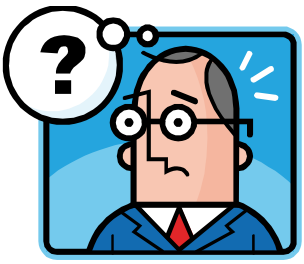
MondayMonday

Think You Know Everything?

June 2, 2014

In the world of tort reform; in an America which believes that it cannot be hurt by corporations whose only fealty is to the bottom line; in a country who believes that the doctor is woefully beset by greedy trial lawyers and, if just left to his own devices, will consistently render superlative care without fail; we offer Exhibit "A": The VA Hospital crises.

We'll be blunt. We knew. As personal injury trial lawyers, we knew that VA medical services were horrendous, that facilities were inadequate and that medical care was, at best, hit and miss. But why listen to us? After all, we're the people who made your playgrounds safe, stopped your kids from being burned by their flammable pajamas, made car manufacturers put seatbelts in the autos they sold you, stopped those same carmakers from selling you cars with gas tanks that blew up on contact, convinced tobacco pushers that maybe it was cheaper telling you plainly about the cancer they caused rather than duping you into being killed by it, and a plethora of other minor matters affecting the quality—to nothing of the length– of your life. So if you can sit there with a straight



face as you wait 2 hours to see your Gucci-loafered doctor, whose Porsche sits glistening in the office parking lot, and truly believe that we, who are <u>your</u> lawyers, are both your enemy and his, then stop complaining. Sometimes, you have to know who your friends are, because your enemies certainly do. In order for the Dick the Butcher's of the world to prevail, the first thing they must do is "kill all the lawyers." For, as Shakespeare knew, we are your last line of defense against all the people and things that can hurt you.

Can hundreds of lawyers get something wrong? Can tens of courts do so too? That's what has medical device lawyers scratching their heads after the Office of the Solicitor General weighed in as amicus on whether or not to grant certiorari in Stengel v. Medtronic, Inc., 12-1351. While it's rare that the Supreme Court asks for help in deciding what to review, when it does, it looks to the "SG", the person who represents the United States before the Court and, without a doubt, has the most experience in Supreme Court practice. That only happens about a dozen times a year, and it's what is known as a CVSG ("Call for the View of the Solicitor General"). In 80% of the cases in which the SG advises the Court not to grant the petition for certiorari, the Court follows the SG's suggestion.

In the *Stengel* petition, review was sought from an 11th Circuit case in which the circuit had held that the Stengels could bring an action seeking damages from a medical device manufacturer notwithstanding federal preemption arguments made under the Medical Device Amendment ("MDA") to the FDCA. Medtronic argued that it was exempt from any lawsuit challenging its medical device as the MDA preempted all state laws designed to protect medical consumers. While the 11th Circuit relied on the Supreme Court's 2008 decision in *Riegel* to hold otherwise, the SG's opinion arrived at the same conclusion, but over new ground.

The SG stunned lawyers on both sides of the question by advising the Court not to grant review at all, since <u>the medical device had never been entitled to preemption</u> in the first instance. The FDA had never <u>specifically preempted</u> the device, which it was required to do under the MDA. Failing that specific preemption, there was none, and the device is now subject to state consumer protection laws, says the SG. Who knew?