

Asbestos

Published by LexisNexis™

'Medical Monitoring And Asbestos Litigation' —

**A Discussion With
Richard Scruggs
And Victor Schwartz**

LOEC Panel Discussion

*Chapman University
Orange, California*

**A commentary article
reprinted from the
March 1, 2002 issue of:
Mealey's Litigation Report:
Asbestos.**

Commentary**'Medical Monitoring And Asbestos Litigation' —
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The following panel discussion took place at the Law and Organizational Economics Center's Fourth Annual Judges and Lawyers Symposium held at Chapman University in Orange, California, on October 26, 2001. The title of the symposium was Health Care: Economics, Law, and Public Policy. The LOEC is the nation's preeminent provider of rigorous, high-quality education to state judges.

Texas Supreme Court Justice Craig Enoch:

We have two talented speakers today who are going to address two very interesting topics: medical monitoring and asbestos litigation. Our first speaker is Richard Scruggs from Pascagoula, Mississippi. Mr. Scruggs represents workers suffering from occupational injuries such as asbestosis, noise-induced hearing loss, and hand and arm vibration syndrome. His firm serves as special consultant to the Attorneys General of Mississippi and Louisiana, represents plaintiffs in asbestos litigation, and acts as co-counsel in special litigation involving consolidated personal injury cases. Since May of 1994, Mr. Scruggs' firm has been the lead private counsel to the Attorney General of Mississippi in the state's litigation against the tobacco industry. His firm filed the first complaint of its kind seeking reimbursement of Medicare funds and other health care costs provided by state government. He has also worked with Puerto Rico and states such as Oklahoma, Idaho, Louisiana, Michigan, Kansas, Montana, Ohio, Oregon, Rhode Island, Vermont, and New York. In 1997, his firm was influential in negotiating a Memorandum of Understanding between a number of state attorneys general and the tobacco industry. That Memorandum of Understanding was the model for the Master Settlement Agreement between the state attorneys general and the tobacco industry in 1998.

Our next speaker is Victor Schwartz, a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P., a 575-person law firm based in Kansas City, Missouri. Mr. Schwartz is a former law Professor and Dean of the University of Cincinnati College of Law. Later, as chairman of the Federal Interagency Task Force on Product Liability, he received the Department of Commerce Secretary's Award for professional excellence in government service. Mr. Schwartz assisted in the drafting of both the Model Uniform Product Liability Act and the Risk Retention Act. For over two decades, he has been the senior author of *Prosser, Wade and Schwartz's Torts* (10th ed. 2000), the most widely used torts casebook in the United States. He is also the author of *Comparative Negligence*, co-author of *Guide to Multistate Litigation*, and author of numerous articles. Mr. Schwartz is frequently quoted in *The Wall Street Journal*, *The Washington Post*, and *The New York Times*, and has appeared on "Oprah" and "60 Minutes."

We are very pleased to have both speakers with us today. The first topic they will address is medical monitoring.

Richard Scruggs:

Medical monitoring is a controversial topic that has its foundation in class actions resulting from mass torts. The class action vehicle itself has been controversial as a tool for resolving mass tort cases. Class actions can be efficient in that they allow claimants to aggregate all of their claims

changed into a comparative negligence rule. I agree that comparative negligence is a better rule, but that change took decades. Changing a rule that says somebody who is not harmed can recover damages is a fundamental change to tort law.

The Supreme Court of the United States looked at medical monitoring in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). *Metro-North* involved a medical monitoring claim brought by a pipefitter against his employer under the Federal Employers' Liability Act ("FELA") for occupational exposure to asbestos. FELA provides a cause of action for railroad workers against railroads engaged in interstate commerce. Cases involving FELA have generally been construed in favor of plaintiffs since FELA was enacted in 1908.

Metro-North was a case in which the facts were very sympathetic to the plaintiff. Buckley had been exposed to significant levels of asbestos, but he could not demonstrate any present physical injury — nothing was wrong. The Supreme Court decided not to allow medical monitoring under FELA. If you look at the opinion it is interesting what the Court said and observed. The Court expressed concern about many of the same issues that I will discuss today, such as the huge, almost limitless classes of people that could potentially have a claim for medical monitoring, and the difficulty of identifying which medical monitoring costs are necessary and beneficial.

I disagree with Mr. Scruggs in that I do not think that medical monitoring avoids the individualized issues raised in a class action. I think that there are several questions in medical monitoring cases that will vary from plaintiff to plaintiff. These issues include, what type of treatment is needed by each plaintiff? How much exposure is necessary before you allow a man or a woman to make a claim for medical monitoring? Are these questions really best suited for a court? Very recently the Supreme Court of Alabama (*see Hinton v. Monsanto Co.*, 2001 WL 1073699 (Ala. Sept. 14, 2001)) and the Supreme Court of Nevada (*see Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001)) both answered that question in the negative. Those two courts reasoned that the legislature may be in a better position to decide whether medical monitoring should be awarded and, if so, when.

Another issue raised by medical monitoring is, how can the courts ensure that the person who receives an award is actually going to use it to obtain medical monitoring? My friend Justice Maynard of the West Virginia Supreme Court of Appeals filed a dissenting opinion in a recent case in which a majority of that court decided to allow medical monitoring (*see Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W.Va. 1999)). As Justice Maynard noted in his dissent, there is absolutely no way to assure that somebody who receives an award under a medical monitoring claim will actually use it to get a checkup. In contrast, a legislature can establish mechanisms to ensure that medical monitoring awards are used for checkups. Moreover, legislatures can determine what should be done in cases where a plaintiff may already receive medical monitoring under his or her existing health care plan. Under the collateral source rule, courts are generally not permitted to consider funds that a plaintiff may receive from outside sources. In the case of medical monitoring, however, it may be worth letting the legislature decide whether to allow a double recovery.

Another problem with medical monitoring is that it may produce a flood of claims. Let me give you one hypothetical to illustrate the difference between the number of claims that may be filed in a mass tort action alleging actual injury and the avalanche of claims that could result if medical monitoring were allowed. Suppose that exposure to a particular drug or chemical may produce cancer in a small percentage of the people exposed. There may be several hundred claimants. But, if medical monitoring were allowed, millions of people might have claims. As you can see, there is a very significant difference. The money spent on monitoring may use up assets needed to compensate those with an actual injury. This might occur even if the people exposed had proper monitoring available to them through their health plans.

While I can understand why medical monitoring sounds appealing, the need for medical monitoring is a highly individualized decision. It is extremely difficult for any court to construct a

distribute the damages to the plaintiffs? Should the plaintiffs receive lump sum damages, or does there need to be a mechanism in place to ensure that the funds are used for medical monitoring? Third, should claimants who are already receiving medical monitoring through their employer or their insurance be entitled to a double recovery? Can we have a clear trigger to differentiate those who really deserve medical monitoring from those who do not? These are some of the issues that courts need to consider when they are deciding whether to allow medical monitoring.

Audience Member:

Is medical monitoring a new cause of action that is just developing?

Richard Scruggs:

Medical monitoring is not that new; it has been around for a long time. Medical monitoring first arose in the context of asbestos, where people would sue for exposure only, stating that they were at risk because they were exposed to asbestos. Most courts of appeals said that the statute of limitations would begin to run when there was a manifestation of the disease, although in some states, such as Alabama, the statute is triggered by exposure. In some cases, 20 years later, when that person gets cancer, the statute of limitations has run out because he did not sue at the time of exposure. Most courts, however, have taken the position that the statute does not start to run, and the injury is not compensable, until there is a physical manifestation resulting from the exposure.

Audience Member:

What would happen if a plaintiff was successful on medical monitoring claim and, then, within the statute of limitations period, the plaintiff develops an injury such as cancer? Would the plaintiff have a new claim? Is the physical injury claim barred by the prior medical monitoring recovery?

Richard Scruggs:

There are separate causes of action, arguably, but I think that most courts would say that the defendant would be entitled to a credit for any amount of money that has been paid to the victim in medical monitoring. I think that if the plaintiff actually develops a disease, he is entitled to compensation for that injury, but the defendant should receive some sort of credit for the amount that it has already paid.

Victor Schwartz:

As I discussed in a recent article, courts in the various states that have looked at medical monitoring have dealt with the issue in several different ways. (*See* Victor E. Schwartz *et al.*, *Medical Monitoring — Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999)).

Justice Enoch:

Let's move on to asbestos.

Richard Scruggs:

I think Victor may be surprised at some of what I will say regarding asbestos. I think that, as one California Supreme Court Justice has said, asbestos litigation has become the endless search for a solvent bystander. Most of the companies that were culpable in promoting the sale of asbestos-containing products have been held accountable and most of them have gone bankrupt.

Conservative estimates by Rand Corporation indicate that unimpaired claimants account for at least half of the new asbestos cases being filed. Courts are going to be flooded with these claims, and the only way to stem the tide will be to apply basic rules of law. I am not talking about tort reform; I am talking about basic rules that are applied to other cases when there is a peripheral defendant involved. First, the best way to protect an unimpaired claimant is to make sure that his or his claim is not extinguished by the statute of limitations. As I said earlier, some estimates indicate that 25 million people have been exposed to asbestos. It is going to be difficult for courts to handle that volume of claims. There are a few people who are seriously injured who need help, and the courts need to be able to address the claims of those people. Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.

Audience Member:

Perhaps the solution to the problem is to have the state legislatures address the situation, to amend the statute of limitations so that it does not begin to run on exposure, but only runs when there is an actual injury. What do you think of that solution?

Richard Scruggs:

I think that would be a great solution in a perfect world. I think the problem is going to require national legislation, however, because if only a few states do it then the plaintiffs will migrate to states in which the statutes do not run. Asbestos litigation has become a cottage industry. I consider myself to be a first or second generation asbestos lawyer. We are now in the eighth and twelfth generation of asbestos lawyers. Some attorneys are building their practices on these mass production inventory asbestos settlements. If one state passes some sort of asbestos litigation reform law, the attorneys will simply go to another state that has more liberal joinder rules and bring the case over there. There must be national legislation in order to solve this problem. The problem with ATLA (the Association of Trial Lawyers of America) and other organizations like that who are watch dogs for consumer rights and lawyer rights, is that these groups are afraid of any sort of legislation in Congress, because even if the initial proposal looks good, they are afraid of what the end result will be. Victor, with his able skills in the American Tort Reform Association, will try to move the goalposts way down field. Nobody can trust the legislative process. I think that national legislation is needed to address the asbestos litigation problem and it would be great if that could be done.

Victor Schwartz:

I agree with Mr. Scruggs that national legislation is needed and I would pledge, certainly on the behalf of anybody that I represent, not to load up such legislation with tort reform. I think the asbestos registry approach would be very helpful to preserve the claims of people if they get sick. I would not try to load legislation dealing with this very major problem with any tort reform. I would try to reach agreement with people like Mr. Scruggs on something that they considered fair. This is a national problem.

In Congress right now there is an atmosphere of bipartisanship that I have not seen in a very long time. There is an opportunity for people who normally may not be in agreement to try to reach agreement on things that affect us all at this point.

Judge Enoch:

Some people view asbestos litigation as being a "mature mass tort." It has been around for decades and certain rules have been fashioned to address it. Is there an immature mass tort on the horizon? Are there new types of claims that trial court judges will be facing in the very near future?

toring than they will with case-by-case injury claims, but once the insurance is exhausted then the victim will move on to someone else. I really do not think that medical monitoring is going to increase health care costs.

Victor Schwartz:

I think the worst way to handle medical monitoring is through the liability system. I think it should be handled under the health care system, where there is a health care provider to make a judgment as to whether or not an individual needs medical monitoring. If he or she does, the medical provider can see that he or she receives the proper monitoring, as compared to a lump sum damages award that may never be used for medical monitoring.

Justice Enoch:

We have time for one more question.

Audience member:

We have been talking about asbestos defendants and some incriminating evidence that surfaced in a document from the 1930s. How does the concept of a long latency period affect the evidence available to the plaintiffs?

Richard Scruggs:

Well, unfortunately for the plaintiffs, much of the evidence has been lost either intentionally or through some document retention policy where every 10 years a company will cull its files and get rid of documents.

We were fortunate in the asbestos and tobacco litigations that documents were not destroyed. We may be fortunate in the welding liability litigation as well. Some of the documents I have seen are pretty incriminating. I think the plaintiffs are going to have to prove that there is some evidence of spoliation of documents in order to get a presumption that the evidence would have been incriminating. That is why I think that regardless of how well-funded the plaintiffs are, or are perceived to be, and how aggressive they have been, the companies are still generally holding most of the cards, and they have gotten away with murder. There is a saying that when a worker kills his boss it is murder, but when the boss kills the worker, it is workers' compensation.

Victor Schwartz:

I think that judges will be very harsh in situations where there has been spoliation of evidence. That behavior should be discouraged. Part of my practice is counseling people on how to stay out of court, and I think that document preservation is important.

In closing, I just want to clarify one point. I agree with Mr. Scruggs that the pharmaceutical companies are going to be exposed to new and very serious litigation. On that point we agree. For the record, however, when Mr. Scruggs talked about how the companies deserve it — I did not agree with him there. ■

