

# Consolidation: Tempering the Temptation for Judicial Economy

By Eric Hudson and Ben Scott

Rule 42(a) of the Federal Rules of Civil Procedure, which permits the consolidation for trial of “actions involving a common question of law or fact,” can be an effective tool for trial judges attempting to manage mass torts. In the eyes of the court, consolidation provides an opportunity to try many cases at once and possibly clear a series of cases from a court’s docket. Where there are hundreds or even thousands of related cases pending, consolidation may serve to resolve common issues of law or fact that ultimately lead to the disposition or settlement of all the claims. However, consolidation is not without significant risks to the civil justice system. Consolidation can result in unfairness to parties — particularly defendants — when the number of cases tried and the amount of evidence presented pose the danger of confusing a jury. Verdicts in such circumstances are not the product of a properly reasoned examination of the evidence. Juror confusion from improper consolidation may result in bias for a plaintiff whose claim was consolidated with “stronger” plaintiffs’ claims, or persuasive evidence pertaining to only one plaintiff may be

mistakenly applied by a jury to the benefit of the other consolidated plaintiffs’ claims. In light of these significant concerns, this article examines recent case law on consolidation and discusses the risks trial courts face in overemphasizing judicial economy at the cost of juror confusion and unfairness to the parties.

it emphasized that the fundamental requirement for a trial court to consider in deciding whether to consolidate cases for trial is *fairness*.

In determining whether various claims are appropriate for consolidation, the dominant consideration in every case is

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## Basic Considerations for Consolidation

A case that is increasingly cited for the hazards associated with improper consolidation is *In re Van Waters & Rogers, Inc.*, and it provides a good example of the investigation courts should undertake when considering consolidation.<sup>1</sup> *Van Waters* involved the claims of 454 plaintiffs who all worked at the same manufacturing plant at various times over a 17-year period. Plaintiffs in *Van Waters* alleged exposure to a “toxic soup” of chemicals utilized at the plant, and they claimed various ailments from exposure including headaches, eye irritation, skin irritation and throat irritation. After discovery the trial court granted the plaintiffs’ motion to consolidate 20 of the plaintiffs’ individual cases for trial, and the Supreme Court of Texas accepted the defendants’ petition for a writ of mandamus.

On appeal the Texas Supreme Court analyzed existing law relating to the consolidation of mass torts. Importantly,

whether the trial will be fair and impartial to all parties. Consolidation should be avoided if it would cause confusion or prejudice as to render the jury incapable of finding the facts on the basis of the evidence. If an injustice will result from consolidated trials, a trial court has no discretion to deny separate trials.<sup>2</sup>

In the context of workplace exposure claims, the Texas court recognized several factors, now referred to as the “*Maryland*” factors, that courts routinely utilize to determine whether consolidation will result in injustice to the parties.<sup>3</sup> These factors include (1) whether the plaintiffs shared a common work site, (2) whether the plaintiffs shared similar occupations, (3) whether the plaintiffs had similar times of exposure, (4) whether the plaintiffs have a similar type of disease, (5) whether plaintiffs are alive or deceased, (6) the status of discovery, (7) whether all plaintiffs are represented by the same counsel, (8) the type of injury alleged and (9) the type of products to which the plaintiffs were

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exposed. Although specific to workplace exposure claims, variations of the *Maryland* factors could be utilized in any consolidation analysis.

The court in *Van Waters* also recognized the scholarship of Professor Francis McGovern and emphasized that trial courts should proceed with “extreme caution” when consolidating claims of immature mass torts.<sup>4</sup> Torts are generally considered to be “mature” only when there has been full and complete discovery, a number of jury verdicts and a persistent strength to the plaintiffs’ claims over a series of trials. A “toxic soup” case like the claims alleged in *Van Waters* had never been tried to verdict in Texas; as a result, the claims were immature. For such immature torts, the Texas court emphasized that trial courts have “less discretion to consolidate dissimilar claims and must proceed with *extreme caution*.”<sup>5</sup> With this recognition, the court then analyzed the facts against the *Maryland* factors and concluded that the majority of these factors weighed heavily against consolidation.

### Early Consolidation Poses Risks That May Be Difficult To Overcome

A year after *Van Waters*, the Supreme Court of Alabama reached a different conclusion on consolidation in *Ex Parte Flexible Products Co.*<sup>6</sup> *Flexible Products* involved the claims of 1,675 plaintiffs who alleged injury from exposure to isocyanate while employed as coal miners. These claims were originally filed as three lawsuits, and the plaintiffs then moved to consolidate all the claims for discovery and trial. The court granted the motion to consolidate and issued a case management order consolidating all the cases for discovery and trial although the claims encompassed numerous work sites, the plaintiffs had various occupations within the coal mines and the exposures occurred over a fairly long period with different claims of injury. The case management order also included a plan for an initial, “common issues” trial to consist of 27 plaintiffs. The common is-

ssues determined at that trial would apply in later trials on specific causation and damages for the remaining plaintiffs.

On the defendants’ petition for a writ of mandamus, the Alabama Supreme Court noted that the cases had not yet been set for trial, and that, in contrast to *Van Waters*, the consolidation order required a trial of issues common to all the actions rather than a consolidated trial of all the plaintiffs’ claims. Nonetheless, the Alabama court discussed *Van Waters* in great detail and emphasized that the trial court must recognize the considerations set forth in *Van Waters* as a means of avoiding prejudice in the common issues trial. Apparently important to the Alabama Supreme Court’s decision not

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to overturn the consolidation order was that the case management order only identified common issues that *might* be selected for the first consolidated trial. This recognition is at best only slightly reassuring since, as the decision pointed out, one of the common issues proposed to be tried (which would then potentially bind *all* the remaining individual plaintiffs) was general causation — i.e., whether exposure to isocyanates in mining operations caused the plaintiffs’ alleged health problems. Although not unexpected, it is unsettling that appellate courts apply less deference to a trial court’s consolidation ruling simply because the harm has not yet been done.

Another problematic aspect of *Flexible Products* is that nowhere in the decision did the court discuss whether the claims of coal-mining isocyanate exposure had reached maturity. As a result, the decision affirming consolidation is at odds with this caution from the Federal Judicial Center’s *Manual for Complex Litigation*:

If there are few prior verdicts, judgments, or settlements, additional information may be needed to determine whether aggregation is appropriate. The need for such information may lead a judge to require a number of single-plaintiff, single-defendant trials, or other small trials. These trials would test the claims of causation and damages and whether the evidence applies across groups, in order to provide the necessary information as to whether aggregation is appropriate, the form and extent of aggregation, and the likely range of values of the various claims.<sup>7</sup>

Although the Alabama court attempted to minimize the possible immaturity of the claims by emphasizing that the trial court’s order consolidated only the general liability phase of the trial, the court’s decision in *Flexible Products* presents the stark possibility of general causation in an immature tort being decided by a jury considering more than 20 consolidated claims.<sup>8</sup> Such use of consolidation invites the precise potential for unfairness that the court in *Van Waters* and Professor McGovern cautioned against.

Another risk highlighted by *Flexible Products* is that it is difficult for appellate courts to determine whether a jury’s verdict is the product of confusion related to unfair consolidation. Appellate courts generally will not disturb a consolidation order absent an abuse of discretion, and meeting this standard of review is difficult.<sup>9</sup> A notable exception, as well as an excellent example of the juror confusion that can result from improper consolidation, is *Malcolm v. National Gypsum Co.*<sup>10</sup> In *Malcolm* the trial court consolidated 48 asbestos cases for trial

on a reverse-bifurcation basis (i.e., damages were tried before liability). Twenty-five defendants appeared at the trial, and many of these defendants had numerous third-party claims against other parties. The damages trial lasted four months, and the liability phase lasted another six months. A number of the cases settled during trial, but two survived to a liability verdict after 10 months of trial. The jurors allocated 9 percent liability against one of the defendants, and on appeal this defendant pointed out significant differences between the proof related to exposure to its product versus the proof relating to a codefendant's product — which also received a 9 percent allocation of liability. Evidence about exposure to the appealing defendant's product was "vague, minimal and heavily circumstantial," while there was extensive evidence on exposure to the codefendant's product. The appellate court found this difference in proof "hard to explain" and concluded that "under the unique circumstances of this case, there is 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."<sup>11</sup> Whether the situation was "unique" or not, the significant error produced by consolidation in this case is clear: the jurors were inundated with 10 months of complicated trial evidence involving different defendants, different claims of exposure and different evidence, and their findings revealed a complete inability to distinguish significant differences between important evidence. That it may have taken an exactly equal — yet wholly incorrect — liability allocation to trigger reversal reveals how difficult it is for appellants to overcome incorrect consolidation orders.

### **Cautionary Jury Instructions and Sequenced Trials May Not Eliminate Prejudice**

Courts may attempt to eliminate juror confusion by giving explicit instructions and controlling the sequence of

the plaintiffs' claims. Although these "controls" may be sufficient in some cases, once a trial reaches a sufficient level of complexity it will be impossible for careful instructions or phased proof to prevent juror confusion. It is difficult, however, for parties seeking to avoid consolidation to convince a court that the complexities of a case tip the scales against consolidation. For example, in the recent cases of *Ex Parte Novartis Pharmaceutical Corporation*, the Alabama Supreme Court accepted a mandamus petition to determine whether a trial court's consolidation order should be vacated.<sup>12</sup> The consolidation order in

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*Novartis* required a joint trial of claims by the state against two pharmaceutical manufacturers for alleged fraud in Medicaid pricing. Although the court recognized the potential for confusion that was likely to result from a complex evidentiary record, it emphasized that cautionary jury instructions and "careful trial management" could avoid or "mini-mize" prejudice and juror confusion.

Importantly, the Alabama Supreme Court addressed the consolidation question in response to a writ of mandamus, and it recognized that appellate relief on a writ of mandamus was available only

where "there is no reasonable basis for controversy" about the right to relief. It is of course difficult to prove there is "no reasonable basis for controversy" about the likelihood of prejudice resulting from consolidation *before* a trial has taken place. As a result, parties opposing consolidation are placed in the difficult position of having to demonstrate either (a) the clear prejudice that will result from consolidated trials before they take place or, (b) in the event relief is sought after trial, that the trial court abused its discretion in ordering consolidated trials. These are high hurdles for relief, and the review standards underscore the importance for the trial court proceeding cautiously when considering consolidation.

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Litigants' rights to have a jury consider evidence fairly and without confusion should not be overridden by the interests of judicial economy.

### **Implications of Rule 403 on Consolidation**

Rule 403 of the Federal Rules of Evidence, which permits the exclusion of certain evidence if its "probative value is substantially outweighed" by unfair prejudice or confusion, is instructive for courts considering consolidation. Just as the *Maryland* factors are utilized to determine if the facts of a number of cases are too complicated to permit fair consolidation, Rule 403 is the standard for determining if specific evidence will result in confusion. In the context of consolidation, a useful analogy from Rule 403 is testimony by coworkers about alleged injuries caused by the same or similar workplace exposure.

For example, in a single plaintiff case involving harm allegedly caused by exposure to some product in the workplace,

a plaintiff may try to offer coworker testimony about the coworker's exposure to the same product allegedly resulting in comparable injuries. The coworker's testimony could result in the need for individual "mini-trials" where the coworker's treating physicians would be called as witnesses and evidence of the coworker's exposure history would be examined. Under Rule 403, evidence of the coworker's exposure and injury is likely to result in a confusion of the issues, and such testimony is often excluded.<sup>14</sup> By analogy, the same analysis applies under Fed.R.Civ.P. 42(a): individual claims alleging injuries from various workplace exposures may present a complex array of evidence on causation, product identification and types of injuries. The more disparate this evidence, the less "fair" consolidation becomes.

The interplay between Rule 403 and Fed.R.Civ.P. 42(a) often arises in the same case. For example, in *Green v. City of Coon Rapids*, the Minnesota Court of Appeals affirmed a trial court's decision not to consolidate cases in which multiple plaintiffs brought exposure-based suits against a municipality based on exposure to nitrogen dioxide from an ice-resurfacing machine at a public arena.<sup>15</sup> Crucial to the trial court's analysis was that conditions at the arena varied from day to day, and various plaintiffs were in the arena at different times. Thus, each day's particular circumstances had to be examined in order to address a given plaintiff's claim of damaging exposure. Despite every plaintiff claiming harm from nitrogen dioxide at the same arena, the trial and appellate courts agreed that the numerous claims, the differing conditions associated with each exposure, and the great quantity of evidence specific to each individual plaintiff would be unduly confusing in a single trial.

Applying Rule 403, the court of appeals affirmed the trial court's decision during the separate trials to exclude evidence or testimony about injuries and symptoms suffered on days other than those of a particular plaintiff's exposure.

Concerned that proof of harmful levels of nitrogen dioxide on one particular occasion might prejudice the jury about the risk on the precise day or time at issue, the court affirmed the exclusion of evidence of similar alleged injuries. The court's conclusion under Rule 403 is consistent with its decision to deny consolidation. Just as the consolidation of different plaintiff's cases would result in juror confusion, the presentation of evidence of other nonparty plaintiffs' exposures and injuries would result in the same confusion. The analysis under Rule 403 and Fed.R.Civ.P. 42(a) is similar, and parties should consider relying on both rules when attempting to eliminate prejudice resulting from juror confusion.

The potentially prejudicial effect of evidence concerning other allegedly injured individuals was also addressed by the Supreme Court of South Carolina in *Whaley v. CSX Transportation, Inc.*, in which a railroad operator filed suit because of alleged exposure to excessive heat in a locomotive.<sup>16</sup> Though consolidation was not at issue, the trial court permitted evidence of other nonparty employees' complaints about the excessive temperatures in locomotive cabs. The trial court allowed the plaintiff to present evidence that between 1984 and 2000, the railroad company received 97 employee complaints related to excessive heat and that 18 railroad employees suffered heat stroke during that period. Relying on Rule 403, the Supreme Court of South Carolina held that the trial court wrongly admitted the evidence because the plaintiff did not establish that the other incidents "stemmed from the same or similar circumstances" as his alleged injuries. As in *Green v. City of Coon Rapids*, the similarity of the alleged injuries, while apparent, was not strong enough to negate the risk of prejudice to the jury.

### Conclusion

Litigants facing proposed consolidation orders must educate the trial judge about

the risks associated with juror confusion and the procedures utilized to examine the propriety of consolidation. There are limits to consolidation under Fed.R.Civ.P. 42(a), and courts must be cognizant of the very real threat posed by juror confusion in consolidated cases involving complex evidence. The mass filing of allegedly related claims does not trigger any lowering of the procedural bars intended to provide all litigants a level playing field. Courts must refuse to allow crowded dockets to outweigh procedural fairness. ♣

### Endnotes

- 1 145 S.W.3d 203 (Tex. 2004).
- 2 *In re Van Waters*, 145 S.W.3d at 207 (internal quotations and citations omitted).
- 3 The "Maryland" factors arise from an unreported federal district court decision, *In re All Asbestos Cases Pending in the United States District Court for the District of Maryland*, slip op. at 3 (D.Md. Dec 16, 1983) (en banc).
- 4 See Francis McGovern, "An Analysis of Mass Torts for Judges," 73 *Tex. L. Rev.* 1821, 1843 (1995).
- 5 *In re Van Waters*, 145 S.W.3d at 208 (emphasis added).
- 6 915 So.2d 34 (Ala. 2005).
- 7 *Manual for Complex Litigation (Fourth)*, § 22.314 (2004).
- 8 The Alabama Supreme Court devoted significant discussion to the potential use of nonmutual, offensive collateral estoppel by plaintiffs that were not parties to the initial, common issues trial. See *Ex Parte Flexible Products Co.*, 915 So.2d 34, 45-49 (Ala. 2005). Although a discussion of the potential erosion of the "mutuality" requirement for offensive collateral estoppel is beyond the scope of this paper, for a recent discussion of the implications of offensive

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## **LaRussa's Dilemma: Does an Advocate Have a Duty to the Client to Press Every Advantage?**

### **Endnotes**

- 1 J. Marshall, "Tony LaRussa's World Series Ethics," <http://www.ethicsscoreboard.com/list/larussa.html> (October 25, 2006).
- 2 Model Rule 1.2(a); RLGL §22.
- 3 RLGL§22 comment e, *citing, inter alia, Davis v. Black*, 406 So. 2d 408 (Ala. Civ.Ct. 1981) (stipulation that

client's case will be governed by result in "test case" is unethical).

- 4 For the "Lawyer's Creed", see, e.g., <http://www.lafj.org/la/index.cfm?event=showPage&pg=Lawyers%20Creed> (Louisiana); [http://www.dallasbar.org/dbf/printable\\_creed.asp](http://www.dallasbar.org/dbf/printable_creed.asp) (Dallas, Texas); [http://www.msbar.org/2\\_lawyers\\_creed.php](http://www.msbar.org/2_lawyers_creed.php) (Mississippi).
- 5 RLGL §23, comment c.
- 6 RLGL §21, comment e.
- 7 RLGL §21, comment e.
- 8 RLGL §21(1).

- 9 RLGL §23, comment c.
- 10 RLGL §21, Illustration 1.
- 11 See J. Heyman, "All the right moves: LaRussa's easily been best manager of postseason," *Sports Illustrated*, [http://sportsillustrated.cnn.com/2006/writers/jon\\_heyman/10/25/larussa.game3/index.html](http://sportsillustrated.cnn.com/2006/writers/jon_heyman/10/25/larussa.game3/index.html), (October 25, 2006).
- 12 Indeed, Durocher won only one World Championship, in 1954; LaRussa has won twice, in 1990 and 2006, and is still an active manager.

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## **Using Demonstrative Evidence to Win**

### **Endnotes**

- 1 Roy Kreiger, "Now Showing At A Courtroom Near You," 78 *American Bar Association Journal* 92 (Dec. 1992).
- 2 Bloom Strategic Consulting, Inc., a litigation and communication strategy firm, [www.bloomstrategy.com](http://www.bloomstrategy.com).
- 3 See William S. Bailey, "Lessons From 'L.A. Law' Winning Through Cinemagraphic Techniques," *Trial*, Aug. 1991, at 98.
- 4 Roy Krieger, "Now Showing at a Courtroom Near You," 78 *A.B.A.J.* 92 (Dec. 1992).

- 5 H. Weiss and J. B. McGrath, *Technically Speaking: Oral Communication for Engineers, Scientists and Technical Personnel*, New York: McGraw-Hill 1963.
- 6 "To a Mouse," by Robert Burns: ("The best laid schemes o' mice an' men / Gang aft a-gley.").
- 7 See Federal Rules of Evidence 403; Tex. R. Civ. Evid. 403; *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998).
- 8 See Robert D. Brain and Daniel J. Broderick, "Demonstrative Evidence: Clarifying its Role at Trial," *Trial*, Sept. 1994, at 74; "The Derivative Relevance of Demonstrative Exhibits: Charting its Proper Evidentiary Status," 25

*U.C. Davis L. Rev.* 957, 968 (1992).

- 9 See *Goff v. Continental Oil Co.*, 678 F.2d 593, 596 (5th Cir. 1982).
- 10 Federal Rules of Evidence 104.
- 11 Federal Rules of Evidence 403.
- 12 Tex. R. Evid. 1006.
- 13 *Baylor Med. Plaza Servs. Corp. v. Kidd*, 834 S.W.2d 69 (Tex. App.—Texarkana 1992, writ denied).
- 14 *Victor M. Solis Underground Utility & Paving Co. v. Laredo*, 751 S.W.2d 532 (Tex. App.—San Antonio 1988, writ denied).
- 15 *Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981) (internal citations omitted).

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collateral estoppel in the mass tort context, see Byron G. Stier, "Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts" (2008), available at [http://works.bepress.com/byron\\_stier/2](http://works.bepress.com/byron_stier/2).

- 9 See, e.g., *Johnson v. Celotex Corp.*,

899 F.2d 1281, 1285 (2nd Cir. 1990) (where trial court considered *Maryland* factors in effort to ensure that each plaintiff's claim was considered separately by jury, no abuse of discretion).

- 10 995 F.2d 346 (2nd Cir. 1993).
- 11 *Malcolm*, 999 F.2d at 352.
- 12 \_\_\_ So.2d \_\_\_ (Ala. 2008), 2008 WL 1759109 (Ala. April 18, 2008).
- 13 *In re Repetitive Stress Injury*

*Litigation*, 11 F.3d 368, 373 (2nd Cir. 1993) (quoting *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2nd Cir. 1992).

- 14 See *Whaley v. CSX Transportation, Inc.*, 609 S.E.2d 286 (S.C. 2005).
- 15 *Green v. City of Coon Rapids*, 485 N.W.2d 712, 714-16 (Minn. App. 1992).
- 16 *Whaley v. CSX Transportation, Inc.*, 609 S.E.2d 286 (S.C. 2005).