CASE NOS. ___________

IN THE SUPREME COURT OF ALABAMA

EX PARTE ASTRAZENECA PHARMACEUTICALS LP AND ASTRAZENECA LP, ET AL.,	**CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA**
PETITIONERS.	**CIVIL ACTION NOS. CV-2005-219 (MASTER DOCKET) CV-2005-209.10, CV-2005-219.11, CV-2005-219.52, CV-2005-219.68.**
(IN RE: ALABAMA MEDICAID PHARMACEUTICALS AVERAGE WHOLESALE LITIGATION.)	

ON PETITIONS FOR WRITS OF MANDAMUS
TO THE HONORABLE CHARLES PRICE
CIRCUIT COURT FOR MONTGOMERY ALABAMA

BRIEF OF *AMICI CURIAE,* BUSINESS COUNCIL OF ALABAMA AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS ASTRAZENECA PHARMACEUTICALS LP, ET. AL.'S PETITIONS FOR WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

The trial court's decision to consolidate for all purposes the State's separate claims against AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively, "AstraZeneca"), SmithKline Beecham Corp. d/b/a GlaxoSmithKline ("GSK"), and Novartis Pharmaceuticals Corporation ("Novartis") sets a dangerously low standard for consolidation of complex cases that threatens the ability of defendants to obtain a fair trial. The order ignores the safeguards for consolidation found in Rule 42 of the Alabama Rules of Civil Procedure and all but ensures jury confusion. The result of the order, if not reversed, will be to deny each defendant a fair trial - a right guaranteed by the constitutions of both Alabama and the United States - in favor of clearing the trial court's docket by pressuring the defendants to settle quickly and without regard to the merits of their individual cases. The impact of the trial court's order, if affirmed, will extend beyond the parties in this case. Accordingly, the Business Council of Alabama and the Chamber of Commerce of the United States of America (collectively, "*Amici*") request oral argument to more fully inform the Court of the potential ramifications of the trial court's consolidation order.

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STATEMENT OF THE FACTS

Amici adopt Petitioner Novartis' Statement of the Facts.

ISSUE PRESENTED

Did the trial court abuse its discretion in ordering a joint trial of the State's separate fraud actions against AstraZeneca, GSK, and Novartis where consolidation will require jurors to digest and synthesize a mountain of complex data involving hundreds of pharmaceutical products and appreciate subtle, but fundamental, differences between the defendants' individual cases?

REQUESTED RELIEF

Amici respectfully request an Order accepting this brief, granting the petitions of AstraZeneca, GSK and Novartis, inviting full briefing on the consolidation issue and, ultimately, issuing a writ of mandamus directing the trial court to vacate its consolidation order.

REASONS WHY THE WRIT SHOULD ISSUE

The judiciary's most important task is to ensure that litigants receive a fair trial. Even as the judiciary seeks to implement innovative techniques in an effort to overcome the often crowded dockets that may slow the wheels of justice, the overarching concern is and must be the fairness of the litigation process. *See Fox v. Hollar Co., 576 So. 2d 223, 225 (Ala. 1991)* ("*Fox*")(stating that "the right of a party to litigate all claims in one proceeding is secondary to the overriding goal of preventing prejudice to the parties"); *Bateh v. Brown*, 310 So. 2d 186, 191 (Ala. 1975) (holding that "consolidation should not be allowed where it may result in prejudice to one or more of the parties"); *see also Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (noting that as to consolidation "[c]onsiderations of convenience and economy must yield to paramount concern for a fair and impartial trial"); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993)(*"Malcom")* (observing that "[t]he benefits of efficiency can never be purchased at the cost of fairness"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748-49 (5th Cir. 1996) (*"Castano")* (refusing to certify class due, in part, to concerns that adequacy of class action device could not be fairly evaluated in the context of a novel tort theory); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1021 (5th Cir. 1997) (rejecting proposed

bellwether trial for determining liability of approximately 3000 claims and noting, "our sympathies and our appreciation for the efforts of the district court in this case do not outweigh our due process concerns").

In this case, the proposed innovation is not a class action or a bellwether trial, but the consolidation of fraud actions against three separate defendants. Although the ordered consolidation involves only three defendants, it will require the trial of an overwhelming number of individual fraud allegations involving hundreds of pharmaceutical products over a period of approximately 15 years. Thus, the due process issues involved in the more typical mass action (*i.e.*, juror confusion and litigant prejudice) are undeniably present in this case. Moreover, because the State's liability theory in this case is a novel one, a well-reasoned approach to case management is particularly critical.

The Circuit Court, however, has entered a perfunctory consolidation order that fails to provide the substantive basis for its case management decisions. Rather than a well-reasoned approach, the order establishes a trial plan that will necessarily prejudice each defendant's ability to defend itself. In doing so, the Circuit Court's order improperly pressures the defendants to settle with the State regardless of the weakness of the State's case or the validity of their own defenses.

Indeed, if allowed to stand, the Circuit Court's order potentially paves the way for substantial prejudice to all businesses in Alabama. Should the Circuit Court's consolidation receive this Court's imprimatur, it will be clear that Alabama favors clean dockets over fair trials for defendants - corporate or otherwise.

I. The Circuit Court's Order Violates The Defendants' Due Process Rights On Numerous Levels.

A. The Circuit Court's Consolidation Order Deprives Each Defendant Of Its Constitutional Due Process Rights By Subjecting It To The Taint Of Other Parties' Alleged Conduct.

The United States and Alabama Constitutions guarantee that no person will be deprived of his property without "due process of law." U.S. CONST., amend. XIV, § 1; ALA. CONST. 1901, § 13. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

The Circuit Court's order prevents the defendants from receiving a fair trial by subjecting each defendant to the potential taint of conduct allegedly performed by unrelated entities in unrelated transactions. Should such a trial take place, this unfair conglomeration of evidence against all parties would require setting aside any verdict imposing liability on a defendant and render the prior trial a waste of judicial and litigant resources. For example, in *Cain v. Armstrong World Industries*, 785 F. Supp. 1448 (S.D. Ala. 1992),

United States District Judge Charles Butler consolidated 13 asbestos cases against multiple defendants. After the jury returned a verdict in that trial, Judge Butler concluded that the consolidation had simply confused the jury and prevented the defendants from receiving a fair trial. *Id.* at 1454-55. Ordering that the cases be re-tried separately, Judge Butler identified the problems that result when a court gives in to the temptation to clear its docket rather than ensure a fair trial:

> 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 had 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 the thirteen plaintiffs' cases that varied greatly in so many critical aspects."

Id. at 1457 (emphasis added).

In this case, of course, there is only one plaintiff. Yet, the consolidated cases involve allegations of fraud in the sale and marketing of hundreds of pharmaceutical products by three separate, unrelated defendants. Substantial juror confusion is

therefore inevitable. The fundamental problem is that in a consolidated trial, the jurors, instead of separately analyzing the evidence relevant to each defendant and each drug, will simply ignore the company-specific and drug-specific differences and consider *all* of the evidence as relevant to *all* of the defendants.

For example, evidence bearing on GSK's marketing plan for any particular product is irrelevant and inadmissible as to AstraZeneca and Novartis (and their respective plans are irrelevant to GSK). In the contemplated consolidated trial, however, *all* of the evidence would run together and would inevitably be considered by the jury as if relevant to *every* defendant. Accordingly, the consolidation will subject each defendant to the potential taint of conduct alleged against other unrelated defendants that just happen to be in the courtroom at the same time.

Given the unacceptable risk of having a defendant found liable based on evidence relating to another, unrelated defendant, this Court has held that consolidation should be denied - that trials should be separate - where the complexity of joint proceedings will likely confuse jurors. *See, e.g., Ex parte R.B. Ethridge & Assocs., Inc.*, 494 So. 2d 54, 59 (Ala. 1986) (upholding order severing trials where plaintiff "would suffer prejudice as the result of an undue complication of

issues and evidence"); *Fox*, 576 So. 2d at 225-26 (affirming severance where consolidated trial would have resulted in admission of "highly prejudicial" evidence against one of the defendants). Accordingly, this Court should grant Petitioners' requests to vacate the Circuit Court's consolidation order.

B. The Due Process Concerns Are Heightened Here Because The State Seeks Consolidation Of Claims Arising From Immature, Unproven Liability Theories.

The due process concerns are particularly acute in this case by virtue of the fact that Alabama courts lack experience with the State's novel AWP-related fraud theory. Where a trial court can point to no prior cases to demonstrate that consolidation can be accomplished absent the prejudice and juror confusion generally associated with trying multiple cases at the same time, the court's discretion to consolidate the trials should be, and is, severely limited.

Numerous courts, including this one, have recognized the inherent problems with attempting to utilize nontraditional trial techniques to resolve immature torts. *See, e.g., Ex parte Flexible Prods. Co.*, 915 So. 2d 34, 43 (Ala. 2005) ("*Flexible Products*")(*citing In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 208 (Tex. 2004)("*Van Waters*")). Specifically, in *Flexible Products*, this Court approved the Texas Supreme Court's conclusion that where an "immature" tort is alleged, a "'trial court has less discretion to consolidate dissimilar claims and

must proceed with extreme caution.'" *Id.*, 915 So. 2d at 44 (quoting *Van Waters*, 145 S.W.3d at 208). As endorsed by this Court, a tort has matured "'only when there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' [contentions].'" *Id.* (internal quotations omitted). Where the specific tort theory has "'ever been tried or appealed'" in the State, the tort is necessarily "immature". *Id.* In assessing whether a tort theory has matured, courts assess the specific theory of liability at issue. For example, the *Van Waters* court noted that its analysis related to a "'toxic soup' case" - not the more general "personal injury" case - and that such a theory was immature because it had not been tried or appealed in Texas. *Id.*

The Texas Supreme Court is not alone in questioning the utility of innovative trial techniques in relation to immature torts. For example, in *Castano*, 84 F. 3d at 737, the Fifth Circuit addressed a putative class action seeking compensation "solely for the injury of nicotine addiction." Recognizing that the plaintiff's theory was novel, the Court ultimately rejected combining the claims in a class action: "Our specific concern is that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by Rule 23." *Id.* at 747. That

is, the Fifth Circuit recognized that without some sort of track record, it is nigh impossible for a trial court to conclude with any level of confidence whether the purported common issues will ultimately be significant. *See also Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (citing *Castano* with approval for the proposition that "individual trials in 'immature tort' context may actually enhance long-term judicial efficiency by allowing plaintiffs to winnow claims to include only strongest causes of action, thereby simplifying choice of law and predominance inquiries for eventual class treatment"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (reversing trial court's class certification order, and noting with approval the "robust" results of allowing individual claims to go to trial "because the pattern that results will reflect a consensus, or at least a pooling of judgment of many different tribunals"). Accordingly, courts routinely recognize that where a tort is immature, the analysis necessary to determine whether class certification, consolidation, or some other non-traditional trial technique is appropriate simply does not exist. Decisions to forego individual trials, then, result from a guessing game that needlessly endangers the litigants' right to a fair trial.

The State's AWP-related fraud theory is indisputably novel. Specifically, it has neither been the subject of "multiple jury

verdicts" nor been appealed in Alabama. Similarly, there is no evidence to suggest that this theory has shown any "persistent vitality." As such, consolidation of the State's AWP-related fraud claims against multiple defendants is improper.

C. The Due Process Concerns Here Are Heightened Even Further Because The State Seeks Punitive Damages In A Multi-Defendant Single Trial Involving Different Products And Events.

In addition to the general due process concerns relating to admission of irrelevant evidence and juror confusion, which are compounded by the fact that the State's case rests on untested, immature tort theories, the State's punitive damage claim (Second Amended Complaint, at Prayer for Relief ¶ (3)) further complicates the confusion/prejudice analysis and, indeed, raises substantial constitutional concerns of its own. Stated briefly, the Fourteen Amendment's Due Process Clause does not allow one defendant to be punished for the conduct of another defendant. And, indeed, courts have been directed to take all necessary steps to ensure against this "bleedover" punishment.

Punitive damages, in contrast to compensatory damages, "are aimed at deterrence and retribution." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003) ("*State Farm*"); *see also BMW of North Am., Inc. v. Gore,* 517 U.S. 559, 568 (1996) ("*Gore*") (citations omitted) ("punitive damages may properly be imposed to further a State's legitimate interests in

punishing unlawful conduct and deterring its repetition"). Although the States have discretion in the imposition of punitive damages, the United States Supreme Court has made it abundantly clear that "there are procedural and substantive constitutional limitations on [punitive damage] awards." *State Farm,* 538 U.S. at 416 (citations omitted). Specifically, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* (citations omitted).

The Supreme Court has stated unequivocally that punitive damages may not be used to punish conduct by a defendant that may have been lawful where it occurred. *Gore,* 517 U.S. at 572 ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions."). Similarly, punitive damages may not be used to punish conduct by a defendant that is dissimilar to the conduct alleged to have harmed the plaintiff. *State Farm,* 538 U.S. at 424 ("[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance."). The Supreme Court has also held that the Constitution's Due Process Clause prohibits the use of punitive damages to punish conduct by a defendant that

may have caused harm to others who are strangers to the litigation. *Philip Morris USA v. Williams,* __ U.S. __, 127 S. Ct. 1057, 1063 (2007) ("*Philip Morris*") ("In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.").

In light of these cases, there can be no doubt that, at the very least, the Due Process Clause prohibits the award of punitive damages against one defendant *based on the conduct of another defendant*. Yet, that is exactly the danger presented by the consolidated trial ordered in this case. One defendant could be too easily exposed to punitive damages based on alleged conduct attributable to a different defendant. The Due Process Clause prohibits such a result: "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574.

In the *Philip Morris* case, the Supreme Court addressed the following question: "How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility [which is constitutionally permissible], also

seeks to *punish* the defendant for having caused injury to others [which is not constitutionally permissible]?" 127 S. Ct. at 1065. The Supreme Court answered that question in *Philip Morris* in a way that is equally applicable here: "Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. . . . [F]ederal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* The form of federal constitutional protection that is appropriate *in this case* is separate trials for each defendant. Otherwise, the confusion and prejudice caused by a consolidated trial against multiple defendants involving different products and events over an extended time period will render any award - and certainly any punitive damage award - constitutionally impermissible.[1]

II. Consolidation Under These Circumstances Sends The Message That Alabama Is Not Interested In Ensuring That Business Litigants Receive Fair Trials.

Should the Circuit Court's order stand, the message will ripple through the Alabama business community - and populace more generally - that Alabama's courts are more concerned with docket maintenance than ensuring litigants a fair trial.[2] The

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[1] The juror confusion and prejudice to the defendants cannot be avoided through jury instructions. *See Malcolm,* 995 F.2d at 349-52 (the "dizzying amount of evidence" rendered ineffective the trial court's efforts to keep each claim separate, which included jury instructions.)

[2] Ironically, emphasizing judicial efficiency at the expense of due process may ultimately result in more - not less - crowded dockets. *See* Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts-View from the Bench*, 15

consolidation issue presented here is significant for all businesses, regardless of industry, and indeed for all defendants. Specifically, consolidation of fraud claims (1) against three unrelated defendants (2) involving hundreds of independent acts over an extended time period (3) pursuant to a theory that has never been tested in Alabama (4) under circumstances that all but ensure jury confusion and an unfair trial.

These concerns are not unique to the defendants in this case or to the pharmaceutical industry more generally. It is not hard to imagine a plaintiff asserting similar-sounding-but-factually-distinct theories against multiple defendants, such as banks, insurance companies or heavy manufacturers. Imagine several scenarios involving corporate defendants in other industries. This Court has already identified one such scenario in its previous opinion in this case. *Ex parte Novartis Pharms. Corp.*, ____ So. 2d ____, No. 1060224, 2007 WL 1576114 (Ala. June 1, 2007) ("*Novartis*"). In *Novartis,* this Court set out the following analogy: "[C]onsider a hypothetical plaintiff who makes multiple purchases (for example, a house, a boat, an

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TOURO L. REV. 685, 688 (1999) (judge overseeing New York asbestos litigation observing that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases"); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L. J. 531, 537 (2001) (noting that effort to manage large asbestos caseloads more efficiently "simply invited plaintiffs' lawyers to file thousands of additional claims").

automobile, and a tractor) and finances those purchases through different lenders. . . . It is easy to determine that in this illustration, the plaintiff cannot join the various entities he seeks to sue in one action because his claims do not arise from the same transaction or series of transactions." *Id.* at *6.

Just as this Court concluded that it would be improper in that illustration to join the various lender defendants in a single civil action, it would also be improper to consolidate the plaintiff's claims against the various lender defendants in a single trial. This would be especially true, as here, if there were no allegation of conspiracy or concerted action among the defendants. A plaintiff's claim against each lender would rise or fall based on the lender-specific facts: What was said by each lender, to whom, and when? What did each lender's loan documents say about the issue in dispute? What damages flow from each lender's conduct? A consolidated trial against multiple lenders would essentially comprise series of mini-trials against each defendant crammed into a single proceeding to no one's benefit, except possibly the plaintiff. Each defendant would be forced to distinguish its own superficially similar written and oral representations, business practices and documents from the other defendants, and the jury would be asked to sort it all out. Evidence would be presented in the consolidated trial that would not be admissible in separate

trials against each defendant. A joint trial against multiple defendants would not make any sense. The inevitable result would be confusion for the jury and prejudice to the defendants.

Consider also a claim by a plaintiff company against different insurers for failing to disclose a particular fact, such as the monthly expense charge, in various policies (i.e., workers compensation, comprehensive general liability, automobile liability, errors and omissions, etc.). Plaintiff's claim against all the insurance companies would be the same - fraudulent suppression. The defenses for each defendant insurance company would also be similar - statute of limitations, filed-rate doctrine, merger, etc., in addition to attacks on the elements of the fraudulent suppression claim (i.e., was the fact suppressed, was it material and did damages result?). The *proof* of each claim and defense, however, would be very different for each insurance company. What each policy says about the expense charge would be different for each company and each policy. What the agents said about the expense charge during the sale of the policies would be different for each company and each policy. The damages would depend on the expense charge for each policy. Again, the scenario presents a poor candidate for consolidation. The claim against each insurance company, although superficially similar, is factually distinct. A consolidated trial would include evidence that is

not relevant, and would not be admissible, in separate trials against each insurance company. The near-certain result would be juror confusion and prejudice to the defendants.

Similarly, consider claims by a plaintiff against car manufacturers for intentionally violating emission standards in different makes and models of cars purchased from different manufacturers over the course of several years. The plaintiff's legal theory - wantonness - would be the same against all the car manufacturers. The defenses asserted by the various defendant car manufacturers - that they did not violate emission standards and/or that they did not do so intentionally, federal preemption, etc. - would likewise be similar for all defendants. Under the trial court's reasoning in the Order in this civil action, such a case would be appropriate for consolidation. However, the actual *proof* of those claims and defenses would be very different from defendant to defendant. What emission standards applied could likewise vary from car to car and year to year. Whether the defendants' testing revealed compliance (or non-compliance) would necessarily be different for each defendant, for each make of car, and for each model year. Proof of the plaintiff's claim against one defendant would not advance the ball one yard for plaintiff's claims against the other defendants. A consolidated trial in such a case would be a series of separate and independent trials lumped together for no

good reason. The result: Again, monumental inefficiency, paralyzing confusion, and patent unfairness.

These analogies, coupled with the lack of substantive analysis in the trial court's order, show how exceedingly low the trial court has set the bar for consolidation. Indeed, the consolidation order in this case is so generic that it could easily be modified to apply to different cases involving different industries. For example, the "Common Issues of Law" (Order at p. 6) could be revised as follows:

> "A review of the pleadings in these actions reveals that the [plaintiff's] allegations against [General Motors, Ford and Chrysler] present identical claims and theories of recovery . . . Similarly, the answers of [General Motors, Ford and Chrysler] to the [plaintiff's claims] reflect that these defendants have asserted . . . common factual and legal affirmative defenses to [plaintiff's] claims . . . ."

The same is true for the trial court's "Common Issues of Fact" (Order at p. 7):

> "Of particular note is the fact common to [General Motors, Ford and Chrysler] that each of these defendants manufactures, distributes, markets, and/or offers for sale [cars] . . . Another significant fact common to [General Motors, Ford and Chrysler] is that each of them is [subject to emissions standards]."

The conclusory confusion/prejudice "analysis" (which is really no more than a passing reference) is equally fungible (Order at p. 8):

> "Finally, the logical grouping of [General Motors, Ford and Chrysler] - all of which manufacture and sell [cars subject to emissions standards] - minimizes the risk of any prejudice or confusion which could potentially result from consolidation."

Without question, the depth of analysis leaves much to be desired and, if adopted as an acceptable model, could expose defendants in all types of industries to unfair consolidation.

The point is that fairness in the consolidation procedure is vital to the Alabama business community in general. Improper consolidations could exert enormous pressure on business defendants to enter into excessive - and unwarranted - settlements. Verdicts based on "snowballed" evidence, and the settlements that the prospect of those verdicts can induce, drive up the cost of doing business and, if unchecked, drive business across state borders.

The consolidation issue presented here is also not solely a business issue, it is a "defendant" issue, important whether the defendant is an individual or a business. A perfect example is again found in this Court's earlier decision in this case regarding the joinder issue. *Novartis,* 2007 WL 1576114. In *Novartis,* this Court found that the facts presented in a series of DIRECTV cases were "strikingly similar" to the facts presented in this case. *Id.* at *5. Because the DIRECTV cases involved stand-alone claims against each defendant that were

joined with similar, but factually distinct, claims against other defendants, joinder was not proper. *Id.* For the same reasons that joinder was improper in the DIRECTV cases, consolidation would also be improper in the DIRECTV litigation. Whether an individual defendant illegally obtained television programming depends on facts relevant *only* to that individual defendant.[3] If DIRECTV's claims against multiple defendants were tried in a single lawsuit, the jury would be asked to absorb and compartmentalize the evidence relevant to each defendant. This likely would lead to juror confusion. It also would not promote judicial economy, because there would be no material common issues provable one time for all defendants.[4] Although a complicated undertaking, the difficulties presented by consolidating a DIRECTV case against multiple defendants (or a case against taxpayers, debtors or landowners) would pale in comparison to the complexity presented in this case where consolidation will require jurors to understand and compartmentalize complex data involving hundreds of products and distinguish the critical differences between the defendants' individual cases.

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[3] Did the defendant obtain the programming at all? If so, did the defendant pay for the programming? If the defendant obtained television programming illegally, did he do so affirmatively and intentionally or did he simply fail to notify DIRECTV that he was receiving programming by mistake? If the defendant received television programming illegally, for how long?

[4] Other examples are easy to imagine: a state's lawsuit against taxpayers; a creditor's lawsuit against debtors; or a condemnation lawsuit against multiple landowners.

This Court should refuse to permit such confusion to be thrust on jurors. Further, this Court should refuse to force defendants into the Catch-22 of choosing between a patently unfair trial process and negotiating a settlement based on the potential result of such an unfair trial (rather than the actual merits of the claim).

III. This Court Should Adopt A Standardized Framework For Consolidation Orders.

The question remains what standard this Court should establish to instruct the bench and bar on how to deal with proposed consolidation motions. In its *Amicus* brief to this Court in *Flexible Products*, the BCA (with the Alabama Coal Association) made a proposal for handling consolidation issues in mass tort cases. The same reasoning applies here (and is restated in part here), but the previous proposal is modified for the facts presented here (single plaintiff v. multiple defendants) and is intended to have broader application (not limited to mass torts).

The first step is to adopt a "rigorous analysis" requirement like this Court implemented in class action cases. Before the Alabama Legislature addressed "drive-by" conditional class certifications by enacting Sections 6-5-641 and 6-5-642 of the Alabama Code, this Court had already taken steps to eliminate automatic, conclusory class certification. This Court

adopted a "rigorous analysis" requirement for class action orders under which a trial court had to set forth in its certification order the facts and law as to how a proposed class met each factor provided in Rule 23.[5] For example, in *Ex parte Citicorp Acceptance Co.,* Justice See, writing for the Court, reversed a class certification order stating:

> Although the certification order in this case does outline the prerequisites of Rule 23 and does state that each has been met, the trial court: (1) did not test whether the [putative class representative] could fairly and adequately protect the interest of the class - - class representation requires more than having the competence to hire legal counsel; and (2) certified what appears to be a nationwide class without addressing such issues as choice of law and whether the acts of Citicorp were legal in other states.

715 So. 2d 199, 204 (Ala. 1997) (citation and footnote omitted)[6]. Such a written analysis by the trial court would afford appellate courts the same opportunity to review fairly the

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[5] *Amici* recognize that a statute would be required to gain some of the benefits of Sections 6-5-641 and 6-5-642 of the Alabama Code, such as a right of direct appeal of a consolidation order and an automatic stay of trial court proceedings during the appeal.

[6] *See also Ex parte Water Works & Sewer Bd.,* 738 So. 2d 783, 788 (Ala. 1998) (reversing certification order that "merely recites the requirement of these criteria and summarily concludes that both of these prerequisites are met"); *Ex parte Am. Bankers Life Assurance Co.,* 715 So. 2d 186, 191 (Ala. 1997) (reversing conditional class certification order for lack of rigorous analysis and instructing the trial court that the new "order must not simply parrot the language of Rule 23(a) but must provide a written rigorous analysis of each element and explain how the proponents of class certification have met their burden of proving these elements").

facts, law, and reasoning of an order granting or denying consolidation.

Under this standard, a trial court's order requiring consolidation would have to set forth a "written rigorous analysis of each element and explain how the proponents of [consolidation] have met their burden of proving [the Rule 42] elements." *See Am. Bankers,* 715 So. 2d at 191. Specifically, a consolidation order should:

1. Define what the specific "common question[s] of law or fact" are, explaining how the facts and law make such questions pertinent in the litigation and applicable to all the plaintiffs and defendants; and

2. Detail why consolidation would promote judicial efficiency and not confuse the jury or prejudice the parties.

Further, it would be useful if trial courts would assess factors such as:

a. the number of defendants to be consolidated in a single trial;

b. the number of products/transactions/events at issue;

c. the time period covered by the actions at issue;

d. what proof is common to all defendants;

e. whether the case involves a "mature" tort;

f. whether the plaintiff seeks punitive damages and, if so, whether that implicates Due Process concerns;

g. whether the defendants are represented by the same counsel; and

h. whether discovery relating to the claims against the defendants has similarly progressed.

Such a judicial standard would help prevent a trial court from simply consolidating claims without analysis, as the trial court did in this case. In fact, even a cursory analysis of these factors reveals that consolidation would not be appropriate in a situation such as this case. The trial court's order: (1) does not explain how the common questions of law and fact are applicable to all defendants (because they are not, at least with respect to the proof required); (2) does not explain why consolidation will not confuse the jury or prejudice the defendants (because it will); and (3) does not assess factors such as the number of products/transactions/events at issue (hundreds), the time period covered by the actions at issue (15 years), whether the case involves an "immature tort" (yes), whether plaintiff seeks punitive damages and, if so, whether that implicates Due Process concerns (yes), or whether defendants are represented by the same counsel (no). Because of the potential dangers posed by consolidation, the device should be used, if at all, sparingly - and certainly not here - and only where it would be clearly warranted under the facts and law.

CONCLUSION

Upholding the Circuit Court's consolidation order in this matter would send a clear message that Alabama is more concerned about clearing its dockets than providing litigants in its courts - including business litigants - a fair trial. This Court has previously made clear the specific parameters within which consolidation is appropriate. This Court should grant Petitioners' request for mandamus and provide each defendant the fair and impartial trial to which it is entitled under the Alabama and United States Constitutions.

Respectfully submitted,

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