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Paper Assesses State of Law on "Medical Monitoring" Class Actions

Few court-created liability claims are more alluring to plaintiffs' lawyers than the medical monitoring class action. In theory, plaintiffs' don't need to prove an actual injury or direct causation, and their lawyers can easily combine hundreds or thousands of claims together to compel settlements and seek astronomical fees. As a new Washington Legal Foundation (WLF) paper describes, fortunately for defendants and proponents of an equitable legal system, an increasing number of courts have recognized the potential for abuse of medical monitoring, and have erected new limitations on the claims, while also applying existing class action rules to safeguard due process rights.

The publication, **MEDICAL MONITORING: INNOVATIVE NEW REMEDY OR MONEY FOR NOTHING?**, was authored for WLF by **Steven J. Boranian** and **Kevin M. Hara** of the law firm *Reed Smith LLP*. Mr. Boranian is a partner in the firm's San Francisco office, and Mr. Hara is a litigation associate in the Oakland office. The paper is the latest installment in WLF's educational WORKING PAPER series.

The authors begin by examining the evolution and current status of medical monitoring claims. As one court described it, "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." Medical monitoring first arose in the context of exposure to hazardous materials, with plaintiffs seeking recompense for the cost of future medical testing. Lawyers have since aggressively sought to expand the theory to encompass "harm" by everyday consumer products.

But as the authors state, "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." The paper goes on to explain how state courts have split over whether monitoring is recognized as a claim at all, whether it is a cause of action or simply a type of remedy available, and whether an actual injury is required. During their analysis, they identify the position taken by various state courts.

In the paper's final section, the authors provide a case study on how courts assess medical monitoring class actions, focusing on lawsuits against medical device and drug makers. One significant impediment to such suits, the paper notes, is that many courts have strictly applied Federal Rule of Civil Procedure 23 and ruled that

medical monitoring classes have "cohesion difficulties" due to the claims' varying facts and circumstances. The authors also note other impediments, such as limitations on claims-splitting and the ability of federal courts to apply state laws.

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Copies of this educational paper, WLF WORKING PAPER, Number 136 (January 2006), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.