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1st Circuit hears challenge to Maine 'wrongful birth' lawsuit ban

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BOSTON (Reuters) - A federal appeals court on Monday wrestled with whether a Maine statute that bars women from pursuing "wrongful birth" lawsuits was constitutional, in a case by a woman suing Merck & Co Inc over a contraceptive implant she claimed was defective.

Members of the three-judge panel of the 1st U.S. Circuit Court of Appeals in Boston expressed concern during oral arguments about the extent to which the law would prohibit women like Kayla Doherty from pursuing any claims for damages.

U.S. Circuit Judge William Kayatta questioned why, under Maine law, Doherty would have been allowed to pursue claims to recover the costs of an abortion if she had chosen to end her pregnancy but was precluded from suing because she went ahead with it instead.

"Is that constitutional?" he asked.

In her lawsuit, Doherty claimed a physician failed to properly insert a Merck-produced Implanon into her arm because of a defect associated with the contraceptive device. The Implanon was designed to prevent pregnancy for at least three years.

Doherty became pregnant and, at the age of 21, gave birth to her son Blake in 2014. She sued Merck and the U.S. government, which funded and was legally responsible for the Lovejoy Health Center, the community health center where the procedure took place.

In January 2017, the Maine Supreme Judicial Court, at the request of U.S. District Judge D. Brock Hornby in Portland who was presiding over the case, determined Maine's "wrongful birth" statute would bar Doherty's claims.

Hornby subsequently rejected Doherty's argument that the statute violated the U.S. Constitution by depriving her of her due process and equal protection rights, as well as her right to a jury trial.

Citing major U.S. Supreme Court birth control and abortion rulings including *Roe v. Wade*, Doherty had also claimed the statute intruded on her privacy rights, which protect a woman's contraceptive decisions.

Laura Honold White, a lawyer for Doherty at Bergen & Parkinson, in court on Monday argued the law was gender biased and that Maine could not demonstrate a compelling government interest to limit Doherty's ability to sue.

"Limiting tort recovery just because of the nature of the procedure involved - there's just nothing compelling to justify doing that," White said.

But Deputy Maine Attorney General Susan Herman argued the state had a legitimate basis for enacting the tort reform-related law in 1986 to limit "wrongful birth" lawsuits amid concerns about the high costs of medical practice insurance.

"There was in fact a rational basis and legitimate state interest in the legislature drawing the line where it did," she said.

Steven Boranian, a lawyer for Merck at Reed Smith, pointed to similar laws barring "wrongful birth" lawsuits in other states that had been upheld in court.

"Each of those times those statutes come up for review, they've been judged on a rational basis," he said.

The other judges on the panel included U.S. Circuit Judges Juan Torruella and David Barron.

The case is Doherty v. Merck & Co., Inc., et al, 1st U.S. Circuit Court of Appeals, No. 17-1997.

For Doherty: Laura Honold White of Bergen & Parkinson

For Merck: Steven Boranian of Reed Smith

For Maine: Deputy Attorney General Susan Herman

For the United States: Assistant U.S. Attorney Andrew Lizotte

--- **Index References** ---

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