


3-13-2014

A Dubious Exercise of Case Consolidation: Center For Biological Diversity v. BP America Production Co.

Rebecca M. Mitchell

Boston College Law School, rebecca.mitchell.2@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Civil Procedure Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Rebecca M. Mitchell, *A Dubious Exercise of Case Consolidation: Center For Biological Diversity v. BP America Production Co.*, 41 B.C. Envtl. Aff. L. Rev. E. Supp. 68 (2014), <http://lawdigitalcommons.bc.edu/ealr/vol41/iss3/7>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

A DUBIOUS EXERCISE OF CASE CONSOLIDATION: *CENTER FOR BIOLOGICAL DIVERSITY v. BP AMERICA PRODUCTION CO.*

REBECCA M. MITCHELL *

Abstract: The explosion of the Deepwater Horizon and the dispersal of millions of gallons of oil into the Gulf of Mexico in 2010 generated a mass of litigation. To organize and manage this complex mass, the U.S. District Court for the Eastern District of Louisiana created “pleading bundles,” which consolidated similar cases, and provided that each bundle must file a single complaint on behalf of the entire group. In *Center for Biological Diversity v. BP America Production Co.*, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court’s dismissal of most of the Center for Biological Diversity’s claims on the grounds of mootness, and further concluded that the district court was within its discretion when placing the Center’s case into a pleading bundle that did not recognize all of the Center’s claims. This Comment argues that the district court’s consolidation technique prejudiced the Center and was inappropriate.

INTRODUCTION

Americans consume approximately 18.7 million barrels of petroleum products per day to power the national economy.¹ As part of British Petroleum’s (BP) efforts to drill in the Gulf of Mexico and meet this demand, BP leased the mobile offshore drilling unit Deepwater Horizon from Transocean, Ltd., and drilled the Macondo well.² On April 20, 2010, as three

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2013–2014.

¹ NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, at viii (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf> and <http://perma.cc/EW69-C5F5>.

² *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 418 (5th Cir. 2013); *Our US Operations*, BP, <http://www.bp.com/en/global/corporate/about-bp/bp-worldwide/bp-in-america/our-us-operations.html> (last visited Nov. 10, 2013), available at <http://perma.cc/Q3VJ-3XAE> (explaining that BP supports the American economy by striving and innovating to meet increasing energy needs); U.S. DEP’T OF THE INTERIOR, REPORT REGARDING THE CAUSES OF THE APRIL 20, 2010 MACONDO BLOWOUT 1, 13–16 (2011), available at http://docs.lib.noaa.gov/noaa_documents/DWH_IR/reports/dwhfinal.pdf and <http://perma.cc/GFP7-NLKP> (explaining that deep-water drilling in the Gulf of Mexico yields high volumes of gas and oil, and that BP plays a large role in such operations in the Gulf).

friends were out on the thirty-one foot Ramblin' Wreck for a day of tuna fishing, their radio sounded: "Mayday, Mayday, Mayday, this is the Deepwater Horizon. We are on fire."³ The Deepwater Horizon explosion that day killed eleven men and began the discharge of about 4.9 million barrels of oil into the Gulf of Mexico, which made the accident "the biggest unintentional offshore oil spill in the history of the petroleum industry."⁴

More than 100,000 individuals claimants filed lawsuits arising from the Deepwater Horizon disaster.⁵ One such party, the Center for Biological Diversity ("the Center"), a nonprofit environmental organization,⁶ sued BP and Transocean under the citizen-suit provisions of three environmental statutes.⁷ To manage this case, along with the hundreds of others, the U.S. District Court for the Eastern District of Louisiana exercised a case consolidation technique by grouping similar cases together into "pleading bundles" and providing that each pleading bundle file one master complaint.⁸

This Comment argues that the Center's claims were dismissed as a result of the district court's improper exercise of case consolidation and the U.S. Court of Appeals for the Fifth Circuit's subsequent deference to this pretrial management decision.⁹ After the district court's consolidation of claims into pleading bundles and its assignment of the Center's case to a bundle that did not recognize the Center's requests for civil penalties, the court rendered virtually all of the Center's claims for relief moot.¹⁰ On review, the Fifth Circuit in *Center for Biological Diversity, Inc. v. BP America Production Co.* should have recognized that the district court's consolidation violated Supreme Court precedent.¹¹

I. FACTS AND PROCEDURAL HISTORY

In President Barack Obama's address to the nation shortly after the Deepwater Horizon explosion, the president declared that the fight against

³ NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 1, at 10.

⁴ *BP Leak the World's Worst Accidental Oil Spill*, TELEGRAPH (Aug. 3, 2010), <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7924009/BP-leak-the-worlds-worst-accidental-oil-spill.html>, available at <http://perma.cc/LW3J-QY4N>.

⁵ *Ctr. for Biological Diversity*, 704 F.3d at 419.

⁶ *Id.* (discussing the Center for Biological Diversity, a non-profit environmental organization with more than 40,000 members, 3500 of which reside along the Gulf).

⁷ *Id.* at 417–18.

⁸ *Id.* at 419; see Pretrial Order No. 11 at 2, *Ctr. for Biological Diversity*, 704 F.3d 413 (2:10-md-02179-CJB-SS), available at <http://www.laed.uscourts.gov/OilSpill/Orders/PTO11.pdf> and <http://perma.cc/YU4Q-XVEJ> (filed Oct. 19, 2010).

⁹ See *infra* notes 82–100 and accompanying text.

¹⁰ See *Ctr. for Biological Diversity*, 704 F.3d at 419–32.

¹¹ See *infra* notes 67–74, 96–100, 117–119 and accompanying text.

the millions of gallons of spilled oil would continue.¹² In June and August 2010,¹³ just months after the Deepwater Horizon explosion, the Center sued BP and Transocean under the citizen-suit provisions of the Clean Water Act (CWA),¹⁴ Emergency Planning and Community Right-to-Know Act (EPCRA),¹⁵ and Comprehensive Environmental Response Compensation and Liability Act (CERCLA).¹⁶ The Center sought declaratory and injunctive relief, as well as civil penalties, in its individual complaint.¹⁷

The U.S. Judicial Panel on Multidistrict Litigation transferred the Center's complaints, along with hundreds of other cases, to a district court judge in the Eastern District of Louisiana.¹⁸ To manage the complex litigation, the judge issued Pretrial Order No. 11, which consolidated the various claims into pleading bundles organized based on similarity.¹⁹ Accordingly, the judge provided that each pleading bundle would file a master complaint.²⁰ The Center's complaints were placed into Pleading Bundle D1, which was for injunctive or regulatory claims against private parties.²¹ The D1 Master Complaint was markedly similar to the Center's original complaint, but the Master Complaint did not request civil penalties.²² Instead, the Center's requests for civil penalties were stayed "until further order of the Court."²³ Although the Cen-

¹² Press Release, White House Office of the Press Secretary, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>, available at <http://perma.cc/XWY6-6PVC>.

¹³ The Center brought two lawsuits against the defendants because the first suit, filed on June 18, 2010, alleged only violations of the Clean Water Act (CWA). *Ctr. for Biological Diversity*, 704 F.3d at 418–19. The second suit, filed in August 2010, asserted additional claims under the CWA, Comprehensive Environmental Response Compensation and Liability Act, and Emergency Planning and Community Right-to-Know Act. *Id.*

¹⁴ In the Center's initial suit, it alleged five counts of violations of the CWA for discharge of pollutants (toxic and otherwise), discharge of oil and hazardous substances, violations of national standards of performance for offshore drilling operations, and gross negligence or willful misconduct. *Id.* at 419; see 33 U.S.C. §§ 1311, 1321, 1317, 1316, 1321(b)(7)(D) (2006).

¹⁵ The Center charged the defendants with "failure to report the release of hazardous substances to the emergency coordinator for the local emergency planning committee, in violation of EPCRA, 42 U.S.C. § 11004." *Ctr. for Biological Diversity*, 704 F.3d at 419.

¹⁶ The Center also charged the defendants with "failure to report to the National Response Center the release of hazardous substances, in violation of CERCLA, 42 U.S.C. § 9603(a)." *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ "Pretrial Order No. 11 established several 'pleading bundles' into each of which claims of similar nature would be placed." *Id.*; Pretrial Order No. 11, *supra* note 8, at 2–4.

²⁰ *Ctr. For Biological Diversity*, 704 F.3d at 419.

²¹ *Id.*

²² *Id.* at 420 (explaining that "the allegations and prayers for relief contained in the Master Complaint were deemed to amend and supersede allegations and claims contained in the pre-existing individual complaints").

²³ *Id.* at 419–20.

ter moved on three occasions to have all of its claims moved into a pleading bundle that recognized civil penalties, those attempts were unsuccessful.²⁴

On June 16, 2011, the district court dismissed the D1 Master Complaint in its entirety.²⁵ After the district court's dismissal, the Center asked the court for clarification as to whether its individual complaint requesting civil penalties had been dismissed along with the D1 Master Complaint.²⁶ Several months passed without a response to the Center's request for clarification.²⁷ Eventually, the Center "asked that the court enter a final judgment in order to allow the Center to exercise its right of appeal."²⁸ In accordance with this request, and pursuant to the reasons set forth in the district court's June 2011 Order,²⁹ "as that Order relates to the Center's individual complaints," the court entered a final judgment.³⁰ The Center then appealed the final judgment.³¹

On January 9, 2013, the Fifth Circuit affirmed the district court's findings that all claims related to the CWA and CERCLA were moot.³² The Fifth Circuit concluded, however, that it was unable to determine whether the defendants had satisfied EPCRA's reporting requirements.³³ As a result, the Fifth Circuit held that the EPCRA claim was not moot and remanded so that the lower court could redress the Center's claimed informational injury.³⁴ On appeal, the Center also challenged "the district court's use of pleading bundles and the separation of the Center's claims for injunctive relief and civil penalties," and argued "that the district court's failure to place its civil penalties claims into a pleading bundle . . . resulted in a *de facto* dismissal of those claims."³⁵ The Fifth Circuit held that the district court was exercising its discretion in creating pleading bundles and segregating the Center's claims for relief.³⁶ The Fifth Circuit also held that the dismissal of these claims was "at the Center's own insistence by demanding a final judgment for purposes of appeal."³⁷

²⁴ *Id.* at 420.

²⁵ The district court dismissed the Master Complaint upon finding that (1) the D1 plaintiffs lacked standing, (2) the D1 claims were moot, and (3) the D1 claims were not actionable. *Id.*; *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, 792 F. Supp. 2d 926, 933 (E.D. La. 2011).

²⁶ *Ctr. for Biological Diversity*, 704 F.3d at 421.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *supra* note 25 and accompanying text.

³⁰ *Ctr. for Biological Diversity*, 704 F.3d at 421.

³¹ *Id.*

³² See *id.* at 426–29.

³³ *Id.* at 430–32.

³⁴ *Id.* at 430, 432.

³⁵ *Id.* at 431–32.

³⁶ *Id.* at 432.

³⁷ *Id.*

II. LEGAL BACKGROUND

Under 28 U.S.C. § 1407, the U.S. Judicial Panel on Multidistrict Litigation may transfer civil actions involving common questions of fact in different districts to a single district for consolidated pretrial proceedings.³⁸ Once the panel has completed such a transfer, “[s]ection 1407 contemplates that the degree and manner of coordinated or consolidated pretrial proceedings is left entirely to the discretion of the [transferee] judge.”³⁹ The legislative history of § 1407 also indicates that the Federal Rules of Civil Procedure (FRCP) define the parameters of a transferee court’s pretrial authority.⁴⁰ Specifically, FRCP 42(a) states: “If actions before the court involve a common question of law or fact,⁴¹ the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”⁴² Furthermore, courts have recognized that a “trial court’s managerial power is especially strong and flexible in matters of consolidation.”⁴³

Given a trial judge’s broad authority, case consolidation is proper when an action not only satisfies threshold requirements but also serves the interests of judicial economy.⁴⁴ In FRCP 42(a)’s consideration of an order for consolidation, the rule “permits the [c]ourt to weigh the savings of time and effort that consolidation would produce against any inconvenient delay or expense that would be caused to the parties and to the [c]ourt.”⁴⁵ In 1999, Pennsylvania citizens brought a public liability action, *Hall v. Babcock & Wilcox Co.*, against a nuclear fuel fabrication facility and alleged that radiation released from the facility caused their cancer.⁴⁶ Within this public liability action, more than two hundred claims were consolidated into eight cases for trial.⁴⁷ Despite the defendants’ objection to the consolidation, the U.S. District Court for the Western District of Pennsylvania concluded that

³⁸ 28 U.S.C. § 1407(a) (2012).

³⁹ *In re Data Gen. Corp. Antitrust Litig.*, 510 F. Supp. 1220, 1226 (J.P.M.L. 1979).

⁴⁰ *In re Patenaude*, 210 F.3d 135, 144 (3d Cir. 2000); H.R. REP. NO. 1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900.

⁴¹ Whether two proceedings involve a common party and common issues of fact or law has been deemed the “threshold issue” for consolidation. *Town of Norfolk v. U.S. Env’tl. Prot. Agency*, 134 F.R.D. 20, 21 (D. Mass. 1991).

⁴² FED. R. CIV. P. 42(a).

⁴³ *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013) (citing *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1013 (5th Cir. 1977)).

⁴⁴ *See Hall v. Babcock & Wilcox Co.*, 69 F. Supp. 2d 716, 733 (W.D. Pa. 1999); *supra* note 43 and accompanying text.

⁴⁵ *United States v. Mottolo*, 605 F. Supp. 898, 911 (D.N.H. 1985).

⁴⁶ 69 F. Supp. 2d at 719.

⁴⁷ *Id.* at 732.

the consolidation was appropriate.⁴⁸ To prevail, the plaintiff must have been able to prove a violation of the same statute in each individual case, and the court concluded, “[that] determination, in itself, would be sufficient to support consolidation.”⁴⁹ The defendants also did not allege any specific prejudice that might result from an order of consolidation, which provided further support for the determination that consolidation was an appropriate and effective tool for case management.⁵⁰

In the 1985 case *United States v. Mottolo*, the U.S. District Court for the District of New Hampshire granted only a partial consolidation of two causes of action.⁵¹ The court reasoned that the Comprehensive Environmental Response Compensation and Liability Act claims in the case would be most efficiently handled in one consolidated trial to avoid duplicative litigation and a waste of resources.⁵² On the other hand, a series of pendent state claims presented different questions of law and fact, and the court found that “consolidation of these state claims would prove more confusing than efficient.”⁵³

Case consolidation is inappropriate when the costs of consolidation outweigh the benefits.⁵⁴ Where consolidation is a possibility, the benefit of judicial economy “must yield to a *paramount concern for a fair and impartial trial.*”⁵⁵ In the 1991 case *Town of Norfolk v. U.S. Environmental Protection Agency*, after conducting a cost-benefit analysis, the U.S. District Court for the District of Massachusetts denied the plaintiff’s motion to further consolidate National Environmental Policy Act of 1969 cases with a suit brought under the Water Pollution Control Act arising from sewage discharges into the Boston Harbor.⁵⁶ The court found that the costs of consolidation “grossly outweighed” the benefits; the Boston Harbor case was already “unwieldy”⁵⁷ such that the addition of more parties and issues would muddle a pending proceeding that had already amassed a great volume.⁵⁸

⁴⁸ *Id.* at 732–33.

⁴⁹ *Id.* at 733.

⁵⁰ *Id.*

⁵¹ 605 F. Supp. at 911–12.

⁵² *Id.* at 911.

⁵³ *Id.* at 912.

⁵⁴ *Town of Norfolk*, 134 F.R.D. at 21.

⁵⁵ *Solvent Chem. Co. ICC v. E.I. Dupont de Nemours*, 242 F. Supp. 2d 196, 221 (W.D.N.Y. 2002) (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)) (emphasis added).

⁵⁶ *Town of Norfolk*, 134 F.R.D. at 21–22.

⁵⁷ *Id.* at 22; see *Americus Mortg. Corp. v. Mark*, No. 12–10158–GAO, 2013 WL 3106018, at *12 (D. Mass. June 17, 2013).

⁵⁸ *Town of Norfolk*, 134 F.R.D. at 22.

Case consolidation is also improper if it causes prejudice⁵⁹ to a party.⁶⁰ FRCP 42(a) is “designed to achieve efficiency without compromising a litigant’s right under the Seventh Amendment to a jury trial.”⁶¹ In the 1993 case *Malcolm v. National Gypsum Company*, the U.S. Court of Appeals for the Second Circuit reviewed the district court’s consolidation under an abuse of discretion standard.⁶² The Second Circuit reviewed 600 asbestos-related cases in a “herculean task” wherein the district court employed a set of criteria to evaluate the effectiveness of the consolidation.⁶³ Despite the view that judicial efficiency favors consolidation, the Second Circuit feared that the jury would “[throw] up its hands in the face of a torrent of evidence.”⁶⁴ Ultimately, the Second Circuit overturned the order of consolidation and concluded, “it is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process.”⁶⁵

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Supreme Court elaborated upon prejudice and its implications.⁶⁶ In *Laidlaw*, the Court granted certiorari to resolve a circuit split on whether a defendant’s post-complaint compliance with its Clean Water Act permit⁶⁷ rendered claims for civil penalties moot.⁶⁸ The Supreme Court resolved the inconsistency by reversing the judgment of the Fourth Circuit.⁶⁹ In accordance with the uniform conclusion of other Courts of Appeal,⁷⁰ the Supreme Court established that a “defendant’s voluntary cessation of allegedly un-

⁵⁹ “[C]ourts will reject consolidation requests where a preponderance of fairness or prejudice concerns, such as inconvenience, delay, expense, or risk of jury confusion, appears.” V.A.L. Floors v. 1418 Tower, L.P., No. 08-CV-5680, 2009 WL 1977840, at *3 (E.D. Pa. July 8, 2009).

⁶⁰ *Malcolm v. Nat’l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (quoting *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1988)) (“[C]onsiderations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice.”).

⁶¹ *Id.* at 354.

⁶² *Id.* at 348, 350–51, 355 (Walker, J., dissenting); see *Santucci v. Pignatello*, 188 F.2d 643, 645 (D.C. Cir. 1951) (“The exercise of this discretion will not be disturbed on appeal except for abuse.”).

⁶³ *Malcolm*, 995 F.2d at 348, 350–51.

⁶⁴ *Id.* at 350–52.

⁶⁵ *Id.* at 354.

⁶⁶ See 528 U.S. 167, 173–74 (2000).

⁶⁷ National Pollutant Discharge Elimination System (NPDES) permits are issued under the Clean Water Act (CWA). 33 U.S.C. § 1342 (2006). They “impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation’s waters.” *Laidlaw*, 528 U.S. at 174.

⁶⁸ *Laidlaw*, 528 U.S. at 179–80. In *Laidlaw*, the Supreme Court reversed the Fourth Circuit’s holding, which contradicted decisions of the Second, Third, Seventh, and Eleventh Circuits. See *Atl. States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 502–03 (3d Cir. 1993); *Atl. States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020–21 (2d Cir. 1993); *Atl. States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990).

⁶⁹ *Laidlaw*, 528 U.S. at 173.

⁷⁰ See *supra* note 68 and accompanying text.

lawful conduct ordinarily does not suffice to moot a case.”⁷¹ The Supreme Court noted that civil penalties serve as a valuable deterrent with remedial potential.⁷² Additionally, in a concurring opinion, Justice Stevens equated civil penalties with punitive damages, rather than with injunctive or declaratory relief, and concluded, “No one contends that a defendant’s post-complaint conduct could moot a claim for punitive damages; civil penalties should be treated the same way.”⁷³

III. ANALYSIS

In *Center for Biological Diversity, Inc. v. BP America Production Co.*, the U.S. Court of Appeals for the Fifth Circuit affirmed the U.S. District Court for the Eastern District of Louisiana’s dismissal of most⁷⁴ of the Center for Biological Diversity’s (“the Center”) claims relating to the Deep-water Horizon oil spill.⁷⁵ The Fifth Circuit affirmed the district court’s taking of judicial notice that the Macondo wellhead was capped in July 2010 and killed in September 2010, as well as the district court’s findings that all but one of the Center’s claims for injunctive and declaratory relief were moot.⁷⁶ The Fifth Circuit also held that the district court was “well within [its] discretion” when it created pleading bundles and separated the Center’s claims for civil penalties and injunctive relief.⁷⁷ The Fifth Circuit reviewed the district court’s case management decision and stated that “the court’s express and inherent powers enable the judge to exercise extensive supervision and control of litigation.”⁷⁸ When the Center’s case was brought before the district court judge, the case was one of hundreds, and the Fifth Circuit held that considering this “daunting” litigation, the judge’s decision to consolidate the Center’s case was within the court’s “broad grant of authority.”⁷⁹ When pressed about the dismissal of the civil penalty claims, the Fifth Circuit concluded that the Center, by requesting a final appealable judgment, had abandoned those claims.⁸⁰

Case consolidation can be inappropriate and an abuse of a trial court’s discretion when the costs of consolidation outweigh the benefits,⁸¹ and

⁷¹ *Laidlaw*, 528 U.S. at 174.

⁷² *Id.*

⁷³ *Id.* at 197 (Stevens, J., concurring).

⁷⁴ See *supra* note 34 and accompanying text.

⁷⁵ 704 F.3d 413, 422 (5th Cir. 2013).

⁷⁶ *Id.* at 418, 424, 432.

⁷⁷ *Id.* at 432.

⁷⁸ *Id.* (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.1 (2004)).

⁷⁹ *Ctr. for Biological Diversity*, 704 F.3d at 419, 432.

⁸⁰ See *id.* at 427, 432. “[T]hose [civil penalty] claims were dismissed at the Center’s own insistence by demanding a final judgment for purposes of appeal.” *Id.* at 432.

⁸¹ *Town of Norfolk v. U.S. Env’tl. Prot. Agency*, 134 F.R.D. 20, 21 (D. Mass. 1991).

“where the inevitable consequence to another party is harmful and serious prejudice.”⁸² In *United States v. Mottolo*, the court consolidated only certain claims and found that consolidation of other pendent state claims would cause confusion.⁸³ Similarly, in *Town of Norfolk v. U.S. Environmental Protection Agency*, the court found that consolidation of two cases brought under different environmental statutes would increase the unwieldiness of an already ponderous set of issues; as a result, the court ultimately denied the consolidation request.⁸⁴ These cases suggest that a potential for confusion and unwieldiness are consolidation “costs” that may unduly inconvenience an action and render an order for consolidation improper.⁸⁵ By consolidating the Center’s claims into a pleading bundle that did not recognize the Center’s requests for civil penalties, the district court in *Center for Biological Diversity* unduly inconvenienced the Center with a cost that is arguably greater than confusion, namely prejudice.⁸⁶

As the court in *Malcolm v. National Gypsum Company* stated: “The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice and we must take care that each individual plaintiff’s . . . cause not be lost in the shadow of a towering mass litigation.”⁸⁷ *Malcolm* discusses the importance of a case maintaining its identity when consolidation is under consideration, especially when the case is one of hundreds, if not thousands, of cases.⁸⁸ When *Malcolm* was decided in 1993, asbestos litigation comprised the largest mass toxic tort in the United States.⁸⁹ Regardless of this immense challenge, however, the U.S. Court of Appeals for the Second Circuit recognized the very real possibility of prejudice and noted that the “benefits of efficiency can never be purchased at the cost of fairness.”⁹⁰ The Second Circuit overturned the district court’s order of consolidation.⁹¹ In contrast, by separating the Center’s claims for injunctive relief from claims for civil penalties, and by failing to include the claims for civil penalties in any pleading bundle, the district court in *Center for Biological Diversity* effectively stripped the Center’s case of its identity.⁹²

⁸² *Malcolm v. Nat’l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (citing *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1988)).

⁸³ 605 F. Supp. 898, 911–12 (D.N.H. 1985).

⁸⁴ 134 F.R.D. at 21–22.

⁸⁵ *See id.*; *Mottolo*, 605 F. Supp. at 911–12.

⁸⁶ *See* 704 F.3d at 420; *Mottolo*, 605 F. Supp. at 912; *supra* note 59 and accompanying text.

⁸⁷ *See Malcolm*, 995 F.2d at 350.

⁸⁸ *See id.* at 348, 352.

⁸⁹ *See id.* at 348.

⁹⁰ *See id.* at 350–52.

⁹¹ *See id.* at 354.

⁹² *See Ctr. for Biological Diversity*, 704 F.3d at 420; *Malcolm*, 995 F.2d at 352.

In the Center's case, the district court's consolidation⁹³ was improper because it might have contributed to the eventual dismissal of the Center's case.⁹⁴ In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Supreme Court emphasized the deterrent effect of civil penalties and held that a defendant's compliance after the commencement of litigation (as when BP capped the Macondo well on July 15, 2010) will not moot claims for civil penalties.⁹⁵ As a result, *Laidlaw* required the district court in *Center for Biological Diversity* to recognize the significance⁹⁶ of the Center's civil penalties requests put forth in the Center's initial August 2010 complaint; to do otherwise would prejudice the Center.⁹⁷ Accordingly, the district court should not have put the Center's case into a pleading bundle that did not recognize these requests.⁹⁸ At the least, the district court judge could have granted any of the Center's three motions to have all of the Center's claims moved into a pleading bundle that recognized civil penalties.⁹⁹

Case consolidation is proper when it serves the interests of judicial economy and does not prejudice any party or the court.¹⁰⁰ Although the district court judge's creation of pleading bundles was in the interest of judicial economy,¹⁰¹ consolidation in *Center for Biological Diversity* fell short of this standard because the Center's placement into pleading bundle D1 essentially eliminated its civil penalty claims from contention, which prejudiced the Center.¹⁰² The existence of identical claims was significant in the

⁹³ Federal Rule of Civil Procedure (FRCP) 42(a) gave the district court judge the authority to consolidate, though he did not explicitly state that he was relying on FRCP 42(a) when issuing Pretrial Order 11 and creating pleading bundles. Pretrial Order No. 11, *supra* note 8, at 2–4; *see supra* note 40 and accompanying text.

⁹⁴ *See Ctr. for Biological Diversity*, 704 F.3d at 419–21; *infra* notes 95–99 and accompanying text.

⁹⁵ *See Laidlaw*, 528 U.S. at 174; *Ctr. for Biological Diversity*, 704 F.3d at 420, 427.

⁹⁶ *See infra* note 106 and accompanying text.

⁹⁷ *See Laidlaw*, 528 U.S. at 174; *Ctr. for Biological Diversity*, 704 F.3d at 419; *supra* note 59 and accompanying text.

⁹⁸ *See Laidlaw*, 528 U.S. at 174; *Ctr. for Biological Diversity*, 704 F.3d at 419–20; *supra* note 59 and accompanying text.

⁹⁹ Pleading Bundle C was for “Public Damage Claims” brought by governmental entities. It might be that the district court's dismissal of the Center's three motions to have its claims moved into Pleading Bundle C was a result of the fact that the Center is not a governmental entity. *See Ctr. for Biological Diversity*, 704 F.3d at 420; Pretrial Order No. 11, *supra* note 8, at 4.

¹⁰⁰ *See Hall v. Babcock & Wilcox Co.*, 69 F. Supp. 2d 716, 733 (W.D. Pa. 1999); *supra* note 59 and accompanying text.

¹⁰¹ In Pretrial Order 11, the district court judge issued a Case Management Order that created pleading bundles because of “the need for organization of this complex litigation.” Pretrial Order No. 11, *supra* note 8, at 1.

¹⁰² *See Ctr. for Biological Diversity*, 704 F.3d at 420; *Hall*, 69 F. Supp. 2d at 733; *supra* note 59 and accompanying text.

court's decision in *Hall v. Babcock & Wilcox Co.* to consolidate the case.¹⁰³ Furthermore, in *Hall*, due to the absence of any allegations of specific prejudice, the court was not convinced by the defendants' arguments in opposition to an order of consolidation.¹⁰⁴ In stark contrast, in the Center's August 2010 individual complaint, the Center sought civil penalties, and had it not requested a final appealable judgment, it would never have belonged in a pleading bundle seeking solely injunctive and regulatory relief.¹⁰⁵ In addition, as a result of the district court's placement of the Center's case into pleading bundle D1, the Center suffered specific prejudice because the Center was inconvenienced¹⁰⁶ by its inability to request monetary damages under the citizen suit provisions of the Clean Water Act, Emergency Planning and Community Right-to-Know Act, and Comprehensive Environmental Response Compensation and Liability Act.¹⁰⁷

Both *Hall* and *Malcolm* involve the consolidation of hundreds of cases into a more manageable few.¹⁰⁸ Taken together, *Hall* and *Malcolm* present a significant paradigm, however, because they demonstrate the line between what is and is not an appropriate exercise of pretrial consolidation, respectively.¹⁰⁹ The *Hall* court recognized that consolidation of massive amounts of claims, each of which presented common questions of law or fact, and resulted in no specific prejudice to the defendants, was not only an effective management tool but was also in the interest of judicial economy.¹¹⁰ On the contrary, in *Malcolm* the "reversal of consolidation was appropriate where the . . . 'prejudice arising from an improper consolidation' . . . simply could not be eliminated."¹¹¹ Similarly, in *Center for Biological Diversity*, the prejudice that befell the Center as a result of improper consolidation of its claims cannot be eliminated.¹¹² Complex litigation inevitably requires a trial court to employ strategies to manage a "sclerotic backlog of cases."¹¹³ Per

¹⁰³ 69 F. Supp. 2d at 733.

¹⁰⁴ *Id.*

¹⁰⁵ See *Ctr. for Biological Diversity*, 704 F.3d at 419–21.

¹⁰⁶ In a June 16, 2011 order dismissing the D1 Master Complaint, the district court judge remarked: "The D1 bundle Plaintiffs are not seeking the type of civil monetary penalties that saved the *Laidlaw* case from mootness." See *supra* note 25 and accompanying text. This statement suggests that if the Center had been able to bring its claims for civil penalties alongside those for injunctive relief, the Center might have been able to save its case. See *Laidlaw*, 528 U.S. at 174; *Ctr. for Biological Diversity*, 704 F.3d at 420; *supra* note 25 and accompanying text.

¹⁰⁷ See *Ctr. for Biological Diversity*, at 419–20; *supra* notes 59, 80 and accompanying text.

¹⁰⁸ See *Malcolm*, 995 F.2d at 348; *Hall*, 69 F. Supp. 2d at 732.

¹⁰⁹ See *Malcolm*, 995 F.2d at 350–54; *Hall*, 69 F. Supp. 2d at 733.

¹¹⁰ 69 F. Supp. 2d at 732–33.

¹¹¹ 995 F.2d at 352 (citing *Arnold*, 712 F.2d at 907) (alteration in original).

¹¹² See *id.*; *Ctr. for Biological Diversity*, 704 F.3d at 420; *supra* note 59 and accompanying text.

¹¹³ See *Malcolm*, 995 F.2d at 350.

Malcolm, however, this efficiency cannot be achieved without consideration of the individual cases for which consolidation is in question.¹¹⁴

In *Center for Biological Diversity*, either the district court should have been more meticulous in its assignment of cases to pleading bundles, regardless of how “daunting” the task, or the Fifth Circuit should not have taken such a deferential approach toward the district court.¹¹⁵ *Laidlaw* made the Center’s claims for civil penalties unique: The claims had a potential to preclude the district court’s finding of mootness.¹¹⁶ Appellate courts in the future should take heed of the warning in *Malcolm* and review trial judges’ decisions to consolidate with greater scrutiny, especially where the risk of a single case being “lost in the shadow of a towering mass of litigation” is so great.¹¹⁷

CONCLUSION

The old adage that with great power comes great responsibility is still true today. The Deepwater Horizon explosion and oil spill generated a mass of litigation that essentially mandated that courts employ strategies in pursuit of judicial economy. These strategies signify a power that should have been met with the U.S. District Court for the Eastern District of Louisiana’s recognition of the particularities of environmental law citizen suits. Case consolidation can be a significant tool in a court’s arsenal, but not at the expense of prejudicing a party. The Center for Biological Diversity’s case in *Center for Biological Diversity, Inc. v. BP America Production Co.* was a casualty of the prejudicial exercise of this power, and one can only hope that in the future, courts are more mindful of the implications of their pre-trial case management decisions.

Preferred Citation: Rebecca M. Mitchell, Comment, *A Dubious Exercise of Case Consolidation: Center For Biological Diversity v. BP America Production Co.*, 41 B.C. ENVTL. AFF. L. REV. E. SUPP. 68 (2014), <http://lawdigitalcommons.bc.edu/ealr/vol41/iss3/>.

¹¹⁴ See *id.* at 350–54.

¹¹⁵ See *Ctr. for Biological Diversity*, 704 F.3d at 419–20, 432; *supra* notes 95–99, 106 and accompanying text.

¹¹⁶ See *supra* notes 95–99, 106 and accompanying text.

¹¹⁷ See *supra* notes 87–92 and accompanying text.