Medical Monitoring - Another Individualized Issue

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Medical monitoring is an odd-duck (we would say illegitimate) tort because it's almost 100% dependent upon a particular procedure - the class action - for its existence. Procedure, of course, is not supposed to alter the substantive law, but in medical monitoring it has. Thus, kill the medical monitoring class action and one largely kills the tort.

We blogged not too long ago about the Third Circuit's decision in Gates v. Rohm & Haas Co., 655 F.3d 255 (3d Cir. 2011), because of that court's evaluation of the presence of individual medical/exposure in medical monitoring claims. The finding in Gates on the predominance question, we thought, pretty much closed the coffin on class certification of medical monitoring claims, at least under Pennsylvania law.

Kill the class action and we kill the tort.

Here's another recent opinion putting some nails in the coffin: Fiorentino v. Cabot Oil & Gas Co., 2011 WL 5239068 (M.D. Pa. Nov. 1, 2011). The court's ruling arises in a somewhat odd context, a discovery dispute. It's not entirely clear, but we think it's a fracking case - part of the latest environmental guerilla war in these parts (although with natural gas less carbon-intensive than coal, we're not sure what the fight is really supposed to be about).

In Fiorentino, a bunch of plaintiffs were seeking medical monitoring. As usual, they alleged no personal injury at all, only some vague "future risk." Rather cheekily (and unwisely, as it turned out) they refused to turn over their medical records. The defendants pursued the issue, arguing that they needed medical records to evaluate whether the plaintiffs really required monitoring beyond what they would have had to get anyway, given their pre-existing medical conditions. That's element six of medical monitoring in Pennsylvania. Fiorentino, 2011 WL 5239068, at *3 (listing elements). We'll call it the "over-and-above" element for short.

The plaintiffs claimed that their individual records were "completely irrelevant" because the over-and-above element was judged solely against what was "normally prescribed for the general public." The defendants viewed this over-and-above element as requiring monitoring beyond that "normally recommended for that particular plaintiff." 2011 WL 5239068, at *3.

General public versus particular plaintiff.

Common issue versus individualized issue.

Class certification versus no class certification.

Kill the class; kill the tort.

The court in Fiorentino came down squarely on the side of the over-and-above element requiring individualized proof:

"The fundamental principles of tort law and the evolution of the medical monitoring claim throughout Pennsylvania Supreme Court decisions leads to the prediction that the Supreme Court would **require each plaintiff to demonstrate that the monitoring regime recommended for her is different from the monitoring regime recommended *for her* absent the alleged exposure**. In other words, each plaintiff's **individual medical condition/history is relevant** to establishing the medical monitoring claim."

2011 WL 5239068, at *6 (emphasis added). There follow (follows? - interesting grammatical conundrum) several pages of analysis in support of that conclusion, which we commend to anyone defending a medical monitoring claim (and not just in Pennsylvania). We won't go into all that now.

Our takeaway. Here's yet another way - beyond those already held dispositive in Gates - of demonstrating that common issues do not predominate in medical montoring claims (and after Dukes, predominance cannot be avoided). Since almost every state that has made the mistake of recognizing medical monitoring claims includes an over-and-above element, the same argument should be available elsewhere.

Kill the class action; kill the tort.