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Coosa PCB civil suit motionless

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BIRMINGHAM — It's probably the largest civil suit ever filed in Alabama, and it's going nowhere.

Usually, expensive litigation gets jockeyed from motion to motion, from conference to conference before it finally comes to the pre-trial stage.

But there is no such maneuvering in the $1 billion class action suit submitted in federal court here two years ago by 21 plaintiffs, most of them from Cherokee County. In fact, there has been no action whatsoever since last December, according to a clerk at U.S. District Court in Birmingham. And lawyers on both sides say there's no telling when there might be some.

"Confusion," said plaintiffs' attorney Robert Finnell of Rome, Ga., when asked to describe the suit.

"It's confusing," echoed Charles Tisdale, an Atlanta attorney handling the case for defendants General Electric (GE) and Monsanto Corp. "I couldn't give you an idea of when it may go to trial."

The plaintiffs seek the massive damages because, they say, discharge of polychorinated biphenyls (PCBs) into the Coosa River — which feeds into Cherokee County's Weiss Lake — by a GE plant near Rome adversely affected their ability to make a living. Monsanto is named in the action since it sold PCBs, which were used to make electric transformers, to GE before GE stopped using the chemical about 18 months ago.

In laboratory tests, PCBs have been found to cause cancer in rats.

Virtually all of the plaintiffs depend on Weiss Lake, a fishing and recreation haven, for their living. They own, operate or work at lakefront bait shops, restaurants and service stations.

Their business dropped dramatically after fish samples taken from Weiss Lake in September 1976 indicated concentrations of PCBs higher than the U.S. Food and Drug Administration's limit of five parts per million. The suit was filed four months later.

Since then business has picked up somewhat — the State Health Department says PCB levels in Weiss Lake fish are slowly dropping — but "people don't fish like they used to since all this junk about PCBs came down," says the owner of Pruett's Fish Camp in Centre.

Joe Tierce, who bought the camp in June, 1977, would sell out if he could. But he says he is "in so deep" he has to stay with it, and uses the same tactic his counterparts use when worried customers ask him about PCBs.

"I just tell them you've got to eat so many fish for so many years for it to hurt you," Tierce says. "You've got to eat a ton or maybe two tons before it affects you."

Whether the plaintiffs on the lake ever will get part of the $1 billion depends, confusingly enough, not on what happens in Alabama, but on what takes place with a similar suit filed by Finnell in Georgia.

The Georgia suit is something of a test case for the Alabama action, Finnell explains. It also names GE and Monsanto; it was filed by people who depend for their livelihood on the Georgia portion of the Coosa River; but it only asks half as much in damages — $500

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million.

And it has run into trouble.

A Georgia federal judge has remanded the case to a Fulton County court after denying the plaintiffs' motion for a class action, according to Tisdale. Finnell explained the trouble was that in order for the suit to remain a class action in federal court, he would have had to show that each plaintiff suffered damages in excess of $10,000. In other courts, it is only necessary to show that total damages exceeded $10,000 — a much easier task.

Even so, confusion remains over whether the case is a class action in the Fulton County court. The Fulton County judge has yet to rule on that, Tisdale said.

Meanwhile in Alabama, U.S. Dist. Judge James H. Hancock has not yet ruled on whether he will allow the suit to remain a class action here. Thus the case is said to be in the "class action discovery" stage, which means parties in the suit are supposed to be informing each other as to facts known by themselves or by witnesses about whether the suit affects an entire "class" of people. In this case, the class would be everyone whose living is affected by the commercial or recreational uses of Weiss Lake.

The Georgia suit is in "general discovery" — one step forward and presumably the last step before the pre-trial stage.

Hancock's docket clerk, Leigh Campbell, said Hancock has the option of dismissing the the Alabama case for lack of prosecution. But he has allowed it to continue, probably because attorneys in the case have asked to wait until the Georgia litigation is resolved before proceeding in Alabama, Ms. Campbell said.

Hancock was presiding over a trial in Gadsden last week and could not be reached for comment.

Ms. Campbell said there is no time limitation on the class action discovery phase unless the judge chooses to set one. Once or twice a year, she says, she brings neglected cases like this one to his attention and he sometimes dismisses them. This case was last reviewed in March or April and Hancock chose to let it ride, according to Ms. Campbell.

The suit's most recent major development came in early 1977 when the State of Alabama intervened. Attorney General Bill Baxley filed a motion asking compensatory damages of $1 million plus punitive damages of $100,000 from the defendants.

Ben Cohen, an assistant attorney general, says Baxley's office may take more independent action on the case but no such decision has been made.

"I don't know exactly what's happened. It's just jogged along, and I don't know why," Cohen said.

On the lakefront, State Health Officer Ira L. Myers has stuck to his guns by not banning commercial fishing at Weiss, despite criticism from environmental groups.

Georgia health officials chose to promulgate the ban shortly after the September 1976 fish sample tests were made public. The ban followed a warning from the U.S. Environmental Protection Agency that the chemical was present in heavy concentrations in fish taken from the Coosa.

At the time, Myers said there was "not enough evidence to cause a wholesale restriction" of the eating of Weiss Lake fish.

Last week, Myers reiterated that point and said he is "encouraged" by the falling PCB levels in recent fish samples, although a non-enforceable health department warning remains in effect.

"People need to be aware of the problem and make their own decision," Myers told The Star. "You can't avoid every hazard in life. Otherwise we'd lay in bed and die of inactivity."

The health officer said only bottom-feeders, like catfish, still are being found with PCB concentrations in excess of the federal standard of five parts per million.

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