Approved: 3/22/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on March 7, 1994 in Room 514-S of the Capitol.

All members were present except: Senator Vancrum (excused)
Senator Martin (excused)

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Meredith Williams, Kansas Public Employees Retirement System
Tom Murray, Council to Board of Trustees, Kansas Public Employees Retirement System
Bradley Post, Attorney, Wichita
Mark Hegarty, Dalkon Shield Claimant Trust
Ron Smith, Kansas Bar Association

Others attending: See attached list

SB 751--liability of settling parties in action brought by Kansas Public Employees Retirement System

Meredith Williams, Kansas Public Employees Retirement System testified in support of SB 751 and provided written testimony (Attachment No. 1). Mr. Williams introduced Tom Murray, legal counsel to Board of Trustees, Kansas Public Employees Retirement System to address the provisions of SB 751 and answer questions of the Committee.

Tom Murray, legal counsel to Board of Trustees, Kansas Public Employees Retirement System testified in support of SB 751, provided written testimony (Attachment No. 2) and answered questions of the Committee. He said there was concern on the part of co-defendants that they could be brought back into litigation by some other defendant who has not settled if this legislation is not passed. He addressed the suggested changes to SB 751 (Attachment No. 1). Mr. Murray said under SB 751, once a settlement is proposed it must be approved by the court with notice to all non-settling parties. When the court has approved the settlement, a non-settling party, if disenchanted; could then appeal the ruling. Once the ruling has been made, the settling party cannot be brought back into any current or future cases. Mr. Murray said this bill assures the settling party they would not be brought in on a claim that would not be covered by statute K.S.A.60-258(a). In addressing the issue of sunsetting SB 751, Mr. Murray said three years would be better than two years.

SB 755--limitation of actions brought by or on behalf of Dalkon Shield victims

Bradley Post, Attorney, Wichita, testified in support of SB 755 and provided written testimony (Attachment No. 3).

Ron Smith, Kansas Bar Association provided written testimony in support of SB 755 (Attachment No. 4).

Mark Hegarty, Dalkon Shield Claimant Trust testified in opposition to SB 755. He said the primary purpose of the trust was to efficiently and effectively resolve Dalkon Shield claims based upon individual medical facts of the claimant. Mr. Hegarty said the purpose of the trust fund was for payment of Dalkon Shield claims and not for litigation expenses. He said SB 755 would encourage claimants to reject the trust offer and proceed with litigation.

Chairman Moran announced SB 755 has been assigned to the Civil Law Subcommittee. Senator Harris, Chairman said the Civil Law Subcommittee would be meeting, Tuesday, March 8 at 7:30 a.m. to consider SB 755.

A motion was made by Senator Oleen, seconded by Senator Emert to approve Committee minutes for February 15, 16 and 17, 1994. The motion carried.

Chairman Moran announced that the Kansas Bar Association would be having a luncheon for House and Senate Judiciary committee members and staff on Wednesday, March 16 at the Top of the Tower Restaurant from 12:00 to 1:00 p.m.

The next meeting is scheduled for March 8, 1994.

GUEST LIST

COMMITTEE: Senate Judiciary Committee **DATE:** 3/7/94

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
Bradley Post	Wichita, KS	Post & Syrios
Diane Milleson	Topeka Ks.	W.U. Law
Bob Keaton	Topeka	HPTK law office
Gladys Hooker	Wichita KS	Bradley Post/Lawyer (KS)
Mark Hegarty	Lenexa, KS	Dalkon Shield Claimants Trust
Paul Shelby	Topeka	OJA
Libby Sward		AP
Merrill Williams	Topeka	KPERS
Gene Schmidt	Topeka	Self
TONI WITTESCH	~~Topeka~~ Topeka	SEN KARR
James Rountree	Lawrence, Ks	Sen. Rock

SENATE BILL No. 751

AN ACT concerning liability of settling parties in certain actions brought by the Kansas public employees retirement system.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (1) A judicially approved settlement ~~in any action brought by~~ of any claim or cause of action of the Kansas public employees retirement system ~~to recover money damages whether the liability for such recovery is based on tort, breach of fiduciary duty or any other theory of recovery, other than contract,~~ against any party for any injury, loss or damage shall discharge the settling party from all liability for contribution or noncontractual indemnity to any other individual or entity that is or may be liable, in whole or in part, for that same injury, loss or damage, irrespective of whether or not such individual or entity has been joined as a party to ~~the action,~~ any suit brought by the Kansas public employees retirement system, provided such individual or entity is notified, in any manner approved by the court, of the proceeding to approve the settlement not less than 20 days prior thereto. As used in this section, the term "noncontractual indemnity" includes indemnity between active and passive tortfeasors and indemnity based on principles of vicarious liability but does not include indemnity which arises by reason of contract.

(2) When a release, covenant not to sue or agreement not to enforce a judgment is given in good faith by the Kansas public

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employees retirement system, the release, covenant not to sue or agreement not to enforce a judgment does not discharge any non-settling party from liability, unless the terms of the release, covenant not to sue or agreement not to enforce a judgment so provide. However, non-settling parties shall be entitled to a set-off against any claims that are made against them by the Kansas public employees retirement system and that are not covered by the Kansas comparative negligence statute (K.S.A. §60-258a) in the amount stated in the release, covenant not to sue or agreement not to enforce a judgment, or the amount of the consideration actually paid for it, whichever is greater.

(3) Such settlement shall conclusively establish that the settling party has extinguished such settling party's share of the total liability and is not obligated for or entitled to pro rata contribution or noncontractual indemnity from any other individual or entity irrespective of whether or not such individual or entity has been joined as a party to the action and whose liability is not extinguished by the settlement.

(4) The provisions of this act shall apply to any settlement judicially approved after the effective date of this act regardless of the date on which the Kansas public employees retirement system suffered any injury, loss or damage or the date on which any claim or cause of action of the Kansas public employees retirement system arose or accrued.

(5) Except as provided in this act, the provisions of this act are not intended to alter the substantive law of Kansas relating to contribution, indemnity or comparative fault.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

2/25/94, 1:11 pm

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GLEE S. SMITH, JR.

OF COUNSEL

March 9, 1994

VIA FACSIMILE

Senator Jerry Moran
Chairperson
Senate Judiciary Committee
State Capitol, Room 255-E
Topeka, Kansas 66612

Re: Summary of Testimony on Senate Bill No. 751

Dear Senator Moran:

At your request, I enclose herewith written summary of testimony presented to your Committee on March 7, 1994. Please understand that this summary is primarily intended to be reasonably representative of what would have been submitted to your Committee prior to my testimony, had it been so requested. To the best of my memory, this summary accurately reflects, and is consistent with, the essence of my actual testimony.

Very truly yours,

BARBER, EMERSON, SPRINGER, ZINN & MURRAY, L.C.

Thomas V. Murray

Thomas V. Murray

TVM/ah
Enclosure

cc: Mr. Meredith Williams

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SUMMARY OF TESTIMONY OF THOMAS V. MURRAY ON SENATE BILL #751, MARCH 7, 1994

The purpose of Senate Bill #751 is to aid KPERS in settling with defendants in the pending litigation involving losses to KPERS resulting from direct placement investments.

KPERS currently has ten lawsuits pending involving these investments. Each lawsuit names a number of defendants. Because of the varying relationship of the defendants to KPERS and the investments, the claims made in the lawsuits include a number of legal theories. Some claims are based on negligence alone; others are based on violation of contract rights; and still others allege breach of fiduciary duty, gross negligence, securities fraud and other similar torts.

As this litigation has progressed there have been negotiations with some of the defendants regarding settlement, and some firm settlement offers have been made. However, concern has been expressed by defendants that if they settle the KPERS claims against them, other defendants, or other parties not yet made defendants but later sued, would be in a position to sue them and bring them back into the litigation, seeking indemnity or contribution. Senate Bill #751 is designed to overcome this obstacle to the settlement of KPERS' claims.

Some of the direct placement investments were made by KPERS prior to July 1, 1987. That is an important date, because it is on that date that the comparative fault statute [K.S.A. 60-258(a)] became effective as to economic loss. The Kansas Supreme Court has held that prior to the statutory amendments, the comparative fault statute did not apply to economic losses such as those incurred by KPERS. Therefore, if a cause of action arose prior to July 1, 1987, pre-comparative concepts of joint and several liability apply to negligence actions in which damages for economic loss are sought.

Prior to adoption of our comparative fault statute in 1974, Kansas courts had adopted an "active/passive" theory of negligence which allowed indemnity to be sought by one negligent party from another where the indemnitor's negligence was "passive, implied or constructive" as opposed to the negligence being "active, primary or direct." In these cases, the negligence of the indemnitee was a failure to recognize or to take action to prevent a hazard, whereas the failure of the indemnitor was that it actively caused the defect or risk to occur.

This "active/passive" concept of allowing indemnity between joint tortfeasors was judicially interpreted as having been eliminated by the application of comparative fault to negligence cases, but since economic losses were not covered by the comparative fault statute

until July 1, 1987, and since some of KPERS' investments were made prior to that time, it is conceivable that nonsettling defendants could make a claim that their negligence, in regard to a KPERS investment, was "passive," whereas a settling defendant's negligence was "active," and seek indemnification from such settling defendant.

Kansas rules of civil procedure [K.S.A. 60-214 and K.S.A 60-258(c)] provide a procedural basis for a nonsettling defendant to bring in another party to attempt indemnity.

Thus, without the proposed Senate Bill #751, defendants settling with KPERS believe they face the risk and expense that other defendants will seek indemnity against them on the basis of the active/passive negligence concept.

The proposed statute would provide protection to settling parties from claims of "noncontractual indemnity" brought by other named parties or nonparties. By the statute, noncontractual indemnity specifically includes:

> "indemnity between active and passive tortfeasors and indemnity based on principles of vicarious liability."

Some KPERS claims involve defendants who could, in fact, make active/passive negligence claims and/or vicarious liability claims against other defendants.

The proposed statute clearly does not apply to "noncontractual indemnity." If there is a contractual right of indemnity between two defendants, the statute does not interfere with the rights and obligations created by such contract between the parties.

Senate Bill #751 also allows for a nonsettling defendant to receive a setoff from any judgment by KPERS in an amount equal to the settlement received by KPERS. But such a setoff is not allowed in purely negligence cases, i.e., cases in which K.S.A. 60-258(a) applies. Such exclusion from setoff is consistent with the present Kansas statute, because by its very nature the comparative fault statute reduces each defendant's liability for negligence to only that defendant's proportion of fault.

In summary, Senate Bill #751 will encourage settlement by defendants in the KPERS direct placement litigation. The Bill relieves the defendants from concern that they will run the risk of being found liable pursuant to the "active/passive" negligence theory. But, more importantly, the Bill relieves the defendants from the continued financial drain of defending against such indemnity claims. Because these cases involve complex legal and factual situations, and because of the number of parties involved,

merely defending an action for indemnity in itself can well become extremely burdensome. Parties and their insurance companies will not settle if they face this continued risk and expense. Senate Bill #751, by eliminating such risk and expense, will, we believe, greatly facilitate settlement for KPERS'losses incurred by reason of direct placement investments.

MEMORANDUM IN SUPPORT OF LEGISLATION TO CHANGE STATUTE OF LIMITATION FOR ACTIONS INVOLVING THE DALKON SHIELD

The purpose of this memorandum is to recommend changes in the statute of limitations to affect only Dalkon Shield actions filed in Court against the Dalkon Shield Claimants Trust (the "Trust"), successor to A.H. Robins Company, Inc. ("Robins"), a corporation.

Background.

During the 1970s a pharmaceutical company known as A.H. Robins Company, Inc., with home office and principal place of business in Richmond, Virginia, manufactured, promoted, and sold an intrauterine contraceptive device known as the Dalkon Shield. This product was defective and was advertised, promoted, and sold using misrepresentation and fraud. The defects and hazards of this product were successfully concealed by Robins for many years, and the company even engaged in the destruction of "sensitive" documents. Numerous lawsuits were brought against this company as women discovered Robins' wrongdoing and it filed for Chapter 11 bankruptcy in August 1985 in Richmond, Virginia.

As a result of bankruptcy procedures, Robins was required to notify the world (of its bankruptcy) and that claims could be made by those injured by its product. As a result, more than 300,000 claimants came forward and made claims for injuries caused by the Dalkon Shield. During the bankruptcy, Robins was purchased by another corporation, but a trust fund containing approximately $2.5 billion was established for the sole purpose of compensating Dalkon Shield victims. This fund is being administered in Richmond,

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Virginia and the trustees have been appointed by the United States District Court located in Virginia. The procedures established for compensating Dalkon Shield victims were put in place by the Trust with the approval of that court. These procedures require claimants to send records and other detailed information to it. It then makes unilaterally-determined offers which are supposed to represent full value for Dalkon Shield victim's claim. If the victims do not accept the unilateral offers, they retain the right to proceed with litigation in the state where their injuries occurred. A number of Kansas women have filed claims in this bankruptcy and a few are presently engaged in litigation against the Trust. Many other Kansas victims will in the future have the option to file cases in Court.

When claims result in litigation, every possible defense is being asserted in an effort to defeat women who do not accept the offers first made by the Trust. One of the defenses used is the statute of limitations and it is being asserted against all theories. Litigation of statute of limitations issues is very expensive and has nothing to do with the merits of any woman's claim.

The Trust has the right to waive statute of limitations defenses and it has done so for every claim in which a victim accepts the unilaterally-determined offer of the Trust. It is now offering to waive the defense in arbitration proceedings for less serious injuries, if victims agree to a $20,000 cap. It has also waived statute of limitations defenses in some states, while in other

states it continues to assert them. These defenses are being asserted against Kansas women who have proceeded to litigation against the Trust and it is anticipated that this tactic will continue.

In a recent decision the Ohio Supreme Court has made a ruling which will eliminate all statute of limitation defenses for Dalkon Shield victims inserted in Ohio. The case is Hyde v. Reynoldsville Casket Co., (1994) 68 Ohio St.3d 240. The Dalkon Shield Claimants Trust filed a brief *amicus curiae*. In view of the 5-2 decision and the public interest in the case, there is little chance the Trust will be able to obtain a rehearing. In the case of Imelda Marchesini-Ruperti v. Dalkon Shield Claimants Trust, D.C. Super. Ct. (1992), the Trust has thrown in the towel for claims from around the world filed in that jurisdiction. In seeking transfer of these foreign claims to Virginia the Trust "vowed" to waive any statute of limitation defense (fn.7, p.15). (Copies of these important Court decisions are available for review).

It makes no sense to permit the "Trust" to discriminate and selectively assert statute of limitation defenses against Dalkon Shield victims from Kansas. The legislature can prevent such discrimination by passing Senate Bill 755.

There is a Need for Changes in the Kansas Statute of Limitations For Dalkon Shield Claims.

It is here proposed that the legislature should act as promptly as possible to change the statute of limitations as it affects the claims of Kansas women injured by the Dalkon Shield.

Based on the case of Harding v. K.C. Wall Products, Inc., 250 Kan. 655, 831 P.2d 958 (1992), the legislature could pass an express provision that would have retroactive effect on the litigation involving the Dalkon Shield Claimants Trust and that is what is proposed. The ten-year statute of repose would not be changed since it is substantive law and not procedural. Nevertheless, a significant benefit could result to Kansas women who are Dalkon Shield victims with changes in the procedural aspects of the statute of limitations, K.S.A. 60-513. It is proposed that this law be changed so that Dalkon Shield victims' claims based on negligence or strict liability due to defective design and failure to warn should be extended for a period not to exceed ten years from the date of injury to the date Robins filed for Chapter 11 Bankruptcy, August 21, 1985. (The statute was tolled at that time.) It is further proposed that the fraud statute of limitations, K.S.A. 60-513(a)(3), should be clarified to specifically state that the fraud cause of action shall not accrue until the fraud is discovered regardless of when the physical injury occurred.

In litigation, the Trust has taken the position that physical injury in fraud actions is synonymous with knowledge of its cause in fact, that is, discovery of Robins' fraudulent misrepresentation and concealment of defects. The wrongdoing of Robins and the evidence describing its fraud is well summarized in a unanimous Kansas Supreme Court opinion, Tetuan v. Robins, 241 Kan. 441, 738 P.2d 1210 (1987).

No Tax Money or Detriment to Any Ongoing Business is Involved

If the statute of limitations is changed and made retroactive for Dalkon Shield litigation against the Dalkon Shield Claimants Trust, no tax money of any kind will be involved and there would be no detriment to any existing business or corporation. If the law is not changed, the only potential detriment would be to Kansas women who are victims of the Dalkon Shield. They may have their cases decided other than on the merits and be deprived of compensation from a Trust fund specifically designed for their benefit to compensate their injuries.

Money Being Spent by the Dalkon Shield Claimants Trust Fund is Owned by and Owed to Dalkon Shield Victims

Ironically, the money paid to the trustees in Richmond, Virginia, administering the Dalkon Shield Claimants Trust and the fees and expenses incurred by the law firms which the Trustees have hired to defend Dalkon Shield cases is being paid from the trust funds owned by Dalkon Shield victims. Every penny that is spent to defeat a claimant's claim on the basis of statute of limitations reduces the amount of money left in the fund to compensate victims. If funds remain after all claims are paid (based on current financial reports there most surely will be funds remaining) they must be distributed proportionately to Dalkon Shield victims who have received payment from the Trust. If the Trust continues to litigate statute of limitations defenses, this could add years to the litigation and increase the fees and expenses paid to the trustees and their lawyers, thereby depleting the funds remaining

to compensate Dalkon Shield victims. The Plan of Reorganization did not take away the defense of the statute of limitations and the Trust, at its option, may raise that defense. In turn, the defense will be determined by state law which will vary from state to state.

Conclusion

Many Dalkon Shield victims from Kansas have signed petitions supporting this request for changes in the statute of limitations which apply to Dalkon Shield cases. At the same time, victims and their attorneys in other states will be invited to join in the effort to have the statutes of limitations removed from these claims in all states so that Dalkon Shield claims can be determined uniformly on the merits, and not on a legal technicality that may bar claims in some states but not in others. This is especially appropriate because of the massive fraud by misrepresentation and concealment of product defects which, as described in Tetuan, supra, occurred over a period of more than ten years.

#4

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: *Senate Judiciary Committee*

FROM: *Ron Smith, KBA General Counsel*

SUBJ: *SB 755, Dalkon Shield*

March 7, 1994

SUMMARY

The KBA Board of Governors supports SB 755.

BACKGROUND

The women in these cases already have filed claims for recovery based on injury from the Dalkon Shield. If they agree to the settlement offer by the defendant, their settlement will come from a trust fund. If they decide to pursue a trial, any judgment will come from the same trust fund.

Statutes of limitation were designed to bar untimely litigation. That is not the situation here. The claims are filed.

If the Kansas women involved here are not allowed this legislation to preserve their cause of action, then women in other states will benefit. The **Kansas** legislature should not prefer that result.

Thank you.

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This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.