Civil Number **A120923**

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

FOSTER WHEELER LLC,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR
THE COUNTY OF SAN FRANCISCO,

Respondent,

JOSEPH LUJAN, et al.,

Real Parties in interest, and

QUEEN ESTHER PIERCE, et al.,

Real Parties in interest.

San Francisco Superior Court Case Number CGC-05-444221
Consolidated With CGC-06-457822
Hon. James Robertson II, Judge Presiding

AMICI CURIAE BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

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Amici Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and American Chemistry Council join Petitioner Foster Wheeler in asking this Court to issue a writ compelling the Superior Court to implement a formal process for the consolidation of asbestos cases. Further, *amici* join Petitioner in asking this Court to issue a peremptory writ to the Superior Court to vacate its order

consolidating the groups created at the December 20, 2007 and February 21, 2008 State and Setting Conferences, or issue an alternative writ directing the Superior Court to show cause why it should not be so directed, and upon return of the alternative writ, issue the peremptory writ.

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in California and their insurers. Accordingly, *amici* have a substantial interest in ensuring that California's tort system is fair, consistent with statutory law and due process, and reflects sound public policy. *Amici* will show that the trial court's informal procedures for consolidating asbestos cases violates these principles.

STATEMENT OF FACTS

Amici adopt Petitioner's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decision to consolidate a particular set of cases under California Code of Civil Procedure § 1048(a) has tremendous significance for individual litigants and the civil justice system. In appropriate cases, such as in litigation involving a series of related events, the practice may lead to judicial economy. On the other hand, when used improperly, the practice can have very serious, unintended impacts – it may augment the very backlog of cases the court is trying to address; it may violate the due process and jury trial rights of plaintiffs and defendants; and it may create serious ethical problems for plaintiffs' lawyers.

As explained more fully in Petitioner's Writ of Mandate, the informal procedure use by the Superior Court for consolidating asbestos trials provides no meaningful opportunity for defendants to be heard prior to Court action affecting defendants' substantive rights. This Court should adopt formal procedures to give litigants and trial court judges clear guidelines to reduce the risk of prejudice and confusion, among other adverse consequences, that flow from the improper joinder of dissimilar actions.

Specifically, the Court should consider *publishing* an opinion which adopts the criteria set forth in *Malcolm v. National Gypsum Co.* (2d Cir.1993) 995 F.2d 346 "to strike the appropriate balance as to consolidation." *Id.* at 350. In *Malcolm*, the Second Circuit articulated the criteria commonly used by federal courts for evaluating whether the trial court had abused its discretion in consolidating asbestos cases: "(1) common worksite, (2) similar occupation, (3) similar time of exposure, (4) type of disease, (5) whether plaintiffs were living or deceased, (6) status of discovery in each case, (7) whether all plaintiffs are represented by the same counsel, and (8) type of cancer alleged." *Id.* at 350-351. Texas courts have added a ninth factor to the *Malcolm* analysis: "(9) the type of asbestos-containing product to which the worker was exposed." *In re Ethyl Corp.* (Tex. 1998) 975 S.W.2d 606, 616-617. Given the fact that the California statute is virtually identical to the federal rule and courts and counsel in California are familiar with the *Malcolm/Ethyl* criteria, it is appropriate to employ them.

ARGUMENT

I. AN OVERVIEW OF ASBESTOS LITIGATION

"One of the greatest challenges facing both state and federal courts is the crush of tort suits arising from the extensive use of asbestos" throughout much of the last century. *Malcolm,* 995 F.2d at 348; *see also In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200 ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits."); Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993). The United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a "crisis."[1]

Through 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* http://rand.org/pubs/monographs/MG162/. In August 2006, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases in state and federal courts. *See* American Academy of Actuaries Mass Torts Subcomm., *Current Issues in Asbestos Litigation* 5 (Aug. 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf. So far, the litigation has forced an estimated eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from*

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[1] *See generally* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

the Abyss, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on defendant corporations, employees, retirees, affected communities, and the economy.[2] Over 8,500 defendants have been named. *See* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns: Asbestos, Aug. 2004, at 5.

As long ago as 1996, the Court of Appeal stated that California courts were "already overburdened with asbestos litigation . . . ." *Hansen v. Owens-Corning Fiberglas Corp.* (1st Dist. 1996) 51 Cal. App. 4th 753, 760. Much of the surge in asbestos case filings nationwide has happened since that time; California courts have not been spared. *See Asbestos Claims Facility v. Berry & Berry* (1st Dist. 1990) 219 Cal. App. 3d 9, 23 (noting "the burdens placed on the judicial system by [asbestos] litigation."); Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 Santa Clara L. Rev. 1 (2004); Steven Weller *et al.*, *Report on the California Three Track Civil Litigation Study* 28 (Pol'y Stud. Inc. July 31, 2002) ("The San Francisco Superior Court seems to be a magnet court for the filing of asbestos cases."), *available at* www.clrc.ca.gov/pub/BKST/BKST-3TrackCivJur.pdf.

In fact, the litigation in California appears to be worsening. *See* Alfred Chiantelli, *Judicial Efficiency in Asbestos Litigation*, 31 Pepp. L. Rev. 171, 171 (2003) (former San

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[2] *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

Francisco Superior Court Judge stating, "Lately, we have seen a lot more mesothelioma and other cancer cases than in the past."). In 2004, one San Francisco Superior Court judge stated at a University of San Francisco Law School symposium that asbestos cases take up twenty-five percent of the court's docket. *See Judges Roundtable: Where is California Litigation Heading?*, HarrisMartin's Columns: Asbestos, July 2004, at 3. Another San Francisco Superior Court judge noted that asbestos cases are a "growing percentage" of the court's ever increasing caseload and that they take up a large share of the court's scarce resources. *See id.*

More recently, an influx of filings – many by out-of-state plaintiffs – has significantly increased the burden on California courts. *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 599 (2007) ("plaintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases."); Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883, 885 (2007) ("With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state."); Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. Bus. J. 8 (Feb. 27, 2006), *available at* 2006 WLNR 4514441 ("California is positioned to become a front in the ongoing asbestos litigation war.").

II. CONSOLIDATION: TRYING TO SOLVE THE SYMPTOMS OF THE PROBLEM

A. Efficiency Over Fairness?

To some observers, the primary problem with asbestos litigation is the large number of asbestos claims. In an effort to address the overabundance of asbestos claims on their dockets, some courts, including the San Francisco Superior Court, have consolidated cases for resolution at trial. *See* Chiantelli, *supra.* Consolidation is a procedure for joining separate lawsuits that involve common questions of law or fact, are pending in the same court, and would promote judicial economy if tried together. *See* Cal. Code Civ. Proc. § 1048(a).[3] The idea underlying case consolidation seems logical. If asbestos claims are crowding court dockets, then it would seem sensible to resolve the claims as efficiently as possible and to reduce the transaction costs in doing so. *See General Motors Corp. v. Superior Court* (1966) 65 Cal. 2d 88, 91 ("consolidation of actions decreases the backlog of cases pending before trial courts and thus enables litigants to bring their actions to trial with less delay.").

The rush for expediency, however, may sometimes lead even well-intentioned judges to promote efficiency over fairness. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and*

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[3] Section 1048(a) provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Innocent Victims in Asbestos Liability Cases, 24 Am. J. Trial Advoc. 247 (2000). Former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described the situation facing many judges with heavy asbestos caseloads. In testimony before Congress, Justice Mallett observed that trial court judges inundated with asbestos claims might feel compelled to shortcut procedural rules:

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.

The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 320 (1999) (statement of the Hon. Conrad L. Mallett, Jr.). The subject litigation appears to be the type of situation Justice Mallett was describing.

B. Policy Issues Raised by Trial Consolidations

As it turns out, bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains. *See* 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 (2001). Rather than making cases go away, the practice invites new filings. As mass tort expert Francis McGovern of Duke University Law School has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the

opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam." Francis E. McGovern, The *Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).[4] Another commentator has observed, "When plaintiffs learn that a particular forum will coerce settlement procedurally irrespective of the merits of their claims, one doubts whether that forum will remain unclogged for long." Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945, 954 (2003).

Plaintiffs' lawyers also may appreciate that small scale consolidations have been shown to "improve outcomes for plaintiffs." Hanlon & Smetak, *supra,* at 574; *see also* Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal. Stud. 365, 365 (2006) ("Small scale consolidations are found to increase plaintiffs' probabilities of winning and receiving punitive damages. . . ."); *In re Rhone-Poulenc Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298 (Posner, J.) (explaining in the class action context that aggregation of claims can produce "blackmail settlements.").

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[4] *See also* Helen E. Freedman, *Product Liability Issues in Mass Torts--View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating, "Increased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases"); James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 232 (2006) ("However well-intentioned, these experiments [with aggregation] failed, not only as mechanisms to clear dockets and to adjudicate the claims then pending, but also by facilitating the increasing rate of claim filings").

The San Francisco Superior Court's reputation for being a "magnet court" for asbestos claims, and the continuing increase in filings in California, support the view that, in the world of asbestos litigation, "if you build it, they will come." *Cf.* Hanlon & Smetak, *supra,* at 574 (small scale consolidations "continue to flourish" in San Francisco). In contrast, states such as Mississippi, Texas, and Ohio, have recently experienced a dramatic reduction in filings after trial consolidations were abolished and other reforms were implemented through judicial decision or legislation. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006).[5]

C. Constitutional and Ethical Issues Raised by Consolidations

Trial consolidations also raise due process issues for both plaintiffs and defendants, and serious ethical issues for plaintiffs' lawyers. These problems stem from the fact that "[c]onsolidations can be abusive of individual rights." Alan Brayton, *Alternatives to Asbestos Impairment Standards*, 31 Pepp. L. Rev. 29, 31 (2003).

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[5] The Mississippi Supreme Court has severed multi-plaintiff asbestos-related cases. *See, e.g., Harold's Auto Parts, Inc. v. Mangialardi* (Miss. 2004) 889 So. 2d 493; *Janssen Pharmaceutica, Inc. v. Armond* (Miss. 2004) 866 So. 2d 1092. In 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions. *See* Ohio R. Civ. P. 42(A)(2). In 2006, the Michigan Supreme Court adopted an order precluding the "bundling" of asbestos-related cases for trial. *See* Admin. Order No. 2006-6, Prohibition on "Bundling" Cases (Mich. Aug. 9, 2006), *available at* 2006 WLNR 14601437; *see also* Editorial, *Unbundling Asbestos*, Wall St. J., Aug. 21, 2006, at A10, *available at* 2006 WLNR 14482501. Texas, Kansas, and Georgia have enacted laws that generally preclude the joinder of asbestos cases at trial. *See* Kan. St. Ann. § 60-4902; Tex. Civ. Prac. & Rem. Code § 90.009; Ga. Code Ann. § 51-14-11.

For example, plaintiffs with meritorious cases may be harmed when their claims are joined with the less sick or the non-sick. As Griffin Bell, a former Fifth Circuit Judge and U.S. Attorney General, has observed, "the trading off of one plaintiffs' claim for that of another" not only "violates the most fundamental rule of legal ethics – loyalty to each individual client" but "also has due process implications." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 4 (2003); *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833, 860-861 (2005) (when claims of seriously injured claimants are joined with a large group of lesser or non-injured claimants, the seriously injured often receive lower claim values, "breach[ing] the ethical and fiduciary obligations of the lawyer to the severely injured claimants who receive less so that their lawyers may receive more."); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. Rev. 879, 894 (1995) (consolidation may benefit plaintiffs with weak claims, "while harming plaintiffs with stronger claims.").

In *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, where the U.S. Supreme Court overturned a nationwide asbestos class action settlement, the Court was troubled that "the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 595; *see also Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 816-18 (relying on constitutional concerns as well as Rule 23 to invalidate proposed asbestos settlement). Consequently, Judge Bell has said, "Individual plaintiffs have a clear incentive, as well as clear standing, to challenge the aggregation of asbestos claims on the due process ground

that there is no 'structural assurance' that all plaintiffs will be treated fairly in a settlement." Bell, *supra*, at 4. "Defendants also may have standing to challenge the aggregation of claims on the ground that individual plaintiffs may not be bound by a settlement that violates due process." *Id.*

The nature of consolidated trials may raise other constitutional problems if defendants are denied a meaningful opportunity to defend against an individual plaintiff's claims, resulting in prejudice or confusion. *See* Victor E. Schwartz *et al.*, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed By the Non-Sick*, 31 Pepp. L. Rev. 271, 285 (2004); *see also Todd-Stenberg v. Dalkon Shield Claimants Trust* (1st Dist. 1996) 48 Cal. App. 4th 976, 981 (confusion and prejudice engendered by consolidation may violate due process and deprive defendant of a jury trial); *General Motors,* 65 Cal. 2d at 92 (trial court must consider "all possibilities of prejudice" in a consolidation]; *Fellner v. Steinbaum* (2d Dist. 1955) 132 Cal. App. 2d 509, 511 (no substantial rights of the defendant should be "trenched upon").

Courts in other jurisdictions have recognized that "specific risks of prejudice and possible confusion" that might result even when relatively small numbers of asbestos claims are joined. *Cain v. Armstrong World Indus.* (S.D. Ala. 1992) 785 F. Supp. 1448, 1455 (quoting *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1495).

III. CLEAR GUIDELINES ARE NEEDED TO GOVERN CONSOLIDATION OF ASBESTOS CASES UNDER CALIFORNIA CODE OF CIVIL PROCEDURE § 1048(a)

A. Limits on Trial Court Discretion to Consolidate

The decision to consolidate pursuant to California Code of Civil Procedure § 1048(a) is a matter committed to the sound discretion of the trial court, *see Todd-Stenberg,* 48 Cal. App. 4th 978-979, "to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of . . . justice." *Slack v. Murray* (3d Dist. 1959) 175 Cal. App. 2d 558, 565; *see also Westside Cmty. for Indep. Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 (trial court discretion is not unlimited and is subject to reversal on appeal "where no reasonable basis for the action is shown.").

B. *Malcolm* Factors Should be Applied to Limit the Risk of Prejudice and Confusion in Consolidated Asbestos Trials

As the above discussion makes clear, the decision to consolidate a particular set of cases has tremendous significance for individual litigants and the civil justice system. In appropriate cases, such as in litigation involving a series of related events, the practice may lead to judicial economy. *See, e.g., Jud Whitehead Heater Co. v. Obler* (1st Dist. 1952) 111 Cal. App. 2d 861, 867 (consolidation was appropriate where both causes of action arose out of one series of transactions); *Fellner v. Steinbaum* (2d Dist. 1955) 132 Cal. App. 2d 509, 511 (consolidation involved related series of transactions). On the other hand, when used improperly, the practice can have very serious, unintended impacts – it may augment the very backlog of cases the court is trying to address; it may

violate the due process and jury trial rights of plaintiffs and defendants; and it may create serious ethical problems for plaintiffs' lawyers.

A strong policy argument can be made for abolishing consolidated asbestos trials, as a few other jurisdictions have done. *See supra* p.10 n.5. If this court allows asbestos case consolidations to continue under California Code of Civil Procedure § 1048(a) then, at a minimum, litigants and trial court judges should be given clear guidelines to reduce the risk of prejudice and confusion, among other adverse consequences, that flow from the improper joinder of dissimilar actions.

In that regard, the Court should consider *publishing* an opinion which adopts the criteria set forth in *Malcolm v. National Gypsum Co.* (2d Cir.1993) 995 F.2d 346 "to strike the appropriate balance as to consolidation." *Id.* at 350. In *Malcolm*, the Second Circuit articulated the criteria commonly used by federal courts for evaluating whether the trial court had abused its discretion in consolidating asbestos cases: "(1) common worksite, (2) similar occupation, (3) similar time of exposure, (4) type of disease,[6] (5) whether plaintiffs were living or deceased, (6) status of discovery in each case, (7) whether all plaintiffs are represented by the same counsel, and (8) type of cancer alleged." *Id.* at 350-351; s*ee also Johnson v. Celotex Corp.* (2d Cir.) 899 F.2d 1281,

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6 *See, e.g., Cantrell v. GAF Corp.* (6th Cir. 1993) 999 F.2d 1007, 1011 ("The potential for prejudice resulting from the consolidation of a cancer case with a non-cancer case is obvious. Evidence relevant only to the causation of one plaintiff's case cancer may indicate to the jury that the other plaintiff will likely develop cancer in the future.").

1287, *cert. denied*, (1990) 498 U.S. 920; *In re Joint E. & S. Dists. Asbestos Litig.* (E.D.N.Y. & S.D.N.Y. 1989) 125 F.R.D. 60, 64-65.

Texas courts have added a ninth factor to the *Malcolm* analysis: "(9) the type of asbestos-containing product to which the worker was exposed." *North Am. Refractory Co. v. Easter* (Tex. App.-Corpus Christi 1999) 988 S.W.2d 904, 917; *see also In re Ethyl Corp.* (Tex. 1998) 975 S.W.2d 606, 616-617 ("At least one other consideration should be added to the [*Malcolm*] factors in asbestos litigation and that is the type of asbestos-containing product to which the worker was exposed.").[7]

Given the fact that California Code of Civil Procedure §1048(a) is virtually identical to the federal rule, *see* Fed. R. Civ. Proc. 42(a), and courts and counsel in California are familiar with the *Malcolm/Ethyl* criteria, it is appropriate to employ them. *See Hypertouch, Inc. v. Superior Court* (2005) 128 Cal. App. 4th 1527, 1544.

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[7] An Ohio federal MDL court has added one more "important factor" – a potential *Malcolm* factor (10) – "whether the law applicable to all plaintiffs is the same." *In re Welding Rod Fume Prods. Liab. Litig. (MDL 1535)* (N.D. Ohio), 2006 WL 2869548, *3 (slip copy). As the court explained, "even if all of the [*Malcolm*] Factors weigh in favor of consolidation, a requirement that the Court or a jury apply different legal standards to the different cases may present an excessive risk or prejudice and confusion, such that consolidation is not appropriate." *Id*; *see also In re Consolidated Parlodel Litig.* (D.N.J. 1998) 182 F.R.D. 441, 447 ("the economies of consolidation would be significantly reduced in these cases by the need to apply different law to each Plaintiff's claim, and even to individual issues within each claim.").

C. Application of the *Malcolm* Factors Demonstrates That the Subject Consolidated Trial Plan Violates Petitioner's Due Process Rights

As explained more fully in Petitioner's Writ of Mandate, the informal procedure use by the Superior Court for consolidating asbestos trials provides no meaningful opportunity for defendants to be heard prior to Court action affecting defendants' substantive rights. *See Cordova v. Vons Grocery Co.* (1987) 196 Cal. App. 3d 1526, 1531. Moreover, the Superior Court's consolidation decision here did not follow "fixed legal principles" of due process and the *Malcolm* factors. *Slack*, 175 Cal. App. 2d at 562. In fact, it appears that the only *Malcolm* factors present here that support consolidation are that (1) both claims are for wrongful death and (2) both claimants are represented by the same firm. On the far more important issues, such as those that relate to basic liability, the claims proposed to be tried together appear dissimilar. *See In re Ethyl Corp.*, 975 S.W.2d at 616 (whether plaintiffs are represented by the same counsel and the status of discovery "are far less important than the other considerations identified by the [*Malcolm*] criteria."); *In re Repetitive Stress Injury Litig.* (2d Cir. 1993) 11 F.3d 368, 374 ("factors 1-4 are far more important than identity of counsel and progress of discovery.").

Given the predominance of dissimilar issues in this case, this Court should conclude that the trial court abused its discretion in ordering the cases consolidated for trial. Instructions to the jurors will not be sufficient to dispel the potential prejudice to Petitioner from having one jury try these two cases with issues apparently involving different diseases, different worksites, different occupations, and different time periods of

exposure, among other important distinctions. An additional aspect of prejudice to the Petitioner is the time and expense that it would have to incur if forced to sit through lengthy portions of one trial (*Pierce*) in which it does not appear to be involved. *Amici* believe the entitlement to relief is obvious and there is a compelling need for immediate action. *See Alexander v. Superior Court* (1993) 5 Cal.4th 1218 1223; *Ng. v. Superior Court* (1992) 4 Cal.4th 29, 35.

CONCLUSION

For these reasons, *amici curiae* ask this Court to issue a writ compelling the Superior Court to implement a formal process for the consolidation of asbestos cases. Further, *amici* ask this Court to issue a peremptory writ to the Superior Court to vacate its order consolidating the groups created at the December 20, 2007 and February 21, 2008 State and Setting Conferences, or issue an alternative writ directing the Superior Court to show cause why it should not be so directed, and upon return of the alternative writ, issue the peremptory writ.

Respectfully submitted,

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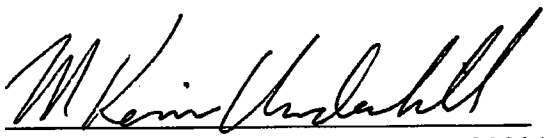
CERTIFICATE OF WORD COUNT

Pursuant to Rule 14(c)(1) of the California Rules of Court, the undersigned hereby certifies that this Brief contains ~~3,737,~~ less than 4,000 words, exclusive of captions, tables, and this certification.



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