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Climate Torts: It's a Conspiracy!

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CLIMATE TORTS: IT'S A CONSPIRACY!

Abstract: As public concern about climate change grows, so does frustration with the federal government's inability to develop a strategy for reducing greenhouse gas emission. Consequently, in the past decade, multiple states and municipalities have filed lawsuits seeking to address climate change through common law claims, such as public nuisance. Courts, however, dismissed many of these suits because the Supreme Court held in 2011, in *American Electric Power Company v. Connecticut*, that the Clean Air Act governs greenhouse gas emissions and therefore displaces the common law as a cause of action. Despite this unfavorable precedent, the past three years produced numerous new climate-related lawsuits against fossil fuel companies. Almost all these cases cite the fossil fuel industry's decision to misrepresent and conceal the link between their products and climate change as a driving impetus for the lawsuits. Nevertheless, plaintiffs continue to base their complaints on the perilous legal foundation of public nuisance. This Note argues that plaintiffs seeking to hold fossil fuel companies accountable for climate change should instead bring causes of action for civil conspiracy and fraud. By combining civil conspiracy with fraudulent misrepresentation and fraudulent concealment, plaintiffs can require companies to pay for what has consistently delayed climate action: disinformation about the nature and causes of climate change.

INTRODUCTION

In the 1990s, it became apparent that climate change would force the relocation of Newtok, Alaska's residents.[1] As villagers waited for the government to act, melting permafrost destabilized foundations and buckled roads.[2] Reduced pack-ice allowed storm surges from the Bering Sea to rush up the Ninglick River and caused massive erosion, bringing the village ever closer to the water.[3] The village landfill and wastewater treatment plant closed due to flooding and erosion.[4] Sewage leaked into the water supply.[5] In October 2019,

[1] Greg Kim, *Residents of an Eroded Alaskan Village Are Pioneering a New One, in Phases*, NPR (Nov. 2, 2019), https://www.npr.org/2019/11/02/774791091/residents-of-an-eroded-alaskan-village-are-pioneering-a-new-one-in-phases [https://perma.cc/XK4S-MNRC].

[2] Craig Welch, *Climate Change Has Finally Caught Up to This Alaska Village*, NAT'L GEOGRAPHIC (Oct. 22, 2019), https://www.nationalgeographic.com/science/2019/10/climate-change-finally-caught-up-to-this-alaska-village/ [https://perma.cc/2EHE-5MLJ].

[3] *Id.*

[4] Suzanne Goldenberg, *America's First Climate Refugees*, THE GUARDIAN (May 13, 2013), https://www.theguardian.com/environment/interactive/2013/may/13/newtok-alaska-climate-change-refugees [https://perma.cc/2PMX-MQY3]; Welch, *supra* note 2.

[5] Goldenberg, *supra* note 4.

after more than twenty-five years of waiting, some of America's first climate refugees finally moved to their new homes.[6]

Newtok, Alaska is a Yup'ik village home to almost four hundred people.[7] Situated along the mouth of the Ninglick River and the Bering Sea, Newtok sits on permafrost that started thawing during the last decades of the twentieth century.[8] The extended process of moving this native Alaskan village, which will cost more than one hundred million dollars, is largely the result of the federal and state governments' failure to develop an overarching strategy to relocate climate refugees.[9] Of course, developing such a program would require political leaders to acknowledge the scientific consensus that climate change is real and caused by human beings.[10] In Alaska, and nationally, many elected and appointed officials still deny fundamental climate science.[11]

In the face of climate denial by politicians, several states and municipalities turned to the courts for relief and sued major fossil fuel companies, such as Exxon, Suncor, Chevron, and BP, under state and federal tort law.[12] These law-

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[6] Kim, *supra* note 1; Welch, *supra* note 2. The term "climate refugee" does not have a uniform definition or recognition within international law; however, it is used in here to describe individuals displaced by climate impacts such as extreme weather, desertification, and rising sea levels. Tim McDonnell, *The Refugees the World Barely Pays Attention to*, NPR (June 20, 2018), https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to [https://perma.cc/BYR8-F7QK].

[7] Welch, *supra* note 2. The Yup'ik are native Alaskans traditionally living on the coast of Bering Sea in the Yukon Delta region of Southwest, Alaska. Paula Ayunerak, et al., *Yup'ik Culture and Context in Southwest Alaska: Community Member Perspectives of Tradition, Social Change, and Prevention*, 54 AM. J. CMTY. PSYCH. 91, 93 (2014).

[8] Goldenberg, *supra* note 4; Welch, *supra* note 2.

[9] Suzanne Goldenberg, *An Undeniable Truth?: From Palin to Parnell, Alaska's Politicians Have Struggled to Reconcile Policy with Actuality*, THE GUARDIAN (May 13, 2013), https://www.theguardian.com/environment/interactive/2013/may/14/alaska-politics-climate-change-sarah-palin [https://perma.cc/SL56-SBAW]; Kim, *supra* note 1.

[10] *See* Ellen Cranley, *These Are the 130 Current Members of Congress Who Have Doubted or Denied Climate Change*, BUS. INSIDER (Apr. 29, 2019), https://www.businessinsider.com/climate-change-and-republicans-congress-global-warming-2019-2 [https://perma.cc/4Z9D-FJMA] (naming the members of Congress who deny climate change as "[s]tanding in the way of" climate action).

[11] *See id.* (providing an overview of current members of Congress who are climate deniers); Goldenberg, *supra* note 9 (explaining the challenge of addressing climate change in Alaska when state leaders doubt its severity). Although Alaska is on the frontlines of climate change, Alaska's governor, Michael Dunleavy, quietly ended the state taskforce designed to coordinate the state's response in 2019. Nathaniel Herz, *Alaska GOP Gov. Dunleavy Disbands State Climate Response Team*, ALASKA PUB. MEDIA (Feb. 23, 2019), https://www.alaskapublic.org/2019/02/23/alaska-gop-gov-dunleavy-disbands-state-climate-response-team/ [https://perma.cc/LZA3-BHWK].

[12] *E.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 954–55 (D. Colo. 2019); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146, 148 (D.R.I. 2019); Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548 (D. Md. 2019); City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 468, 470 (S.D.N.Y. 2018); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1019 (N.D. Cal. 2018); Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018).

suits sought compensation from the defendant companies for the cost of state or municipal programs adapting to, and mitigating the effects of, climate change.[13] The plaintiffs in these suits primarily relied upon theories of negligence and public nuisance as their causes of action.[14] Courts, however, have struggled with this approach and dismissed many of the suits.[15] Federal courts dismissed some suits after determining that the Clean Air Act displaced federal public nuisance law when it came to climate change.[16] Other suits have met their demise when courts, uncertain of how to assign responsibility for climate change, dismissed the complaints as political questions better left to the legislature.[17]

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[13] *See Native Vill. of Kivalina*, 696 F.3d at 853 (seeking monetary damages after having to relocate the village due to climate change); *Rhode Island*, 393 F. Supp. 3d at 146 (seeking contribution for damage anticipated from climate change); *City of New York*, 325 F. Supp. 3d at 468 (seeking money damages for the cost of sea level rise); *Cnty. of San Mateo*, 294 F. Supp. 3d at 937 (seeking compensation for climate mitigation and adaption). For example, in *Rhode Island*, the State sought relief from the anticipated damages of climate change. 393 F. Supp. 3d at 146. Specifically, the State sought compensation for the costs associated with repairing and fortifying infrastructure from severe weather and rising sea levels. *See id.* ("Casualties are expected to include the State's manmade infrastructure, its roads, bridges, railroads, dams, homes, businesses, and electric grid; the location and integrity of the State's expansive coastline[;] . . . vast sums are expended to fortify before and rebuild after the increasing and increasingly severe weather events . . . .").

[14] *See Am. Elec. Power Co.*, 564 U.S. at 418 (suing for public nuisance); *Native Vill. of Kivalina*, 696 F.3d at 853 (bringing a claim of public nuisance); *Rhode Island*, 393 F. Supp. 3d at 148 (suing for public nuisance); *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 548 (bringing claims of public nuisance, negligence, and strict liability); *City of New York*, 325 F. Supp. 3d at 470 (suing fossil fuel companies for creating a public nuisance); *City of Oakland*, 325 F. Supp. 3d at 1019 (asking the court to grant relief under public nuisance law); *City of San Mateo*, 294 F. Supp. 3d at 937 (claiming damages for public nuisance and negligence).

[15] *See, e.g.*, *Am. Elec. Power Co.*, 564 U.S. at 415 (dismissing public nuisance claim because the Clean Air Act's carbon dioxide regulations displaced the plaintiffs' right to common law relief); Comer v. Murphy Oil USA, Inc., 718 F.3d 460, 464, 465 (5th Cir. 2013) (dismissing the suit because mitigating climate change is a task for Congress and not federal courts); *Native Vill. of Kivalina*, 696 F.3d at 858 (same); *City of New York*, 325 F. Supp. 3d at 478 (same).

[16] *See Am. Elec. Power Co.*, 564 U.S. at 424 (deciding that the Clean Air Act displaced the federal common law of public nuisance); *Native Vill. of Kivalina*, 696 F.3d at 856 (same).

[17] *See Comer*, 718 F.3d at 466 (upholding the district court decision that claims presented "nonjusticiable political questions"); *City of New York*, 325 F. Supp. 3d at 475 (finding that the Clean Air Act displaced the common law and the task of assigning responsibility for climate change was a political question). Climate change is a global issue whose impacts and causes are not confined to a single country; therefore, the regulation of greenhouse gases will have significant impact on the global economy. *See* PAUL GRIFFIN, CDP, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017, at 8 (2017) (outlining how a variety of international corporations and state-owned entities have contributed to greenhouse gas emissions). If fossil fuel companies continue to develop at the same rate as they have during the past three decades, the global average temperature is expected to increase by at least 4° Celsius by the end of 2100. *Id.* at 7. This business as usual emissions pathway would be catastrophic, however, because anything more than a 1.5° Celsius- increase in global average temperature risks triggering feedback loops that could forever alter human society and decimate global biodiversity. MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICY MAKERS 5, 7–11 (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_

These climate tort lawsuits arose, in large part, from revelations that the fossil fuel industry knew about the dangers of climate change but nevertheless chose to fund disinformation campaigns designed to spread doubt and confusion regarding the existence, cause, and risks of climate change.[18] If the defendants' misinformation is the impetus for the current spate of climate tort suits, then plaintiffs should sue fossil fuel companies for their coordinated efforts to defraud the American public about the link between fossil fuel energy and anthropogenic climate change.[19] Plaintiffs can accomplish this by suing fossil fuel companies, including their trade associations and think tanks, for civil conspiracy and fraud.[20]

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version_report_LR.pdf [https://perma.cc/V9A5-JPHG] (summarizing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5° C).

[18] *See Native Vill. of Kivalina*, 696 F.3d at 854 (charging that defendants worked together to discredit climate science); *Rhode Island*, 393 F. Supp. 3d at 146 (claiming that the defendants deliberately sowed doubt about climate science to protect their profits); *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 548 (asserting that the defendants misled the public regarding the risks posed by fossil fuels); *Bd. of Cnty. Comm'rs*, 405 F. Supp. 3d at 955 (alleging that the defendants hid and otherwise distorted the impacts of their products); *City of New York*, 325 F. Supp. 3d at 468–69 (claiming that the defendants undertook efforts to confuse the public about the connection between fossil fuels and climate change); *City of Oakland*, 325 F. Supp. 3d at 1021 (alleging that the defendants engaged in public relations efforts designed to minimize the dangers of climate change); *see also* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 214 (2010) (explaining how industry-funded experts successfully infiltrated mainstream media and political discourse on climate change); Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/ [https://perma.cc/4EGC-EJ3W] (discussing how Exxon's internal climate research led to corporate adaption efforts even as the company actively promoted the idea that climate science was unsettled); Amy Lieberman & Susanne Rust, *Big Oil Braced for Global Warming While It Fought Regulations*, L.A. TIMES (Dec. 31, 2015), https://graphics.latimes.com/oil-operations/ [https://perma.cc/758B-AG34] (detailing how Mobile Oil, Shell, and other fossil fuel companies altered their infrastructures to account for rising sea levels while at the same time funding think tanks that attacked climate science and discouraged government adaptation and mitigation efforts).

[19] *See supra* note 18 and accompanying text (describing how fossil fuel companies conspired to spread misinformation about climate science and how plaintiffs include that misinformation in their complaints).

[20] *See* Cooper v. O'Connor, 99 F.2d 135, 142 (D.C. Cir. 1938) (holding that a civil conspiracy is when two or more persons act together to achieve an unlawful purpose or to achieve a lawful one by unlawful means). The *Restatement (Third) of Torts* defines civil conspiracy as requiring three elements: 1) a meeting of the minds to commit a tortious or illegal act; 2) an underlying tort; and 3) actual damage to the plaintiff. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 (AM. L. INST., Tentative Draft No. 3, 2018). As the elements make clear, a civil conspiracy, as a cause of action, is predicated on the completion of some underlying tortious act by at least one party in the conspiracy. *Id.*; *see* Alder v. Fenton, 65 U.S. (1 Black) 407, 410 (1861) (adopting the English common law construction from *Savile v. Roberts* that civil conspiracy requires the actual harm (quoting Savile v. Roberts (1698) 91 Eng. Rep. 1147, 1150; 1 Lord Raym 374, 378)). In cases involving accusations that an industry conspired to hide information from the public, most plaintiffs rely on fraudulent misrepresentation or fraudulent concealment as the independent tort. Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 400, 402 (2007). The litigation strategy proposed in this Note likewise relies upon fraud to meet the

Part I of this Note examines the history of climate tort lawsuits and climate denialism.[21] Part II discusses the elements of a claim of civil conspiracy.[22] Finally, Part III of this Note analyzes the various aspects of a climate conspiracy case against fossil fuel companies and argues that a climate conspiracy-based litigation strategy may prove more fruitful for litigants than the existing climate litigation strategy based in state common law of public nuisance and negligence.[23]

I. TORT LAW AND THE HISTORY OF CLIMATE DENIAL

In 2015, the Los Angeles Times and Energy and Environmental Reporting Project at Columbia University's Graduate School of Journalism jointly released an exposé outlining the disparities between Exxon's internal understanding of climate change and the company's public positions.[24] For example, even as Exxon's executives used shareholder meetings to publicly attack climate change models as unreliable guesswork, the company relied on those same models to plan for changes to its arctic operations.[25] These revelations generated enough backlash against Exxon that several state attorneys general announced investigations into Exxon for securities and consumer fraud.[26] Exxon, however, was not the only company who misled the public about climate change.[27] Over the last

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independent tort requirement. *See infra* notes 178–193 and accompanying text. Furthermore, civil conspiracy is a particularly useful tort, despite the independent tort requirement, for three reasons: 1) it imposes liability on secondary actors—those who planned, funded, or encouraged the underlying tort; 2) it extends the reach of long-arm jurisdiction over non-resident defendants; and 3) it exempts from the hearsay rules statements made "in furtherance of the conspiracy." Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIA. L. REV. 1, 11, 12 (1999). Additionally, civil conspiracy has been used to impose liability on trade associations and industry-sponsored think tanks. *See* Rogers v. R.J. Reynolds Tobacco Co., 761 S.W.2d 788, 799–800 (Tex. App. 1988) (holding that claims against the Tobacco Institute could proceed because sufficient evidence existed that the Institute conspired with tobacco producers to hide the negative health consequences of smoking).

[21] *See infra* notes 24–86 and accompanying text.

[22] *See infra* notes 87–159 and accompanying text.

[23] *See infra* notes 160–208 and accompanying text.

[24] *See* Jerving et al., *supra* note 18 (explaining how even as Exxon scientists accurately predicted changes to sea ice and other climate impacts, the company publicly maintained that the science was too uncertain to warrant action).

[25] *Id.*

[26] *See, e.g.*, Nate Raymond, *Massachusetts Accuses Exxon in Lawsuit of Climate Change Deceit*, REUTERS (Oct. 24, 2019), https://www.reuters.com/article/us-exxon-mobil-lawsuit-massachusetts/massachusetts-accuses-exxon-in-lawsuit-of-climate-change-deceit-idUSKBN1X32GA [https://perma.cc/7F7X-EATX] (explaining that Massachusetts Attorney General Maura Healey filed a lawsuit accusing Exxon of misleading investors about the risks climate change posed to the business while lying to consumers about the connection between fossil fuels and climate change); John Schwartz, *New York Sues Exxon Mobil, Saying It Deceived Shareholders on Climate Change*, N.Y. TIMES (Oct. 24, 2018), https://www.nytimes.com/2018/10/24/climate/exxon-lawsuit-climate-change.html [https://perma.cc/23YH-5XWZ] (discussing the New York Attorney General's investor fraud lawsuit against Exxon for minimizing the climate-risks of climate change).

[27] *See* CHRISTOPHER LEONARD, KOCHLAND: THE SECRET HISTORY OF KOCH INDUSTRIES AND CORPORATE POWER IN AMERICA 392–426 (2019) (detailing Koch Industries' strategy for defeating

five years, a flurry of tort lawsuits has sought to hold fossil fuel producers accountable for their contributions to climate change.[28] Section A explores the history of climate tort lawsuits in the United States.[29] Section B describes the efforts fossil fuel companies took to delay public policy action on climate change by manufacturing doubt regarding climate science.[30]

A. History of Climate Tort Lawsuits

Climate tort lawsuits occur when states or individuals assert their common law rights to recover damages related to climate change.[31] Subsection 1 discusses climate tort lawsuits under federal common law.[32] Subsection 2 explores the more recent trend of bringing climate tort suits under state common law.[33]

1. Federal Climate Lawsuits

The first major climate tort lawsuit was *American Electric Power Co. v. Connecticut*, decided by the United States Supreme Court in 2011.[34] In *American Electric Power Co.*, eight states, New York City, and three private land trusts sued five electric utility companies that constituted some of the largest greenhouse gas emitters in the United States.[35] The plaintiffs claimed that the carbon dioxide emissions from the defendants' power plants constituted a public nuisance.[36] They argued that these emissions contributed to global warming, which,

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federal climate change legislation as well as its history of funding climate denialism); Lieberman & Rust, *supra* note 18 (explaining that Exxon, Mobil, Shell and other oil companies spent millions of dollars lobbying against policies that would regulate greenhouse gas emissions).

[28] *E.g.*, Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019); Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548 (D. Md. 2019); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 948 (D. Colo. 2019); City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1019 (N.D. Cal. 2018); Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018).

[29] *See infra* notes 31–64 and accompanying text.

[30] *See infra* notes 65–86 and accompanying text.

[31] *See, e.g.*, *Rhode Island*, 393 F. Supp. 3d at 146 (suing under public nuisance to recover damages for rising sea levels and extreme weather resulting from defendants' climate change causing emissions); *Bd. of Cnty. Comm'rs*, 405 F. Supp. 3d at 954–55 (seeking recovery under nuisance, trespass, and negligence law for the cost of climate change impacts, such as drought and wildfires); *City of New York*, 325 F. Supp. 3d at 468 (seeking money damages for the cost of protecting New York City against sea level rise).

[32] *See infra* notes 34–50 and accompanying text.

[33] *See infra* notes 51–64 and accompanying text.

[34] *See* 564 U.S. 410, 415 (2011) (holding for the first time that the Clean Air Act displaced the federal common law's ability to regulate greenhouse gas pollution).

[35] *Id.* at 418. The plaintiffs were California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, New York City, Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire. *Id.* at 418 nn.3 & 4. The defendants were American Electric Power Company, Inc., Southern Company, Xcel Energy Inc., Cinergy Corporation, and the Tennessee Valley Authority. *Id.* at 418 n.5.

[36] *Id.* at 418.

in turn, impacted public health, infrastructure, and the habitat of plant and animal species enjoyed by citizens and landowners represented by the plaintiffs.[37] The plaintiffs sought to limit the emissions of each power plant and require that emissions decrease over time.[38] The Supreme Court determined that because Congress delegated the regulation of greenhouse gas emissions to the Environmental Protection Agency (EPA) under the Clean Air Act, the Clean Air Act displaced the federal common law in this area.[39] The Court, therefore, dismissed the case.[40]

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[37] *Id.* at 418–19. At the time of the lawsuit, the defendants' emissions "constitute[d] 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, and 2.5 percent of all anthropogenic emissions worldwide." *Id.* at 418 (citation omitted). Public nuisance can be thought of as an interference with the general public's ability to access a public right. RESTATEMENT (SECOND) OF TORTS: PUB. NUISANCE § 821B (AM. L. INST. 1979). The interference must be unreasonable, which is generally defined as "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience . . . ." *Id.*

[38] *Am. Elec. Power Co.*, 564 U.S. at 419. The plaintiffs did not specify a specific percentage by which the cap should be reduced annually; instead, they looked to the court to determine an appropriate decrease. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011). After the United States District Court for the Southern District of New York dismissed the case under the political question doctrine, the plaintiffs appealed and the United States Court of Appeals for the Second Circuit reversed the lower court's dismissal. *Am. Elec. Power Co.*, 564 U.S. at 419. The political question doctrine is designed to maintain the separation of power between the branches of government. Baker v. Carr, 369 U.S. 186, 210 (1962). The doctrine is often attributed to the Supreme Court's 1803 decision in *Marbury v. Madison*, where the Court refused to order the Secretary of State fulfill Marbury's commission. *See* 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). Questions that could be dealt with by the legislature or executive are not automatically deemed political questions. *Baker*, 369 U.S. at 217. Instead political questions exist when the Constitution assigns an issue to another branch of government, when no "judicially discoverable and manageable standards" exist for resolving it, or when a judicial decision would impinge upon or contradict the prerogative of another branch of government. *Id.*

[39] *See Am. Elec. Power Co*., 564 U.S. at 424 (holding that the right to federal common-law relief from climate-change-causing power plant emission is displaced because the Clean Air Act and the Environmental Protection Agency's (EPA) regulations directly address the management of greenhouse gas emissions). The plaintiffs argued, and the Second Circuit agreed, that the federal common law is not displaced until the EPA fully exercised its regulatory authority and set emissions standards for carbon dioxide at the defendant's plants. *Id.* at 425–26. But the Supreme Court rejected this approach and determined that displacement occurred once Congress delegated authority over an issue to an agency. *See id.* at 426 (holding that by providing the EPA with authority to regulate air pollution, Congress displaced the common law right, because even if the EPA to decline to act, federal courts would not be able to abrogate that decision by granting relief under federal nuisance law). Even if the EPA had developed a system to regulate greenhouse gas emission, plaintiffs seeking compensation for climate-related damages would find suing under the Clean Air Act inadequate, because although the citizen suit provision allows individuals to sue for compliance, plaintiffs are unable to recover monetarily. *See* 42 U.S.C. § 7604(a). Any civil penalties imposed by the courts under the Clean Air Act are paid to the United States Treasury. *Id.* § 7604(g)(1).

[40] *Am. Elec. Power Co.*, 564 U.S. at 424. For a detailed discussion of how environmental advocates and states hoped the Supreme Court would handle standing in climate tort suits, see Gregory Bradford, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065 (2011).

In the years since, many federal courts have continued to dismiss climate tort suits following *American Electric Power Co.*'s rationale.[41] For example, in 2012, the United States Court of Appeals for the Ninth Circuit decided *Native Village of Kivalina v. ExxonMobil Corp*., by applying the Supreme Court's precedent.[42] In *Native Village of Kivalina*, an Alaskan village and the indigenous tribe sued a group of twenty-two fossil fuel companies and electric utilities claiming that the companies' greenhouse gas emissions constituted a public nuisance.[43] Melting sea ice, allegedly caused by the defendants' emissions, exposed the village, situated on a barrier island north of the arctic circle, to erosion and forced the relocation of the village's entire population.[44] The court determined that the plaintiffs could not recover relocation costs or other damages from the defendants because the Clean Air Act displaced the common law of public nuisance.[45]

Similarly, in 2018, the United States District Court for the Southern District of New York also followed the precedent set forth in *American Electric Power Co.* and dismissed *City of New York v. BP P.L.C.*[46] New York City alleged that the defendants sold oil and gas products that caused the harmful effects of climate change, including a rise in the sea level.[47] New York City tried

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[41] *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856 (9th Cir. 2012) (holding that the Clean Air Act had displaced the federal common law of nuisance); City of New York v. BP P.L.C., 325 F. Supp. 3d 466,472 (S.D.N.Y. 2018) (finding that New York City could not use the common law to recover for climate change damages because the Clean Air Act had displaced the tort remedy).

[42] 696 F.3d at 856.

[43] *Id.* at 853. The defendants in this case were ExxonMobil Corporation, BP P.L.C., BP America, Inc., BP Products North America, Inc., Chevron Corporation, Chevron U.S.A., Inc., Conocophillips Company, Royal Dutch Shell PLC, Shell Oil Company, Peabody Energy Corporation, The AES Corporation, American Electric Power Company, Inc., American Electric Power Services Corporation, Duke Energy Corporation, DTE Energy Company, Edison International, Midamerican Energy Holdings Company, Pinnacle West Capital Corporation, The Southern Company, Dynegy Holdings, Inc., Xcel Energy, Inc., and Genon Energy, Inc. *Id.* at 853 n.1.

[44] *Id.* at 853–54. The sea ice, which historically protected the village from storms, began to destabilize due to warming ocean and atmospheric temperatures, threatening the village's very existence. *Id.* at 853. As a result, the village became exposed to the Bearing Sea's seasonal storms. *Id.* This exposure accelerated erosion of the land on which the village is situated. *Id.*

[45] *See id.* at 856 (holding that the Supreme Court's decision that Congress had displaced the common law as it relates to carbon dioxide emissions required that they dismiss the case). The court acknowledged that, unlike the plaintiffs in *American Electric Power Co.*, Kivalina does not want to limit future emissions. *Id.* at 857. Instead, the *Native Village of Kivalina* plaintiffs sought to recover damages flowing from the defendants' past emissions. *Id.* The Ninth Circuit, however, concluded that "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement. . . . . Thus, under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies." *Id.*

[46] *See City of New York*, 325 F. Supp. 3d at 472 (holding that precedent requires the dismissal of New York City's public nuisance and trespass claims related to the defendants' carbon dioxide pollution).

[47] *Id.* at 469–70. The defendants in this case were BP P.L.C., Chevron, ConocoPhillips, Exxon, and Royal Dutch Shell. *Id.* at 468.

to navigate around *American Electric Power Co.* by framing its complaint to address the sale of oil and gas products.[48] The City argued that the Clean Air Act regulates emissions but not "the production and sale of fossil fuels," and, therefore, argued that the court should not displace the City's common law right.[49] The court acknowledged that the defendants' products primarily caused climate change; however, it rejected the City's novel approach.[50]

2. State Climate Lawsuits

In recent years, recognizing that principles established by *American Electric Power Co.* foreclose recovery under federal law, plaintiffs have developed a new strategy based upon state tort law claims.[51] In *American Electric Power Co.*, the Court declined to consider whether the Clean Air Act also preempted state common law.[52] As a result, plaintiffs began tailoring their lawsuits to state common law claims.[53]

The success of this strategy, however, remains uncertain as federal district courts have produced inconsistent rulings.[54] Federal courts in Rhode Island, Maryland, and Colorado have remanded climate tort lawsuits against fossil fuel companies to state courts.[55] For example, in 2018 in *Mayor & City Council of Baltimore v. BP P.L.C.*, Baltimore sued twenty-six fossil fuel companies in the Circuit Court for Baltimore City under state tort and statutory law for

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[48] *Id.* at 474.

[49] *Id.*

[50] *Id.* (finding that because the climate change damages were caused by the burning of fossil fuels and not their sale, the City was attempting to regulate the same activity addressed in *American Electric Power Co.*).

[51] *See, e.g.*, Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019) (explaining that the plaintiff's tailored their complaint to only bring state law claims); Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548 (D. Md. 2019) (same); Bd. of Cnty. Comm'rs v. SuncorEnergy (U.S.A.) Inc., 405 F. Supp. 3d 947, 954–55 (D. Colo. 2019) (same); City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470, 474 (S.D.N.Y. 2018) (bringing state law claims while also structuring federal law so as to avoid displacement); Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (asserting state law claims).

[52] *See* 564 U.S. 410, 429 (2011) (explaining that none of the parties argued this claim and, therefore, the Court declined to review it).

[53] *E.g.*, *Rhode Island*, 393 F. Supp. 3d at 146 (bringing eight state law claims); *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 548 (claiming that the defendants violated seven provision of the Maryland common law as well as the Maryland Consumer Protection Act); *Bd. of Cnty. Comm'rs*, 405 F. Supp. 3d at 954–55 (asserting six Colorado common law and statutory causes of action); *City of New York*, 325 F. Supp. 3d at 470 (alleging three state law causes of action).

[54] *Compare Rhode Island*, 393 F. Supp. 3d at 152 (finding that state law claims govern), *with City of New York*, 325 F. Supp. 3d at 471 (finding that federal law, not state law, governs all issues involving interstate pollution).

[55] *See, e.g.*, *Rhode Island*, 393 F. Supp. 3d at 152; *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 574; *Bd. of Cnty. Comm'rs*, 405 F. Supp. 3d at 981.

damages suffered from climate change allegedly caused by the defendants.[56] The defendants removed the case to federal court, and Baltimore filed a motion requesting the court remand the lawsuit back to state court.[57] The United States District Court for the District of Maryland subsequently found that federal-question jurisdiction did not exist because federal law neither governed nor completely preempted state law, and remanded the case back to state court for trial under state law.[58] Similarly, in *Rhode Island v. Chevron Corp*. and *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, the United States District Courts for the District of Rhode Island and the District of Colorado, respectively, agreed with the plaintiffs' assertions that the state law claims governed and remanded each case to state court.[59] In October 2019, the Supreme Court refused to stay the remands of the Rhode Island, Baltimore, and Boulder County cases while the fossil fuel companies appealed.[60]

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[56] 388 F. Supp. 3d at 548, 574; Complaint at 107–30, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Balt. City Cir. deferred Aug. 6, 2020). Baltimore brought eight state law claims: "public nuisance (Count I); private nuisance (Count II); strict liability for failure to warn (Count III); strict liability for design defect (Count IV); negligent design defect (Count V); negligent failure to warn (Count VI); trespass (Count VII); and violations of the Maryland Consumer Protection Act (Count VIII)." *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 548 (citation omitted).

[57] *Id.* at 548–49. Under the Federal Rules of Civil Procedure, any defendant has the right to file a notice of removal to federal court within thirty days of the filing of the initial complaint. 28 U.S.C. § 1446(b)(1). The case may be removed in two instances: 1) if the claim could have been filed in federal court; or 2) if there is diversity of citizenship between the parties. *Id.* § 1441(a), (b). Once a case has been removed from state to federal court, the non-moving party has thirty days to file a motion for remand if they believe the federal court lacks jurisdiction to hear the case. *Id.* § 1447(c). The federal court must then decide if it has the authority to hear the case or if the proper venue is state court. *Id.*

[58] *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 557, 574. Federal courts are courts of limited jurisdiction. *See* U.S. CONST. art. 3, § 2, cl. 1. The Constitution only grants federal courts jurisdiction in a limited set of circumstances, such as in suits between citizens of different states and in suits questioning federal law. *Id.* When suits arise under federal law, they are said to trigger federal question jurisdiction. *See* Merrell Dow Pharms. Inc. v. Thompson *ex rel.* Thompson, 478 U.S. 804, 808 (1986) (explaining that "cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action"). In such situations, the federal law is said to "create[] the cause of action." *Id.* As a result, courts look to the complaint to determine if federal question jurisdiction exists. *Id.* Defenses that rely upon a federal question will not trigger jurisdiction. *Id.* The existence of a federal statute is not the only method of triggering federal question jurisdiction, however. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (explaining that federal courts should be able to hear state law claims if the claim raises significant federal law questions). State law claims that involve a federal issue can trigger federal-question jurisdiction to ensure consistency across jurisdictions. *Id.*

[59] *Rhode Island*, 393 F. Supp. 3d at 152; *Bd. of Cnty. Comm'rs*, 405 F. Supp. 3d at 981; *see Mayor & City Council of Balt.*, 388 F. Supp. 3d at 574 (remanding to state court).

[60] Adam Liptak, *Supreme Court Lets Climate Change Lawsuit Proceed*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/us/supreme-court-climate-change.html [https://perma.cc/SX5P-ZTF9]. The Supreme Court's decision to refuse to stay the remand means the state court proceeding will continue while the respective circuit courts hear the appeals of the remand order. *Id.*

Despite the Supreme Court's refusal to intervene pending appeal, the decision to remand state common law cases has not been universal.[61] Federal courts in both California and New York refused to remand similar cases, instead determining that federal interests trump the state's interest when it comes to climate change.[62] These courts held that the plaintiffs' claims arose as a result of cross-boundary emissions, and therefore the federal interest in uniform treatment outweighed the state's individual interest.[63] As a result, it remains uncertain if the strategy of bringing claims under the state common law of nuisance, trespass, and negligence will succeed.[64]

B. The Climate Denial Conspiracy

Scientists first discovered the relationship between carbon dioxide emissions and climate change in the late 1800s.[65] In fact, in 1896 a Swedish scientist, Svante Arrhenius, calculated that a doubling of atmospheric carbon dioxide would result in a total warming of the planet by five-to-six degrees Celsius.[66] In 1965, President Lyndon Johnson became the first president to receive an official warning about the dangers fossil fuels posed to the global climate system.[67] In the report issued by the President's Scientific Advisory Committee, some of the nation's top scientists warned that an increase in atmospheric carbon dioxide due to the burning of fossil fuels would not only raise surface temperatures, but also melt ice caps, raise sea levels, increase ocean temperature, and acidify fresh water.[68]

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[61] *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (holding that federal jurisdiction was appropriate); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018) (same).

[62] *See, e.g.*, *City of New York*, 325 F. Supp. 3d at 471–72 (holding that interstate pollution is a federal question); *City of Oakland*, 294 F. Supp. 3d at 1021 (holding that determining the effects of climate change, including coastal flooding, is a federal question).

[63] *See City of New York*, 325 F. Supp. 3d at 471–72 (stating that lawsuits over pollution that cross state and international boards are within the domain of federal common law); *City of Oakland*, 294 F. Supp. 3d at 1021 (concluding that the plaintiffs' state law public nuisance claims triggered federal jurisdiction because only federal law can provide the uniformity in result needed to address a problem such as climate change). Cross-boundary emissions—pollution that impacts public health and the environment across state lines—constituted one of the primary justifications for federal regulation of air pollution. Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution Under the Clean Air Act of 1990*, 24 B.C. ENV'T AFFS. L. REV. 1, 13 (1996).

[64] *See* Liptak, *supra* note 60 (noting that the Supreme Court has not yet decided whether the Clean Air Act preempts state common law on the issue of climate change).

[65] *See, e.g.*, Svante Arrhenius, *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237 (1896) (calculating the effects of greenhouse gases).

[66] *Id.* at 266.

[67] *See* ENV'T POLLUTION PANEL OF THE PRESIDENT'S SCI. ADVISORY COMM., RESTORING THE QUALITY OF OUR ENVIRONMENT 112 (1965) (providing a thorough report of the effects of pollution).

[68] *Id.* at 123–24.

Oil companies were once at the leading edge of understanding the scientific connection between their product and global warming.[69] As early as the 1950s, the American Petroleum Institute (API), a trade association representing a number of stakeholders in the U.S. energy industry, alerted oil and gas companies that fossil fuel use would significantly alter our climate system.[70] In fact, in 1968, API published a report warning of the serious impacts API suspected could occur by the end of the century as atmospheric carbon dioxide concentration increased, including warming oceans, melting ice caps, and rising sea levels.[71]

Additionally, between 1979 and 1983, API members formed the Climate and Energy Task Force (Task Force) to coordinate their scientific findings on global warming.[72] The Task Force's notes demonstrate that members understood the relationship between carbon dioxide and global average temperature, and that the Task Force recognized the near unanimity among scientists that continued greenhouse gas emissions would produce catastrophic impacts on the planet.[73]

API's approach to climate change shifted significantly by the late 1980s.[74] In August 1988, facing growing concerns about a warming climate, executives at Exxon circulated an internal memorandum on climate change.[75] The memorandum acknowledged the consensus among climatologists that fossil fuels were contributing to climate change.[76] The memorandum also argued, however, that Exxon must promote uncertainty among the public and Congress on the level of consensus within the scientific community in regards to the effects of greenhouse gases.[77] By promoting uncertainty, Exxon could avoid policies designed to mitigate climate change, such as mandatory reductions in carbon dioxide emissions, that would in turn hurt their business practice by low-

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[69] ORESKES & CONWAY, *supra* note 18, at 170 (explaining how the scientist Roger Revelle found the connection between fossil fuels and carbon dioxide).

[70] City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018).

[71] *See* E. ROBINSON & R.C. ROBBINS, STANFORD RSCH. INST., SOURCES, ABUNDANCE, AND FATE OF GASEOUS ATMOSPHERIC POLLUTANTS 109 (1968) ("[M]an is now engaged in a vast geophysical experiment with his environment, the earth. Significant temperature changes are almost certain to occur by the year 2000 and these could bring about climatic changes.").

[72] *City of New York*, 325 F. Supp. 3d at 468.

[73] *Id.* at 468–69.

[74] *Compare* ROBINSON & ROBBINS, *supra* note 71, at 109 (concluding, in 1968, that humans are dangerously manipulating the climate), *with* Chris Mooney, *Some Like It Hot*, MOTHER JONES (May 2005), https://www.motherjones.com/environment/2005/05/some-it-hot/ [https://perma.cc/8DAM-SF7A] (describing how API downplayed the risks and questioned the cause of climate change).

[75] Katie Jennings et al., *How Exxon Went from Leader to Skeptic on Climate Change Research*, L.A. TIMES (Oct. 23, 2015), https://graphics.latimes.com/exxon-research/ [https://perma.cc/ANR5-X9E3].

[76] *Id.*

[77] *Id.*

ering the demand for fossil fuels.[78] Less than one year later, fossil fuel companies and their associated industry organizations created the Global Climate Coalition (GCC) to create public uncertainty about climate science.[79] The GCC attempted to discredit climate models, questioned the need for action on global warming, asserted non-anthropogenic causes of climate change, and, at times, outright denied its existence.[80] These efforts were funded, at least in part, by API.[81]

The strategy of promoting a public perception that climate change science is uncertain continued from the 1980s to the present day.[82] In 1998, the New York Times revealed an internal API memo outlining a multi-million dollar plan to convince the public and lawmakers that the science on climate change remained unsettled.[83] Between 2000 and 2016, fossil fuel interests spent nearly two billion dollars on lobbying against climate change legislation and regulations.[84] Additionally, the five largest publicly traded oil companies have spent nearly one billion dollars challenging policies designed to combat climate change since the enactment of the Paris Agreement.[85] The fossil fuel industry's large-scale misinformation campaign has largely succeeded in eroding public trust in climate science and stalling efforts to achieve meaningful policy change.[86]

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[78] *See id.* (describing Exxon's opposition to policy proposals to "reduce [global] emissions of CO2 by 10% by 1990").

[79] Lieberman & Rust, *supra* note 18; Mooney, *supra* note 74.

[80] Mooney, *supra* note 74.

[81] Lieberman & Rust, *supra* note 18.

[82] *See* Sandra Laville, *Top Oil Firms Spending Millions Lobbying to Block Climate Change Policies, Says Report*, THE GUARDIAN (Mar. 21, 2019), https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report [https://perma.cc/44MM-95S5] ("The largest five stock market listed oil and gas companies spend nearly $200m (£153m) a year lobbying to delay, control or block policies to tackle climate change . . . .").

[83] John H. Cushman Jr., *Industrial Group Plans to Battle Climate Treaty*, N.Y. TIMES (Apr. 26, 1998), https://www.nytimes.com/1998/04/26/us/industrial-group-plans-to-battle-climate-treaty.html [https://perma.cc/YP8J-HWYV]; Mooney, *supra* note 74. The API memo said that "[v]ictory will be achieved when . . . recognition of uncertainty becomes part of the 'conventional wisdom.'" Mooney, *supra* note 74 (alteration in original).

[84] Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 CLIMATE CHANGE 289, 289 (2018).

[85] INFLUENCEMAP, BIG OIL'S REAL AGENDA ON CLIMATE CHANGE: HOW THE OIL MAJORS HAVE SPENT $1BN SINCE PARIS ON NARRATIVE CAPTURE AND LOBBYING ON CLIMATE 2 (2019). The Paris Agreement is an international climate change agreement adopted in 2015 by members of the United Nations Framework Convention on Climate Change. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Under the agreement every nation submits a specific level of reduction it will commit to reaching. *Id.* at art. 4 § 2. Nations are supposed to update their commitments at least every five years. *Id.* at art. 4 § 9.

[86] *See* ORESKES & CONWAY, *supra* note 18, at 214 (explaining how industry-funded experts successfully infiltrated mainstream media and political discourse on climate change); Justin Farrell, Kathryn McConnell, & Robert Brulle, *Evidence-Based Strategies to Combat Scientific Misinformation*, 9 NATURE CLIMATE CHANGE 191, 191–92 (2019) (finding that the proliferation of scientific misinformation has polluted public dialogue, contributed to increased polarization across the United States, and inhibited the passage of climate change legislations); *see also* Robert J. Brulle, *Institution-*

II. Civil Conspiracy in Tort Law

A civil conspiracy is where two or more persons act together to achieve an unlawful purpose or to achieve a lawful purpose by unlawful means.[87] Civil conspiracy is a particularly appealing tort for plaintiffs because it allows them to bypass certain procedural hurdles.[88] First, civil conspiracy can be useful in imposing liability on secondary actors, particularly those who planned, funded, or encouraged the underlying tort, even if they did not commit the tort themselves.[89] For example, in 1988, the Texas Appeals Court held in *Rogers v. R.J. Reynolds Tobacco Co.* that a tobacco trade association and an industry-sponsored think tank were liable under a civil conspiracy claim, despite not manufacturing or distributing tobacco.[90] Second, some jurisdictions allow a plaintiff to use a conspiracy cause of action to support the court's exercise of long-arm jurisdiction over non-resident defendants, provided that the court has personal jurisdiction over at least one conspirator.[91] Finally, proving conspira-

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alizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations, 122 Climatic Change 681, 687 (2014) (tracing the sources of funding of think tanks that promote climate denialism); Justin Farrell, *Corporate Funding and Ideological Polarization About Climate Change*, 113 Proc. Nat'l Acad. Scis. 92, 94–95 (2016) (tracking how corporate funding influences the effort to sow disagreement over the veracity of climate science); Justin Farrell, *Network Structure and Influence of the Climate Change Counter-Movement*, 6 Nature Climate Change 370, 373 (2016) (mapping the network and influence of climate denial organizations).

[87] Cooper v. O'Connor, 99 F.2d 135, 142 (D.C. Cir. 1938).

[88] Leach, *supra* note 20, at 11.

[89] *See* Mox, Inc. v. Woods, 262 P. 302, 303 (Cal. 1927) (holding civil conspiracy "renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity"); Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 925–26 (Tex. 1979) (holding each co-conspirator "is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination").

[90] Rogers v. R.J. Reynolds Tobacco Co., 761 S.W.2d 788, 799–800 (Tex. App. 1988); *see* Jefferson v. Lead Indus. Ass'n, 930 F. Supp. 241, 247–48 (E.D. La. 1996) (finding that a lead paint trade association could be held liable for conspiracy, but ultimately dismissing the claim because the plaintiff was unable to prove all elements of the underlying tort), *aff'd*, 106 F.3d 1245 (5th Cir. 1997).

[91] *See* Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1392–93 (7th Cir. 1983) (recognizing that conspiracy extends long-arm jurisdiction); Gemini Enters., Inc. v. WFMY Television Corp., 470 F. Supp. 559, 564 (M.D.N.C. 1979) (same); Wilcox v. Stout, 637 So.2d 335, 337 (Fla. Dist. Ct. App. 1994) (same). Long-arm jurisdiction extends personal jurisdiction over a non-resident defendant. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (holding that although the due process clause provides non-residents with some protection from judgment in foreign jurisdictions, if the non-resident "purposely avails" themselves of the jurisdiction, the state is justified in asserting jurisdiction over the defendant). Normally, long-arm jurisdiction requires a three-part test: 1) Is there relevant contact between the defendant and the forum; 2) Does the plaintiff's claim arise from the defendant's contact in with the forum; and, 3) Is jurisdiction fair? *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985) (describing how the due process clause protects a defendant from adjudication in an unfamiliar jurisdiction).

cy allows for an exemption from the hearsay rules for statements made "in furtherance of the conspiracy."[92]

Despites its usefulness, civil conspiracy has proven to be a difficult tort for many plaintiffs to successfully employ against product manufacturers.[93] This is largely because of the difficulty in proving all the elements of a civil conspiracy.[94] The *Restatement (Third) of Torts* defines the elements of civil conspiracy as containing three elements: 1) an agreement or meeting of the minds; 2) a substantive underlying tort other than the conspiracy; and 3) actual harm.[95] First, Section A discusses what constitutes an agreement for the purpose of proving a civil conspiracy.[96] Next, Section B explores the difficulties in proving a substantive underlying tort.[97] Finally, Section C examines the damages that a plaintiff may wish to pursue, including restitution and lost opportunity.[98]

A. The Agreement

In order to prove the existence of a conspiracy, plaintiffs must first prove that the alleged conspirators agreed to commit a wrongful act.[99] For example, in 2001 in *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, the plaintiffs accused the defendants of forming task forces and other organizations, including the MTBE Committee, to conceal the dangers of

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[92] FED. R. EVID. 801(d)(2)(E). The existence of a conspiracy, however, must be proven by a preponderance of the evidence. *See* Bourjaily v. United States, 483 U.S. 171, 176 (1987) (holding that a proponent of a co-conspirator statement must demonstrate the conspiracy by the preponderance standard before the evidence may be admitted). Co-conspirators are treated as agents of one another; therefore, once a conspiracy has been established, the out-of-court statements of one co-conspirator can be used to tie another co-conspirator to the wrongful act. *See* Anderson v. United States, 417 U.S. 211, 218 n.6 (1974) (stating that the justification for the co-conspirator statement hearsay exception is based on an agency theory); Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926) (holding that all co-conspirators are responsible for the actions one conspirator takes in furtherance of the conspiracy).

[93] *See* Ausness, *supra* note 20, at 383 ("Surprisingly, less than half of the civil conspiracy claims have made it to trial. This unimpressive success rate suggests that courts are not very receptive to civil conspiracy claims even when there is strong evidence of wrongdoing by product manufacturers." (footnote omitted)).

[94] *Id.* at 412.

[95] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 (AM. L. INST., Tentative Draft No. 3, 2018) (defining the elements of civil conspiracy as: "(a) [t]he defendant made an agreement with another to commit a wrong; (b) a tortious or unlawful act was committed against the plaintiff in furtherance of the agreement; and (c) the plaintiff suffered resulting economic loss").

[96] *See infra* notes 99–110 and accompanying text.

[97] *See infra* notes 111–133 and accompanying text.

[98] *See infra* notes 134–159 and accompanying text.

[99] *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 175 F. Supp. 2d 593, 635 (S.D.N.Y. 2001) (holding an agreement existed between conspirators to hide the risks of Methyl Tertiary Butyl Ether); McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 259 (Ill. 1999) (dismissing the conspiracy claim because the evidence was inadequate to find that an agreement existed between asbestos manufacturers).

MTBE.[100] The plaintiffs claimed that the defendants plotted to deceive the government and the public about the dangers posed by MTBE.[101] The United States District Court for the Southern District of New York found the formation of the various industry task forces were enough to support a claim of an unlawful agreement.[102]

In many cases, however, plaintiffs lack evidence of an agreement, such as the formation of the MTBE committee.[103] In these situations, courts allow for circumstantial evidence of an agreement, such as parallel conduct.[104] Most courts, however, will not allow circumstantial evidence on its own to prove the agreement.[105] For example, in 1999, in *McClure v. Owens Corning Fiberglas Corp.*, the Supreme Court of Illinois heard a case in which several asbestos manufacturers allegedly conspired to conceal the negative health impacts of asbestos.[106] The Supreme Court of Illinois held that to meet the burden demonstrating an actual conspiracy, the plaintiffs would need to show some direct evidence of an agreement between the defendants.[107] The plaintiffs, however,

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[100] 175 F. Supp. 2d at 634. MTBE is a gasoline additive developed from oil refining byproducts. *Id.* at 599. As early as 1978, the defendant oil companies were sharing information about MTBE contamination. *Id.* at 601. During the mid-1980s, scientific studies about the dangers of MTBE began to emerge and through the auspice of their trade associations, oil companies publicly challenged the validity of the studies, while internally acknowledging that they had no data that contradicted the reports. *Id.* When the EPA proposed additional health and safety testing of MTBE, Amoco, Arco, Chevron, Citgo, Exxon, Shell, Sunoco, Texaco, and Conoco formed the MTBE Committee. *Id.* at 602. The MTBE Committee provided the EPA with less than complete information about MTBE and successfully dissuaded it from requiring additional health and safety testing. *Id.*

[101] *Id.* at 602.

[102] *Id.* at 635. In addition to the MTBE Committee, oil companies used trade associations, such as the Oxygenated Fuels Association, to convince the public that the risk of MTBE contaminating groundwater was minimal. *Id.* at 602.

[103] *See, e.g.*, *In re* Asbestos Sch. Litig., 46 F.3d 1284, 1294 (3d Cir. 1994) (concluding that plaintiffs were unable to provide concrete evidence of an agreement to commit an illegal act); *McClure*, 720 N.E.2d at 259 (same); Collins v. Eli Lilly Co., 342 N.W.2d 37, 47–48 (Wis. 1984) (same).

[104] *See McClure*, 720 N.E.2d at 259 ("[P]arallel conduct may serve as circumstantial evidence of a civil conspiracy."). Parallel conduct is when companies in the same industry behave in the same or a substantially similar manner. *See In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321 (3d Cir. 2010) (providing as an example of parallel conduct "setting prices at the same level," which may be indicative of a conspiracy or simply an interpretation of what consumers will pay).

[105] *See McClure*, 720 N.E.2d at 259 ("Our review of the case law from other jurisdictions convinces us that the overwhelming weight of authority has refused to accept mere parallel action as proof of conspiracy."); *see also In re Asbestos Sch. Litig.*, 46 F.3d at 1294 (holding that "we do not see how a rational jury could find the existence of a civil conspiracy . . . based solely on the alleged fact that Pfizer and other defendants consciously engaged in parallel conduct"); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 473 (Pa. 1979) ("The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy." (quoting Fife v. Great Atl. & Pac. Tea Co., 52 A.2d 24, 39 (1947)); *Collins*, 342 N.W.2d at 47–48 ("[T]he drug companies apparently engaged in parallel behavior in both 1941 and 1947, but parallel behavior alone cannot prove agreement.").

[106] *McClure*, 720 N.E.2d at 245–46.

[107] *Id.* at 267.

could only proffer evidence of parallel conduct as proof of an agreement and failed to produce any direct evidence that the companies agreed to suppress the health information.[108] The court, therefore, considered such circumstantial evidence insufficient to prove that an actual conspiracy existed between the asbestos manufacturers.[109] Requiring more evidence than parallel conduct alone to prove a conspiracy forces plaintiffs to produce some concrete evidence that the defendants knowingly conspired.[110]

B. The Substantive Tort

A civil conspiracy as a cause of action is predicated on the completion of some underlying tortious act by at least one party in the conspiracy.[111] Not all torts will satisfy this independent tort requirement; instead, most courts require that the underlying tort must be an intentional one, because joining a conspiracy is an intentional tort and one cannot conspire to do a negligent act.[112]

Indeed, proving the completion of the underlying tort is essential for succeeding in a claim of civil conspiracy.[113] If plaintiffs fail in their burden to prove the substantive tort, their claim for civil conspiracy will also fail.[114] For

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[108] *Id.* The three plaintiffs in this case asserted that they, or their husbands, were exposed to asbestos as a result of work for Unarco. *Id.* at 245–46. The asbestos was manufactured by Johns–Manville; however, the plaintiffs did not bring a suit against either Unarco or Johns–Manville. *Id.* at 245. Instead the plaintiffs sued Owens Corning based on the theory that Owens Corning conspired with Johns–Manville and Unarco, as well as others, to hide information about the health risks posed by asbestos. *Id.*

[109] *Id.* at 267.

[110] *See id.* at 262 (stating that additional evidence beyond parallel conduct is "necessary to protect manufacturers from becoming insurers of their industry"); *Collins*, 342 N.W.2d at 47–48 (holding that parallel conduct was not evidence that the plaintiffs worked together to deceive the Food and Drug Administration).

[111] *See* Alder v. Fenton, 65 U.S. 407, 410 (1861) (adopting the English common law construction that civil conspiracy requires the actual harm). As Judge Learned Hand observed, this construction is notably different than the construction of conspiracy used in criminal law. Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp., 80 F.2d 862, 864 (2d Cir. 1936) (explaining that in criminal law, the conspiracy to break the law is punishable in and of itself, but the same is not true in tort law).

[112] *E.g.*, Wright v. Brooke Grp. Ltd., 114 F. Supp. 2d 797, 837 (N.D. Iowa 2000); Allstate Indem. Co. v. Lewis, 985 F. Supp. 1341, 1349 (M.D. Ala. 1997); Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996); Allen v. Allison, 155 S.W.3d 682, 689 (Ark. 2004); Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 894 (Ill. 1994); Juhl v. Airington, 936 S.W.2d 640, 642 (Tex. 1996). Scholarly critique of the independent tort requirement exists; however, courts have not been receptive to this idea. *See* Leach, *supra* note 20, at 27–29 (arguing that civil conspiracies should be actionable without the completion of an independent tort, just as criminal conspiracies are prosecuted even if the planned-for crime was not committed).

[113] *See infra* notes 114–120 and accompanying text.

[114] *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) (dismissing a claim of civil conspiracy because the public nuisance claim failed); Jefferson v. Lead Indus. Ass'n, 930 F. Supp. 241, 248 (E.D. La. 1996) (dismissing the plaintiff's civil conspiracy claim be-

example, in 1996, the United States District Court for the Eastern District of Louisiana heard *Jefferson v. Lead Industries Ass'n Inc.*, a case in which the mother of a child suffering from lead poisoning sued a trade association for lead producers under the premise that the trade association conspired to promote lead paint through fraudulent misrepresentation.[115] The court, however, dismissed the case against the trade association because the plaintiff failed to prove all the elements of fraudulent misrepresentation.[116]

The failure to prove an underlying tort has defeated climate related civil conspiracy claims as well.[117] In *Native Village of Kivalina v. ExxonMobil Corp.*, the village brought a claim of civil conspiracy against the defendant fossil fuel companies.[118] Plaintiffs, however, predicated this conspiracy claim on the underlying tort of public nuisance.[119] Because the Clean Air Act displaced federal public nuisance law, the court dismissed the civil conspiracy claim without granting it any consideration.[120]

In cases involving accusations that an industry conspired to hide information from the public, most plaintiffs rely on fraudulent misrepresentation or fraudulent concealment as the independent tort.[121] Fraudulent misrepresentation and fraudulent concealment are related torts but their elements differ in critical ways.[122] A fraudulent misrepresentation claim consists of a false statement, made knowingly or recklessly, with the intent of deceiving someone, like the plaintiff, into relying on it.[123] The plaintiff must then suffer an injury as a result of "justifiable reliance" on the statement.[124] Fraudulent concealment requires proof that the defendant knowingly concealed a material fact, or remained silent when they possessed a "duty to speak," with the intent to pro-

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cause the claim of fraudulent misrepresentation was not properly pleaded), *aff'd*, 106 F.3d 1245 (5th Cir. 1997).

[115] *Jefferson*, 930 F. Supp. at 243, 248.

[116] *See id.* at 248 (dismissing the claim for fraudulent misrepresentation because the plaintiff failed to allege reliance on the defendant's misrepresentative claims about lead paint in her complaint).

[117] *See Native Vill. of Kivalina*, 696 F.3d at 858 (dismissing a claim of civil conspiracy because the Clean Air Act displaced the substantive tort of public nuisance).

[118] *Id.* at 853, 858.

[119] *See id.* at 858 (holding that the civil conspiracy claim was reliant on the "substantive claim" of public nuisance).

[120] *See id.* (dismissing the civil conspiracy claim because all parties agreed it depended upon the success of the public nuisance claim, which the court already rejected).

[121] Ausness, *supra* note 20, at 400, 402.

[122] *See id.* (providing the elements of fraudulent misrepresentation and fraudulent concealment).

[123] *See id.* at 400 (describing the elements of fraudulent misrepresentation as: "1) a representation; 2) which is material to the transaction at hand; 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) the resulting injury was proximately caused by the reliance").

[124] *Id.*

duce reliance on the part of the plaintiff, and that the silence resulted in injury to the plaintiff.[125]

Fraudulent misrepresentation and fraudulent concealment present unique challenges for plaintiffs.[126] In fraudulent misrepresentation cases, plaintiffs often struggle to prove that they relied upon the defendant's misrepresentation.[127] For example, in 2000, in *Estate of White v. R.J. Reynolds Tobacco Co.*, in the United States District Court for the District of Maryland, the plaintiffs asserted that Mr. White's smoking habit constituted sufficient evidence that he relied upon the defendant's advertising and promotional statements in deciding whether to smoke.[128] The court rejected this assumption-based approach without further evidence that the decedent had actual knowledge of the tobacco companies' statements and therefore dismissed the plaintiffs' claim for failing to prove that the decedent relied on any of the defendant's statements or advertising.[129]

Likewise, plaintiffs bringing fraudulent concealment cases often struggle to prove that the defendant had a duty to disclose.[130] For example, in 2003, in *Viguers v. Philip Morris USA, Inc.*, the Superior Court of Pennsylvania upheld the dismissal of a fraudulent concealment claim because, without a duty to speak, the defendants' silences alone did not constitute fraud.[131] The court found no such duty and no evidence that the decedent's cigarette addiction stemmed from the tobacco company's silence about the dangers of smoking.[132] On the other hand, in 1987, in *Nicolet, Inc. v. Nutt*, the Supreme Court of Delaware held that a defendant who "actively conceal[ed] a material fact" could

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[125] *See id.* at 402 (stating that the elements of civil conspiracy are: "1) deliberate hiding by the defendant of a material fact, or silence when there is a duty to speak, 2) '[t]hat the defendant acted with scienter,' 3) intent to cause the plaintiff to rely upon the concealment, 4) causation, and 5) 'damages resulting from the concealment'" (alteration in original) (quoting Nicolet, Inc. v. Nutt, 525 A.2d 146, 149 (Del. 1987)).

[126] *Id.* at 401, 402 (discussing the challenges of proving reliance in fraudulent misrepresentation claims and a duty to speak in fraudulent concealment claim, respectively).

[127] *See* Johnson v. Brown & Williamson Tobacco Corp., 122 F. Supp. 2d 194, 207–08 (D. Mass. 2000) (holding that plaintiff could not rely on the defendant's "superior knowledge" and must demonstrate reliance upon a particular fraudulent statement); Estate of White v. R.J. Reynolds Tobacco Co., 109 F. Supp. 2d 424, 429 (D. Md. 2000) (requiring proof that the plaintiff had actual knowledge of the defendant's fraudulent statements); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1013 (D.S.C. 1981) (finding that the plaintiff's doctor did not rely on the defendant's marketing material when deciding to prescribe diethyestilbestro).

[128] *Estate of White*, 109 F. Supp. 2d at 429.

[129] *Id.*

[130] *See, e.g.*, Viguers *ex rel.* Estate of Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super. Ct. 2003); *Nutt*, 525 A.2d at 149, 150.

[131] *Viguers*, 837 A.2d at 540.

[132] *See id.* (finding that failure to speak about the dangers of smoking does not necessarily constitute fraud).

be held liable for fraudulent concealment whether or not they ordinarily possessed a duty to speak.[133]

C. Damages

One cannot bring a claim of civil conspiracy without demonstrating the existence of actual harm caused by the defendant's actions.[134] This Section discusses two types of potential damages.[135] Subsection 1 examines damages for lost opportunity.[136] Subsection 2 explores restitution, otherwise known as disgorgement of unjust enrichments.[137]

1. Lost Opportunity

The majority of American jurisdictions recognize lost opportunity.[138] Lost opportunity is a characterization of harm that permits recovery when traditional categories of harm and rules of causation would not allow recovery.[139] As described in the *Restatement (Third) of Torts*, lost opportunity is the harm suffered minus the difference between probability of the harm occurring with the defendant's actions and the probability of the harm occurring without the defendant's actions.[140] Although most courts recognize lost opportunity as a cog-

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[133] *Nutt*, 525 A.2d at 149–50 (emphasis omitted). In this case, a group of plaintiffs sued several asbestos manufacturers, including Nicolet, Inc., seeking compensation for asbestos related illnesses. *Id.* at 147. The plaintiffs did not claim that their injuries were caused by exposure to Nicolet's products, instead they asserted that "Nicolet participated in an industrywide conspiracy with other asbestos manufacturers to intentionally misrepresent and suppress information concerning the health hazards of asbestos and thus is liable for the asbestos-related injuries sustained by the various plaintiffs." *Id.* The plaintiffs claimed that Nicolet was a member of the Quebec Asbestos Mining Association and the Asbestos Textile Institute, and that these trade associations "suppressed publication as well as general dissemination of medical and scientific data concerning the health hazards associated with inhalation of asbestos fibers." *Id.* at 148.

[134] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 (AM. L. INST., Tentative Draft No. 3, 2018) (explaining damages are an element of any civil conspiracy claim).

[135] *See infra* notes 138–159 and accompanying text.

[136] *See infra* notes 138–151 and accompanying text.

[137] *See infra* notes 152–159 and accompanying text.

[138] *See* Smith v. State Dep't of Health & Hosps., 95-0038 (La. 6/25/96); 676 So. 2d 543, 547 n.8 (stating that lost chance or some variation has been adopted in "a majority of the states"); Scafidi v. Seiler, 574 A.2d 398, 403 (N.J. 1990) (concluding that a majority of the courts allow juries to consider whether defendant's actions diminished the plaintiffs ability to recover); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 400–01 (Tex. 1993) (finding that many states recognize lost chance and only eight have refused to adopt it).

[139] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 cmt. n (AM. L. INST., Proposed Final Draft No. 1, 2005) (stating that courts generally require that plaintiffs prove by a preponderance of the evidence that adequate medical care would have produced a better outcome for the patient).

[140] *See id.* ("The lost opportunity may be thought of as the adverse outcome discounted by the difference between the ex ante probability of the outcome in light of the defendant's [wrongful act] and the probability of the outcome absent the defendant's [wrongful act].").

nizable harm, the majority apply it only to medical malpractice cases.[141] Nevertheless, the theory of lost opportunity can apply to a wide variety of cases with difficult-to-prove damages, and many scholars have argued for a more expansive application of the doctrine.[142]

Some courts have recognized that plaintiffs should be able to recover for lost economic opportunities, such as earning potential.[143] For example, in 1991, the Supreme Judicial Court of Maine considered this possibility in *Snow v. Villacci*, where the plaintiff, Snow, was injured when the defendant negligently started a car and struck Snow in his garage.[144] Snow sought damages for "a lost earning opportunity" stemming from the delay in his career advancement.[145] Prior to Snow's injury he was pursuing career advancement training; however, after the accident Snow was unable to finish his course despite fully recovering from his injury.[146] In deciding whether this type of damage was recoverable in Maine, the court distinguished lost opportunity damages from damages for lost earning capacity, which requires a continuing injury that limits the plaintiff's income-making ability.[147] Instead, the court concluded that lost opportunity exists when the defendant's actions deny the plaintiff a chance to take advantage of an opportunity he otherwise could have pursued.[148]

The Supreme Judicial Court of Maine's construction of lost opportunity fits well with an understanding of the harm as one's lost opportunity to pursue a more desirable course of action rather than the lost opportunity to elude an

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[141] *Id.*

[142] David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 611–14 (2001) (explaining the potential scope of a full-blown lost opportunity doctrine including medical and legal malpractice cases as well as failure to warn and failure to install safety devices); Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1396–97 (1981) (advocating for an expansive use of lost opportunity).

[143] *See* Snow v. Villacci, 2000 ME 127, 754 A.2d 360, 366 (upholding a denial of summary judgment because lost earnings opportunity is a cognizable harm); *see also* Rodriguez v. Henderson, 578 N.E.2d 57, 62, 64, 66 (Ill. App. Ct. 1991) (holding that plaintiffs stated a claim and had standing to challenge the constitutionality of a zoning ordinance where they alleged, among other things, lost job opportunities arising from the rezoning of a manufacturing district to a commercial/residential district). Unlike American courts, which have shown a preference for applying lost opportunities to physical harms, courts in the British Commonwealth apply the lost opportunity doctrine almost exclusively to "cases involving economic loss." Fischer, *supra* note 142, at 610, 613 (noting that American courts use lost doctrine in medical malpractice).

[144] *Snow*, 754 A.2d at 362.

[145] *Id.*

[146] *Id.*

[147] *See id.* at 363–64 (holding that lost earning capacity requires a permanent or ongoing injury, but lost opportunity requires only the loss of a preferred course of action).

[148] *See id.* at 364 (holding that a lost opportunity occurs when a defendant's actions cause the plaintiff to miss out on an opportunity the plaintiff otherwise might have been able to pursue).

injury or take advantage of a benefit.[149] Because the lost opportunity is related to the inability to follow a preferred course of conduct, such harm could arise when a defendant knowingly caused a plaintiff to rely, to his detriment, on the defendant's fraudulent acts or claims.[150] This approach to lost opportunity would permit recovery in a wide variety of cases, such as medical malpractice cases where the defendant deprived the plaintiff of the opportunity to seek the proper medical treatment, as well as product liability failure to warn cases.[151]

2. Restitution

Restitution, as a damage, requires the surrender of benefits wrongfully obtained.[152] This disgorgement remedy strips a wrongdoer of any profits they might have obtained as a result of their misconduct.[153] Disgorgement of unjust enrichments, sometimes referred to as ill-gotten gains, is an "equitable remedy."[154] As such, disgorgement is not punitive in nature, but rather, designed to return the wrongdoer to the position they would have been in had they not engaged in wrongful conduct.[155] This equitable remedy, however, also provides the benefit of awarding potentially greater monetary damages than those typically available so long as the plaintiff can demonstrate that a rational connection exists between the profits sought and the defendant's fraud.[156]

A central challenge, therefore, when seeking disgorgement of unjust enrichments is demonstrating that the causal link between the profits sought to be returned and the defendant's misconduct is not so attenuated as to be consid-

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[149] *See id.* (describing lost opportunity damages as recoverable when the plaintiff is denied the opportunity to pursue an alternative course of conduct); Fischer, *supra* note 142, at 624 (describing an approach to the lost opportunity doctrine which would apply it to tortious conduct that deprives a plaintiff of the opportunity to pursue an alternate course of action); Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 290–91 (1992) (proposing that lost opportunity doctrine should apply in the situation where the plaintiff has lost the chance to pursue any potentially superior course of action).

[150] Fischer, *supra* note 142, at 624.

[151] Denis W. Boivin, *Factual Causation in the Law of Manufacturer Failure to Warn*, 30 OTTAWA L. REV. 47, 85–86 (1998) (arguing that lost opportunity should apply to failure to warn cases where the plaintiff had a preferable course of action); Perry, *supra* note 149, at 291 (arguing that this theory could be used in medical malpractice cases).

[152] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 3 (AM. L. INST., 2011) ("A person is not permitted to profit by his own wrong.").

[153] *Id.* § 51 cmt. e.

[154] *See* Tull v. United States, 481 U.S. 412, 424 (1987) (holding that damages are equitable when they amount to restitution); Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) (stating that restitution of illegally obtained profits is "within the recognized power and within the highest tradition of a court of equity").

[155] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. k.

[156] *See* Falk v. Hoffman, 135 N.E. 243, 244 (N.Y. 1922) (stating that whereas plaintiffs in securities fraud suits who sue "at law" can only recover for the current value of their shares, plaintiffs who sue in equity can recover the profits the defendants earned from the fraud).

ered too remote to support recovery.[157] This is not an impossible task, however, as many courts have rules that actively favor the plaintiff in such cases.[158] Such rules are reflected in the 1989 United States Circuit Court of Appeals for the District of Columbia Circuit case, *Securities & Exchange Commission v. First City Financial Corp.*, which held that if the plaintiff can demonstrate a reasonable connection between the profits sought and the wrongful act, then the burden shifts to the defendants to demonstrate why the profits should not be disgorged.[159]

III. BUILDING A CLIMATE CONSPIRACY CASE

Plaintiffs interested in bringing a climate conspiracy case against fossil fuel companies and their allies need to satisfy all the elements of civil conspiracy.[160] Such plaintiffs will need to prove that the defendants agreed to conspire to commit some underlying tort, which resulted in cognizable damages to the plaintiffs.[161] Section A of this Part explores the feasibility of demonstrating that the fossil fuel industry engaged in conspiracy by agreeing to coordinate lobbying and public affairs efforts with the aim of spreading misinformation about the link between their product and climate change.[162] Section B describes two potential substantive torts—fraudulent misrepresentation and fraudulent concealment—which plaintiffs could bring to satisfy the underlying tort require-

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[157] *See* Janigan v. Taylor, 344 F.2d 781, 787 (1st Cir. 1965) (suggesting that if an artist used stolen paints to produce a work of art, the art from which the paints were stolen would not be entitled to the painting as compensation).

[158] *See id.* at 786 ("It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them."); Pidcock v. Sunnyland Am., Inc., 854 F.2d 443, 448 (11th Cir. 1988) ("[T]he presumption operates so as to require the [defendants] to come forward with evidence showing that the profit is attributable to causes other than their fraudulent purchase of [the claimant's] interest.").

[159] *See* Secs. & Exch. Comm'n v. First City Fin. Corp., 890 F.2d 1215, 1231–32 (D.C. Cir. 1989) (holding that courts only require a "a reasonable approximation of profits" flowing from the tort to make a disgorgement calculation, and that uncertainty in the calculation should be borne by the defendant, because they are the responsible party). The court in *First City* recognized that "separating legal from illegal profits exactly may at times be a near-impossible task." *Id.* at 1231. The court, therefore, established a rule where if the plaintiffs can show but-for causation between the illegal activity and profits, then the burden shifts to the defendants to prove that their profits from the "tainted transactions" should not be disgorged. *Id.* at 1231–32; *see* Secs. & Exch. Comm'n v. Teo, 746 F.3d 90, 105 (3d Cir. 2014); United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1228 (D.C. Cir. 2005) (Tatel, J., dissenting).

[160] *See supra* notes 87–159 and accompanying text (providing a detailed explanation of the various element of a claim of civil conspiracy).

[161] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 (AM. L. INST., Tentative Draft 2018) (defining civil conspiracy as consisting of three elements: 1) an agreement or meeting of the minds; 2) a substantive underlying tort other than the conspiracy; and, 3) actual harm).

[162] *See infra* notes 165–173 and accompanying text.

ment.[163] Section C examines the likelihood of plaintiffs demonstrating their damages flowed from the fossil fuel industries tortious actions.[164]

A. The Conspiracy: Coordination Between Fossil Fuel Companies

If plaintiffs want to succeed in a claim of civil conspiracy, they must first demonstrate the existence of an agreement between fossil fuel industry, their trade associations, and think tanks to act in a tortious manner.[165] Even though the defendants all engaged in public relations efforts aimed at dissuading the adoption of climate change legislation, an agreement to act in a tortious manner may be hard to prove.[166] Many courts agree that parallel conduct alone is insufficient to prove the existence of a conspiracy, particularly when that defendants are engaged in otherwise legal activity, such as lobbying.[167]

The fossil fuel industry, however, has engaged in more than the conscious parallel conduct rejected by the United States Court of Appeals for the Third Circuit and the Supreme Court of Illinois in *In re Asbestos School Litigation* and *McClure*, respectively.[168] In 1989, the fossil fuel companies founded the GCC to attack and sow doubt about the veracity of climate science.[169] The creation of the GCC by the fossil fuel industry aligned the climate conspiracy case closely with precedent from *In re Methyl Tertiary Butyl Ether ("MTBE")*

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[163] *See infra* notes 174–193 and accompanying text.

[164] *See infra* notes 194–208 and accompanying text.

[165] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 (describing the first element of civil conspiracy as an agreement to commit a tortious act); *see, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 175 F. Supp. 2d 593, 634 (S.D.N.Y. 2001) (concluding that plaintiffs must demonstrate that MTBE producers entered an unlawful agreement for their civil conspiracy claim to succeed).

[166] *See* McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 259 (Ill. 1999) (holding that parallel conduct is not enough to demonstrate defendants conspired); *see also supra* notes 104–107 and accompanying text (describing the difficulties in proving the existence of an agreement between manufactures of the same product).

[167] *See* Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 473 (Pa. 1979) ("The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy." (quoting Fife v. Great Atl. & Pac. Tea Co., 52 A.2d 24, 39 (1947)); *see also* Collins v. Eli Lilly Co., 342 N.W.2d 37, 47–48 (Wis. 1984) ("[T]he drug companies apparently engaged in parallel behavior in both 1941 and 1947, but parallel behavior alone cannot prove agreement.").

[168] *See In re* Asbestos Sch. Litig., 46 F.3d 1284, 1294 (3d Cir. 1994) ("[W]e do not see how a rational jury could find the existence of a civil conspiracy . . . based solely on the alleged fact that Pfizer and other defendants consciously engaged in parallel conduct."); *McClure*, 720 N.E.2d at 267 (holding the plaintiffs' failure to produce evidence of an agreement, beyond parallel conduct by asbestos manufactures, fatal to their case).

[169] Lieberman & Rust, *supra* note 18; Mooney, *supra* note 74; *see supra* notes 79–81 and accompanying text (describing the formation of the Global Climate Coalition (GCC)).

Products Liability Litigation.[170] There, the United States District Court for the Southern District of New York held that the formation of the MTBE Committee constituted sufficient evidence to demonstrate that MTBE manufacturers agreed to conceal the risks posed by MTBE.[171]

To strengthen their cases, plaintiffs should explore the actions taken by API and other industry associations on behalf of their members as evidence of a possible agreement to unlawfully suppress climate change risks.[172] Additionally, the fossil fuel industry and their allies created and funded other organizations, such as the Cato Institute and the Heritage Foundation, that could serve as further evidence that defendants entered into an unlawful agreement to hide the dangers their products posed to a stable climate system.[173]

B. The Substantive Tort

Plaintiffs seeking to pursue a climate conspiracy case will also need to choose a substantive tort that underpins the alleged conspiracy.[174] Because such plaintiffs will claim that the fossil fuel industry conspired to mislead the public on climate science and conceal the dangers their product posed to a safe climate system, the most obvious underlying torts are fraudulent misrepresen-

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[170] *Compare MTBE Prods. Liab. Litg.*, 175 F. Supp. 2d at 602 (stating that defendants formed MTBE Committee to combat efforts by the EPA to require additional health testing for the chemical), *with* Mooney, *supra* note 74 (describing GCC's efforts to slow regulation of greenhouse gases).

[171] *See MTBE Prods. Liab. Litg.*, 175 F. Supp. 2d at 634, 635 (finding the formation of task forces and other organizations to be sufficient evidence of a conspiracy between MTBE manufacturers).

[172] *See* Jefferson v. Lead Indus. Ass'n, 930 F. Supp. 241, 248 (E.D. La. 1996) (dismissing claim against lead paint trade association only because the plaintiff was unable to prove all elements of the underlying tort), *aff'd*, 106 F.3d 1245 (5th Cir. 1997); Rogers v. R.J. Reynolds Tobacco Co., 761 S.W.2d 788, 799–800 (Tex. App. 1988) (holding that the tobacco trade association and an industry-sponsored think tank were liable under a civil conspiracy claim); *see also* Mooney, *supra* note 74 (describing API's efforts to convince the public and lawmakers that the science on climate change was not settled).

[173] Brulle, *supra* note 86, at 687–89, 692 (describing the Cato Institute and the Heritage Foundation as major recipients of climate change counter-movement money). *See generally supra* note 86 (discussing academic studies tracing the funding of climate denial organizations). Climate change counter-movement groups engage in activities designed to prevent the adoption of public policies that would reduce greenhouse gas emissions. Brulle, *supra* note 86, at 683. One scholar identified 118 of such organizations, including trade organization as well as education and advocacy non-profits. *Id.* at 684. Between 2003 and 2010, ninety-one of these organizations had a total income of more than $7 billion. *Id.* at 685. The non-trade association players in the climate counter-movement include some of the best know conservative think tanks in the United States, such as the American Enterprise Institute, the Heritage Foundation, the Cato Institute, and the Heartland Institute, as well as advocacy organizations such as the Americans for Prosperity Foundation. *Id.* at 687–88, 692.

[174] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 27 (AM. L. INST., Tentative Draft 2018) (describing the second element of civil conspiracy as a substantive underlying tort other than the conspiracy); *see also* Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp., 80 F.2d 862, 864 (2d Cir. 1936) ("Whatever may be the rule in criminal conspiracies, it is well settled that the civil liability does not depend upon the confederation . . . but upon the acts committed in realization of the common purpose.").

tation and fraudulent concealment.[175] Subsection 1 discusses fraudulent misrepresentation as it applies to a climate conspiracy suit.[176] Subsection 2 describes fraudulent concealment as it applies to a climate conspiracy suit.[177]

1. Fraudulent Misrepresentation

To succeed on a claim of fraudulent misrepresentation, climate conspiracy plaintiffs must prove that the defendant fossil fuel companies, their trade associations, and think tanks made a material misrepresentation that they knew, or should have known, to be false.[178] Furthermore, they must demonstrate that they made these misrepresentations with the aim of misleading the plaintiff and that the plaintiff "justifiabl[y] reli[ed] on the misrepresentation" and suffered a harm.[179]

Climate conspiracy plaintiffs should begin by demonstrating that fossil fuel companies made a knowing or reckless misrepresentation of climate science.[180] Although it is impossible to predict precisely how a trier of fact will decide the issue of intent, ample evidence exists to prove that fossil fuel companies internally understood the risk posed by climate change, while publicly casting doubt on the science.[181]

The most challenging component of a fraudulent misrepresentation claim is demonstrating that the plaintiffs relied on the fossil fuel industries' misrepre-

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[175] *See* Ausness, *supra* note 20, at 400, 402 (describing fraudulent misrepresentation or fraudulent concealment as the most often-employed substantive tort for cases involving accusations that an industry conspired to hide information from the public).

[176] *See infra* notes 178–185 and accompanying text.

[177] *See infra* notes 186–193 and accompanying text.

[178] *See* Ausness, *supra* note 20, at 400 (defining fraudulent misrepresentation as including a statement, "made falsely, with knowledge of its falsity or recklessness as to whether it is true or false"). *See supra* notes 65–86 and accompanying text (describing how the fossil fuel industry and its allies deliberately concealed and misrepresented what they knew about climate change).

[179] *See* Ausness, *supra* note 20, at 400 (stating that the misrepresentation must be made "with the intent of misleading another into relying on it" and cause "justifiable reliance on the misrepresentation").

[180] *See id*. (describing fraudulent misrepresentation as requiring the defendant to knowingly or recklessly make a misleading statement); Jerving et al., *supra* note 18 (discussing how Exxon internally acknowledged the scientific consensus about climate change while publicly stating that the science was uncertain and unreliable). *Compare* ROBINSON & ROBBINS, *supra* note 71 (an API report concluding that climate change posed a significant risk), *with* Lieberman & Rust, *supra* note 18 (describing API's funding of the GCC, and organizations whose mission was to create doubt about climate science), *and* Mooney, *supra* note 74 (describing API's efforts to downplay the need for climate action).

[181] *See* Lieberman & Rust, *supra* note 18 (explaining how oil companies adapted their infrastructure to rising sea levels while funding attacks on climate science); Jennings et al., *supra* note 75 (describing an internal memorandum in which Exxon acknowledged the scientific consensus around anthropogenic climate change, but advocated a strategy of promoting misinformation to avoid regulations).

sentation.[182] As demonstrated by cases relating to the tobacco industry, courts routinely reject assumption-based approaches to demonstrating reliance, and instead require concrete evidence that the plaintiffs were exposed to and took the defendants' statements seriously.[183] As a result, climate conspiracy plaintiffs will need to be creative in developing evidence that their state or municipal political leaders relied on the fossil fuel industry's statement in determining appropriate climate policy.[184] For example, plaintiffs could look to legislative history or the public statements of climate denying leaders to see if they parroted the industry's talking points when opposing climate action.[185]

2. Fraudulent Concealment

Climate conspiracy plaintiffs looking to prove fraudulent concealment on the part of fossil fuel companies must demonstrate that the defendants know-

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[182] *See supra* notes 127–129 and accompanying text (describing the difficulty of proving reliance).

[183] *See supra* notes 127–129 and accompanying text; *see, e.g.*, Estate of White v. R.J Reynolds Tobacco Co., 109 F. Supp. 2d 424, 429 (D. Md. 2000) (finding a smoking habit alone insufficient to prove reliance on tobacco company's fraudulent statements).

[184] Johnson v. Brown & Williamson Tobacco Corp., 122 F. Supp. 2d 194, 207–08 (D. Mass. 2000) (holding that the plaintiff must plead specific facts demonstrating reliance, and cannot rely merely generalizations); *Estate of White*, 109 F. Supp. at 422–29 (requiring that the plaintiff provide evidence of particular instances of reliance).

[185] *See, e.g.*, Goldenberg, *supra* note 9 (describing an Alaskan politician as expressing doubt over whether humans cause climate change). For example, Pennsylvania is a state with little legislative progress on climate change, in part because of state legislators like Representative Daryl Metcalfe (R-Butler) who believes reducing carbon dioxide emission will harm the planet. *See* Ryan Deto, *State Rep. Daryl Metcalfe Says Reducing Carbon Dioxide Emissions Will Kill His Vegetables*, PITT. CITY PAPER (Feb. 22, 2019), https://www.pghcitypaper.com/pittsburgh/state-rep-daryl-metcalfe-says-reducing-carbon-dioxide-emissions-will-kill-his-vegetables/Content?oid=13785614 [https://perma.cc/RM73-ZXV5] ("I enjoy my vegetables, and plants need CO2, so I want to make sure we have plenty of CO2 out there so we have green grass and green vegetables growing."). Representative Metcalfe has used his position as the Chair of the House Environmental Resources and Energy Committee to invite industry-backed climate deniers to hearings at the state house and to block renewable energy and climate adaptation legislation. *See* Rachel McDevitt, *Pa. Produces a Lot of Greenhouse Gases, but Its Republican-Led Legislature Isn't Acting on Climate Change—Even as Scientists Say the Clock Is Ticking*, NPR (Aug. 6, 2020), https://stateimpact.npr.org/pennsylvania/2020/08/06/pennsylvania-climate-change-greenhouse-gases-republican-legislature/ [https://perma.cc/7QUF-HHNH] (stating that Representative Metcalfe blocked climate bills with potential bipartisan support from coming up for debate); John L. Micek, *Daryl Metcalfe Responded to DePasquale's Climate Change Report in the Most Daryl Metcalfe Way Ever*, PENN. CAP. STAR (Nov. 14, 2019), https://www.penncapital-star.com/commentary/daryl-metcalfe-responded-to-depasquales-climate-change-report-in-the-most-daryl-metcalfe-way-ever-thursday-morning-coffee/ [https://perma.cc/R5B8-9B2D] (describing Representative Metcalfe's reaction the State Auditor's report on the cost of extreme weather events and opposition to a climate change adaptation bill); *see also* Stephen Caruso, *'The Stakes Are Too High': Climate Skeptics Meet Their Own Critics at State House Committee Hearing*, PENN. CAP. STAR (Oct. 28, 2019), https://www.penncapital-star.com/energy-environment/the-stakes-are-too-high-climate-skeptics-meet-their-own-critics-at-state-house-committee-hearing/ [https://perma.cc/XYB5-XQCR] (describing a hearing Representative Metcalfe organized during which climate deniers cited reports from the Cato Institute and others).

ingly concealed a material fact, or, despite having a duty to speak, remained silent.[186] Plaintiffs must also prove that defendants did so intending for plaintiffs to rely on their concealment.[187]

Unlike fraudulent misrepresentation, fraudulent concealment avoids the difficulty of proving reliance, as the plaintiff need only show that the defendant intended reliance.[188] Although this may be a difficult task, it is not impossible, as several internal documents, from Exxon and API, already detail how these entities intended to alter public opinion and policy with their actions.[189]

Demonstrating that the defendants had a duty to disclose is the primary challenge facing a fraudulent concealment claim.[190] Some courts have been hesitant to impose a duty simply because the plaintiff suffered a possibly preventable negative outcome had the defendant spoken.[191] Where the defendant deliberately conceals a material fact, however, some courts will find liability regardless of whether a clear duty exists.[192] Fossil fuel companies arguably fall into the category of deliberate concealers.[193]

C. Damages

The essence of the climate conspiracy suit is that the fossil fuel industry knew that their product was contributing to dangerous anthropogenic climate

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[186] *See* Ausness, *supra* note 20, at 402 (defining the elements of fraudulent concealment); Lieberman & Rust, *supra* note 18 (explaining that fossil fuel companies planned for climate change impacts while discouraging government adaptation and mitigation efforts). *Compare* ROBINSON & ROBBINS, supra note 71 (discussing the risks of climate change in an API report), *with* Cushman, *supra* note 83 (describing API's plan to spread doubt about climate science).

[187] Ausness, *supra* note 20, at 402 (explaining that fraudulent concealment requires: "intent to cause the plaintiff to rely upon the concealment").

[188] *See id.* at 400, 402 (explaining that fraudulent misrepresentation requires that the plaintiffs justifiably relied on the defendant's fraudulent statement, whereas fraudulent concealment requires that the plaintiff prove that the defendant concealed with the intent that the plaintiff would rely on that concealment).

[189] *See supra* notes 74–83 and accompanying text (outlining the evolution of Exxon and API from leaders in climate science to advocates for climate denialism).

[190] Ausness, *supra* note 20, at 402.

[191] *See* Viguers *ex rel.* Estate of Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super. Ct. 2003) (holding that defendant's silence about the dangers of smoking silence is not enough to prove fraud).

[192] *See* Nicolet, Inc. v. Nutt, 525 A.2d 146, 150 (Del. 1987) (holding asbestos manufactures liable because they actively concealed the risks posed by asbestos). Like the asbestos companies in *Nutt*, fossil fuel companies understood that their product was altering the climate with potentially dangerous impacts, but nevertheless choose to spend millions of dollars to sow public doubt. *See supra* notes 18 & 74–83 and accompanying text (detailing how fossil fuel companies spread misinformation about climate change). As such, it is foreseeable that a court would hold these companies liable regardless of whether a clear duty to disclose exists under common law. *See Nutt*, 525 A.2d at 150 (holding defendants who deliberately conceal relevant information liable regardless of whether there was a duty to speak).

[193] *See supra* notes 18 & 74–83 and accompanying text (describing the efforts of the fossil fuel industry to hide information about climate science).

change and, nevertheless, conspired to misrepresent the dangers to the public and policy makers.[194] As a result of this fraud, society delayed the adoption of policies that would have reduced the demand for fossil fuels.[195] Meanwhile, the fossil fuel industry profited from the continued high demand for their product created by this delay.[196] These actions could lead to damages based in lost opportunity and disgorgement of unjust enrichments.[197]

The costs of mitigating climate change caused by fossil fuel companies is uncertain.[198] Plaintiffs, however, will need to assert that the conspirators' fraud prevented them from pursuing mitigation at an earlier point in time.[199] This fraud denied them the opportunity to pursue a less expensive and more preferable decarbonization strategy.[200] Although courts do not universally recognize this construction of lost opportunity damages, adequate academic and judicial support, both in the United States and abroad, exists to build a convincing ar-

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[194] *See supra* notes 18–20 and accompanying text.

[195] Farrell, McConnell, & Brulle, *supra* note 86, at 191–92; *see supra* note 86 and accompanying text (discussing a series of academic articles analyzing the extent and success of the climate disinformation campaign).

[196] *See* U.S. ENERGY INFO. ADMIN., DEP'T OF ENERGY, SR/OIAF/98-03 (S), WHAT DOES THE KYOTO PROTOCOL MEAN TO U.S. ENERGY MARKETS AND THE U.S. ECONOMY? 2 (1998), https://www.eia.gov/analysis/requests/archive/1998/kyoto/pdf/oiaf9803s.pdf [https://perma.cc/D2H5-X2KZ] (predicting that the demand for coal could decline by a as much as seventy percent and demand for oil could decline by as much as thirteen percent if the United States ratified the Kyoto Protocol); *see also* Chloe Taylor, *'Abrupt' Climate Policies Could See High-Emitting Firms Lose 43% of Their Value, Research Claims*, CNBC (Dec. 9, 2019), https://www.cnbc.com/2019/12/09/climate-polices-could-see-high-emitting-firms-lose-43percent-of-value-study.html [https://perma.cc/9WR9-X2WC] (describing how climate change policies could reduce the valuation of fossil fuel companies).

[197] *See* Snow v. Villacci, 2000 ME 127, 754 A.2d 360, 364 (defining lost opportunity as the loss of a preferred course of action); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 3 (AM. L. INST., 2011) (defining disgorgement of unjust enrichment as a remedy designed to prevent a defendant from profiting off their wrongdoing); *supra* notes 142–159 and accompanying text (discussing the construction of lost opportunity and restitution damages).

[198] *Compare* Adam Majendie & Pratik Parija, *How to Halt Global Warming for $300 Billion*, BLOOMBERG (Oct. 23, 2019), https://www.bloomberg.com/news/articles/2019-10-23/how-to-halt-global-warming-for-300-billion [https://perma.cc/GQ27-CULD] (discussing a proposal to increase the ability of global soils to sequester carbon dioxide and slow climate change by twenty years for three hundred billion dollars), *with* Ishika Mookerjee, *Morgan Stanley Says These Firms Will Profit from Climate Change*, BLOOMBERG (Oct. 24, 2019), https://www.bloomberg.com/news/articles/2019-10-24/-50-trillion-is-needed-to-stop-global-warming-morgan-stanley [https://perma.cc/X3AQ-CL2D] (discussing a report by Morgan Stanley that predicts stopping climate change will require fifty trillion dollars of investment).

[199] *See Snow*, 2000 ME 127, 754 A.2d at 364 (holding that lost opportunity is when a defendant's conduct prevents a plaintiff from pursuing an otherwise available course of action); *supra* note 86 (discussing the success of the fossil fuel industries' climate disinformation efforts).

[200] *See Snow*, 2000 ME 127, 754 A.2d at 364 (finding that lost opportunity exists when "[an] opportunity arises which could otherwise have been utilized by the plaintiff, but is lost because of a disability caused by . . . the defendant").

gument that courts should allow for recovery of lost opportunity in climate conspiracy cases.[201]

Additionally, the fact that the defendants profited by fraudulently delaying climate action will likely support the disgorgement of unjust enrichments.[202] There will certainly be some difficulty distinguishing which profits are the result of the defendants' fraudulent actions.[203] These barriers, however, can be overcome.[204] For example, in the late 1990s, both private and public agencies developed projections for how fossil fuel demand would change if the United States ratified the Kyoto Protocol.[205] If plaintiffs can demonstrate the reliability of such reports, they will likely be able to assert that any demand in excess of these projections is the results of the conspirators' fraud.[206] Courts would then likely place the burden on the defendants to prove that the profits are attributable to other causes.[207] If the defendants fail to meet this burden, a court could order the disgorgement of profits.[208]

CONCLUSION

Since the late 1980s, the fossil fuel industry, along with their think tanks and associations, have engaged in a multi-billion-dollar campaign to delay climate action by spreading disinformation about climate change. This disinformation campaign successfully prevented national climate legislation and limited the response of many state governments. Some states and municipalities, frustrated with the gridlock, turned to the court system to hold fossil fuel

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[201] *See supra* notes 142–151 and accompanying text; *see, e.g.*, *Snow*, 2000 ME 127, 754 A.2d at 364; King, *supra* note 142, at 1396–97.

[202] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. e (stating that restitution requires that a wrongdoer surrender any profits obtained as a result of his misconduct); *supra* notes 152–159 and accompanying text.

[203] *See* U.S. ENERGY INFO. ADMIN., *supra* note 196, at 2 (proposing seven different possible trajectories for decreased U.S. emissions if the country ratified the Kyoto Protocol).

[204] *See* Secs. & Exch. Comm'n v. First City Fin. Corp., 890 F.2d 1215, 1231–32 (D.C. Cir. 1989) (holding that although the plaintiff must demonstrate a reasonable link between profits and fraud, once that link is established it is the responsibility of the defendant to rebut); Pidcock v. Sunnyland Am., Inc., 854 F.2d 443, 448 (11th Cir. 1988) (same).

[205] *See* U.S. ENERGY INFO. ADMIN., *supra* note 196, at 2 (developing seven possible scenarios for fossil fuel consumption under the Kyoto Protocol, none of which the United States tracked).

[206] *See First City Fin. Corp.*, 890 F.2d at 1231 (stating that "disgorgement need only be a reasonable approximation of profits causally connected to the violation."); *see also* Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) ("It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them.").

[207] *See Pidcock*, 854 F.2d at 448 (stating that there is a presumption in favor of the plaintiff's attribution of profits that the defendant must rebut with its own evidence); *First City Fin. Corp.,* 890 F.2d at 1232 (holding that because the defendant's wrongful acts created uncertainty about how much profits should be disgorged, the court requires that the defendant bear the risk of that uncertainty).

[208] *See Pidcock*, 854 F.2d at 448 (holding that the defendant must produce evidence demonstrating that the profits were not ascribable to the fraud).

companies liable and receive compensation for their climate impacts. Unfortunately for these litigants, federal courts have largely dismissed their lawsuits, holding that the EPA's power to regulate greenhouse gases under the Clean Air Act displaces any common law right to sue for public nuisance and negligence. Although several plaintiffs successfully convinced federal district courts to remand public nuisance law claims to state courts, the long-term viability of this strategy remains uncertain.

The courthouse door is not fully closed to plaintiffs, however. By combining civil conspiracy with fraudulent misrepresentation or fraudulent concealment, plaintiffs can target and hold companies accountable for what has consistently delayed climate action: disinformation about the nature and causes of climate change. Even though proving a civil conspiracy case will not be easy, the conspiracy strategy produces several advantages. Civil conspiracy allows actors who participated in an unlawful or tortious agreement to be brought to account, even when they only planned, funded, or encouraged the underlying fraud. Meanwhile, the focus on fraudulent misrepresentation or concealment as the underlying tort removes the suit from the realm of Clean Air Act displacement. Although untested, this strategy may ultimately prove more fruitful than the existing public nuisance-based litigation approach.

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