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Litigators of the Week: No Halt for Combat Earplug Suits for 3M Despite Subsidiary's Bankruptcy

U.S. Chief Bankruptcy Judge Jeffrey Graham in Indianapolis, who is overseeing the restructuring of 3M subsidiary Aearo Technologies, refused to stay lawsuits against 3M claiming earplugs supplied to military personnel led to hearing loss and ringing of the ear.

By Ross Todd
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3M can't press pause on the largest multidistrict litigation in U.S. history via a bankruptcy filing by its subsidiary.

That's essentially what U.S. Chief Bankruptcy Judge Jeffrey Graham in Indianapolis, who is overseeing the restructuring of 3M subsidiary Aearo Technologies, ruled this week in refusing to extend bankruptcy's automatic stay on litigation to 3M. The ruling paves the way for hundreds of thousands of lawsuits to move forward on behalf of U.S. service members who claim the company's combat arms earplugs were defective and led to hearing damage.

Our Law.com colleague Amanda Bronstad, who covers the mass torts and product liability world, called Graham's decision "a game-changing win for plaintiffs attorneys suing over combat earplugs." Our litigators of the week this week are three of the lawyers who helped change the game: **Robert Pfister** of **KTBS Law**, **Eric Winston** of **Quinn Emanuel Urquhart & Sullivan**, and **Melanie Cyganowski** of **Otterbourg P.C,** the former chief bankruptcy judge for the Eastern District of New York.

Lit Daily: So explain to me who exactly you were representing in the bankruptcy court. Judge Graham points out there was no formal committee of objectors in the bankruptcy case prior to this decision and you were not speaking formally with one voice.

Robert Pfister, KTBS Law: Coordination is key in bankruptcy cases—and all the more so at the very outset of the case, when it matters most. The debtors' side had the advantage of months of preparation and speaking for just one client. On the claimants' side, upwards of two dozen law firms (the vast majority of them non-bankruptcy firms) had appeared, and there are hundreds of thousands of claimants.

Courtesy photos

(L-R) Eric Winston of Quinn Emanuel, Robert Pfister of KTBS Law and Melanie Cyganowski of Otterbourg P.C..

One advantage we had going in is that the MDL litigation is extraordinarily well coordinated already, and we were able to build from that existing structure. We worked very hard to keep the entire group coordinated and cohesive, minimize the number of separate filings, and generally keep everyone working toward the same goal. The debtors were expecting—and were ready to exploit—any daylight between the claimants. Through continuous updates to the large claimant group and a careful division of labor that aimed to give everyone an opportunity to participate as part of the team in multiple aspects (strategy, briefing, discovery, and ultimately trial), we were able to keep the group together and speaking with one voice.

Beyond preventing the debtors from exploiting any differences in strategy or execution, the benefit from

structuring our team this way is that we were able to draw on an extraordinary depth of talent, ideas, and people power—far greater than any one of us could have done alone.

Who all was on your team and how did you divide the work?

Pfister: Every one of the lawyers and firms on our team was an essential component. My firm (on behalf of **Aylstock, Witkin, Kreis & Overholtz**, or AWKO) worked extremely closely with Melanie's firm (on behalf of **Seeger Weiss**), Eric's firm (Quinn Emanuel Urquhart & Sullivan, LLP), **Tristan Manthey**'s firm (**Fishman Haygood**, on behalf of **Clark, Love & Hutson**), and **Kevin Maclay**'s firm (**Caplin & Drysdale**, on behalf of **The Gori Law Firm**) as the core discovery and trial group. I introduced our team at the start of the trial, and Melanie gave our opening statement. The witnesses, crosses and directs were handled by Eric, Tristan, me, Melanie's partner **Adam Silverstein**, and **Dave Buchanan** of Seeger Weiss. And we split the closing argument between me, Melanie, and Kevin. Throughout, we were immeasurably assisted by Indiana counsel at **Rubin & Levin** (**Debbie Caruso** and **Meredith Theisen**) and **SmithAmundsen** (**Martha Lehman**), as well as a host of others who contributed in ways large and small. This was truly a team effort.

Early on, we established small working groups that were tasked with discrete projects—preparing the brief, doing discovery, and actually trying the case. We included at least one person from every firm or group, and kept the large group updated with daily large group updates that kept everyone informed and on the same page. We had innumerable Zoom meetings, conference calls, and email chains, but always worked to make sure everyone was involved and invested in the project and our ultimate goal—to defeat the preliminary injunction.

Who were the other plaintiffs' teams that were involved at the bankruptcy court and how did their positions differ from yours?

Pfister: We worked hard to make sure there was just one team. Ultimately, a handful of plaintiffs ended up filing their own briefs (**Bailey Glasser**, the **Paul LLP** firm from Minnesota, and **Keller Postman**), but even in that regard we were largely on the same page. There was one firm, Keller Postman, that went its own way with a separate witness, but aside from that, we were on the same page.

What were the key moments in this three-day evidentiary hearing for you and your clients?

Eric Winston, Quinn Emanuel: Two key moments come to mind.

First, the night before the evidentiary hearing started, Judge Rodgers in the MDL issued a detailed opinion with findings concerning 3M and conduct relating to its direct and independent liability. This was a resolution of a motion we had filed during the period between the petition date and the hearing and my colleague **Adam Wolfson** had argued on August 11. It not only demonstrated the importance of prevailing against a TRO being issued by the bankruptcy court, but it gave us a sense going into the preliminary injunction hearing that at least one court understood what had occurred was the opposite of "efficient and equitable" efforts—despite 3M's and the Aearo debtors' representatives constant repetition of these words.

Second, as each attorney on our side finished a witness examination, one got the sense we were shining more and more light on what seemed obvious to us—that the terms of the funding agreement disproved everything the debtors' lawyers were arguing. From Rob's and Brian's first examination of the chief restructuring officer, to Tristan's examination of the insurance witness, then to David's examination of the 3M's earplug guy, and then Adam Silverstein's examination of the 3M representative who signed the funding agreement, and finally Kevin's examination of the "independent" director, collectively we stitched together a presentation of the evidence that made clear there was no harm whatsoever to the debtors by denying the injunction.

Why do you think the Judge ultimately was persuaded not to extend the automatic stay to 3M?

Melanie Cyganowski, Otterbourg P.C.: One of the keys to the court's decision was its analysis of the funding agreement and its determination that it provided an uncapped, non-recourse commitment from 3M. I believe that the claimants were collectively able to show the court that, under any scenario, continuation of the litigation in the MDL would have no financial impact on the bankruptcy estate and ultimately any distribution to the debtors' creditors. As the court stated, "whatever liability the pending actions generate—in bankruptcy, outside of bankruptcy, stay in place or no stay—Aearo can satisfy such liability by making a payment request under the funding agreement." One of the amazing aspects of the preliminary injunction hearing was the incredible coordination and cooperation among the many counsel for the claimants. For all of us, the point immediately crystallized that 3M always was the sole responsible party for the litigation liability, both before and after the bankruptcy, and we all stayed on message during the hearing. Just because 3M wanted to find an alternative forum other than the MDL court where it

had been suffering loss after loss, the bankruptcy court was not required to "bless" their strategic maneuvering by granting an injunction in favor of 3M, to the detriment of more than 230,000 veterans and service members harmed by the defective ear plugs.

A 3M spokesperson has said that litigating these cases one-by-one moving forward "will not provide certainty or fairness for any party." What will continuing to litigate in an MDL where there are 200,000-plus plaintiffs accomplish?

Winston: Likely a combination of settlements and further trial verdicts for those plaintiffs who would prefer to put the issue to a jury rather than accept settlement. But that is just like in any other mass tort. The issue with 3M's arguments about bankruptcy is that they are code for "litigating is more uncertain for *us*," which translates to less settlement leverage for 3M. They want to stay the MDL because that presumably gives them more power to drive down settlement numbers, but they don't want to subject themselves to the very onerous requirements for a debtor in bankruptcy. In the end, this is really just a battle over who has the better settlement position, but it is one where 3M is trying to avoid having to go through bankruptcy itself. It is noteworthy that the MDL judge ordered mediation to occur this month to be attended by 3M and the veteran-plaintiffs' representatives, with an invitation to the Aearo debtors estates' representatives.

How do you think this ruling could affect other companies' efforts to harness the bankruptcy courts to manage potential tort liabilities?

Cyganowski: Until the ruling, there had seemed to be a growing trend that Fortune 500 companies would be successful in using the bankruptcy process to obtain all of the benefits of bankruptcy without any of the burdens. As a retired U.S. Chief Bankruptcy Judge, I believe that congress did not intend for non-debtor parents and affiliates, with funds sufficient to pay for their obligations, to be able to evade their obligations simply by artificially creating a pathway by which its subsidiaries file for bankruptcy. Moreover, as the evidence in *Aearo Technologies* unfolded, it became clear that 3M's intention was to transfer all of the litigation liability to the five Aearo subsidiaries so that they could seek an injunction to stop the litigation pending against 3M before the MDL court pending in Florida. In the words of Judge M. Casey Rodgers, the presiding MDL district court judge: "The plan was for Aearo to file for Chapter 11 bankruptcy protection, and then seek an extension of the statutory automatic stay to 3M Company, who would remain completely solvent and never file a bankruptcy petition itself." I believe that it is fundamentally unfair for solvent non-debtor parents and affiliates to be protected by the powerful tools of bankruptcy, without themselves filing for bankruptcy (like *Purdue Pharma*), especially when the purpose is to evade their responsibilities to claimants such as the military in 3M or the ovarian cancer and mesothelioma claimants in LTL.

What will you remember most about this matter?

Cyganowski: I was most honored to rise on behalf of more than 230,000 military service personnel and veterans who had been harmed by 3M's defective combat arms earplugs version 2 while serving their country. These claimants, together with their counsel (especially MDL co-chairs **Chris Seeger** and **Bryan Aylstock**), were litigating vigorously in the MDL proceedings, in federal and state courts, to have "their day in court" before a jury of their peers. I am grateful that we were all successful in persuading the bankruptcy court to deny the debtors' motion for a preliminary injunction to protect its parent, especially at a time when 3M had no intention of stopping the payment of billions of dollars in dividends to its shareholders.

Winston: Teamwork. We brought together more than a dozen law firms (often represented by lawyers who had not seen the inside of a bankruptcy court), seamlessly worked through allocation of responsibility, and stayed laser-focused on the themes we sought to present. The witness examinations were divided up because the group trusted each attorney to handle that particular witness. The closing arguments were allocated by themes, not by egos, and that was critical. Given that I often compete with many of the restructuring lawyers in these firms for business, or represent opposite sides in cases, it was refreshing and fun. For the non-bankruptcy lawyers, it was terrific to show them what we do and hear their stories.

And our four veterans in the courtroom. I hope we fought for them in the way we can, as they fought for us in the (far more important) ways they fought for us.

Pfister: The benefit of early coordination and teamwork. Different lawyers have different perspectives and ideas. We did well because we listened to everyone, talked about the pros and cons of each potential strategy, and then decided as a group how to move forward. What mattered is that we were all working on behalf of servicemembers who had been injured. Keeping that fact in mind allowed us to bridge any differences and keep moving forward as a team.