

8th Circ. Restores 3M Warming Device MDL

By **Emily Field**

Law360 (August 16, 2021, 4:05 PM EDT) -- The Eighth Circuit on Monday revived thousands of suits in multidistrict litigation against 3M over injuries caused by a surgical warming device, finding that the lower court erred by excluding expert witnesses' opinions on the cause of the patients' infections.



The Eighth Circuit revived thousands of suits in multidistrict litigation against 3M on Monday over injuries allegedly caused by a surgical warming device. (iStock.com/[josefkubes])

A three-judge panel said the lower court in July 2019 made an error in judgment by barring three medical experts' opinions that 3M's Bair Hugger forced-air warming device caused bacterial infections by circulating bacteria from nonsterile areas of the operating room to the surgical site. The experts all relied on a 2011 study that found that patients who were warmed with a convection device — which is what the Bair Hugger system is — were four times as likely to develop an infection than patients who used a different device, the panel said. But the study fell short of finding that the devices caused the infections.

The panel disagreed with the lower court's conclusion that it's unreliable for an expert to infer causation from an epidemiological study that disclaimed proving causation.

"Instead, epidemiology enables experts to find associations, which by themselves do not entail causation," the panel said.

That study was also not the only basis that the experts used to form their opinions, the panel noted. They also used reports and studies that ostensibly showed plausible ways that forced-air warming can cause periprosthetic joint infections, or PJI, according to the opinion.

The experts for the patients are epidemiologist Dr. Jonathan M. Samet, infectious disease specialist Dr. William Jarvis and Dr. Michael J. Stonnington, a surgeon, according to the opinion.

Gabriel Assad of Kennedy Hodges LLP, counsel for the patients, told Law360 on Monday that they are very "excited" about the decision.

"There is ample evidence that the Bair Hugger warming blanket causes significant injuries to patients. We look forward to representing the 5,000+ plaintiffs in this MDL," Assad said. "The [Eighth] Circuit has confirmed our allegations that the Bair Hugger blanket can cause serious infections in implant surgeries."

A spokeswoman for 3M told Law360 that the ruling was procedural and that the panel didn't rule on the merits of any case.

"Every court and independent agency that has considered claims against the Bair Hugger system on their merits has rejected them," the spokeswoman said. "The only bellwether case to go to trial, in which the plaintiffs'

experts testified, resulted in a swift jury verdict for 3M. We are confident in our case and will continue to vigorously defend ourselves."

The panel also said that engineering expert Dr. Said Elghobashi's opinion that forced-air warming plays a role in spreading particles to the surgical site shouldn't have been excluded because it was "developed for litigation." His report also appeared in a peer-reviewed journal, the panel said.

"In these circumstances — where a 'hired gun' expert's work has been peer reviewed and published, and the developed-for-litigation concern is the only remaining reason for excluding the testimony — we conclude that lingering questions of reliability and objectivity go to weight rather than admissibility," the panel said.

The MDL was first consolidated in 2015, and patients in the litigation alleged that they developed infections from the warming system, which is designed to prevent and treat unintended hypothermia in people undergoing surgery.

Specifically, the device, which blows hot air into a specially designed blanket covering a patient, spreads bacteria from the hospital floor or the inside of the device, the lawsuits say.

In 2017, the parties selected 31 bellwether cases, which are still being litigated. 3M won the first case, while several others have been dismissed before trial.

When the cases were first consolidated, 3M painted the suits as a smear campaign by Bair Hugger inventor Scott Augustine. Augustine founded Augustine Medical Inc., which eventually became 3M subsidiary Arizant Healthcare Inc. and also manufactures the device.

Augustine left the company in 2003 when he and his company were being investigated for Medicare fraud, according to 3M.

Augustine pled guilty to one misdemeanor count of Medicare fraud and agreed to pay the government \$2 million in 2004, according to filings in the criminal case. His company also pled guilty to criminal charges, and the government dropped charges against Arizant.

3M bought Arizant from private equity company Court Square Capital in 2010.

Circuit Judges Raymond W. Gruender, Jane Kelly and L. Steven Grasza sat on the panel for the Eight Circuit.

3M is represented by Aaron Van Oort Faegre Drinker Biddle & Reath LLP.

The patients are represented by Gabriel Assad of Kennedy Hodges LLP, Michael A. Sacchet of Ciresi Conlin LLP and Genevieve M. Zimmerman of Meshbesh & Spence.

The case is *In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation*, case number 19-2899, in the U.S. Court of Appeals for the Eighth Circuit.

--Additional reporting by Kevin Stawicki. Editing by Steven Edelstone.