

No. 31743

**Supreme Court of Appeals
of West Virginia**

CHEMTALL, INCORPORATED, ET AL.,

Petitioners/Defendants-Below,

v.

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

Respondents.

**BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS/DEFENDANTS-BELOW**

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached as Appendix A.

Many of PLAC’s members — including manufacturers of pharmaceuticals, medical devices, pesticides, foodstuffs, and chemicals — are potentially subject to lawsuits alleging long-term negative health effects from exposure to their products. The Circuit Court of Marshall County’s decision to certify a multi-state class action in this case stands as an open invitation to potential plaintiffs (and their attorneys) to file sweeping medical monitoring class actions in West Virginia. Of particular concern to PLAC are: (i) the court’s failure to conduct an adequate choice-of-law analysis, and (ii) the court’s disregard for its duty to protect the defendants’ due process rights to defend against the plaintiffs’ claims. Both aspects of the decision reflect an inclination to “bend the rules” that normally would govern the plaintiffs’ claims in order to pave the way for certification of a larger class. If other courts are similarly permissive in certifying multi-state medical monitoring class actions, manufacturers of many useful products will face

unprecedented litigation costs and massive potential liability. Accordingly, PLAC has a strong interest in encouraging this Court to reverse the class certification in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the class action device has many legitimate uses, it was not developed in order to aggregate the most claims possible into one lawsuit, to arrogate extraordinary power to one court, or to accumulate the largest potential fees for one set of plaintiffs' attorneys. Those will be the effects, however, of turning this case into a multi-state class action encompassing the claims of absent class members who do not reside in West Virginia, whose alleged injuries were not sustained in West Virginia, and who have no connection to West Virginia other than this action.

“[A] class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (internal quotation marks omitted). Use of the class action device, therefore, is properly constrained by rules and procedures carefully designed to protect the rights of litigants and avoid abuses. If courts making class certification decisions abandon these safeguards or lose sight of their obligation to protect litigants' rights, then class action procedures can become a mechanism for changing the substantive outcome of cases or, worse, extorting settlements and attorneys' fees from defendants in cases with little merit.

Particularly dangerous from this perspective is any class that reaches across state lines to include individuals whose claims lack a connection to the forum state. The practical difficulties of managing such sprawling actions inevitably push the court toward applying uniform legal rules to the entire class, creating a real risk that the class certification will result in the application of substantive law different from that which would be applied if the cases were tried

individually or in single-state classes. Multi-state class actions also tend to compromise the parties' ability to litigate individualized issues. At the very least, therefore, before certifying a multi-state class, a court should rigorously and strictly apply the criteria that govern the approval of class actions. The Circuit Court plainly failed to do so here.

Although the Circuit Court's analysis is deficient in several respects, the most egregious failing from PLAC's perspective is the court's refusal to grapple with the choice-of-law issues presented by the multi-state action that it certified. Although the court pronounced that any and all choice-of-law problems could be solved through use of subclasses (Order, at 27-31), it neither discussed the pertinent laws of the seven states involved, nor analyzed their differences, nor explained how subclasses would be employed.

Had the court actually performed that analysis, it would have recognized that no two of the seven states involved here would apply the same legal standards to plaintiffs' claims — requiring no fewer than seven subclasses under the Circuit Court's approach. Even assuming that it is possible adequately to instruct a jury on seven different legal regimes, there can be no conceivable justification for adjudicating what amounts to seven different state-wide class actions here in West Virginia.

The Circuit Court also failed to satisfy its obligation to ensure, *before* certification, that the putative class action can be litigated in a way that respects the due process rights of all parties. Although it recognized the existence of individualized issues that will need to be proved separately by each plaintiff (Order, at 20), it did not explain how defendants will be able to raise individualized defenses when the relevant evidence is located in other states and is not controlled by any party. Defendants' ability to defend themselves inevitably will be compromised if they are forced to try these out-of-state claims in West Virginia.

In sum, the Circuit Court’s decision to certify a multi-state class in this case signals that the “rigorous analysis” necessary to support certification of a class action (*General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)) does not apply when West Virginia courts consider claims by citizens of other states. This Court should, therefore, reverse the certification with respect to out-of-state plaintiffs.

ARGUMENT

I. THE CIRCUIT COURT FAILED TO CONDUCT AN APPROPRIATE CHOICE-OF-LAW ANALYSIS AND FAILED TO EXPLAIN HOW THE TRIAL OF THIS SEVEN-STATE CLASS ACTION CAN BE MANAGED.

The Circuit Court’s consideration of medical monitoring law and punitive damages law — critical elements of this case — was limited to conclusory statements that any “differences in the laws of the applicable states [do] not make the class action unmanageable.” Order, at 31. And rather than deciding whether, and to what extent, the law of different states would govern individual claims, the court simply stated that any choice-of-law issues “are manageable by the creation of subclasses, if necessary, as allowed by Rule 23(c)(4) of the West Virginia Rules of Civil Procedure.” *Id.* at 26. This perfunctory choice-of-law analysis was inadequate to protect the parties’ rights and did not justify expanding this class action beyond West Virginia.

A. Before Certifying A Multi-State Class, The Circuit Court Must Resolve Choice-Of-Law Issues And Explain How The Case Is Manageable.

Like its federal equivalent, the West Virginia class action statute limits use of the class action device to situations where: (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the represented parties are typical of those of the class, and (4) the represented parties will fairly and adequately protect the interest of the class. W. Va. R. Civ. P. 23(a). A court cannot properly decide whether a class action is appropriate, however, unless it has already resolved any

choice-of-law issues in the case. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (“[A] court must understand the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues.”); *Spence v. Glock Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000) (“The district court is required to know which law will apply before it makes its determination.”); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (class action plaintiffs must provide an extensive analysis of state law to allow courts to determine whether these pose insuperable obstacles to certification); *Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995) (courts must “analyze the substantive claims and defenses of the parties and the essential elements of those claims and defenses” in order to determine if class action requirements have been met). Deciding what law will apply to class members’ claims is a necessary prerequisite to any class certification decision, especially where the proposed class spans state lines and thus implicates the laws of more than one jurisdiction.

Here, the Circuit Court did not decide whether it would apply the laws of Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia to the claims of class members from those states or, instead, would apply the law of West Virginia to the entire seven-state class. Nor did the court either (i) identify differences in the various states’ laws and show how trial of this class could remain manageable and fair despite the need to apply seven (or some lesser number of) different legal regimes, or (ii) explain why it was appropriate to apply West Virginia law to the claims of all class members. Instead, the court simply asserted that *if* it needed to apply the laws of other states, and *if* there were relevant differences in those laws, then it would be able to solve any conflicts by creating subclasses. Order at 27-31. There are several fundamental problems with this approach.

First, by abdicating its responsibility to investigate, analyze, and resolve the choice-of-law issues that the parties have raised, the Circuit Court deprived this Court of a basis in the record on which to assess its certification decision. As it stands, this Court — which reviews certification decisions *de novo* (see, e.g., *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997)) — must begin its analysis of these issues from scratch. It must decide, without a lower court opinion to which it can react, what law should apply to out-of-state claimants and whether the resulting class is manageable, consistent with defendants' due process rights, and a legitimate use of the class action device. That alone would be reason enough to issue the writ and require the Circuit Court to finish its task and explain its reasoning more fully.

Second, the Circuit Court's optimistic prediction that subclasses can be used to solve any choice-of-law problems — to be discovered and addressed in the future — allowed it to avoid the serious manageability problems that would attend the trial of claims that accrued in seven states. Defendants were entitled to have this analysis performed *before* the court certified this immense class. When a court certifies a class action without fully resolving the choice-of-law issues, it unfairly exposes defendants to increased costs, risk, and settlement pressure without the due process guarantees that class action rules and procedures are designed to afford.

Third, the Circuit Court's approach will discourage companies from doing business in West Virginia. If the Circuit Court's decision is upheld, then a company considering whether to subject itself to the jurisdiction of West Virginia's courts must take into account that it can be exposed to the costs and risks of a multi-state class action even though choice-of-law and manageability problems should foreclose certification of such a sprawling class. Because this risk encompasses not just the company's potential activities in West Virginia, but its conduct in every other state, the potential cost to a company is enormous. Moreover, by refusing to provide

defendants with a full and fair due process determination *before* certifying this class, the Circuit Court has created the impression that courts of West Virginia give little weight to the rights of businesses that are sued here.

The Circuit Court should have conducted a full and fair analysis of all aspects of its certification decision — including the choice-of-law issues raised by the parties — up front, before it certified the class. Anything less violates these defendants’ due process rights, sets a dangerous precedent for future cases, and threatens to alienate the business community and inhibit investment in West Virginia.

B. If The Circuit Court Had Conducted The Required Choice-Of-Law Analysis, It Would Have Realized That Certifying The Out-Of-State Claims Is Improper Because Each State’s Claimants Must Form Their Own Subclass.

Although the Circuit Court did not decide what law it would apply to the out-of-state claims that it certified, it remarked that there were no “significant differences” (Order, at 26) in the laws of the states involved. It predicted, moreover, that the differences that do exist are “manageable by the creation of subclasses.” *Id.* As we discuss below, however, there *are* dramatic differences among the state laws implicated in this class action. Given these differences, due process would require the application of seven bodies of law to the claims of the class, rendering this case thoroughly unmanageable.

Under the strictures of the due process clause, the law of a single state cannot be applied to the claims of absent class members unless there is a “significant contact or significant aggregation of contacts to the claims asserted by *each* member of the plaintiff class” which demonstrate that “the choice of [that one state’s] law is not arbitrary or unfair.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (emphasis added) (internal quotation marks and citation omitted). Furthermore, “[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its

borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). It would violate these norms to impose the law of West Virginia — including its punitive damages law — on the claims of absent class members having no connection to the forum, at least to the extent that West Virginia law differs from the law that would apply if class members filed claims in their own states.

In fact, striking differences exist among the laws of the seven states involved here. Even if one limits the analysis to medical monitoring and punitive damages, as we do below, the law’s variation from state to state is so substantial that claims from no two states can be combined within a single subclass.¹ If the differences in the other areas of the law identified in Chemtall’s Memorandum (at 26-47) are considered, the state-by-state differences are even more pronounced. Thus, seven subclasses, subject to seven different bodies of law, plainly will be required. Such an unwieldy structure will overwhelm the trial court and the jury, significantly compromise the interests of both plaintiffs and defendants, and subvert the purposes of the class action device.

1. *West Virginia claims require their own subclass.*

Of the seven states, only West Virginia, Pennsylvania, and Ohio have explicitly recognized a cause of action for medical monitoring. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999); *Redland Soccer Club, Inc. v. Department of the Army*, 696 A.2d 137 (Pa. 1997); *Riston v. Butler*, 777 N.E.2d 857 (Ohio Ct. App. 2002). Of these,

¹ Because this is the class that the plaintiffs asked the Circuit Court certify, the court should have considered the differences in state laws on punitive damages even though it is not clear that such damages may be awarded in a medical monitoring case. *See, e.g., Appel v. Beazer East*, No. 98-C-2847, letter op. at 6 (W. Va. Cir. Ct. Kanawha County. Feb. 13, 2002) (“punitive damages are not recoverable on any claim for medical monitoring”).

West Virginia's law differs markedly from the other two. West Virginia plaintiffs must prove that their exposure to hazardous substances was "significant[]," whereas Pennsylvania and Ohio plaintiffs need show only that their exposure exceeded "normal background levels." Similarly, Pennsylvania and Ohio plaintiffs must prove that their exposure has caused a "significantly increased risk of contracting a serious latent disease," while West Virginia plaintiffs need only show "an increased risk of contracting a serious latent disease * * * relative to the general population." *Compare Bower*, 206 W. Va. at 141, *with Redland*, 548 Pa. at 195-96. The precise terms that apply to a given claim are important, as this Court recognized in *Bower*. 206 W. Va. at 143 (*citing Redland* but refusing to follow its language).

Furthermore, West Virginia's punitive damages law starkly differs from that of Ohio, Tennessee, Indiana, and Virginia. Those states all require plaintiffs to prove the elements of their claims by "clear and convincing evidence" before punitive damages may be awarded. *See* OHIO REV. CODE ANN. § 2315.21(C)(2) (2004) (Ohio); *Barnett v. Lane*, 44 S.W.3d 924, 928 (Tenn. Ct. App. 2000) (Tennessee); IND. CODE ANN. § 34-51-3-2 (Indiana); *Flippo v. CSC Assocs. III, L.L.C.*, 547 S.E.2d 216 (Va. 2001) (Virginia). West Virginia, however, expressly rejects the clear and convincing standard and instead requires proof by only a preponderance of the evidence. *See Coleman v. Sopher*, 201 W. Va. 588, 602, 499 S.E.2d 592 (1997). The West Virginia claims, therefore, plainly would have to be handled in their own subclass.

2. *Pennsylvania claims require their own subclass.*

Pennsylvania claimants also would have to be afforded their own subclass. Of the seven states involved here, only Pennsylvania, Illinois, and West Virginia allow punitive damages awards to plaintiffs who prove their claims by a preponderance of the evidence but lack clear and convincing proof. *See Polselli v. Nationwide Mut. Fire Ins. Co.*, No. 91-1365, 1993 U.S. Dist. LEXIS 5697, at *18 (E.D. Pa. April 30, 1993); ILL. JUR. *Personal Injury & Torts* § 5:97 (noting

that the Civil Justice Reform Act of 1995, which would have required clear and convincing proof as a predicate to punitive damage awards, was held unconstitutional in its entirety); *Coleman*, 201 W. Va. at 602. A single subclass with claimants from these states would be inappropriate, however, because their laws on medical monitoring significantly diverge. As noted above, Pennsylvania’s medical monitoring law requires different types of proof from the law in West Virginia. And Illinois courts have never recognized any claim for medical monitoring: Indeed, federal courts in the state have expressed doubt that such a theory is consistent with Illinois law. *See Guillory v. America Tobacco Co.*, No. 97C8641, 2001 WL 290603, at *7 (N.D. Ill. Mar. 20, 2001) (“[I]t is far from clear whether Illinois recognizes medical monitoring as an independent cause of action”); *Carey v. Kerr-McGee Chem. LLC*, 1999 WL 966484, at *1 (N.D. Ill. Sept. 30, 1999) (“Neither the U.S. Court of Appeals for the Seventh Circuit nor any Illinois reviewing court has decided * * * [w]hether Illinois would recognize a cause of action for medical monitoring absent present physical injury.”).

3. *Ohio claims require their own subclass.*

Ohio is the only state that both explicitly recognizes medical monitoring claims and requires that juries award punitive damages only upon clear and convincing evidence of wrongdoing. That alone makes the body of law governing Ohioans’ claims unique.

Ohio’s common law requirement that plaintiffs prove “actual malice” in order to claim punitive damages further distinguishes it from the other six states. *See Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1220-31 (Ohio 1999). Ohio courts define “actual malice” as “(1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty*, 512 N.E.2d 1174, 11766 (Ohio 1987). In contrast, punitive damages are permissible in Illinois when a defendant is aware that

his conduct will naturally and probably result in *any* injury; that is, the defendant need not have been conscious of the rights of others, nor aware that the probability of “substantial harm” was “great.” *See* ILL. JUR. *Personal Injury & Torts* § 5:94. The only way to protect the parties’ rights to be judged according to the applicable law is to separate out Ohio claimants into a separate subclass.

4. *Tennessee claims require their own subclass.*

The Tennessee claims likewise deserve separate treatment. Tennessee courts have yet to recognize a cause of action for medical monitoring in the absence of physical injury, and nothing suggests that medical monitoring claims for plaintiffs without proof of a present injury would be cognizable under Tennessee case law. For example, Tennessee courts award damages for negligent infliction of emotional distress in very limited circumstances, where “‘physical’ pain, suffering and disability resulting from fright or psychic shock * * * is brought about by the negligence of the defendant.” TENN. JUR. *Damages* §15 (citations omitted). Similarly, a Tennessee plaintiff may not recover damages for negligent infliction of emotional distress based on the fear of contracting AIDS “without presenting evidence that he or she was actually exposed to the [HIV or AIDS virus].” *Id.* Medical monitoring without evidence of physical injury would be inconsistent with Tennessee’s skepticism toward unverifiable damages. Thus, Tennessee claimants must be segregated in their own subclass, at least until the court decides whether they can proceed with their claims, and if so, on what conditions.

5. *Virginia claims require their own subclass.*

A separate inquiry is also required to adjudicate the Virginia claims. Like Tennessee, Virginia has yet to recognize a claim for medical monitoring in the absence of personal injury. Unlike in Tennessee, however, the Fourth Circuit has predicted that such claims are *not* cognizable under Virginia law. *See Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991). When

it decided *Bower*, this Court rejected *Ball*'s holding inasmuch as it concerned West Virginia law. 206 W. Va. at 139. Yet no court has taken similar steps in Virginia.

Furthermore, "the Virginia legislature, when it has created new causes of action and intend[ed] to allow punitive damages * * * [has] specifically provide[ed] for such damages." *McGladrey & Pullen, L.L.P. v. Shrader*, 62 Va. Cir. 401, 411 (2003). Even if Virginia would recognize a cause of action for medical monitoring, punitive damages might not be available to plaintiffs bringing such a claim. Virginia claimants thus would need to be placed in a separate subclass, to allow the court to determine not only whether medical monitoring claims would be recognized at all, but also whether claimants would be entitled to punitive damages.

6. *Indiana claims require their own subclass.*

Indiana claims deserve their own subclass too, because the circumstances applicable to determining Indiana's law of medical monitoring are unique. Although no Indiana court has ever approved an independent claim for medical monitoring, in 1993 an appeals court upheld a plaintiff's action in nuisance for medical monitoring relief. *See Gray v. Westinghouse Elec. Corp.*, 624 N.E.2d 49, 52 (Ind. Ct. App. 1993). As with Tennessee and Virginia, the Circuit Court will have to predict the future development of Indiana law, but unlike those states, claimants from Indiana may have grounds to argue that their claim is cognizable because it sounds in nuisance.

7. *Illinois claims require their own subclass.*

Finally, Illinois claims must also be handled within their own subclass. As with Virginia (*see Ball*, 958 F.2d 36), federal courts have consistently expressed doubt that an action for medical monitoring is cognizable under Illinois law. *See Guillory*, 2001 WL 290603, at *7; *Carey*, 1999 WL 966484, at *1. But even though the state courts in Illinois and Virginia have been similar in their silence, any prediction of what law they would apply here would have to be

tailored to their prior decisions in analogous cases. If a West Virginia court undertakes to predict what Illinois and Virginia courts would have decided, it will have to treat each state's law separately.

Furthermore, Illinois law does not allow an award of punitive damages unless the plaintiff has sustained an actual injury for which compensatory damages have been awarded. *See Hayman v. Autohaus on Edens, Inc.*, 734 N.E.2d 1012 (Ill. Ct. App. 2000). It is not clear whether Illinois courts, should they recognize a cause of action for medical monitoring, would consider this prerequisite for punitive damages to be satisfied by a verdict ordering creation of a medical monitoring program. Only by maintaining a subclass of all Illinois claims can the court separate out these individual legal issues.

* * * * *

The need to instruct the jury on seven different bodies of law, varying on a dozen different dimensions — not just the two detailed above — proves that this case cannot be managed as a multi-state class action. No judge can be expected to craft rational and coherent instructions that accurately convey the variations, sometimes subtle, sometimes not, between the laws of seven different states. And no jury can be expected to understand even the most carefully crafted instructions or to reach fair verdicts that conform with seven different states' laws. Finally, it is unfair to expect defendants or plaintiffs to litigate their cases — making rational trial decisions and fashioning cogent arguments — under such a confusing set of legal rules. The multi-state behemoth certified by the Circuit Court is simply not manageable.

C. Certification Of Out-Of-State Claims Is Particularly Inappropriate In A Case Involving Medical Monitoring, Where The Governing Law In Many States Is Still Being Developed.

The relative immaturity of the medical monitoring cause of action strongly militates against certification of a multi-state class. “For over two hundred years, one of the fundamental

principles of tort law has been that a plaintiff cannot recover without proof of a physical injury.” Victor E. Schwartz, *et al.*, *Medical Monitoring: Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059 (1999) (quoted in *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001) (declining to recognize cause of action for medical monitoring)). Just a few years ago, this Court joined others that “are venturing into uncharted territory as they create medical monitoring causes of action” (*Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 856 (Ky. 2002)), for the first time “reject[ing] the contention that a claim for future medical expenses must rest upon the existence of present physical harm” (*Bower v. Westinghouse Elec. Corp.*, 206 W. Va. at 139). And as the Supreme Court of the United States has observed, “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.” *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997). Unless properly administered, medical monitoring claims “threaten both a ‘flood’ of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany ‘unlimited and unpredictable liability.’” *Id.* (citation omitted). The decision whether or not to allow, and how to structure, suits for medical monitoring thus has significant public policy implications.

In *Bower*, this Court deemed medical monitoring claims to be a “well-grounded extension of traditional common-law tort principles.” 206 W. Va. at 138. But in other states, including several of the states whose laws apply here, the courts have either reached a different conclusion or have yet to complete the task of determining the status of medical monitoring claims under their own state’s law. Thus, this multi-state class action will devolve into a guessing game in which the Circuit Court of Marshall County will attempt to predict the future development of the law in other states. At best, this ambitious endeavor will waste West

Virginia's limited judicial resources. At worst, if the Circuit Court guesses incorrectly and recognizes, say, a Tennessee-based claim that Tennessee would have rejected, or dismisses a claim that Tennessee would have allowed, the decision to extend this case beyond Tennessee will effect a blatant miscarriage of justice. There is no reason for the courts of West Virginia to engage in this risky exercise when plaintiffs from other states are free to bring claims in their own states' courts.

Moreover, West Virginia's co-equal sister states have a sovereign interest in allowing this new area of law to develop, in the normal course, in their own state court systems. They must strike their own balance between the competing interests of public welfare, judicial principle, desired ends, and efficient means. That process will happen less quickly, if at all, if West Virginia opens its courthouse doors to medical monitoring class actions that arise elsewhere. Yet the Circuit Court arrogated this law-making power to itself without any participation in this case by a citizen of Illinois, Indiana, Ohio, Pennsylvania, Tennessee or Virginia who claims to have been injured in one of those states.

The West Virginia courts should not lightly entertain lawsuits that have not been expressly authorized by the states with the greatest interest in their outcome. The Circuit Court's willingness to certify this multi-state class action despite the unsettled nature of the applicable law is further evidence of its failure to approach the class certification decision with the appropriate seriousness and caution.

II. DUE PROCESS PREVENTS A WEST VIRGINIA COURT FROM ADJUDICATING THE CLAIMS OF PLAINTIFFS WHO ALLEGE EXPOSURE TO A TOXIC SUBSTANCE IN ANOTHER STATE.

Even setting aside the specific requirements of the class action device, every state lawsuit — including a class action — must conform with the requirements of the Due Process Clause of the Fourteenth Amendment. The Supreme Court has made clear that use of the class action

device is consistent with due process only if trial of the action can be accomplished “without sacrificing procedural fairness” and without “abridg[ing], enlarg[ing] or modify[ing] any substantive right.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 615 (1997) (quoting the Rules Enabling Act, 28 U.S.C. § 2072(b)); *see also Broussard*, 155 F.3d at 345 (“[A] class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. It is axiomatic that the procedural device of [a class action] cannot be allowed to expand the substance of the claims of class members.”) (internal quotation marks and citations omitted). Similarly, in West Virginia, as in federal court, Rule 23 “does not alter the required elements which must be found to impose liability and fix damages.” *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998). “What this means, as a practical matter, is that, in an effort to achieve manageability, courts may not relieve plaintiffs of the burden of proving the individualized elements of their claims * * * and may not deprive defendants of the right to put on individualized evidence, to raise individualized defenses, and to receive a verdict on the individualized facts of each class member’s claims.” Evan M. Tager, *The Constitutional Limitations on Class Actions*, MEALEY’S LITIG. RPT.: CLASS ACTIONS, January 2001, at 35; *see generally Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (“[d]ue process requires that there be an opportunity to present every available defense”) (internal quotation marks and citation omitted); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (“defendants must be allowed to present any relevant rebuttal evidence they choose”).

Thus, regardless of the existence or even predominance of common issues among class members, courts cannot certify a class if use of the class action device would deprive defendants of their due process right to present a full and fair defense to the plaintiffs’ claims. In other words, any gains in efficiency from class certification are trumped by the court’s constitutional

obligation to protect each party's right to present its case. The multi-state class that was certified here violates this constitutional rule by depriving defendants of the ability to put on a defense with respect to individualized issues raised by each class member's claim.

A. Toxic Exposure Class Actions Are Inherently Suspect.

Claims of injury — and, as here, the potential for future injury — from past exposure to allegedly toxic substances are, in general, poor candidates for class action treatment. These claims necessarily involve a tremendous number of individualized issues, cause complex manageability problems, and threaten the parties' abilities to adjudicate their claims in a full and fair manner. For this reason, courts routinely refuse to certify classes of plaintiffs who allege toxic exposure.² And, of course, all of the problems raised by these individualized issues are

² See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (upholding decertification of class of individuals exposed to asbestos in defendants' products); *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995) (upholding denial of certification of class of individuals exposed to emissions from uranium mill); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (vacating order for class action trial of individuals exposed to asbestos in defendants' products); *Jacobs v. Osmose, Inc.*, 213 F.R.D. 607 (S.D. Fla. 2003) (denying certification of putative class of individuals whose property was contaminated by CCA, a wood treatment, that leached from treated wood); *Neenan v. Carnival Corp.*, 199 F.R.D. 372 (S.D. Fla. 2001) (denying certification of putative class of cruise ship passengers exposed to waste fumes); *Church v. General Elec. Co.*, 138 F. Supp. 2d 169 (D. Mass. 2001) (denying certification of putative class of individuals whose land was contaminated with PCBs that leaked from defendant's plant); *Jones v. Allercare, Inc.*, 203 F.R.D. 290 (N.D. Ohio 2001) (denying certification of putative class of individuals who suffered allergic reaction to dust mite powder and spray); *Reilly v. Gould, Inc.*, 965 F. Supp. 588 (M.D. Pa. 1997) (dismissing class action allegations of individuals whose homes were contaminated by lead from a battery plant); *Hurd v. Monsanto Co.*, 164 F.R.D. 234 (S.D. Ind. 1995) (denying certification of putative class of workers exposed to PCBs during work at electrical plant); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994) (denying certification of putative class of individuals whose groundwater was contaminated by TCE released from bearings plant); *Puerto Rico v. M/V Emily S.*, 158 F.R.D. 9 (D.P.R. 1994) (denying certification of putative class of individuals exposed to fumes from fuel oil spill); *Jackson v. The Glidden Co.*, No. 236835, 2001 Ohio Misc. LEXIS 2 (Ct. Com. Pl. Mar. 30, 2001) (denying certification of putative class of individuals exposed to lead-based paint in their residences); *Millett v. Atlantic Richfield Co.*, No. CV-98-555, 2000 Me. Super. LEXIS 39 (Mar. 2, 2000) (denying certification of putative class of individuals whose well water was polluted by spillage of MTBE, a gasoline additive); *Muttart v. American Mortgage & Guar. Co.*, No. 96C-09-263-

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magnified (and, when the law of multiple states must be applied, are multiplied) when the proposed class includes claimants from a broad geographic area.

The individualized issues raised by toxic exposure cases include, most notably, the amount (and in this case the “type”) of the allegedly toxic substance present at each plaintiff’s alleged place of exposure,³ as well as each plaintiff’s actual historical exposure level.⁴ These individualized issues are present even in a cause of action for medical monitoring — as the Circuit Court recognized. *See* Order at 20 (“A question which goes to the merits of Plaintiffs’ case is whether each proposed member had ‘significant’ exposure to Defendants’ products to

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WTQ, 1998 Del. Super. LEXIS 30 (Feb. 9, 1998) (striking class action allegations of individuals exposed to contaminated air in a building).

³ *Church*, 138 F. Supp. 2d at 182 (“[t]o judge whether there has been a harmful enough invasion by PCBs for liability to attach * * * an expert must necessarily measure the extent of the contamination of the individual properties”); *Reilly*, 965 F. Supp. at 598-99 (“[a] random sampling * * * reveals that other members * * * have varying levels of lead in their soil”).

⁴ *Amchem*, 521 U.S. at 609 (“class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time”); *Boughton*, 65 F.3d at 828 (“individual measurements can be quite relevant evidence in determining the extent of an individual’s level of exposure and * * * such measurements may vary from individual to individual”); *In re Fibreboard Corp.*, 893 F.2d at 710 (“[t]he dates of exposure [and] [t]he types of products to which class members were exposed varies among class members”); *Reilly*, 965 F. Supp. at 603-04 (“exposure varies from person to person * * * [and] the effect that lead has on a child * * * is dependent on the amount of lead ingested and the duration of ingestion”); *M/V Emily S*, 158 F.R.D. at 14 (“[there are] variances in exposure leading to the need of assessing the individualized circumstances of each personal injury claimed”); *id.* (“environmental factors * * * varied significantly over time, which lead to a variance in duration, intensity, and implications of exposure”); *Jackson*, 2001 Ohio Misc. LEXIS at *18 (“The plaintiffs were all exposed to lead-based paint for different amounts of time, and to paint that was manufactured and applied over different periods.”); *Muttart*, 1998 Del. Super. LEXIS at *13-14 (“Class members allegedly shared the common experience of exposure to contaminants in the * * * building. The extent of their commonality ceases to exist at that point, however. The nature of the allegations by the Plaintiffs inevitably will contain individual issues of causation, as they relate to varying exposure to the building contaminants, and issues of pre-existing medical conditions.”).

warrant medical monitoring.”). And even where toxic exposure class actions are limited to a single site — as opposed to here, where an unspecified multitude of locations, in seven different states, are involved — many individualized issues remain because “each plaintiff was exposed to different levels of [the allegedly toxic substance] for different amounts of time in different areas of the plant * * * [and] some class members have been exposed to [the substance] only for a few months and at low levels, while others, for decades and at high levels.” *Hurd*, 164 F.R.D. at 239-40. The number of individualized issues obviously grows with the addition of each new location, presenting not only the individualized facts of each person allegedly exposed at the site but also the peculiar factual issues that are certain to arise at each separately organized and operated facility.

Once they recognize the highly individualized nature of a toxic exposure claim, courts consistently decide that a class action trial would either be dominated by individualized issues or would violate the parties’ rights to a full and fair adjudication by relieving plaintiffs of the burden of proving the individualized elements of their claims, depriving defendants of the right to put on individualized evidence and raise individualized defenses, or depriving the parties of their right to receive a verdict on the facts of their individualized cases.⁵ The greater the number

⁵ *Jacobs*, 213 F.R.D. at 614 (“unlike single-incident tragedies, more nebulous classes based on injuries that are spread out over a long period of time do not lend themselves well to class certification, in that no single set of operative facts establishes liability and no single proximate cause applies to each potential class member’s injuries”) (citation omitted); *Neenan*, 199 F.R.D. at 376 (“the individual issues of causation and injury in fact will consume the majority of the Court’s time in this matter * * * whether the passenger returned to a cabin with fully operational toilets and water faucets or to a cabin with faulty toilets and water faucets; whether toilets were reinstated in the passenger’s cabin; whether the water in the passenger’s cabin was brown, cloudy, or clear; whether the passenger was compelled to drink bottled water”); *Hurd*, 164 F.R.D. at 240 (“even if a jury could make a class-wide finding of fact regarding the general health risks posed by PCBs, resolution of liability issues would still require an individual inquiry into the circumstances involving each class member’s exposure and susceptibility”); *Thomas*, 846 F. Supp. at 1404 (“[there would be] hundreds or thousands of individual mini-trials on

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of class members, the more sites of alleged exposure, and the more diverse the circumstances of exposure that the court has aggregated into a single class, the more severe and intractable these problems become. This Court should therefore be very skeptical of the Circuit Court's willingness, not merely to certify a class of West Virginia claimants, but to exacerbate the already formidable problems inherent in any toxic exposure class by adding huge numbers of claimants from six other states.

B. The Trial Court's Description Of The Case Demonstrates Why It Cannot Be Litigated Without Violating Defendants' Due Process Rights.

The Circuit Court recognized that “[a] question which goes to the merits of Plaintiffs’ case is whether each proposed member had ‘significant’ exposure to Defendants’ products to warrant medical monitoring.” Order at 20. Although the court conceded that this is an individualized issue — and acknowledged that each class member must individually prove his or her historical exposure to polyacrylamide flocculants — it simply stated that “[t]his and other related issues must be proven by the evidence at trial and are not required for purposes of certification.” *Id.* In a toxic exposure class that spans state borders, however, the presence of significant individualized issues cannot be addressed by requiring each plaintiff to prove those issues at trial, because the operation of such a trial would violate defendants’ due process rights.

Defendants cannot be compelled to take at face value a claimant’s assertion that he or she was exposed to their products while working at a coal preparation plant in, for example, Illinois.

(... cont’d)

complex causation and damages issues, while the only benefit of a class would be that the ruling of several common, but not particularly daunting issues, would be made applicable to the entire class”); *M/V Emily S*, 158 F.R.D. at 15 (“the issues that would take the most judicial time to resolve, and which are central to the plaintiffs’ ability to recover, will be individual issues of injury in fact and causation * * * [e]ven if the plaintiffs succeeded in establishing the fault or negligence of one or more defendants, the personal injury claimants would still have the bulk of their cases to prove”).

Defendants have the right to present evidence proving, for example, that the person did not work at the specified facility, that his or her job did not involve exposure to defendants' products, or that he or she did not receive a "significant" exposure. Such evidence likely would come from records or witnesses at the relevant coal processing facility in Illinois. If an Illinois claimant brought his or her claim individually in Illinois — or even as part of a class action in an Illinois court — then defendants could obtain the relevant evidence through the traditional methods of compelling discovery from a non-party.

If the claim were arrogated to a court in West Virginia, in contrast, defendants would have no obvious method of compelling an Illinois coal processing facility to provide the necessary information or testimony. The Circuit Court of Marshall County lacks jurisdiction over a coal processing plant in Illinois — unless the facility happens to be owned by an entity that has significant contacts with West Virginia. And the discovery tools available to litigants in West Virginia courts cannot compel an out-of-state non-party to produce documents (W.VA. CODE § 57-5-4) or witnesses (W.VA. CODE § 57-5-1). *See also* W. VA. R. CIV. P. 45(b) ("a subpoena may [only] be served at any place within the State"). Thus, when an individual whose claim is adjudicated by the Circuit Court of Marshall County, West Virginia, alleges exposure to polyacrylamide flocculants at a coal processing facility in Illinois, the Circuit Court cannot guarantee that defendants will have a chance to rebut the allegation.

This is a substantial impediment to defendants' due process right to put on a defense. By certifying this multi-state class, the Circuit Court has effectively altered out-of-state claimants' cause of action by reducing their burden of proving exposure to defendants' products to a mere prima facie showing. That result is inconsistent with the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The Court should issue a Writ of Prohibition and/or Mandamus instructing the district court to decertify the class in this case at least with respect to claims by individuals in states other than West Virginia.

Respectfully submitted.

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JULY 22, 2004

APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. (AS OF 6/10/2004)

3M	CATERPILLAR INC.
ALTEC INDUSTRIES	CHEVRON CORPORATION
ALTRIA CORPORATE SERVICES, INC.	CONTINENTAL TIRE NORTH AMERICA, INC.
AMERICAN HOUSEHOLD, INC.	COOPER TIRE AND RUBBER COMPANY
AMERICAN SUZUKI MOTOR CORPORATION	COORS BREWING COMPANY
AMGEN INC.	CROWN EQUIPMENT CORPORATION
ANDERSEN CORPORATION	DAIMLERCHRYSLER CORPORATION
ANHEUSER-BUSCH COMPANIES	DANA CORPORATION
APPLETON PAPERS, INC.	DEERE & COMPANY
ARAI HELMUT, LTD.	DELPHI CORPORATION
ASTEC INDUSTRIES	DIAGEO NORTH AMERICA INC.
AVENTIS PHARMACEUTICALS, INC.	DOREL JUVENILE GROUP, INC.
BASF CORPORATION	E & J GALLO WINERY
BAYER CORPORATION	E.I. DUPONT DE NEMOURS AND COMPANY
BERETTA U.S.A. CORP.	EATON CORPORATION
BIC CORPORATION	ELI LILLY AND COMPANY
BIRO MANUFACTURING COMPANY, INC.	EMERSON ELECTRIC Co.
BLACK & DECKER (U.S.) INC.	ENGINEERED CONTROLS INTERNATIONAL, INC.
BMW OF NORTH AMERICA, LLC	ESTEE LAUDER COMPANIES
BOEING COMPANY	EXXON MOBIL CORPORATION
BOMBARDIER RECREATIONAL PRODUCTS	FEDERAL SIGNAL CORPORATION
BP AMERICA INC.	FMC CORPORATION
BRIDGESTONE/FIRESTONE, INC.	FORD MOTOR COMPANY
BRIGGS & STRATTON CORPORATION	FREIGHTLINER LLC
BRISTOL-MYERS SQUIBB COMPANY	GENERAL ELECTRIC COMPANY
BROWN AND WILLIAMSON TOBACCO	GENERAL MOTORS CORPORATION
BROWN-FORMAN CORPORATION	GLAXOSMITH KLINE
CARQUEST CORPORATION	GLOCK, INC.

GREAT DANE LIMITED PARTNERSHIP
GUIDANT CORPORATION
HARLEY-DAVIDSON MOTOR COMPANY
HARSCO CORPORATION
HONDA NORTH AMERICA, INC.
HYUNDAI MOTOR AMERICA
ICON HEALTH & FITNESS, INC.
ILLINOIS TOOL WORKS, INC.
INTERNATIONAL TRUCK AND ENGINE
CORPORATION
ISUZU MOTORS AMERICA, INC.
JOHNSON & JOHNSON
JOHNSON CONTROLS, INC.
JOY GLOBAL INC., JOY MINING MACHINERY
KAWASAKI MOTORS CORP., U.S.A.
KIA MOTORS AMERICA, INC.
KOCH INDUSTRIES
KOLCRAFT ENTERPRISES, INC.
KRAFT FOODS NORTH AMERICA, INC.
LINCOLN ELECTRIC COMPANY
MASCO CORPORATION
MAZDA (NORTH AMERICA), INC.
MCNEILUS TRUCK AND MANUFACTURING,
INC.
MEDTRONIC, INC.
MERCEDES-BENZ OF NORTH AMERICA, INC.
MICHELIN NORTH AMERICA, INC.
MILLER BREWING COMPANY
NIRO INC.
NISSAN NORTH AMERICA, INC.
NOVARTIS PHARMACEUTICALS
CORPORATION
PACCAR INC.

PANASONIC
PENTAIR, INC.
PFIZER INC.
PHARMACIA CORPORATION
POLARIS INDUSTRIES, INC.
PORSCHE CARS NORTH AMERICA, INC.
PPG INDUSTRIES, INC.
PURDUE PHARMA L.P.
RAYTHEON AIRCRAFT COMPANY
REMINGTON ARMS COMPANY, INC.
RHEEM MANUFACTURING
RJ REYNOLDS TOBACCO COMPANY
SCHERING CORPORATION
SCHINDLER ELEVATOR CORPORATION
SMC GROUP USA INC.
SEARS, ROEBUCK AND CO.
SHELL OIL COMPANY
SMITH & NEPHEW, INC.
SNAP-ON INCORPORATED
SOFAMOR DANEK
STURM, RUGER & COMPANY, INC.
SUBARU OF AMERICA, INC.
SYNTHES (U.S.A.)
TEREX CORPORATION
TEXTRON, INC.
THE DOW CHEMICAL COMPANY
THE GOODYEAR TIRE & RUBBER COMPANY
THE HEIL COMPANY
THE PROCTER & GAMBLE COMPANY
THE RAYMOND CORPORATION
THE SHERWIN-WILLIAMS COMPANY
THE TORO COMPANY
THOMAS BUILT BUSES, INC.

TK HOLDINGS

TOSHIBA AMERICA INCORPORATED

TOYOTA MOTOR SALES, USA, INC.

TRW AUTOMOTIVE US LLC

UST (U.S. TOBACCO)

VOLKSWAGEN OF AMERICA, INC.

VOLVO CARS OF NORTH AMERICA, INC.

VULCAN MATERIALS COMPANY

WATER BONNET MANUFACTURING, INC.

WATTS WATER TECHNOLOGIES, INC.

WHIRLPOOL CORPORATION

WYETH

YAMAHA MOTOR CORPORATION, U.S.A.

ZIMMER, INC.