower*, 206 W. Va. at 133, 522 S.E.2d at 433. Additionally, "the plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure" and "no particular level of quantification is necessary to satisfy this requirement." *Id.* (internal citations omitted).

The laws of the states of other class members differ. In Pennsylvania, a plaintiff must have a "significantly increased risk of contacting serious latent disease" as a result of "exposure greater than normal background levels." *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145 (Pa. 1997). In Illinois, the level of risk required is "a reasonable certainty of contracting a disease in the future." *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998). In Ohio, plaintiffs must show that they have a "substantially increased risk of disease" such "that a reasonable doctor would recommend medical monitoring of their condition." *Day v. NLO*, 851 F. Supp. 869, 883 (S.D. Ohio 1994).

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forth seven factors a plaintiff must establish in order to prevail on a claim for medical monitoring).

The differences between these "triggers" keeps the claims in this class action from being typical under Rule 23(a), for claims in each of these states would be governed by different legal standards.[4] Furthermore, asking jurors to parse out these different standards and apply them to the facts for each claimant would be a nearly impossible task.

C. Key Difference Number Three: West Virginia Does Not Require Medical Monitoring To Have The Potential To Prevent Disease, Unlike Other States Involved In This Action

Under West Virginia law, the named plaintiffs and West Virginia class members are not required to show that treatment currently exists for the disease that is the subject of the medical monitoring. *See Bower*, 206 W. Va. at 142-43, 522 S.E.2d at 433-34. In stark contrast, in other states, the plaintiff must show that medical monitoring has the potential to cure or prevent disease.

This latter requirement finds support in the medical community, which takes the position that medical monitoring programs, which generally pose some degree of risk to the patient, must have the potential to be effective in curing or preventing disease. *See* Myrton F. Beeler & Robert Sappenfield, *Medical Monitoring: What Is it, How Can it Be Improved?*, 87:2 Am. J. of Clinical Pathology 285, 285 (Myrton F. Beeler et al., eds. 1987). The scientific and medical community

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[4] The payment mechanism for medical monitoring awards also may present an issue in interstate medical monitoring class actions. In *Bower*, this Court made clear that plaintiffs can receive lump-sum awards. 206 W. Va. at 434, 522 S.E.2d at 143. Other states prefer medical monitoring to be awarded through a court-administered fund. *See, e.g., Redland Soccer Club*, 696 A.2d at 142; *Ayers v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987); *Day*, 851 F. Supp. at 886; *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 982 (Utah 1993). In this case, we understand that plaintiffs have requested court-administered medical monitoring funds, so key differences in state laws regarding lump-sum payments do not appear to be a critical issue here. But, it is easy to imagine future cases where class action plaintiffs do not request court-administered funds. In such a case, differences in state laws regarding the payment mechanism for any award would provide another key difference between state medical monitoring laws, and defeat the typicality requirements of Rule 23. Furthermore, overseeing multi-state court appointed funds would be an administrative nightmare for courts. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-72 (1994).

does not believe that medical monitoring is always beneficial. As one medical professional has said, "the assumption that early diagnosis is always beneficial is fallacious .... If it is not possible to cure or substantially improve the prognosis of the condition, or failing that to delay morbidity and mortality in those affected, then early detection is futile." W.K.C. Morgan, *Medical Monitoring with Particular Attention to Screening for Lung Cancer, in Occupational Lung Disease* 157, 157 & 158 (J. Bernard L. Gee et al. eds., 1984). Under this approach, many scientists and medical professionals have determined that untreatable and incurable diseases are not appropriate for medical monitoring. *Id.* at 157.

One state involved in this action, Ohio, follows this approach. Under Ohio law, a medical monitoring claim can only succeed in circumstances where a medical professional would "order preventative measures and periodic future testing, in order to have the best opportunity for early detection and treatment of the full blown disease, if and when it might manifest itself." *Day*, 851 F. Supp. at 880. Thus, the class members from Ohio must prove an additional element to succeed on their medical monitoring claims than the named plaintiffs from West Virginia will. If a claim in one state requires proof of elements not required in another, it can defeat Rule 23(a) typicality. *See West Virginia v. Secretary of Educ. of the United States.* 1993 WL 545790 at *3.

D. Key Difference Number Four: The Trigger For What Medical Basis Is Required Before a Medical Monitoring Claim Can Succeed Differs Among the States Class Representatives Seek to Represent

In *Bower*, this Court set the standard for what medical basis is required for a medical monitoring claim, explaining that while there "obviously must be some reasonable medical basis" for medical monitoring, the requirement does not preclude medical monitoring where that determination is based, at least in part, on a plaintiff's subjective desires ... for information concerning the state of his or her health." 206 W. Va. at 142, 522 S.E.2d at 433.

Other states involved in this action have stricter standards for what medical basis is required for a claim for medical monitoring, involving no consideration at all of a plaintiff's subjective desires. Pennsylvania requires that the "prescribed monitoring regime is reasonably necessary according to contemporary scientific principles." *Redland Soccer Club, Inc.*, 696 A.2d at 146. In Ohio, the test is whether "a reasonable doctor would recommend medical monitoring of [the] condition." *Day*, 851 F. Supp. at 883.

The West Virginia named plaintiffs are not held to the same high requirement as would be imposed upon the Pennsylvania and Ohio class members. It would be difficult for the West Virginia named parties to represent the Pennsylvania and Ohio class members, as due process requires. Moreover, these differences would make it very difficult for a jury to determine whether the requested medical monitoring in this case is, for the Pennsylvania class members, "reasonably necessary according to contemporary scientific principles;" for the Ohio class members, the type of monitoring "a reasonable doctor would recommend;" and for the West Virginia class members, based on "some reasonable medical basis," including the subjective desires of the class member. These differences illustrate that claims for medical monitoring in these states do not involve the same questions of legal theory, as required by Rule 23(a).

E. Key Difference Number Five: West Virginia Allows Class Actions For Medical Monitoring, Unlike Cases In Other States Involved In This Action

In February 2003, this court allowed a 5,000-member medical monitoring class action for users of an allegedly defective prescription drug Rezulin. *See In re W. Va. Rezulin Litig.*, 214 W. Va. at 76, 585 S.E.2d at 76. Other states that allow individuals to recover for medical monitoring absent present physical injury do not allow class actions. They contend that the facts in common to class members do not predominate over the facts that are not in common. They base this decision on their state law equivalents of the Federal Rules of Civil Procedure Rule 23(b)(3),

which allows claims to succeed when Rule 23(a)'s requirements are met and when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Courts in Illinois have taken this approach. An Illinois circuit court recognized the difficulty of allowing a medical monitoring class action in a case where those who took the prescription drug Baycol sought medical monitoring for risks allegedly associated with that drug. *See Jensen v. Bayer AG*, No. 01 CH 13319, 2003 WL 22962431, *4 (Cook County Cir. Ct., order denying class certification issued Dec. 15, 2003). The court denied class certification, holding that common questions of fact did not predominate the claims of the class members, reasoning:

> An examination of the pleadings reflect numerous individual questions of fact. ... The medical monitoring claim of Plaintiff, almost by definition, would require an individual inquiry. Each class members' individual medical condition would have to be monitored based on that class member's prior medical condition. The dosage of Baycol and period of time that class member ingested Baycol would also be an individual consideration unique to each class member. ... Common questions of fact do not predominate over questions affecting individual class members.

Id. at *4.

This approach should be respected because it is supported by the prevailing views of the medical and scientific communities. These communities believe that medical monitoring programs are specific regimens that must be individually tailored to reflect patient histories and expected disease. *See* Laura Welch & Pekka Roto, *Medical Surveillance Programs for Construction Workers*, *in* 10:2 *Occupational Med.: Constr. Safety & Health* 421, 425 (Knut Ringen et al. eds., 1995). Doctors and scientists also stress that each individual's decision to participate in a medical monitoring program "must be fully informed and voluntary and should be preceded by a sufficient understanding of both the benefits and liabilities." Gary R. Krieger et

al., *Medical Surveillance and Medical Screening for Toxic Exposure, in Clinical Envtl. Health & Toxic Exposures* 108, 116 (John B. Sullivan, Jr. & Gary R. Krieger eds., 2d ed. 2001). As a result, to doctors and scientists, there should an individual determination of risks and benefits in every case where a plaintiff seeks medical monitoring. *See* Morgan, *supra*, at 158.

Allowing a medical monitoring class action that includes claims of people whose states have not allowed class actions for medical monitoring undermines those states' public policy decisions for their citizens.[5]

F. A Word of Caution: The Five Key Differences Above Do Not Exist In A Vacuum, But Arise In A Multiplicity Of Combinations In The Laws Of The Jurisdictions

It is important to note that while this *amici curiae* brief has shown five key differences between West Virginia law and the law of the other states involved in this action, other differences exist and any or all of these differences may exist in a multiplicity of combinations. As a result, this class action becomes even more complicated. These compounding differences defeat Rule 23(a) requirements for class certification because a claim for medical monitoring in each state is based on a different elements and legal theories. *See, e.g., Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 58 (S.D. Fl. 1990) (noting in Fed. R. Civ. Pro. Rule 23(a) analysis that factual variances in the case, in conjunction with "the varying state laws that would apply to the claims of the members of the proposed class, make it impossible for the plaintiffs to have claims typical of the proposed class").

The situation before this court is the same. The class representatives seek to represent class members from six states other than West Virginia that each have their own laws and

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[5] *See* Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on this Trend?*, 70 Def. Counsel J. 315 (2003).

requirements for medical monitoring. The court should similarly conclude that allowing this multi-state class action to proceed would not advance Rule 23's goal of judicial economy.

III. BECAUSE OF THE DIFFERENCES IN THE STATE LAWS OF THE CLASS MEMBERS, THE COURT SHOULD FIND THIS CLASS ACTION CANNOT SATISFY RULE 23(A)(3)'S TYPICALITY REQUIREMENT

While this is an issue of first impression for this Court, state courts in Pennsylvania and Illinois have determined that multi-state class actions for medical monitoring do not meet Rule 23(a)'s requirements -- because of the differences in applicable state laws.

In *Lewis v. Bayer AG*, 2004 WL 1146692, *13 & *17 (Pa. Ct. Comm. Pl. Mar. 19, 2004), a Pennsylvania court held that a class action for medical monitoring absent present physical injury on behalf of Pennsylvania residents met Rule 23(a) requirements, but that a class action on behalf of a multi-state class failed to meet the requirements because of varying state laws. In determining the multi-state class action could not succeed, the court stated that "[t]he elements of a Medical Monitoring claim are not uniform among the states," *id.* at 10, and "[t]he law applicable to these national classes differs from jurisdiction to jurisdiction." *Id.* at *11. In its holding that "any claim to commonality of law is defeated" for purposes of Rule 23(a), the court reasoned:

> To hold that Pennsylvania law applies to that transaction affords Pennsylvania law an extraterritorial scope neither contemplated by the Pennsylvania Legislature in enacting our choice of law rules nor contemplated by our founding fathers in creating our Federal form of national government. Such a proposition actually destroys Pennsylvania sovereignty since it's [sic] effect is to require manufacturers to adhere to the most restrictive standards imposed by any state lest they find that standard applied to their commercial behavior in all states including Pennsylvania. Such a holding affords national jurisdiction to every state legislature. This is not the law. Accordingly, any claim to commonality of law is defeated.

Id. at *13.

In *Jensen v. Bayer AG, supra*, 2003 WL 22962431, *4, an Illinois circuit court made a similar determination. The court determined that a national medical monitoring class action could not satisfy Rule 23(a) of the Illinois Rules of Civil Procedure. *Id.* It held there was no commonality of law to meet Rule 23(a) requirements since "the development of the law of medical monitoring can, at best, be characterized as embryonic." *Id.* It recognized that the Illinois case allowing a medical monitoring cause of action absent present physical injury provides little guidance for trial courts on "what elements are sufficient to state an independent claim of medical monitoring." *Id.* Regarding the law of the other states, the court held, "[t]his Court declines Plaintiff's invitation to predict what proof forty (40) states will require of a plaintiff to plead a cause of action for medical monitoring." *Id.*

Similarly, a number of federal courts applying Federal Rule 23(a) have found that typicality cannot exist where different states impose different legal requirements on the class members' claims.

For example, in *Nicodemus v. Union Pac. Corp.*, 204 F.R.D. 479, 491 (D. Wyo. 2001), the United States District Court for the District of Wyoming ruled that certification of a multi-state class was inappropriate in a lawsuit brought by owners of land adjacent to railroad rights of way seeking compensation for use of the rights of way to lay fiber optic cable. The court found that differences in various state laws governing the plaintiffs' claims for trespass, the acquiescence doctrine, limitations and unjust enrichment kept the plaintiffs from establishing that the Federal Rule 23(a)(3) typicality requirement was satisfied. *See id.* at 490-91.

Similarly, in *Brooks v. S. Bell Tel. & Tel. Co., supra*, 133 F.R.D. 54, a lawsuit over the denial of certain contractual employee benefits after the divestiture of a telephone company, the

U.S. District Court for the Southern District of Florida rejected certification of a proposed class of 5,000 members throughout four states. The named plaintiffs were all Florida residents. The court explained that in cases where "proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims." *Id.* at 58 (citing *Am/Comm Sys., Inc. v. Am. Tel. & Tel. Co.*, 101 F.R.D. 317, 321 (E.D. Pa. 1984)). Here, the court said, the differences among the four states' laws on contract formation, limitations, modification, waiver and other issues would "make it impossible for the plaintiffs to have claims typical of the proposed class." *Id.*

Similarly, if this Court allows this class action to proceed, it will have to define the differences between the elements of a medical monitoring action in West Virginia and the other states that have also recognized medical monitoring absent present physical injury. Additionally, it will have to hypothesize about the medical monitoring law of two states that have yet to consider the issue, Tennessee and Indiana. Further, it will have to reconcile its law with that of Virginia, which does not allow such a claim. Because of these many differences of state law, the claims by the named plaintiffs in West Virginia are not typical of the claims of the class. In the words of the United States Court of Appeals for the Sixth Circuit, "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class. That premise is not valid here." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). Nor is that premise valid in the case at hand.

IV. ALLOWING THIS ACTION TO PROCEED WOULD CONTRADICT THE CLEAR PUBLIC POLICY OF THE LEGISLATURE TO KEEP COURTS OPEN TO ONLY RESIDENTS OF WEST VIRGINIA AND THOSE WHOSE CLAIMS AROSE HERE

In 2003, the West Virginia legislature enacted a forum non conveniens law prohibiting plaintiffs from bringing claims in West Virginia state courts unless they reside in West Virginia

or their claim arises in West Virginia. *See* W. Va. Code Ann. § 56-1-1(c) (Michie 2003). This new civil justice reform measure does not explicitly state that it applies to class actions, but it expressly states that it applies to claims by joined plaintiffs:

> In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refiling in a court in any other state or jurisdiction.

Id.

Though this statute became effective after this lawsuit was filed, it is important to recognize that it expresses the West Virginia Legislature's stated public policy preference of ensuring that West Virginia courts are operated for the benefit of West Virginians and those who suffer wrongs in the state. The statute recognizes the importance of conserving court resources for West Virginians and those whose injuries arise in the state.

This Court has yet to consider this recent reform. At some point, it will have to review the statute and flesh out its application to class action lawsuits. If the Court allows this class action to continue, despite the fact that many class members reside out-of-state and were exposed out-of-state, West Virginia courts are likely to be flooded with multi-state class actions by counsel seeking to circumvent the West Virginia venue requirements. *See* W. Va. Code Ann. § 56-1-1(c) (Michie 2003). Doing so would establish a dangerous precedent adverse to the clear message of the West Virginia Legislature, resulting in out-of-state plaintiffs plaguing West Virginia dockets with their claims, consuming West Virginia resources, and channeling West Virginians' tax dollars away from West Virginians – all in contradiction to the policies expressed in Section 56-1-1(c). This Court can help stem that tide by ruling that Section 56-1-1(c) applies to class actions as well as other civil actions in which more than one plaintiff is joined.

CONCLUSION

Justice Maynard warned in his dissent in *Bower* that "the practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action." 522 S.E. at 435. If the Court allows a multi-state class action involving widely varying state laws on medical monitoring, the practical effect of its decision here will be to make not just "almost every West Virginian a potential plaintiff," but almost every American a potential plaintiff in West Virginia. Such widely different claims defeat the typicality requirement of Rule 23(a).

Allowing a class action to go through with these very substantial differing laws would cause impossible difficulties at trial, requiring lay jurors to understand and make subtle distinctions between different requirements and standards for recovery in the different states. Further, this multi-state action would bring great cost to West Virginia courts without any significant benefit to West Virginian taxpayers, contravening the strong public policy preference of the West Virginia legislature as expressed in recently enacted Section 56-1-1(c). The out-of-state claimants could bring their claims in their own states to be governed by their own law. West Virginia should not endure the economic burdens of entertaining the claims of out-of-state claimants for medical monitoring.

PRAYER FOR RELIEF

Amici respectfully ask this Court to reject this attempt to certify a multi-state class action for medical monitoring absent present physical injury under Rule 23 of the West Virginia Rules

Respectfully submitted,

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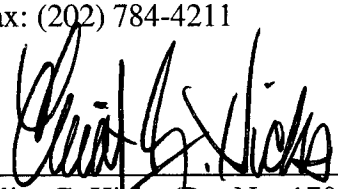

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Dated: August 2, 2004

IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA
NO. 31743

CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT MCKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INCL., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,

Defendant-Petitioners,

v.

THE HONORABLE JOHN T. MADDEN; AND ALL PLAINTIFFS IN *STERN, ET AL. v. CHEMTALL, INCORPORATED, ET AL.*, Civil Action No. 03-C-49M,

Plaintiff-Respondents.

CERTIFICATE OF SERVICE

I, Elliot G. Hicks, hereby certify that I served true and exact copies of the foregoing "Brief of the West Virginia Manufacturers Association, National Association of Manufacturers, Chamber of Commerce of the United States, American Chemistry Council, Coalition for Litigation Justice, Inc., and Property Casualty Insurers Association of America as *Amici* Curiaein Support of Defendant-Petitioners," on all counsel of record herein, by regular United States mail, postage prepaid, on the 2ND day of August, 2004, in envelopes as addressed below:

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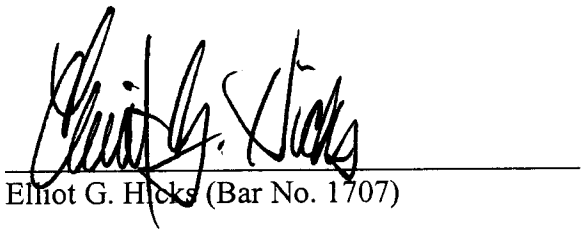

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