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The Limits of Litigation - The Dalkon Shield Controversy

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BOOK REVIEW

THE LIMITS OF LITIGATION—THE DALKON SHIELD CONTROVERSY. By Ronald J. Bacigal. Durham, N.C.: Carolina Academic Press, 1990. 143 pages, \$20.00.

*Reviewed by J.R. Zepkin**

The Limits of Litigation—The Dalkon Shield Controversy is a tightly written, interesting book. It takes the reader from the beginning of the litigation concerning the contraceptive device to the bankruptcy settlement for the claimants. Professor Ronald J. Bacigal provides insight into the competing perspectives of the litigants as these cases crawled through the courts. The book reveals how the physical and emotional injuries that were suffered by so many women placed great pressure on the trial judges to force a resolution.

Prior to writing this book, Bacigal had begun a biography of Federal District Court Judge Robert R. Merhige, Jr. During this time, Judge Merhige had many Dalkon Shield cases pending in his court and he became a moving force behind the resolution of the litigation. Because the Dalkon Shield cases were so intricate, Bacigal chronicled a separate account of the litigation, resulting in a compact book of about 125 pages.

This book is written so that both lawyer and non-lawyer will enjoy it. The book is balanced and explains the views of each side of the controversy. Professor Bacigal describes the Robins family and the A.H. Robins Company before their involvement with the Dalkon Shield as being highly regarded for their integrity and social conscience. He traces the giant mistakes in judgment by the A.H. Robins Company, its owners and executive staff. These errors caused terrible injury to the victims. They also cost the company

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and its owners their high standing in the business and personal communities. Ultimately, the Robins family lost control of the company that earlier members had founded.

The book also makes a convincing argument that the court system is not equipped to handle mass litigation. Judge Merhige was quite active in trying to move the cases to their conclusion. Yet he was criticized both for being too involved and for not being involved enough. As Bacigal points out, there are strongly differing beliefs as to how much of a manager a trial judge should be.

This aspect of the book is very timely. Increasing pressure is being placed on trial judges to move litigation through the courts to avoid delays.¹ In the Dalkon Shield cases, Judge Merhige and Federal District Judge Miles W. Lord of Minnesota, who also had some of the Dalkon Shield cases on his docket, were required to deal with a large number of lawyers. Many of these attorneys became very personal in their attacks against each other and against the judges. This made it impossible, without judicial intervention, for agreement on even routine matters such as pre-trial depositions and exchange of documents. Appellate courts chastised Judge Merhige and Judge Lord for excess activism. Professor Bacigal shows both jurists to be deeply concerned over the injuries suffered by the victims and frustrated by their inability to force the competing sides to act responsibly in moving the litigation to a conclusion.

When the litigation began, all the principals involved, including the company and plaintiff's counsel, behaved admirably in terms of their corporate and professional responsibility. As the litigation progressed however, their behavior deteriorated. The attorneys who took the early cases did so knowing there was a good chance that no recovery would result, and consequently, no attorney's fees would be generated. But as evidence mounted showing fault and cover-up on the part of the A.H. Robins Company, the prospect of

1. For example, the Judicial Council of Virginia recently adopted Case Processing Time Standards. The Council advises: ". . . the court, not the lawyers or litigants, should control the pace of litigation." See Records of June 1990 meeting of The Judicial Council of Virginia; see also *Commission on the Future of Virginia's Judicial System, Annual Report 22*: "A third way to reduce delay would be a firm judicial commitment to effective case management. . . . The judicial commitment to timely disposition of cases naturally extends to the relationship of the court to the lawyers appearing before it. While reasonably accommodating lawyers and their clients, it is the court, not the lawyers or litigants, who must control the movement of cases. . . . The judge must have both the desire and the authority to press attorneys and litigants into resolving cases in the least time required for full consideration of the issues presented."

recovery grew as did the zeal with which some lawyers sought Dalkon Shield cases. After the first successful litigation against the company,² a race for clients began. Law firms used mass advertising campaigns to solicit more clients. Lawyers fought each other over these unfortunate victims.

The parties' counsel were not alone in their lack of professionalism. Before purchasing the rights to the Dalkon Shield, the A.H. Robins Company had operated for almost an entire century without having a single product liability action filed against it.³ The company enjoyed an excellent reputation for high standards. Its owners were respected for their charitable contributions and enjoyed a high position in the community. However, a picture of greed and deceit unfolds in the company's handling of the Dalkon Shield matters. The A.H. Robins Company continued marketing the device after it had strong evidence of a health risk. The company then refused to recall the Dalkon Shield, partly in fear of jeopardizing its position in pending litigation.⁴ Even after the shield was taken off American shelves, the Company continued to market the shield in third world countries. The book details how the company used false data concerning the effectiveness of the device in order to market the product.⁵ An employee who was placed in charge of quality control was ignored when he expressed concern over design features of the Shield.⁶

The breakthrough for the claimants occurred when Roger Tuttle, who had previously been in-house counsel for A.H. Robins Company, disclosed that in accordance with company instructions he had destroyed important documents. Tuttle further divulged that he had kept some of the most damaging papers. He then released these documents to the attorneys representing the claimants.⁷ This evidence contributed to a huge punitive damage award against the company.⁸

The company's next step was to file for reorganization under the bankruptcy laws. This froze all litigation. At this time, Judge Merhige required the A.H. Robins Company to undertake a massive

2. BACIGAL, *THE LIMITS OF LITIGATION—THE DALKON SHIELD CONTROVERSY* 16 (1990).

3. *Id.* at 5.

4. *Id.* at 13.

5. *Id.* at 9.

6. *Id.* at 11.

7. *Id.* at 36.

8. *Id.*

information campaign to alert all potential claimants that they must file claims within a certain specified period.

The bankruptcy court worked incessantly to process all of the 327,044 claims filed against the A.H. Robins Company. The intensity of attorney bickering and discourtesy increased.⁹ Bacigal tells of attorneys churning cases to run up billable hours. Normally, the bankruptcy court allows partial interim payments to attorneys while a bankruptcy case works its way through the system. However, Judge Merhige was aware of the inordinate number of hours being billed and refused at one point to approve any more interim payments for fees. Thus, the lawyers' fees were delayed until the case concluded.¹⁰

While the bankruptcy case continued, a series of offers surfaced to buy the A.H. Robins Company. Like other aspects of this case, this was not a simple matter either. Offers were made and then withdrawn. The company executives tried to protect their deferred bonuses and the value of their stock holdings. A trust fund was included as part of each proposal in order to pay victims' claims and there was disagreement over the amount necessary to protect all claimants. The value of these potential claims was estimated by the bankruptcy court at \$2.475 billion dollars.¹¹ Finally, American Home Products bought the company, establishing a trust fund for the claimants. Following the purchase, skirmishing occurred over the number and selection of the trustees of the compensation fund and over the control Judge Merhige would exercise over the trustees.

This book gives a concise picture of one of the largest mass tort litigation cases that any of our court systems has ever handled. It is unfortunate that a company that was truly reputable, and the legal profession that has contributed so much to the public good, both failed in this instance to meet their own high ideals.

9. *Id.* at 59.

10. *Id.* at 63.

11. *Id.* at 107.