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Westinghouse Accord Clears Court Docket

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Merhige move helps Robins clear hurdle

By Thomas R. Morris

Times-Dispatch staff writer

A.H. Robins Co. cleared a hurdle yesterday when a federal judge ruled it was too early to put Robins' motion for a class action to a more severe test.

U.S. District Judge Robert R. Merhige Jr. in a two-paragraph order with a 3½-page explanation, said he was turning down motions made on various grounds by lawyers representing women with claims against the company stemming from use of the Dukon Shield intrauterine device.

The lawyers' motions questioned whether Merhige has jurisdiction to certify a class action for punitive damages, which are the type of damages levied to punish a business or person for causing an injury. Merhige ruled that he does.

The memorandum that he wrote in explaining the ruling, though, said that only one of the points raised by the lawyers deals with the question of jurisdiction.

In that point, Bradley Post of Kansas and Robert Manchester of Vermont contended that U.S. District Judge Frank G. Thies in Kansas rather.

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Hurdle is cleared by Robins

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er than Merhige should be the one to rule on this issue. Post and Manchester noted that a federal Multi-District Litigation panel began transferring some of the Dalkon Shield cases to Theis in 1975. Theis has handled pre-trial rulings on roughly 1,000 Dalkon Shield cases and continues overseeing 106.

Merhige ruled that that "argument is not well-taken." He said he is not precluded from ruling on a motion to certify a class action in other cases.

Manchester has asked the MDL panel in Washington to transfer the question of the class action to Theis. Until the panel would do so, Merhige ruled that he "clearly has jurisdiction to entertain Robins' motion."

In the four other major legal issues that the plaintiffs' lawyers raised, Merhige ruled that they went beyond the issue of his jurisdiction and that it would thus be premature to rule on them. He said he "expresses no opinion whatever on the validity of these arguments as they relate to the merits of Robins' motion to certify. These arguments do not, however, support the contention that the court lacks jurisdiction to consider Robins' motions."

Those arguments had contended that Merhige lacked jurisdiction because:

- The 9th Circuit Court of Appeals overturned a previous ruling by a California judge to certify a class action. That should have settled the issue, according to Thomas J. Brandt of San Francisco.

- Plaintiffs should be allowed to determine where their claim is heard, because the principle of due process gives them the right to a trial before a jury of their peers. If granted, this would be the first time a class action would be certified at the behest of a defendant, rather than the plaintiffs.

At a conference before Merhige in December, some lawyers raised the question of whether a woman from another state would be afforded a fair trial before a jury in Robins' hometown of Richmond. Merhige hinted heavily that if he thought that would be a problem, he wouldn't hesitate to move a trial from Richmond.

- A provision in the Texas Constitution gives that state's residents a right to punitive damages. Robins contended that the right applied only in instances of wrongful death. Austin lawyer Jim Mallios contended that interpretation was too narrow and that the "constitutional dimension . . . stems from the conduct of the [defendant] rather than the survival of the victim."

- Cases cannot be moved from state courts to a federal court unless specific guidelines are satisfied. Los Angeles lawyer Denver R. Andrews Jr. contended that Robins doesn't meet those guidelines. Of the cases still pending in the nation's courts, 1,791 are filed in federal courts in 45 states and 1,721 are in local courts in 40 states. (Another 7,700 claims have been settled, at a cost to Robins and its insurer of \$26 million.)

Robins' motion seeks to have a single trial to determine whether, and how much, Robins must pay in punitive damages in pending cases plus those that haven't yet been filed. Separate trials would be held to determine whether, and how much, a plaintiff would be compensated for medical expenses and pain, although a second part of Robins' motion would establish an expedited procedure for that.

Merhige has consolidated the 300 cases specifically transferred here and has appointed former U.S. Sen. William Spang, now dean of the law school at the College of William and Mary, to head a committee to draft the expedited procedure. He also has ordered that lawyers work to settle those claims even while Robins' motion for a class action in all remaining cases is pending.

Merhige's ruling on the jurisdictional issue was made available to lawyers in the case yesterday.

The Robins legal team picked up its copy at the District Court's third-floor office in the federal courthouse, and one of its lawyers said that although the judge deferred ruling on a number of points, "it was favorable to our side."