No. 131317

IN THE SUPREME COURT OF ILLINOIS

ABBOTT LABORATORIES, *Defendant-Movant,* *v.*	On Motion for Supervisory Order Pursuant to Illinois Supreme Court Rule 383.
THE HONORABLE KATHY M. FLANAGAN, *Respondent,* and	The Circuit Court of Cook County, Illinois No. 2022L005366 Calendar E.
COOK COUNTY NEC LITIGATION PLAINTIFFS CONSOLIDATED FOR PRETRIAL PURPOSES, *Plaintiffs.*	The Honorable KATHY M. FLANAGAN, Judge Presiding.

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ILLINOIS CHAMBER OF COMMERCE, NATIONAL ASSOCIATION OF MANUFACTURERS, ILLINOIS MANUFACTURERS' ASSOCIATION, PRODUCT LIABILITY ADVISORY COUNCIL, INC., AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT'S MOTION FOR SUPERVISORY ORDER VACATING TRIAL CONSOLIDATION

David B. Goodman
(ARDC # 6201242)
GOODMAN LAW GROUP
20 N. Clark Street, #3300
Chicago, IL 60602
(312) 626-1888
dg@glgchicago.com

**Counsel of Record*

Of Counsel:
Philip S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com
cappel@shb.com

Counsel for Amici Curiae

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are the Chamber of Commerce of the United States of America, Illinois Chamber of Commerce, National Association of Manufacturers, Illinois Manufacturers' Association, Product Liability Advisory Council, Inc., American Property Casualty Insurance Association, Coalition for Litigation Justice, Inc., and International Association of Defense Counsel. The Defendant's Motion in this case arises from the first wave of consolidations resulting from a new trial-consolidation policy for mass-tort cases in the Circuit Court of Cook County that promises to usher in a new regime of joint trials of unrelated product-liability plaintiffs across multiple litigations. *Amici* represent a broad swath of companies that are based or do business in Illinois, along with their insurers and defense counsel. They have major concerns that this new trial-consolidation policy, as demonstrated here, will undermine the ability of defendants in mass-tort cases to receive fair trials in Illinois courts.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Illinois Chamber of Commerce ("Illinois Chamber") has more than 1,800 members in virtually every industry. It advocates on behalf of its members to achieve an optimal business environment that enhances job creation and economic growth. It also regularly files *amicus curiae* briefs in cases before this Court that, like this one, raise issues of importance to the State's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Illinois Manufacturers' Association ("IMA") is an Illinois not-for-profit corporation founded in 1893 and is the oldest and one of the largest state-wide manufacturing association in the United States. More than 4,000 Illinois manufacturing companies currently hold IMA membership. Illinois manufacturers employ 650,000 workers and the IMA's members, which include businesses of all sizes, employ over 70 percent of Illinois'

manufacturing workforce. The IMA's mission is to preserve and strengthen the Illinois manufacturing base by providing information to and advocating on behalf of member companies on issues that relate to the Illinois business climate, such as industrial relations, federal and state regulations, tax policy, labor law, insurance, public affairs, and environmental matters. The IMA works actively in the judicial and legislative arenas in furtherance of this objective and has filed *amicus curiae* briefs in other important cases affecting manufacturers' interests in Illinois.

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers. PLAC contributes to the improvement and reform of the law, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,200 *amicus curiae* briefs on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The American Property Casualty Insurance Association ("APCIA"), headquartered in Chicago, is the primary national trade association for home,

auto, and business insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of the U.S. property-casualty insurance market and write more than $22.7 billion in premiums in the State of Illinois annually, including 78% of the general liability insurance market. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before state and federal courts. *Amicus* filings allow APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims.[1] The Coalition has filed over 200 *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The International Association of Defense Counsel ("IADC") is an association of approximately 2,500 invitation-only, peer-reviewed attorneys who work in corporations, for insurers, and at law firms and whose practices are concentrated on the defense of civil lawsuits. Founded in 1920, the IADC

---

[1] The Coalition includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC's activities seek to benefit the civil justice system and the legal profession.

INTRODUCTION

In recent months, the Acting Presiding Judge of the Law Division of the Circuit Court of Cook County has established a trial-consolidation policy for mass-tort cases that, as demonstrated by the Motion in this case, proposes to usher in a new regime of highly prejudicial multi-plaintiff trials that will broadly deny the fair-trial rights of Defendant. As a consequence of this policy set by the Acting Presiding Judge, trial courts have issued—and will continue to issue—orders consolidating multiple plaintiffs' claims into single-group trials merely because the claims involve the same defendant and the same or similar products. But, in this litigation and the other mass-tort cases subjected to this new policy, each individual plaintiff's case depends on completely different facts and circumstances related to its own unique allegations of harm. This Court's intervention through a Supervisory Order is urgently needed to ensure that defendants in mass-tort cases receive fair trials in Illinois courts.

Attempts to consolidate dissimilar claims, often in the name of judicial expediency, are not new and have long been discredited. State and federal courts around the country have consistently held that such multi-plaintiff

trials, particularly in product-liability litigations like those here, raise major due-process problems by tilting the scales of justice against defendants and distorting litigation outcomes. Specifically, they mask weaknesses in plaintiffs' claims, blur important complexities among claims, and overwhelm juries with details they cannot reasonably keep straight. As a result, juries tend to make their liability decisions for each plaintiff based on the accumulated evidence across all of the cases, rather than focusing on the evidence solely germane to that individual plaintiff. Indeed, courts have found that lumping cases together into a single trial creates for the jury the false impression that if more than one plaintiff is making the accusations, the claims are more likely true.

What's more, in cases potentially involving punitive damages, the jury's consideration of such damages exacerbates the due-process problems inherent in consolidated multi-plaintiff trials. Under U.S. Supreme Court precedent, juries cannot award punitive damages to a plaintiff based on injuries to others: "The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts . . . upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). If juries assess punitive damages based on the accumulation of the joint plaintiffs' claims, they violate this constitutional rule. Finally, courts have learned from experience that joint trials rarely further judicial economy, which is often cited as the justification for consolidation. Regardless, "efficiency can

never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

Amici, therefore, respectfully request that this Court grant Defendant's Motion for a Supervisory Order, along with other parallel motions challenging similar consolidation orders in Cook County, and vacate the Acting Presiding Judge's consolidation order. In doing so, the Court should recognize that consolidating dissimilar claims for trial poses fundamental fairness and due-process problems. The U.S. Constitution and Illinois Constitution guarantee defendants a fair trial, based on each plaintiff's case-specific allegations, in which each claim succeeds or fails on its own merits.

ARGUMENT

I. Consolidating Dissimilar Claims for Trial Severely Prejudices Defendants and Denies Their Right to Due Process of Law

For several decades, state and federal courts across the country have consistently and repeatedly found that the claims of unrelated plaintiffs, as here, present unique factual and legal circumstances that make consolidation improper. *See, e.g.,* Order, *Mount v. 3M Co.*, No. RG21100427 (Cal. Super. Ct. Alameda Cnty., Aug. 14, 2023) (denying trial consolidation); *Ellis v. Evonik Corp.*, 604 F. Supp. 3d 356, 378 (E.D. La. 2022) (severing claims of fourteen plaintiffs); *Ford v. R.J. Reynolds Tobacco Co.*, No. 4:20-cv-1551, 2021 WL 2646413, at *2 (E.D. Mo. June 28, 2021) (denying trial consolidation and holding that a "[d]efendant is entitled to defend a case on its merits and should

not be required to lump its defense into one").[2] These courts have observed that "[u]nfair prejudice as a result of consolidation is a broadly recognized principle." *Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co.*, 48 So. 3d 976, 988 (Fla. Ct. App. 2010). In one recent case, a trial court found the prejudice so clear-cut that it denied consolidation *sua sponte*. *See* Order, *Alamil v. Sanofi US Servs. Inc.*, No. 2:23-cv-04072-HDV (C.D. Cal. Aug. 21, 2023).

Although consolidated multi-plaintiff trials do not actually further judicial economy, *see infra* Part II, "considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983). "Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." James M. Beck, *Little in Common: Opposing Trial Consolidation in Product Liability Litigation*, 53 No. 9 DRI For The Def. 28, 33 (Sept. 2011).

Courts thus widely agree that joint trials of unrelated product-liability claims deprive defendants of their constitutionally "axiomatic" and "basic" due-process right to "'[a] fair trial in a fair tribunal.'" *Caperton v. A. T. Massey Coal*

---

[2] *See also In re Accutane Prods. Liab. Litig.*, No. 8:04-md-2523-T-30TBM, 2012 WL 4513339, at *1 (M.D. Fla. Sept. 20, 2012) ("[P]roduct liability cases are generally *inappropriate* for multiplaintiff joinder because such cases involve *highly individualized facts and [l]iability, causation, and damages* will . . . be different with each individual plaintiff.") (cleaned up, emphasis added).

Co., 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). This case law includes decisions by both state and federal courts in Illinois. *See, e.g., Levi v. DePuy Synthes*, No. 19L-10969 (Cir. Ct. Cook Cnty., Ill. Nov. 14, 2022) (denying consolidation of two hip-implant product trials); Order, *In re Testosterone Replacement Therapy*, No. 14-cv-1748, Dkt. 1787 (N.D. Ill. Mar. 15, 2017) (selecting seven plaintiffs for seven bellwether trials); Order, *In re Zimmer NexGen Knee Implant*, No. 11-cv-5468, Dkt. 1826 (N.D. Ill. Mar. 11, 2016) (selecting four plaintiffs for four bellwether trials).

A. Consolidation Risks Juror Confusion, Spill-Over Evidence, and Jury Bias, Unduly Prejudicing Defendants and Denying Them a Fair Trial

1. Juror Confusion

Among the various problems with multi-plaintiff trials identified by courts, juror confusion is a significant risk. Consolidation leads juries to conflate evidence and legal theories across dissimilar claims. *See Janssen Pharm., Inc. v. Bailey*, 878 So. 2d 31, 48 (Miss. 2004) (observing the "unfair prejudice for the defendant by overwhelming the jury with . . . testimony, thus creating confusion of the issues"). If "the unique circumstances of . . . cases are considered together in one trial, the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice." *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 461

(E.D. Mich. 1985).[3] For example, "by trying . . . two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case." *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016). In other words, a juror's conclusion that a defendant caused harm to one plaintiff may lead that juror to inappropriately infer that the defendant must have caused harm to all plaintiffs without considering the causation evidence relevant to each unique plaintiff.

Further, courts and social scientists alike have found that jurors are often unable to "compartmentaliz[e] certain evidence that applies to one case but not the other." *Minter v. Wells Fargo Bank, N.A.*, Nos. WMN-07-3442, WMN-08-1642, 2012 WL 1963347, at *1 (D. Md. May 30, 2012). Studies of juror comprehension demonstrate that "comprehension declines as complexity increases, particularly when the complexity arises from the presence of multiple parties or claims." Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. Cin. L. Rev. 929, 929 (2011).

Curative measures, including jury instructions, are often insufficient to prevent jurors from improperly conflating evidence and legal issues. Jurists and scholars broadly agree that such measures generally cannot overcome

[3] *See also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (discussing unfairness created when plaintiffs are able to present a "'perfect plaintiff' pieced together for litigation" based on "the most dramatic" features from individual cases).

jurors' natural tendencies to consider as relevant to all claims the totality of the evidence they hear during trial. "Even with jury notebooks and counsel's attempts to differentiate the plaintiffs, it is almost inevitable that juries will be overloaded with information about each plaintiff's specific medical history, alleged injuries, treatment testimony, and damages that will blur the lines over which evidence applies to which plaintiff." David B. Sudzus, *et al.*, *More Plaintiffs, More Problems*, 15 No. 1 In-House Def. Q. 20 (2020). "The jury may simply resolve the confusion by considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case." *Bailey v. N. Trust Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000). Because of this natural tendency, it "would be *extremely prejudicial* to the defendant if the claims of the plaintiffs are tried jointly." *Id.* (emphasis added).

2. *Prejudicial Spill-Over Testimony*

Trial consolidation also creates the risk that "[e]vidence that would not have been admissible in [one] plaintiff's case" is admitted in another plaintiff's part of the case, thereby improperly benefitting the first plaintiff. *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992). In a consolidated trial involving two unrelated product-liability plaintiffs, "the potential for prejudice resulting from a possible spill-over effect of evidence . . . was obvious," the U.S. Court of Appeals for the Sixth Circuit explained. *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993). This improper spill-over effect can prejudice defendants in all aspects of a consolidated trial. *See,*

e.g., Arnold, 712 F.2d at 907 (improperly admitted evidence "implanted in the minds of the jury resulted in prejudice, almost surely prejudice from the outset and certainly prejudice after the trial had wended its way to conclusion").

Take just two examples relevant to this litigation. Even the mere existence of other lawsuits is generally inadmissible, yet here, a jury would necessarily hear about several other lawsuits and the other plaintiffs' specific allegations. *See* Ill. R. Evid. 402 ("Evidence which is not relevant is not admissible.") *and Davenport v. Goodyear Dunlop Tires N. Am., Ltd.*, No. 1:15-cv-03752-JMC, 2018 WL 833606, at *3 (D. S.C. Feb. 13, 2018) ("Evidence of other lawsuits is likely to confuse and mislead the jury and it is highly prejudicial.") (cleaned up). In addition, evidence such as a defendant's knowledge of product risks at certain times may be relevant to one plaintiff's claims, but not to the others, which could result in the "wrong evidence considered for the wrong plaintiff." Sudzus, *et al.*, *supra*, at 20. Such prejudicial spill-over testimony cannot be avoided in multi-plaintiff trials.

3. Juror Bias

Consolidated trials also foster jury bias against defendants. With respect to establishing liability for the various plaintiffs' alleged harms, "[j]uries see that multiple individual plaintiffs claim to have been somehow injured by the same [or a similar] product, so they simply *assume* that defendants have done something wrong." *Id.* (emphasis added). As a result, a jury may find a defendant liable "based on sheer numbers, on evidence

regarding a different plaintiff, or out of reluctance to find against a defendant with regard to one plaintiff and not another." *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004). Trial consolidation poses "a tremendous danger that one or two plaintiff's [*sic*] unique circumstances could bias the jury against [a] defendant generally, thus, prejudicing [the] defendant with respect to the other plaintiffs' claims." *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994).

Many courts have accordingly recognized the substantial, distorting prejudice such jury bias can have on a verdict in a consolidated trial—both as to liability and to damages. For example, in *Malcolm v. Nat'l Gypsum Co.*, the court found that the jury's apportionment of equal liability to each defendant regarding each plaintiff's claims, despite hearing evidence of materially different levels of responsibility, presented "an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence." 995 F.2d at 352. Similarly, in *Cain v. Armstrong World Indus.*, the court found manifest prejudice where "the jury simply lumped the personal injury plaintiffs into two categories and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." 785 F. Supp. at 1455.

This combination of jury confusion and bias in consolidated trials frequently requires reversal on appeal. *See, e.g., 3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Bailey*, 878 So. 2d at 35-36; *Agrofollajes*, 48 So. 3d at 988.

B. Multi-Plaintiff Trials Produce Unjust, Distorted Verdicts

The confluence of these factors—juror confusion, spill-over evidence, and bias—"makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Studies confirm that juries in consolidated trials are significantly more likely to find for the plaintiff and render a larger damages award than if the cases were tried individually. *See* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damages Awards and Cognitive Processing of Evidence*, 85 J. Applied Psy. 909, 916 (2000).

A study examining consolidated asbestos trials of two to five plaintiffs' claims involving a variety of diseases in a variety of jurisdictions during 1987-2003 found that such consolidation increased plaintiffs' probability of prevailing by 15%, and also increased the chances of a punitive-damages award. *See* Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 385-90 (2006); *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 574 (2007) ("[S]mall scale consolidations significantly improve outcomes for plaintiffs.").

Another study examining verdicts in New York City's asbestos litigation from 2010 through 2014 likewise found that consolidating cases for trial increased a plaintiff's chances of prevailing from 50% in an individual trial to

88% in a consolidated trial, and resulted in verdicts 250% higher per plaintiff than in individual trials over the same period. *See* Peggy Ableman, *et al.*, *The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency*, 30-7 Mealey's Litig. Rep. Asb. 21 (May 6, 2015).

A 2019 study by *amicus* U.S. Chamber of all multi-plaintiff product-liability trials in federal court MDL proceedings during the previous ten years found similarly disparate trial outcomes. *See* U.S. Chamber Inst. for Legal Reform, *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings* (Oct. 2019), at 2.[4] Juries found in favor of plaintiffs over 78% of the time in multi-plaintiff MDL trials, compared to under 37% in single-plaintiff MDL trials. *See id.*; *see also* U.S. Chamber Inst. for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* (May 2024), at 38 ("Several of the largest verdicts in the nation during the past decade occurred after a trial judge consolidated unrelated plaintiffs' product liability actions.").[5]

And a newly published law review article built on these earlier studies in examining outcomes in multi-plaintiff product-injury trials over the past two decades. This analysis, which examines a larger data set of cases, found that trial consolidations "substantially skew trial outcomes," with juries returning

[4] https://instituteforlegalreform.com/research/trials-and-tribulations-contending-with-bellwether-and-multi-plaintiff-trials-in-mdl-proceedings/

[5] https://instituteforlegalreform.com/research/nuclear-verdicts-an-update-on-trends-causes-and-solutions/

a plaintiffs' verdict over 85% of the time in such multi-plaintiff cases. Christopher E. Appel, *The Consolidation Prize: An Analysis of Multi-Plaintiff Product Injury Trials*, 47 Am. J. Trial Advoc. 225, 225, 233 (2024). The analysis also found the multi-plaintiff verdict amounts equally staggering in terms of total award and average per plaintiff awards, which appear to far exceed verdicts in comparable single-plaintiff trials. *See id.* at 235-38. In addition, over one-third of the verdicts in which plaintiffs prevailed "raise an eyebrow because the jury awarded unrelated plaintiffs identical, or nearly identical, damages," a finding that "may evidence juror confusion or bias, or both, because the jury, after hearing different evidence pertaining to each plaintiff's unique claims, resolved to treat these dissimilar plaintiffs the same, or virtually the same, when determining liability and awarding damages." *Id.* at 238.

These consistent and pervasive findings explain why judges who once embraced trial consolidation later reversed course, finding that the practice "raised concerns regarding due process." Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 108 (2013); *see also* Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 Nev. L.J. 1445, 1477 (2015).

C. Consolidation Poses Additional, Unique Risks of Unfair Prejudice with Respect to Claims for Punitive Damages

Claims for punitive damages exacerbate the serious due-process problems with consolidated multi-plaintiff trials. When a jury considers such

claims, consolidation poses a heightened threat to defendants' constitutional fair-trial rights because the U.S. Constitution's Due Process Clause "requires States to provide assurance" that a jury's punitive damages verdict is tailored to the facts of each specific plaintiff's case. *Williams*, 549 U.S. at 355.

In *Williams*, the U.S. Supreme Court held that "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 nonparties[,] . . . those who are, essentially, strangers to the litigation." *Id.* at 353. As a result, *Williams* further held, "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." *Id.* at 357.

Joint plaintiffs are "strangers" to each other's cases. Allowing a jury to hear evidence in a consolidated multi-plaintiff trial regarding each plaintiff's individualized factual allegations and legal theories, and potentially determine punitive damages to one plaintiff based on allegations to another, "would add a near standardless dimension to the punitive damages equation." *Id.* at 354. Because juries are likely to blur distinctions between each plaintiff's separate cases in a joint trial, consolidation contradicts *Williams*. "Under current Supreme Court precedent, consolidating plaintiffs' cases for trial when plaintiffs assert punitive damages claims is quite likely a *per se* constitutional violation." Beck, *supra*, 53 No. 9 DRI For The Def. at 33.

II. Consolidation Does Not Further Judicial Economy

Some courts initially considered consolidation under the mistaken understanding that it would provide an efficient means to clear their dockets

faster, but these courts quickly found that any purported efficiency gains were often "exaggerated" and "illusory." *Scaramuzzo v. American Flyers Airline Corp.*, 260 F. Supp. 746, 749, 750 (E.D.N.Y. 1966). Courts learned through experience that, in the aggregate, individual trials are more efficient than multi-plaintiff trials and more effective for managing their dockets. For this reason, in addition to the substantial prejudice problems discussed above, courts increasingly reject consolidated multi-plaintiff trials.

As one federal district court explained, combining for trial "plaintiffs who have no connection to each other *in no way* promotes trial convenience or expedites the adjudication of asserted claims." *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) (cleaned up, emphasis added). Consolidated trials generate voluminous evidence to prove facts and legal theories in each case, along with the defendant's individualized defenses. As a result, another federal district court recognized, "allowing all of the Plaintiffs to join together in a single action and single trial" does not actually "enhance judicial economy" as intended because "[i]t would be practically impossible for a jury to keep track of all of the facts and applicable law regarding each of [multiple] plaintiffs." *Adams v. Alliant Techsys., Inc.*, No. 7:99cv00813, 2002 WL 220934, at *2 (W.D. Va. Feb. 13, 2002). "Judicial resources are wasted, not conserved, when a jury is subjected to a welter of evidence relevant to some parties but not others." *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547, 551 (W.D. Wis. 1999). Consolidated trials accordingly can take up more trial time *per*

plaintiff than individual trials. *See Matter of New York City Asbestos Litig. (Abrams v. Foster Wheeler Ltd.)*, No. 108667/07, 2014 WL 3689333, at *4 (N.Y. Sup. July 18, 2014) (observing that, in "13 asbestos trials in New York County, those with only one plaintiff lasted up to two weeks each, whereas those with more lasted as long as 16 weeks").

In addition, consolidation policies like the Cook County policy at issue here can *worsen* strain on local dockets, rather than alleviate it. Such a policy makes a jurisdiction an especially attractive forum for plaintiffs, encouraging the filing of *more* cases there, as plaintiffs' lawyers seek to take advantage of the prejudicial effect of group trials. For years, the judiciary has "tried and failed" with various consolidation experiments seeking to capture this elusive efficiency. Robreno, 23 Widener L.J. at 108. But such efforts only provoked more claims: "However well-intentioned, these experiments 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." James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 232 (2006).

This claims-promoting effect holds true for both large and small consolidations. *See Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings*, *supra*, at 9-12 (reporting that seven multi-plaintiff product-liability MDL trials between 2010 and 2019, most of which resulted in large verdicts, included between two and six plaintiffs); Ableman, et al., *supra*, 30-7 Mealey's Litig. Rep. Asb. at 21 (reporting NYCAL's

multi-plaintiff trials between 2010 and 2014, which produced larger per plaintiff verdicts, typically included two or three plaintiffs at start of trial). As Professor Francis McGovern summarized, "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).

After decades of experience, "the federal and state courts, legislative and judicial branches, appellate and trial benches, in nearly every region of the country, all conclude that consolidation of mass tort claims is ineffective." *In re Asbestos Personal Injury & Wrongful Death Litig. Global*, No. 24-X-87-048500, 2014 WL 895441, at *19 (Md. Cir. Ct. Baltimore City Mar. 5, 2014). This reexamination by courts has resulted in fewer consolidations and greater individualized trials—not only because the latter safeguards defendants' constitutional right to a fair trial, but also because individualized trials requiring claims to succeed solely on their distinct merits are often the most efficient option for managing crowded dockets. The trial-consolidation order in this litigation—along with similar orders in other Cook County cases issued pursuant to the Acting Presiding Judge's newly announced policy—unwisely rejects these hard-learned lessons. This Court should heed those lessons and protect Defendant's due-process rights.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant Abbott's Motion for a Supervisory Order and vacate the trial-consolidation order.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ILLINOIS CHAMBER OF COMMERCE, NATIONAL ASSOCIATION OF MANUFACTURERS, ILLINOIS MANUFACTURERS' ASSOCIATION, PRODUCT LIABILITY ADVISORY COUNCIL, INC., AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

By: */s/ David B. Goodman*
David B. Goodman (ARDC # 6201242)
GOODMAN LAW GROUP
20 N. Clark Street, Suite 3300
Chicago, IL 60602
(312) 626-1888
dg@glgchicago.com

Of Counsel:

Philip S. Goldberg (pgoldberg@shb.com)
Christopher E. Appel (cappel@shb.com)
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400

Counsel for Amici Curiae

December 16, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 345 (Briefs Amicus Curiae) and 383 (Motions for Supervisory Orders). The foregoing brief additionally conforms to the general brief requirements of Rule 341. The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 4,881 words.

Dated: December 16, 2024 */s/ David B. Goodman*