View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by ValpoScholar

ValpoScholar Valparaiso University Law Review

Volume 51
Number 1 *Fall 2016*

Fall 2016

Removing the Mass Misperception: A Consideration of Mass Environmental Torts and Removal Jurisdiction under the Class Action Fairness Act

Kirsten Z. Myers
Valparaiso University

Follow this and additional works at: https://scholar.valpo.edu/vulr

Part of the Law Commons

Recommended Citation

Kirsten Z. Myers, *Removing the Mass Misperception: A Consideration of Mass Environmental Torts and Removal Jurisdiction under the Class Action Fairness Act*, 51 Val. U. L. Rev. (2016).
Available at: https://scholar.valpo.edu/vulr/vol51/iss1/6

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

REMOVING THE MASS MISPERCEPTION: A CONSIDERATION OF MASS ENVIRONMENTAL TORTS AND REMOVAL JURISDICTION UNDER THE CLASS ACTION FAIRNESS ACT

I. INTRODUCTION

Oil is one of the most constructive resources fueling our everyday life—it can also be one of the most destructive.[1] On April 20, 2010, at approximately 10:00 P.M. CST, the United States experienced one of the greatest environmental catastrophes in its history.[2] Methane gas from a well located on the Deepwater Horizon oil rig in the Gulf of Mexico expanded into a drilling rig, caught fire, and exploded, killing nearly a dozen British Petroleum ("BP") employees and injuring many others.[3] Over the next 87 days, 4.9 billion barrels of oil leaked into the Gulf of Mexico, impacting approximately 68,000 square miles of the ocean along the Gulf Islands, Intercostal Waterway, Pensacola Beach, and several states including Texas, Alabama, Florida, Mississippi, and Louisiana.[4]

---

[1] *See* Alan Neuhauser, *Oil Spills Aplenty Since Exxon Valdez*, U.S. NEWS (Mar. 25, 2014), http://www.usnews.com/news/blogs/data-mine/2014/03/25/us-racks-up-dozens-of-oil-spills-in-25-years-since-exxon-valdez [https://perma.cc/QR4Q-95NJ] (providing a graphic chart of oil spills that have occurred within the United States since the Exxon Valdez disaster of March 1989); *see also Oil Can Do More*, WINTERSHALL, http://www.wintershall.com/en/company/oil-and-gas/oil-can-do-more.html [https://perma.cc/7SGE-3XA6] (explaining some of the useful purposes of crude oil). Crude oil generates heat, fuels our mechanisms of travel, and drives our factory machines. *Oil Can Do More*, *supra* note 1. Day-to-day materials such as paints, plastics, detergents, and even some medicine contain components of crude oil. *Id.*

[2] *See The Gulf of Mexico Oil Spill: The World's Largest Accidental Offshore Oil*, U.N. ENV'T PROGRAMME (Aug. 2010), http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=65 [https://perma.cc/RSC6-QZRC] (detailing the facts of the Deepwater Horizon oil spill); *see also* Debbie Elliott & Scott Horsley, *How an Oil Spill Spread into a National Crisis*, NPR (May 5, 2010), http://www.npr.org/2010/05/05/126508979/how-an-oil-spill-spread-into-a-national-crisis [https://perma.cc/WBZ5-YARD] (discussing the tragic consequences associated with the oil spill).

[3] *See* Elliot & Horsley, *supra* note 2 (providing details of the Deepwater Horizon oil spill); *see also* Sharon Dunn, *Fracking 101: Breaking Down the Most Important Part of Today's Oil, Gas Drilling*, GREELEY TRIB. (Jan. 5, 2014), http://www.greeleytribune.com/news/9558384-113/drilling-oil-equipment-wellbore# [https://perma.cc/Z32C-G5RM] (defining a drilling rig as a machine used to drill a hole, which is what forms the well for the extraction of natural resources such as oil).

[4] *See* Joel Achenbach & David A. Fahrenthold, *Oil Spill Dumped 4.9 Million Barrels into Gulf of Mexico, Latest Measure Shows*, WASH. POST (Aug. 3, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html [https://perma.cc/2W53-EXQR] (describing the amount of oil that was spilled during the Deepwater Horizon oil spill); *see also* Daniel Gilbert & Sarah Kent, *BP Agrees to Pay $18.7*

Produced by The Berkeley Electronic Press, 2016

On July 3, 2015, the United States District Court for the Eastern District of Louisiana announced BP must pay an additional $18.7 billion in settlement fees to the state and federal government, increasing BP's total liability to $53.8 billion for criminal and civil penalties and cleanup costs.[5] However, the sum of $53.8 billion did not include any damages to the privately owned businesses that suffered because of the oil spill.[6] Under the Class Action Fairness Act ("CAFA"), these business owners may consolidate their claims against BP into one action known as a mass action lawsuit.[7] If the business owners file their lawsuit against BP in state court, then BP has the opportunity to remove the action to federal court.[8] These small business owners, who may prefer to litigate their case in a state court, can then move to remand the case back to state court.[9] However, a problem arises when the federal court must determine whether it is proper

---

Billion to Settle Deepwater Horizon Oil Spill Claims, WALL ST. J. (July 2, 2015) (suggesting the states that were impacted by the oil spill).

5 *See* Gilbert & Kent, *supra* note 4 (stating the breakdown of the BP settlement as follows: $5.5 billion for violation of the Clean Water Act, $1 billion for 400 local government claims, $7.3 billion for the natural resources damages, and $4.9 billion for the 5 state claims).

6 *See id.* (providing additional information as to the financial breakdown of British Petroleum's ("BP") settlement as a result of the Deepwater Horizon oil spill); *see also Tourism Industry Impacts: The Deepwater Horizon Spill*, CONVERSATIONS FOR RESPONSIBLE ENVTL. DEV. (July 1, 2010), http://credbc.ca/tourism-industry-impacts-the-deepwater-horizon-spill/ [https://perma.cc/9RXJ-Q9HP] [hereinafter CRED] (discussing the impact of the Deepwater Horizon oil spill on local businesses). Due to the Deepwater Horizon oil spill and the potential safety risks of areas that were harmed, the tourism industry in states such as Louisiana suffered. CRED, *supra* note 6. According to the Louisiana Office of Tourism, twenty-six percent of individuals who intended to visit Louisiana had cancelled or postponed their trips. *Id.* The hospitality industry across the states of Louisiana, Alabama, Mississippi, and Florida experienced an increase in cancellations of reservations by sixty percent, as well as forty-two percent more difficulty in booking future events. *Id.* Over 7.3 million businesses throughout Alabama, Florida, Louisiana, Mississippi, and Texas were harmed as a result of the oil spill that affected 34.4 million employees and cost $5.2 trillion in sales volume. *Id.* The Institute for Business and Home Safety estimated twenty-five percent of the businesses that were harmed from a major disaster did not reopen. *Id.*

7 *See* Annika K. Martin, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, LIEFF, CABRASER, HEIMANN & BERNSTEIN ATT'YS AT L. (2016), http://www.lieffcabraser.com/Case-Center/BP-Gulf-Oil-Spill.shtml [https://perma.cc/W5AD-DU9D] (contributing a list of the lawsuits brought by private property owners against BP).

8 *See* 28 U.S.C. § 1332(d)(11)(B)(ii) (2012) (explaining when a mass action constitutes a class action under the Class Action Fairness Act ("CAFA")); *see also* § 1332(d)(4) (providing the requirements for when a district court must refuse to exercise jurisdiction over a class action).

9 *See* § 1332(d)(11)(B)(ii)(I) (allowing mass actions to be remanded to state court if the claims of the parties arise from the same event or occurrence). The exception preventing the removal of a mass action where all the claims arise out of the same event or occurrence under the CAFA is known as the single local event exception. *Id.*

to grant the motion to remand the case back to state court.[10] A mass action may be remanded back to the state court under the single local event exception if the parties' claims arise out of the same event or occurrence.[11] Currently, the CAFA does not provide a clear definition of what constitutes the same event or occurrence for the purposes of the single local event exception; thus, many courts waste valuable time litigating this issue, which produces inconsistent results.[12] As a result, the CAFA standard fails to promote the common principles of allocating past losses, minimizing or potentially preventing future accidents, and discouraging classes of people from engaging in conduct that poses an excessive risk of personal injury or property damage.[13]

To provide a clear interpretation of the single local event exception, this Note proposes a four-factor test for the federal courts to implement, which will remove the vague standard of what is considered the same event or occurrence for the purpose of remanding a mass action back to state court.[14] First, Part II discusses the characteristics of toxic torts and environmental torts by looking at the recent court cases that caused a three-way circuit split when trying to define the same event or occurrence.[15] Then, Part III analyzes the problem with the current circuit split and argues courts need to adopt a clear standard for the single local event exception.[16] Next, Part IV, for public policy reasons, proposes the SORT Test and suggests that the federal courts implement this test.[17]

---

10 *See* § 1332(d)(11)(B)(ii) (discussing when a mass action is able to be remanded back to state court).

11 *See* § 1332(d)(11)(B)(ii)(I) (exploring the jurisdiction of class actions and mass actions of the CAFA); *see also* § 1332(d)(11)(B)(ii) (defining mass action and explaining a mass action is removable as a class action under the CAFA); Martin, *supra* note 7 (providing a list of cases where private property owners brought a suit against BP); *infra* Part II (discussing generally the problem with removal jurisdiction of mass actions under the CAFA).

12 *See infra* Part III (analyzing the effects of not having a clear definition of the same event or occurrence under the single local event exception, taking into consideration the characteristics of environmental toxic tort claims).

13 *See infra* Part III (arguing it is good public policy to deter accidents and prevent harm); *see also* Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY 671, 671 (1976) (stating that the Latin phrase *ignorantia juris non exusat* translates to ignorance of the law excuses no one). To uphold this legal principle, courts should provide clear guidelines for the parties to understand. Cass, *supra* note 13, at 671.

14 *See infra* Part IV (proposing the SORT Test, a balancing test for courts to adopt). This Note focuses on the three-way circuit split for determining what constitutes "the same event or occurrence" under the CAFA for the removal of mass environmental torts. *See infra* Part II (discussing toxic tort litigation).

15 *See infra* Part II (considering the characteristics of toxic environmental torts and general tort public policy).

16 *See infra* Part III (evaluating the three-way circuit split and arguing that for public policy reasons the circuit split needs to be resolved).

17 *See infra* Part IV (proposing a four-factor test and evaluating it).

Finally, Part V concludes by reiterating the importance of establishing a clear standard for the single local event exception under the CAFA.[18]

II. BACKGROUND

Chief Judge Howard Thomas Markey of the United States Court of Appeals for the Federal Circuit stated "[t]he differences between the judicial and the scientific-technological processes are profound and pervasive. Failure to recognize that difference has led to judicial expressions of frustration and an unfortunate tendency to rest judicial decisions on current, and often transient, 'truths' and 'facts' of science and technology."[19] The fact specific nature of environmental toxic torts along with complicated scientific concepts produce vague standards; therefore, the standards are impossible to apply accurately and consistently.[20] As such, the issue of whether a mass environmental tort action falls under an exception of the CAFA, specifically the same event or occurrence exception, is challenging to litigate and one the American court system struggles to evaluate.[21]

Ultimately, the courts have failed to determine one concise and cohesive standard to apply to the single local event exception.[22] *Allen v. The Boeing Company* created a three-way circuit split between the Third, Ninth, and Fifth Circuits and demonstrated the inconsistency of determining the issue of what constitutes the same event or occurrence for

---

[18] *See infra* Part V (summarizing the need for courts to have a single standard for the single local event exception under the CAFA).

[19] Rubanick v. Witco Chem. Corp., 593 A.2d 733, 741 (N.J. 1991).

[20] *See infra* Part II.A.1 (evaluating the characteristics of environmental torts); *infra* Part III.A (addressing how the characteristics of environmental torts apply to scientific knowledge).

[21] *See* Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014) (stating that there is no anti-removal presumption for a removal action in the CAFA); Benko v. Quality Loan Serv. Corp., 789 F.3d 1111, 1118–19 (9th Cir. 2015) (holding that the District Court abused its discretion and the plaintiffs met the burden of proving their class action claim fell within the single local event exception); Mondragon v. Capital One Auto Fin., 736 F.3d 880, 882 (9th Cir. 2013) (discussing one of the other requirements of the single local event exception regarding the diversity of citizenship of the plaintiffs); Coleman v. Estes Express Lines, Inc., 631 F.3d 1010, 1020–21 (9th Cir. 2011) (reasoning that a diversity class action should be remanded from the federal court back to the state court when two of the criteria for the single local event exception were not met). Each of these cases provide some insight into every aspect of the single local event exception under the CAFA; however, for purposes of this Note, the approach is very narrow and looks at only one aspect of the single local event exception, which is the same event or occurrence requirement.

[22] *See infra* Part III.A (analyzing the problems with the vague approach to resolving the issue of removal jurisdiction for mass environmental torts under the CAFA).

the purposes of removal jurisdiction of mass actions under the CAFA.[23] First, Part II.A examines toxic environmental torts and the hurdles parties encounter when litigating toxic tort cases.[24] Next, Part II.B evaluates mass actions and removal jurisdiction under the same event or occurrence language of the CAFA.[25] Finally, Part II.C provides the relevant information pertaining to the circuit split in the Third, Ninth, and Fifth Circuits.[26]

A. A General Overview of Mass Environmental Torts and Tort Public Policy

The resulting harm caused by environmental torts differs from case to case; therefore, lawsuits involving toxic torts tend to be more fact specific.[27] The fact specific nature associated with mass toxic and environmental torts makes it challenging for courts to interpret the same event or occurrence exception under the CAFA using traditional methods of judicial interpretation.[28] Part II.A.1 provides the relevant characteristics

---

[23] *See infra* Part II.C (discussing the facts and rulings of the recent cases from the Third, Ninth, and Fifth Circuits); *see also* Tom Cummins & Adam Aft, *Appellate Review*, 2 J. OF L.: A PERIODICAL LAB. OF LEGAL SCHOLARSHIP 59, 60–61, 63–65 (2012) (exploring the characteristics of circuit splits and ultimately measuring circuit court performance based on the resolutions of circuit splits). A circuit split exists when a federal court of appeals decides a case that conflicts with the decision of another federal court of appeals. Cummins & Aft, *supra* note 23, at 60.

[24] *See infra* Part II.A (evaluating the characteristics of toxic torts and how their characteristics can challenge the promotion of general tort public policy).

[25] *See infra* Part II.B (considering the characteristics of mass torts under the CAFA and the vague language used within the CAFA causing problems for the courts when interpreting the legislation).

[26] *See infra* Part II.C (providing the relevant facts and holdings to each of the cases in the Third, Ninth, and Fifth Circuits).

[27] *See infra* Part II.A (reviewing the characteristics of toxic torts); *see also* Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 222 (2004) (stating that environmental law is defined as "a synthesis of pre-environmental era common law rules, principles from other areas of law, and post-environmental era statutes . . . and other areas of science, economics[,] and ethics"). To exemplify the factual context of environmental torts, consider this metaphor to the medical field written solely by the author. Much like a doctor considers a list of symptoms to determine a diagnosis, a judge must listen to the specific facts of a case to decide a ruling. In the medical field, the symptoms in one patient may not heed the same ailment in another patient, and this is the case in environmental torts. Each environmental tort is different, brought about by a unique set of facts and circumstances, each with a different chemical makeup of hazardous material that may impact the environment, the people, and businesses around them differently.

[28] *See* Joey Senat, *Methods of Judicial Interpretation*, OKLA. ST. U. (June 21, 2013), https://media.okstate.edu/faculty/jsenat/jb3163/methods.html [https://perma.cc/H4ZS-9ZJN] (explaining the different types of judicial interpretation). The different methods of judicial interpretation are: literalism, original intent, doctrinal approach, and structuralism. *Id.* Each method of interpretation has its advantages and disadvantages. *Id.* Under the literalism method, the judge will look to the literal text of the document, using no

of toxic environmental torts.[29] Part II.A.2 discusses general tort public policy as applicable to toxic tort characteristics.[30]

1. The Nexus of Toxic Torts and Environmental Torts

An individual files a toxic tort lawsuit when a hazardous material causes harm to the individual or his or her property.[31] Whereas, an

---

external sources as support. *Id.* While literalism removes the possibility of misinterpretation of the law, the literalism approach is challenging when there is any ambiguity or imprecise language. *Id.* Lack of specificity exists under the current interpretation of the CAFA. *Id.* Under the original intent method, the court looks to the historic basis of the document to determine what the purpose of the law is and what the drafters intended the law to mean. Senat, *supra* note 28. The original intent approach provides a basis to begin when unanticipated circumstances arise, which is applicable to the problem with the CAFA. *Id.* The doctrinal approach is also known by the Latin phrase of *stare decisis*, which translates to "let the decision stand." *Id.* This means new cases should be decided the same way as old cases, so long as the facts are similar. *Id.* This approach has not been successfully applied to the issue of removal jurisdiction because currently there are three different holdings on what is considered the same event or occurrence under the CAFA. *Id.* The final method of judicial interpretation is structuralism, which considers the larger relationship within the document, not its specific provisions. *Id.* For example, for removal jurisdiction, the judges would look to the whole document of the CAFA, not just the section discussing mass actions as class actions for the purposes of removal using structuralism. Senat, *supra* note 28. This approach tends to be more problematic and likely will not apply in the interpretation of the CAFA for this Note because it provides a more subjective and abstract approach. *Id. See also infra* Part II (evaluating the characteristics of environmental torts); *infra* Part III.A (addressing how the characteristics of environmental torts apply to scientific knowledge).

[29] *See infra* Part II.A.1 (discussing the characteristics of toxic torts and explaining how the unique characteristics of toxic torts relate to the problem of removal jurisdiction of mass actions under the CAFA).

[30] *See infra* Part II.A.2 (providing the public policy surrounding issues involving torts and toxic torts and explaining how the circuit split does not promote sound tort public policy).

[31] *See* L. Neal Ellis, Jr., *Introduction, in* TOXIC TORT LITIGATION 2 (D. Alan Rudlin ed., 2007) (explaining what toxic torts are and are not); *see also* 42 U.S.C. § 9601(14) (2012) (describing a hazardous substance). The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") is codified in the United States Code under 42 U.S.C. § 9601. § 9601. CERCLA defines a hazardous substance as:

> [A]ny substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Act [33 U.S.C. § 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. § 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the

environmental tort claim is filed when the harm results from a hazardous substance that impacts the environment and characteristically violates a federal statute.[32] Environmental torts can become toxic torts when a toxic substance detrimentally affects both the environment and an individual or their land.[33] Traditionally, environmental tort cases contain more hurdles for the plaintiff to overcome than a normal tort case, such as negligence or battery.[34] Courts review environmental torts under a

---

> Toxic Substances Control Act [15 U.S.C. § 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. Although crude oil is not defined as a hazardous substance under CERCLA, it is considered hazardous by the Occupational Safety and Health Administration ("OSHA") Hazard Communication Standard. *Material Safety Data Sheet Crude Oil*, TESORO (Feb. 1, 2011), https://tsocorpsite.files.wordpress.com/2014/08/crude-oil-generic.pdf [https://perma.cc/WJE2-D73T]; *see also* Kenneth S. Abraham, *Cleaning up the Environmental Liability Insurance Mess*, 27 VAL. U. L. REV. 601, 602–03 (1993) (discussing liability for environmental torts under CERCLA). CERCLA is an environmental statute designed to accomplish the cleanup of hazardous materials through "the expenditure of cleanup costs from a fund (hence the name 'Superfund') raised through a series of different taxes" and through the "imposition of liability for the cost of cleanup on the 'responsible parties.'" Abraham, *supra* note 31, at 602–03.

32 *See* Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2256 (2015) (evaluating and contrasting environmental law and toxic torts).

33 *See* Ben A. Franklin, *Toxic Cloud Leaks at Carbide Plant in West Virginia*, N.Y. TIMES (Aug. 12, 1985), http://www.nytimes.com/1985/08/12/us/toxic-cloud-leaks-at-carbide-plant-in-west-virginia.html [https://perma.cc/Q99X-Y6YW] (exemplifying a situation where environmental and toxic torts collided). On August 11, 1985, a Union Carbide Corporation plant in West Virginia released aldicarb oxime, a chemical, which when combined with methyl isocyanate, creates a compound used in pesticides. *Id.* Because of this incident, 135 residents of Charleston, West Virginia were treated for eye, throat, and lung irritation, and twenty-eight individuals were admitted to a hospital near the Union Carbide plant. *Id*. The leak lasted about fifteen minutes and resulted from a failed gasket on a 500-gallon storage tank that contained the aldicarb oxime. *Id*. Broadcasts encouraged residents to stay inside and turn off their air conditioning and other forms of ventilation to prevent the chemical from traveling indoors. *Id.* This incident exemplifies how a chemical that harms the environment, in this case, the air, can also harm individuals within the surrounding communities, interlinking both environmental law and toxic torts. *Id.*

34 *See* Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1445–46 (2005) (arguing that for a tort system to return a fair recovery of damages, judges must adjudicate cases individually based on their specific facts). Two common hurdles in toxic tort litigation are accounting for the latency period for the harm to appear within the plaintiff and proving that the defendant actually caused the harm. *Id.* at 1445. There tends to be more hurdles for a plaintiff in an environmental tort case because unlike a tort case, such as battery, where cause and effect is readily identifiable, the cause and effect in environmental tort cases can be less apparent. *Id.* at 1441–42. As such, the plaintiff in an environmental tort case has more "formidable problems of proof." *Id.* at 1445.

negligence standard rather than a strict liability standard, and thus the plaintiff must prove issues of causation and a high latency of harm.[35] Toxic torts differ from other types of civil litigation in many key ways, which cause challenges during litigation.[36] These characteristics need to be acknowledged because they play a significant role in the concept of removal jurisdiction for mass environmental actions under the CAFA.[37]

First, plaintiffs have difficulty identifying the defendant(s) responsible for their harm because environmental toxic torts typically involve numerous plaintiffs and defendants, unlike other areas of tort

---

35 *See id.* (discussing the standard of review for environmental torts); *see also* Bill Charles Wells, *The Grin without the Cat: Claims for Damages from Toxic Exposure without Present Injury*, 18 WM. & MARY J. OF ENVTL. L. 285, 288–90 (1994) (addressing the characteristics of the harm that can be caused by toxic torts). In a latency period, the full effect of the exposure to the hazardous material is not immediately apparent. *Id.* at 288–90. Thus, the resulting harm suffered by the plaintiff may be delayed, and this ultimately creates a problem with the elements of causation and resulting harm, unlike a normal tort action. *Id.* at 289. *See also* Alani Golanski, *General Causation at a Crossroads in Toxic Tort Cases*, 108 PENN. ST. L. REV. 479, 481 (2003) (considering the element of causation necessary to recover damages in a toxic tort lawsuit). Some latency effects are: cancers, birth defects, and other life altering diseases. *Id.* at 481. *See also* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2191 (2014) (discussing the delay in detecting a harm caused by latency periods). The delay can range from as little as ten years to as many as thirty years or more. *Id.* A clear standard would help ensure that those plaintiffs who have a latency period associated with their injury may have a successful lawsuit against the defendant who caused their harm. *Id.*

36 *See* Wells, *supra* note 35, at 288–90 (providing the four characteristics of environmental torts). Toxic torts differ from other types of torts in four ways: toxic torts involve a large number of plaintiffs and defendants, toxic torts have challenges in identifying the source of harm, the litigation procedure surrounding toxic torts is complex, and scientific evidence is used to resolve causation issues. *Id.*

37 *See id.* (suggesting the four characteristics of environmental torts that can make mass tort litigation challenging); *see also* 28 U.S.C. § 1441 (2012) (providing the requirements for the removal of civil actions). In general, environmental torts are civil actions because they do not have a criminal aspect to the claim. § 1441. Removal jurisdiction is a situation where a defendant to a civil action filed in a state court may motion to have the matter litigated in federal court. *Id. See* Jeffrey S. Gutman, *Removal Jurisdiction*, FED. PRAC. MANUAL FOR LEGAL AID ATT'Y (2015), http://federalpracticemanual.org/node/14 [https://perma.cc/49WY-TWSX] (examining the general overview of removal jurisdiction to federal courts). When an issue of removal arises, courts consider whether the federal court could have initially exercised jurisdiction over the case. *Id.* Federal courts have original jurisdiction over class actions. *Id.* The problem arises when courts deem a mass action a class action. *Id.* Under the CAFA, a mass action is not a class action when the claims of the plaintiffs arise out of the same event or occurrence. § 1332(d)(11)(B)(ii)(I). Thus, the mass action is not removable to federal court as a class action. *Id.* Another problem arises when determining the definition of the same event or occurrence for removal jurisdiction of mass actions. *See infra* Part II (explaining the relevant background information surrounding the same event or occurrence); *infra* Part II.B (discussing the CAFA, why it was ratified, and the problems with the current context of the act).

law.[38] As such, federal and state courts have implemented different causation tests to determine the proportion of liability each defendant shares.[39] In addition, due to the multiparty claims and the difficulty proving causation, the litigation of environmental toxic torts characteristically results in complex procedures.[40] Thus, courts will not consolidate cases if doing so will result in a delay or any unnecessary burdens on the parties.[41]

---

38 *See* Ellis, *supra* note 31, at 7 (explaining the challenge of identifying defendants in toxic tort cases). Multiparty lawsuits, if they involve an exceedingly large number of plaintiffs or defendants, can be a mass action and classified as a class action. *Id.* This allows federal courts to have jurisdiction over the mass action because class actions fall under federal court jurisdiction. *Id. See also* Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 885, 887–89 (1996) (addressing the need to find a proper way to litigate a claim with a fictitious defendant). The unique nature of environmental toxic torts may also raise the issue of a fictitious defendant. *Id.* A fictitious defendant is a situation where a party suing is not sure whether there are unknown persons involved in a suit. *Id.* at 885. Typically, these unknown defendants get fake names, such as John Doe and Jane Doe. *Id.* Traditionally, for many types of torts, the statute of limitations is relatively short which pressures the plaintiff seeking to recover to file his or her complaint. *Id.* at 887–88. This theory of a fictitious defendant is a tactic used to preserve the limitation period for the plaintiff, and with leave of court, the name can later be amended to include the defendants who have been identified. *Id.* at 888–89.

39 *See* Antony Honoré, *Causation in the Law*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (2010), http://www.plato.stanford.edu/entries/causation-law [https://perma.cc/9V36-NEKT] (discussing the concept of causation in a tort claim). Causation may be broken down into two classes of theories: the cause-in-fact theory and the criteria for determining responsibility for causing the harm. *Id. Compare* Ravo v. Rogatnick, 514 N.E.2d 1104, 1106 (N.Y. App. Ct. 1987) (holding that when two or more tortfeasors act together to produce one single injury suffered by the plaintiff, those defendants may be held jointly and severally liable), *with* Suria v. Shiffman, 490 N.E.2d 832, 837 (1986) ("[W]hen two tortfeasors neither act in concert nor contribute concurrently to the same wrong, they are not joint tortfeasors; rather, their wrongs are independent and successive.").

40 *See* FED. R. CIV. P. 42(a) (stating if actions before the court involve a common question of law or fact, the court may: consolidate actions, join for a hearing any or all matters at issue in the action, or enter any other orders to avoid unnecessary costs or delays); *see also* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 335 (2006) (considering the common problem of forum shopping that is prevalent in complex litigation); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553–57 (1989) (explaining forum shopping in both domestic and international lawsuits and evaluating the reasons why parties may opt to forum shop); *see also Complex Litigation Resource Guide*, NAT'L CTR. FOR ST. CTS. (2015), http://www.ncsc.org/Topics/Civil/Complex-Litigation/Resource-Guide.aspx [https://perma.cc/ZXA9-C7VL] (providing that mass torts and class actions are two types of complex litigation).

41 *See* FED. R. CIV. P. 42(a) (giving the rule for consolidation of a claim). Consolidation is a way to join claims of parties that involve a common question of law or fact for a joint hearing or trial. *Id.* If combining the claims would create prejudice or if it more effective to hold separate trials, the court may also order separate trials for any issues, claims, crossclaims, counterclaims, or third-party claims. FED. R. CIV. P. 42(b). *See also* Shump v. Balka, 574 F.2d 1341, 1344 (10th Cir. 1978) (supporting the district court's decision to consolidate as is within its discretion).

Another characteristic of toxic tort litigation is that toxic torts tend to be driven by science and require that the parties, jury, and judge be able to rely on, interpret, and understand grandiose scientific concepts used as evidence to prove the resulting harm.[42] As a result, courts must determine the effects that exposure to chemicals unknown to the average citizen, such as asbestos, benzene, and dioxins, have on the plaintiff.[43] For example, when adjudicating a toxic tort claim, courts evaluate the plaintiff's exposure to the toxin and whether the injury was a result of the exposure to the toxin.[44] A plaintiff must establish that the substance is capable of causing the injury at issue and the exposure to the substance is, in fact, what caused the injury.[45] Finally, to prove these two issues, courts must not only understand whether a particular substance can cause the resulting harm, but also determine the harm suffered by the plaintiff.[46] Litigants prove the factual standings through scientific mechanisms such

---

[42] *See* Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1197 (11th Cir. 2002) (viewing toxic tort litigation as a subset of products liability holding that "cases . . . are won or lost on the strength of the scientific evidence presented to prove causation"); *see also infra* Part III.A (analyzing the problem of the need to apply scientific reasoning to toxic tort litigation).

[43] *See* Note, *supra* note 32, at 2256–57 (2015) (discussing the causal link of an actor's negligent behavior and the resulting harm inflicted on another). In all tort claims there are common features of liability and causation. *Id.* Causation provides many problems in environmental tort litigation; however, there are some factors of tort claims that are relevant only to certain areas of tort law. *Id.* Environmental torts and toxic torts treat causation differently, creating the challenge of determining whether the harmful substance directly caused the resulting harm suffered by the plaintiff. *Id.* at 2257. Also, the Federal Rules of Evidence state:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods of the facts of the case.

FED. R. EVID. 702 (2014). *See also* Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 15–20 (1988) (exploring the concerns associated with mass litigation and the new characteristics associated with mass torts).

[44] *See* J. Michael Veron, *The Trial of Toxic Torts: Scientific Evidence in the Wake of* Daubert, 57 LA. L. REV. 647, 647–48 (1997) (evaluating how the litigation procedure of toxic torts has changed since *Daubert*); *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 579–80 (1993) (holding that the Federal Rules of Evidence successfully limit and interpret how scientific evidence is to be used to prove causation).

[45] *See Daubert*, 509 U.S. at 579–80 (providing the standard for judges to consider scientific evidence); *see also* Lin, *supra* note 34, at 1446–47 (explaining the elements necessary to establish a toxic tort claim as the plaintiff and what evidence is needed to bring a toxic tort claim).

[46] *See* Lin, *supra* note 34, at 1447 (considering the duties of the court when evaluating and adjudicating a toxic tort claim).

as epidemiology.[47] The use of scientific evidence contributes to the overall problem because it requires judges to handle highly technical, factual issues that may have no set scientific conclusion, which influences the ruling and the consistency of the rulings.[48] In contrast, other areas of tort

---

47 *See* Melissa Moore Thompson, *Causal Interference in Epidemiology: Implications for Toxic Tort Litigation*, 71 N.C. L. REV. 247, 249–50 (1992) (exploring the causal connection of epidemiology and how it relates to toxic tort litigation); *see also* Stephanie A. Scharf, *Introduction, in The Use of Epidemiology in Tort Litigation* 2–3 n.5 (2007), http://www.schoeman.com/assets/pdf/scharf/The_Use_of_Epidemiology_in_Tort_Litigation_Introduction.pdf [https://perma.cc/RH5B-ARXM] (introducing epidemiology and its use in tort litigation). Epidemiology is "the science concerned with the study of the factors determining and influencing the frequency and distribution of disease, injury, and other health-related events and their causes in a defined human population . . . ." Scharf, *supra* note 47, at 2. Epidemiology melds the worlds of the hard sciences and statistics to determine the relationship between exposure to a substance and the resulting injury. *Id.* Scharf provides an example illustrating this relationship:

> An investigator may measure and correlate a range of background characteristics (e.g., gender, left-handedness, family history of breast cancer, low income); exposures (e.g., smoking, workplace chemicals, x-ray, pharmaceuticals, Agent Orange); and positive or negative health consequences (e.g., lung cancer, depression, infertility, Hepatitis C, efficacy of the vaccine, lower risk of hypertension, AIDS, obesity). Sometimes a characteristic does not neatly fall into one or the other category, e.g., obesity may be a family characteristic as well as a health consequence.

Id. at 3. *See also* Robert F. Blomquist, *American Toxic Tort Law: An Historical Background, 1979–87*, 10 PACE ENVTL. L. REV. 85, 86, 88–90, 94 (1992) (providing a detailed explanation of toxic torts and the litigation procedure within American law). Epidemiology allows evidence to be used to assist the judge with understanding how the resulting harm impacts the health and welfare of the parties involved and considering how hazardous substances affect the human body. *Id.* at 89–119. *See also* Note, *supra* note 32, at 2268–69 (providing the scientific implications of toxic torts). The causation issue involved in toxic torts can result in discrepancies. *Id.* at 2268–71. One problem involved with litigating these issues is, as science continually advances, there is more research that may change a ruling in the future. *Id.* at 2271. *See also infra* Part IV.A (suggesting a four factor test for courts to adopt).

48 *See* Note, *supra* note 32, at 2270 (discussing judges' abilities to litigate technical issues); *see also* Marbury v. Madison, 5 U.S. 137, 177–78 (1803) (explaining the duty of the judicial department to say what the law is); United States v. Diallo, 575 F.3d 252, 256–57 (3d Cir. 2009) (stating that when looking to determine the scope of a statute, one must look to the ordinary meaning in the language of the statute); Lark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 740–45 (Nov. 2011) (analyzing the gap between tort common law and recent legislative developments to provide remedies to individuals who suffer environmental harm); Frank C. Newman, *How Courts Interpret Regulations*, 35 CALIF. L. REV 509, 512–13 (Dec. 1947) (evaluating how judges and courts interpret regulations). Because of ambiguities in legislation that have raised legal issues for courts to resolve and because of the public policy of respecting the other branches of government, this circuit split should be resolved. *Id.* Judges have become a beacon for interpreting and resolving those issues. *Id.* Because judges' opinions are highly regarded, it is imperative that they properly interpret the law to promote justice in the judicial system. *Id.* Newman, when discussing the value of judges' opinions stated:

law rarely have technical disputes regarding causation between the defendant's conduct and the plaintiff's injury.[49]

Each of the aforementioned problems have the underlying component of causation.[50] Causation is problematic for the plaintiff in environmental toxic tort lawsuits because the plaintiff usually cannot draw a direct causal connection between the defendant's activity and the injury alleged.[51]

> Judges' opinions are emphasized, not because they are more correct or socially significant than, say, the opinions of government officials or Wall Street lawyers, but because they are authoritative. Since they are authoritative, government officials, Wall Street lawyers[,] and anyone else who would acquire expertness in this field must know their framework and their logic.

Id. *See also infra* Part II.C (discussing the problem with the circuit splits).

[49] *See* Robert F. Blomquist, *Emerging Themes and Dilemmas in American Toxic Tort Law, 1988–91: A Legal-Historical and Philosophical Exegesis*, 18 S. ILL. U. L.J. 1, 25 (1993) (exploring the evaluation of American toxic tort law in relation to the nature and limitations of toxic tort liability). The area of torts and causation is highly contested and continually debated. *Id.* *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 18 (2010) (evaluating the liability of a defendant in a tort lawsuit). A defendant who knows or has reason to know of a risk that may occur from his or her conduct, and fails to warn of the danger may be liable. *Id.* If the defendant does adequately warn the plaintiff of the risk, it is possible that the defendant may still be held liable if the defendant fails to adopt further precautions to protect against the risk if the risk is foreseeable. *Id.* The Restatement is directly applicable to the section discussing the contribution on liability for mass action lawsuits regarding environmental toxic torts. *Id.* "If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 12 (2010). *See also* Garratt v. Dailey, 279 P.2d 1091, 1092–93 (Wash. 1955) (exemplifying the tort of battery and how there was no issues of causation). In this case, a child defendant pulled a chair out from underneath the plaintiff as she was about to sit. *Id.* at 1092. As a result, the plaintiff suffered a severely injured hip. *Id.* In cases like this, where the defendant pulling the chair from underneath the plaintiff directly caused the plaintiff to suffer a broken hip, courts do not have to waste judicial resources litigating the causation element of negligence. *Id.* at 1093.

[50] *See* Blomquist, *supra* note 49, 25–28 n.158, 30–31 n.169–71, 33–34, 36–37 (discussing the issues of causation within toxic torts). Due to the problems with drawing a causal connection between the source of the harm, the harm that resulted, and the impact of the harm, it makes it challenging for courts to promote tort policies that seek to benefit the public. VINCENT R. JOHNSON, STUDIES IN AMERICAN TORT LAW 6–7, (Gary J. Simson et al. eds., 5th ed. 2013).

[51] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 583 (1993) (discussing the issue of whether expert scientific testimony is admissible in toxic tort proceedings). Due to the problem of drawing a direct causal connection between the toxic substance and the resulting harm, plaintiffs often rely on expert scientific testimony to help develop their proof. *Id.* at 582. One famous toxic tort case surrounding expert testimony is *Daubert*, where petitioners sued for birth defects suffered by their children as a result of the mother ingesting Bendectin. *Id.* Bendectin is a prescription antinausea drug marketed by the respondent of the suit. *Id.* After extensive discovery, the respondent moved for summary judgment, arguing the drug, Bendectin, did not cause the birth defects and claimed the petitioners would not be able to provide any admissible evidence that proves otherwise. *Id.* The respondent presented an expert who reviewed the literature on Bendectin and could not find any correlation between

Myers: Removing the Mass Misperception: A Consideration of Mass Environm

Without knowing the cause of the harm, it is nearly impossible to determine whether the environmental toxic torts arose out of the same event or occurrence.[52]

2. Tort Public Policy

Like much of tort law, the public policy surrounding environmental torts cannot be defined by a succinct objective or goal.[53] General tort public policy has been known for compensating those who have been detrimentally impacted by the act of another.[54] Nine of the twelve general tort public policies are applicable to mass environmental torts and can be categorized into three purposes: (1) to hold one liable based on their

---

the drug and birth defects among 130,000 human patients, and because of this testimony, the petitioners presented their own expert who claimed that Benedictine could create birth defects based on the testing of "in vitro" and "in vivo" animal studies. *Id.* Both the District Court and Court of Appeals, relying on the case of *Frye v. United States*, held that the petitioners' evidence did not meet the standard of admissible evidence. *Daubert*, 509 U.S. at 583–84. However, the Supreme Court held that the rule in *Frye* of "general acceptance" does not govern the admissibility of expert scientific evidence. *Id.* at 589. "General acceptance" was a standard for admitting expert testimony that required "a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1013 (D.C. App. Ct. 1923). However, *Daubert* overturned this holding. *Daubert*, 509 U.S. at 587–88. The Supreme Court in *Daubert* stated "nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard." *Id.* at 588.

52 *See infra* Part III.A (considering the problem with causation and multiple party actions in regards to the characteristics of environmental torts).

53 *See* JOHNSON, *supra* note 50, at 6–7 (explaining why there is a need to consider public policy as applicable to general tort public policy).

54 *See id.* at 7–9 (suggesting twelve tort public policies that have traditionally applied to tort law). Johnson provides twelve tort public policies that are applicable to tort lawsuits. *Id.* The public policies are: (1) "[l]iability should be based on fault;" (2) "[l]iability should be proportional to fault;" (3) "[l]iability should be used to deter accidents;" (4) "[t]he costs of accidents should be spread broadly;" (5) "[t]he costs of accidents should be shifted to those best able to bear them;" (6) "[t]hose who benefit from dangerous activities should bear resulting losses;" (7) "[t]ort law should foster predictability in human affairs;" (8) "[t]ort law should facilitate economic growth and the pursuit of progress;" (9) "[t]ort law should be administratively convenient and efficient, and should avoid intractable inquiries;" (10) "[t]ort law should promote individual responsibility and discourage the waste of resources;" (11) "[c]ourts should accord due deference to co-equal branches of government;" and (12) "[a]ccident victims should be fully compensated." *Id.* The tort public policies that are not included in this section and are not evaluated in this Note are as follows: (1) "[t]he costs of accidents should be spread broadly;" (2) "[t]he costs of accidents should be shifted to those best able to bear them;" and (3) "[t]ort law should be administratively convenient and efficient, and should avoid intractable inquiries." *Id.* While these are still important tort public policies to consider when evaluating mass environmental torts, the remaining three policies often interlink with the other policies and do not require their own analysis. *Id.*

Produced by The Berkeley Electronic Press, 2016

Valparaiso University Law Review, Vol. 51, No. 1 [2016], Art. 6

actions; (2) to benefit the general public; and (3) to promote economic prudence.[55]

Within the first purpose, to hold one liable for their tortious actions, tort public policy states that "liability should be based on fault," which is built upon the notion that liability should be imposed on the defendant only if the defendant's conduct is blameworthy.[56] The public policy stating that "[t]ort law should promote individual responsibility and discourage the waste of resources" is premised with the purpose of discouraging the waste of judicial resources.[57] Individuals who have a high risk for liability are encouraged to use the resources around them to protect their interests and prevent harm, rather than waiting for the harm to occur and relying on the judicial system to provide a remedy.[58] The final public policy that ensures individuals are held responsible for their tortious actions states "those who benefit from dangerous activities should bear [the] resulting losses" and is based on the principle of culpability.[59]

---

55 *See* JOHNSON, *supra* note 50, at 6–9 (discussing the general tort public policies that are applicable to environmental torts and the different categorical purposes the public polices form for environmental law).

56 *See id.* at 7 (considering fault as a tort public policy and establishing the need to hold one responsible for the harm he or she cause another). Tort public policy defines fault as a situation where harm is the product of intentional conduct or failure to exercise the appropriate amount of due care. *Id.* *See also Fault*, LAW DICTIONARY (2016), http://thelawdictionary.org/fault/ [https://perma.cc/8DY6-5KND] (defining fault in a civil lawsuit as "[a]n improper act or omission, injurious to another, and transpiring through negligence, rashness, or ignorance" and explaining that there are three degrees of fault in law).

57 *See* JOHNSON, *supra* note 50, at 9 (exploring the concept of wasting judicial resources as a deterrent and the promotion of sound tort public policy).

58 *See id.* (advocating for conserving judicial resources and arguing how the resolution of the circuit split will help promote this public policy in the environmental field); *see also* Roger Bernstein, *Judicial Economy and Class Actions*, 7 J. OF LEGAL STUD. 349, 349–50 (1978) (providing the economic impact class actions have on the judicial system). Class actions face the issue of aggregating small claims to one claim big enough so the potential recovery for the plaintiffs outweighs the cost of litigation. Bernstein, *supra* note 58, at 349. However, many opponents of class actions argue this wastes judicial resources because these small claims are claims the plaintiffs would not have brought individually because the amount they could recover is so insignificant compared to the cost of litigation. *Id.* Having vague legislative regulations applicable to issues that already have a reputation of wasting judicial resources further enforces that concept. *Id.*

59 *See* JOHNSON, *supra* note 50, at 8 (advocating for liability of those who assume risky behaviors); *see also* Peter Clarke, *Tort Law Liability*, LEGALMATCH (2015), http://www.legalmatch.com/law-library/article/tort-law-liability.html [https://perma.cc/6UEL-HSUY] (explaining the different theories of tort liability). Traditionally, tort law has many different theories of liability. Clarke, *supra* note 59. Joint liability occurs when several tortfeasors are held responsible for injury against one party. *Id.* The tortfeasors are jointly liable and are required to pay based on their individual degree of liability. *Id.* Vicarious liability usually occurs in the work place where someone in a superior position is responsible for the actions

https://scholar.valpo.edu/vulr/vol51/iss1/6

The second purpose of the nine applicable general tort public policies is to promote these policies for the benefit of the public.[60] The public policy that "[l]iability should be used to deter accidents" seeks to minimize, and potentially prevent, future accidents by discouraging certain classes of individuals from engaging in conduct that poses a risk of injury.[61] To further benefit the public, "[t]ort law should foster predictability in human affairs," indicating a person should not be forced to act without knowing what the law requires of them.[62] Finally, "[a]ccident victims should be fully compensated" for the resulting harm they suffer ensures individuals receive compensation for any accidents they are not at fault for.[63]

---

of his or her subordinates. *Id.* Liability to third parties is another theory of liability, which is most apparent in landlord-tenant relationships where a tortfeasor is held responsible for injuries sustained by a third party. *Id.* Contributory negligence, also known as plaintiff/victim liability, is a situation where the plaintiffs contributed to the harm that resulted and are liable for the part of the harm that they caused. *Id.* Strict liability holds a tortfeasor liable even if they had no intention to cause the resulting harm. Clark, *supra* note 59. Clarke discusses the theory of requiring that those who knowingly participate in harmful or dangerous activities be held responsible for any harm that results from those dangerous activities. *Id.*

[60] *See supra* Part II.A.2 (discussing the three categories of tort public policy applicable to environmental torts).

[61] *See* JOHNSON, *supra* note 50, at 7 (arguing that it is good public policy to deter accidents and prevent harm).

[62] *See id.* at 8 (providing the tort public policies); *see also* Cass, *supra* note 13, at 671 n.4 (stating that the Latin phrase *ignorantia juris non exusat* translates to ignorance of the law excuses no one). To uphold this legal principle, courts should provide clear guidelines for the parties to understand. *See infra* Part IV (discussing this Note's proposed contribution).

[63] *See* JOHNSON, *supra* note 50, at 9 (exploring why "[a]ccident victims should be fully compensated"); *see also* Ken LaMance, *Remedies in Tort Law*, LEGALMATCH (2015), http://www.legalmatch.com/law-library/article/remedies-in-tort-law.html [https://perma.cc/P43D-L83B] (explaining the different forms of compensation in tort law available to plaintiffs). Compensation comes in many forms in tort law. LaMance, *supra* note 63. A victim of a tort can receive damages, which are monetary payments to compensate for any injuries, losses, and pain and suffering. *Id.* Punitive damages, which are damages used to punish and deter the negligent conduct, may be included as well. *Id.* There are also restitutionary remedies. *Id.* Restitutionary damages are similar to monetary damages; however, they are calculated based on the tortfeasor's gain rather than the plaintiff's loss. *Id.* Replevin allows the plaintiff to recover property that may have been lost because of the tort. *Id.* Ejectment removes a person staying on real property owned by the plaintiff, and is usually only present in trespass torts. LaMance, *supra* note 63. Courts may also put a property lien, which is a method of compensating a plaintiff for his or her harm through the sale of the tortfeasor's property. *Id.* A third category of remedies is equitable remedies, which comes into play when monetary damages will not suffice as adequate compensation. *Id.* Equitable remedies include temporary restraining orders, which prevent the tortfeasor from contacting or coming near the plaintiff, and temporary or permanent injunctions, which may prohibit the tortfeasor's activity or may order a tortfeasor to take affirmative steps. *Id.* Generally, for environmental torts, courts only consider compensatory and punitive damages. *Id.*

The final purpose of general tort public policy is to encourage economic prudence.[64] Environmental catastrophes and vague statutory definitions do not encourage economic prudence and violate the policy that "[t]ort law should facilitate economic growth and the pursuit of progress."[65] To further promote economic prudence, courts need to recognize certain questions are generally best left to the legislature to remedy in a statute, rather than relying on the judicial branch to resolve in litigation.[66] Therefore, "[c]ourts should accord due deference to co-equal branches of government," ensuring that the judicial and legislative branches are in a balance ultimately promoting economic prudence.[67]

Currently, these nine tort public policies are not adequately considered in the current interpretation of the CAFA and the same event or occurrence language.[68] Tort public policy should be promoted for the safety and health of the citizens who could potentially be impacted by these environmental catastrophes.[69] Thus, for the benefits of tort public policy and to alleviate the confusion amongst the parties and the judicial system, a more precise definition of same event or occurrence is needed.[70]

B. *The History of the Class Action Fairness Act*

Cases that involve large numbers of plaintiffs or defendants are known as class actions.[71] Today, the function of a class action lawsuit is

---

[64] *See* JOHNSON, *supra* note 50, at 6–7 (discussing the three categories of tort public policy applicable to the environmental torts and the issue of removal jurisdiction and arguing for the need to resolve the circuit split to promote these public policies).

[65] *See id.* at 9 (advocating economic growth and arguing that the promotion of economic growth is one form of tort public policy).

[66] *See id.* (encouraging the balance of the judicial and legislative branches of government).

[67] *See id.* (promoting co-equal branches of government and requiring that defendants take action to prevent their harm, rather than waste judicial resources by relying on the court to determine the damages).

[68] *See infra* Part II.B (demonstrating how the CAFA fails to adequately define the same event or occurrence exception).

[69] *See infra* Part II.C (exemplifying situations where parties were detrimentally harmed by environmental catastrophes).

[70] *See infra* Part IV (providing the factor test courts should adopt to eliminate the vague standard of the same event or occurrence exception under the CAFA).

[71] *See* Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(1)(B) (2005) (explaining what is a class action under the CAFA); *see also* McCastle v. Rollins Envt'l Servs. of La., Inc., 456 So. 2d 612, 615 (La. 1984) (holding that a class action was an appropriate form of suit that was brought before the Louisiana state court and exemplifying a situation of a class action lawsuit). In *McCastle*, there were approximately 4,000 residents who lived near a hazardous waste disposal facility owned by Rollins Environmental Services. *McCastle*, 456 So. 2d at 615 The plaintiffs alleged that from March 6, 1980 to February 21, 1981, the land farming operation produced chemical fumes that caused the plaintiffs' illnesses and discomfort with burning eyes, sore throats, and upset stomachs, while increasing the risk of asthma, cancer, and heart disease. *Id.*

to prevent plaintiffs' remedies from being limited simply because the rules of court restrict their ability to bring a claim.[72] Class actions, rooted in English courts, were created to combat common problems in multiparty lawsuits.[73] Taking from the equitable principles found in English law, the American court system sought to provide a remedy in law and equity to those harmed in class actions.[74] Eventually, the United States adopted Equity Rule 38, a rewritten version of the English Equity Rule 48.[75] Equity

---

72 *See* West v. Randall, 29 F.Cas. 718, 721 (C.C.D.R.I. 1820) (discussing the rights of defendants to a claim and interested parties in a lawsuit); *see also* Brown v. W. & G. Ricketts, 3 Johns.Ch. 553, 555–56 (N.Y. Ch. 1818) (discussing the issue of whether certain parties can be involved in the claim brought).

73 *See* BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK 3 (Samantha Cassetta et al. eds., 2010) (discussing generally how to litigate class actions). Class actions have not always existed in American law and the legislation regarding class actions is based on English law. *Id.* Many problems may arise with single-plaintiff lawsuits. *Id.* First, separate lawsuits may lead to inconsistent outcomes. *Id.* This means a court may rule two different ways in cases that are factually similar. *Id.* These inconsistencies can degrade the view of the American judicial system as one legislative body because it raises a question of fairness. *Id.* Second, requiring separate lawsuits for claims that may be against the same defendant causes individuals to waste their economic resources. ANDERSON & TRASK, *supra* note 73, at 3. Litigation is expensive because, for example, it requires hiring an attorney to research elements of a claim, hiring appropriate experts, and reviewing documents and other pieces of evidence. *Id. See also West*, 29 F.Cas. at 721 (discussing the laws of equity). When developing a class action, English courts considered all persons with an interest in the subject matter of a suit a necessary party and one that could be involved in the lawsuit. *Id.* at 718. *See, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 803 (E.D.N.Y. 1991) (exemplifying a situation of multiparty litigation).

74 *See West*, 29 F.Cas. at 721 (quoting Justice Joseph Story who stated that "[i]t is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties in the suit, however numerous they may be."). Justice Story listed three exceptions in regards to the general rule that all interested parties to the suit should be involved. *Id.* at 722. The first exception is if there are numerous parties, it will be almost impossible to bring them all before the court. *Id.* The second exception to the rule is if the question is of general interest, a few may sue for the benefit of the whole. *Id.* The final exception is if the parties form part of a voluntary association, they may represent the rights and interests of the whole. *Id.* For those harmed, courts have traditionally been interested in promoting equitable relief by providing the opportunity to present the case. *Id.* at 718*; see also* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 998–99 (2015) (considering the laws of equity and how the courts evaluate equity when adjudicating issues and reaching a remedy).

75 *See* Clarke v. Boysen, 285 F. 122, 126 (8th Cir. 1922) (providing the language for Equity Rule 48). Equity Rule 48 states that:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

Rule 38 provided that when the issue before the court is one of common or general interest to many persons, so that it would be impracticable to bring them all before the court individually, then one or two individuals may sue or defend on behalf of the whole group.[76] Over time, American courts have found if there were numerous parties, it would be impracticable to bring them all into court, but if these parties had a common interest and adequate representation in the claim filed, the courts had a willingness to allow cases to proceed as class actions.[77]

Before the enactment of the CAFA, the courts considered many environmental regulations and rules when adjudicating environmental torts to prevent corruption that may occur with complex litigation.[78] The

---

Id. *See also Class Action*, LEGAL INFO. INST. (2015), https://www.law.cornell.edu/wex/class_action [https://perma.cc/4DSD-FN3L] (evaluating how class suits apply to the rules of equity and providing the language for Equity Rule 48). Equity rules are a group of rights and procedures set in place to provide fairness. *Equity*, LAW.COM (2015), http://dictionary.law.com/Default.aspx?selected=646 [https://perma.cc/76NS-2NQD]. The rules of equity arose in England in response to the strict rules of common law. *Id.* The courts of chancery, also known as the courts of equity, were established to provide remedies through royal power that common law did not provide. *Id.* The courts of law and the courts of equity were separate during that time in England; however, the two usually combined and were treated under the same cause of action. *Id.* *See* Daniel K. Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 170 (1939) (providing Equity Rule 38, which combined the previous language in *Smith* and Equity Rule 48 that helped form F.R.C.P. 23 surrounding class actions).

[76] *See* Hopkins, *supra* note 75, at 170 (discussing Equity Rule 38, which is the rule the United States chose to adopt based on the English Rules of Equity). Equity Rule 38 states that:

> [T]he test to be applied to representative suits was that the question should be one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court

Id. (internal quotation marks omitted).

[77] *See* FED. R. CIV. P. 20 (explaining the requirements for joining parties into one action); *see also* FED. R. CIV. P. 42(a) (providing the requirements for consolidating multiple claims into one action).

[78] *See* Clean Water Act, 33 U.S.C. § 1251(a), (c) (1972) (governing water pollution on a federal level); Oil Pollution Act, 33 U.S.C. § 2701 (1990) (providing a way to mitigate and deter future oil spills in the United States); Clean Air Act, 42 U.S.C. §§ 7401(b)–(c) (1963) (standardizing a method of controlling air pollution on a national level); National Environmental Policy Act, 42 U.S.C. § 4321 (1969) (promoting the enhancement of the environment); *see also Timeline: The Modern Environmental Movement*, PBS (2016), http://www.pbs.org/wgbh/americanexperience/features/timeline/earthdays/ [https://perma.cc/8HGT-QUV4] (providing that throughout the 1970s, the legislature adopted environmental statutes and regulations to protect the environment and promote public safety as a public policy argument). On January 1, 1970, the Court adopted the National Environmental Policy Act of 1969, requiring federal agencies to consider the environmental consequences of their actions and disclose those impacts to the public to help deter future harms. 42 U.S.C. § 4321. The Clean Air Amendment of 1970 sought to protect

Myers: Removing the Mass Misperception: A Consideration of Mass Environm

federal courts adopted Rule 23 of the Federal Rules of Civil Procedure ("F.R.C.P.") because the environmental regulations failed to assist in the adjudication of a class action claim.[79] F.R.C.P. 23 is one of the earlier examples of the judicial system's attempt to address litigation of class actions, and it provides four conditions that allow a claim to be considered a class action.[80] The first condition requires the size of the class to be so large that joinder is not possible.[81] The next requirement is that the class presents a common question of law and fact.[82] The third requirement provides that the representatives in the lawsuit must present claims and defenses of those that are typical of that class of individuals.[83] Finally, the

public health by providing air quality standards for people to know when the air is considered unsafe for humans and hazardous to the environment. 33 U.S.C. § 1251. In 1990, the Oil Pollution Act aspired to remedy the gaps found in the Clean Water Act of 1977 and the Federal Water Pollution Act of 1972. § 2701. The Oil Pollution Act was directed at companies who are at a high liability for spilling oil into the United States waterways and required that companies have a plan to prevent the spills and a detailed plan outlining the actions the company would take in the event of an oil spill. *Id. See also* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 65–66 (2003) (discussing the procedural problems that arise with complex litigation procedure such as class actions).

79 *See* FED. R. CIV. P. 23(a) (listing guidelines for a judge to determine if the prerequisites for a class action have been met).

80 *See id.* (providing the prerequisites for a class action). F.R.C.P. 23 further requires the following to have a successful class action: there is a risk of inconsistent rulings; the interests of others are similar; the defendants have not behaved in a manner the class bringing the action expects; the claims of the class have a common question of law or fact; and that a class action is superior to other methods of adjudication to have a class action. *See also* FED. R. CIV. P. 23(b) (describing the different types of class actions that may arise); *see also* Sarah Somers, *7.2 Rule 23 Class Certification Requirements*, SARGENT SHRIVER NAT'L CTR. ON POVERTY L. (2014), http://federalpracticemanual.org/node/42 [https://perma.cc/ZXV8-JDSX] (reviewing the requirements, under F.R.C.P 23, for class certification).

81 *See* FED. R. CIV. P. 23(a)(1) (requiring that the class be so broad and encompassing that it is impractical to join the members of the claim); *see also* FED. R. CIV. P. 20(a) (discussing when parties may be joined in one action). Joinder is a situation in which several lawsuits, or several parties, may be combined in one lawsuit so long as the issues and facts in the case are the same. FED. R. CIV. P. 20(a).

82 *See* FED. R. CIV. P. 23(a)(2) (ensuring that the class action involves the same issue between all the plaintiffs); *see also* Stephen A. Wiener, *The Civil Jury Trial and the Law-Fact Distinction,* 54 CALIF. L. REV. 1867, 1867–68 (1966) (discussing the distinction between law and fact). Questions of facts are issues that are to be resolved by the jury, whereas questions of law are issues that are to be resolved by the judge. *Id.* at 1867.

83 *See* FED. R. CIV. P. 23(a)(3) (suggesting that the claims and defenses the parties may bring are common to the claim). Some common defenses in toxic torts are: the plaintiff has not proved the elements necessary for the claim, the defendant has not caused the resulting harm, the defendant has complied with government regulations and should not be held liable, the plaintiff assumed the risk of harm, and the statute of limitations has run out. *See* Kathleen Michon, *Toxic Tort Litigation: Common Defenses*, NOLO (2015), http://www.nolo.com/legal-encyclopedia/toxic-tort-litigation-common-defenses-32209.html [https://perma.cc/2G7T-5SZ8] (establishing some of the common defenses of toxic torts that defendants may raise in litigation).

Produced by The Berkeley Electronic Press, 2016

representatives must fairly and adequately protect the interests of the class.[84] However, this rule did not alleviate the problems of forum shopping and other mass litigation problems.[85]

The law has not been without attempt to provide an adequate solution for proper litigation of mass environmental torts, and in response to the past failures, former President George W. Bush signed the CAFA into law on February 17, 2005.[86] The CAFA's purpose is to ensure fair and prompt recoveries for plaintiffs with multiple claims, restore the intent of those who drafted the Constitution by providing federal court jurisdiction over cases of national importance, and benefit society by encouraging innovation and lowering consumer prices.[87] As such, the CAFA supplements F.R.C.P. 23 and provides a way for parties to remove an action to federal court.[88]

The CAFA defines a class action as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of

---

[84] *See* FED. R. CIV. P. 23(a)(4) (allowing the classes to act as a representative for everyone who is an interested class member).

[85] *See* Lahav, *supra* note 78, at 65–66 n.3 (providing a guide that discusses complex litigation procedure); *see also* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 431 (1998) (exemplifying some of the problems associated with circuit splits).

[86] *See* Lahav, *supra* note 78 and accompanying text (discussing the numerous environmental regulations to help deter environmental catastrophes); *see also* FED. R. CIV. P. 23(a) (providing a piece of legislation used to aid courts in adjudicating class actions); Marcy Hogan Greer & Paul L. Peyronnin, *The Class Action Fairness Act of 2005 in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 241 (Marcy Hogan Greer et al. eds., 2010) (stating the Act was enacted in response to abuse in class action litigation stated in the Senate Judiciary Committee Report). Commenting on the purpose of the Act, the Senate Judiciary Committee Report stated:

> One key reason for the problems with our existing class action system is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements.

Greer & Peyronnin, *supra* note 86, at 241. Those who ratified the CAFA have ultimately concluded that states are not able to adequately handle massive, multistate class actions. *Id.* at 242. Thus, Congress created a law that alleviated some of the claims states would be required to hear. *Id.*

[87] *See* 28 U.S.C. § 1332 (2012) (explaining the purposes of the CAFA are to "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices").

[88] *See* § 1332(d)(1)(B) (discussing class action lawsuits and defining a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action").

judicial procedure authorizing an action to be brought by [one] or more representative persons."[89] By comparison, under § 1332(d) of the CAFA, federal courts have minimal diversity jurisdiction over class actions with 100 or more individual class members whose amount in controversy exceeds more than $5 million.[90] The CAFA defines a mass action as "any civil action [where] . . . [the] claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."[91] As such, a mass action is deemed to be a class action and removable under the United States Code ("U.S.C.") §§ 1332(d)(2)-(10).[92] However, the CAFA provides an exception to this rule.[93] Under the CAFA, a mass action does not exist if "all the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that state."[94] While this exception is helpful for the purposes

---

[89] *See* § 1332(d)(1)(B) (defining a class action as any civil action filed under Rule 23 of the F.R.C.P. authorizing an action to be brought by one or more representative persons); *see also* § 1711(2) (providing another instance in which a class action is defined); FED. R. CIV. P. 23(a) (establishing guidelines for litigating mass actions as class actions).

[90] *See* § 1332 (providing the sections of the United States Code where the CAFA is codified); *see also* § 1332(a) (discussing non-class action federal jurisdiction requiring that the parties be of diverse citizenship, meaning that the parties involved in the lawsuit must be citizens of different states, and requiring the amount in controversy to exceed $75,000).

[91] § 1332(d)(11)(B)(i); *see also Civil Action*, LAW DICTIONARY (2015), http://thelaw dictionary.org/civil-action/ [https://perma.cc/U2QT-VUXV] (explaining that a civil action is a lawsuit in civil law where there is a personal action instituted to compel payment or doing something else that is purely civil in nature).

[92] *See* § 1332(d)(11)(A) (describing a mass action generally). Mass actions can be removed as class actions under the CAFA because class actions are an area of law that federal courts have jurisdiction over. § 1332(d)(2).

[93] *See* § 1332(d)(3), § 1332(d)(4), § 1332(d)(11) (explaining exceptions of claims that come within the CAFA). Under the CAFA there are additional exceptions for mass actions. *Id.* This Note focuses on only one exception for mass actions—what constitutes the same event or occurrence for a mass action to be a class action—and thus, removable to federal court as a class action. *See supra* Part II.A (considering the characteristics of environmental torts). However, there are additional limitations to federal court jurisdiction of mass actions under the CAFA. § 1332(d)(11)(B). The first limitation of mass actions and federal jurisdiction is the federal court has the discretion to choose whether to exercise jurisdiction over a mass action when more than one-third, but fewer than two-thirds, of the members of citizens of the foreign states and the primary defendants are also citizens of the forum state. § 1332(d)(3). Furthermore, a district court is required to decline jurisdiction if two-thirds or more of the class members and the primary defendants are citizens of the forum state. § 1332(d)(4)(B). Another instance where the district court is required to decline jurisdiction over a mass action is when the principal injuries resulting from the conduct at issue occurred in the forum state or where no similar class action involving any of the same defendants was filed during the three-year period before the filing of the complaint at issue. § 1332(d)(4)(A).

[94] § 1332(d)(11)(B)(ii)(I). Also, a mass action is not considered a class action if:

> the claims are joined upon motion of a defendant; all of the claims in the action are asserted on behalf of the general public (and not on behalf of

of removal jurisdiction, the phrase "same event or occurrence" is vague in the context of environmental torts.[95] The vagueness of the single local event exception can be further exemplified by the three-way circuit split of the Third, Ninth, and Fifth Circuits.[96]

C. The Circuit Split

Circuit splits are generally disfavored because they create inconsistent holdings and confuse the parties and prospective litigants.[97] Recently, the Third, Ninth, and Fifth Circuit courts evaluated the issue of whether a mass action is a class action under the single local event exception.[98] These three circuits provided different interpretations of what was considered the same event or occurrence phrase, thereby creating inconsistent holdings surrounding environmental torts.[99]

In the Third Circuit ruling, *Abraham v. St. Croix Renaissance Group, L.L.L.P.*, over 500 individual plaintiffs sued because of an aluminum refinery's negligent operation, which harmed the plaintiffs' health and land.[100] When the defendants attempted to remove the action to federal court, the plaintiffs sought to remand the case back to the state court arguing that federal courts lacked subject matter jurisdiction because the

---

> individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or the claims have been consolidated or coordinated solely for pretrial proceedings.

§ 1332(d)(11)(B)(ii)(II)–(IV).

[95] *See infra* Part III.A (evaluating the CAFA and critiquing the vague language of the single local event exception).

[96] *See infra* Part III (addressing the problems with the vagueness of the same event or occurrence phrase); *see also infra* Part IV (providing a solution to the vague language of the CAFA's single local event exception).

[97] *See infra* Part III.A (critiquing circuit splits through the lens of tort public policy); *see also* Deborah Beim & Kelly Rader, *Evolution of Conflict in the Court of Appeals*, YALE UNIV. (May 12, 2015), http://campuspress.yale.edu/beim/files/2011/10/Beim_Rader_Conflicts-xxkfk0.pdf [https://perma.cc/XRZ7-ADQB] (recognizing the reasons for circuit splits and evaluating how long circuit split conflicts exist before they are resolved).

[98] *See infra* Part II.C (discussing three recent examples of the single local event exception under the CAFA).

[99] *See infra* Part II.C (commenting on the three-way circuit split and courts' interpretations of the CAFA).

[100] *See* 719 F.3d 270, 272–73 (3d Cir. 2013) (holding that the continued release of hazardous materials over a period of time is a single event). St. Croix Renaissance Group ("SCRG") owned an aluminum refinery, and the plaintiffs asserted that for thirty years, as a result of the refinery's operations, hazardous materials were buried in red mud and stored outdoors in piles up to 120 feet high and spreading over 190 acres of land. *Id.* at 272–73. Apart from these hazardous materials, friable asbestos was also present. *Id.* at 273. The wind dispersed these chemicals causing erosion. *Id.* The plaintiffs argue that SCRG knew gusts of wind could easily disburse the red mud and that plaintiffs and their property could be subject to damage because of the red mud, but did nothing to combat it. *Id.*

mass action fell under the single local event exception.[101] The court found that "[t]he word *event* . . . is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane[,] or chemical spill."[102] As such, the Third Circuit ultimately concluded that an environmental hazard that is continuing in nature might fit the "event" element of the single local event exception of the CAFA.[103]

In the Ninth Circuit ruling of *Allen v. The Boeing Company*, the plaintiffs filed an action against Boeing, Landau, and fifty John Does alleging property damage due to groundwater contamination spanning over a fifty-three-year period.[104] Boeing removed the action to the federal court on the basis that the federal courts had jurisdiction to hear the claim because the claim was a mass action.[105] The plaintiffs then motioned to remand the issue back to state court, arguing the claim fell under the single

---

[101] *See id.* at 272 (stating where the claim was original filed); *see also* FED. R. CIV. P. 12(b)(1) (providing that a defense motion must be filed under this rule when a party is trying to dismiss a claim for a lack of subject-matter jurisdiction). A court must have jurisdiction to have authority to enforce a judgment on a claim. FED. R. CIV. P. 12(b)(1). Subject-matter jurisdiction is one type of jurisdiction that allows a claim to be heard in federal court. *Id.* Subject-matter jurisdiction is the requirement that the court has the power to hear the specific kind of claim brought to the court. *Id.* If courts do not have subject-matter jurisdiction, they must dismiss the case. *Id.* Class actions are an example of claims that federal courts have subject-matter jurisdiction over due to their complex nature; therefore, if a mass action is not a class action, federal courts do not have jurisdiction over the claim. *Id.*

[102] *Abraham*, 719 F.3d at 274 (emphasis in original). The first step is to determine whether the particular language has a plain and unambiguous meaning regarding the dispute in the case. *Id.* If the meaning of the statutory text is plain, then there is no further inquiry. *Id.*

[103] *See id.* (concluding that a continuing event may still be the same event). The District Court noted that the word event used in the CAFA could encompass a continuing tort, for example, the continuous release of a toxic chemical. *Id.* The District Court reasoned that using a narrow view, like what SCRG wanted to argue, would undermine the intent of Congress to allow state courts to adjudicate claims involving truly localized torts with localized injuries. *Id.* To illustrate this, the District Court stated that:

> [T]he word *event* in our view is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane, or chemical spill. For example, one can speak of the Civil War as a defining event in American history, even though it took place over a four-year period and involved many battles.

Abraham, 719 F.3d at 277 (emphasis in original). The Third Circuit upheld the District Court's reasoning. *Id.* at 280.

[104] *See* 784 F.3d 625, 627 (9th Cir. 2015) (holding that a single event is limited to a single happening). Landau was the environmental remediation contractor for Boeing and the plaintiffs asserted that Landau was liable for negligently investigating, remediating, and cleaning up the contamination, and for failing to warn plaintiffs of the contamination. *Id.*

[105] *See id.* at 627–28 (discussing the removal procedure); *see also* 28 U.S.C. § 1332(d)(11)(A) (2012) (providing that so long as the action is considered a mass action under the CAFA, then the case may be removed to federal court).

local event exception and the local controversy exception of the CAFA.[106] Ultimately, on appeal, the Ninth Circuit stated that the single event or occurrence exclusion only applies where "all claims arise from a single event or occurrence."[107]

Finally, in the Fifth Circuit, *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, a group of 167 individuals brought a negligence claim against Denbury Onshore for injuries incurred thirteen years prior.[108] Denbury moved to remove the action to federal court under the CAFA, and the plaintiffs moved to remand the motion, claiming that the single local event exclusion applied.[109] The Fifth Circuit held that the ongoing patterns of conduct were contextually connected, and therefore resulted in one event,

---

106 *See Allen*, 784 F.3d at 628–30, 633 (evaluating the motion on remand); *see also* Coleman v. Estes Express Lines, Inc., 631 F.3d 1010, 1010–17 (9th Cir. 2011) (providing the precedent case the Ninth Circuit relied on in *Allen*). In *Coleman*, the court stated a plaintiff seeking remand under this exception has the burden of showing that the exception applies and indicated that issues of statutory interpretation are reviewed *de novo*. *Coleman*, 631 F.3d at 1013–14. *Coleman* further holds "that CAFA's language unambiguously directs the district court to look only to the complaint in deciding whether the criteria set forth in § 1332(d)(4)(A)(i)(II)(aa) and (bb) are satisfied." *Id.* at 1015. The court in *Coleman* offered three reasons for courts not looking beyond the complaint to determine whether a case satisfies the requirements of subsections (aa) and (bb). *Id.* at 1016. The first requirement states that "the plain language of these subsections indicates, through the use of the words 'sought' and 'alleged,' that the district court is to look to the complaint rather than to extrinsic evidence." *Id.* The second requirement states "though district courts sometimes consider evidence in making some subject matter jurisdiction determinations, they do not always do so." *Id.* The final requirement states "factual determinations under subsections (aa) and (bb) are likely to be more expensive and time consuming than factual determinations of citizenship and amount-in-controversy." *Id.* at 1016. The court in *Coleman* concluded that "nothing in CAFA . . . indicates a congressional intention to turn a jurisdictional determination concerning the local defendant's 'alleged conduct' into a mini-trial on the merits of the plaintiff's claims." *Coleman*, 631 F.3d at 1017. While this is not the section addressed in this Note, it provides some understanding as to how to interpret the language of the CAFA.

107 *See Allen*, 784 F.3d. at 628–29 (emphasis omitted) (deciding on the definition of the same event or occurrence). Previously, on September 23, 2014, the District Court for the Western District of Washington ruled that the single local event applied, and thus, the federal court did not have jurisdiction to hear the case. *Id.* at 628.

108 *See* 760 F.3d 405, 407 (5th Cir. 2014) (holding that there was no single event within this lawsuit for the purposes of remanding the case back to state court). The 167 individuals entered into a contract with Denbury Onshore, Specter Exploration, and SKH Energy allowing them to explore for oil, gas, and hydrocarbons on their land. *Id.* at 407. The plaintiffs brought a suit stating that Denbury had breached its duty as a lessee to "act as a reasonable and prudent operator of the well." *Id.* They further alleged that Denbury failed to: follow methods that were designed to prevent the drill pipe from getting stuck, adequately "cement the casing in a sidetrack well," "heed increased differential pressures in the drilling of the original well," and correct a defective cement job. *Id.*

109 *See id.* at 407 (describing the procedural history of the case, stating the district court found that the case fell under the single local event exception, and therefore, remanded the case back to the state court for further proceedings).

so the single local event exception applied.[110] The three-way circuit split reveals that there is a need for an adequately defined standard for what is considered the same event or occurrence.[111]

III. ANALYSIS

The current legal language of the CAFA does not provide a clear definition or explanation of the single local event exception, as evidenced by the three-way circuit split of the Third, Ninth, and Fifth Circuits.[112] The individual circuits provided guidance on what constitutes the same event or occurrence in a mass environmental tort; however, federal courts should forego the Circuits' previous rulings defining the same event or occurrence because they do not successfully consider the context of mass environmental torts.[113] Instead, federal courts should adopt a balancing factor test that will allow for environmental tort claims to be evaluated under the same standard.[114] As such, Part III.A analyzes the manners in which the CAFA and other environmental regulations fail to adequately consider removal jurisdiction of mass environmental torts.[115] Next, Part III.B examines circuit splits and shows how they generally deter courts from promoting sound public policy.[116]

A. *The Trouble with the CAFA and Other Regulations*

Currently, under the CAFA, no unified standard or definitional phrase is provided for courts when they are interpreting removal jurisdiction of mass environmental torts.[117] Originally, the CAFA and other mass action legislation was enacted to prevent corruption in multiparty litigation, but these pieces of legislation fail to accomplish that

---

110 *See id.* at 413 (finding that the district court did not err, and instead affirmed the decision that the case came within the single local event exception).

111 *See supra* Part II.C (exploring the holdings of the Third, Ninth, and Fifth Circuits regarding the CAFA and removal jurisdiction of mass actions).

112 *See supra* Part II.B (discussing the CAFA and the definitions and standards provided within the legislation).

113 *See supra* Part II.B (reiterating the holdings of the Third, Ninth, and Fifth Circuits and composing their standards for what the same event or occurrence is under the CAFA).

114 *See supra* Part II.C (illustrating the specific facts of the cases involved circuit splits); *see also infra* Part IV (proposing a four-factor balancing test for courts to adopt).

115 *See infra* Part III.A (evaluating the CAFA and arguing how it inadequately promotes the original purpose of the CAFA through the removal of mass actions).

116 *See infra* Part III.B (analyzing circuit splits generally, and then critiquing the specific circuit split of the Third, Ninth, and Fifth Circuits).

117 *See* 28 U.S.C. § 1332(d)(11)(B)(ii) (2012) (describing the single local event exception and discussing when a mass action is a class action to be removed to federal court under the CAFA).

Produced by The Berkeley Electronic Press, 2016

purpose.[118] A vague standard for removal jurisdiction, under the CAFA, aggravates many policy areas of tort law by failing to use liability as a means to deter accidents.[119]

Additionally, forum shopping is another consequence that results from vague legislation, like the CAFA, because it encourages parties to remove a lawsuit from state court to federal court seeking more favorable treatment.[120] In mass environmental tort litigation, a party may seek to remove a case to or from federal court simply because that forum could provide the party with a more favorable outcome.[121] However, in reality, that forum may have no legal authority to adjudicate the case in the first place.[122] Forum shopping violates tort public policy and the legislative intent of the CAFA.[123] As such, adopting specific guidelines at the federal

---

118 *See* Herald, *supra* note 85, at 431 (describing the problems associated with circuit splits, specifically considering the Ninth Circuit); *see also* ANDERSON & TRASK, *supra* note 73, at 3 (exploring the different types of corruption that can occur in complex litigation, such as forum shopping, inconsistent judgments, issues of equity and fairness, and the waste of economic resources); *supra* Part II.C (providing the facts used to create the three-way circuit split of the Third, Ninth, and Fifth Circuit); *infra* Part III.B.2 (discussing the problems that result from circuit splits and how they can impact the litigation of a claim).

119 *See* JOHNSON, *supra* note 50, at 7–9 (discussing the twelve general tort public policies that should be promoted when litigating environmental torts).

120 *See* Bassett, *supra* note 40, at 335.

(examining forum shopping as a problem involved in complex litigation); *see also Judicial Selection: The Process of Choosing Judges*, ABA 5, 8 (June 2008), https://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf [https://perma.cc/ULQ9-HU4K] [hereinafter *Judicial Selection*] (exploring the election of state judges and their duties to the public). There has been much debate that one of the reasons parties forum shop is to avoid the potential bias of state judges because they are elected for limited terms and to serve the public. *Judicial Selection*, *supra* note 120, at 5. Many believe state judges should not enter rulings based on the interest of the public, but instead should rule in the interest of the law. *Id.* at 8. Furthermore, incentives are provided to a plaintiff who settles because F.R.C.P. 68(d) requires that a plaintiff who refuses to settle must pay the defendant's post-offer costs if the final judgment is less than the unaccepted offer. F.R.C.P. 68(d). In regards to the payment to the plaintiff for the resulting harm, post-judgment interest rates are monitored by federal law and are often significantly less than state post-judgment interest rates. 18 U.S.C. § 3612 (2012). There are other reasons why a defendant favors federal court over state court; however, these were the ones that are most apparent. *Id.*

121 *See* Bassett, *supra* note 40, at 342 (exploring the concept of forum shopping and the corruption associated with forum shopping because it is easier for parties to seek to file in the court that they know may give them a more favorable ruling).

122 *Id.* at 344 (exemplifying that there is the possibility of being able to legally bring a claim in two forums). While there is legal authority to bring a claim under jurisdiction and venue requirements outlined in the F.R.C.P., this Note focuses more on selecting one forum over another, specifically based on how a judge may litigate a case, making it more burdensome on the defendant who does not get to select the forum. *Id.* at 346.

123 *See* Greer & Peyronnin, *supra* note 86, at 241–42 (explaining the purpose of the CAFA and describing the inconsistent adjudication process without the CAFA); *see also* JOHNSON, *supra* note 50, at 7–9 (discussing tort public policy); *supra* Part II.A.2 (evaluating the specific

court level will eliminate forum shopping because parties will not be able to skew the facts or the evidence of their case to seek a favorable ruling that aligns with that specific court's approach.[124] Instead, federal courts should apply a *unified* standard to all environmental toxic tort claims for what constitutes the same event or occurrence under the single local event exception.[125] Using the unified standard, courts will be able to determine whether a claim is properly removable to federal court.[126]

Furthermore, under the current language of the CAFA, the failure to provide a standard for the same event or occurrence violates the drafters' legislative intent, as well as tort public policy.[127] Congress enacted numerous environmental regulations to protect the people and the environment.[128] Therefore, to promote the legislative intent of the environmental policies enacted, defendants who fail to abide by the regulations and fail to prevent any resulting harm must be held liable.[129] The implementation of different environmental regulations are aimed at

---

tort public policies that are applicable to mass environmental torts). The CAFA sought to combat the problems often associated with complex litigation, and vague standards do not remedy the apparent problems of forum shopping and public policy violations. *Supra* Part II.A.

[124] *See* Juenger, *supra* note 40, at 553–54 n.9 (illustrating how forum shopping works in favor of litigants); *see also infra* Part IV (providing a solution aimed at eliminating corruption within the judicial system).

[125] *See* Cummins & Aft, *supra* note 23, at 60 (discussing how circuit splits work and their impact on the Supreme Court).

[126] *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (2012) (stating that a mass action is considered a class action under the CAFA when the claim does not arise out of the same event or occurrence, thus giving federal courts jurisdiction over the mass action as if it were a class action).

[127] *See* Benko v. Quality Loan Serv. Corp., 789 F.3d 1111, 1115–16 (9th Cir. 2015) (exemplifying a case that considers the local controversy exception, which is an exception applied to a class action). The single local event exception differs from the local controversy exception because the single local event exception is a narrowly tailored rule. *Id.* at 1115.

[128] *See* Clean Water Act, 33 U.S.C. § 1251(a), (c) (1972) (advocating for the minimization of water pollution on a national scale); Oil Pollution Act, 33 U.S.C. § 2701 (1990) (construing a document to be used to help deter oil spills and more effectively clean up oil spills that occur); National Environmental Policy Act, 42 U.S.C. § 4321 (1969) (recommending regulations to promote a clean environment); Clean Air Act, 42 U.S.C. §§ 7401(b)–(c) (1963) (urging the regulation of air pollutants). These environmental regulations were enacted before the CAFA to aid in combating the problems associated with the environment and to ensure that parties who fail to abide by states' regulatory requirements are held responsible for their actions. *See supra* Part II.B (discussing the circuit courts' holdings regarding the same event or occurrence phrase).

[129] *See* JOHNSON, *supra* note 50, at 7–8 (saying that those who choose to engage in risky behavior should bear the resulting losses and incur liability in proportion to their actions).

discouraging certain classes of people from engaging in forms of conduct that pose an excessive risk of personal injury or property damage.[130]

In addition, vague legislation distracts the judge from issues such as liability of the defendant and recovery of the plaintiff, and shifts the focus to procedural issues, which is unfavorable for public policy.[131] When a defendant chooses to forego statutory regulations, such as environmental regulations, a negligence action is brought and the court analyzes the defendant's conduct under two different theories of negligence: a negligence per se action or a breach of duty under the traditional negligence theory.[132] The theory of negligence and element causation in a mass environmental tort case are the important issues that courts must address; however, because of the vague language of the CAFA, the courts instead must address issues of removal jurisdiction of mass environmental torts.[133] A unified standard to apply to removal jurisdiction under the CAFA will allow the court to focus on the issue of the defendant's intent and care, which will better hold tortfeasors liable for the resulting harm that could have been prevented or minimized.[134]

Finally, the CAFA also fails to account for the fact specific nature of toxic tort claims.[135] Due to the specific nature of such claims, it is more challenging for the court to consistently apply a rule that is too narrow or

---

130 *See id.* at 6–7 (exploring tort public policy and providing that one public policy is to deter accidents and prevent individuals from engaging in conduct that is at a high risk of negligence).

131 *See id.* at 7–10 (noting the importance of public policy). Vague legislation does not promote public policy because it hinders and delays the plaintiff's potential recovery. *Id.* at 9–10.

132 *See Negligence Per Se in a Personal Injury Case*, ALLLAW (2015), http://www.alllaw.com/articles/nolo/personal-injury/negligence-per-se.html [https://perma.cc/7ZLM-LMMN] (explaining that a personal injury lawsuit, such as a toxic tort lawsuit, may be brought under a cause of action claim or a regular personal injury litigation claim). Environmental laws are designed to protect the public. *Id. See, e.g.*, 33 U.S.C. §§ 1251(a), (c) (standardizing water pollution on a national scale); 33 U.S.C. § 2701 (suggesting a way to remedy oil spills and prevent future oil spills from occurring); 42 U.S.C. § 4321 (encouraging the promotion of a safe and clean environment); 42 U.S.C. §§ 7401(b)–(c) (controlling the amount of air pollutants on a national scale).

133 *See* JOHNSON, *supra* note 50, at 7–9 (exploring the traditional rules for proving factual causation); *see also* Clarke, *supra* note 59 (reviewing the different theories of liability found within tort law).

134 *See* JOHNSON, *supra* note 50, at 7–9 (arguing that a tortfeasor should be liable for any resulting harm that he or she caused and providing the twelve tort public policies that are applied to the general category of tort law).

135 *See* Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014) (describing one of the few times federal courts have ruled on the issue of removal jurisdiction of a mass action under the CAFA); *see also* Lin, *supra* note 34, at 1441–42, 1445–46 (stating that the two common hurdles for plaintiffs in toxic tort litigation are the latency period where the plaintiff proves that an actual harm has occurred and proving the defendant actually caused the harm).

too broad, such as the Ninth Circuit ruling and the Third Circuit ruling.[136] As such, a factor test is the most appropriate; it allows the courts to have discretion when hearing these cases, which is important because environmental laws are more fact specific when they are being litigated.[137] A unified standard is needed, because it allows for an equitable solution while considering the fact specific nature of environmental torts.[138] The presence of a circuit split regarding what constitutes the same event or occurrence under the CAFA is not surprising.[139] Courts want to ensure that the rule they are applying is fair and equitable for the cause, which is why the legislature enacted the CAFA; however, the vague language in the Act does little to promote fair and equitable adjudication of toxic tort litigation and removal jurisdiction.[140] Therefore, courts need to adopt a unified standard to ensure that the environmental torts do actually arise out of the same event or occurrence, promoting the legislative intent of the CAFA and allowing courts to contextually analyze truly localized claims.[141]

B. The Trouble with Circuit Splits and Toxic Torts

Circuit splits have created many problems and have never been favored among courts, judges, or litigants because such splits create

---

[136] *See* Allen v. Boeing Co., 784 F.3d 625, 633 (9th Cir. 2015) (narrowing the Third Circuit's view of the CAFA exception); Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C., 760 F.3d 405, 407 (5th Cir. 2014) (clarifying the Third and Ninth Circuits' interpretation of the CAFA); Abraham v. St. Croix Renaissance Grp., L.L.L.P., 719 F.3d 270, 272 (3d Cir. 2013) (interpreting the exception under the CAFA broadly); Veron, *supra* note 44, at 647–48 (reviewing how toxic tort litigation and its fact specific nature has changed over time since the *Daubert* case). The latter three cases exemplify the apparent need to better define the same event or occurrence to resolve the circuit split. *See, e.g., Allen*, 784 F.3d at 633 (limiting the interpretation of the CAFA exception made by the *Abraham* Court); *Rainbow Gun Club, Inc., L.L.C.*, 760 F.3d at 407 (resolving the mixed interpretations of the CAFA provided by the Third and Ninth Circuits); *Abraham*, 719 F.3d at 272 (taking a broad approach to the CAFA exception).

[137] *See* Rice, *supra* note 38, at 885, 887–89 (arguing that because of the fact specific nature of toxic torts, the fictitious defendant problem arises); *see also* Franklin, *supra* note 33 (showing how environmental catastrophes can be fact specific and determining the resulting harm is based on the facts).

[138] *See supra* Part II.A (exemplifying generally the characteristics of the environmental torts); *see also* Note, *supra* note 32, at 2269 (stating the problems of causation and the duty of the plaintiff in alleging the resulting harm).

[139] *See supra* Part II.C (addressing the three cases that caused a three-way circuit split). The Third, Ninth, and Fifth Circuits all provide valid arguments for what constitutes the same event or occurrence, but the unclear approach and the split among the Circuits is what makes litigation challenging. *See supra* Part III.B.2 (critiquing the Circuits for their different interpretations of the same phrase).

[140] *See* Clarke v. Boysen, 285 F. 122, 126 (8th Cir. 1922) (considering Equity Rule 48 for the purposes of ensuring multiparty litigants are treated fairly).

[141] *See Rainbow Gun Club, Inc., L.L.C.*, 760 F.3d at 407 (discussing the Fifth Circuit's holding).

Produced by The Berkeley Electronic Press, 2016

confusion and inconsistent rulings.[142] In adjudicating the issue of removal jurisdiction for mass actions under the CAFA, the Third, Ninth, and Fifth Circuits attempted to balance the CAFA's legislative intent and tort public policy.[143] However, these circuits failed to agree on one approach that embodied those two concepts, thereby creating a confusing interpretation of the CAFA and inconsistent results.[144] Therefore, a well-defined standard used to evaluate removal jurisdiction of mass actions is needed to eliminate confusion and balance the legislative intent of the CAFA against tort public policy.[145] First, Part III.B.1 considers circuit splits generally and how they impact tort public policy.[146] Second, Part III.B.2 critiques the "Goldilocks Standard" of the Third, Ninth, and Fifth Circuits.[147]

1. Circuit Splits Generally

In toxic tort litigation, circuit splits create confusion among individuals seeking to bring a claim, which results in a myriad of other potential problems.[148] Specifically, circuit splits fail to provide a consistent standard for judges to utilize, and the splits do not promote tort public policy.[149] Tort principles must provide tortfeasors with a clear, consistent, and established standard as to when the defendant's conduct arises from the same event or occurrence.[150] Circuit splits challenge and complicate

---

142 *See supra* Part III.A (evaluating the characteristics of circuit splits and analyzing the impact circuit splits have on environmental torts).

143 *See* Abraham v. St. Croix Renaissance Grp., L.L.L.P., 719 F.3d 270, 276 (3d Cir. 2013) (reasoning that the phrase same event or occurrence is ambiguous; therefore, the court is able to look at the legislative history of the CAFA or other external material); *see also* Allen v. Boeing Co., 784 F.3d 625, 629 (9th Cir. 2015) (referring to the Senate report on the CAFA and interpreting the report to support the idea that the legislative history of the CAFA supports an interpretation of the single local event exception applying to only truly local events); *Rainbow Gun Club, Inc.*, 760 F.3d at 410 (suggesting that the legislative history of the CAFA supports the ordinary meaning of the phrase same event or occurrence).

144 *See Complex Litigation Resource Guide*, *supra* note 40 (stating the problems of confusion and extortion with circuit splits and forum shopping).

145 *See id.* (explaining the problems common with circuit splits, such as confusion, extortion, and forum shopping).

146 *See infra* Part III.B.1 (considering circuit splits and their detrimental impact generally).

147 *See infra* Part III.B.2 (critiquing the specific circuit split of the Third, Ninth, and Fifth Circuits).

148 *See infra* Part III.B.1 (explaining how forum shopping violates the legislative intent of the CAFA); *see also* Juenger, *supra* note 40, at 553–57 (exploring the concept of forum shopping).

149 *See* JOHNSON, *supra* note 50, at 7–9 (listing the different tort public policies that are applicable to general torts and evaluating how those general policies are applicable to environmental law).

150 *See id.* at 8–9 (providing that tort public policy should foster predictability in human affairs). Along these lines, tort public policy suggests that parties should be made aware of

this notion.[151] The Third, Ninth, and Fifth Circuits each tried to resolve the problem when each circuit created its own test; however, their individual rulings contributed to the confusion by providing different interpretations of what constitutes the same event or occurrence for the purposes of removal.[152]

A clear, established standard for judges to evaluate when considering the same event or occurrence under the CAFA would benefit the courts of different jurisdictions by providing one coherent standard to apply when adjudicating issues involving removal jurisdiction for mass environmental torts.[153] Adopting a test to determine same event or occurrence would diminish the inconsistency across the Circuits, which would promote the interest in balancing the judicial and legislative branch.[154] A clear standard would also help reduce the amount of time courts currently spend trying to evaluate the vague application provided by the Third, Ninth, and Fifth Circuits.[155]

When courts reach a decision in a timely fashion, plaintiffs are able to get compensation quicker.[156] A unified standard dealing with the issue of removal jurisdiction for mass torts under the CAFA will allow full and

---

their dangerous actions and how those actions impact their surroundings. *Id.* Therefore, to account for this, any laws made to restrict the behavior of an individual for the purposes of public safety and public good should be clarified so the defendant can adapt his or her conduct accordingly. *Id.*

[151] *See* Abraham v. St. Croix Renaissance Grp., L.L.L.P., 719 F.3d 270, 272 (3d Cir. 2013) (recommending a broader interpretation of the single local event exception under the CAFA); *see also* Allen v. Boeing Co., 784 F.3d 625, 633 (9th Cir. 2015) (giving a more narrow interpretation of the same event or occurrence under the CAFA); Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C., 760 F.3d 405, 407 (5th Cir. 2014) (exploring a more defined interpretation of the holding in *Abraham*); *see infra* Part III.B.2 (analyzing the three-way circuit split of the Third, Ninth, and Fifth Circuit, considering the impact that circuit split has on tort public policy, and advocating for a unified standard to promote good tort public policy).

[152] *See* ANDERSON & TRASK, *supra* note 73, at 3 (exploring how to litigate class actions and explaining that because class actions are a form of complex litigation, many problems may arise, such as inconsistent outcomes that can cause confusion amongst the litigants).

[153] *See* Latham et al., *supra* note 48, at 740–45 (discussing the gap between the regulations used to handle environmental claims and the theories of common tort law). The gap between different laws and regulations, as it relates to environmental claims, is a main cause of the circuit split because judges look at similar facts under different lenses of interpretation. *Id.*

[154] *See* Newman, *supra* note 48, at 512–13 (considering that courts have battled ambiguous language in legislation, which raised new legal issues to be resolved, requiring judges to balance both public policy and the different branches of government).

[155] *See* Coleman v. Estes Express Lines, Inc., 631 F.3d 1010, 1020 (9th Cir. 2011) (viewing removal jurisdiction under the CAFA); *see also supra* Part II.C (exemplifying situations where the federal courts have to evaluate the issue of the "same event or occurrence" exception to removal jurisdiction of mass environmental torts under the CAFA).

[156] *See* JOHNSON, *supra* note 50, at 9 (providing the tort public policy that aligns with the view to fully compensate accident victims and advocating for a remedy to the circuit split so that accident victims may receive their compensation more quickly).

adequate compensation for accident victims by enabling a court to arrive at a decision swiftly, thereby compensating the accident victim(s) faster.[157] A balanced factor test would ensure that the defendant is liable for the environmental catastrophe he or she caused.[158]

In addition, the confusion regarding the circuit split does not promote economic growth.[159] The complex nature of environmental torts creates confusion for the parties involved when trying to determine if, when, and how to litigate the action because the parties and attorneys cannot adequately infer how a judge may rule on the case.[160] Without a standard to aid a judge in determining when to remand a case from federal court to state court under the single local event exception, parties to a lawsuit do not have the opportunity to weigh the risks and benefits of bringing a lawsuit, as well as the potential cost of litigation.[161] Circuit splits result in unpredictable outcomes, so the parties tend to be less likely to settle and will be more willing to embrace the financial burdens of a lengthy lawsuit.[162] By adopting a unified standard, the parties can weigh the potential outcome of whether their cause has the grounds to be heard in federal court or if it will be remanded back to the state court.[163] A unified standard not only diminishes the costs of litigating this specific issue, but

---

157 *See* Clarke, *supra* note 59 (providing the theories of tort liability, such as joint liability, vicarious liability, and contributory negligence, with each determining how a tortfeasor divides the amount of money owed to the plaintiff for the injuries incurred as a result of his or her negligence); *see also supra* Part II.A.2 (explaining one of the basic tort policies that accident victims should be fully compensated); *compare supra* Part III.B.2 (stating the holdings of the three-way circuit split), *with infra* Part IV.A (providing the four-factor contribution to help facilitate the adjudication of the removal issue).

158 *See infra* Part IV (outlining the four-factor test that allows judges to apply a unified standard while still being allowed to exercise their discretion with the complex nature of class actions and urging courts to adopt the test to promote good tort public policy).

159 *See* JOHNSON, *supra* note 50, at 9 (arguing the two views of tort public policy favors economic growth and that tort public policy promotes due deference and discussing why economic growth is a tort public policy that courts seek to promote).

160 *See* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 18–19, 21–23 (2009) (examining solutions to resolve circuit splits at the federal court of appeals level).

161 *See* JOHNSON, *supra* note 50, at 9 (articulating the tort public policies that surround the costs of litigation); *see also* FED. R. CIV. P. 23(a) (discussing how actions before the court that involve a common question of law or fact may be joined to avoid any unnecessary costs or delays). F.R.C.P. 23 is based on the desire to reduce costs of the parties seeking to bring a claim. FED. R. CIV. P. 23(a). When mass actions have a common question of law or fact, they too can be consolidated. *Id.* From this general rule, there is an inference that courts do not favor costly litigation. *Id.* The vague standard of the CAFA requires that the parties spend more money because of litigation, which goes against the purpose of the courts. *Id.*

162 *See id.* (suggesting how courts prefer to save on litigation costs).

163 *See infra* Part IV (providing a four-factor test that should be implemented by the federal courts as a unified standard to resolve the issue of removal jurisdiction for mass actions under the CAFA).

it promotes settlements because one party may seek to settle the matter outside of court if their claim cannot be heard in the court that is more favorable to them.[164]

Defendants should be liable in a situation where the harm could have been prevented.[165] When adjudicating claims based upon a negligence standard, courts have always considered the defendant's intent and care.[166] Negligence is usually the cornerstone of most toxic tort lawsuits; however, there are many interrelated negligence theories that also arise in toxic torts.[167] Adopting a clearer standard of the same event or occurrence will ensure that federal courts will hear the issues of intent and care that they are supposed to without encroaching on the state's rights.[168] Thus, to alleviate the confusion among parties and the judicial system, and for the benefit of tort public policy, an all-inclusive standard for removal jurisdiction needs to be adopted by the federal courts.[169]

A distinct application of the same event or occurrence will help facilitate growth and progress because judges will be able to give stricter

---

164 *See* FED. R. CIV. P. 23(a) (suggesting that claims that have similar contexts may be joined to avoid unnecessary costs or delays); *see also* Bernstein, *supra* note 58, at 349–52 (arguing how class actions impact the judicial system economically).

165 *See* JOHNSON, *supra* note 50, at 8 (stating that one of the general tort public policies that should be promoted is the idea that those who bear the risk should also bear the burden of the resulting harm that occurs because of the risk that was taken).

166 *See id.* at 7 (requiring that a defendant be held liable for the resulting harm if the defendant is at fault).

167 *See* Peter K. Wahl & Rita A. Sheffey, *Theories of Liability and Damages in Toxic Tort Cases, in* TOXIC TORT LITIGATION 17–18 (D. Alan Rudlin ed., 2007) (looking at the theories of negligence found in toxic torts). There are many theories of negligence that arise in toxic torts. *Id.* To have a successful negligence lawsuit, the plaintiff must show: (1) a duty or obligation of the defendant required by law; (2) a breach of that duty; (3) a causal connection between the breach of the duty and the resulting harm; and (4) the resulting harm, also known as damages. *Id.* at 18. The causal connection element, considering both actual and proximate cause, is the most challenging element for toxic tort litigants to prove. *Supra* Part III.A. However, there are other types of negligence actions such as negligence per se, gross negligence, and the doctrine of *res ipsa loquitur*. Wahl & Sheffey, *supra* note 167, at 18. In toxic tort cases, there are five specific types of negligence actions that directly correlate to toxic torts: negligent failure to warn, negligent failure to investigate, negligent design, breach of statutory and/or regulatory duties, and breach of self-imposed duties. *Id.* at 19–23.

168 *See* 28 U.S.C. § 1711 (2012) (providing the purpose of the CAFA); *see also infra* Part III.B (considering the history and language of the CAFA and looking at why it was enacted, concluding that the framers of the CAFA had the desire to balance the interest of both the state and federal courts and not give one court too much power over the other when litigating mass actions).

169 *See supra* Part III.A (discussing generally how the three-way circuit split of the Third, Ninth, and Fifth Circuit does not benefit tort public policy because characteristically, circuit splits do not promote public policy and advocating for the adoption of a unified standard to help promote sound tort public policy).

Produced by The Berkeley Electronic Press, 2016

rulings based on those standards, which will help advance the hazardous materials industry to find better and more secure ways to prevent spills.[170] Environmental catastrophes cost large sums of money to clean and repair the damage.[171] Individuals who have a high risk for liability should use the resources around them to help protect their interests and prevent the potential harm, instead of waiting for the harm to occur and relying on the judicial system to provide a remedy.[172] The courts should adopt a standard for the purpose of eliminating confusion and promoting economic growth.[173] The problem with circuit splits is exacerbated, as exemplified by the circuit split between the Third, Ninth, and Fifth Circuits.[174]

2. The "Goldilocks Standard" of the Third, Ninth, and Fifth Circuits

In general, the Third, Ninth, and Fifth Circuits' application of the same event or occurrence exception are either too broad or too narrow.[175] In addition to being inconsistent, the interpretations fail to provide courts with accurate guidelines to balance their authority to exercise discretion with the defendant's due process rights of removal.[176] When the Third, Ninth, and Fifth Circuits individually determined what is considered the same event or occurrence in a mass environmental tort for removal to

---

170 *See supra* Part III (evaluating how circuit splits in general do not promote sound tort public policy and a unified standard should be enacted to promote tort public policy, how the intent of the CAFA is not being promoted through the circuit split, and how the phrase same event or occurrence should not be based on a view that is too broad or too narrow, but one that generally aligns with the Fifth Circuit).

171 *See* Gilbert & Kent, *supra* note 4 (exemplifying the costs associated with environmental catastrophes such as oil spills); *see also* Neuhauser, *supra* note 1 (using the oil spill in the Gulf of Mexico to exemplify how it is possible the funds will not adequately compensate the victims, such as private business owners, of the oil spill).

172 *See* JOHNSON, *supra* note 50, at 6–9 (providing the nine tort public policies applicable to mass actions and environmental torts, and separating them into three general purposes that courts seek to promote when adjudicating cases).

173 *See infra* Part IV (suggesting four factors that courts should adopt to determine the issue of whether a mass action is a class action under the same event or occurrence exception for the purposes of removal jurisdiction of mass actions under the CAFA).

174 *See* Abraham v. St. Croix Renaissance Grp., L.L.L.P., 719 F.3d 270, 272–73 (3d Cir. 2013) (stating that the St. Croix Renaissance Group owned an aluminum refinery that released red mud into the air for a period of thirty years); *see also* Allen v. Boeing Co., 784 F.3d 625, 627, 630, 632 (9th Cir. 2015) (asserting that the defendant was negligent by failing to warn the plaintiffs of the potential groundwater contamination); Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C., 760 F.3d 405, 407 (5th Cir. 2014) (alleging that the defendant, Denbury, negligently operated a drilling pipe and well).

175 *See infra* Part III.B.2 (critiquing the three-way circuit split of the Third, Fifth, and Ninth Circuits).

176 *See* Tarlock, *supra* note 27, at 222 (considering how courts interpret environmental legislation and the challenges they have with evaluating and applying the legal standards).

federal court, they returned three different holdings.[177] Each holding has successful merits in defining the same event or occurrence; however, the holdings do not coordinate to create one concise, cohesive rule that federal courts may apply.[178] While judges must consider the legislative intent of the CAFA when applying the statute, the courts have difficulty consistently determining what the legislative intent is.[179] When examining the legislative intent of the CAFA, the drafters did not want an approach for removal jurisdiction of mass actions to be too broad or too narrow.[180] The "Goldilocks Standard" of the same event or occurrence exception harmonizes one single event, which is too narrow, a continuing set of circumstances, which is too broad, and a continuing set of circumstances that are contextually connected, which is just right.[181] First, Part III.B.2.a critiques the Third Circuit's broad holding in *Abraham*.[182] Second, Part III.B.2.b analyzes the Ninth Circuit's narrow interpretation of the phrase same event or occurrence as not being successful in the context of mass environmental torts in *Allen*.[183] Finally, Part III.B.2.c evaluates the

---

[177] *See Allen*, 784 F.3d at 631 (limiting the single event exception to one single happening or one single event); *Abraham*, 719 F.3d at 274 (arguing "[t]he word *event* . . . is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane[,] or chemical spill" and ultimately concluding that an environmental hazard that has a continuing nature, may fit the "event" element of the local single event exception of the CAFA) (emphasis in original); *see also Rainbow Gun Club, Inc.*, 760 F.3d at 413 (holding that because Denbury's acts were ongoing patterns of conduct that were contextually connected, the continuous harm that the plaintiffs suffered all occurred in one event).

[178] *See infra* Part III.A (describing the critiques of the circuit splits).

[179] *See* United States v. Diallo, 575 F.3d 252, 256–57 (3d Cir. 2009) (stating that when looking to determine the scope of a statute, one must look to the ordinary meaning in the language of the statute); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that the judicial department has a duty and the authority to determine what the law is).

[180] *See supra* Part II.B (analyzing the CAFA by looking at the English Courts of Equity's previous attempts at combating corruption in environmental torts through regulations, and ultimately discussing how the CAFA was ratified in 2005).

[181] *See Abraham*, 719 F.3d at 277 (broadening the language of the CAFA single local event exception to encompass a continuing set of circumstances); *see also Allen*, 784 F.3d at 631 (narrowing the single event or occurrence language to only one single happening); *Rainbow Gun Club, Inc.*, 760 F.3d at 413 (providing the most acceptable interpretation of the CAFA by holding that the same event or occurrence may be a continuing set of circumstances so long as they are contextually connected).

[182] *See infra* Part III.B.2.a (exploring the problem of a broad interpretation stating that it further allows for corruption and does not provide a valid solution to the circuit split).

[183] *See infra* Part III.B.2.b (reasoning that a narrow view of the single local event exception does not allow for the consideration of the unique characteristics of mass environmental torts).

Fifth Circuit's holding in *Denbury* as the most successful interpretation of the single local event exception.[184]

a. Too Hot: The Broad Holding of the Third Circuit

The Third Circuit, while making valid claims, provides an approach that is too broad of a spectrum for the federal courts to apply.[185] Under the Third Circuit's holding, the same event or occurrence can be multiple events.[186] The overly expansive view of the Third Circuit allows courts to exercise their discretion, but fails to provide guidelines or limits that allow courts to properly exercise that discretion.[187] The proponents of the Third Circuit's ruling argue that this Circuit is the most accurate in applying the same event or occurrence definition because the Court was merely interpreting the words as the law allows them, but flounders in the accurate interpretation of the phrase by providing a view that is too broad to adequately litigate the issue.[188]

In spite of the fact that a single tort is not always limited to one single event and may in fact be multiple happenings, the Court in *United States v. Diallo* held that when there is no statutory definition for the courts to interpret, judges are confined to apply the ordinary meaning of the word.[189] As such, a broad approach goes directly against the legislative intent of the CAFA because the CAFA sets out multiple exceptions and a broad interpretation of the same event or occurrence diminishes the value of those exceptions.[190] When a broad definition is applied, courts construe cases and facts that may not fit within the exception, yet apply them as if they do.[191]

Furthermore, a definition of same event or occurrence that is too broad may result in joining defendants that may not have actually caused

---

184 *See infra* Part III.B.2.c (stating the reasons why the Fifth Circuit has the best interpretation of the phrase same event or occurrence under the CAFA and explaining how it will be used for the contribution).

185 *See Abraham*, 719 F.3d at 277 (concluding that an event may be continuing in nature).

186 *See id.* (providing the holding of the Third Circuit's interpretation of the single local event exception).

187 *See* Latham et al., *supra* note 48, at 740–45 (considering how judges evaluate tort common law and the legislative developments to more adequately compensate environmental tort victims).

188 *See Abraham*, 719 F.3d at 277 (noting one of the cases involved in the three-way circuit split).

189 *See* United States v. Diallo, 575 F.3d 252, 256–57 (3d Cir. 2009) (exemplifying the duty of the courts to interpret legislation).

190 *See* 28 U.S.C. § 1332(a)(11)(B)(ii) (2012) (providing the multiple exceptions that are found within the CAFA).

191 *See id.* (discussing the exceptions that are found within the CAFA).

the harm.[192] The purpose of bringing an action against numerous defendants is to ensure that the defendants to a mass lawsuit are not taken advantage of and to guarantee that all of the plaintiffs are equally compensated.[193] Thus, their claims and relief sought must all be similar.[194] The proposed standard seeks to ensure that the defendants of mass lawsuits are not taken advantage of, while guaranteeing that the plaintiffs are equally compensated by requiring all of the claims and relief sought to be similar—particularly, having the sameness in all essential details of a claim.[195] This aspect of the test allows for the promotion of economic growth by ensuring that the parties are adequately compensated, are aware of how their claim may fare under the judge's ruling, and are all interested parties in the lawsuit.[196]

b. Too Cold: The Restrictive View of the Ninth Circuit

The view of the Ninth Circuit succeeds at ensuring that the claims of the mass action that arise out of the same event or occurrence are remanded down to the state courts; however, the view is too narrow to limit the standard to only one distinct act.[197] Nevertheless, the Ninth Circuit held that these views relate to the legislative intent of the drafters of the CAFA, arguing that the application of the ordinary meaning was intended when interpreting a definition.[198]

The Ninth Circuit further argued that the legislative intent of the single local event exception is a narrowly construed standard because states have an interest in adjudicating issues where the source and harm arise in the same place.[199] However, a narrow view also undermines the legislative intent because it weakens the extent of Congress to allow state

---

192 *See Complex Litigation Resource Guide*, *supra* note 40 (examining the problems associated with parties involved in multiparty claims).

193 *See* Rice, *supra* note 38, at 885, 887–89 (addressing the problems associated with the fictitious defendant).

194 *See* Ellis, *supra* note 31, at 7 (explaining how mass environmental torts involve large numbers of plaintiffs or defendants).

195 *See Similar*, LAW DICTIONARY (2015), http://thelawdictionary.org/similar/ [https://perma.cc/G3BW-M73E] (defining "similar" as a "word [that] is often used to de[n]ote a partial resemblance only; but it is also often used to denote sameness in all essential particulars. Thus, a statutory provision in relation to 'previous conviction of a similar offense' may mean conviction of an offense identical in kind").

196 *See infra* Part IV (considering the SORT Test to resolve some of the problems with the circuit splits).

197 *See* Allen v. Boeing Co., 784 F.3d 625, 631 (9th Cir. 2015) (reasoning that actions are considered the same event if it is a single happening).

198 *See* Abraham v. St. Croix Renaissance Grp., L.L.L.P., 719 F.3d 270, 277 (3d Cir. 2013) (reiterating the legislative intent of the CAFA).

199 *See id.* at 274 (showing that the purpose is to ensure state courts hear claims with only truly localized issues).

Valparaiso University Law Review, Vol. 51, No. 1 [2016], Art. 6

courts to adjudicate truly localized claims with truly localized harms.[200] Furthermore, toxic torts consider how certain strains of chemicals and substances impact the human body and the plaintiff must also prove by a preponderance of the evidence that the defendant caused the plaintiff's harm.[201] Thus, a narrow view, such as the one the Ninth Circuit applied, does not provide an equitable or fair consideration to the rules because it does not take into consideration the nature of the environmental tort.[202]

c. Just Right: The Reasonable Fifth Circuit

The Fifth Circuit's holding in *Denbury* provided the most acceptable explanation of what defines a single event or occurrence.[203] The Fifth Circuit held that because the environmental hazard was an ongoing pattern and each instance of that pattern was contextually connected, the events were all interconnected and could be viewed as one single event.[204] Unlike the Third and Ninth Circuit, the Fifth Circuit provided an interpretation of same event or occurrence language that is not too broad, nor too narrow.[205] Starting with the same preliminary interpretation like the Third Circuit in *Abraham*, the Fifth Circuit further reasoned that an event can in fact be a continuing condition and is not limited to a single moment in time.[206] Stopping with that interpretation would have created the same problem as the Third Circuit with an approach that was too broad; however, to eliminate the broad language in the CAFA, the Fifth Circuit also reasoned that because the events were contextually connected and when completed, created a related event, they could fall under the same event or occurrence.[207]

---

200 *See Allen*, 784 F.3d at 627, 630, 632 (examining the abuse that occurs with class actions); *see also Abraham*, 719 F.3d at 274 (articulating why the Third Circuit affirmed the holding of the District Court).

201 *See* Note, *supra* note 32, at 2261 (explaining that specific causation requires a plaintiff to prove the defendant caused the resulting harm).

202 *See* Veron, *supra* note 44, at 647–48 (exploring toxic torts and their impacts on the litigation procedure due to their fact specific nature); *see also* Thompson, *supra* note 47, at 249–50 (evaluating the issue of causation and how it relates to mass environmental torts).

203 *See infra* Part IV.B (detailing the factors of the test proposed in Part IV.A).

204 *See* Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C., 760 F.3d 405, 409–11 (5th Cir. 2014) (stating that ongoing patterns of conduct that are contextually connected are the same event or occurrence).

205 *See Abraham*, 719 F.3d at 277 (holding that a continued release of a hazardous material is a single event, but providing no restraints on the rule); *see also Allen*, 784 F.3d at 629 (limiting the phrase "same event or occurrence" to one single event, providing an approach that is too narrow).

206 *See Rainbow Gun Club, Inc.*, 760 F.3d at 412 (agreeing partially with the Third Circuit's interpretation of the phrase "same event or occurrence").

207 *See id*. (believing that as long as the continuous events are contextually connected, the events arise out of the same event or occurrence).

https://scholar.valpo.edu/vulr/vol51/iss1/6

By narrowing the approach of the Third Circuit, the Fifth Circuit eliminates the problem that defendants, who may not have any connection to the harm, are required to respond to the complaint and spend large sums of money to defend against claims that should have never been filed against them in the first place.[208] In environmental toxic torts, courts face the problem of consolidating and aggregating individual litigants who may not have suffered the same harm as the rest of the class.[209] This expedites potential exploitation of the judicial system and allows a plaintiff to receive more compensation than he or she actually deserves.[210] Therefore, by further analyzing the problem to allow for continuing events that are contextually connected, the Fifth Circuit takes a broad interpretation and narrows it to the correct scheme without narrowing the problem too much.[211]

One unique characteristic of environmental torts that current legislation does not acknowledge is a latency period.[212] The latency period associated with toxic torts presents courts with a challenge in determining when the resulting harm occurs and what the resulting harm was.[213] To balance both a vague and a narrow definition, this Note proposes a time frame of thirty years to bring a claim for an environmental harm.[214] The defendant in the *Denbury* case properly asserted "[f]or the exception of the statute to have any real meaning, there must be a limit."[215] Thus, a

---

208 *See* John C. Coffee, Jr., *Corruption of the Class Action: The New Technology of Collision*, 80 COR. L. REV. 851, 853 (taking the position that mass tort litigation is shifting from being favorable to plaintiffs to acting as a shield for defendants).

209 *See* Shump v. Balka, 574 F.2d 1341, 1344 (10th Cir. 1978) (defining a consolidated claim); *see also* Eric Posner & Ariel Porat, *Aggregation and Law*, 7–22 (Jan. 2011), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1038&context=law_and_economics [https://perma.cc/6Q35-PCX7] (exploring the concept of aggregation in tort law). Factual aggregation occurs when the issue is focused on whether the defendant committed a specific wrong at a certain time and place. Posner & Porat, *supra* note 209, at 7.

210 *See* Lahav, *supra* note 78, at 65–66 n.3 (analyzing small claims class actions, the issues surrounding the settlement phase of class actions, and recognizing class actions do not fit nicely within one narrow viewpoint).

211 *See Rainbow Gun Club, Inc.*, 760 F.3d at 413 (providing the holding of the Fifth Circuit by allowing events that are contextually connected to be deemed the same event or occurrence).

212 *See* Lin, *supra* note 34, at 1441–42, 1445–46 (asserting that a latency period is common in toxic torts, and defining the latency period as a period of time between when the harm was suffered and when the results of that harm actually became apparent).

213 *See* Wells, *supra* note 35, 288–90 nn.17, 22, 294 n.59 (evaluating the latency period of toxic torts).

214 *See Rainbow Gun Club, Inc.*, 760 F.3d at 409 (agreeing in part with the Third Circuit, but further interpreting the single local event exception as allowing continuing events that are contextually connected to be continuing events for the purpose of removal jurisdiction under the CAFA); *see also* Note, *supra* note 32, at 2261 (discussing the latency period of environmental torts).

215 *Rainbow Gun Club, Inc.*, 760 F.3d at 407.

definition of the same event or occurrence involving toxic torts needs to consider that the resulting harm may take years to appear, but an indefinite standard will not be beneficial, nor fair under tort public policy.[216] The thirty-year period takes into consideration the latency period for the resulting harm in environmental torts and balances the interests of all the parties involved.[217] As such, the standard proposed in this Note aims to further define and exemplify what is considered a contextually connected event, which enables a court to ensure that it is hearing the claims it has the authority to review.[218] The proposed standard balances the Fifth Circuit's holding with the unique characteristics of mass environmental torts to adopt a standard that is easily applicable by the federal courts.[219]

Although the Third, Ninth, and Fifth Circuits and the drafters of the CAFA took a step in the right direction by trying to prevent the corruption that is characteristically present in mass actions, a clear standard must be created for the single local event exception and the same event or occurrence requirement.[220] Therefore, a standard must be applied that will allow for a fair and equitable relief for the plaintiffs while taking into account the unique and specific nature of environmental torts.[221] The SORT Test is offered as an aid to prevent any potential for corruption.[222] Environmental cases require a strong factual support for a finding of liability.[223] Due to the specific nature of these claims, it is more challenging for the court to apply a rule that is too narrow or too broad, such as the Ninth Circuit's ruling and the Third Circuit's ruling.[224] A factor test is the most appropriate because it gives the courts the discretion

---

[216] *See infra* Part IV (stating a unified standard for the same event or occurrence).

[217] *See infra* Part IV (providing the third factor within the SORT Test, which discusses a thirty-year-time period for multiple events to be the same event or occurrence); *see also* Wells, *supra* note 35, at 288–90 nn.17–22 (examining the time frame for the latency period).

[218] *See Rainbow Gun Club, Inc.*, 760 F.3d at 409–11 (redefining the Third Circuit's holding and requiring there be contextually connected events to be considered the same event, not just a continuing set of circumstances).

[219] *See infra* Part IV (proposing the unified standard for courts to adopt).

[220] *See supra* Part II.B (discussing the CAFA); *see also supra* Part II.C (analyzing the circuit split); *infra* Part IV (providing the four-factor-balancing test).

[221] *See* Note, *supra* note 32, at 2269 (stating the problems of causation and the plaintiff's duty to allege the resulting harm); *see also supra* Part II.A (exemplifying the characteristics of the environmental torts).

[222] *See infra* Part IV (contributing a four-factor-balancing test for courts to apply when considering mass torts and the requirements of "same event or occurrence").

[223] *See* Note, *supra* note 32, at 2269 (explaining the issue of causation and importance of causation as an element in proving liability for environmental torts).

[224] *See supra* Part III.A (considering the problem with the circuit splits and addressing the challenges and how to combat them).

to hear these cases while being considerate of the fact specific nature of each claim.[225]

IV. CONTRIBUTION

Current legislation considering and regulating mass actions fails to consistently apply these overly vague discretionary standards to mass environmental torts. As such, a consistent, clear standard for what the same event or occurrence constitutes must be provided to gives courts the appropriate amount of discretion, while providing clear guidelines that are understandable to all the parties involved.[226] The current circuit split exists because there is no clear standard for courts to abide by when determining removal jurisdiction of mass environmental torts.[227] Therefore, courts need one succinct test to determine when a mass action arises out of the same event or occurrence and thus, is not removable to federal court.[228] To begin, Part IV.A proposes the language and factor test that courts should utilize when evaluating the issue of removal jurisdiction for mass environmental torts.[229] Then, Part IV.B explains each of the proposed factors and addresses any potential counterarguments that may arise when addressing these factors.[230]

A. *Proposed Factor Test*

To remove the mass confusion from removal jurisdiction of mass environmental torts, under the CAFA, the following four factors should be used by federal judges to determine when a mass environmental tort arises out of the same event or occurrence:

The SORT Test

> Upon removal to federal court, a mass environmental claim may be remanded back to the state court, under the CAFA, if the claim falls under the single local event exception. The single local event exception is met when the resulting harm from the environmental spill or

---

225 *See id.* (addressing the problems with circuit splits).
226 *See supra* Part III (advocating for the application of one cohesive and concise standard to the issue of removal jurisdiction for mass environmental torts).
227 *See* Juenger, *supra* note 40, at 553–57 (identifying problems associated with circuit splits, such as inconsistent results and forum shopping).
228 *See infra* Part IV.A (contributing a four-factor-balancing test for courts to evaluate when determining the issue of removal jurisdiction for mass environmental torts).
229 *See infra* Part IV.A (proposing the SORT factor test).
230 *See infra* Part IV.B (evaluating and discussing the factor test).

Produced by The Berkeley Electronic Press, 2016

contamination arises under the same event or occurrence. When evaluating what is considered the same event or occurrence the court should balance the following four factors:

1. Whether the resulting harm incurred by the plaintiffs originated from the same source;
2. Whether the defendant had notice that the resulting harm could have occurred or was occurring;
3. Whether each of the individual plaintiffs suffered similar resulting harms and are seeking similar relief; and
4. Whether the period for the environmental catastrophe extended beyond thirty years.[231]

B. Commentary

Federal courts have failed to adequately resolve the discrepancy of the phrase "same event or occurrence" under the CAFA, which causes both economic strife among the parties and confusion within the court system.[232] The inconsistent rulings do not provide a succinct holding applicable to future cases.[233] As such, the current standard for same event

---

[231] The SORT Test is the contribution of the author. The SORT Test gets its name from the four factors above: same source, occurrence of the hazard, resulting harms, and time frame of thirty years. *See supra* Part IV.A (proposing the four-factor-balancing test). The first factor eliminates the problem of complex litigation involving multiple plaintiffs and defendants by ensuring that the defendants in the lawsuit actually caused the harm to the plaintiff. *See supra* Part II.A.1 (considering that one characteristic of environmental torts is a complex litigation procedure that tends to involve multiple plaintiffs and defendants, that raises issues of causation, and questions whether the defendant actually caused all of the individual plaintiffs' harms). The second factor ensures that the plaintiffs are not being overcompensated or undercompensated for the harm that results, allowing for the public policy that tort victims should be fully compensated while balancing theories of equity. *See supra* Part II.A.1 (providing a medical hypothetical in a footnote to model the concept that the resulting harm in one patient may not result in an identical harm of another patient). The language of the third factor relies on the strict liability standard of toxic torts and ensures that defendants who could have prevented the injuries are responsible for the resulting harm. *See supra* Part II.A.2 (evaluating the public policies of torts and applying them to toxic torts). The final factor takes into account the specific nature of the environmental toxic torts and considers the possibility that the harm suffered by the plaintiff may appear as much as thirty years later. *See supra* Part II.A.1 (discussing the latency period surrounding environmental torts); *see also* Wells, *supra* note 35, at 288–90 nn.17, 22 (exploring the concept of the latency period).

[232] *See* ANDERSON & TRASK, *supra* note 73, at 3 (providing examples of the potential problems that may arise as a result of circuit splits).

[233] *See* Greer & Peyronnin, *supra* note 86, at 241–43 (stating a problem in the judicial system is that judges do not rule consistently).

or occurrence under the CAFA fails to provide clear removal guidelines for defendants.[234] Thus, courts should adopt the four-factor SORT Test for determining when an event falls under the same event or occurrence exception, requiring the mass action to remain in state courts rather than federal courts.[235] If adopted by the federal courts, the proposed factor test will resolve the circuit split, eliminate the confusion surrounding removal jurisdiction of mass torts, and remedy the vague language of the CAFA.[236] Using the proposed factor test, courts still have discretion, but are limited to the context and fact specific nature of the claims.[237] By adopting the proposed test, federal judges will be able to adequately determine whether a claim is truly localized, eliminating the corruption associated with the removal of mass actions.[238]

Nevertheless, critics may argue the legislature should apply and define this standard within the CAFA itself.[239] However, this test strictly is limited to the unique nature of mass environmental torts.[240] The CAFA is designed to discuss class actions and mass actions generally.[241] This test is applicable for the purposes of mass environmental torts, which tend to be more narrowly viewed.[242] Because mass environmental torts are very fact specific, the judges are in the best position to execute the proposed

---

[234] *See supra* Part III (exploring the problems with the current language of the single local event exception of the CAFA).

[235] *See supra* Part IV (suggesting the language for the SORT test).

[236] *See supra* Part IV.A (examining the SORT Test and providing the legal framework for its basis).

[237] *See supra* Part II.A (discussing only environmental toxic torts for the purpose of this Note).

[238] *See* ANDERSON & TRASK, *supra* note 73, at 3, 5 (analyzing how confusion can lead to corruption when litigating mass actions).

[239] *See* 28 U.S.C. § 1332(d)(3) (2012) (stating that the federal court has the discretion to choose not to exercise jurisdiction over a mass action when more than one-third, but fewer than two-thirds, of the foreign state citizens and the primary defendants are also citizens of the forum state); *see also* § 1332(d)(4)(B) (requiring courts to decline jurisdiction if two-thirds or more of the class members and the primary defendants are citizens of the forum state); § 1332(d)(4)(A) (stating that courts need to decline jurisdiction over a mass action when the principal injuries occurred in the forum state or where no similar class action involving any of the same defendants was filed during the three-year period before the filing of the complaint at issue).

[240] *See* Blomquist, *supra* note 47, at 25 (defining toxic torts and discussing their place in the judicial system).

[241] *See* § 1332(d) (addressing how class actions will be litigated and what constitutes a class action).

[242] *See* Lin, *supra* note 34, at 1445 (articulating how environmental torts tend to be more fact-specific, and thus, tend to have more narrow approaches to their interpretation of the resulting harm).

Valparaiso University Law Review, Vol. 51, No. 1 [2016], Art. 6

standard.[243] Therefore, this standard is better implemented by the federal courts, rather than amending the enacted legislation.[244]

Critics of this test may also argue that this test provides standards that are just as vague and confusing as the ones the courts previously provided.[245] The purpose of this test is to provide unified factors for a judge to consider when presented with the issue of removing a mass environmental tort action to federal court.[246] The test seeks to provide a balance between limiting the court's authority to hear a claim and the fact specific nature of the claim.[247] Thus, courts can use this standard as a stepping stone and look to other court cases to determine how best to apply the standard and use their discretion in the claim.[248]

Furthermore, the proposed approach may allow parties seeking to bring a removal action to assist with the interpretation of the standard.[249] It is likely that from these standards, the parties themselves will be able to determine whether their claim is removable to federal court.[250] There is no guarantee that adopting this test will deter frivolous lawsuits completely, but it may eliminate some of the unnecessary lawsuits by providing the parties with notice regarding how the court will interpret the defendant's conduct for the purposes of the single local event exception of the CAFA.[251]

---

243 *See supra* Part IV.A (giving the standard federal courts should adopt to resolve the vague language in the CAFA).

244 *See supra* Part IV (arguing for the adoption of the SORT test by the courts).

245 *See* Clean Water Act, 33 U.S.C. § 1251 (1972) (mitigating water pollution on a national scale); Oil Pollution Act, 33 U.S.C. § 2701 (1990) (suggesting a way to prevent oil spills); Clean Air Act, 42 U.S.C. §§ 7401(b), (c) (1963) (controlling air pollutants on a national scale); National Environmental Policy Act, 42 U.S.C. § 4321 (1969) (promoting a safe and clean environment).

246 *See supra* Part IV (providing the standard for courts to adopt).

247 *See* Newman, *supra* note 48, at 512–13 (arguing for the need to balance legislative intent and respect the different branches of government).

248 *See* Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014) (stating that there is no antiremoval presumption for a removal action of the CAFA); *see also* Benko v. Quality Loan Serv. Corp., 789 F.3d 1111, 1118–19 (9th Cir. 2015) (allowing the plaintiffs to remove the case to federal court); Mondragon v. Capital One Auto Fin., 736 F.3d 880, 882 (9th Cir. 2013) (discussing the diversity of citizenship requirement under the CAFA); Coleman v. Estes Express Lines, Inc., 631 F.3d 1010, 1020 (9th Cir. 2011) (remanding the case back to state court since the requirements of the CAFA were not met).

249 *See* Newman, *supra* note 48, at 513 (raising the issues of circuit splits and stating how judges' opinions are highly regarded, and thus, circuit splits should be resolved for that purpose).

250 *See id.* (discussing when a party is able to weigh the risks and benefits of litigating a claim).

251 *See supra* Part III.A (arguing how the current circuit split does not create one cohesive standard).

https://scholar.valpo.edu/vulr/vol51/iss1/6

While critics may also argue that this factor test appears to disfavor defendants and big corporations, such as BP, this test does not prohibit claims to be heard in federal court.[252] The purpose and goal of the SORT Test is to ensure that removal issues for mass environmental torts are interpreted on the same level, which is beneficial for both parties.[253] Furthermore, the SORT Test is necessary, whether or not it tends to favor one party over another, because these types of environmental cases tend to impact more than just one individual, but also surrounding communities.[254] Resolving this issue for the purposes of public policy has a greater interest than providing one party a forum it finds more favorable.[255] Finally, if applying this test creates a result that is unfavorable, the parties still have the option of settlement, which is encouraged by the courts.[256]

Finally, critics may also argue the factors are too similar to F.R.C.P. 23, which was not successful in regulating class actions originally, resulting in the ratification of the CAFA.[257] While the factors found in F.R.C.P. 23 appear on its face to be similar to the SORT Test, contextually they are very different.[258] F.R.C.P. 23 only applies to class actions.[259] This Note considers the characteristics of mass actions, which is a type of class action, and these factors are focused solely on the claims of mass actions.[260] More specifically, these factors seek to resolve a problem with mass actions in environmental law.[261] F.R.C.P. 23, like the CAFA, only looks at class

---

252 *See supra* Part IV.A (providing the SORT Test and explaining how the four factors are to be used when evaluating the issue of removal jurisdiction for mass environmental torts).

253 *See* Beim & Rader, *supra* note 97, at 1 (indicating some of the problems associated with circuit splits); *see also* ANDERSON & TRASK, *supra* note 73, at 3, 5 (stating the issues that can result due to circuit splits).

254 *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 579 (1993) (exemplifying a situation where an environmental catastrophe had a detrimental impact on the surrounding community).

255 *See* JOHNSON, *supra* note 50, at 7–9 (listing the twelve tort public policies applicable to tort law); *see supra* Part II.A.2 (categorizing nine of the general tort public policies and applying them to mass environmental torts).

256 *See* Greer & Peyronnin, *supra* note 86, 240–43 (discussing how it is currently more challenging to manage proposed settlements in circuit splits and class actions).

257 *See* 28 U.S.C. § 1332(d)(1)(B) (2012) (evaluating the history of the CAFA taking into consideration the F.R.C.P. regarding removal of class actions).

258 *See* FED. R. CIV. P. 23(a) (explaining class actions under the F.R.C.P.).

259 *Compare* § 1332(d)(11)(A) (defining a class action), *with* FED. R. CIV. P. 23(a) (providing the guidelines that are required to have a class action under the F.R.C.P.); *but see* § 1332(d)(11)(B)(i) (explaining when a mass action is deemed a class action).

260 *See supra* Part II.B (explaining the difference between a class action and a mass action).

261 *See supra* Part II.A (focusing solely on environmental torts and toxic tort litigation).

actions from a broad and general perspective.[262] Therefore, the two tests, while similar on their face, relate to two different types of actions.[263]

V. CONCLUSION

This Note established the significant and dire need for a clear standard for the single local event exception under the CAFA. The proposed test will resolve the current confusion and discrepancies of what constitutes a single event for the purposes of removal jurisdiction. Without a unified standard for mass actions for federal courts to adopt, courts will spend both time and money litigating issues that could have easily been resolved. Thus, courts should adopt the proposed factor test to facilitate the already hectic litigation process for both the plaintiff and the defendant. The SORT test will promote tort public policy, diminish corruption associated with complex litigation procedures, and allow for the return of consistent judgments.

In the Deepwater Horizon oil spill, if each of the private beachfront property owners were to bring a mass action claim against BP, under the SORT test, they would be able to keep their claim in state court. BP would not be able to prove through the SORT test that the harm these property owners incurred arose out of different and separate events. Thus, their claim would be one that arises out of the same event or occurrence under the CAFA and would be able to be remanded back to state court under the single local event exception. The SORT Test will help judges consistently adjudicate claims similar to the ones brought against BP.

Kirsten Z. Myers*

---

262 *See* § 1332(d)(1)(B) (discussing class action lawsuits and determining how mass actions are applicable to class actions lawsuits).

263 *See supra* Part II.B (analyzing the CAFA and the F.R.C.P.).

* J.D. Candidate 2017, Valparaiso University Law School (2017); B.A., Political Science, Minor, Chemistry, Colorado State University (Dec. 2013). I would like to dedicate this Note to my parents Kathleen and Richard Myers and thank them for their love, support, dedication, and encouragement through the Notewriting process and my journey in law school. I would like to thank my faculty advisor, Professor Robert F. Blomquist, for his guidance, input, and carefully constructed critiques. I would also like to thank the *Valparaiso University Law Review* Volume 50 and Volume 51 Executive Board for the countless edits and read-throughs of my Note. I would like to specifically thank my mentor, Cecelia Harper, for her patience, assistance, and advice. Finally, I would like to thank my friends and family not specifically mentioned herein for providing me with unwavering support, motivation, and strength.