

CHAPTERS

AGGREGATION: AN ESSENTIAL TOOL IN ACHIEVING IMPERATIVE ENVIRONMENTAL ENFORCEMENT, PROTECTION, AND JUSTICE

BY

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Climate change is no longer a distant threat. The effects from environmental degradation, exorbitant greenhouse gas emissions, and the exploitation of our natural resources are inducing catastrophic tragedies that were once preventable. For the last four decades, between 1980–2021, the United States averaged seven weather disasters per year. In 2021, there were 20 weather disasters in the United States alone. 724 lives were lost, and the cost of the damage was in the billions.

*We must face the reality that we have financially incentivized industry to pollute and violate environmental regulations. The recent U.S. Supreme Court decision in *West Virginia v. EPA* devastated the effectiveness of EPA’s regulatory development and enforcement powers. It is now inadequate to rest our societal well-*

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being on the hope that environmental regulations are properly developed and enforced, or on the naïve belief that technological advancements are adequately and equitably implemented. Despite the dire situation we face, entrenched with unavoidable harms due to our inaction, there remains time for us to take effective action and evade mounting loss of livelihoods, cultures, biodiversity, infrastructure, and life.

To secure a livable future for all, especially the most vulnerable, we must implement ambitious, innovative, and intersectional solutions. One such solution is aggregate litigation, which has the power to influence industry practices, enforce environmental regulations, achieve justice for disenfranchised communities, provide remedy for injured parties, and protect our environment. In light of the “Clean Diesel” litigation, industry is now aware that it can be more expensive to pollute than to internalize pollution-reduction costs.

Unconventional aggregate litigation achieves our conventional environmental goals. Consumer class actions can hold industry accountable for greenwashing and reward the environmentally conscious consumer. Mass torts in response to environmental disasters can take significant strides towards achieving the greatest remedy possible for those injured and facilitate the restoration of the damaged environment. Nuisance class actions against polluting facilities can achieve justice for communities that were otherwise left without viable recourse. Antitrust class actions can hold the oil industry accountable for responding transparently and accurately to our societal shift away from fossil fuels.

Other solutions must advance in tandem, but if we continue to underutilize the power within aggregate litigation, we will continue to allow our society to face pervasive, devastating, and preventable tragedies.

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I. INTRODUCTION

A recent Supreme Court decision severely constrained the United States Environmental Protection Agency’s (EPA) ability to enact and enforce nationwide, systemic changes to combat climate change.¹ In *West Virginia v. EPA*,² the Supreme Court applied a new and expansive form of the “major questions” doctrine to limit EPA’s authority to regulate greenhouse gas emissions.³ Chief Justice Roberts, despite conceding that regulatory caps on carbon dioxide emissions, to the extent that it forces a nationwide transition away from coal, may be a “sensible solution to the crisis of the day,” concluded that EPA does not have the authority to adopt such a regulatory scheme.⁴ Chief Justice Roberts reasoned that “[a] decision of such magnitude and consequence

¹ David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, STANFORD LAW SCHOOL BLOG: LEGAL AGGREGATE (July 6, 2022), <https://perma.cc/47PJ-238U>.

² 142 S. Ct. 2587 (2022).

³ *Id.* at 2614–2616.

⁴ *Id.* at 2616.

rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”⁵

As a result of *West Virginia*, the Supreme Court devastated EPA’s power to fight climate change in ruling that the agency lacked clear authority to regulate on a major question of policy.⁶ Thus, going forward, the ability to address climate change, an issue that involves major questions of policy, through the development and enforcement of regulations is contingent on supportive actions promulgated by Congress and the states.⁷ Stanford Law Professor David Freeman Engstrom described the effect of *West Virginia* on the American climate regulatory framework as “bleak” given that “Congress is so polarized it’s paralyzed, and states and municipalities are hobbled by their limited reach, inadequate funding, and piecemeal authority.”⁸ *West Virginia* critically proves that it is not possible for us to viably combat climate change and secure a livable future for all if we are reliant on EPA’s enforcement and development of environmental regulations.

Despite the proliferation of environmental laws and regulations in the recent decades, prior to *West Virginia*, pollution, declining biodiversity, and climate change persevere.⁹ The Secretary-General of the United Nations refers collectively to these problems as the “triple planetary crisis,” and considers it society’s “number one existential threat.”¹⁰ Unless we strengthen enforcement of environmental rules and find other mechanisms to hold liable parties accountable, preventable tragedies and harms will persist no matter how seemingly rigorous our environmental rules are.¹¹

The triple planetary crisis requires diverse and intersectional solutions.¹² In the aftermath of *West Virginia*, EPA’s stifled regulatory powers makes it critical that we utilize solutions outside of the expansive major questions doctrine’s reach. One such solution is aggregate litigation. To protect and promote our societal well-being while negotiating this crisis, we must align the solutions we need with the best interests of the market. As Judge Ambro powerfully said in another context, we are in an urgent situation and cannot, “risk making

⁵ *Id.*

⁶ *Id.* at 2614.

⁷ Freeman Engstrom & Priddy, *supra* note 1.

⁸ *Id.*

⁹ *Environmental Laws Impeded by Lack of Enforcement, First-Ever Global Assessment Finds*, INT’L INST. FOR SUSTAINABLE DEV. (Jan. 29, 2019), <https://perma.cc/4GSF-SBLQ>.

¹⁰ U.N. Secretary-General, Opening Remarks at Press Encounter on the Appointment of the Secretary-General of the United Nations to a Second Term of Office (June 18, 2021), <https://perma.cc/XA8G-6GQ4>.

¹¹ *Id.*

¹² See Fernando Coimbra, *The Triple Planetary Crisis: Forging a New Relationship Between People and the Earth*, UNITED NATIONS ENV’T PROGRAMME (July 14, 2020), <https://perma.cc/4NEW-NJNH> (advocating for an approach to the ‘triple planetary crisis’ that “break[s] down the siloes [sic] that characterize global environmental cooperation”).

the perfect the enemy of the good.”¹³ “The United States has a deeply ingrained market-based system.”¹⁴ As a result, industry balances the costs associated with the choice to pollute or not.¹⁵ The former often prevails as enforcement falls short of deterring injurious conduct and protecting our environment.

Private aggregate litigation performs an important public service: it aligns self-interest with societal well-being.¹⁶ Aggregate litigation involves numerous plaintiffs with claims against the same defendants.¹⁷ This Chapter explores aggregate litigation devices, bringing attention to the immense power aggregate litigation wields. Even in pursuit of unconventional claims not typically aligned with environmental issues, aggregate litigation can execute environmental enforcement, remedy harm done to our environment and communities, and influence industry to adopt environmentally compliant practices.¹⁸

The Volkswagen “Clean Diesel” litigation (Clean Diesel)¹⁹ illustrates aggregate litigation’s success in achieving environmental enforcement and protection. The Clean Diesel litigation encompasses a multidistrict litigation (MDL) which includes a securities fraud class action; consumer class actions and government actions; and independent aggregate litigations such as the recent Ninth Circuit

¹³ *In re Nat’l Football League Players Concussion Inj. Litig. (NFL Concussion)*, 821 F.3d 410, 447 (3d Cir. 2016).

¹⁴ Roger W. Ferguson, Jr. & Robert E. Rubin, *Robert E. Rubin: The Challenges and Future of Capitalism in the United States*, COUNCIL ON FOREIGN RELATIONS (Jan. 20, 2022, 2:29 PM), <https://perma.cc/T25N-R2B9>; Cf. Wayne B. Gray, *Environmental Regulations and Business Decisions* 6–7, IZA WORLD OF LABOR (Sept. 2015), <https://perma.cc/34X8-E7AM> (analyzing how pollution regulations influence business decisions in the United States).

¹⁵ *Id.*

¹⁶ David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305, 307 (2014).

¹⁷ AM. L. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02(a) (2010).

¹⁸ See Alexandra Cunningham & Meredith Daly, *Litigation Forecast for PFAS-Containing Consumer Products*, J. PROD. LIAB., Mar. 10, 2021, at 1–2, WL (discussing significant risk of PFAS litigation wave, including through massive tort litigation); see also *Our Amicus Brief Was Cited in a Federal Court Decision Affirming the Right of Communities to Stand Up to Polluting Industry*, PUB. INT. L. CTR. (July 13, 2020), [hereinafter *PILC Amicus Brief*] <https://perma.cc/L4CV-37VH> (“[T]he nuisance class action is a crucial mechanism for relief from environmental harms suffered by the communities we serve: communities facing discrimination, inequality, and poverty.”); see also Yassin Denis Bouzzine & Rainer Lueg, *The Contagion Effect of Environmental Violations: The Case of Dieselgate in Germany*, 29 BUS. STRATEGY & THE ENV’T 3187, 3198 (2020) (stating that the mass litigation, “Dieselgate,” “serve[s] as a good example that complying with environmental regulations matters and violating them is costly”).

¹⁹ See *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018) (summarizing the history of the litigation).

case.²⁰ This recent case is a securities fraud class action and is one of the latest aggregate litigations pursued under the Clean Diesel litigation.²¹

The Clean Diesel litigation is an example of the power of the courts, federal and state regulators, and of aggregate litigation to stop injurious conduct and protect the environment.²² In less than a year, parties agreed to a robust settlement including requirements that Volkswagen pay \$2.7 billion to support the reduction of NOx in the atmosphere, \$2 billion towards promoting non-polluting cars, and restitution on top of the vehicle value to more than 500,000 owners of the vehicles at issue, with the option to have the vehicle altered to original emission rates as advertised, or better.²³ The MDL was able to remove 98% of the 500,000 excessively polluting vehicles around the country from the road.²⁴ In addition to the environmentally-focused settlement provisions, because of the Clean Diesel litigation industry learned that “complying with environmental regulations matters and that violating them is costly.”²⁵ It has now been dramatically demonstrated that violating environmental regulations to obtain business advantages can invoke devastating legal and financial consequences, and that stock markets can provide financial incentives for firms to act in an environmentally conscious way.²⁶ Aggregate litigation thus empowered stock markets as a corporate governance mechanism for environmental compliance.²⁷

The Clean Diesel litigation made more progress towards addressing our societal triple-crisis than many previous efforts combined. In addition to securities-fraud, consumer class actions, and the MDL device used in Clean Diesel, aggregate litigation devices also involve claims that address mass torts, environmental disasters, antitrust claims, common law claims, and regulatory violations.²⁸ These claims pursued in the aggregate attain essential environmental enforcement, protection, and justice.

²⁰ *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig. (3.0-Liter Settlement)*, MDL No. 2672 CRB (JSC), 2017 WL 2212783, at *1–3 (N.D. Cal. May 17, 2017).

²¹ *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig. (In re Volkswagen “Clean Diesel”)*, 2 F.4th 1199, 1202 (9th Cir. 2021).

²² Elizabeth Cabraser, GUEST LECTURER, PROFESSOR ROBERT KLONOFF’S COMPLEX LITIGATION CLASS at 1:20:30 (Mar. 7, 2022) (“I think [Clean Diesel] is a tremendous accomplishment just in terms of what courts can do to stop wrongful conduct, to stop damaging or injurious conduct, and to protect the environment.”).

²³ Order Granting the United States’ Motion to Enter Proposed Amended Consent Decree at 2–4, 7, 11, *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030 (N.D. Cal. 2018), *aff’d in part, rev’d in part*, 959 F.3d 1201 (9th Cir. 2020) (No. 15-md-02672-CRB, Doc. No. 2103).

²⁴ See Cabraser, *supra* note 22, at 1:15:00, 1:16:38 (“[W]e were able, within a year, to get 98% of the [roughly half a million] vehicles off of the road.”).

²⁵ Bouzzine & Lueg, *supra* note 18, at 3198.

²⁶ *Id.*

²⁷ *Id.*

²⁸ ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 1 (4th ed. 2017) (noting the vast range of legal areas in which aggregate litigation devices play a central role).

II. OVERVIEW OF AGGREGATION DEVICES

Aggregate litigation is an important and dynamic area of law. It utilizes many aggregate devices, including class actions under the Federal Rules of Civil Procedure and transfers pursuant to the multidistrict litigation statute.²⁹ This Part breaks down the critical components within the class action aggregation device as it pertains to environmental law and concludes with a brief discussion on the factors within multidistrict litigation that make it one of the most important aggregation devices in the federal system today.

A. Class Actions

The federal system and nearly all state systems permit class actions.³⁰ This Chapter focuses on federal class actions, which abide by Rule 23 of the Federal Rules of Civil Procedure (Rule 23).³¹ Courts generally require that the proposed class representatives satisfy four threshold requirements to achieve certification: (1) the existence of a definable class; (2) the presence of at least one representative who is a member of the class; (3) the existence of a live claim; and (4) the existence of standing under Article III of the Constitution.³² Also, the proposed class representatives must satisfy all the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—along with the requirements for one of the three subdivisions of Rule 23(b).³³ Rule 23(e) and (c)(4) are effective provisions within Rule 23 that optimize the effectiveness of aggregate litigation.

1. Rule 23(a)(1–4): Prerequisite Requirements for Class Certification

Failure to satisfy any of the four federal class action requirements under Rule 23(a) is fatal to class certification.³⁴ “Numerosity” under Rule 23(a)(1) provides that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the class is so numerous that joinder of all members is impracticable.”³⁵ “Adequacy” under Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interest of the class.”³⁶ The courts seek to uncover conflicts of interest between class representatives and the class they seek to represent, and analyze the class counsel to

²⁹ See *id.* at 1, 953 (explaining various aggregate devices). Although not discussed in this Chapter, bankruptcy and consolidation under Rule 42 are also aggregation tools.

³⁰ Timothy G. Cameron et al., *The Class Actions Law Review: USA*, in CLASS ACTIONS L. REV. 1 (5th ed., 2021).

³¹ FED. R. CIV. P. 23.

³² KLONOFF, *supra* note 28, at 35.

³³ *Id.* at 72–73, 159.

³⁴ *Id.* at 35.

³⁵ *Id.* at 73.

³⁶ *Id.* at 115.

determine if they will represent the interests of the entire class and if they are qualified, experienced, and capable.³⁷ “Commonality” under Rule 23(a)(2) requires a demonstration of “questions of law or fact common to the class.”³⁸ “Typicality” under Rule 23(a)(3) requires that plaintiffs demonstrate that the claims or defenses of the representatives are “typical of the claims or defenses of the class.”³⁹

2. Rule 23(b)(1–3): Categories of Maintainable Class Actions

In addition to Rule 23(a), a class action must meet the criteria of at least one of the categories within Rule 23(b).⁴⁰ Class actions under (b)(1) include an optional notice procedure and prohibit opt-outs,⁴¹ and are permissible when gathering all similarly situated parties in one proceeding is necessary to protect the defendant from inconsistent adjudications, or to protect the rights of absent class members.⁴² Environmentally relevant Rule 23(b)(1) cases include litigations of the rights and duties of riparian owners, or of landowners’ rights regarding a nuisance.⁴³

Rule 23(b)(2) covers classes seeking injunctive relief.⁴⁴ This category does not have a notice requirement or opt-out rights for class members.⁴⁵ Rule 23(b)(2) imposes two related requirements: (1) the defendant acted or refused to act on grounds that apply generally to the class, and (2) final injunctive relief is appropriate for the entire class.⁴⁶ Environmentally relevant Rule 23(b)(2) cases include consumer class actions that incriminate greenwashing.⁴⁷

Rule 23(b)(3) is the category commonly invoked as a basis for class certification.⁴⁸ The procedural protections serving a Rule 23(b)(3) class include mandatory notice and the right to opt out.⁴⁹ A class action under Rule 23(b)(3) requires satisfaction of (1) the “predominance” requirement, where questions of law or fact common to class members

³⁷ *Id.* at 115, 135.

³⁸ *Id.* at 86.

³⁹ *Id.* at 103.

⁴⁰ *Id.* at 159.

⁴¹ *Id.* at 386.

⁴² *Id.* at 160, 172.

⁴³ FED. R. CIV. P. 23 advisory committee’s note on Clause A (1966).

⁴⁴ KLONOFF, *supra* note 28, at 190.

⁴⁵ *Id.* at 200.

⁴⁶ *Id.* at 159.

⁴⁷ *E.g.*, Cunningham & Daly, *supra* note 18, at 2 (discussing ongoing litigation against companies misrepresenting the environmentally friendly nature of their products in violation of consumer protection laws). Greenwashing is generally defined as unsubstantiated or misleading claims regarding an actor’s environmental performance. LISA BENJAMIN ET AL., THE CLIMATE SOCIAL SCIENCE NETWORK RESEARCH REPORT 2022:1: CLIMATE-WASHING LITIGATION: LEGAL LIABILITY FOR MISLEADING CLIMATE COMMUNICATIONS 3 (2022), <https://perma.cc/4572-JX4K>.

⁴⁸ KLONOFF, *supra* note 28, at 211–12.

⁴⁹ *Id.* at 200.

predominate over questions affecting only individual members, and (2) the “superiority” requirement, where the class action device is superior to other available methods for fairly and efficiently resolving the case.⁵⁰

3. Rule 23(e) & *Amchem*: Settlement Class Certification

In December 2018, “various amendments to Rule 23 were adopted relating to class settlements.”⁵¹ Amended Rule 23(e) requires parties seeking settlement to obtain court approval and includes detailed criteria for a court to consider in reviewing the fairness of a settlement.⁵² Before a court may approve a proposed settlement, it must now consider factors such as if the relief provided for the class was adequate, taking into account the costs, risks, and delay of trial, the terms of proposed attorney’s fees, and objections to the proposed settlement made by class members.⁵³ If objecting class members could have opted out but did not, then a court would weigh that fact in favor of finding the settlement fair, reasonable, and adequate.⁵⁴

In *Amchem*,⁵⁵ the Supreme Court held that when a class certification and class-wide settlement are sought simultaneously, plaintiffs must still satisfy all the requirements of Rule 23, including the predominance requirement in a (b)(3) settlement class.⁵⁶ The Court also carved out an exception in its opinion, in which mass torts can satisfy predominance and subsequently receive settlement class certification.⁵⁷ The Court held that if the circumstances at issue involve a common disaster, satisfaction of the predominance requirement and certification of the settlement class may be appropriate.⁵⁸ This narrow but essential common disaster exception allows the courts to certify a Rule 23(b)(3) class for settlement purposes, thus achieving remarkable settlements and justice as seen in the Deepwater Horizon Spill⁵⁹ and Flint Water Crisis cases.⁶⁰ Environmental disasters will continue to become both

⁵⁰ *Id.* at 212.

⁵¹ ROBERT H. KLONOFF ET AL., UPDATE MEMO—AUGUST 2021, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 34 (4th ed. 2021).

⁵² FED. R. CIV. P. 23(e)(2).

⁵³ KLONOFF, *supra* note 51, at 34–35.

⁵⁴ Settlement & Fees Order at 41–42, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-MD-2800, 2020 WL 256132, (N.D. Ga. Mar. 17, 2020).

⁵⁵ *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

⁵⁶ *Id.* at 619–22.

⁵⁷ *Id.* at 609.

⁵⁸ *Id.* at 625.

⁵⁹ *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on Apr. 20, 2010*, 910 F.Supp.2d 891, 904, 964 (E.D. La. 2012) (approving a settlement that allowed victims of the Deepwater Horizon spill to resolve their claims under an uncapped settlement agreement).

⁶⁰ See Opinion & Order Granting Final Approval of a Partial Settlement, Granting Certification of a Settlement Class, Granting Appointment of Settlement Class Counsel [1792], Denying Objections, and Adopting the Report & Recommendation at *1, *32, *In re Flint Water Cases*, 571 F. Supp. 3d 746 (E.D. Mich. 2021) (denying objections to the

more frequent and more severe as we navigate climate change.⁶¹ Thus, the common disaster predominance exception for class settlement certification is important now, and will only become more so.

4. Rule 23(c)(4), *Met-Coil*, & *Behr-Dayton*: Issue Class Certification

Certifying an “issue class” under Rule 23(c)(4) is also an effective provision within Rule 23.⁶² Rule 23(c)(4) provides that plaintiffs may pursue class action certification with respect to a particular issue.⁶³ Most courts understand that issue classes do not need to satisfy the typical predominance requirement and instead the proper inquiry is whether certification of one or more issues will “materially advance” the case as a whole.⁶⁴ Importantly, Judge Posner posed in *Met-Coil*⁶⁵ the power of achieving a general causation issue class certification for difficult mass tort cases.⁶⁶

In *Met-Coil*, Judge Posner evaluated two questions: (1) whether Met-Coil leaked Trichloroethylene (TCE) in violation of the law, and (2) whether the TCE contaminated the homes of the class members in a similar capacity.⁶⁷ Despite the individualized components within the second question, Judge Posner certified the class.⁶⁸ Judge Posner held that if genuinely common issues exist that are identical across all the claimants, it is preferable “to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.”⁶⁹ Although Judge Posner did not explicitly consider issue classes under Rule 23(c)(4), his holding and analysis was effectively certification of an issue class for the general causation issue of whether Met-Coil leaked TCE in violation of the law.

In a toxic tort class action stemming from alleged groundwater contamination, the Sixth Circuit affirmed the certification of seven Rule 23(c)(4) issue classes finding that each issue could have been resolved with common proof and the individualized inquiries did not outweigh the common questions.⁷⁰ In *Martin v. Behr Dayton Thermal Prods. LLC (Behr-Dayton)*, the Sixth Circuit adopted the “broad approach” that

largest comprehensive settlement in Michigan history) [hereinafter Order Granting Final Approval of a Partial Settlement].

⁶¹ Eric McDaniel, *Weather Disasters Have Become 5 Times as Common, Thanks in Part to Climate Change*, NAT'L PUB. RADIO (Sept. 7, 2021), <https://perma.cc/97DF-836T>.

⁶² KLONOFF, *supra* note 28, at 298.

⁶³ *Id.*

⁶⁴ *Id.* at 299.

⁶⁵ *Mejdrech v. Met-Coil Sys. Corp. (Met-Coil)*, 319 F.3d 910, 910–11 (7th Cir. 2003).

⁶⁶ See KLONOFF, *supra* note 28, at 301 (discussing how *Met-Coil* acknowledges that class certification is proper for answering common questions before turning to individualized hearings).

⁶⁷ *Met-Coil*, 319 F.3d at 911.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Martin v. Behr Dayton Thermal Prods. LLC (Behr-Dayton)*, 896 F.3d 405, 408, 415 (6th Cir. 2018).

issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) could not be met.⁷¹ The Sixth Circuit held in *Behr-Dayton* that the issue classes, which included whether: the defendants created the contamination; the contamination migrated into the class areas; defendants' actions and inaction caused potential vapor intrusion, and defendants negligently failed to investigate and remediate the contamination, satisfied predominance because the issues themselves were capable of resolution with generalized, class-wide proof.⁷² This broad view adopted by the Sixth Circuit provides plaintiffs in a toxic tort class with the ability to litigate issues establishing the defendant's release of contaminants and the extent of contamination, which would likely be dismissed if brought solely under Rule 23(b)(3).

B. Multidistrict Litigation (MDL)

Two of the most prominent and consequential environmental lawsuits to-date, *Clean Diesel* and *Deepwater Horizon*, relied on the MDL device to expeditiously facilitate global peace.⁷³ To promote efficient case management and resolution, the federal multidistrict litigation statute authorizes the Judicial Panel on Multidistrict Litigation (JPML) to centralize similar lawsuits filed in different federal courts in a single court and appoint a judge to coordinate pretrial proceedings.⁷⁴ To qualify for transfer, cases must involve one or more common questions of fact, the transfer must be convenient for the parties and witnesses, and the transfer must promote a just and efficient conduct of the case.⁷⁵ MDL courts oversee all pretrial proceedings, including discovery and class certification.⁷⁶

The MDL is "one of the most important aggregation devices in the federal system."⁷⁷ In 2017, MDLs made up over a third of all civil claims pending in federal courts.⁷⁸ Recent Supreme Court decisions imposed constraints on settlement class actions that make it difficult to settle mass torts on a class-wide basis.⁷⁹ Those decisions spurred popularity of

⁷¹ *Id.* at 413.

⁷² *Id.* at 410, 414.

⁷³ *17 Top Controversial Lawsuits That Brought Environmental Triumph*, ZEBRESKY PAYNE SHAW LEWENZ LLP- CLASS ACTION LAWSUITS (Jan. 19, 2016), <https://perma.cc/Z853-KXXU>.

⁷⁴ 28 U.S.C. § 1407(a) (2018).

⁷⁵ *Id.*

⁷⁶ Kate Jaycox & Brenda Johnson, *MDLs 101: Primer on Multi-District Litigation*, BARRISTER, Nov.–Dec. 2016, at 7.

⁷⁷ KLONOFF, *supra* note 28, at 953.

⁷⁸ *Id.* at 953; *see also id.* at 1008 (discussing how several states now also provide for such multidistrict coordination within their state court systems).

⁷⁹ *Id.* at 957.

the MDL device, which can facilitate global peace.⁸⁰ Recently, there has been an effort to coordinate MDL cases with similar state court cases through cooperation between MDL and state court judges.⁸¹ Some MDL judges appoint a Special Master to oversee the settlement process.⁸² In the best-case scenario, both federal and state courts utilize the same Special Master, allowing the courts to better grasp the complexity of the issues, the incentives of the parties, and the path toward global resolution.⁸³

III. ESSENTIAL BENEFITS OF AGGREGATION

Due to our poor environmental enforcement, we allow for pervasive environmental injustices and inequitable use of our natural resources, and exacerbate the already disturbing impacts we face from climate change.⁸⁴ Our well-being depends on our ability to address these issues urgently and effectively.⁸⁵ Aggregate litigation devices are essential solutions that enable access to the courts and justice for injured parties previously left without recourse.⁸⁶ Aggregate litigation has the power to enforce environmental regulations, influence industry practices, achieve justice for disenfranchised communities, provide a remedy for injured parties, and protect our environment.⁸⁷ In particular, aggregate litigation is an effective tool at strengthening deterrence, bridging the regulatory gap that exists due to the limitations within the public sector, and achieving environmental justice.

A. Strengthens Deterrence

Aggregate litigation's ability to remedy destructive greenwashing efforts illustrates the power wielded by this tool, as it can expand beyond the limitations within environmental regulation to achieve environmentally beneficial results and strengthen deterrence effects.

⁸⁰ *Id.* at 956 (explaining that corporate defendants are often eager to settle aggregate litigations to achieve "global peace" which avoid lingering individual suits and settlement negotiations requiring greater resource expenditures).

⁸¹ CATHY YANNI, BEST PRACTICES FOR SETTLING MDLS, JAMS MEDIATION, ARBITRATION, AND ADR SERVICES 1 (2014), <https://perma.cc/639F-LJFU>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Renee Cho, *Why Climate Change is an Environmental Justice Issue*, COLUMBIA CLIMATE SCH. (Sept. 22, 2020), <https://perma.cc/PK8W-8VNF> (discussing the disproportionate impact of climate change on low-income communities and communities of color).

⁸⁵ See *id.* (noting the worst impacts of climate change occur as time goes on).

⁸⁶ Rebekah Diller & Emily Savner, *A Call to End Federal Restrictions on Legal Aid for the Poor*, BRENNAN CTR. FOR JUSTICE 9 (2009), <https://perma.cc/HPB4-PJXR>.

⁸⁷ See Bouzzine & Lueg, *supra* note 18, at 3198 (explaining that aggregate litigation can result in compliance with environmental regulations and affect industries and industry actors' scandalous behavior).

The choices made by individual consumers have little influence on whether an industry adopts more environmentally friendly practices, however, greenwashing efforts undermine any success consumers have. Greenwashing involves unsubstantiated or misleading claims regarding an actor's environmental performance.⁸⁸ Companies, along with governments, politicians, and other state actors, employ greenwashing to paint their conduct as environmentally friendly to sway public opinion in their favor.⁸⁹

Private enforcement attenuates harmful greenwashing and prevents future injurious conduct through aggregate litigation.⁹⁰ Aggregate litigation also achieves imperative general deterrence by effectively holding industry actors responsible for their wrongful conduct.⁹¹ "Specific deterrence" refers to the effects of enforcement against a particular violator on that violator's future conduct.⁹² "General deterrence" refers to effects of visible enforcement efforts in the legal environment on a would-be violator.⁹³ The legislature's highest goal is to achieve general deterrence: to stop discrimination, end unfair and injurious business practices, and prevent environmental destruction.⁹⁴ Private aggregate litigation yields specific and general deterrence effects, thus achieving the legislature's highest goal.⁹⁵

1. Achieving Deterrence Through Influencing Industry Practices

Aggregate litigation can change attitudes, behaviors, and general social patterns.⁹⁶ This tool permits the cumulation of individual damages into a sizable sum, which strengthens the deterrent effect of the substantive rule.⁹⁷ The ability to strengthen deterrence is optimized when, because of the small size of the individual claims, no action is pursued in the absence of an aggregate device.⁹⁸

⁸⁸ BENJAMIN ET AL., *supra* note 47, at 3.

⁸⁹ *Id.*

⁹⁰ *See id.* at 8, 15 (noting that legal claims are increasingly being brought by private plaintiffs, among others, against companies engaged in "climate-washing," which is when a company misleads its consumers about the climate change impacts of its products).

⁹¹ Stephen B. Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, FAC. SCHOLARSHIP AT PENN L. no. 347, 2014, at 1, 37.

⁹² *Id.* at 40.

⁹³ *Id.*

⁹⁴ *Id.* at 40–41.

⁹⁵ *Id.*

⁹⁶ P.A. Paul-Shaheen & Harry Perlstadt, *Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases*, 57 INDIANA L.J. 385, 385 (1982).

⁹⁷ Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUDIES 47, 60–61 (1975).

⁹⁸ *Id.* at 49.

Aggregate litigation also serves societal well-being through increased monetary deterrence against wrongful industry conduct.⁹⁹ Monetary deterrence occurs when the financial penalties imposed through litigation motivate change in industry behavior.¹⁰⁰ It does not include when the mere existence of litigation changes industry behavior through fear of reputational damage or a desire to abide by laws and norms.¹⁰¹ Through monetary deterrence and deterrence from the mere existence of litigation, aggregate litigation achieves the rare result of effectively influencing industry practices.¹⁰² In the Clean Diesel litigation, the use of aggregation devices illustrated to Volkswagen and the German automotive industry that compliance with environmental regulations matters and violation is costly.¹⁰³ Aggregate litigation influenced industry to abide by regulations and prevent wrongful behavior in the future as industry finally understood that the cost of pollution and regulatory violations drastically outweighs the cost to not pollute.¹⁰⁴

A well-respected business journal published an article after Clean Diesel that advised corporations with business models similar to Volkswagen's that they are subject to becoming "guilty by association" and, thus, should actively ensure differentiation from industry peers to avoid financial contagion.¹⁰⁵ Because of Clean Diesel, industries pursue environmentally compliant practices because of the tangible economic benefit.¹⁰⁶ The article asserts that Clean Diesel convinced firms, "regardless of . . . industry," to avoid violating environmental regulations to obtain business advantages, as legal and financial consequences can be devastating.¹⁰⁷ If not omitted, the violating corporation—as well as its peers—will deal with a long-term reputational loss that could transform formerly highly reputable firms into despised entities.¹⁰⁸

⁹⁹ Andrew Faisman, *The Goals of Class Actions*, 121 COLUM. L. REV. 2157, 2162 (2021); Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 800–01 (2015).

¹⁰⁰ Faisman, *supra* note 99, at 2162.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Bouzzine & Lueg, *supra* note 18, at 3198.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (noting that stock markets provide financial incentives for firms to act in environmentally conscious ways).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

2. Increasing Deterrence Through Collaboration

Most MDLs and class actions end in settlement.¹⁰⁹ Class action settlements can provide more accountability, efficiency, and equity than individual litigation.¹¹⁰ They hold defendants accountable for widespread harm at great economies of scale and achieve justice for victims through compensating their losses.¹¹¹ Most large-scale investigations of corporations involve multiple agencies from federal and state governments, criminal prosecution, and regulatory and common law claims.¹¹² Collaboration among criminal prosecutors and private and governmental attorneys in aggregate litigation is critical to achieving optimal deterrence.¹¹³ A recent U.S. Department of Justice (DOJ) policy announcement highlights the significance of collaboration: “[I]t is important that criminal, civil, and agency attorneys coordinate in a timely fashion, discuss common issues that may impact each matter, and proceed in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law.”¹¹⁴ Collaboration allows lawyers to work together on parallel criminal and civil cases; prosecutors and civil litigators reap the benefits of joint preparation.¹¹⁵

In addition to the benefits of joint preparation, the deterrent effect of criminal punishment is often greater than that of civil punishment, both because of a criminal prosecution’s reputational harm and the collateral consequences that may result from a criminal conviction.¹¹⁶ If public prosecution—criminal charges or civil enforcement actions—accompanies private aggregate litigation, then the optimal deterrence calculation should also consider the expected value of criminal and civil penalties and the costs of defending against such actions.¹¹⁷ “The deterrent value of threatened litigation, therefore, is equal to the

¹⁰⁹ Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 812 (2010).

¹¹⁰ Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 508 (2011).

¹¹¹ *Id.*

¹¹² Nicolas Bourtin, *Negotiating Global Settlements: The US Perspective*, GLOB. INVESTIGATIONS REV. (Jan. 3, 2020), <https://perma.cc/LLSM-DFYG>.

¹¹³ See Deborah R. Hensler, *Can Private Class Actions Enforce Regulations? Do They? Should They?* in COMPARATIVE L. AND REGULATION: NAT’L, INT. & TRANSNATIONAL PERSPECTIVES 238, 254–56 (2016) (discussing the problems of using solely private party class actions as a method of enforcing regulations); Linda Sandstorm Simard, *Response, Fees, Incentives, and Deterrence: A Reply to Professor Fitzpatrick*, 160 U. PA. L. REV. 10, 14 (2011) (discussing the potentially increased level of deterrence brought by private aggregate litigation when attorney fees are increased).

¹¹⁴ U.S. Dep’t of Just., *Org. & Functions Manual* § 27 (2012).

¹¹⁵ Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 397 (2001).

¹¹⁶ David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 UC DAVIS L. REV. 1235, 1241 (2016).

¹¹⁷ Hensler, *supra* note 113, at 249–50.

expected loss from the litigation.”¹¹⁸ Whether or not a plaintiff pursues litigation, the industry will be motivated to invest in precautions if they believe that a credible threat of litigation exists.¹¹⁹ The success of either criminal prosecution or parallel civil litigation will improve the likelihood that the other claim will also succeed.¹²⁰ Collaboration among criminal prosecutors, private attorneys, governments, and agencies—to the extent allowable under the rules of law—is essential to optimize deterrence: It invokes the fear of criminal conviction and develops optimal recovery due to the parallel and collaborative efforts in criminal prosecution and aggregate litigation.¹²¹

B. Bridges the Regulatory Gap

Our regulatory system is only as good as its underlying enforcement mechanisms.¹²² Private litigation serves as a crucial complement to public enforcement of environmental laws and regulations, as it vindicates substantive rights, deters environmentally detrimental conduct, and ensures reliable regulation of wrongdoing.¹²³ Private aggregate litigation functions as a vital regulator given that limitations on public bodies can diminish their achievement of regulatory goals.¹²⁴ In light of the recent constraints imposed on public bodies through the expansive application of the major questions doctrine as set forth in *West Virginia*, private aggregate litigation is more important than ever.

1. Resolves Public Enforcement's Limited Capacity and Political Influence

Public enforcers often suffer informational disadvantages and are now more constrained than ever before due to the recent Supreme Court rulings.¹²⁵ The best sources of information about private wrongs are often the parties themselves because they tend to have superior knowledge regarding the costs and benefits of given activities, the costs

¹¹⁸ Simard, *supra* note 113, at 13.

¹¹⁹ *Id.*

¹²⁰ See Thomas C. Newkirk, Assoc. Dir., Div. of Enf't, U.S. Sec Exch. Comm'n & Ira L. Brandriss, Staff Attorney, Div. Enf't, U.S. Sec Exch. Comm'n, Speech at the 16th International Symposium on Economic Crime: The Advantage of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the U.S. Securities Laws, U.S. SEC. & EXCH. COMM'N (Sept. 19, 1988), <https://perma.cc/F6VG-W83C> (discussing the benefits of the dual civil and criminal regulatory actions brought by the SEC and FBI).

¹²¹ Hensler, *supra* note 113, at 266, 269 (discussing the benefits of combining private, aggregate litigation and public regulatory authorities to adequately enforce regulations).

¹²² J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1142 (2012).

¹²³ *Id.*

¹²⁴ *Id.* at 1153.

¹²⁵ *Id.* at 1154.

of reducing risks of harm, and the probability or severity of risk.¹²⁶ Public regulatory bodies are generally distant geographically from sites of harm, which limits their ability to access those who suffered alleged harm and reduces their ability to even know such harm occurred.¹²⁷ Private aggregate litigation enforcers—those whom industry violations directly impact, whose proximity to violations gives them inside information, and whose connections to the relevant industry give them expertise to judge violations—collectively have knowledge about violations that far exceeds what the administrative state could achieve.¹²⁸

In addition, the limited resources of public enforcement bodies are often insufficient to perform their tasked functions.¹²⁹ “Private enforcement provides, in many respects, a direct response to the functional limitations of public regulatory bodies in the enforcement of various laws.”¹³⁰ Private enforcement “provides protections against harm based on the initiative of a few, which counters the problem of limited agency resources.”¹³¹ It also provides a “back-up” system of redress, “which responds both to the problem of limited agency resources and to the limited ability of ex ante regulations to anticipate and prevent malfeasance.”¹³² Moreover, private enforcement litigation can enhance the efficient use of scarce bureaucratic resources by allowing government regulators to focus enforcement efforts on violations that do not provide adequate incentives for private enforcement.¹³³

State attorneys general have limited budgets, small staffs, and cannot borrow against the prospect of a successful suit and a large recovery.¹³⁴ States can achieve some economies of scale by coming together in multistate actions, creating what may amount to a nationwide class of claimants.¹³⁵ But even if collaborating, states can rarely keep pace with the opposition’s private-sector spending.¹³⁶ Thus, state attorneys general often rely on private attorneys on a contingency basis to pursue the public interest in a broad range of cases, including environmental cases, with frequent success.¹³⁷ These private attorneys

¹²⁶ *Id.*

¹²⁷ *Id.* at 1154–55.

¹²⁸ Burbank et al., *supra* note 91, at 38.

¹²⁹ Glover, *supra* note 122, at 1153.

¹³⁰ *Id.* at 1155.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Burbank et al., *supra* note 91, at 38.

¹³⁴ Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 523 (2012).

¹³⁵ *Id.*

¹³⁶ *Id.* at 524.

¹³⁷ *Id.* For an example of this strategy, see Press Release, Ill. Att’y Gen., Attorney General Raoul Files Lawsuit Against 3M Over Contamination By Toxic ‘Forever Chemicals’ (Mar. 16, 2022), <https://perma.cc/NT9N-JRDZ> (noting that private law firms

general resolve the resource disparities between state offices and the attorneys that defendants employ.¹³⁸

Government regulators who are subject to capture by well-capitalized or politically influential interest groups often applaud class actions and aggregate litigation.¹³⁹ Constrained by limited resources and political pressure, state and federal regulators look to private class action lawsuits to supplement their regulatory enforcement efforts and provide incentives for businesses to comply with environmental regulations.¹⁴⁰ Private interpretation of regulations and subsequent enforcement measures are more stable and consistent over time than interpretations from fluctuating and inconsistent politically-led agencies.¹⁴¹ For instance, the EPA is led by an administrator who is appointed by the Executive every few years, and is thus subject to political influence.¹⁴² With a growing partisan divide in our country, the appointment of the next administrator will include a different individual and different agenda. Meanwhile, private enforcement produces durable and consistent enforcement pressure removed from the political influences that may lead an agency to stray from legislators' enforcement preferences.¹⁴³

Furthermore, public government regulators may choose to underenforce due to the underlying implications of their positions, which are subject to lobbying, campaign contributions, and other influences that can discourage enforcement.¹⁴⁴ Regulators themselves may have preferences for underenforcement such as ideological preferences, career goals, budget allocations, and political agendas.¹⁴⁵ Additionally, electoral imperatives, or the desire to protect specific constituents, may motivate legislators in pressuring administrators to underenforce.¹⁴⁶ Private enforcement can counterbalance uncertainty

were hired as "special assistant attorneys general" to pursue aggregate litigation against 3M Company, and that they were seeking to hold 3M accountable for contaminating the state water supply with PFAS).

¹³⁸ Paul Harzen Beach, *The Parens Patriae Settlement Auction*, 52 GONZ. L. REV. 455, 464–65 (2016).

¹³⁹ Glover, *supra* note 122, at 1155.

¹⁴⁰ *Id.* (discussing the various benefits that private regulatory enforcement brings to the resource-limited public regulatory bodies); Burbank et al., *supra* note 91, at 38 (discussing the way the American regulatory system is set up to need private regulatory enforcement alongside public enforcement).

¹⁴¹ Glover, *supra* note 122, at 1152–53, n.56 (citing Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1247 (2002)).

¹⁴² See Lisa Friedman, *EPA to Review Attacks on Science Under Trump*, N.Y. TIMES (Mar. 24, 2021), <https://perma.cc/S5L5-K5JW> (highlighting the political differences between the two Trump-appointed administrators and the current Biden-appointed administrator).

¹⁴³ Glover, *supra* note 122, at 1152.

¹⁴⁴ Burbank et al., *supra* note 91, at 39.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

regarding agency enforcement and operate as a substitute for public enforcement.¹⁴⁷ Further, private enforcement can bring attention to agencies that do not address violations and prompt them into action.¹⁴⁸ Private aggregate litigation's enforcement efforts perform a failsafe function by ensuring that legal norms are not wholly dependent on the current preference of public enforcers.¹⁴⁹

2. *Protects Against Inadequately Regulated Hazardous Wastes*

Private aggregate litigation also protects our natural resources and communities from inadequately regulated hazardous chemicals.¹⁵⁰ For example, EPA has yet to implement a comprehensive regulatory framework for per- and poly-fluoroalkyl substances (PFAS), despite studies linking PFAS to kidney and testicular cancer.¹⁵¹

To address hazardous PFAS in drinking water and consumer products in the absence of EPA action, society has turned to the courts.¹⁵² Government research did not spark PFAS litigation.¹⁵³ Instead, effective aggregate litigation pursued PFAS regulation independently, and through using creative aggregation devices generated independent findings demonstrating the toxicity of the chemicals.¹⁵⁴ These findings resulted from a provision in a class action settlement agreement that funded the work of an independent panel of three epidemiologists tasked to investigate the health effects of exposure to PFAS.¹⁵⁵ The settlement agreement was between a chemical manufacturer and a class of individuals claiming injuries from the discharge of the manufacturer's nearby plant.¹⁵⁶ Through use of class actions and medical monitoring, aggregate litigation generated a conducive environment for imperative scientific research in the absence of EPA regulation.¹⁵⁷ The resulting research found a link between PFAS exposure and cancer as well as thyroid disease, ulcerative colitis, and pregnancy-induced hypertension.¹⁵⁸ Accordingly, in the absence of EPA action and a regulatory framework, aggregate litigation provided a

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Elle Rothermich, *Can Personal Injury Plaintiffs Regulate Dangerous Chemicals?*, REGUL. REV. (July 28, 2021), <https://perma.cc/5MUQ-5AVF> (explaining how, in the absence of EPA regulations, class action lawsuits can result in scientific research on harmful chemicals and remedies for those affected).

¹⁵¹ *Breaking Down Toxic PFAS*, EARTHJUSTICE (Oct. 19, 2021), <https://perma.cc/QW9K-ABG9>.

¹⁵² Rothermich, *supra* note 150.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

remedy for PFAS-induced injuries, enforced safe industry practices, and developed a better understanding of the chemical.¹⁵⁹

C. Achieves Environmental Justice

No group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations, or from the execution of federal, state, and local environmental policies.¹⁶⁰ But in reality, environmental pollution disproportionately impacts racial-ethnic minorities and low-income populations, yet environmental laws remain underenforced in those communities.¹⁶¹ In addition, climate change exacerbates the burdens that these vulnerable communities face from environmental injustices.¹⁶²

Awareness and focused energy addressing environmental justice issues is rising.¹⁶³ The most popular mechanisms used to pursue environmental justice are Executive Orders, EPA policy and guidelines, and state legislation.¹⁶⁴ The current judicial approach to environmental justice is to pursue claims under the Equal Protection Doctrine and Title VI of the Civil Rights Act.¹⁶⁵ Unfortunately, communities subjected to persistent environmental injustices have not experienced much progress from these pursuits and remain in desperate need of relief.¹⁶⁶ These groups require alternate forms of solutions for recourse, such as aggregate litigation.

Aggregate litigation devices are among the most effective mechanisms for securing environmental justice to date. As the North Carolina Legal Services Planning Council concluded, “challenging some

¹⁵⁹ See *supra* text accompanying notes 152–158.

¹⁶⁰ *Fair Treatment, EJ 2020 Glossary*, U.S. ENV'T PROT. AGENCY (2020), <https://perma.cc/F73L-TPMS>.

¹⁶¹ *PILC Amicus Brief*, *supra* note 18.

¹⁶² According to the Intergovernmental Panel on Climate Change (IPCC), populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C, and beyond, include disadvantaged and vulnerable populations. IPCC, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS 9 (2018) [hereinafter IPCC SUMMARY FOR POLICY].

¹⁶³ See Rick Mullin, *The Rise of Environmental Justice*, CHEM. & ENG'G. NEWS (Aug. 24, 2020), <https://perma.cc/577U-XFDA> (describing environmental justice protests by advocates of color near industrial facilities).

¹⁶⁴ *E.g.*, H.R. 2021, 117th Cong. § 1 (2022); E2SSB 5141, State of WA, 67th Legislature (2021); U.S. ENV'T PROT. AGENCY, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ANALYSIS (2016).

¹⁶⁵ Michael Fisher, *Environmental Racism Claims Brought Under Title VI of The Civil Rights Act*, 25 ENV'T. L. 285, 288 (1995).

¹⁶⁶ Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice*, NAT. RES. DEF. COUNS. (Feb. 10, 2014), <https://perma.cc/29GP-PHBT> (“While there has been some progress in environmental justice, much remains to be done. The federal legal foundation is still very weak, based as it is on Title VI of the Civil Rights Act of 1964.”).

'illegal but widespread practices' without a class action lawsuit is 'impossible.'¹⁶⁷ For low-income people in particular, the availability of the class action option "is critical for obtaining relief from widespread illegal practices" and provides significant access to justice.¹⁶⁸ Class actions and other aggregation devices provide avenues for individuals who might not have the resources or knowledge to bring an individual claim, and ensure broad discovery of a defendant's injurious actions.¹⁶⁹ These devices can secure relief that is longer lasting and more broadly based, which is of critical importance to communities that constantly encounter nefarious business practices.¹⁷⁰ In addition, aggregate litigation provides courts and litigants with an efficient mechanism for adjudicating similar claims of individuals and allows all similarly situated individuals to obtain just relief when a defendant violates the law.¹⁷¹ Through empowering just remedies for all those affected by a defendant's bad behavior, aggregate litigation offers equal and fair treatment to many who are otherwise subjected to relentless bias and discrimination.¹⁷²

The ability to pursue nuisance and common law claims in the aggregate is essential to the well-being of environmental justice communities.¹⁷³ Individual nuisance lawsuits often cost more to bring than the victim would recover, which is why pursuing private nuisance claims in the aggregate gives these individuals the specific relief they need.¹⁷⁴ "[C]lass actions have historically enabled lawyers to 'aggregate these small claimants into an efficient procedural vehicle.'¹⁷⁵ The nuisance class action is an imperative mechanism through which communities suffering from environmental harms, while facing discrimination, inequality, and poverty can obtain relief.¹⁷⁶ "Without the ability to pursue private nuisance as a class, individual members of those communities often lack the knowledge and resources to vindicate their rights against polluters."¹⁷⁷ The Third Circuit held that public agencies and the political process do not address the interests of historically underrepresented communities; thus, it is even more

¹⁶⁷ Diller & Savner, *supra* note 86, at 9 (internal citation omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536, 1546 (2016).

¹⁷¹ Diller & Sayner, *supra* note 86, at 9.

¹⁷² *Id.*

¹⁷³ See *PILC Amicus Brief*, *supra* note 18 ("The nuisance class action is crucial mechanism for relief from environmental harms suffered by communities facing discrimination. Inequality, and poverty.").

¹⁷⁴ Gilles, *supra* note 170, at 1535.

¹⁷⁵ *Id.* The first environmental justice case was the class action *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979). Laura Petersen, *Welcome to the Front Lines of Environmental Justice with Robert Bullard*, AM. ASS'N FOR ADVANCEMENT SCI. (Apr. 30, 2021), <https://perma.cc/BSU5-TSN4>.

¹⁷⁶ *PILC Amicus Brief*, *supra* note 18.

¹⁷⁷ *Id.*

important that these communities maintain the right to file nuisance claims in the aggregate.¹⁷⁸ Private aggregate nuisance claims are a tool for residents to combat pollution within their communities and empower development of solutions that the entities they are dependent on fail to provide.¹⁷⁹

Although class action suits are clearly effective, they do not supplant more holistic social movements. “Class action suits are not a perfect substitute for a . . . social movement that cultivates a . . . broad range of grass roots support” and investment in the community.¹⁸⁰ Class action suits and aggregate litigation, although imperative, are just some of the effective strategies to include within a reform movement to bring about social change within environmental justice issues.

IV. CASES ILLUSTRATING THE BENEFITS OF AGGREGATION

The modern environmental movement aims to preserve natural resources, distribute natural resources equitably, protect the environment from pollution, and build a resilient society capable of adapting to the effects of climate change.¹⁸¹ This Part illustrates how unconventional aggregate litigation achieves all the conventional goals of the environmental movement by describing the Clean Diesel, PFAS-containing consumer products, Deepwater Horizon, Flint Water Crisis, and oil industry antitrust litigations.

A. *Clean Diesel: Securities Fraud and Consumer Class Actions*

The entire Clean Diesel litigation encompasses securities fraud class actions such as the one the Ninth Circuit ruled on most recently,¹⁸² along with an MDL that included another securities fraud class action, consumer class actions, and federal and state claims.¹⁸³ The Clean Diesel litigation illustrates the power of cooperation and aggregate

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Paul-Shaheen & Perlstadt, *supra* note 96, at 423.

¹⁸¹ Dana M. Lovelady & Shivant Shrestha, *Environmentalism*, LEARNING TO GIVE (2019), <https://perma.cc/XP7J-2ZXXN>.

¹⁸² *In re Volkswagen “Clean Diesel”*, 2 F.4th 1199, 1202 (9th Cir. 2021). A retirement fund for Puerto Rico’s government employees served as class representative in a securities fraud class action claiming Volkswagen misled institutional investors when they collectively purchased \$8.3 billion in bonds. Nicholas Iovino, *Ninth Circuit Reverses Loss for Volkswagen in Investor Class Action*, COURTHOUSE NEWS SERV. (June 25, 2021), <https://perma.cc/G88V-9PU8>. This is a separate securities class action from the one included in the MDL. *In re Volkswagen “Clean Diesel”* 2 F.4th at 1202. The Ninth Circuit remanded the case back to the district court and there remains a possibility that the case results in a settlement or ruling in favor of the class. *Id.* at 1209.

¹⁸³ Amended Order Granting Preliminary Approval of Settlement at *1, *3, *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 WL 4010049 (N.D. Cal. July 29, 2016) [hereinafter Amended Order Granting Preliminary Approval of Settlement].

litigation: It made remarkable strides toward deterring industry from violating environmental regulations. The Clean Diesel consumer class action and resulting settlement created a framework for improving environmental protection. Clean Diesel was revolutionary in its compensation to the consumer for their lost opportunity in reducing pollution,¹⁸⁴ and it has led to creative and innovative consumer class actions in pursuit of that same goal.

All allegations in the Clean Diesel litigations addressed the same common issue: The fraudulent sale and marketing of more than 500,000 diesel vehicles in which Volkswagen allegedly installed defeat devices, which detected when the engine was being tested and would change the performance accordingly, enabling the vehicles to pass emissions tests while polluting at up to forty times the legal limit.¹⁸⁵ Within two months after Volkswagen publicly admitted to deliberately installing such devices, more than 500 complaints were filed in more than sixty federal district courts.¹⁸⁶ The JPML determined that consolidation for pre-trial purposes was appropriate and selected Judge Breyer in the Northern District of California as the MDL judge.¹⁸⁷ Both the consumer and securities class actions were transferred to Judge Breyer.¹⁸⁸

The consolidated securities class action in the MDL, filed by investors in Volkswagen-sponsored American Depository Receipts, contended that Volkswagen violated federal securities laws by making false statements about Volkswagen's regulatory compliance and commitment to producing environmentally friendly cars.¹⁸⁹ The class members satisfied Rule 23(a) and (b)(3) requirements and Judge Breyer certified the class for settlement purposes.¹⁹⁰

The multistate attorneys general who brought their own claims previously against Volkswagen, understood that most of the prominent players in the Clean Diesel scandal were collaborating within the MDL. These players included the U.S. Department of Justice's Civil Division, EPA, the Federal Trade Commission, and the leading private plaintiff attorneys. Collaboration to this degree was vitally important to achieving the greatest deterrence effect possible.¹⁹¹ The attorneys general understood that it was in their best interest to collaborate with

¹⁸⁴ *See id.* at *4, *6 (possible settlement remedies included a cash vehicle buyback, fixing the class member's vehicle when and if appropriate emission modifications are made by the EPA and CARB, or "terminat[ing] their leases without penalty plus receiv[ing] additional cash.").

¹⁸⁵ *Id.* at *1, *2.

¹⁸⁶ DEBORAH R. HENSLER ET AL., THE GLOBALIZATION OF MASS CIVIL LITIGATION: LESSONS FROM THE VOLKSWAGEN "CLEAN DIESEL" CASE 26–28 (2021).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Order Granting Motion for Preliminary Approval of Settlement at *1, *In re Volkswagen "Clean Diesel" Mktg., Sales Prac., & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2018 WL 6198311 (N.D. Cal. Nov. 28, 2018).

¹⁹⁰ *Id.* at *2.

¹⁹¹ HENSLER ET AL., *supra* note 186, at 29.

the MDL and, thus, informed Judge Breyer of their investigations, claims, remedies, and readiness to participate in a global settlement, which contributed to the final successful agreement.¹⁹²

The early appointment of Robert Mueller as Settlement Master signaled Judge Breyer's objective to rapidly settle the litigation.¹⁹³ Ultimately, the parties reached a class-wide settlement; Judge Breyer approved the first consumer class action just 10 months after the JPML transferred the cases to him.¹⁹⁴ The securities fraud class action resulted in a \$48 million settlement.¹⁹⁵ In the consumer class action, Volkswagen "agreed to pay \$11.2 billion directly to consumers, as well as \$2.9 billion to [an] Environmental Trust Fund established under the settlements."¹⁹⁶ The consumers at issue were influenced by fraudulent claims to purchase or lease cars they thought produced low emissions.¹⁹⁷ To make the environmentally conscious consumer whole, those who pursued a modification procedure to reduce the vehicle's emissions to advertised rates or lower were compensated for buyback of the vehicle and for their interest in reducing emissions.¹⁹⁸ As of 2020, Volkswagen spent approximately \$39 billion in connection to the "Clean Diesel" litigation.¹⁹⁹

B. PFAS: Consumer Class Action (Greenwashing)

An innovative consumer class action case was filed in 2020, *Ambrose v. Kroger Co.*,²⁰⁰ in pursuit of achieving environmental protection.²⁰¹ The plaintiffs alleged that retailers advertised and sold disposable plates as "compostable" although, in reality, the PFAS in the products did not break down over time.²⁰² *Ambrose* represents a new path for PFAS litigation—consumer class actions based on the persistence of PFAS in the environment rather than health risks to the consumer.²⁰³ *Ambrose* was a class action against greenwashing,²⁰⁴

¹⁹² *Id.*

¹⁹³ *Id.* at 28–29.

¹⁹⁴ *Id.* at 31.

¹⁹⁵ *Id.* at 34.

¹⁹⁶ *Id.* at 33.

¹⁹⁷ Amended Order Granting Preliminary Approval of Settlement at *2, 2016 WL 4010049 (N.D. Cal. July 29, 2016).

¹⁹⁸ *Id.* at *5–6.

¹⁹⁹ Edward Taylor & Michelle Martin, *Volkswagen says Diesel Scandal has Cost it 31.3 Billion Euros*, REUTERS (Mar. 17, 2020), <https://perma.cc/BY33-WRW7>.

²⁰⁰ Class Action Complaint at 1–2, *Ambrose v. Kroger Co.*, No. 20-CV-04009 (N.D. Cal. 2020).

²⁰¹ See Stipulation of Settlement at 2, *Ambrose*, No. 20-CV-04009 (*Ambrose Stipulation of Settlement*) (the plaintiffs alleged that Kroger used "compostable" for products wrongfully, as they contain PFAS, which are chemicals that do not allow products to break down over time).

²⁰² *Id.* at 1–2.

²⁰³ Thomas R. Waskom, *Is a Wave of PFAS Consumer Class Actions on the Horizon?*, NAT'L L. REV. (July 14, 2020), <https://perma.cc/H2UT-GRW2>.

reaching a court approved settlement requiring the removal of “compostable” labels until PFAS were removed.²⁰⁵ Although the tangible environmental benefit is minor, the settlement is critical in advancing environmental protection, barring greenwashing efforts, and influencing industry practices.

C. BP Deepwater Horizon MDL: Environmental Disaster

In April 2010, a blowout, explosion, and fire occurred aboard the Deepwater Horizon, an offshore drilling rig engaged in drilling activities off the coast of Louisiana.²⁰⁶ The BP Deepwater Horizon Oil Spill (Deepwater Horizon) was one of the largest spills in history and led to eleven deaths, immediate injuries, and a massive discharge of oil into the Gulf of Mexico.²⁰⁷

In August 2010, the JPML centralized Deepwater Horizon federal actions, including hundreds of cases with thousands of individual claimants.²⁰⁸ To effectuate settlement, the litigation was divided into two separate aggregate litigations: (1) a Medical Benefits Class Action and (2) an Economic and Property Damages Class Action.²⁰⁹ In the Medical Benefits Class Action, the Settlement Class, which was limited to individuals who satisfied objective criteria and suffered past exposure to oil and or dispersants during a “well-defined” and finite time period, was certified for purposes of settlement pursuant to Rules 23(a) and 23(b)(3).²¹⁰ The court found that the circumstances were distinguishable from *Amchem* in that the conditions the settlement compensates arose, by definition, within mere hours of exposure such that all class members knew whether they were inflicted with the specific injury that granted inclusion into the class.²¹¹ The court also concluded that the individualized damage issues did not overwhelm the common issues concerning liability and that class treatment was superior to litigation via multiple trials as 17,000 joinders had been filed at the time and every individual suit would relitigate many of the same issues.²¹²

²⁰⁴ See BENJAMIN ET AL., *supra* note 47, at 4 (“[G]reenwashing is generally defined as unsubstantiated or misleading claims regarding an actor’s environmental performance”).

²⁰⁵ *Ambrose Stipulation of Settlement*, No. 20-CV-04009 at 2.

²⁰⁶ *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico (Deepwater Horizon Medical Benefits Settlement)*, 295 F.R.D. 112, 117 (E.D. La. 2013).

²⁰⁷ Daniel A. Farber, *Paying the Price for Environmental Disaster: An Interim Report on Criminal and Civil Liability for the BP Oil Spill*, U. ILL. L. REV. ONLINE, 2014, at 9; *Deepwater Horizon—BP Gulf of Mexico Oil Spill*, ENV’T PROT. AGENCY (Feb. 15, 2022), <https://perma.cc/873K-32NX>.

²⁰⁸ *Deepwater Horizon Medical Benefits Settlement Order*, 295 F.R.D. at 118.

²⁰⁹ See *id.* at 117 (regarding the Medical Benefits Class Action). See also *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico (Deepwater Horizon Property Damages Settlement)*, 910 F. Supp. 2d 891, 900–01 (E.D. La. 2012) (regarding the Economic and Property Damages Class Action).

²¹⁰ *Deepwater Horizon Medical Benefits Settlement Order*, 295 F.R.D. at 133.

²¹¹ *Id.* at 141–42.

²¹² *Id.* at 141–42, 145.

For the Economic and Property Damages class, class counsel sought to certify a geographically-bounded settlement class pursuant to Rules 23(a) and (b)(3) that categorized the nature of the losses on behalf of private individuals and businesses.²¹³ The court certified the class for purposes of settlement only, concluding that the settlement class was objective, precise, and “nearly the epitome of how a class in a mass tort action [should] be defined.”²¹⁴ The court, citing Professor Robert Klonoff’s Declaration on behalf of the class, held that the common issues in this environmental disaster mass tort case predominated over individual issues.²¹⁵

In December 2012 and January 2013, the court granted final approval of both settlement classes.²¹⁶ Because this case was in an MDL, the Economic and Property Damage Class Settlement could include an immediate payout of benefits BP claimed it had no legal obligation to pay or provide, including payment of any share of damages resulting from other defendants.²¹⁷ The settlements processed claims in an “impressive fashion.”²¹⁸ As of early 2018, the settlements have delivered over \$11.2 billion to compensate claimants’ losses.²¹⁹ In addition, “BP has already paid over \$25 billion in clean-up, damages, and penalties.”²²⁰ These “settlements directed billions of dollars to the Gulf Coast states to address the environmental and economic consequences of the spill.”²²¹

This case is a textbook example of how to properly frame and pursue an effective aggregate litigation. Class Members in the Medical Class were allowed adequate time to make decisions before the opt-out deadlines of the settlement and they did not release claims against BP for Later–Manifested Physical Conditions.²²² Any common benefit class counsel fees awarded were not deducted from Class Members’ recoveries and were paid by BP separately.²²³

BP’s willingness to agree to such generous terms is attributable to its interest in global peace through the “class action settlements, which gave BP finality in terms of potential future claims.”²²⁴ The class action

²¹³ *Deepwater Horizon Property Damages Settlement*, 910 F. Supp. 2d. at 903.

²¹⁴ *Id.* at 913–14.

²¹⁵ *Id.* at 926.

²¹⁶ *Id.* at 900; *Deepwater Horizon Medical Benefits Settlement*, 295 F.R.D. 112, 112 (E.D. La. 2013).

²¹⁷ *Deepwater Horizon Property Damages Settlement*, 910 F. Supp. 2d. at 934.

²¹⁸ *Id.* at 944.

²¹⁹ *BP Gulf Oil Spill*, LIEFF, CABRASER, HEIMANN, & BERNSTEIN, <https://perma.cc/US2J-PW36> (last visited Apr. 6, 2022).

²²⁰ Farber, *supra* note 207, at 9.

²²¹ Mark Schleifstein, *BP and its Partners Have Spent \$71 Billion over 10 Years on Deepwater Horizon Disaster*, NOLA (Apr. 18, 2020), <https://perma.cc/32JL-JRS6> (quoting University of Michigan law professor and former chief of the U.S. Justice Department’s environmental crimes division, David Uhlmann).

²²² *Deepwater Horizon Medical Benefits Settlement*, 295 F.R.D. at 119.

²²³ *Id.* at 126.

²²⁴ Farber, *supra* note 207, at 15 (internal citation omitted).

in this environmental disaster was superior to all other mechanisms because the settlement was able to deliver finality in a fair and equitable manner.²²⁵ BP “had strong incentives to move the process along quickly, entering a guilty plea in the criminal case and agreeing to a generous class action settlement.”²²⁶ Any effort to delay would potentially damage BP’s public image and its political standing which were valuable company assets.²²⁷ The success of the Deepwater Horizon MDL “ushered in the era of multi-billion-dollar criminal and civil settlements for environmental disasters.”²²⁸

D. Flint Water Crisis: Environmental Justice (Mass Tort and Environmental Pollution)

The mass poisoning in the Flint Water Crisis “was an unprecedented emergency that required an unprecedented, interdisciplinary response at the intersection of medicine, education law, and environmental law[.]”²²⁹ and clearly illustrates the use of the class action aggregate litigation device as an effective vehicle to achieve justice. Plaintiffs in the Flint Water Crisis aggregate litigation included “tens of thousands of people who were impacted by exposure to lead . . . from the City of Flint’s municipal water supply.”²³⁰ The class members and individual plaintiffs were certified under Rule 23(a) and (b)(3) for a settlement class and additional subclasses.²³¹

In evaluating the predominance requirement, the court concluded, as the Deepwater Horizon court had, that the circumstances qualified as a mass tort disaster and that the common liability questions satisfied predominance for settlement purposes.²³² In November 2021, the court granted final approval of a \$626.25 million settlement.²³³ The court held that the settlement, with a portion going towards creating special education services for qualifying students, was a remarkable

²²⁵ *Id.*

²²⁶ *Id.* at 16.

²²⁷ *Id.*

²²⁸ See Schleifstein, *supra* note 221 (quoting University of Michigan law professor and former chief of the U.S. Justice Department’s environmental crimes division, David Uhlmann).

²²⁹ Lindsay Heck, *When Environmental Racism, a Public Health Crisis, and an Educational Emergency Collide*, 46 HUM. RTS. MAG., no. 4, Jun. 14, 2021, <https://perma.cc/5Q7P-4ETD>.

²³⁰ Opinion and Order Granting Final Approval of a Partial Settlement, Granting Certification of a Settlement Class, Granting Appointment of Settlement Class Counsel [1794], Denying Objections, and Adopting the Report and Recommendation [2006] at 1, *In re Flint Water Cases*, 571 F. Supp.3d 746, 755 (E.D. Mich. 2021).

²³¹ *Id.* at 174–75. Subclasses included: Adult Exposure, Business Economic Loss, and Property Damage Subclasses. *Id.*

²³² *Id.* at 90.

²³³ *Id.* at 1.

achievement in setting forth a “comprehensive compensation program and timeline that [was] consistent for *every* qualifying participant.”²³⁴

Nowhere in the settlement was there mention of environmental justice, despite the case representing one of the clearest instances of tragic environmental injustice.²³⁵ Yet, the case did achieve justice through the class settlement for a community of predominantly Black individuals with no other viable recourse.²³⁶ Achieving environmental justice through other means, such as EPA enforcement practices now constrained by *West Virginia*, litigation of Title VI claims, or even legislation has yet to provide any substantial remedy for these communities in desperate need.²³⁷ Although aggregate litigation is not a flawless solution, we cannot allow for inaction any longer, especially given that these communities and the disproportionate environmental harms they face are already being exacerbated by climate change.²³⁸ Legislation, Title VI discrimination claims, investment, education, and regulation need to advance in tandem to provide an adequate remedy. But for now, we must relentlessly and urgently pursue environmental justice through methodical and principled aggregate litigation to achieve relief for these environmental justice communities.

E. Oil Industry Colluding to Remain Profitable: Antitrust Class Actions

In our current societal push away from coal to renewable energy, oil companies are fighting to remain profitable.²³⁹ Antitrust laws were developed to protect the process of competition for the benefit of consumers through ensuring that there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.²⁴⁰ David Goldwyn, a top State Department energy official in the

²³⁴ *Id.* (emphasis in original).

²³⁵ See Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT. RES. DEF. COUNS. (Nov. 8, 2018), <https://perma.cc/5ABF-NWB9> (summarizing extent of Flint water crisis as it pertains to various underprivileged communities).

²³⁶ See U.S. Census Bureau *Quickfacts: Flint City Michigan*, U.S. CENSUS BUREAU (July 1, 2021), <https://perma.cc/GQE6-MPAW> (identifying that 54% of U.S. Census participants in Flint identified as “Black or African American alone,” comprising the largest racial group in the city).

²³⁷ See Huang, *supra* note 166 (explaining the struggle to provide remedies achieving environmental justice under existing laws, regulations, practices, and statutes); see also Hannah Perls, *EPA Undermines its Own Environmental Justice Programs*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Nov. 12, 2020), <https://perma.cc/23XV-TPGP> (explaining how, because there is no federal law governing environmental justice, EPA enforcement of Title VI has not been effective for environmental justice communities).

²³⁸ IPCC SUMMARY FOR POLICY, *supra* note 162.

²³⁹ See Chantal Beck et al., *The Big Choices for Oil and Gas in Navigating the Energy Transition*, MCKINSEY & CO. 3, (Mar. 10, 2021), <https://perma.cc/YX2W-QBG7> (explaining that the oil and gas “sector’s traditional business model [is] under stress” due to changing climate).

²⁴⁰ *Guide to Antitrust Laws*, FEDERAL TRADE COMMISSION, perma.cc/M8AH-42LR (last visited Aug. 31, 2022).

Obama administration, stated that despite the great societal demand for climate action, the major players within the U.S. oil industry are betting on a long-term future for oil and gas, and that the way the market reacts to this strategy will determine whether or not they were right to bet against the societal demand.²⁴¹ David Goldwyn's statement is dependent on authentic competition within the energy market, and would be true if the oil industry was not in violation of antitrust laws.²⁴² If the major players within the oil industry are, instead, working together to insulate themselves from the pressure of society's demand to transition away from fossil fuels, then not only is that in violation of antitrust laws but it will also prevent renewables from out-competing oil.

Chief Justice Roberts conceded in *West Virginia* that forcing a nationwide transition away from coal is likely a "sensible solution to the crisis of the day."²⁴³ The oil industry, however, can conceal itself from facing the pressure that would force such a transition through allegedly adopting anticompetition agreements within the industry. With EPA's authority stifled by the major questions doctrine, supplemented by the internal protection from market influence due to collusion within the oil industry, the chances that we are able to force a nationwide transition away from fossil fuels is bleak. Thus, antitrust class actions against a colluding oil industry are critical to ensure that the industry is responding to our society's progress, not actively working to reverse it. In 2016, an antitrust class action brought under Rule 23(b)(2) and (b)(3) sought injunctive relief and damages in the U.S. District Court for the Southern District of California on behalf of all persons or entities that purchased gasoline directly from companies such as ExxonMobil, Shell, Valero, and Chevron.²⁴⁴ The complaint alleged that the proposed class members paid artificially inflated prices for gasoline over multiple years due to a conspiracy amongst oil and gas companies to "engage in anticompetitive discussions involving pricing, supply, and production levels."²⁴⁵ This is an ongoing and high-profile class action²⁴⁶ and illustrates the importance of using aggregate litigation to ensure that the societal demand for renewables translates to the proper market influence on the oil industry.

²⁴¹ Clifford Krauss, *U.S. and European Oil Giants Go Different Ways on Climate Change*, N.Y. TIMES, perma.cc/2LBQ-B6TK (last updated Oct. 13, 2021).

²⁴² *Id.*

²⁴³ *West Virginia*, 142 S. Ct. 2587, 2616 (2022) (internal citations omitted).

²⁴⁴ First Amended Complaint for Violations of the Sherman Act, California's Cartwright Act, and Unfair Competition Law at 64, 72, *Persian Gulf Inc. v. BP West Coast Products LLC et al. (Persian Gulf Inc)*, No. 15-CV-01749 (S.D. Cal. Sept. 22, 2016).

²⁴⁵ *Id.* at 54.

²⁴⁶ See Jeff McDonald, *Escondido Gas Retailer Files Class-Action Lawsuit Accusing Oil Companies of Conspiring to Keep Prices High*, SAN DIEGO UNION-TRIB. (Feb. 23, 2022), perma.cc/ZJK2-FY92 (explaining the context of the class action case against oil companies in California).

V. AGGREGATION OBSTACLES & CORRESPONDING SOLUTIONS

Aggregate litigation is a vehicle that obtains nuanced and incremental steps towards the environmental goals we seek, but it is not infallible. Establishing commonality, predominance, and Article III standing is the Achilles heel for most conventional environmental aggregate litigations.²⁴⁷ Awarding attorney fees at the conclusion of litigation or settlement divests potential remedy away from injured parties.²⁴⁸ Further, certifying class actions in federal courts is becoming increasingly difficult.²⁴⁹ The effective use of aggregate litigation to achieve environmental enforcement, protection, and justice is contingent on overcoming these obstacles. Luckily, the innovative field of aggregate litigation produces viable solutions to these obstacles if pursued methodically and ethically.

A. Difficulties in Establishing Commonality and Predominance

The Supreme Court's *Wal-Mart Stores, Inc. v. Dukes*²⁵⁰ decision developed a more rigorous commonality standard: to warrant certification, the common question underlying each class member's claim must be essential to the outcome of the case.²⁵¹ In *Dukes*, the Supreme Court denied certification of a nationwide class action involving all current and former female Wal-Mart employees.²⁵² The decision could significantly impact Rule 23(b)(1) and (b)(2) classes, effectively imposing a predominance requirement where the drafters of Rule 23 chose not to include one.²⁵³ In the environmental context, this heightened commonality requirement will impact Rule 23(b)(2) consumer class actions with allegations against greenwashing, like *Ambrose*, and environmentally relevant Rule 23(b)(1) class actions, such as riparian rights cases.²⁵⁴

To overcome this rigorous requirement of commonality, litigating attorneys must draft the optimal class size when defining the class. The

²⁴⁷ Douglas Henderson & Nicholas Howell, *Environmental Tort Class Actions*, KING & SPALDING-JD SUPRA (Aug. 6, 2020), <https://perma.cc/HQ88-M8WJ> (establishing that lack of commonality and predominance are often used to defeat certification); Brent A. Rosser & Kate Perkins, *Article III Standing Still Proving to be a Formidable Defense to Environmental Citizen Suits*, NAT'L L. REV. (Sept. 7, 2021), <https://perma.cc/24QU-4VPL> (establishing that Article III standing is a "formidable defense to environmental citizen suits").

²⁴⁸ See Simard, *supra* note 113, at 1 (explaining that it is common that class action lawyers collect high attorneys' fees "while class members walk away with almost nothing").

²⁴⁹ Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 733 (2013).

²⁵⁰ 564 U.S. 338 (2011).

²⁵¹ Klonoff, *supra* note 249, at 734, 775.

²⁵² *Id.* at 775.

²⁵³ *Id.* at 775–76.

²⁵⁴ *Id.* at 778–79.

goal is to achieve a class definition like the objective and precise class definition from the Deepwater Horizon case and to avoid overreaching; as the lawyers did in *Dukes* when defining their class as *all* female employees of Walmart.²⁵⁵ Using subclasses to increase commonality between class members and ensuring sufficient evidence to establish the existence of common litigation theories on a class-wide basis both represent ways to achieve an optimal class definition and likely satisfy the heightened commonality requirement.²⁵⁶

Rule 23(b)(3)'s predominance requirement is fatal to many cases and a nonstarter for countless mass tort and environmental class actions that involve arguably individualized claims.²⁵⁷ Issue class certification under Rule 23(c)(4) is one possible solution to overcoming the predominance requirement in environmental mass tort class actions. Issue classes are critical in achieving aggregate litigation in environmental cases as one can pursue issue class certification on the general causation issue, which subsequently leads to discovery.²⁵⁸ The goal is then to file for an issue class certification, which would likely induce a robust settlement offer if achieved.²⁵⁹ The attorneys take risks in pursuing issue classes because even if attorney fees are awarded for failed issue class efforts, preclusion may prevent further litigation on behalf of the injured parties.²⁶⁰ In addition, another solution is to pursue a case in an MDL that involves non-class claims.²⁶¹ Non-class MDLs avoid the class action mechanism altogether such that the predominance inquiry becomes irrelevant.²⁶²

Also, mass tort cases arising from a common cause or disaster may, depending on the circumstances, satisfy the predominance requirement.²⁶³ Thus, in certain mass tort disasters, class members may meet the predominance requirement even if questions peculiar to each individual member remain after the common question of the defendant's

²⁵⁵ See *In re Deepwater Horizon—Appeals of the Economic and Property Damage Class Action Settlement*, 739 F.3d 790, 802 (5th Cir. 2014) (explaining why the class action survives Article III standing issues); see also *Dukes*, 564 U.S. at 342, 345 (explaining that the class in *Dukes* included all “current and former” female employees).

²⁵⁶ See FED. R. CIV. P. 23(c)(5) (each subclass must be treated as a separate class for purposes of Rule 23 requirements).

²⁵⁷ Henderson & Howell, *supra* note 247.

²⁵⁸ KLONOFF, *supra* note 28, at 307–08.

²⁵⁹ *Id.* at 371 (explaining that “due process [is] required to bind absent plaintiffs to a judgement.”).

²⁶⁰ See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005) (explaining the threat that claim and issue preclusion can pose to class members).

²⁶¹ KLONOFF, *supra* note 28, at 1147.

²⁶² *Id.*

²⁶³ See, e.g., *Amchem Prods., Inc.*, 521 U.S. 591, 594 (1997) (“[a]lthough mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement . . . such cases are ordinarily not appropriate for class treatment”).

liability is resolved.²⁶⁴ Therefore, common liability questions may satisfy the predominance requirement for settlement purposes.²⁶⁵ As seen in the Deepwater Horizon and Flint Water Crisis aggregate litigations, courts can certify settlement classes that satisfied the predominance requirement under Rule 23(b)(3) and achieved recovery for those injured in these tragic circumstances.²⁶⁶

B. Insufficient Remedy Due to Attorneys' Fees

The financial benefits awarded to plaintiff class counsel in class action litigation through attorney fees are essential to the aggregate litigation tool.²⁶⁷ Despite being the root of the benefits encompassed within aggregate litigation, attorneys' fees face recurrent criticism.²⁶⁸

Aggregate litigation at its core is a vehicle for mass justice.²⁶⁹ The engine of this vehicle is that clients do not pay directly for representation. Yes, there is potential for the exploitation of aggregate litigation devices in pursuit of maximizing attorneys' fees; however, this does not take away from the effectiveness of this vehicle when used ethically. Plaintiffs' attorneys representing injured parties that do not have to pay for their representation allows for zealous advocacy for those who cannot afford it. As a result, attorneys' fees are essential to aggregate litigation and cannot be avoided.

Especially in the environmental justice context, there is a concern that not enough remedy is given to the class members once accounting for attorneys' fees, thus allowing for exploitation of these vulnerable communities.²⁷⁰ A recent article criticized the Flint Water Crisis settlement by pointing out that once the attorneys' fees are subtracted from the \$626 million fund, lawyers could come away with more than the injured parties.²⁷¹ In the Flint Water Crisis settlement, the court granted an equitable attorney fee award that totaled less than a third of

²⁶⁴ Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988).

²⁶⁵ *Id.*; see also *NFL Concussion*, 821 F.3d 410, 434 (3d Cir. 2016) (explaining how the predominance test was met in this class action).

²⁶⁶ *Deepwater Horizon Property Damages Settlement*, 910 F. Supp. 2d 891, 926 (E.D. La. 2012); Opinion and Order Granting Final Approval of a Partial Settlement, Granting Certification of a Settlement Class, Granting Appointment of Settlement Class Counsel [1794], Denying Objections, and Adopting the Report and Recommendation [2006], 571 F. Supp.3d 746, 790 (E.D. Mich. 2021).

²⁶⁷ DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 490 (2000).

²⁶⁸ See Simard, *supra* note 113, at 1 (debunking the accusations against class action lawyers).

²⁶⁹ See Klonoff, *supra* note 249, at 731 (arguing that courts in recent years have made it more difficult for plaintiffs to bring class action lawsuits).

²⁷⁰ See Jessica Myers, *Flint's Water Settlement Is a Kick in the Face: \$626 Million Might Seem Like a Lot, But Not When 99,000 People Drank Tainted Water*, MAG. SIERRA CLUB (Dec. 17, 2021), <https://perma.cc/6AVX-LF2F> (demonstrating how financial remedies won in class action lawsuits are not evenly distributed).

²⁷¹ *Id.*

the settlement.²⁷² The court held that just because the total fee award exceeded the potential monetary award of any one individual claimant, it did not justify rejecting the fee request.²⁷³ The court followed with powerful reasoning as to why it awarded substantial fees: (1) the societal interest in paying lawyers for their work and in encouraging counsel to accept similar engagements in the future; (2) that the Plaintiffs' Counsel had not been paid for their work in the six-year litigation in which they achieved an extraordinary settlement, and (3) that the Plaintiffs' Counsel made significant contributions of time and expenses at the risk of nonrecovery.²⁷⁴ Attention-grabbing statements undermining fees, similar to those made in the article mentioned previously, simplify the situation at hand and irresponsibly hinder the opportunity for others to benefit from aggregate litigation.²⁷⁵ It is of critical importance that judges continue to publicly disclose the reasoning behind why attorneys' fees are fair and essential, and subsequently awarded.

Even though the attorneys' fees concept cannot be removed from the vehicle of aggregate litigation, aggregate litigation facilitates the drafting of creative settlements like the one agreed to in *Deepwater Horizon*, in which attorneys ensured through negotiations that the fees were to be paid separately from the remedy provided to the injured parties.²⁷⁶

In addition, other aggregate litigation mechanisms exist which, if implemented, can also mitigate the impact fees have on the remedy obtained for those injured. For example, Rule 23(e) protects class members from an unfair settlement through court certification and provides opt-out and objection procedures for class members not satisfied with the provisions.²⁷⁷ Rule 23(h) is another mechanism that protects class members as it provides a vehicle for the court to review attorneys' fees.²⁷⁸ Also, courts, such as the Ninth Circuit, mitigate the risks posed by attorneys' fees by requiring courts to scrutinize settlement agreements for subtle signs that counsel infected negotiations with their pursuit of their own self-interests.²⁷⁹ The subtle

²⁷² Opinion and Order Granting in Part and Denying in Part Plaintiff's Motion for an Award of Attorney Fees and Reimbursement of Expenses [1458]; Denying *Hall* Objectors' Motion to Review and Respond to Hourly Billing and Costs [1586]; and Denying the *Chapman/Lowery* Plaintiffs' Motion to Review and Respond to Hourly Billing and Costs [1710, 1722], In re Flint Water Cases, 2022 WL 34675 (E.D. Mich. Feb. 4, 2022).

²⁷³ *Id.* at 78.

²⁷⁴ *Id.* at 3, 54.

²⁷⁵ Myers, *supra* note 270.

²⁷⁶ *Deepwater Horizon Medical Benefits Settlement*, 295 F.R.D. 112, 117 (E.D. La. 2013).

²⁷⁷ FED. R. CIV. P. 23(e)(2) (amended 2018).

²⁷⁸ FED. R. CIV. P. 23(h).

²⁷⁹ See, e.g., *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021), where the Ninth Circuit reversed the district court's decision of granting injunctive relief because they failed to quantify the value of the injunction and allowed the parties to agree to a settlement that did not require the company do to anything beyond what they had already done.

signs that courts should look for as identified by the Ninth Circuit include: (1) when counsel receives a disproportionate distribution of the settlement; (2) when the parties negotiate a clear sailing arrangement such that the defendant promises to refrain from challenging a request for an agreed-upon fee; and (3) when the agreement contains a kicker clause that returns unawarded fees to the defendant instead of to the class members.²⁸⁰ Courts that implement such review of agreements mitigate the impact fees have on the remedy obtained for those injured.

Issue classes are another mechanism available to maximize recovery awarded to the injured parties.²⁸¹ As previously discussed, issue classes under Rule 23(c)(4) allow for the certification of general causation.²⁸² Once certified, individuals may use the issue class on their own behalf to achieve justice, potentially avoiding attorney fees altogether.²⁸³ If aggregate litigation continues after issue class certification, the defendant could grow concerned and that concern could translate into an eagerness to settle to generous terms.

Class action and MDL settlements are the premier vehicles for achieving justice in time-sensitive cases, such as toxic pollution and medical injuries, in which the speed individuals can receive just compensation for their injuries is of great importance. These benefits are enabled through successful aggregate litigation efforts that achieve justice on behalf of those harmed by powerful defendants and would not be possible without the concept of attorneys' fees.

C. Trends of Federal Courts against Aggregation and Heightened Standing Requirement

The private sector is not a fan of aggregate litigation for the obvious reasons discussed in this Chapter, and it pursues great efforts to combat this tool.²⁸⁴ In addition, the heightened Article III standing requirement held by the Supreme Court poses issues for cases asserting injuries caused by environmental harm such that pursuing class actions in state courts, rather than federal courts, will likely grow in popularity.²⁸⁵

The Class Action Fairness Act (CAFA)²⁸⁶ allows defendants to remove most multistate class actions to federal court.²⁸⁷ CAFA removal

²⁸⁰ *Id.*

²⁸¹ See KLONOFF, *supra* note 28, at 301 (describing the factors considered when certifying an issue class).

²⁸² FED. R. CIV. P. 23(c)(4).

²⁸³ *Id.*

²⁸⁴ See, e.g., Klonoff, *supra* note 249, at 819 (describing a case in which a credit card company successfully avoided a class action suit because of an arbitration clause that contained a class action waiver).

²⁸⁵ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (describing Article III standing requirements for federal courts).

²⁸⁶ 28 U.S.C. §§ 1453, 1711–1715 (2018).

²⁸⁷ KLONOFF, *supra* note 28, at 257.

reduces the chance that a class action is certified.²⁸⁸ To navigate this result, plaintiffs' attorneys can file state-only class actions in state courts under the limited exceptions to CAFA.²⁸⁹ Filing multiple cases in isolated state courts does make achieving global settlement more difficult in larger cases that involve the same defendants but expand beyond state boundaries.²⁹⁰ MDLs are an effective device for dealing with this problem.²⁹¹ An MDL transferee judge does not need to rely on the class action aggregation device "to achieve the benefits of aggregation and promote a global settlement."²⁹²

[A]lthough a federal transferee judge [in an MDL] does not have jurisdiction over related state cases, settlement negotiations as to the federal cases can . . . coordinate[] with the attorneys in the state cases, and the federal MDL can serve as a catalyst for a global settlement . . . [J]oint negotiations between lawyers in the state and federal actions, and the collaboration of state judges with the federal MDL judge, can bridge the jurisdictional divide to accomplish an aggregate settlement without resort[ing] to class actions.²⁹³

Under Article III of the U.S. Constitution, a litigant needs standing to sue in federal court.²⁹⁴ The Supreme Court identified a three-part test a litigant must satisfy to establish standing: (1) the plaintiff must have suffered an injury in fact, (2) a causal connection must exist between the injury and the conduct of the defendant, and (3) a favorable outcome must be likely to redress the injury presented.²⁹⁵ The Supreme Court increasingly makes Article III standing harder to satisfy. In *TransUnion LLC v. Ramirez*,²⁹⁶ the Supreme Court held that some members of a class lacked standing to bring claims under the Fair Credit Reporting Act²⁹⁷ because they lacked a concrete injury.²⁹⁸ In short, the Court concluded, "[n]o concrete harm, no standing."²⁹⁹ As a result, the *TransUnion* opinion will likely make pursuing class actions in an environmental context more difficult in federal court. Justice Thomas in his dissent highlighted that "[b]y declaring that federal courts lack

²⁸⁸ See *id.* (discussing how federal courts have a tendency to be stricter with class certification).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 957.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ U.S. CONST. art. III, § 2, cl. 1.

²⁹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations omitted).

²⁹⁶ *TransUnion*, 141 U.S. 2190, 2226 (2021).

²⁹⁷ 15 U.S.C. §§ 1681–1681x (2018).

²⁹⁸ *TransUnion*, 141 U.S. at 2200.

²⁹⁹ *Id.*

jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over [many] class actions.”³⁰⁰

One solution to navigate the post-*TransUnion* rigorous concrete harm threshold in Article III standing is to file the class action in state court, as Justice Thomas suggests.³⁰¹ Rule 23 sets forth the requirements for a class action in federal court, whereas each state has its own rules for class actions brought in state court.³⁰² CAFA requires remand to state court where the federal court does not have subject matter jurisdiction.³⁰³ The act does not allow for a class action’s dismissal for lack of Article III standing in federal courts if it was initially filed in state court.³⁰⁴ The Federal Judicial Center found that state and federal courts were equally likely to approve a class-wide settlement.³⁰⁵ Thus, minimizing the risk of not satisfying Article III standing by filing the class action in state court and utilizing the MDL device to facilitate coordination will become a viable solution.

In addition, class actions can proceed in federal courts by pursuing creative environmental litigation contexts, such as securities fraud class actions holding corporations accountable for greenwashing, mass tort disasters invoking settlement class certification, consumer class actions, and antitrust class actions. Thus, conventional mass torts alleging injury from environmental harm are not essential to environmental enforcement, protection, and justice. Class actions involving unconventional environmental claims, in which establishing Article III standing is easier, can be brought in federal class actions with the same goals as conventional mass tort environmental class actions.

Despite the obstacles discussed, effective aggregate litigation is possible, as the case examples in this Chapter illustrate. Essential to the success of an aggregate litigation is to remain methodical and conservative in scope. Avoiding the tendency to overreach, as seen in *Dukes*, and maintaining an awareness of the trends of the courts enables attorneys to optimize aggregate litigation and obtain justice through creativity and various aggregate litigation mechanisms.³⁰⁶

³⁰⁰ *Id.* at 2224 n.9.

³⁰¹ *Id.*

³⁰² See KLONOFF, *supra* note 28, at 1, 7, 35 (describing Rule 23 and its threshold requirements for federal courts).

³⁰³ See *id.* at 452 (discussing the diversity requirements of CAFA to keep a class action suit in federal court).

³⁰⁴ See *id.* at 257 (discussing that many class action suits can get moved to federal court with CAFA).

³⁰⁵ THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 10 (2005).

³⁰⁶ See, e.g., Klonoff, *supra* note 249, at 830–31 (concluding that class actions “provide[] a powerful remedy for achieving mass justice”).

VI. CONCLUSION

Aggregate litigation is one of the most effective tools to comprehensively advance environmental enforcement efforts and achieve imperative results in environmental protection and justice.

A consumer class action can hold entities accountable for greenwashing efforts and reward the environmentally conscious consumer.³⁰⁷ A mass tort class action in response to an environmental disaster can achieve the greatest remedy for those injured, including the environment.³⁰⁸ A common law class action for nuisance claims against a polluting facility can achieve justice for communities that are otherwise left without viable recourse.³⁰⁹ An antitrust class action can hold the oil industry accountable for failing to respond transparently and accurately to our societal shift away from fossil fuels.³¹⁰ All these cases can centralize into an MDL that facilitates enhanced collaboration and effective results.³¹¹ Unconventional aggregate litigations can achieve the conventional environmental goals that we have pursued for over half a century. The Clean Diesel litigation, which encompassed a consumer and securities fraud class actions within an MDL, produced one of the greatest advancements in environmental enforcement that we have seen to date. Clean Diesel changed the way private entities view environmental regulations.³¹² The private market now knows that aggregate litigation can make it more expensive for corporations to pollute in violation of regulations than abide by them and internalize pollution-reduction costs.³¹³ The mechanisms to achieve vital progress are available. We need to utilize aggregate litigation devices in the greatest capacity and in an effective, ethical, and methodical manner that results in nuanced and incremental progress towards the achievement of environmental enforcement, protection, and justice.

Professor Arthur Miller predicted that our greatest challenge in the future will be to navigate the struggle between those who try to restrict

³⁰⁷ See *Ambrose Stipulation of Settlement*, No. 20-CV-04009 at 2–3 (N.D. Cal. 2021) (summarizing how consumers kept Kroger accountable for its misuse of the term “compostable”); see also *3.0-Liter Settlement*, 2017 WL2212783 at 18 (N.D. Cal. May 17, 2017) (showing consumers who were misguided successfully forming a class to challenge misleading companies’ online ads).

³⁰⁸ See *BP Gulf Oil Spill*, *supra* note 219 (showing how a class action lawsuit was able to get a large monetary award for many affected by BP’s notorious oil spill).

³⁰⁹ See *PILC Amicus Brief*, *supra* note 18 (discussing how a law firm took up a class action suit against a company causing pollution that affected certain communities).

³¹⁰ See *Persian Gulf Inc.*, No. 15-CV-01749 at 5–6 (S.D. Cal. Sept. 22, 2016) (showing how gas companies tried to take advantage of market situations and trends to charge consumer’s unreasonable prices).

³¹¹ See HENSLER ET AL., *supra* note 186, at 60–61 (discussing how many courts, not just in the U.S., can learn from these cases discussed to facilitate mass litigations).

³¹² See *id.* at 59 (discussing how Clean Diesel resulted in many judgments against Volkswagen alluding that other private companies will be more cautious to avoid suffering the same fate).

³¹³ See *id.* (discussing lessons learned where private companies, like Volkswagen, are forced to pay large settlements for not abiding the law).

access to the courts by limiting aggregation and those who understand that in a world filled with mass phenomena and risks, restricting adjudication to one-by-one claims is no longer effective.³¹⁴ Professor Arthur Miller's prediction is promptly turning into reality. There exists great urgency with which we need to implement effective solutions to address our existential triple planetary crisis. Aggregate litigation is one such effective solution that is imperative to implement and develop. Other solutions must advance in tandem, but if we continue to ignore the power of aggregate litigation, we will continue making the perfect the enemy of the good.

³¹⁴ See Arthur R. Miller & Robert Klonoff, *Symposium Interview on Aggregate Litigation*, 24 LEWIS & CLARK L. REV. 697, 707 (2020) (discussing the future of aggregate litigation over the next 50 years).