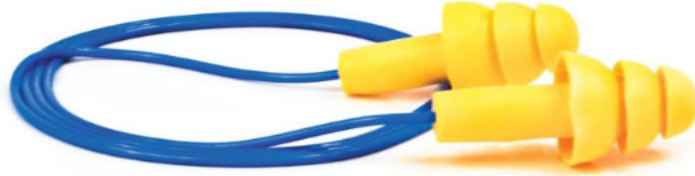


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With earplug MDL 'broken beyond repair,' 3M tries bankruptcy court

FEDERAL COURT

By [Daniel Fisher](#)
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INDIANAPOLIS (Legal Newsline) – Besieged by litigation that has already cost it multiples of the \$31 million in revenue it earned selling protective earplugs to the U.S. military, 3M placed its Aearo unit in Chapter 11 bankruptcy to try to halt a legal process it described as a “a perfect storm no reasonable settlement could solve.”

Plaintiff lawyers used an advertising blitz to recruit more than 280,000 service members in what has become the **biggest multidistrict litigation in history**, with twice as many claims as the other 191 pending MDLs combined. That huge size, combined with a string of defeats on key legal issues, drove 3M to abandon settlement efforts and use the rules of bankruptcy court to end the litigation instead.

The company laid out its side of the dilemma in a 60-page “informational brief” filed with U.S. Bankruptcy Court in Indianapolis on July 26. In it, 3M says most of the claims against it are unsupported, either because the plaintiffs never used its Combat Arms earplugs or didn’t suffer hearing loss. But because U.S. District Judge Casey Rodgers suspended the normal rules of federal civil procedure, including requiring plaintiffs to provide basic information to support their claims, 3M faced the threat of open-ended litigation expenses with no ability to quantify the value of the claims against it.

“In short, the tort system is no longer a viable forum to resolve this litigation, which is instead now a cautionary tale of an MDL that is broken beyond repair,” 3M said.

Even Judge Rodgers discussed the problem of questionable claims in MDLs, writing in a 2021 [law review article](#) that 20-50% of consumer product liability claims lack evidence.

“The sheer volume of unsupportable claims in some MDLs can grossly distort the true merit and size of the litigation,” Judge Rodgers wrote.

Cases like the Combat Arms litigation illustrate basic problems with the MDL procedure, said Alex Dahl, general counsel of [Lawyers for Civil Justice](#), which advocates for changes in the federal rules of civil procedure. Congress approved MDLs as a way for federal courts to manage thousands of tort cases based on similar facts and allegations by placing them before a single judge for pretrial proceedings.

But critics, including corporate defense lawyers, say the procedure has long operated outside the rules that are supposed to govern civil lawsuits in federal courts, including rules requiring plaintiffs to provide the most basic information to back up their claims

Defendants also argue they are often forced into multiple “bellwether” trials to establish how much jury thinks plaintiff claims are worth without being able to appeal judicial rulings that could determine whether the cases proceed at all.

“Unfortunately, MDLs lack the most basic rules, including ones that in all other kinds of cases require lawyers to perform due diligence, provide proof of claims and allow appellate review on key questions of law,” said Dahl. “That’s what bankruptcy courts have now, and MDL courts don’t – rules.”

3M’s problems began with its purchase of Aearo for \$1.2 billion in 2007. With the acquisition came its Combat Arms earplug, which Aearo developed in consultation with the military to provide protection against detonation noise while allowing users to hear other sounds such as commands and instructions. The military approved the design and initially ordered it shipped without instructions because it preferred to train soldiers how to use them itself.

Plaintiff lawyers later came across internal memos including one suggesting the device had failed an early test. They also accused 3M of failing to provide adequate instructions for use, leading soldiers to expose themselves to hearing-damaging noise. 3M paid \$9.1 million in 2018 to settle a similar claim by the government, without admitting fault.

3M denies all the allegations and hoped to thwart the litigation by arguing the military contractor defense, which says it can’t be held liable for selling a product whose design was approved by the government. Judge Rodgers denied that defense, however, and prohibited 3M from even suggesting to jurors the military had any involvement with the design of the Combat Arms earplugs.

“It’s not going to be suggested to the jury, they’re not going to be told, it’s not going to be argued to them, witnesses are not going to get into that the government was responsible for the design,” she said in court. “That is not going to happen.”

3M appealed the ruling to the 11th Circuit, which still hasn’t ruled on it. In the meantime, Judge Rodgers ordered a series of bellwether trials. So far plaintiffs have won nine, including a \$50 million jury verdict, and 3M has won six. 3M argues the trials were marred by disputed evidence and improper arguments, such as the comment of one lawyer who suggested Aearo was happy with the Sept. 11 terrorist attacks: “Seven days after 9/11, war profiteering. Thank you, Osama,” he told jurors.

Lawyers also dismissed half of the cases originally teed up for bellwether trials, however, possibly because they feared losing, and they have dropped more than 50,000 claims since Judge Rodgers started ordering them to provide basic supporting documents.

“Any lawyer who has too many claims to perform due diligence on has too many claims, period,” said Dahl.

Lawyers for Civil Justice has proposed changes to the federal rules to require the same sort of documentation in mass-tort MDLs as in regular civil lawsuits. The group also is pushing for some sort of interlocutory review of key judicial decisions, so both sides know the rules before launching into bellwether trials.

“It would actually expedite cases rather than delay,” Dahl said. “If you do 12 trials then figure out the legal basis for them, you’ve spent a lot of time and legal resources and then it might all be upended.”

By placing Aearo in bankruptcy, 3M hopes to obtain an injunction halting further trials against it and the subsidiary while the bankruptcy court devises a system for processing, evaluating and paying claims. 3M has pledged open-ended financial support for Aearo in exchange for protection from continuing litigation. Johnson & Johnson is trying a **similar tactic** to manage lawsuits over its cosmetic talc business.

“That is exactly what bankruptcy courts have that MDLs unfortunately don’t,” Dahl said. “They have deadlines, they have standards for reviewing claims, and appellate review. That’s why it’s an attractive place for defendants.”



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