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2nd Circ. Won't Revive Mirena Injury MDL Against Bayer

By **Rachel Graf**

Law360, New York (October 24, 2017, 3:47 PM EDT) -- The Second Circuit on Tuesday affirmed the dismissal of multidistrict litigation over alleged injuries from Bayer Pharmaceuticals Inc.'s intrauterine device Mirena, saying the lower court properly excluded problematic testimony by the plaintiffs' experts.

The three-judge panel said the witnesses supplied by the women allegedly injured by Mirena offered unaccepted and unsupported theories about "secondary perforation," in which the women were supposedly injured after the device was inserted into the uterus. The lower court correctly determined that witness testimony would be needed to prove causation, and granted summary judgment in Bayer's favor, the panel said.

"In its careful and well-reasoned opinion and order, the district court identified numerous problems with the plaintiffs' experts," the panel said.

The women who brought the roughly 1,300 cases, which were certified as part of the MDL in 2013, claim Mirena can perforate the uterus and migrate away from it after insertion. Bayer has warned about perforation during insertion, but not after, and could therefore be liable if secondary perforation occurred, the filing says.

The lower court determined in March 2016 that the women's experts assumed secondary perforation happened and then worked backward to attempt to prove this assumption. The lower court consequently excluded their testimony as unreliable.

The panel upheld this conclusion Tuesday, noting the experts didn't offer support for secondary perforation by other members of the scientific community and lacked any expertise about the topic before working on this litigation.

"Finding no direct support in the literature for secondary perforation and having conducted no prior research on the subject, the experts all assumed the existence of the very phenomenon in dispute and then hypothesized how it could occur," the panel says.

Without the expert testimony, the women would not be able to prove causation to a jury, according to the filing.

Bayer is "pleased" with the decision, the company said in a statement.

"As we've always maintained, Mirena is an important reproductive health option for women, and this decision affirms that the company has at all times acted responsibly," Bayer said in a statement.

Counsel for the women didn't respond Tuesday to a request for comment.

U.S. Circuit Judges John M. Walker Jr., Jose A. Cabranes and Reena Raggi sat on the panel for the Second Circuit.

The women are represented by Jay L.T. Breakstone of Parker Waichman LLP.

Bayer is represented by Lisa S. Blatt of Arnold & Porter Kaye Scholer LLP.

The case is In re Mirena IUD Products Liability Litigation, case number 16-3012, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Philip Shea.

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