IN THE SUPREME COURT OF ALABAMA

FLEXIBLE PRODUCTS COMPANY, et al.,	)	
Petitioners.	)	
(RE: RANDY WADE BICE, *et al.*,	)	CASE NO. _____
Plaintiffs,	)	CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BESSEMER DIVISION
v.	)	CIVIL ACTION NOS. CV-01-1194
MICON, INC., *et al.*,	)	CV-01-1341
Defendants.)	)	CV-02-1518

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF JOINT PETITION FOR WRIT OF MANDAMUS

ORAL ARGUMENT REQUESTED

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I. INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses, representing an underlying membership of more than 3,000,000 businesses and professional associations of every size, in every sector, and from every region of the country, including the State of Alabama. The Chamber serves as the principal voice of the American business community, and represents the interests of its members by serving as *amicus curiae* in cases addressing issues of national concern to American business.

Members of the Chamber have been increasingly subjected to improper, abusive and extortionate aggregated claims litigation, in the form of either: (i) class actions improperly certified for class treatment without giving adequate consideration to the practical impossibilities of resolving inherently individualized issues through class-wide adjudication; or (ii) "mass actions" aggregating for trial the individualized claims of large numbers of plaintiffs against one or more defendants, with disparate defenses, in violation of consolidation and/or joinder standards. Such litigation deprives the parties of basic

constitutionally-protected due process and trial fairness rights, impugns the integrity of the judicial system, and has a significant adverse impact upon local and interstate commerce.

The Chamber has grave concerns about the immediate and irreparable harm its members will face if this Court does not intervene to correct the fundamental procedural and constitutional errors of the consolidation order entered by the court below.

The Chamber has an exceedingly strong interest in participating in this case as *amicus curiae* to bring to the Court's attention various concerns which it has on behalf of its members regarding the proper exercise of judicial power and authority in dealing with substantial numbers of individualized claims that seek mass action status.

II. SUMMARY OF THE ARGUMENT

"Mass actions," such as that resulting from the lower court's consolidation order in this case, in which the claims of large numbers of plaintiffs with individualized claims against one or more defendants with disparate defenses are indiscriminately joined for simultaneous trial, are violative of consolidation and/or joinder aggregation standards, deprive the parties of basic due

process and trial fairness rights, impugn the integrity of the judicial system, and have significant adverse impact upon local and interstate commerce.

While courts may think, when confronted with an overwhelming number of claims seeking aggregated mass action status, that granting requests for consolidation will “solve the problem” and make the cases “go away,” experience teaches that just the opposite occurs. Improper consolidation tramples upon the rights of the existing parties (plaintiffs as well as defendants), and burdens the court and the judicial system by encouraging the filing of more actions seeking to improperly aggregate disparate individualized claims against multiple “deep pocket” defendants.

Improper consolidation tramples upon the rights of the existing parties by: (i) depriving them of a fair trial in which the fact-finder can make sense of the evidence and defenses, (ii) depriving them of any meaningful appellate review, and (iii) placing improper and extortionate pressure upon them to indiscriminately settle the mass of claims brought against them for fear of the crushing economic consequences that flow from asserting their

constitutionally protected rights.

Improper consolidation impugns the judicial process by: (i) sanctioning and encouraging the filing of more actions seeking to improperly aggregate disparate individualized claims against multiple “deep pocket” defendants; (ii) impairing, if not destroying, the ability of the judicial system to fairly compensate those entitled to judicial relief while rejecting claims that have no merit; and (iii) overburdening already scarce judicial resources and causing or increasing delay in the adjudication of meritorious cases whose litigants look to and rely upon the judicial system to resolve.

Improper consolidation, such as that sanctioned by the lower court’s order, can have a devastating economic impact upon businesses who suffer constitutional deprivations and improper extortionate pressures to settle claims whose merits have not, and cannot, economically be tested, including baseless claims which could not survive judicial scrutiny except through aggregation.

This case presents this Court with the opportunity to provide positive guidance to the trial courts as to the proper process and procedures to be applied in situations

where a court is confronted with the challenge of dealing with substantial numbers of individualized claims seeking aggregated mass action status.

III. ARGUMENT

A. Introduction

1. Aggregated Claims "Mass Actions" are a Recent Phenomenon Generally Inconsistent With Traditional Concepts of Claims Consolidation

A bedrock principle historically embraced by our state and federal litigation system is that claims should usually be adjudicated separately, on a claimant-by-claimant basis.[1] In recent years efforts have become more frequent to aggregate claims of multiple individuals and to place those claims before a tribunal for simultaneous resolution.

One form of aggregated claims device is the class, which, when used incautiously, threatens due process rights of both claimants and defendants by attempting to bind a large group of parties to the same result simultaneously.[2]

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[1] *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (reiterating the "usual rule that litigation is conducted by and on behalf of the individual named parties only").

[2] *See, e.g.*, *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002), *cert. denied* by *Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003) ("Efficiency is a vital goal in any legal system—but the vision of 'efficiency' underlying this class certification is the model of the central planner. . . . One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal."). *See generally Becherer v. Merrill Lynch, Pierce, Fenner*

This Court has recognized the dangers of improper class certification, making it clear that under Alabama's procedural rules, trial courts are required to perform a rigorous analysis of factual issues, choice-of-law issues, and other requirements for class certification.[3]

As courts have become more attentive to the requirements for pursuing class actions, increasing efforts have been made to employ the less rigorous procedural requirements of consolidation to bring the claims of large numbers of unrelated plaintiffs against one or more defendants together in "mass actions."

The lower court was obviously faced with an overwhelming number of individual claims against multiple defendants alleging damages caused by exposure to an allegedly harmful product. It likely acted with the best of intentions attempting to craft a solution, that, perhaps in theory, would put money in the hands of those claiming

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and Smith, Inc., 193 F.3d 415, 425 (6th Cir. 1999) ("the minimum requirements of due process inform ... [the] class action doctrine[]").

[3] *See, e.g.*, *Mayflower Nat'l Life Ins. Co. v. Thomas*, Nos. 1021383 and 1021461, 2004 WL 1418683, at *4 (Ala. June 25, 2004) (trial court "fail[ed] to conduct a rigorous analysis" because, *inter alia*, it "fail[ed] to properly consider the defenses of the defendants"); *Ex parte Green Tree Fin. Corp.*, 723 So.2d 6, 10-11 (Ala. 1998) (nationwide class decertified because laws of different states would apply to different class members' claims and because the claims would present individual issues requiring subjective proof); *Ex parte Household Retail Servs., Inc.*, 744 So.2d 871, 878-79 (Ala. 1999); *Mann v. GTE Mobilnet, Inc.*, 730 So.2d 150, 152 (Ala. 1999).

injury as quickly as possible, and clear its crowded docket. Notwithstanding the motivation, bending procedural rules to put pressure on defendants to settle brings no actual efficiency gains, and tramples the rights of the parties.

In *Cain v. Armstrong World Industries*,[4] Judge Butler candidly acknowledged the adverse consequences to the parties and the judicial process that can result from improper consolidation of claims, observing:

> The congestion these cases caused in this district for all civil litigants gives one a skewed view of how to resolve the problem. The "Try-as-many-as-you-can-at-one-time" approach is great if they all, or most, settle; but when they don't, and they didn't here, thirteen shipyard workers, their wives, or executors if they have died, got a chance to do something not many other civil litigants can do—overwhelm a jury with evidence. Evidence that would not have been admissible in any single plaintiff's case had these cases been tried separately. As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects.[5]

History shows that bending procedural rules to put pressure on defendants to settle brings no lasting

[4] 785 F. Supp. 1448 (S.D. Ala. 1992).

[5] *Id.* at 1456-57.

efficiency gains. Rather, in lowering legal barriers to recovery, courts have fueled the fire, inviting more and more claims.[6] They encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants."[7] As mass tort expert Francis McGovern has observed: "If you build a superhighway, there will be a traffic jam.[8]

One West Virginia trial judge involved in mass asbestos consolidations ruefully acknowledged that efforts to put an end to asbestos cases were futile, and trying to do so "was a form of advertising" that "drew more cases."[9]

The improper aggregation of claims into a mass action

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[6] *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 249 (2000); Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report*, 26 (RAND Inst. for Civ. Just., Sept. 2002) ("[I]t is highly likely that the steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.").

[7] *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm.&Mary Envtl. L.& Pol'y Rev. 243, 248 (2001) ("Brickman") ("the very strategies courts have devised to deal with such claims facilitate the bringing of more mass tort claims").

[8] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

[9] *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (hearing before Judge John A. Hutchinson). *See also* Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts–View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

seeks to achieve the benefits similar to those of class actions without having to satisfy the prerequisites for litigating a class action. In Alabama, such an effort should be precluded by application of Ala.R.Civ.P 42 ("Rule 42"), which, like its federal counterpart, requires consolidated actions to possess a common question of law or fact, and prohibits a court from consolidating cases for trial when such consolidation would unduly prejudice a party's right to present its case or defense.[10]

Traditionally, consolidation has been invoked simply as a device of convenience. The U.S. Supreme Court has held that consolidation does not "merge the suits into a single cause, or change the rights of the parties;"[11] and this Court has similarly held that "suits consolidated remain separate as to parties, pleadings, and judgments, unless otherwise directed by the court *under the law*."[12] When consolidation is ordered merely to streamline discovery, it

[10] See, Committee Comments Ala.R.Civ.P. 42 ("Rule 42"), and *Ex Parte Miller*, 273 Ala. 453, 142 So.2d 910, 912 (1962) (acknowledging that Rule 42 was taken from Fed.R.Civ.P. 42, and, citing to several federal cases, observing that consolidation of actions may not be granted when it may result in prejudice to one or more of the parties, or "where the issues affecting the various defendants are certain to lead to confusion or prejudice to any one or all of the defendants").

[11] *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

[12] *Ex Parte Ashton*, 231 Ala. 497, 165 So. 773, 778 (1936) (emphasis added).

poses no concern over the due process rights of the litigants.[13] A consolidation for all purposes, including for trial, however, may well pose such a concern, because such consolidations cannot "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result."[14]

A typical mass action (such as this case) does not meet the established requirements for consolidation, and is in conflict with traditional practice.[15] Such an aggregated case does not arise out of the same transaction or occurrence; rather, it involves hundreds or thousands of people who suffered individualized injuries, such, as here, being exposed to an allegedly defective product (and possibly different formulations and uses of that product) in separate transactions—often involving different defendants—and who each was affected by the alleged

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[13] *See, e.g.*, 28 U.S.C. § 1407(a) (allowing transfer of actions for pretrial proceedings, but requiring actions to be remanded to the federal districts from which they were transferred "at or before the conclusions of pretrial proceedings").

[14] *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973).

[15] *See, e.g.*, Joan Steinnman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1042 (1993) (noting concern that mass consolidations lack the "procedural safeguards that due process and codified rules demand in class actions of similar magnitude").

exposure in separate occurrences. Such claims almost always require inquiries into each plaintiff's circumstances (e.g., such as here, how long, and under what circumstances, a plaintiff was exposed to the product at issue; what symptoms he or she allegedly manifested; whether those symptoms were indeed caused by the product at issue, and, if so, whose product caused those symptoms).

For these reasons, most courts would refuse to treat mass actions as class actions. As the U.S. Supreme Court observed in an asbestos case, the claimants had been

> exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma.[16]

In this brief the Chamber will describe some of the ways in which mass actions, such as the case presented by the Petition, have such adverse consequences, and why it is critically important that this Court take this opportunity to vacate the trial court's order and remand this matter to the trial court for resolution using proper and

[16] *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (*quoting Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 626 (3rd Cir. 1996) *aff'd sub nom. Amchem*); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

constitutionally acceptable procedures.

B. Improper Mass Actions have an Extremely Deleterious Effect Upon Commerce

The lower court's order in this case improperly aggregates plaintiffs' disparate and individualized claims against several defendants for trial under an impossible trial schedule and structure that violates the constitutionally protected due process rights of defendants in fundamental ways by: (i) depriving them of a fair trial in which a jury can make sense of the evidence and defenses; (ii) depriving them of any meaningful appellate review; and (iii) placing improper and extortionate pressure upon them to settle the mass of claims brought against them for fear of crushing economic consequences that would result from asserting their constitutionally protected rights.

1. The Coercive Nature of Improper Mass Actions Results in High Likelihood of Early Settlement of All Claims, Regardless of Merit, Effectively Depriving Parties of Appellate Rights.

The consolidation order of the lower court is, in every practical sense, a final disposition of the proceedings. If the case is allowed to proceed in this manner, the pressure to settle before trial will be overwhelming.

Numerous cases have acknowledged that postponing review of a purportedly interlocutory order aggregating numerous claims against defendants is tantamount to denying review, because the pressure to settle before trial is so enormous. In such cases, courts have not hesitated to grant immediate review of questionable claims aggregation decisions.[17]

Cases dealing with claims aggregation using the class action device have observed that plaintiffs can create exposure risks that are so overwhelming that they necessitate settlements, even where the claimants have relatively weak underlying substantive legal theories.[18]

Alabama's legislature enshrined this principle in adopting Ala. Code § 6-5-642, permitting direct appeal of

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[17] *See, e.g.*, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (noting that mandamus review of decision to use bellwether trials in a mass proceeding of 3,000 cases "aggregated for trial management" was appropriate because "[t]he pressure on the parties to settle in fear of the result of a perhaps all-or-nothing 'bellwether' trial is enormous"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (citing as one reason for granting mandamus review of a class certification order "the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes" defendants) (emphasis in original).

[18] *See, e.g.*, *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere . . . . some plaintiffs or even some district judges may be tempted to use the class device to wring settlements from whose legal positions are justified but unpopular."). *See also In re Rhone-Poulenc*, 51 F.3d at 1298-1300 (directing the lower court to decertify a plaintiff class because defendants might be "forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

an order certifying a class or refusing to certify a class action, similar to Fed.R.Civ.P. 23(f), which rests, in part, on a concern that

> [a]n order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.[19]

Federal appellate courts have uniformly agreed that "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order," if the lower court's ruling is "questionable."[20]

Aggregation under Rule 42 and class certification both increase the likelihood that "the risk of potentially ruinous liability" will lead defendants to settle without

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[19] Fed.R.Civ.P. 23 Advisory Committee's note; *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting that one of the two purposes of Rule 23(f) is to "provide[] a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial").

[20] *Blair*, 181 F.3d at 835; *accord Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) ("[C]lass certification turns a $200,000 dispute ... into a $200 million dispute. Such a claim puts a bet-your-company decision to [Defendant's] managers and may induce a substantial settlement even if the customers' position is weak. This is a prime occasion for the use of 23(f), not only because of the pressure that class certification places on the defendant but also because the ensuing settlement prevents resolution of the underlying issues."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton v. Merrill Lynch*, 259 F.3d 154, 164-65 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142-43 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

regard to the merits of the underlying case.[21]

With the addition of each case, the stakes become higher, until finally, when enough cases are brought together in a single proceeding, the defendant faces what one commentator has called the "Armageddon scenario."[22] Faced with the prospect of "losing the company on his or her watch," a general counsel or chief executive officer will often settle even if convinced the company's position has merit.[23] As one federal judge observed as to a group of defendants facing the prospect of as many as 5,000 claims in a single proceeding: "They may not wish to roll these dice. That is putting it mildly."[24]

Aggregation effectively deprives defendants of the option of settling only with ill claimants, since the risk of not settling cases filed by unimpaired plaintiffs is

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[21] Fed.R.Civ.P. 23 Advisory Committee's Note; *see also* Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 Tex. Tech L. Rev. 779, 790 (1998) (noting that large aggregations raise the same settlement concerns as class actions).

[22] *See, e.g.*, *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89, 98 (July 1, 1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School) ["Eskridge Statement"].

[23] *See* Brickman, *supra*, Note 7, at 252; *see also* Eskridge Statement, *supra* at 98 ("Even risk-neutral people and firms will tend to take too many precautions or pay too high a settlement price when the chance of devastating loss is significant.").

[24] *In re Rhone-Poulenc*, 51 F.3d at 1298.

that a jury will not carefully discriminate among the various individual claims but will simply lump them together in reaching a decision in favor of plaintiffs.[25] Empirical research shows that "aggregation of most injured plaintiffs with less-injured plaintiffs significantly increased the mean awards to the latter."[26]

Through consolidation plaintiffs can combine numerous dissimilar cases and exert tremendous pressure on defendants to settle all the claims simultaneously, thereby avoiding a jury verdict for all the plaintiffs that is unfairly inflated by the few very serious claims. In mass actions, it is not at all uncommon to hear of plaintiffs' counsel with a large volume of cases refusing to settle serious claims unless the defendant is also willing to "buy out" the claims with lesser merit.[27] Aggregation thus raises the stakes by forcing defendants to take account of weak

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[25] *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims."). *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004); *Janssen Pharmaceutica Inc. v. Armond,* 866 So.2d 1092, 1101 (Miss. 2004) ;*Janssen Pharmaceutica v. Bailey*, 878 So.2d 31, 48-49 (Miss. 2004).

[26] Eskridge Statement, *supra*, at 96.

[27] See, Manhattan Institute, *Civil Justice Report: One Small Step for a County Court ... One Giant Calamity for the National Legal System* 9 (April 2003) (available at www.manhattan-institute.org/html/cjr_7.htm) ("CJR No. 7"), *citing* Griffin Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, at 23 (Nat'l Legal Ctr. for the Pub. Int., June 2002)(available at www.nlcpi.org).

cases that might not otherwise figure in settlement calculations. In the words of Judge Henry Friendly, these are "blackmail settlements."[28] Such settlements, entered into regardless of the merits, are bad not just for the businesses forced to pay them, but also for the customers of those businesses, who may suffer higher prices as a result, and for the judicial process, which becomes clogged with unmeritorious claims.

Unlike class actions, a court is not required to examine the fairness of settlements in consolidated cases. In the class context, such clear conflicts of interest would clearly prohibit class certification.[29]

The presence of numerous defendants in a consolidated mass action makes refusal to settle even riskier. Each defendant must consider that other defendants may settle early on favorable terms, with hold-outs facing the prospect of shouldering a massive judgment. The presence of numerous defendants often leads to a "rush to settle" to

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[28] Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *accord Castano*, 84 F.3d at 746 (pressure emanating from certifications of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

[29] *See Amchem*, 521 U.S. at 625; *Ortiz*, 527 U.S. at 856-57.

avoid being disadvantaged if others settle first.[30]

In order to obtain appellate review of the threshold decision permitting mass aggregation, Defendants in a mass action must run the litigation gauntlet to final judgment on the merits. The risks posed by massive verdicts in cases where plaintiffs allege minor injuries are simply too great for most defendants to withstand. Rather, with little prospect of defending against cases that are unfairly combined, defendants face extreme pressure from financial markets and other sources to settle these cases *en masse*.[31]

When mass actions are structured in "phases," as typically occurs, the pressure is even greater, since plaintiffs are free to "piece[] together" a "perfect plaintiff," a "fictional composite" that has suffered all of the harm alleged in the case at the hands of all defendants, even though no one plaintiff could ever really have been so harmed.[32] Forcing defendants to defend against

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[30] Eskridge Statement, *supra*, at 99, (noting that presence of many defendants will lead to a "classic prisoners' dilemma: Although defendants realize that they should bargain as a group with plaintiffs' counsel, each defendant also understands that it can gain an advantage by setting early, and that it will be disadvantaged if others settle first (the sucker's payoff)").

[31] See, e.g, Castano, 84 F.3d at 746 ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.").

[32] *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998).

such a sympathetic fiction is obviously unfair.[33]

In class actions, "the vast majority of certified class actions settle."[34] There is no reason to doubt that the result will be the same as to mass actions.

Such coercive settlements eliminate appeals to test the limits of a trial court's interlocutory decision to aggregate large numbers of individualized claims; and questions raised by a trial court's approach to aggregation are thus largely immune to end-of-trial review.

2. The Risk of Deprivation of Effective Appellate Rights Exists Even if Improper Mass Actions are Tried to Judgment

Opinions of appellate and trial courts in consolidated mass action cases that have reversed jury verdicts and/or granted blanket new trials to defendants prejudiced by the inevitable jury confusion, support the view that appellate rights are eviscerated even if defendants can withstand trial ordeals imposed by improper consolidation orders.

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[33] *See id.* at 345.

[34] Robert G. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291 (2002); *see also* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD 521, 522 (1997) (observing that "virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment"); Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501 (1987) (reporting settlement rate of more than 78% for certified and consolidated class actions based upon sample from the Northern District of California).

See, e.g., In *Janssen Pharmaceutica v. Bailey*, 878 So.2d 31, 47 (Miss. 2004) (judgment reversed because “a trial consisting of all ten plaintiffs with their unique medical histories and ten sets of witness testimony should have been, and is intolerable.”); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (judgment reversed as to one of the two remaining claimants in a “bellwether” group of 48 claimants because sheer breadth of the evidence made precautions taken by the trial court “feckless in preventing jury confusion”); *Cain*, 785 F. Supp. at 1457 (new trials granted where verdicts entered against multiple Defendants on as to consolidated claims of 13 plaintiffs because joint trial allowed plaintiffs to “overwhelm a jury with evidence” and unfairly left it with the “impossible task” of sorting out the facts and law in 13 different cases).

The difficulty here, with 1,675 consolidated claims against numerous defendants, is likewise incomprehensible, since Petitioners’ chance of "obtaining meaningful appellate review" on the propriety of the trial court's consolidation order will be "negligible." *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 617 (Tex. App. 1992).

C. Improper Mass Actions Impugn the Judicial Process

The lower court's order impugns the judicial process by: (i) sanctioning the filing of more actions improperly seeking to aggregate individualized claims against multiple defendants; (ii) adversely affecting the ability of the judicial system to fairly compensate those entitled to judicial relief while rejecting claims that have no merit; and (iii) overburdening scarce judicial resources and delaying the adjudication of meritorious cases.

1. Permitting Improper Mass Actions Risks Creating a Haven for More Mass Actions.

Bending procedural rules to resolve cases brings no lasting efficiency gains; rather, by lowering barriers to recovery, courts invite more claims, asserting greater pressure on solvent defendants."[35]

In Alabama and Texas, this phenomenon was experienced as to class actions in the 1990s. One study found that courts in six rural Alabama counties certified 43 class actions in 1995-1997, at least 28 of which were brought on behalf of nationwide classes, primarily against large

[35] *See*, *supra*, notes 6-9 and accompanying text.

national companies.[36] Trial courts in both states certified (and defendants were forced to settle) class actions that federal courts refused to approve.[37] This Court eventually intervened, and decertified a large number of class actions.[38] The effects were dramatic and immediate. By the end of the decade, it was reported that "Alabama ha[d] lost its reputation as a class action hot spot."[39] The Texas Supreme Court recognized that the promise of huge fees, the ease of filing meritless suits, the inability of absent

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[36] *See* Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998)(attached to Statement of Dr. John B. Hendricks at Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998))(1998 WL 122544). (Dr. Hendricks is the founder of an Alabama research and development company who appeared on behalf of the Chamber).

[37] *Compare*, *e.g.*, Order Certifying Plaintiff Class, *Naef v. Masonite Corp.*, No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995)(reprinted in *Ex parte Masonite Corp.*, 681 So.2d 1068, 1090 (Ala. 1996))(approving plan to try 50-state class action alleging defects in siding material) and *Ford Motor Co. v. Sheldon*, 965 S.W.2d 65 (Tex.App. 1998)(affirming certification of nationwide class of plaintiffs who alleged Ford used defective paint process), *rev'd*, 22 S.W.3d 444 (Tex. 2000), with *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422, 427 (E.D.La. 1997) (denying certification of national class action identical to one in *Naef* because, among other things, the "Esperanto instruction[s]" offered as a panacea in *Naef* inadequate to protect defendants' rights under Due Process Clause, Seventh Amendment, and Rule 23) and *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998) (refusing to certify class identical to one in *Sheldon* because of predominance of individual factual issues).

[38] *See Ex parte Green Tree Fin. Co.*, 723 So.2d at 9; *Ex parte Exxon Corp.*, 725 So.2d 930, 931-33 (Ala. 1998); *Ex parte Household Retail Servs., Inc.*, 744 So.2d at 878-79; *Ex parte Gov't Employees Ins. Co.*, 729 So.2d 299, 305 (Ala. 1999); *Mann*, 730 So.2d at 152.

[39] Eddie Curran, *Critics Blast Alabama Judges' "Drive-by" Rulings*, Mobile Register, Dec. 28, 1999, at 1A; see also Eddie Curran, *Welcome to Greene County, America's Class Action Capital*, Mobile Register, Dec. 26, 1999, at 1B (quoting Greene County court clerk as stating that class action filings had "slowed down dramatically").

class members effectively to monitor the actions of class counsel, and the incentives for plaintiffs' attorneys to invest little and settle suits quickly, combine to create overwhelming incentives to abuse the class action device.[40]

Mass actions, whose existence has expanded dramatically since courts have rigorously enforced the substantive and procedural requirements for class actions, manifest this same phenomenon and factors. The experience of Mississippi is instructive. In 1999, Jefferson County, Mississippi, began attracting large numbers of mass actions, and its juries doled out astounding awards, leading one newspaper to suggest that it was the "best place to sue" in the country,[41] and another newspaper to call it "ground zero for the largest legal attack on the pharmaceutical industry."[42] Jefferson County's only civil judge was perceived as receptive to these cases, and the number of mass actions filed grew more than four-fold in one year—from 17 in 1999

[40] *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953-54 (Tex. 1996) (citing numerous studies and quoting Richard A. Posner, *An Economic Analysis of Law* 570 (4th ed. 1992)).

[41] Tim Lemke, *Best Place To Sue? Big Civil Verdicts In Mississippi Attract Major Litigators*, Wash. Times, June 30, 2002, at A1.

[42] Mark Ballard, *Mississippi Becomes A Mecca For Tort Suits*, NAT'L L.J., Apr. 20, 2001.

to 73 in 2000.[43] The judge appeared to recognize the problem when he stated (in announcing a new policy toward mass actions):

> [W]e have some very, very fine legal talent, legal minds in Mississippi that have crafted a class action rule into our joinder rule and that's not what it was intended for.[44]

Since then, mass actions reportedly proceed in Jefferson County only if all plaintiffs are from the county, and claims involving non-resident plaintiffs have been transferred to other counties.[45] Thereafter, mass actions reportedly moved to other Mississippi counties;[46] and other states, such as West Virginia, are now attracting mass actions due to lax consolidation rules.[47]

2. Improper Mass Actions Unduly Burden Courts and Interfere With Their Ability to Provide Service to Their Constituencies

The prior experiences of Alabama, Texas, Mississippi and West Virginia make clear that if an isolated state court signals a willingness to cut due process and

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[43] CJR No. 7 at 18.

[44] *See* Statement of J. Lamar Pickard, Tr. of Mot. Hearing at 9-10, *Conway v. Hopeman Bros*. (Cir. Ct., Jefferson County, Miss. July 25, 2001), quoted in CJR No. 7 at 17.

[45] *See* CJR No. 7 at 17.

[46] *See* CJR No. 7 at 30.

[47] *See* CJR No. 7 at 6; note 9, *supra*.

fundamental fairness corners in order to accommodate aggregated claims litigation, claims will gravitate to that court. In the end, the results are catastrophic. Defendants are victimized. The courts and their constituencies suffer, because the courts are largely diverted from fulfilling their primary responsibility for resolving local disputes.

The significant social and economic problems presented by these claims is self-evident: they create judicial backlogs and exhaust scarce resources that should go to "the sick and the dying, their widows and survivors."[48] Often, claimants are not treated fairly, with some being undercompensated to benefit others who are overcompensated. Indeed, lawyers representing truly sick clients have expressed concern that recoveries by unimpaired claimants may so deplete available resources that their clients will be left without compensation.[49]

The existence of such "magnet" courts within the borders of a state can have a significant impact upon

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[48] *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001).

[49] *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 (Scruggs: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.")

commerce in that state. In a recent poll conducted for the Chamber by HarrisInteractive, Inc., of more than 1,400 in-house general counsel and other senior litigators at public corporations, eighty percent of the respondents indicated that perceived fairness of the litigation environment in a state "could affect important business decisions at their company, such as where to locate or do business."[50]

Improper mass actions pose a unique threat to our legal system, exacting an enormous toll on interstate commerce, most often by forcing settlements that ignore the legitimate interests of both claimants and defendants.

If this Court does not restore long-standing and well-reasoned boundaries circumscribing consolidated actions, the floodgates may well be opened again in Alabama.

D. This Court Should Use This Case to Provide Guidance to Trial Courts To Correct Problems of Improper Mass Actions

By correcting the error of the court below, this Court has the opportunity to provide guidance to all Alabama trial courts as to the proper course to be followed when confronted with putative mass actions.

Recent opinions from Texas and Mississippi could

[50] See *2004 State Liability Systems Ranking Study: Final Report* (March 2004)(available at www.instituteforlegalreform.org/study030804.html), p. 8.

provide a roadmap for this Court to examine and apply, tailored, as appropriate, to Alabama law and procedure.

In *In re Van Waters & Rogers, Inc.*,[51] the Texas Supreme Court reversed the consolidation of chemical exposure claims of 20 plaintiffs against 9 defendants, articulating a multi-factor test to apply in evaluating whether to consolidate workplace exposure claims. It labeled some of those factors "the Maryland factors," because, as explained in a prior opinion, they were derived from a federal asbestos decision from Maryland.[52] The Maryland factors include: whether the plaintiffs shared a common work site; had similar occupations, exposure to products, times of exposure, types of disease, types of alleged cancer, if any; are alive or deceased; are represented by same counsel; and status of discovery.[53]

The *Van Waters* court also added "the maturity of the mass tort"[54] as a threshold issue; and determined that the

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[51] 145 S.W.3d 203 (Tex. 2004).

[52] *See In re Ethyl Corp.*, 975 S.W.2d 606, 611 (Texas 1998).

[53] 145 S.W.3d at 207-08.

[54] In a previous opinion, the court had adopted Professor Francis McGovern's definition of a "mature" mass tort, i.e., "[A] mature mass tort [is] one in which 'there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' [contentions]. Typically, at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least

"toxic soup" tort claims asserted by plaintiffs in that case were "immature" because they had never been tried.[55] The court concluded that because the tort was immature, the trial court had "less discretion to consolidate dissimilar claims and must proceed with extreme caution."[56] In effect, the immaturity of the tort caused the court to give closer scrutiny to the Maryland factors.

In applying the factors, the *Van Waters* court concluded that,

> because the plaintiffs worked at what were effectively different work sites, and thus were exposed to entirely different chemical mixtures, the other dissimilarities involving disease and occupations are magnified.[57]

The *Van Waters* court listed some of the dangers that these differences presented for the jury, which might: (i) use the sheer number of claims to find against the defendants; (ii) rely on evidence admissible as to one plaintiff to decide for or against another; and (iii) have difficulty keeping straight the parties' competing theories of exposure and causation when multiple 55 defendants

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one full cycle of trial strategies has been exhausted.'" *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601, 603 (Texas 1998) (citation omitted).

[55] 145 S.W.2d at 208.

[56] *Id.*

[57] *Id.* at 210.

supplied chemicals to the work sites.[58]

The Mississippi Supreme Court similarly provided guidance for trial courts in a series of opinions rejecting consolidation in suits involving the drug Propulsid. In *Janssen Pharmaceutica Inc. v. Armond*,[59] the court reversed an order joining for trial claims of 55 individual plaintiffs against 42 defendants due to, among other things, the risk of prejudice and jury confusion. The court acknowledged the concept of “mature” versus “immature” tort, concluding that Propulsid claims arise from an "immature tort," citing to the Texas *Bristol-Myers* case and the definition adopted therein.[60]

In *Janssen Pharmaceutica Inc. v. Bailey*,[61] the court reversed the trial court’s judgment in the first Propulsid case tried to a jury, finding that the joinder of 10 plaintiffs’ claims in the same trial was improper because each claim arose from individual facts and circumstances.[62]

The Chamber respectfully submits that these recent

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[58] *Id.*

[59] 866 So.2d 1092 (Miss. 2004)

[60] *Id.* at 1099.

[61] 878 So.2d 31 (Miss. 2004)

[62] *Id.* at 48-49.

cases, dealing with the same or very similar kinds of issues to those presented by the Petition, can be applied by this Court to give guidance to the court below and the other trial courts of Alabama as to the correct process and procedures to be applied by the trial court when confronted with a putative mass action.

IV. CONCLUSION

For the reasons set forth herein, the Chamber respectfully submits that this Court should grant the Petition, issue its writ of mandamus, and reverse the improper consolidation of the trial court, giving proper guidance to the court below and other Alabama trial courts as to the factors to be considered in deciding whether to consolidate claims in putative mass actions in order to stem the tide of improperly aggregated claims.

REQUEST FOR ORAL ARGUMENT

Pursuant to Ala.R.App.P. 29, the Chamber requests that it be allowed to participate in Oral Argument should Petitioners' request for oral argument be granted pursuant to Ala.R.App.P. 21 and 34.

This _____ day of December, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Joint Petition for Writ of Mandamus, Oral Argument Requested has been served on this the _____ day of December, 2004, by depositing a copy of same in the United States mail, postage prepaid and properly addressed upon the following:

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