The People Vs.

3M MTI

The People vs. 3M

The industrial conglomerate 3M started life as Minnesota Mining Manufacturing in 1902. Since that time, the company has grown into one of the largest corporations in the world, currently ranked at #103 on the Fortune 500. The company is renowned for introducing widely used household-name products such Scotchgard and Scotch tape.

However, the company also has a long history of fighting and settling litigation alleging mass tort malfeasance. The list extends well beyond just dual-ended combat earplugs, the subject of an explosive, well-publicized ongoing multidistrict litigation effort.

In this e-guide, The Mass Tort Institute will explore and analyze issues that have surfaced from cases litigated against and defended by 3M. It can be used as a go-to guide for attorneys, paralegals, and other mass tort professionals to:

- *Gain historical perspective*
- *Better understand the machinations of mass tort litigation*
- *Develop sound strategies—and counterstrategies*
- *Better manage client expectations*
- *Anticipate a coming avalanche of specific toxic torts*
- *Get a sense of just how cagey a large corporate defendant can be in fashioning its own narratives and positioning itself to fight the claims against it*

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CHAPTER 1

KNOW YOUR OPPONENT

Putting a Good Face on Bad Cases

"Here, our history inspires your future," begins 3M's self-released company history.

Like a lot of big-company defendants subject to mass tort litigation, the industrial manufacturer has probably done more good than harm over the course of its 119 years in business. 3M started out by mining for a mineral that is a main ingredient in sandpaper. The company takes visitors through a detailed timeline of how it developed from there.

Scotch tape was born in 1926. The tape's well-known dispenser came in 1939. Surface protectant Scotchgard came 1956. Those yellow sticky notes on your desktop screen? 3M's version hit the market, and popularized it, in 1980.

The timeline mentions the issuance of more than 100,000 patents. Additionally, it highlights 3m's consistent placement on the Down Jones Sustainability Index.

However, mass tort professionals working hard in 2021 may notice a few things missing from this timeline. There's no mention of:

- Per- and polyfluoroalkyl substances (PFAS), the family of "forever chemicals" used to create Scotchgard, aqueous film-forming foam and host of other industrial products
- Adhesives, caulks or cements, many of which contained asbestos prior to their discontinuance
- Any specific products developed for the U.S. military.
- Masks used to protect users from pollutants and viruses, even though the company is a prominent maker of N95 masks

This guide will cover and discuss litigation that touches on all of these products and categories. Study the 3M website more intently, and you will find they are all reserved for more specific, aggressive, and positive coverage elsewhere.

3M serves as a case study of how big companies use their public affairs engine to position themselves against mass tort litigation. Here's how.

Offering Stewardship Over Problems the Company Helped Cause

Do not take The Mass Tort Institute's word for it. Use 3M's own words instead. 3M headlines its website section on PFAS this way: "3M's Commitment to PFAS Stewardship."

This section dedicated to the chemical compounds lets visitors know that the company has invested "more than $200 million" in PFAS-remediation efforts, including testing, capping and containment development at its factories and groundwater treatment.

The State of Minnesota reached an $850 million settlement in 2018 with 3M to resolve PFAS litigation brought by the state against the company years earlier.

Elsewhere on the 3M site, we find its grouped sustainability pages, including a link to its 2021 Sustainability Report. The report discusses how the company is "[g]rowing our business…" by combatting damage to the environment.

"Together with our employees, customers, partners, governments and communities, 3M is committed to a science-based, collaborative approach to solving shared global challenges and improving lives," the company offers in the sustainability section's introduction.

Casting Doubt on the Available Science

3M also links to a health science page in its PFAS section. There, it explains how "the weight of scientific evidence does not show" that PFAS compounds did not cause long-term harm to people at past levels, and still does not at present levels.

The company cites several studies—including ones from a trade association, a science advisory panel in Michigan (home of Flint) and the Australian government—that claim to find no actual causation. It effectively split hairs: 3M distinguishes the cited studies from ones discussing "possible health outcomes." It also says that PFAS has been detected at "extremely" low levels and that its "mere presence" does not necessarily harm people.

Early in 2021, 3M competitor and frequent co-defendant in PFAS cases DuPont established a $4 billion fund along with two other companies to help pay for *future* PFAS settlements.

Attacks on science at the heart of mass tort litigation has worked in the recent past for 3M, though. It defeated multidistrict litigation by summary judgment in 2019 related to one of its surgical warming blankets, the Bair Hugger. It convinced the judge in that MDL to throw out expert witness testimony for failure to use methods that demonstrated causation. Thankfully, the U.S. Court of Appeals for the Eighth Circuit revived the litigation after finding that the pretrial judge improperly excluded plaintiffs' general-causation medical experts and their engineering expert.

Promoting Products and Services that Implicitly Acknowledge Past Defect Claims

"Welcome to the 3M Center for Hearing Conservation." Yes, that's a headline published on 3M's website. Despite battling the largest MDL in history, a plaintiff population comprised of military veterans claiming hearing loss related to a 3M combat earplug product, 3M is teaching people how to prevent hearing loss. The training page hooks back to a larger website section on hearing protection products and services, which is now the top organic search result on Google for "3M military."

You will not just encounter this kind of tension with dual-ended combat earplugs. It comes up in the context of toxic airborne dust particles, too.

For example, a blog article from April 2021 discusses how to ensure masks and respirators fit a user's face properly. Causes of action citing improper fit and failure are worn are found in asbestos-related products liability lawsuits claiming mask defects.

The article invites readers to link to a technical datasheet describing the Aura 9300+ series of respirators, which is available to customers in England and Ireland. Speaking of which…

Pointing to Product Sheets Based on Standards Set Outside of the U.S.

See the Aura 9300+ datasheet linked above.

Deflection of Responsibility

The PFAS Stewardship section includes four links to pages describing the benefits of PFAS-based products in specific industries. describe some PFAS applications. Three of these pages come up as "Not Found." The one that does load ends with a section it dubs "Science-based PFAS management," which features the following excerpt:

> Because … broad definitions of PFAS encompass a range of materials, organizations including the Organization for Economic Co-operation and Development (OECD) have established distinct classes, such as high molecular weight fluoropolymers, for hazard assessments and regulatory purposes. Recognizing such distinct characteristics is vital to ensure sound management of all regulated materials, including PFAS.
>
> Furthermore, because of important safety, health and/or environmental considerations, it is important that the benefits of PFAS solutions are thoughtfully considered in crafting regulations that could impact their availability.

One reasonable interpretation of that statement: It's on the regulators to get this right, not on us, because we're making a public good here. The deflection grows more pronounced when it involves the military.

"Noise-induced hearing loss and tinnitus have been widely acknowledged for decades as common injury risks in combat and off-duty situations. According to the Department of Veterans Affairs, today these conditions are by far the most prevalent service-connected injuries," reads the introduction to 3M's site that pushes back on the combat earplugs MDL (while you'll find 3mearplugfacts.com as a paid search result on Google, you won't find any related results through 3M's own search engine).

The Earplug Facts site explains that the military "requested" design specifications for the earplugs and that "testing" by the military, predecessor company Aearo and 3M "confirmed" that the earplugs limited noise exposure at "every" level.

The MDL springs directly from a $9.1 million settlement the company made with the federal government to settle a False Claims Act. The whistleblower suit alleged it and Aearo knowingly hid findings of a design defect before striking a supplier deal with the military in 2003. On the website, though, 3M states it settled the suit to avoid the "time and expense" of litigation.

The judge in the earplugs MDL has denied a motion by the 3M to use the "government contractor defense," which would shield it from liability and shift the blame for a failure to correct any defects into the military. U.S. District Court Judge M. Casey Rodgers ruled there was no actual contract in place to trigger the contract-inspired defense. (See Chapter 2 for more information on this defense).

A Final Thought

Public affairs and safety mitigation efforts have equaled smart business for 3M over the decades. Business lines to counter fallout from earlier business lines is common practice that has been recognized as effective by business groups, analysts, and watchdog organizations.

Yet they also represent a defense strategy in the name of corporate citizenship. Mass tort law firms selecting 3M-related torts need to know it is coming their way, and that these strategies have proven effective in the past.

CHAPTER 2

BLAME THE MILITARY

Understanding the Government Contractor Defense

The U.S. military and 3M have a longstanding relationship as commercial partners, something 3M actively touts. The parties have collaborated to develop products for use in military operations. The military has also been a customer of 3M's, procuring products manufactured by 3M for use by enlisted members and combat veterans.

However, when 3M has been faced with recent mass tort litigation alleging military-related products have caused serious injury to military veterans, its attorneys turned to an eyebrow-raising defense strategy: Let's use the military to shield ourselves.

The legal mechanism that allows them to attempt this is known as the "government contractor defense." Its use has so far been denied in *In Re: 3M Combat Earplug Products Liability Litigation*, now the largest multidistrict litigation (MDL) in history. Its rejection by presiding District Court Judge M. Casey Rodgers cleared the way for the first handful of bellwether trials. 3M was found liable in the first of these cases, and a total of $7.1 million was awarded to three plaintiffs whose cases were consolidated.

The company also plans invoke the government contractor defense in another active MDL involving it as a defendant, *In Re: Aqueous Film-Forming Foams Products Liability Litigation*, as a removal notice from New Hampshire and 3M's own site on PFAS, the underlying chemicals at issue in the case, make clear.

If used successfully, or if restored on appeal, this defense could potentially put 3M in the clear and absolve it from any legal liability.

What is the "Government Contractor Defense?"

This defense, and the three-part test to satisfy it, date back to a 1988 U.S. Supreme Court case, *Boyle v. United Technologies Corp.*

In a decision written by Justice Antonin Scalia, the Court identified procurement of equipment via a contract by the United States is a "uniquely federal interest." As such, in limited cases, the federal policy interest, Scalia asserted for the majority, may displace or pre-empt a state law, such as "state law that imposes liability for design defects in military equipment", if a "significant conflict" exists between the two.

What standard must defendants meet in order to successfully use this defense?

In fashioning this government contractor defense on behalf of the Court, Scalia listed a three-prong test.: (a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States."

The Court limited use of the test to only the fact pattern before it, namely those state military design defects laws. There is currently a split among the Circuit Courts of Appeals as to whether this government contractor defense can be used in non-military contexts. The Ninth Circuit has found that the defense is contained only to military instances, while the Third Circuit has extended the "uniquely federal interest" policy principles of the defense to the purchase of ambulances from the federal government.

In any event, 3M has grasped onto the *Boyle* test to position its defense in these two active MDLs, in which liability could collectively run well into the billions of dollars.

Using the Defense in the Combat Earplugs Case—So Far, No Good

In her July 27, 2020, ruling, Rodgers, the judge in the *Combat Earplugs* MDL, rejected the argument that any contractor defense should apply for a simple reason. There was no contractual relationship in which the U.S. Army "actually participated in discretionary design decisions."

The hearing-loss and tinnitus injuries at issue in these cases relate to an alleged defect to these "selective attenuation" earplugs, in which improper design caused the flange on one of the plugs to flap back and loosen the fit, leaving some wearers exposed to nearby explosions or other extreme noise.
However, during the development of the earplugs in dispute, Rogers writes, there was no actual contract in place between Aearo, 3M's predecessor in manufacturing the earplugs, and the Army. The *Boyle* decision specifically points to the "obligations to and the rights of the United States *under its contracts*" as justification for endorsing the defense. Because the design specifications of the earplugs were never reduced to a signed contract, the uniquely federal interests defined by Scalia "simply do not exist in the absence of a government contract," Rogers writes.

Turning to the actual three-prong test, Rogers finds that the Army's failure to lay out "reasonably precise specifications" in a contract, or to even put out a request for design proposal or its own proposed specifications, defeats any argument for a favorable ruling on the first prong of the test.

The 56-page order left 3M unable to use the defense during any bellwether trials related to the MDL. (As of this publication, nine such trials have been completed. More on that later in this guide.) It's a good bet the issue will come up again on appeal as attorneys for the plaintiffs accumulate trial victories.

Anticipating the Defense in the Aqueous Film-Forming Foams Case—Perhaps More Plausible

The plaintiffs whose cases are consolidated into *In Re: Aqueous Film-Forming Foams Products Liability Litigation* contend that the PFAS chemicals used to produce aqueous film-forming foam were known to be toxic. The exposure to these "forever chemicals" allegedly caused myriad safety and health issues, including drinking water contamination, reproductive problems and cancers.

On its dedicated "PFAS Stewardship" site, 3M a narrative history of aqueous film-forming foam, used to combat liquid fuel fires on military bases and in other industrial settings.

Here is 3M's contention: We supported the Navy. It was their problem we helped solve using our chemicals. Naval scientists hold the original patent (though 3M has since been listed as inventor or assignee on a number of closely related patents). They still require something we don't even make anymore. Ergo, it's on them, not 3M.

However, given the close multi-year collaboration between the Navy and 3M in developing AFFF, detailed in depth here, the Navy's original initiative in seeking a solution to fighting liquid fires and what seems to be 3M's disavowal of its toxic concoction, perhaps the government contractor defense stands more of a chance in this instance than in the combat earplugs context. It will depend, of course, on an examination of the facts involving the design, drafting, testing and approval of the specifications and if any 3M behaviors can be construed as attempts to "warn" the Navy of AFFF's inherent dangers.

3M does have a recent history of settling cases involving PFAS-related contamination and injury. The company has also taken pains to let the public know that it committed to assisting the federal government with PFAS remediation.

Could 3M evident "non-legal" guilt over PFAS's toxic legacy carry more weight than its argued-for disclaim of liability for AFFF injuries? Is protection of public health and safety a weightier "uniquely federal interest" than the procurement of equipment by the military. That remains to be seen.

A Final Thought

In any case, military plaintiffs in these two MDLs and their attorneys should be aware that 3M either is deflecting or plans to deflect responsibility for the injuries caused by their products in both of these active MDLs. They plan to do it by exploiting their relationship with the military and to hide behind case-driven law that puts an unusual spin on the pre-emption doctrine.

Further study of and familiarity with the "government contractor defense" is an advisable undertaking as more and more potential clients seek intake and as more cases are transferred to the MDL courts.

CHAPTER 3

ASSESSING VALUATION

How Much are Your Combat Earplugs Cases Worth?

It's a question that mass tort professionals hear from clients frequently: "How much is my case worth?" Or perhaps, it's phrased, "What kind of a settlement can I expect?"

How to answer? In the context of multidistrict litigation, two variables are in play:

- Global settlement negotiations
- Potential individual awards to your clients

If your law firm is involved in the Combat Earplugs MDL, you may find yourself fielding inquiries on potential individual settlements *a lot*. The case has attracted an astonishing number of claimants to date, north of 270,000 as the end of 2021 approached.

3M BELLWETHER INSIGHTS TO DATE

So far, the MDL's first tranche of bellwether trials have arguably offered little real insight on how global settlement will be reached. While bellwethers are held to preview the presentation of evidence, the efficacy of permitted defenses, and jury verdicts and damages awards, their most valuable function can be to inform and anticipate a potential lump-sum payment by the defendant.

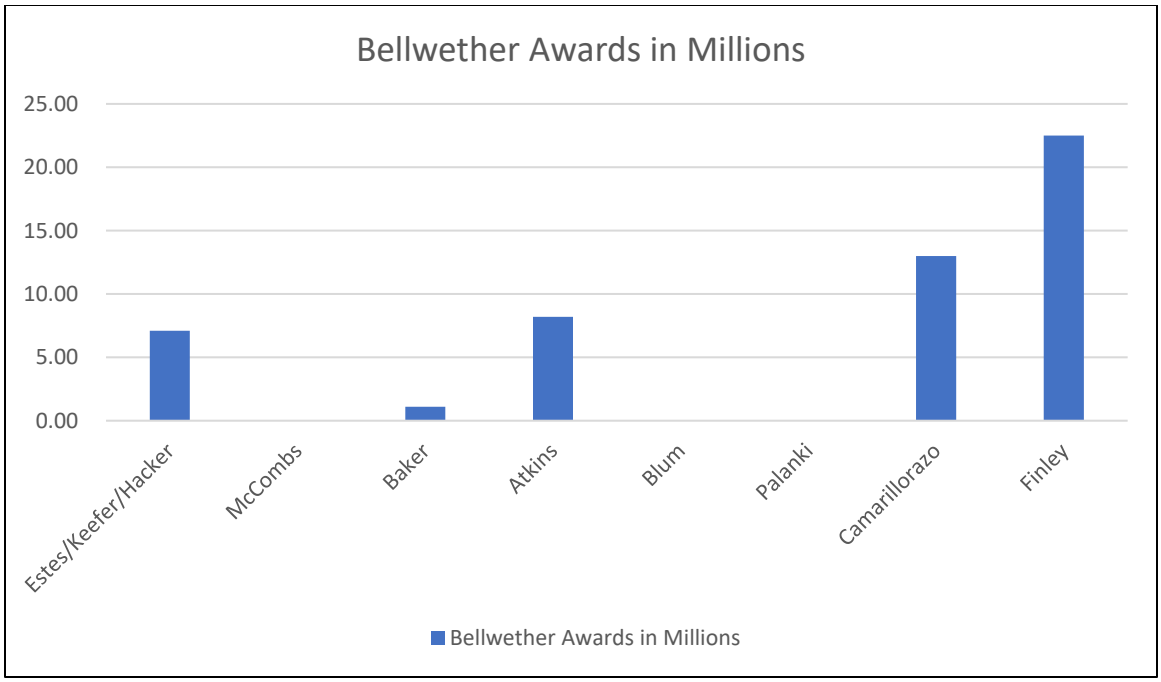
Here, though, we have seen a stream of split results, with the plaintiffs possessing only a slight lead.

In the sixth of these MDL court-selected "test-drive" cases on November 12th, 2021, a jury sitting in Pensacola decided that 3M's earplugs were not responsible for hearing damage suffered by U.S. Army veteran Joseph Palanski. It was a second consecutive positive result for 3M, something the company noted in a public statement maintaining its position the product itself was not at fault for any injuries suffered by the veterans who used the earplugs.

3M's victory lap was short-lived, however. Three days later, on November 15th, the jury in the seventh bellwether trial not only found in favor of plaintiff Sgt. Guillermo Camarillorazo, but it also returned by far the largest award of damages in any of these cases so far.

The award broke down into $800,000 in compensatory damages and $12.25 million in punitive damages. This was significant as the previous three plaintiff trial victories produced a *total* of roughly $17 million in damage awards. While Sgt. Camarillorazo's case was one chosen by the plaintiffs rather than 3M or the court, the jury's assignment of an eight-figure favorability is hard to ignore.

December 2021 produced similarly divergent results. In the eighth trial on December 13th, the jury handed down an even-more-striking damages award of $22.5 million damages award to the plaintiff. Later in the same week, on December 17th, 3M earned its fourth favorable verdict finding it not liable for damages.



Of note, these latest bellwether trials were not overseen by Judge Rodgers, the presiding judge in the MDL itself in the Northern District of Florida. Rogers herself presided over the first five trials.

Even with two multimillion-dollar damages awards on the books, any settlement in this enormous MDL may not be reached anytime soon. Nothing is conclusive yet.

That's something the MDL court presumably anticipated when it scheduled a total of 11 additional bellwether trials earlier in the fall, which included these two. And co-lead counsel for the plaintiffs, Bryan Aylstock, has acknowledged publicly that even 16 bellwether trials likely won't be conclusive enough for billions and billions of dollars to shake loose into a settlement fund.

In fact, back in August, Judge Rodgers, acknowledging the intense backlog of cases that had built up within a span of less than two years, promised the first of in a series of "wave" orders for the parties to "work up" around 500 cases, which would then be remanded to other trial courts once ready. "The Court intends to enter a new Wave Order every 3 months with an 8-month discovery schedule for each wave," Rodgers wrote on August 24th.

That seems like a lot of work will be rumbling downhill toward mass tort professionals fairly soon. Perhaps it's a tactic to accelerate any negotiations as they stare down a potentially daunting assignment. Yet 3M's confident public statement reveals a steadfastness and intent to keep fighting.

HOW TO ANALYZE POTENTIAL SETTLEMENT VALUE FROM 3M

What, then, does this verdict history to date mean? It suggests mass tort professionals will need to anticipate and manage litigation costs and lean harder on cost-benefit analysis models.

The longer this goes, the more budget-conscious you will need to become, and the more realistic you will need to be with your clients. You will need to consider several factors to guide you in assessing possible outcomes.

These factors include:

- **Decision-tree analysis.** This is a time-tested model to analyze potential business and has been applied frequently to litigation. To build a decision tree, you must map out all of the things that can happen as your client's case proceeds and assign probabilities.

  What is the likeliness of summary judgments for 3M or other adverse rulings in your current cases? What is the likelihood of 3M being held liable if your case was to be tried before a jury? What range of settlement amounts do you see as possibilities—low-end, mid-points, high-end—and what probability do you see for each settlement scenario? Your decision tree is potentially an excellent guide to manage your client's expectations appropriately.

- **The size of the case.** The earplugs case is already by far the largest MDL effort in history, surpassing the 30-year-old asbestos MDL, which is still percolating in the Eastern District of Pennsylvania.

  How can so many plaintiffs be adequately compensated for their injuries resulting from the alleged design defect and fraudulent concealment by 3M and predecessor manufacturer Aearo?

  Could 3M actually fund any initial settlement account sufficiently, and then keep funding it? Will your firm need to accelerate its claims for settlement in the spirit of "first come, first serve" to maximize the amount of settlement? Supporting this: What, if any, closure provisions might the settlement include? Facing a case of this magnitude, it's conceivable 3M could push for a high opt-in percentage threshold to maintain the settlement (80 percent? 90 percent?).

- **The size and settlement tendencies of the defendant.** 3M is a gigantic conglomerate. It reported first-quarter 2021 sales of $8.9 billion, net income of $1.6 billion, and adjusted cash flow of $1.7 billion. It also reported assets of nearly $47.2 billion. This is not a struggling entity by any means.

  3M also has a recent history of settling lawsuits and claims against it in large amounts. In addition to the $850 million settlement with the State of Minnesota over PFAS pollution claims, there is also another smaller but significant $32.5 settlement reached in a class-action suit alleging 3M manufactured defective dental crowns. This evidences a desire by the company to walk away from hot button claims against it.

- **The merits of the claim population as a whole. Or lack thereof.** In a 2019 article published in the Kentucky Law Journal, a Kirkland Ellis partner reviewed a significant history of judges presiding over large MDLs disqualifying subsets of individual claims, through summary judgment, dispositive motions, and other devices, for lack of merit. This is especially true for large, well-publicized cases that trigger a wave of case aggregations that may not receive proper scrutiny before being transferred into the MDL.

The article specifically analyzes decisions and inherent flaws that significantly reduced the size of MDLs involving products such as heparin, silica, welding fume, and Propulsid. Could this same dynamic apply to 3M earplugs MDL as the case progresses and reviews of individual cases commence? If so, does that raise the average settlement amount? This definitely necessitates an analysis and should pique your attention.

- **The merits of your own clients' cases.** How severe is the documented damage to your clients? How much exposure to loud noise related to combat, training exercises at military bases, and other instances can be proven?

  How much commonality is there between your clients and other plaintiffs with claims in the MDL—same training facility? Same weapons? Close proximity within a known combat area in Afghanistan?

  Evaluating the answers to these questions can help you estimate the number of points that may be assigned to your client by the court and plaintiff committees. Remember, the more points assigned, the higher the settlement amount.

- **Fees plus the time to reach a resolution and pay out settlement funds.** The massive claim numbers, lengthy expected bellwether timeline, and 3M's penchant for aggressively defending itself could mean a global settlement might take considerable time to materialize. That will likely be the case if any talks between lead counsel for the plaintiffs and the defendants intensify in the short term.

  Once that global settlement is reached, it could well take years for the settlement review and disbursement process to run its course. During this time, fees and costs continue to accrue. On the flip side, interest tied to awards may also accrue.

  Thus, a $140,000 settlement may result in $66,000 actually being collected by a claimant. You'll want to do your best to ballpark the effects of differing turnaround periods (3 months vs. 6 months vs. 2 years vs. 5 years…).

- **The judge's duty to approve a fair and reasonable settlement.** Case law supports this one. Writing for the majority in Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir 2002), Circuit Judge Richard Posner reiterated that judges presiding over mass torts (in this case class-action suit) should serve as "fiduciaries," and as a result must "…exercise the highest degree of vigilance in scrutinizing proposed settlements…" In *Reynolds*, the driver of the appeal was an allegation that attorneys with relatively weak groupings in the class were acting on their "pecuniary self-interest," and that the judge gave to much credence to this influence. Following from this, if Rogers uses her "highest degree of vigilance," then a bloated settlement is unlikely.

- **The use of special masters.** Because of concerns over fairness, or attorneys unduly influencing the determination of settlement awards and especially "common benefit" fees, the appointment of special masters to oversee settlement review procedures by the MDL judges has increased. Often, judges appoint special masters for other discrete MDL management purposes.

In the 3M earplugs, Rogers appointed a retired judge in the fall of 2019 as a special master to facilitate the adjudication of affirmative defenses and to manage discovery from federal agencies. This suggests the use of a settlement special master in this instance is highly likely.

This should be seen as a positive for your clients, as special masters often rule on the proposed apportionment of fees shared among attorneys, as well as establish efficient processes to conduct an intensive review of individual claims. A more equitable assignment of fees, combined with fair-minded awards and disqualifications based on merit, could set up your client for greater compensation. The role of the special master, then, should be conveyed.

A FINAL THOUGHT

While we have established that 3M is a mass tort frequent flyer, *In re: 3M Combat Arms Earplug Products Liability Litigation* represents unchartered waters even for them.

So how will you answer that inevitable question about the monies from your clients? It will take some complex analysis, and maybe some uncomfortable educated guesswork, on your part as a mass tort professional. Yet with guidance and insight from the factors we have offered, you can begin to develop a sense of what may be to come.

CHAPTER 4

PFAS

"Forever Chemicals" Enter the Public Consciousness

3M and DuPont are respectively the second and third largest chemical manufacturers listed in the 2021 edition of the Fortune 500. Each corporation arguably built its overwhelming success on a class of chemicals known as per- and polyfluoroalkyl substances, or PFAS for short.

Yet these days, they perhaps wish they did not. Both companies, along with peers in the chemicals industry, now face a wave of mass tort litigation related to alleged injuries and environmental harm caused by PFAS-based substances, which often are called "forever chemicals." The mass tort actions have been presented both by traditional plaintiffs and state governments.

This development should factor heavily into the tort selection analyses of mass tort law firms not already involved in these matters.

What PFAS-related damages are alleged?

According to the Center for Disease Control and Prevention, potential injuries caused by exposure to PFAS substances include:

- Cancer of the kidneys, testicles and other organs
- Increased cholesterol
- Liver damage
- Low birth weights
- Immunosuppression
- Developmental disabilities
- Pre-eclampsia in pregnant women
- Decreased effectiveness of vaccines in children

The alleged instances of exposure pleaded in these cases relate to the use of or proximity to the chemicals in workplace and military settings, the consumption of drinking water and fish, and contact with some household products. The CDC also reports that various studies over the past several decades have shown that extremely high levels of the chemicals were found in affected communities and in specific classes of workers. Other studies show that these blood-based statistics decreased sharply once water-filtration systems and other mitigation efforts took hold.

Where does the term "forever chemicals" come from?

PFAS substances possess one common trait: They do not break down or self-destruct naturally, and if they do, scientists believe it may take at least hundreds of years for that process to occur. This is why they are becoming more widely known as "forever chemicals."

Stories of "forever chemicals" use are now finding their way into mainstream media. While these PFAS compounds are commonly found in industrial products, it turns out, consumer-product manufacturers use them, too, sometimes in everyday products.

News of PFAS use in makeup, as an example, was reported recently. A new study found that nearly nine in 10 cosmetics companies failed to report the use of the chemicals as required by the Food and Drug Administration. The study prompted the introduction of bipartisan legislation in Congress that aims to better regulate the cosmetics industry.

What can you tell me about the history of these "forever chemicals?"

The first instance of a PFAS substance, often referred to as a "fluoropolymer" and used as surfactants, resulted from a happy lab accident by a DuPont scientist in 1938. That chemical became known as Teflon, the coating that makes pots and pans no-stick products.

3M committed to its own PFAS research in the years afterward. By the 1950s, the company had developed Scotchgard, used to protect the integrity of fabric upholstery, steel countertops, and other surfaces.

Those brands have long been household names, and PFAS compounds have since proliferated into the manufacturing of countless products distributed by different chemical companies and industrial manufacturers. A basic search of Google Patents for "fluoropolymers" retrieves more than 135,000 results. These products include aqueous film forming foam (AFFF), mentioned earlier, which is the subject of multidistrict litigation with 3M as one of numerous defendants in the District of South Carolina.

The new "makeup" research and apparent revelations may birth their own breed of MDL litigation. At the moment, however, 3M and other defendants are busy combatting, or settling with, multiple state governments and aggregated plaintiff populations who claim substantial damages. These litigants also allege that these companies knew about the damage their products could cause and concealed the information.

What litigation and settlements can you point to that demonstrate what to anticipate these cases?

Here is a rundown of some of the litigation that is either active or has reached settlement within the past five years:

In Re: Aqueous Film-Forming Foam Products Liability Litigation (D S.C.)
In this active MDL, the PFAS use under pre-trial discovery involves a variation that extinguishes liquid-triggered fires on military bases, factories and other locations. As discussed in Chapter 2, AFFF as it is known was developed in concert by the U.S. navy and 3M in the 1960s. The litigation largely covers injuries and long-term medical conditions suffered by firefighters and military personnel. While the case's docket is currently crawling, 3M is expected to eventually attempt to invoke the "government contractor defense," which would protect it from liability and effectively shift blame onto the Navy. 3M and DuPont are among two dozen or so listed defendants.

In Re: E.I. DuPont de Nemours and Company C-8 Personal Injury Litigation (E.D. Ohio)

This high-profile MDL, which presides over PFAS-related injury claims brought by plaintiffs in Ohio and West Virginia, has inspired three separate settlement actions by defendants DuPont, Chemours and Corteva since 2017 (as well as a Hollywood film, 2019's "Dark Waters"). The first resulted in a master settlement agreement of $671 million. The second and third actions action happened almost simultaneously in January 2021. One, a $83 million agreement, related directly to the MDL. The other was a commitment by the three defendants to address and fund *future* PFAS litigation claims, either to the tune of $4 billion or payouts over a stretch of 20 years, whichever occurs first. This agreement and recognition of the firm classes of PFAS litigants suggests the chemicals industry sees a long, potentially permanent wave of "forever chemical" causes of action.

State of Minnesota v. 3M Co.

To provide further specifics on the $850 million settlement, reached in 2018, between 3M and Minnesota's government: The State Attorney's General filed its complaint against the company in 2010. The case was a forerunner to recent efforts by other states to find 3M and its peers liable for PFAS-related damages. In the complaint, the state alleged that PFAS compounds produced in 3M facilities had polluted drinking water sources in and around Minneapolis and St. Paul. Minnesota plans to use $720 million of the settlement funds to assist state environmental agencies in efforts to clean up pollution caused by the chemicals and to manage prevention and mitigation projects.

Multiple State Actions Filed by Michigan

Michigan Attorney General Dana Nessel has targeted PFAS makers and distributers aggressively, filing two separate lawsuits on the state's behalf. The first was filed in Lansing in August 2020 and seeks redress for environmental harm. The second was filed in January 2021 in Ann Arbor and focuses on AFFF-related claims. More than 30 defendants are named in the two lawsuits, with many of them listed on the right side of the v. in both.

One All-Encompassing State Action in Alaska

Unlike his counterpart in Michigan, Alaska Attorney General Treg Taylor packed all of his state's claims against a similar set of nearly three dozen PFAS defendants into a single suit, filed this past April. It is a unique hybrid matter that could shed light on how other states choose to proceed with PFAS litigation, assuming they do.

A FINAL THOUGHT

Toxic tort practice is a multi-disciplinary class within the mass tort world. It requires evaluation, analysis and discovery practice that addresses not only personal injuries but also to injuries to communities or specific groups of workers as a whole. You may feel like a public policy analyst as much as you a legal professional as you wind through your case management.

The growing attention paid to PFAS substances, and the resultant swell of new litigation could result in presenting you with an opportunity to develop a toxic-tort-specific skill set on a grand scale. Be prepared.

CHAPTER 5

TOXIC TORTS AND PRODUCTS LIABILITY

Unmasking a Connection

There is a junction within the mass tort universe where toxic torts and product liability intersect. 3M has found itself straddling that line quite frequently even as it grows stronger as a dominant player in the industrial manufacturing sector.

This is a history that precedes 3M and its chemical manufacturing peers' looming wave of litigation alleging serious injury from PFAS products.

Interestingly, though, one particular 3M product, the 8710 model respirator mask, has been the focus of broad-scale litigation efforts involving *three* classes of dangerous airborne dust particles: asbestos, coal dust and silica.

The mask, made primarily of polyurethane and polypropylene, is itself not toxic. Yet allegations of 8710 mask design defects; ineffective testing, performance, and user training; and failures to warn about both have walked through American courtroom doors for years.

Much of the alleged harm's origins date to the 1970s and earlier. 3M stopped selling the 8710 model in the U.S. in 1986 (though it is still marketed in Australia and New Zealand). Even so, awareness of respiratory illnesses such as mesothelioma and pneumoconiosis continue to swell—as does the legal tide against 3M tied to their old respirators.

Perhaps this comes as a surprise. 3M may be *the* pre-eminent maker of protective masks for workers and other people who find themselves in regular proximity to toxins and viruses.

N95 masks have become a cultural staple of the COVID-19 pandemic due the mask's role in protecting people from the virus, most especially frontline workers. And 3M makes a whole lot of those masks: The company estimates it is now producing just short of 100,000 N95 masks a month.

Still, if their record on court dockets is any indication, they don't always score a hundred with their masks. The defects and alleged bad corporate behavior cited in complaints centered on the 8710 masks usually include some combination of:

- The inherent inadequacy of the masks to protect users from toxic dust at high levels
- "Pressure drops" and air leakage caused by improper fit
- Alterations to the masks during shipping that remained uncured, without word from the company on how to correct these alterations
- Lax testing standards and a failure to report adverse results
- Failures to warn of defects or of the risks tied to prolonged exposure, or to raise awareness of how best to wear the masks

Here, we examine some specifics of 3M's litigation battles concerning asbestos, coal dust and silica.

Asbestos: Not Just About Adhesives

In re: Asbestos Products Liability Litigation, a multidistrict litigation effort in Eastern District of Pennsylvania, dates all the way back to 1991. The MDL's formation occurred soon after the Environmental Protection Agency's decision in 1989 to impose a near-total ban on future use of the fibrous material once used to insulate office walls, protect the sides of houses and resist heat, among other uses.

By 2009, the number of claims being transferred to the MDL Court had grown so intense that the judge in the case was forced to severely limit the docket moving forward. The Judicial Panel of Multidistrict Litigation reports that as of June 15, 2021, only 26 cases representing 192,120 claims were on the current docket.

Asbestos matters do still continue to permeate the usual federal and state court dockets. Trust funds totaling more than $30 billion to fund future settlements have been accumulated by 60 defendants.

How does 3M fit into the asbestos story? The company has been a defendant in the giant MDL and in other forums, as it manufactured and sold products containing asbestos, mainly sealants such as adhesives, caulk and cement, starting in the 1930s. It continues to be a defendant in claims alleging harmful exposure to its asbestos products. For instance, a case naming dozens of defendants is alive now in Connecticut state court.

However, most of 3M's legal liability connected to asbestos stems from those 8710 masks and design defect claims. The online information clearinghouse and advocacy organization mesothelioma.net estimates that 3M has settled approximately 300,000 cases claiming the masks proximately caused asbestos-related plaintiff injuries.

In one publicized series of cases, one lot of publicized 8710 mask cases originated from the same Weyerhaeuser door factory in Marshfield, Wis., in the mid-2010s. These actions alleged that at least six employees died from illnesses caused by fireproofing insulation material used in the doors they helped create. Results in the cases were mixed, as some settled, and some were dismissed.

Coal Dust: Miners Earn Their "Black Lung" Sum

The struggle of career coal miners in Appalachia with "black lung disease" has been well documented in recent years. The Centers for Disease Control and Prevention has even produced videos featuring horrific images of lungs by extreme intake of coal dust.

Responsibility does not just lie at the feet of the coal mining companies or business-friendly regulators anymore. Juries in Knott County, Ky., have in recent years have awarded punitive damages to miners suing 3M for the 8710 mask's failure to keep them safe on the job. In one 2018 case, the policy-making rumble of tort punishment was massive: $62.5 million in punitive damages to two brothers suffering from black lung.

That decision seems to have triggered a rush to bring suit against coal mining companies not just in Kentucky and West Virginia but also nationwide. Landing pages promising 3M-linked "dust mask

lawsuit" consultations have popped up all over the Internet. Many of these explicitly reference the big payout in Kentucky.

Silica: From an MDL Failure to Renewed Scrutiny

An ill-fated MDL effort that aggregated silica claims from more than 15 years may be a good lesson for mass tort professionals in what not to do.

Silica is an oxide found in quartz, sand, and other minerals. Starting in 2003, speculation began over whether silica would be the next big mass tort after asbestos. Attorneys and medical screening companies in Mississippi tried their hardest to make it happen, and an MDL targeting 8710 masks and many other products was formed in 2005 in the Southern District of Texas.

As it turns out, 9,000 of the silicosis claims in the MDL were diagnosed by only 12 doctors, and as U.S. District Court Judge Janis Graham Jack ruled, ultimately there was a "fraudulent misjoinder of claims" that masked a lack of diversity jurisdiction.

"To place this accomplishment in perspective, in just over two years, [a screening company] found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period,'" Judge Jack wrote at one amusing point in a ruling that effectively killed the MDL.

This collapse of the silica MDL did not actually mean that long-term illness from silica was not a thing to take seriously. Within the past few years, renewed efforts to combat silicosis have intensified.

As evidence of this, the Occupational and Safety and Health Administration (OSHA) updated its main silica protection rule several years to significantly raise the required level of protections for foundry workers, sandblasters and other professionals exposed regularly to silica dust. The new rule caught the attention of 3M, which released a two-page brochure describing its "respiratory protection options" that comply with the updated OSHA silica rule.

A FINAL THOUGHT

The lawsuit-laden journey of the 3M Model 8710 Disposable Respirator can be seen as an alarm that toxic tort offenses may be more pervasive than we may think initially on the surface. However, it could also be seen as an opportunity for mass tort professionals to refine their skills as factfinders and case evaluators. Sure, exposure to poison chemicals and dust was awful, but how was the protection against them? Were any other remediation efforts faulty or ineffective?

Maybe one day, too, you'll find yourself at that intersection of toxic torts and products liability. And maybe you can excel at directing the traffic.

CONCLUSION

The Mass Tort Institute has prepared this this e-guide with the hopes it will be a useful manual for attorneys, paralegals, vendors, and other mass tort professionals as they work diligently to manage cases involving claims against 3M.

The Combat Earplugs MDL and the growing tide of public sentiment and litigation efforts against the manufacturers of PFAS chemicals are not going away anytime soon. Consequently, the topics and considerations we have covered are meant to be educational as well as practical.

The story of 3M is only one example of how a large corporation finds itself potentially liable for countless personal and financial injuries and fights to limit the damage. We believe many of the legal, financial and case-management issues we have discussed can be applied to Johnson & Johnson, or Bayer, or Pfizer, or Monsanto, or any other defendant involved in a rising class-action suit or MDL litigation.

The mass tort industry is only as good as its ability to prepare to fight these companies. May this publication serve you well.

About the Author

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