
Ervin A. Gonzalez
Colson Hicks Eidson
Coral Gables, FL

Patrick S. Montoya
Colson Hicks Eidson
Coral Gables, FL
A. Multi-District Litigation (MDL)


B. Initially, the use of the MDL was small, but the 1970s and 1980s saw a modest increase. Since the 1990s, the workload of the Panel has substantially increased.¹

C. MDL now comprises over 36% of the entire federal civil caseload (that number leaps to 45.6% if you exclude social security and prisoner cases).²

D. Goals & Criteria of the MDL

A. If a case involves one or more common questions of fact and is transferred, the Panel will then select the district court and assign a judge or judges to preside over the litigation;

B. The overarching goal of this transfer scheme is to avoid duplicative, parallel discovery and other pretrial proceedings, to avoid inconsistent rulings (including rulings on class issues), to reduce litigation costs and conserve the time and effort of the parties, witnesses, and, above all, the courts.

E. Statutory Basis for the MDL

A. “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action.”³

F. What factors are considered by the JPML in deciding to centralize the case?


² Id.

A. How many cases are pending? Where only a few actions or common questions are involved, the MDL movant bears a heavier burden of persuasion.

B. How many common questions of fact are present? What is their nature?

C. How many cases are prospectively involved?

D. What is the geographical nature of the pending cases (e.g., pending in adjoining districts or districts throughout the country)?

E. What detriment, financial or otherwise, will be imposed upon any of the parties by ordering transfer?

F. Will transfer result in substantial elimination of duplicative work for parties and/or courts?

G. If class actions are involved, will transfer serve to prevent inconsistent class action rulings?

H. Can many of the advantages of transfer be worked out by cooperation among courts and counsel without transfer?

I. Are pretrial proceedings already far along in any one or more of the cases?

J. Will transfer hasten or delay progress in the cases?

K. Will the advantages of transfer overcome the normal desirability of having the same judge who conducts the trial also conduct pretrial proceedings?

L. Will transfer impede or promote the prospect of settlements?

M. Will transfer serve an ulterior motive of any party or parties such as forum shopping?

N. Will transfer unjustly delay or deny any party’s right to provisional remedies such as injunctive relief?

O. Does the possibility or probability exist for pretrial rulings that could and should be dispositive of all cases in a consistent fashion?

G. Where will the JPML send the centralized litigation?

A. MDL Panel looks for the “center of gravity” of the litigation -- in an air crash, the district where the crash occurred; if a bankruptcy is involved, where the debtor resides, and, if the federal government is involved, ordinarily the district where the government action is pending;
B. The MDL Panel may consider the judge’s experience, the convenience of witnesses and parties, including the availability of air travel facilities, the number of cases on the docket of the proposed court, & the interest (and consent) of the proposed transferee judge.

C. Other Considerations
   A. Where the earliest actions were filed,
   B. Where the defendant's wrongful act took place,
   C. Where the largest number of cases is pending,
   D. Where the most comprehensive case or class action is pending,
   E. Where cases will be tried on remand,
   F. If all other things are equal, the MDL Panel may transfer the case to the district that the majority of parties favors; or to a district with a judge that has the time and experience to handle the litigation.

H. The Plaintiffs’ Steering Committee (PSC)
   A. To accomplish this task, the court usually appoints a Plaintiffs’ Steering Committee (PSC) to speak for all of the plaintiffs and their lawyers and a Defendant(s)’ Steering Committee (DSC) to speak for the defendant(s). But in practice, the DSC is generally selected by the defendant itself with the approval of the court.4
   B. The PSC is responsible for determining which legal theories to pursue, conducting common discovery, setting up a document depository, briefing and arguing key legal questions.
   C. The PSC represent plaintiffs in all pretrial proceedings on common issues, including settlement.
   D. The committees occupy leadership roles in the litigation—conducting documentary discovery, establishing document depositories, taking depositions, arguing motions, conducting bellwether trials, and in general, carrying out the duties and responsibilities set forth in the court’s pretrial orders, including appearing before the court at periodic conferences or hearings. The MDL transferee court theoretically

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oversees the discovery aspect of the case and remands various cases back to the transferor courts for further proceedings.\footnote{Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).}

E. \textbf{Repeat Players} are prevalent on both the plaintiff and the defense side. These repeat players may act as gatekeepers or toll takers. This matters considerably, for lead lawyers control the proceeding and negotiate settlements. They can bargain for what may matter to them most: defendants want to end lawsuits, and plaintiffs’ lawyers want to recover for their clients and receive high fee awards along the way.\footnote{Elizabeth Chamblee Burch & Margaret S. Williams, \textit{Repeat Players in Multidistrict Litigation: The Social Network}, 102 CORNELL L. REV. (forthcoming 2017) (UGA Research Paper No. 2016-04), available at \url{http://ssrn.com/abstract=2724637}.}

I. MDL vs. State Class Actions

A. Class-action lawsuits form when individuals harmed by a drug or device combine cases into a single lawsuit.

B. Multidistrict litigation cases occur when a panel transfers individual cases to a single court, but the cases are not combined into a single lawsuit.

C. In deciding whether to certify a class action, the court considers whether:
   A. There are enough claims to warrant resolving them in a single lawsuit.
   B. There are common facts or legal questions.
   C. The lead plaintiffs’ claims are typical for the class.
   D. The named plaintiffs fairly represent the interests of the class.

B. Emerging Issues in Mass Torts - What will the big cases in the future be? What specific issues will we face?

A. Self-Driving Cars - According to the Insurance Institute for Highway Safety, it is anticipated that there will be 3.5 million self-driving vehicles by 2025, and 4.5 million by 2030. The institute noted that these vehicles would not be fully autonomous, but would operate autonomously under certain conditions.\footnote{http://www.iii.org/issue-update/self-driving-cars-and-insurance}

   A. After 130 million miles driven without a fatality, Tesla Autopilot’s perfect track record ended tragically on May 7, 2016 with the first fatal crash of a car using Autopilot.
A. Based on the limited available data, it appears that both human drivers were at fault under Florida law: the tractor-trailer driver for failing to yield to the oncoming Tesla and the Tesla driver for failing to spot the trailer or avoid it. In this crash’s causal chain, there were three distinct errors.

A. First, the tractor-trailer driver made an illegal left turn in front of oncoming traffic.

B. Second, the Tesla Autopilot didn’t detect the collision risk posed by the turning truck.

C. Finally, the Tesla driver didn’t intervene to prevent the accident.

B. Because it was the last event in the causal chain, this final human error would be the “critical reason” for the accident. Although Autopilot failed to detect the risk and properly intervene, crashes are almost always caused by a chain of failures, and human errors were significant causes of this one.

B. Liability for an accident involving self-driving cars: The Driver? The Owner? The Manufacturer? Manager of Infrastructure? Software Developer? Map Developer?

A. How the driver of a self-driving car is liable:

A. Several states, including California and Nevada, have determined that the “operator” of an autonomous vehicle (“AV”) is liable for any injury or damage caused by the vehicle.8

B. Under California’s AV laws, the “operator” is the person who is either behind the controls available for manual use, or, in the absence of manual controls, the one who “causes the technology to engage.

B. How the manufacturer of a self-driving car (or other component) is liable:

A. Products Liability - A Tesla owner bringing a lawsuit would likely allege a design defect -- that an alternate design would have made the car safer without impacting the vehicle's utility.

B. There's also the potential for a class action lawsuit in which customers allege that defective autopilot software has damaged the resale value of their cars.

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C. In products liability disputes, courts frequently use a risk-utility test to determine whether a product’s design or warning is defective. Under this test, a court would likely consider whether the economic costs of autonomous vehicle technology exceed the cost of redesigning the product plus any loss of use from the redesigned product. The question, therefore, is not whether autonomous cars are risk-free. Nothing is. But autonomous car technology shows enormous utility and not an inordinate amount of risk.

D. That test does not discriminate between the safety of vehicle occupants and the safety of the general public. Manufacturers are less likely to be liable under risk-utility tests if they design autonomous cars to value occupant lives and third parties’ lives equally.

E. “Eventually, and inevitably, the carmakers will have to take the blame,” an article in Scientific American concludes. Volvo and some other manufacturers of autonomous vehicles have already declared that they will pay for all injuries and property damage caused by their self-driving cars.” (Volvo’s model is expected to debut in 2020.)

F. Currently, California, Nevada, and Florida mandate that an AV manufacturer or developer carry $5 million in liability insurance.

C. Insurance

A. As cars are become increasingly automated, the onus might be on the manufacturer to prove it was not responsible for what happened in the event of a crash.

B. Rather than relying on a driver’s statements, insurance companies may begin to heavily weigh information provided by electronic control modules in vehicles, otherwise known as “black boxes.” It is also possible that the burden may fall on the manufacturer’s shoulders to prove that its vehicle did not cause the crash, rather than the driver of the other vehicle proving that it did.

C. RAND has suggested some kind of no-fault auto insurance system. Others foresee something akin to the National Childhood Vaccine Injury Act, a no-

fault compensation program for vaccine recipients who suffer a serious adverse reaction when vaccinated. The legislation was passed in 1986 in response to the threat that life-saving vaccines might become scarce or even unavailable if manufacturers, overwhelmed by claims of injury, scaled back or terminated production.

D. Solution to the Self-Driving Car Dilemma

A. To level the playing field between human drivers and computer drivers, we should simply treat them equally. Instead of applying design-defect laws to computer drivers, use ordinary negligence laws. That is, a computer driver should be held liable only if a human driver who took the same actions in the same circumstances would be held liable.

B. That approach follows basic principles of negligence law. As Dobbs’s *Law of Torts* (2nd ed.) explains: “A bad state of mind is neither necessary nor sufficient to show negligence; conduct is everything. One who drives at a dangerous speed is negligent even if he is not aware of his speed and is using his best efforts to drive carefully. Conversely, a person who drives without the slightest care for the safety of others is not negligent unless he drives in some way that is unreasonably risky. State of mind, including knowledge and belief, may motivate or shape conduct, but it is not in itself an actionable tort.”

C. For example, a computer driver that runs a red light and causes an accident would be found liable. Damages imposed on the carmaker (which is responsible for the computer driver’s actions) would be equal to the damages that would be imposed on a human driver.

B. Hacking & Cybersecurity: Hardly a week goes by nowadays without headlines of yet another incident of corporate hacking or cybersecurity theft. Companies that electronically store sensitive information are facing the ever-changing challenge of guarding against unauthorized access to, and misuse of, such digital data.

A. Most cybersecurity breach litigation today falls into one of four categories:

A. **Shareholder derivative suits** to recover for losses in stock value;
A. In October 2014, a New Jersey federal district court dismissed a derivative suit that had been filed against Wyndham Worldwide Corporation following a well-publicized cyberattack that allegedly involved the theft of over 619,000 payment card numbers. The court upheld the Wyndham board’s decision to reject the shareholder’s demand to sue, finding that this rejection had been based on a recommendation by outside counsel and the board’s own independent investigation.

B. Although the Wyndham shareholder argued that the board’s investigation was predetermined and unreasonable, the court noted that “the business judgment rule’s strong presumption” authorizes courts to “uphold even cursory investigations by boards refusing shareholder demands.”

B. **Securities fraud class actions** to recover for the diminution in stock value following a cyber breach;

A. **Securities Fraud Class Action Lawsuits**: Perhaps the most frequently used form of lawsuit to recover for diminution in stock value following a cyber breach is securities class action litigation. In this type of suit, similarly situated shareholders contend that they relied to their detriment on a company’s material misrepresentations. The misrepresentation in the cybersecurity context might result from public statements by the company regarding its cyberattack readiness or the comprehensiveness or impact of an attack that already has occurred.

B. In December 2007, Heartland Payment Systems, Inc., a Fortune 1000 bank card payment processor, suffered a data breach impacting 130 million credit and debit card numbers. The plaintiffs alleged that the company finally admitted the full scope of the breach to the public more than a year later in 2009. When Heartland’s stock price fell almost 80 percent, shareholders sued, alleging that the company had hidden the attack on its computer network and also had overstated its cybersecurity preparedness.

C. In a victory for defendants, the trial court dismissed the lawsuit, holding that Heartland’s failure to disclose the prior cyberattack was not a material omission and the mere fact that Heartland’s system had been infiltrated did
not necessarily mean that its public statements were false. Damages in a securities fraud class action based on a cyber breach are typically manifest as a reduction in stock value.

C. **Class action lawsuits** by the breached company’s outside customers or business partners whose sensitive or personal information was compromised during the breach; or

A. **Common Law Claims**

— Perhaps the most frequently asserted consumer class action claim is premised on simple common law negligence. The critical inquiry in data breach negligence cases is whether the breached organization owed the aggrieved individual a duty to exercise care in protecting the individual’s personal information and breached this duty by failing to establish adequate safeguards to prevent such access. In many cases premised on negligence, defendants have been able to avoid liability by proving there was no threshold duty to protect their information from unauthorized access. A common defense to cybersecurity negligence cases is that the plaintiff had a preexisting relationship with the defendant and suffered only economic damages, barring the claim under the economic loss doctrine.

B. **Negligent misrepresentation** claims also have been alleged where the defendant made representations it would take reasonable measures to protect the plaintiffs’ information. The “misrepresentation” is usually found in advertisements, public filings, logos, websites, or marketing statements by the defendant. Defendants frequently seek to dismiss these claims by demonstrating the plaintiff’s reliance on the defendant’s representation was not justified.

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10 *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 178 (3d Cir. 2008) (finding that because plaintiffs sought damages for fraudulent fees charged to their stolen credit cards, the economic loss rule barred plaintiffs’ negligence claim); *see also In re Target Corp. Customer Data Security Breach Litig.*, 66 F. Supp. 3d 1154, 1171-76 (D. Minn. 2014). However, despite some defendants’ successful reliance on the economic loss rule to avoid negligence-based data breach claims, other courts have carved out an exception to the economic loss rule bar where the plaintiff pleads a duty independent of any contract. *See In re Target Corp.*, 66 F. Supp. 3d at 1171-76 (holding that the economic loss rule did not bar plaintiffs’ negligence claims in several states due to those states’ independent-duty exception).
C. **Statutory Claims** — The foregoing common law claims are also increasingly being supplemented by statutory claims premised either on new legislation directed specifically at the cyber breach crisis or on long-standing statutory frameworks that were originally enacted to redress other wrongs.

A. Notably, Florida’s legislature enacted a data breach notification statute in 2014 specifically aimed at addressing data breach issues, but the relief afforded by the statute — similar to many other state notification laws — is limited to the execution of a notice of the breach itself. Looking elsewhere, plaintiffs have sought redress under existing statutes not directly aimed at cybersecurity concerns, and at least one federal district court allowed a data breach claim to proceed under the Florida Deceptive and Unfair Trade Practices Act.

B. In *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800-UU, 2012 WL 9391827 at *6 (S.D. Fla. Oct. 18, 2012), the plaintiff staved off dismissal by sufficiently alleging deceptive practices based on the defendant’s inadequate protection of personally identifiable information (“PII”) and failure to provide prompt notification of the breach, which limited the plaintiff’s remedial actions. Alternatively, Florida businesses victimized by hackers may find statutory relief to offset losses experienced as a result of a data breach — assuming, of course, they can locate the hackers.


D. **Enforcement actions by governmental agencies** invoking their regulatory authority under relevant state or federal laws.
A. As illustrated by the *R.T. Jones Capital Equities Management* matter, SEC Admin. Proceeding No. 3-16827, the SEC is bringing charges against public companies for failure to properly protect the PII of customers and clients — even though these companies were themselves victims of criminal behavior. R.T. Jones, an investment adviser, suffered a cyberattack that enabled access to the PII of over 100,000 clients. At the time of the breach, the investment firm did not have any written policies or procedures to safeguard client data. Finding that R.T. Jones violated the safeguards rule, the SEC exacted, in September 2015, a $75,000 penalty and imposed other nonmonetary conditions. Of particular note, the SEC took this enforcement action even though the clients had not suffered actual economic harm and the subject investment adviser had only seven employees — tacitly proclaiming that no firm or entity is too small to evade the SEC’s radar.

B. The *Wyndham* ruling cemented the FTC’s unofficial role as the primary agency policing cybersecurity practices of domestic companies, and serves as a reminder to businesses that the consequences of data breaches include more than mere business disruption and reputational harm. Although there remains a dearth of statutory or regulatory guidance concerning reasonable cybersecurity practices, the *Wyndham* decision confirms the FTC’s ability to bring enforcement actions for unreasonable or “unfair” cybersecurity practices “affecting commerce” and may embolden other federal agencies to become more active. With data breaches continuing to steal headlines, Congress and regulators likely will face mounting pressure from the public to develop a more comprehensive federal regulatory scheme for cybersecurity issues.

E. Privacy Issues

A. Ashley Madison dating website users must be publicly identified if they want to be class representatives in multidistrict litigation stemming from the Ashley Madison dating website data breach. U.S. District Judge John A. Ross said in his order that general class members of the dating website for cheaters in marriages or committed relationships can use pseudonyms, but the class representatives must be open to scrutiny from the class and subclass members
that they represent. His ruling, he said, is an attempt to balance the possible harms of disclosure against the public's right to access court proceedings. The MDL was created in December as hundreds of lawsuits streamed into federal courts. The numerous anonymous plaintiffs allege that Avid failed to secure their confidential information, falsely advertised a "full delete removal" service that didn't actually purge user account information from the website's database, and used artificial intelligence to fool men into believing they were interacting with women when they were in fact chatting with “bots.”

B. Hacking Beyond Data: Insulin Pump Hacking

A. In 2016, Johnson & Johnson issued a warning about a possible cybersecurity issue with its Animas OneTouch Ping Insulin Infusion Pump. A computer security firm discovered that it might be possible to take control of the pump via an unencrypted radio frequency communication system that allows it to send commands and information via a wireless remote control. The company alerted Johnson & Johnson, which issued the warning. There have been no reported instances of the pumps being hacked. In the OneTouch Ping device, the user can order the pump to give them a dose of insulin via a wireless remote control which talks to the insulin pump via an unencrypted radio frequency communication system. To hack into the OneTouch Ping system, someone would need to use a radio frequency monitor to detect that the person had this particular insulin pump and then which of 16 possible channels it was transmitting on. They could then record a command to deliver more insulin and the repeat that command over and over, potentially resulting in a very high dosage of insulin. There are 114,000 OneTouch Ping insulin delivery systems in circulation in the United States and Canada, according to Johnson & Johnson.

B. Jay Radcliffe said it’s important to note that insulin pumps and in fact all medical devices operate on a much longer development cycle than say cell phones. “This pump was probably designed ten or 15 years ago, when no one was thinking

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11 The MDL is In Re: Ashley Madison Customer Data Security Breach, Case No. 4:15-md-02669, in the U.S. District Court for the Eastern District of Missouri.
about security around communications protocols,” he said. He said Johnson & Johnson “has done a great job” responding to the issue. Future Johnson & Johnson insulin delivery pumps will incorporate security measures, she said.

C. Hacking Legislation: Lawmakers have not been deaf to cybersecurity concerns, as various new federal statutes have been proposed to help unify cybersecurity standards and enforcement. Over the past few years, several pieces of legislation have been introduced in Congress, including the Personal Data Privacy and Security Act of 2014, S. 1897, 113th Cong. (2014), the Data Security Act of 2014, S. 1927, 113th Cong. (2014), and the National Cybersecurity and Critical Infrastructure Protection Act of 2013, H.R. 3696, 113th Cong. (2013). However, as of this writing, none of these legislative initiatives has been enacted into law.

C. Climate Change

A. A Growing Concern

A. Climate change will displace 250 million people by 2050: The United Nations High Commissioner for Refugees (“UNHCR”) has warned that climate change could cause the displacement of 250m people across the world by 2050. It estimates that an additional 6m will have to flee their homes each year if global warming continues at the same rate. Tens of millions of people already have to vacate their homes every year due to natural disasters -- which are on the rise. In 2012 alone over 32m were displaced.

B. Global flooding could triple by 2030: The number of people exposed to flooding each year is at risk of tripling from 21 million to 54 million by 2030, according to a study from the World Resources Institute. This would result in the economic costs of flooding increasing from £65 billion to around £340 billion.

C. Earth could warm by 6 degrees this century: The Earth's average temperature will continue to rise so long as we continue to produce greenhouse gases. The estimates for how much temperatures will increase by 2100 range from 2 degrees Celsius to as much as 6 degrees Celsius.

D. Sea levels rose 19cm between 1900 and 2000: We’ve all heard it many times before, but the global sea level rose twice as much in the last decade than it did in
the whole of the 20th century. Since 1901 in total, the Intergovernmental Panel on Climate Change ("IPCC") estimates it rose 19cm. On top of that, sea level rise since 1850 has been larger than the rate in the last two millennia. The current rate of change is 3.24mm a year -- if we continue at that speed for the rest of the century we'll be looking at a 32.4cm rise.

B. Litigation? Who is liable for damages resulting from climate change? What legal remedies exist for pursuing recovery? What are the prospects for such litigation?

A. A lack of legally enforceable requirements has long been a stumbling block for those trying to force action on climate change through litigation. For several years, private plaintiffs tried to force industry to address climate change or to apportion liability among emitters of greenhouse gases for their purported contributions to global warming. These efforts, however, were largely unsuccessful. Two of the largest and most well-known of these cases — *Native Village of Kivalina v. ExxonMobil Corp.* and *Comer v. Murphy Oil USA Inc.* — illustrate these failures.

A. *Kivalina* was filed in 2008 in the Northern District of California by residents of the city of Kivalina, located on the northwest coast of Alaska, against more than 20 oil, energy, and utility companies. The complaint alleged that the defendants were responsible for contributing to global warming, which would result in the forced relocation or abandonment of Kivalina due to the erosion of the Arctic sea ice that protects the coastline. The complaint included claims for public and private nuisance, civil conspiracy and concert of action, and it sought damages potentially exceeding “hundreds of millions of dollars.” The district court granted the defendants’ motions to dismiss on political question grounds, holding that the case could not be resolved “without an initial policy determination of a kind clearly for nonjudicial discretion.”

A. The court also concluded that the plaintiffs lacked Article III standing because they could not establish sufficient causation and because there was “no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time.”
B. The Ninth Circuit affirmed the decision of the district court, although it did so without reaching the issues raised by the political question doctrine and Article III standing. The Ninth Circuit held, instead, that federal legislation preempted the plaintiffs’ federal common law claims, explaining that any solution to the alleged effects of global warming “must rest in the hands of the legislative and executive branches of our government, not the federal common law.”

B. *Comer* was filed by residents of the Mississippi Gulf coast in the aftermath of Hurricane Katrina as a putative class action against multiple fossil fuel, energy, chemical and utility companies, as well as certain trade associations. The complaint alleged that the defendants’ activities contributed to global warming through the release of greenhouse gases, which led to the severe and “unprecedented” strength of Hurricane Katrina. The complaint sought monetary damages for the plaintiffs’ losses as a result of the storm, and it included claims for unjust enrichment, civil conspiracy, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment.

A. After a number of rulings and appeals, both substantive and procedural, the plaintiffs’ re-filed complaint was dismissed on several grounds, including res judicata, lack of subject matter jurisdiction, and lack of standing. The district court also held that the plaintiffs’ claims were barred by the political question doctrine, were preempted by federal statutes, and that they did not sufficiently plead proximate cause. The Fifth Circuit affirmed the decision on res judicata grounds.

C. These unsuccessful attempts by plaintiffs to hold industry accountable for alleged damages from global warming, however, have not dampened the enthusiasm of groups seeking change through the legal process. To the contrary, they appear to have led to increased efforts to force national and state governments, rather than industry, to address climate change issues. The most significant recent trend in U.S. litigation is the rise in cases based on the “public trust” doctrine, which traditionally has been used to secure the access
to and availability of natural resources, in particular navigable waters, for the public.

D. Plaintiffs around the world also have resorted to nontraditional fora with claims relating to climate change. Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement recently filed a complaint with the Commission on Human Rights of the Philippines, allegedly supported by other organizations and individuals. The complaint asked the commission to initiate an investigation into identified fossil fuel companies and their responsibility for alleged climate change-related impacts, such as storms and typhoons. Residents of several other countries — including Vanuatu, Kiribati, Tuvalu, Fiji and the Solomon Islands — also recently declared their intent to bring similar petitions.

B. In its landmark opinion in *Massachusetts v. EPA*, the U.S. Supreme Court held that the Clean Air Act provides the Environmental Protection Agency (“EPA”) with the necessary authority to regulate greenhouse gas emissions from new motor vehicles, despite the EPA’s claim to the contrary.

A. In a key procedural ruling in the case, the Supreme Court determined that the State of Massachusetts had the right (or standing) to challenge the EPA’s action in part because the state had suffered a concrete injury — the loss of coastal land from rising sea levels due to climate change.

B. As a result, one could pursue purely domestic litigation options in the United States based on American law. In principle, individuals could also sue corporations for emitting greenhouse gases under existing tort law if causation and harm can be shown. One could also try to take advantage of international law. A handful of treaties and, possibly, norms of customary international law imply that states can be held responsible for emitting pollution that injures people living in other states, and one could argue that, if these rules do in fact prohibit such pollution, they apply to greenhouse gases as well.

C. Hurdles in Pursuing a Climate Change Lawsuit

A. **Causation problems:** how can a particular victim of, say, flooding show that the flooding was caused, in the legally relevant sense, by the greenhouse gas
emissions of an American corporation? More importantly, such litigation cannot address a global problem.

A. Most greenhouse gas emissions take place in foreign countries, and most of the victims live, or will live, in foreign countries. Liability based on American activities alone would have only a marginal effect on the climate, especially if, as seems likely given the potential magnitude of damage awards, it would mainly cause industry to migrate overseas. Congress would not permit this to happen, and would modify tort law that placed American industry at such a profound global disadvantage.

B. **Sovereign Immunity**: Litigation targeting the U.S. government for failing to regulate greenhouse gas emissions is even less likely to succeed because of sovereign immunity. Litigation in U.S. courts against foreign states based on international law is equally likely to fare poorly in domestic courts because of foreign sovereign immunity and other doctrines that limit the liability of foreign states and individuals.

A. This barrier is compounded by the weakness of international environmental treaties and customary law. The weakness of the law also makes litigation before international tribunals largely pointless, except, perhaps, as a way of attracting attention; further, international tribunals have no power to coerce states to comply with their judgments.

C. **Standing**: When seeking compensation, climate change plaintiffs face significant procedural hurdles in tort-based litigation. For example, Article III of the U.S. Constitution requires that plaintiffs have “standing” to bring their claims in court. To establish standing, plaintiffs must show that they have (1) suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, (2) that is fairly traceable to the defendant’s actions, and (3) is redressable by the court.

A. All three elements of the standing requirement pose challenges for climate change plaintiffs.

A. First, the global nature of climate change makes it difficult to show particularized injury; everyone is impacted by climate change.
B. Second, scientific uncertainty regarding specific impacts of climate change and how specific contributions by greenhouse gas emitters influence those impacts could make the “fairly traceable” requirement difficult to establish.

C. Third, because nearly all individuals contribute to climate change at some level – whether by driving a gasoline-powered vehicle or using electricity produced from fossil fuels – victims’ injuries might not be redressable through the courts.

B. Despite these procedural difficulties, following Massachusetts v. EPA, the momentum of climate change tort litigation appears to have shifted in favor of the plaintiffs (victims).

D. The legal landscape for climate change compensation is likely to remain in flux for years. Even if courts are willing to grant standing to climate-injured plaintiffs, proving causation and establishing damages will remain significant obstacles.

A. From the defendant’s perspective, tort-based litigation raises significant questions of fairness. How can courts assign responsibility to a particular defendant, or group of defendants, when the anthropogenic inducement of climate change is truly a global phenomenon? Successful tort litigation could also result in multi-million dollar verdicts affecting the profitability and operations of entire sectors of the U.S. economy.

E. **Human Rights Litigation:** But if international environmental law is weak, international human rights law is, by comparison, robust. Scholars have argued that international environmental law claims are more likely to succeed if they can be re-conceptualized as international human rights claims. Most states belong to human rights treaties, and many of the obligations embodied in these treaties have become norms of customary international law. Human rights treaties potentially give individuals (as opposed to foreign governments) claims against states—both the state of which the individual is a citizen and any given foreign state implicated in an alleged rights violation. In theory, individuals or groups could bring human rights claims against their
own state and foreign states in certain international tribunals, and prevail if they could show that failure to regulate greenhouse gas emissions has resulted in a violation of their human rights.

A. Because international tribunals generally have very limited powers, the most promising avenue lies with domestic litigation in the United States. The Alien Tort Statute (“ATS”) allows non-Americans to bring claims in American courts based on torts that violate treaties and customary international law. Litigants can bring these claims against American and foreign corporations and government officials, even if sovereign immunity bars claims against most states. ATS litigation has been distinctive because it has produced awards and even payment of damages (in settlements), so today it is the most prominent and effective means for litigating international human rights claims.

B. If a plausible claim can be made that the emission of greenhouse gases violates human rights, and that these human rights are embodied in a treaty or customary international law, then American courts may award damages to victims.

C. The Plaintiff: To win a tort case, one needs an injury, and so the plaintiff would have to be someone who has been injured by global warming. It is hard to claim that a higher temperature causes an “injury,” as that term is conventionally understood in tort cases. But if one could show that one’s life, health, or property was damaged or destroyed by flooding, disease, or some other hazardous phenomenon connected to global warming, then one could be a plaintiff in an ATS suit. The problems of causation are immense and are one of the highest hurdles a Plaintiff may face.

D. The Defendant: Here, we have an embarrassment of riches. Virtually everyone in the world engages in activities that emit greenhouse gases and thus contribute, however minimally, to global warming and its ill effects. Plaintiffs may pick and choose, of course, and so they are likely to choose either wealthy corporations or states.
A. International law contains a bit of a Catch-22, however: international law generally creates obligations for states, not for corporations or individuals; but states are usually protected by sovereign immunity, so they cannot be sued in U.S. courts. Plaintiffs have managed to escape this Catch-22 in two ways: by suing foreign officials rather than foreign states and by suing corporations that have acted in complicity with states.

E. The Tort: The plaintiff must show that the defendant has committed a tort. This is relatively straightforward: because emitting pollution that harms third parties is a standard tort, plaintiffs should have no trouble persuading courts that greenhouse gas emitters are potential tortfeasors.

F. Thus, international human rights litigation directed against polluters has drawn on human rights that are not specific to environmental protection—namely, general rights to life and health, and rights to be free from discrimination where governments or other entities have directed pollution against disfavored groups.

A. It remains hotly contested whether such rights to life and health are actually international human rights, and indeed this claim has been rejected so far by American courts, at least for ATS purposes.

B. Still, this theory provides the best hope for plaintiffs. An international human rights claim directed at greenhouse gas emitting states or corporations would have to be based on an argument that the polluters, by emitting greenhouse gases, violated victims’ rights to life or health, or discriminated against them.

F. Current Litigation: Four closely watched lawsuits being waged over federal protections for the polar bear have been consolidated to streamline a contentious and increasingly complex array of litigation. The U.S. Judicial Panel on Multidistrict Litigation centralized the polar bear litigation in the U.S. District Court for the District of Columbia, where three actions are currently under way.
A. The decision calls for the transfer of a fourth case filed by the Center for Biological Diversity in the U.S. District Court for the Northern District of California. Four related actions, two pending in both the D.C. court and the Eastern District of Pennsylvania will, like any additional suits, be treated as tagalong actions, the panel determined. “[W]e find that these four actions involve common questions of fact, and that centralization of all actions … in the District of Columbia will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation,” the order said.

B. The 2015 Paris Climate Conference represented the culmination of a decade of meetings and negotiations. Nearly 200 countries signed the agreement and committed to lower their greenhouse gas emissions. According to some, however, the agreement lacked the teeth needed to force change, as the deal provides “no legal requirement dictating how, or how much, countries should cut emissions.”

G. The Climate Compensation Fund: Climate change presents uniquely complex environmental law and policy problems that warrant creative problem-solving. Compensation funds have proven successful in other contexts, such as vaccine injuries and terrorist attacks.

A. “In particular, we should support the creation of a system for compensating climate change victims for the costs of adaptation, to the extent that our excessive past emissions and those of other developed countries have created the need for adaptation. It is no excuse that such a system would be expensive or imperfect.”

D. Biohazards in the Workplace

A. The Zika Virus: Worldwide health authorities and media have publicized the Zika virus disease (Zika) that has been reported throughout South America, Central America, and the Caribbean. Although the United States

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has only experienced a few cases of the virus associated with travel to affected regions, it is only a matter of time before the disease surfaces in more cases throughout the country.

B. U.S. employers and those with international operations should monitor the situation and be prepared to respond to questions from employees and supervisors.

C. **Labor Litigation:** General Duty of Care: Under the Occupational Safety and Health Act (“Act” or “OSHA”), the employer has a legal obligation to provide a safe and healthful workplace. One of the agency’s enforcement mechanisms is the ability to issue citations with monetary penalties to employers. The “General Duty Clause” (Section 5(a)(1)) of the Act requires an employer to protect its employees against “recognized hazards” to safety or health which may cause serious injury or death.

A. Given that OSHA does not have a specific regulation which deals with Zika, the Occupational Safety and Health Administration (the “Agency”) will utilize the General Duty Clause. If the Agency can establish that employees at a worksite are reasonably likely to be “exposed” to Zika (e.g., work-related travel to affected regions, occupations with enhanced exposure to mosquito bites due to working outdoors), OSHA may require the employer to develop a plan with procedures to protect its employees.\(^{13}\)

B. In these instances, citations can be issued by the Agency to the host employer if another employer’s staff members are exposed or if the host employer created the hazard or exposed the other employees to the hazard. The host employer or the controlling employer at the site will ultimately be held responsible to correct the hazard.\(^{14}\)

D. **Worker’s Compensation:** In the event that an employee contracts Zika as a result of occupational exposure (in other words, the illness “arises out of and in the course of employment,” which the employee must prove with


\(^{14}\) *Id.*
competent medical evidence), the employee is entitled to receive temporary total disability benefits in lieu of wages, reasonable and necessary medical treatment and an award for any resulting permanent disability (e.g., reduced respiratory capacity, etc.).

A. An employer should evaluate whether it has adequate worker’s compensation insurance coverage and coverage limits that include occupational diseases. If an employee contracts the disease and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits.

E. **Tort Liability:** In the event of employer negligence, under most states’ worker’s compensation statutes, employees will be limited to the worker’s compensation remedies, and the negligent employer will be insulated from unlimited tort liability. The employee will be guaranteed compensation and the employer will be protected from large jury verdicts.

A. However, when an employee can prove that an injury is substantially certain to occur or an employer was willfully negligent, the injured employee may be able to circumvent worker’s compensation and sue the employee for unlimited tort liabilities. Accordingly, exposing an employee to a country for which the State Department or the Centers for Disease Control & Prevention has issued a travel warning, or a tropical area rife with an epidemic may expose an employer to liability for uninsured workplace negligence claims.

F. **Secondary Litigation:**

A. A Southern California law firm has sued Kimberly-Clark Corp for more than $500 million, alleging that the Kleenex tissue maker committed fraud by marketing and selling some of its surgical gowns as protection against Ebola. A class action lawsuit was filed based on false representations made to health regulators and healthcare workers that its "MICROCOOL Breathable High Performance Surgical Gowns" are impermeable and provide protection against Ebola. The law firm said the gowns had failed
industry tests and did not meet relevant standards for protection against the disease, placing healthcare workers and patients at "considerable risk."

B. Products Liability: On August 3, 2015, New York’s Attorney General, Eric Schneiderman, sent cease and desist letters to seven companies who were deceptively marketing products as “Zika-preventive.” The companies had marketed their products with claims that they prevented or protected against Zika virus, even though the products are known to be ineffective for that purpose.15