# PROTECTING COMMUNITIES FROM HARM

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# Introduction

## Introduction

In the 1990s, a collaboration between state attorneys general and private trial lawyers brought a new series of suits against the tobacco industry, resulting in the largest civil litigation settlement in U.S. history. The litigation highlighted the impact of smoking on not just individuals, but states themselves — largely tied to the expanding health costs for smokers being paid out from Medicaid, as well as equitable relief.[1] In 1998, 52 states and territories signed a Master Settlement Agreement,[2] under which the tobacco companies have had to pay out to included states *in perpetuity* so long as the companies sell cigarettes in the United States.[3] As of 2024, the companies have paid $201.2 billion dollars as part of the settlement.[4]

As the tobacco litigation revealed, access to the civil courts is crucial to ensuring that private citizens, and the communities where they live, have legal remedies to protect themselves from harms and seek justice and remedies when harms do befall them. Civil justice stands as a critical partner to regulatory protections to ensure the health, safety, and welfare of communities, and it is a critical bulwark to guarantee those protections when such protections — for a variety of reasons — fail.

These benefits of civil justice for communities include, though are not limited to:

**Corrective and punitive justice:** The financial impact of wrongs inflicted by corporations on communities can be extreme, both to individual residents in the form of personal injury, as well as damage to the community public health and safety services that bear the brunt of directly responding to the harm, as well as long term ecological damage and environmental toxic exposure that must be both monitored and remediated. Access to civil justice to achieve protections for communities is critical not only to provide financial remediation for the harm suffered, but also to avoid a double injustice of the community not merely suffering the initial harm but having to then pay for the costs of remediation and long-term repair to the community out of public dollars.

**Information production:** Discovery[i] is well situated to shining light on latent sources of harm, as well as the conduct of industry in deliberately hiding or falsifying the safety of their products or services. This information is crucial for three reasons. It provides notice and education to communities of potential sources of harm, enables civil justice lawyers to establish the causation that law requires to link the conduct and products of wrongdoers to community harms, and to push lawmakers to establish more comprehensive protections through regulation.

[i] Discovery is a process in civil litigation wherein, prior to the start of the trial, parties to the litigation has the ability to request evidence from one another. This process can include a variety of requests for information, including depositions, in which the parties submit to questioning under oath, interrogatories which are written questions submitted to the other side, and subpoenas for written and saved materials (i.e. one party's records). The discovery process is overseen by the court to ensure fairness and compliance so as to ensure access of critical information to the case or controversy being litigated.

**Ensuring protections in the face of regulatory gaps:** Regulation and civil justice litigation serve as complementary protectors for communities, and it is crucial that should a regulatory scheme falter or fail, the door to the courthouse remain open for communities to achieve justice and protection. Regulatory failures can occur for a variety of reasons, including simple lack of information about the harm, insufficient staffing or funding to monitor sources of harm, a slow degree of responsiveness to emergent threats, and regulatory capture by corporations, which prevents effective regulation using lobbying, manipulation, or seeing industry members appointed to key positions within a given agency.

Civil justice, through its adversarial process and impartial juries, is less susceptible to these causes of regulatory gaps, and can, through consent agreements, achieve forward-looking community protections that require an industry to adopt best practices above and beyond what is currently required by regulation to mitigate against future harm.

The protections civil justice provides in the face of regulatory gaps is likely to be increasingly important during the second Trump administration. Since taking office in January 2025, the administration has announced significant rollbacks in regulatory protections, for example those provided under the Clean Air and Clean Water acts. Broadly, the administration has also taken extensive steps to depopulate the federal government, using staff reductions across critical regulators such as the Environmental Protection Agency and the Food and Drug Administration. Those and other agencies rely on staff to both conduct the necessary scientific research to identify existing and emerging sources of harm, justify regulatory protections, and hold industries accountable through monitoring and compliance efforts.

In the face of both direct rollbacks and a deliberate hamstringing of agency efficacy, the need for robust access to civil justice will be increasingly necessary to ensure that communities are protected as regulatory gaps widen. In this report, we present seven case studies that demonstrate how civil justice is necessary and significant to protect communities from the unreasonable actions of companies that injure many members of a community that were not prevented by federal regulation. Each case study includes a background of the harm suffered, including a discussion of intentional deceptions by industry as they relate to the use and safety of their products or services, and regulatory failures that led to the harm, as well as a discussion of the structure of the civil justice litigation brought against the wrongdoing actor or actors.

# 1. Opioids

## 1. Opioids: Harm Reduction for Communities Impacted by the Opioid Crisis

**Introduction**

The rapid increase in opioid addiction and overdose death in the United States is well known. This crisis occurred in three waves — the first from prescription overdoses in the 1990s; followed by a rise in heroin overdoses in the 2010s as addicted individuals turned to heroin to supplant prescription opioids following initial industry restrictions; and finally, starting in 2013, a rise in synthetic overdoses from fentanyl and tramadol, acquired either legally or illicitly.[5] As a result of the epidemic, nearly 400,000 people in the United States died between 1999 and 2017.[6]

In the early to mid-1990s, Purdue Pharma was one of the pharmaceutical companies that developed a new class of "controlled release" opioid medications that allowed dosing every 12 hours, instead of every 4 to 6.[7] At the time of its introduction, Purdue Pharma, which manufactured OxyContin, led regulators and the public to believe that the slower absorption rate of the drug would make it less addictive.[8] In fact, the company (and other manufacturers) already knew that crushing and snorting the these opioids produced rapid delivery of its effects to the user — giving the drug's potential for widespread abuse — and acted to conceal that information from both the public and regulators.[9] [10]

When this new class of opioids hit the market, manufacturers engaged in a directed campaign promoting the drugs' effectiveness and downplaying the risk of addiction and abuse they were already well aware of.[ii] [11] They promoted these drugs to hospitals, physicians, and pharmacies and encouraged them to issue prescriptions.[12] This promotion was developed in coordination with consulting firms such as McKinsey & Company, which assisted in pushing false narratives related to use and safety.[13] [iii] [14]

Believing that the drugs were not addictive, doctors saw them as a way to improve patient satisfaction with pain control and to limit the number of visits it took to acquire pain control medication.[15] This latter goal became especially prevalent in rural communities, where travel times to a provider were greater, and was a key contributor to the prevalence of addiction and overdose there.[16]

At the same time, physicians and hospitals turned a blind eye to concerns of over-prescription regarding both the choice of OxyContin instead of other pain relievers and the large quantities

[ii] As early as 2007 Purdue Pharma faced a $600 million criminal fine for feloniously "misbranding" their opioid medications as being less prone to abuse. Knowledge of the prevalence of abuse was known not just by the three specifically charged executives, but throughout the company and by Purdue Pharma's owners – the Sackler family.
[iii] In 2024 McKinsey entered a deferred prosecution agreement, involving forfeiture of monies made working for Perdue, Medicaid fraud, and liability under the false claims act totaling $650 million. This marks the first time that a management consultant firm has been held criminally responsible for advice provided to a client related to the commission of a crime.

of the drug that were prescribed. Compounding this behavior, pharmacies did not flag or even monitor suspicious orders of opioid medications in many instances, including repeat or abnormally large orders in comparatively small communities. As a result, pharmacists facilitated purchases under false pretenses, which increased the availability of legally manufactured, but illegally distributed, opioids to addicted populations.[17]

Addiction rates hit rural communities especially hard. Beyond death, pain and suffering, the consequences of the crisis included community-wide economic degradation and the overburdening of public safety and public health infrastructure as costs rose and services were reduced.

Congress has taken some steps to address the cost of the opioid epidemic by passing the Comprehensive Addiction and Recovery Act in 2016.[18] By 2017, when the estimated economic impact of the opioid crisis in the United States was more than $1 trillion per year, the intensity of the crisis began to fall for the first time, and these trends continued through 2020.[19] However, opioid overdoses increased during the COVID-19 pandemic, and the total yearly cost of the opioid crisis rose again, to $1.47 trillion.[20] Between 2022 and 2024, Congress provided an additional $3 billion in funding for treatment, recovery, and training programs for community health services and first responders through the State Opioid Response Grant program.[21] [22]

## The Lawsuits

Although federal (and similar state and local) legislation and program funding represent a meaningful response to the opioid epidemic, they are limited, and somewhat inequitable, in several ways: they solve harms caused by the private-sector with public money, they fail to identify wrongdoing, and they lack deterrence. This is why the federal government, states, communities, and individuals have turned to the civil courts to seek justice from the harms caused by manufacturers, prescribers, and distributors since the early 2000s. These cases include a variety of causes of action, from public nuisance and consumer protection violations to civil violations of the RICO Act,[iv] fraud, and unjust enrichment claims.[23] States and localities were substantially supported by private counsel who engaged in representation on a contingency fee arrangement, who thus contributed their expertise without placing taxpayer dollars at risk.[24] To ensure that any settlement funds are dedicated to abating harms at the community level, parties agreed to set aside specific capped funding for private counsel's costs.[25]

Several lawsuits against organizations involved in the propagation of the opioid crisis have proceeded to settlement. In 2021–22, national settlements were reached with Johnson & Johnson ($5 billion), AmerisourceBergen, Cardinal Health and McKesson (jointly, $21 billion)[26] McKinsey ($573 million),[27] CVS Health, Walgreens and Walmart ($13.6 billion), and Allergan and Teva ($5.36 billion). Teva was also required to provide either $1.2 billion worth of its generic

[iv] Racketeer Influenced and Corrupt Organizations Act, which includes a provision for bringing civil suit to recover damages from sale of controlled substances

version of Narcan or $240 million in cash at the election of each state participating in the settlement.[28] As of this writing, total settlement value from all sources is $47 billion between U.S. state and local governments and the 16 major pharmaceutical opioid manufacturers, marketers, distributors, and retailers.[29]

Purdue Pharma has entered bankruptcy proceedings, and the value of the settlement is subject to those proceedings. Initially, the settlement from Purdue Pharma and their owners, the Sackler family, approached $8 billion and involved states, local governments, and individuals.[30] However, the U.S. Supreme Court overturned the deal, finding the controversial provisions shielding the Sacklers from future liability to be outside of the scope of the bankruptcy court's authority.[31] Parties have returned to the negotiation table, with extensions granted to Purdue and the Sacklers in September 2024.[32] As of March 18, 2025, Purdue has filed a new bankruptcy plan, with the Sacklers to pay upwards of $7 billion and Purdue to pay $900 million. Purdue has also agreed to transform itself into a public benefit company to produce medicines for treating opioid use and overdoses, although it remains to be seen if this iteration of the settlement agreement is approved by the parties and the courts.[33]

**Community Protections**

These lawsuits, particularly those filed by state attorney generals, have drawn attention to the need for additional funding and regulation.[34] Further, the settlements also contain several provisions that require pharmaceutical companies to refrain from certain practices that led to the crisis. For example, the 2021 national settlement with Cardinal Health, McKesson, and AmerisourceBergen contains a provision of injunctive relief through 2031 requiring, among other things, for the distributors:

1) To create an independent clearing house accessible by the companies and to regulators regarding sourcing and prescribing opioid medications to avoid the practice of over-prescription;
2) To develop methodology to track and prohibit the shipping of suspicious orders; and
3) To terminate customer pharmacies' ability to receive drug shipments and report them to state regulators when they appear to be engaged in suspicious practices.[35]

Similarly, Johnson & Johnson, per its settlement agreement, is barred for ten years from selling opioids, promoting opioids, lobbying on matters related to opioids, and must share clinical trial data.[36]

Like the 1990s tobacco settlements, this settlement structure is representative of coordination between multiple state attorneys general to create a funding pool.[37] Unlike the damages in those

cases,[v] the opioid settlements have been constructed in consultation with local governments and officials to ensure that the money is targeted toward resources that afflicted communities need to address the crisis.[38] More than just learning from the earlier tobacco settlements, the settlements in the opioid cases have been so fashioned because localities brought suit themselves, seeking redress from harms to both their public health and safety infrastructure.[39]

Notably, the settlement agreements have provisions requiring that the funds be directed toward opioid remediation (86.5 percent in the instance of the 2022 settlement).[40] Though implementation varies from state to state, the funds are divided into state and local funding pools, or sometimes into other funds with specific requirements.

In Virginia, for example, settlement funds are split, with 30 percent to cities and counties, 15 percent to the Commonwealth, and 55 percent to the legislatively created[41] Opioid Abatement Fund, which will engage in competitive award-making targeted to communities with high impact, historical economic disadvantage, and some other factors.[vi] [42] [43] [44]

[v] An unfortunate outcome for monies received in the tobacco settlements was that they often flowed to state general funds, which are unrestricted in use and have been used to fund state priorities other than smoking prevention, cessation, and healthcare for smoking-related disease.

[vi] As of this writing, 37 localities have community grant plans, with 4 currently in progress, and 41 have publicly facing announced awards and plans in place.

# 2. PFAS

## 2. PFAS: Access to Remedies and the Power of Discovery and Publicly Visible Trials as a Means of Repair and Resiliency

**Introduction**

Per- and polyfluoroalkyl are toxic chemicals (known more commonly as PFAS and PFOA) that can cause or contribute to numerous serious health hazards to humans and animals. Although this toxicity has historically not been widely known about by the public, industry members, including DuPont and 3M, have been aware of the harms dating back to at least the 1960s.[1] This information was largely kept secret by industry, although manufacturer 3M had disclosed *some* information to the U.S. Environmental Protection Agency (EPA) — for instance, a study related to toxicity in rats — as required under the Toxic Substances Control Act.[2] However this is an outlier to the general conduct of industry actors failing to disclose other critical information, such as DuPont's internal studies on the health of workers exposed to PFAS.[3]

Public awareness of the toxicity of PFAS began in 1999 following a lawsuit brought by Wilbur Tennant, a West Virginia farmer, who observed that his herd of approximately 300 cattle, which grazed near a DuPont plant, rapidly became ill, with over half of them soon dying. Following substantial discovery requests, Mr. Tennant's attorney, Rob Billot, secured documentation demonstrating that the company had knowledge of (at least some) of the toxic impacts of its chemicals, their bioaccumulate nature, and that the company was dumping the chemicals in contravention with internal industry standards for disposal.[4] [5] After the case settled in 2001 for an undisclosed amount, Billot put together a public brief highlighting DuPont's knowledge of the hidden harms of PFAS and filed it publicly with relevant federal agencies, including the EPA and the Department of Justice (DOJ).[6]

This information greatly supported regulatory investigation into PFAS and their manufacturers, and as testing and evaluation became more prevalent, it kicked off a stream of suits against DuPont and its industry peers.[7]

**History and Background of the Harm**

PFAS are a class of chemical compounds used in manufacturing a wide variety of products, including, most notably, "Teflon" non-stick products, as well as clothing, furniture, food packaging, paints, and cosmetics. PFAS as a class includes thousands of chemical variations, all of which have either demonstrable or suspected impacts on human health.[8]

PFAS have three characteristics that make them of particular concern to individuals and communities. First, they cause a wide range of deleterious health impacts. They are suspected carcinogens[i] [9] [10] and are linked to high cholesterol, liver dysfunction, weakened immune systems, and diminished infant and fetal development.[11] Second, PFAS degrade extremely

[i] PFOA and PFOS being confirmed as carcinogenic by the International Agency for Research on Cancer in 2023, and US EPA finding in 2024 that they are *likely carcinogenic*.

slowly — hence the moniker by which they are most widely known: "forever chemicals."[12] Third, PFAS can move quickly through an ecosystem and *bioaccumulate*, or build up in an organism over time. The result is that PFAS are now present not only at sites of manufacturing or heavy utilization, but broadly across water and food supplies.[13]

The result is that the majority of the population has some level of contamination from PFAS.[ii] [14] The people who are most likely to have especially elevated levels of exposure are those employed in PFAS manufacturing, who use the chemicals in high concentrations professionally, and who live in communities with high concentrations of PFAS in their water supply due to local exposure sources. These tend to be low-income and communities of color, such as Flint, Michigan, for example.[15]

Regulators have had some knowledge of PFAS toxicity since at least the 1990s, when as mentioned, the multinational conglomerate 3M made a limited disclosure to EPA that the chemicals cause blood and liver damage in rats.[16] Regulators later had access to the trove of internal DuPont documents made available from discovery in *Tennant* lawsuit, and more disclosures from later lawsuits.[17]

Despite this, EPA announced in 2006 that the chemicals were safe following a substantial lobbying campaign by DuPont, despite reaching an agreement with several PFAS manufacturers to phase out the use of PFOS and PFOA. EPA finally declared that PFAS are *likely carcinogenetic* in 2024[18] and set standards for allowable levels in public drinking water after civil suits revealed the risks to the public. However, the EPA under the second Trump administration is pulling back on these regulatory protections, including reducing the number of PFAS regulated in public water systems.[19]

## The Lawsuits

Filed in 1999, *Tennant v. DuPont* was the first PFAS case brought to court, and the plaintiff's success instigated a spate of individual actions against DuPont after discovery brought increased attention and access to the known hazards of PFAS. In 2001, a West Virginia family filed suit against DuPont after the company dumped more than "7,100 tons of PFOA sludge" on their land.[20] The lawsuit become a class action[iii] on behalf of community members who had consumed PFOA contaminated water that could be linked to DuPont in public or private systems across multiple districts.[21] The case settled in 2005, providing $235 million for medical monitoring for the now approximately 70,000 class members,[22] as well as health and education projects, water treatment to remove PFOA/C8[iv] from the public drinking supply, and, rare for a class action

[ii] The endemic nature of exposure is such that researchers who needed a "control" population of a sufficient size without PFAS exposure had to use blood archived by the US military during the Korean War.
[iii] Class actions involve one or a few individuals who stand in the stead of a larger similarly situated "class" of plaintiffs.
[iv] C8 is a colloquial term for PFOA referencing its chemical structure.

suit,[23] a fund for an independent research panel to investigate the causal link between PFOA exposure and human disease, the results of which would partly determine the extent of liability.[24]

This panel ultimately concluded that exposure could be linked to a number of deleterious health outcomes, including kidney and testicular cancer, ulcerative colitis, thyroid disease, hypercholesterolemia, and pregnancy induced hypertension.[25] [26] The findings of the report provided a causal connection linking exposure to these harms, and led to further personal injury claims against DuPont related to PFOA exposure, including a number of jury awards following trial that included punitive damages.[27] These included a $670.7 million settlement in multi-district litigation (MDL)[v] related to the approximately 3,550 lawsuits tied to personal injuries from contamination in 2017.[28]

More recently, additional lawsuits have included other defendants and other causes of action. For instance, 3M has been involved in several settlements related to contamination of public water systems, encapsulated in a MDL in South Carolina and another settlement in which 3M agreed to pay at least $10.3 billion for remediation.[29] DuPont and associated companies have settled water contamination suits to the tune of $1.18 billion.[30] Further, as of April 2024, 27 state Attorneys General had sued manufacturers to address the public costs of PFAS contamination.[31] These funds are to be directed largely toward cleanup and abatement,[32] and some of have already settled — for instance, the state of Minnesota settling with 3M for $850 million.[33]

**Community Protections**

The line of civil justice litigation against PFAS manufacturers has greatly benefited community protections. From the onset of litigation in 1999, civil discovery has shed light on long-held industry secrets regarding the safety of PFAS, alerting both regulators and the public to the harms of these chemicals and how those harms were deliberately concealed by manufacturers.

Lawsuits also put scrutiny and pressure on the Biden EPA, which after decades of comparative inaction, and in the face of concerted industry lobbying, finally formally classified two classes of PFAS as likely carcinogenic and updated the national primary drinking water standards to establish thresholds for PFAS.

However, the second Trump administration is pulling back from regulatory protections. For example, the administration requested stays in industry-led litigation against the EPA's new PFAS rules, claiming it wants to reassess EPA's priorities.[34]

[v] MDL involves the consolidation of numerous lawsuits from multiple jurisdictions that have a similar factual basis in the claims alleged into one single district to resolve pre-trial proceedings, including, amongst other things, discovery.

Even if the administration does continue to prioritize PFAS regulation (although actions to reduce the number of regulated PFAS may suggest otherwise),[35] these plans will exist within a scheme to reduce the workforce of EPA by significant levels — sapping both the agency's capacity to conduct research to craft appropriate regulations to protect communities, and to conduct monitoring and enforcement efforts. Lacking sufficient capacity to do this, research may well either cease or be outsourced to third parties (such as industry) and leave compliance to be conducted through self-regulation, both of which leave open a great possibility for regulatory capture and a failure of the EPA to provide necessary regulatory protections for communities.[36]

Whatever happens regarding EPA regulation, lawsuits have been successful in requiring ongoing medical monitoring and mandating environmental justice considerations tied to PFAS. As noted earlier, communities of color are disproportionately likely to live near toxic contamination, have commensurately higher levels of PFAS exposure, and therefore higher likelihood of negative health outcomes.[37]

Finally, state and community lawsuits are important means of addressing the cost of monitoring and cleaning drinking water systems, identifying contamination risk, offering medical monitoring, and providing general remediation of an incredibly long-lasting and bioaccumulative set of chemicals. These costs are substantial, and estimates of the cost for meeting EPA's primary drinking water standards for PFAS range from $24 billion to $55 billion; this does not include funding for private systems or the cost of rehabilitating waterways, landfills, and soils.[38] Civil justice litigation ensures that the costs of redressing these harms are born by the industry that caused them, not the taxpayer who has suffered them.

# 3. Pesticides

## 3. Pesticides: Regulatory Issues, the Power of Discovery and Publicly Visible Trials, and "Voluntary" Compliance

**Introduction**

On June 18, 2018, a trial began in the case of *Johnson v. Monsanto* in a California state court. Dewayne Johnson was a groundskeeper for a school district in the Bay Area who had used Monsanto's pesticide, Roundup, for years — mixing and spraying it daily.[1] In 2013, Mr. Johnson suffered a workplace accident that resulted in his being doused from head to toe in the pesticide, and by 2014, he had lesions spreading across his skin and received a diagnosis of non-Hodgkin's lymphoma.[2] As of 2014, the EPA found no connection between glyphosate, Roundup's active ingredient, and cancer, and previous civil justice action by injured parties against the company were unsuccessful due to a lack of a scientific evidence to establish causation between exposure and illness.

In 2015, the World Health Organization's International Agency for Research on Cancer (IARC) classified glyphosate, Roundup's active ingredient, as a probable carcinogen to humans.[3] When Mr. Johnson sued Monsanto in 2018, alleging that his cancer was a direct and proximate result of exposure to the pesticide, he was able to present scientific evidence showing a causal link between glyphosate and cancer. In his suit, Johnson alleged that Monsanto failed to warn users of the risks associated with glyphosate.[4] Evidence presented at trial included the scientific data showing the connection between exposure and disease, IARC's findings determination, as well as documents obtained through discovery highlighting Monsanto's attempts to undercut faith in the IARC determination and push for findings that the product was not cancerous.[5] Johnson prevailed, and the jury awarded him $39.2 million in compensatory damages as well as $250 million in punitive damages (though these were reduced on appeal).[6]

The case was a bellwether[i], and the civil justice lawsuits that followed resulted in additional discovery and compensatory and punitive damages in both federal and state courts.[7] Discovery in these trials has increased the amount of information now available about Monsanto's (now Bayer Corporation, after Bayer purchased Monsanto in June 2018)[8] historical knowledge and, critically, the company's efforts to prevent public knowledge relating to the safety of glyphosate in its products. This body of information is generally referred to as the *Monsanto Papers,* and it would not have been available without the benefit of discovery in civil justice litigation.[9]

While the EPA's position for the past several decades has been that there is no cancer risk from glyphosate, that has not always been the case: In the 1980s, the agency had originally classified the chemical as a possible carcinogen.[10] The story of how and when this classification changed prominently features Monsanto's efforts to push a specious narrative to regulators, the public,

[i] A bellwether case is a test case, or small group of test cases, that are representative of a large group of cases (for instance within the context of MDL), which are tried first and are instructive to parties to the litigation as to the likely result of the main body of cases.

the courts, and the scientific community about their products' safety and to engage in regulatory capture.[11] [12] [ii] [13] [14]

For example, Monsanto flooded scientific journals and the lay press with studies finding glyphosate noncarcinogenic — sometimes by authors who failed to disclose a relationship to Monsanto, and other times outright ghostwritten by employees — and attacking studies that did find such a link.[15] The company also engaged in a public campaign to discredit the IARC specifically and heavily funded scientific lobbying groups to advance its claims before regulators.[16] [17]

In 1988, the company urged EPA to ignore a study demonstrating cancer risk and to cancel requirements for further testing; the EPA complied and re-classified the chemical from "class C" (carcinogenic) to "class D" (not classifiable).[18] In 1991, EPA downgraded the classification further, to class E — evidence of non-carcinogenicity.[19] Perniciously, these very findings were then used by Monsanto to claim they had obeyed federal law and should not be subject to liability.[20]

When EPA re-examined glyphosate in 2020 as it was legally required to do,[iii] the agency reaffirmed its determination of glyphosate's safety. When this was challenged in court, the Ninth Circuit Court of Appeals vacated the human health assessment[iv] finding that the determination of non-carcinogenicity "was not supported by substantial evidence" and remanded the determination to the agency for further review. Nevertheless, the agency maintains its findings on the absence of risk to human health.[21] [22]

## The Lawsuits

Since the time of Mr. Johnson's initial suit, thousands of cases have been launched in both state and federal courts against Monsanto and their new parent company Bayer. As of this time, damages assessed by juries, as well as in settlement agreements, are in the tens of billions in both compensatory and punitive damages. There are currently approximately 54,000 cases pending (roughly 50,000 in state courts and 4,000 in federal courts).[23] Settlement agreements have been reached in over 100,000 cases for a value of approximately $11 billion.[24]

[ii] In 2017, the chair of the EPA's Cancer Assessment Review Committee, Jess Rowland, was investigated by the EPA's inspector general for potential collusion with Monsanto in the review of glyphosate. An email exchange between Monsanto and Rowland reveals the closeness between the company and regulators, with Rowland writing "[i]f I can kill this [assessment] I should get a medal."

[iii] Notably, although the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires a 15-year review, EPA had not conducted a review since 1993

[iv] By vacating the human health assessment, the 9th Circuit has obviated EPA's findings that glyphosate does not have cancerous impacts on human health. In doing so, the court highlighted that EPA's scientific review was substantially lacking, and as such, until such time as EPA can conduct a full study on the health impacts, its findings do not have weight of law.

Bayer has argued that federal law preempts state-law based failure to warn claims that have been at the heart of much litigation related to Roundup. Preemption is a legal mechanism wherein federal law, per the Supremacy Clause of the United States Constitution, supersedes — or preempts — conflicting state law.[25] Preemption, applied overbroadly, has the effect of limiting legal accountability through the civil courts as it can create a "ceiling" of protections and rob the states of their so-called policing powers to protect the public's safety, health, and welfare. This is particularly true in instances where federal law does not provide a meaningful means of redress for injured individuals and communities.[26] In this instance, Monsanto has argued that, as they are compliant with EPA labeling designations under FIFRA, this federal law preempts any state-law based claims. This highlights a special concern where overly broad applications of preemption allow industry to push federal regulators to set a low "ceiling" for protection — despite other evidence of harm to the public — to close the courthouse doors to injured parties and thwart civil justice.

Bayer previously filed for certiorari to the U.S. Supreme Court to take up this question in 2021 and 2022,[27] [28] but neither time was the Court receptive. However, this may change. On August 15, 2024, the Third Circuit held that FIFRA expressly preempts such claims,[29] which means there is now a circuit split. Bayer has filed a petition with the Supreme Court to block state lawsuits.[30]

**Community Protections**

The litigation in the Roundup cases highlights the importance of the civil courts as a critical means for redressing community-wide harms by companies who fail to disclose the dangers of their products. In these instances, there were substantial campaigns by Monsanto (and subsequently Bayer) to dilute and attack scientific evidence demonstrating the harms of glyphosate, and their significant closeness to regulators has had a demonstrable impact on how their products were classified and not regulated.

Critically, discovery during litigation resulted in a trove of documents (the Monsanto Papers), which shed light on the company's long history of engaging in regulatory capture and undermining scientific analysis in the pursuit of profit. Although it is unfortunate that the increased availability of this negative information has not led to meaningful legislative or regulatory reform, the Papers have been extremely valuable to present to juries. Despite regulatory permissiveness, the courts have provided a venue for thousands of people harmed by this product to seek compensatory and punitive damages.

Further, although there has not been any action at the national level to ban the use of Roundup (indeed, regulators seem to be "doubling down" on inaction), a number of localities — including Miami, FL; Austin, TX; Portland, OR; Montgomery County, MD; and Charlottesville, VA — have taken steps to limit the use of Roundup (or pesticides generally) to protect community members from exposure.[31] [32] Coupled with this local response, the amount of data related to the harms of glyphosate disclosed through discovery has the effect of increasing

public awareness of the risks it presents. While this is, perhaps, not as impactful as achieving on-package warnings to the public, increased knowledge does increase community protection by forewarning consumers of the dangers of the product.

Given the success of civil justice litigation, Monsanto/Bayer has begun to lobby extensively at the state and federal levels for legislation to require application of preemption laws to such cases (as well as "tort reform" more broadly) to shield them from civil courts.[33] This is a primary prong of Bayer's "management" of liability.[34] Given the scientific evidence of the harms of their products, and the depth of regulatory capture detailed in discovery, it is critical that the public preserves free access to robust civil remedies to protect themselves from the company's harms.

The glyphosate cases also highlight the need for civil justice litigation for community protections when regulators either fail to act, or in this instance, are subject to substantial regulatory capture that undermines the accuracy and reliability of their decision making. The EPA study on the human health impacts of glyphosate, re-undertaken following the Ninth Circuit vacating the scientifically unsound findings of the agency in 2020, had been expected to be published in 2026 — ideally based on sound scientific analysis of the causal connection between the chemical and cancer. However, under the current administration, EPA has faced significant staffing cuts, including a potential reduction of 75 percent of staff from EPA's office of Research and Development (ORD) as part of a plan to reduce EPA staff by 65 percent.[35] ORD is the science wing of EPA and is responsible for conducting the research that drives health and risk determinations by the agency.

As such, it is unclear whether the regulator will have sufficient capacity to conduct the research necessary to promulgate regulations to protect communities (or truly, if the agency under the current administration is even inclined to do so). As such, it is increasingly critical for robust access to the civil courts to ensure such protection is available.

# 4. Utility-Caused Wildfires

## 4. Utility-Caused Wildfires: Holding Utility Companies Accountable

**Introduction**

In the last decade, numerous wildfires have devastated communities across California and other states. In 2023 alone, more than 7,000 fires burned across 500 square miles in California, killing four people.[1] The rate and intensity of wildfires in the state has been increasing since the 1980s, exacerbated by climate change in the form of warmer weather and drought — but also an increase in the frequency and intensity of tropical storms, including higher windspeeds and heavier rains, brought on by higher sea surface temperatures.[2] [3]

Not only are these conditions a major source of damage to above-ground power lines, which can discharge electricity and start fires,[4] high winds can rapidly cause localized fires to become wildfires, especially in areas suffering prolonged dry conditions. But while historic drought conditions and climate-induced storms have worsened the magnitude of wildfires, the fires themselves are overwhelmingly caused by human action — including transportation, campfires or arson, and particularly power lines, which are increasingly aging and not adequately maintained.[5] [6] [7]

Perhaps the most egregious example of this was the November 2018 Camp Fire, which started when transmission towers operated by Pacific Gas and Electric (PG&E) began to burn and melt into an area of dry brush near Camp Creek Road in Butte County, California.[8] [9] The resulting fire destroyed over 150,000 acres of land and more than 18,000 structures (almost razing the towns of Paradise and Concow entirely), forced the evacuation of over 52,000 people, and killed 85 residents.[10] [11]

Investigation revealed that PG&E was aware of the risk posed by its aging infrastructure, much of it installed in the 1950s with a life expectancy of 40 years.[12] The company had also bucked requirements put in place by the California Public Utilities Commission (CPUC) to establish and then maintain internal inspection and patrolling processes and records — doing so first in 1995, and again in 2005, in large part to reduce costs.[13]

California regulators were also apparently lax in ensuring that PG&E did what was legally required. While the agency had conducted audits on aspects of PG&E's infrastructure, they had not conducted an audit on the section of the lines responsible for the Camp Fire since 2012, even though that audit had revealed failures to inspect and patrol.[14] Investigations also revealed widespread failures by PG&E to maintain equipment, including the very piece — a "C-hook" — which was at least 97 years old at the time and whose failure ignited the fire.[15] PG&E pled guilty to 84 counts of manslaughter and was subject to a $3.5 million fine.[16] Other utility-caused wildfires in California have included the 2021 Dixie Fire and Brewer Fire, the 2020 Zogg Fire, and the 2019 Easy Fire and Kincade Fire, all resulting in hundreds of thousands of acres burned, homes destroyed, and deaths.[17] [18]

## The Lawsuits

In California, state, county, and individual civil justice litigation has proceeded against the utilities, insurers, and some other parties, depending on the specific fire. To date, PG&E has settled suits brought by the town of Paradise and Butte County for $522 million for damages caused by the Camp Fire,[19] as well as other settlements related to that fire, the 2015 Butte Fire, and the 2017 North Bay Fire. As a result, PG&E entered bankruptcy proceedings and set funding from the bankruptcy settlement aside in a fire victim trust. From that trust, $19.56 billion was awarded, and so far, $13.62 has been paid out.[20] PG&E also settled claims for the 2019 Kincade Fire and the 2021 Dixie Fire, paying impacted northern California counties $55 million to address costs of repair and firefighting from the fires. The company also committed to provide funding for wildfire safety training and for a direct claims program that would reimburse individuals in those counties who lost their homes in the blazes.[21]

**Community Protections**

Settlements have provided individuals with compensation for loss of life and loss of property and given communities critical funding to rebuild public infrastructure and offset costs such as firefighting borne by the community in response to these utility-started fires.

The California fires were predominantly caused by aging utility infrastructure, especially transmission lines, which utility companies knew to be dangerously degraded, often out-of-code, and in areas at increasingly higher risk for wildfires because of climate change. Although California regulators were initially not sufficiently vigilant, the lawsuits seem to have spurred additional actions. CPUC, for instance, recently issued a spate of fines against PG&E, including a $45 million dollar sanction against the utility related to a 2021 fire, requiring them to invest in line-safety upgrades.[22] Moreover, scrutiny has expanded to include the regulatory agencies themselves, as information on utility safety has historically been viewed as confidential and difficult or impossible for the public to access. CPUC has faced growing calls to increase its transparency,[23] and although progress has been slow, commissioners appear to be at least concerned about larger issues of regulatory transparency.[24]

Finally, the financial pressure of civil justice litigation (including the nearly $20 billion settlement which pushed PG&E into bankruptcy) has driven utility companies to seriously consider how best to harden their infrastructure against wildfire risk, with utilities advocating for burying several of its lines in high-risk areas.

California is far from the only region of the country where communities suffer these harms. For example, in August 2023, broken power lines that were accidentally re-energized sparked a wildfire in the city of Lahaina on the Hawaiian island of Maui, which led to the death of 102 residents and first responders and resulted in an approximately $4 billion settlement to members of the impacted community.[25] Similarly, multiple juries have found Oregon Utility

Pacificorp liable for negligence and gross negligence as result of the contribution of their transmission lines to the massive 2020 Labor Day wildfires in Oregon.[26]

As extreme weather events driven by climate change collide with an aging U.S. transmission grid, the need for access to civil justice litigation to ensure community protections and increase public pressure on regulators and utilities to invest in improving the safety of the grid will be increasingly critical.

# 5. E-Cigarettes and Vapes

## 5. E-Cigarettes and Vapes: Regulatory Issues and Damages as a Means of Repair and Resiliency

**Introduction**

Cigarette smoking has been on the decline in the United States since the 1960s, with usage rates among adults dropping by 73 percent from 1965 to 2022.[1] This has been attributed to multiple factors, from studies linking smoking to lung cancer to requirements for warning labels and other developments that increased public awareness of health risks.[2] This success was achieved in the face of significant industry-driven resistance in the form of lobbying, as well as industry success in defending against personal injury lawsuits. This success continued until coordinated litigation brought by a coalition of state attorneys general imposed broad liability on the industry through the 1998 Tobacco Master Settlement Agreement.[3]

New regulations and awareness campaigns in the 2000s and 2010s continued to drive down rates of cigarette smoking in both adult and youth populations.[4] But as cigarette sales waned, monthly sales of e-cigarettes soared as tobacco companies sought new markets, especially among youth.[i] [5] [6] Youth targeting of e-cigarettes and vapes has included a major advertising push, products and flavors designed to be attractive to younger audiences, and promotion of these products as less harmful.[7] [8] As sales of e-cigarettes have increased, so has the share of youth who use the products — from 1.5 percent of high schoolers in 2011 to 20.8 percent in 2018 [9]— with the majority of these favoring flavored e-cigarettes and disposable and cartridge-based devices.[10] [11]

Although marketed as a safer alternative to smoking, there is a growing body of data indicating that e-cigarettes carry substantial health hazards, including cardiorespiratory risks, impact on in-utero and newborn development, and risks from the "vapors" included as a delivery mechanism for nicotine in e-cigarettes. Further, there is indication that e-cigarette use, which is addictive, can lead to the uptake of the usage of traditional tobacco products.[12]

Regulators and lawmakers have attempted to respond to these trends. FDA has sought to regulate flavored devices, approving some applications for tobacco or menthol flavored devices but not the youth-popular fruit flavors.[13] [14] [15] Meanwhile, states such as New Jersey have also enacted bans on flavored e-cigarettes.[16]

[i] Cigarette sales declined 27 percent from 2016 to 2021 while sales of e-cigarettes increased by 525.33 percent in this period.

## The Lawsuits

Cases against vape manufacturers have been filed by individuals in class actions across states and localities. For example, a class action case brought against JUUL and Altria[ii] based on *economic* injury to class members — arguing they would not have paid as much for the products had they been properly informed about the addiction and health risks — was settled for about $300 million.[17] [18] [19] Likewise, litigation against JUUL Labs involving more than 5,000 individuals, school districts, and localities was consolidated in the Northern District of California and has largely been settled for a total of $1.7 billion.[20]

In addition, a coalition of state attorneys general sued JUUL in 2019 for deceptive practices, misrepresentation about product safety, and underage sales (some states also brought public nuisance claims, harkening back to the original tobacco cases). For state and local suits, as was the case with the 1998 tobacco master settlement, the use of private civil justice attorneys, retained on contingency, has had the effect of reducing upfront public expenditures and providing expertise to bolster the strength of the plaintiffs' cases.

Most state actions against the company were consolidated into two multistate settlements, encompassing 38 states, Puerto Rico, and Washington, DC, and settled for a combined total of $900.5 million, with money to be paid out over the next six to 10 years.[21] An additional eight states reached independent settlements with JUUL, and other states and territories are still bringing cases against the company.[22] In Minnesota, the JUUL litigation settled for $60.5 million just before closing arguments, but not before the jury heard evidence gleaned in discovery on JUUL's targeted marketing to youths, including internal messaging from marketing directors in which they joked about advertising flavors directly to underage users.[23]

Beyond the monetary damages collected by the states, the settlements prohibit JUUL from marketing directly at youth audiences, using promotional materials featuring individuals under the age of 35, cartoon imagery, and/or paid social media influencers; selling flavored products without FDA approval; and failing to disclose specific nicotine content in its products.[24] Further, all marketing and promotional materials turned over in discovery must be made publicly available.[25]

**Community Protection**

Although there is a regulatory framework for flavored e-cigarettes, enforcement is incomplete. Despite the lack of FDA approval for any flavor beyond tobacco or menthol, these products remain available for sale.[26] The civil litigation brought against JUUL, by comparison, resulted in in a settlement that bars the company from selling flavored products without FDA approval.[27]

[ii] Although far from the only e-cigarette manufacturer, suits against JUUL have been prioritized in this case study as JUUL has historically had a majority market share (at times upwards of 75%) of e-cigarette sales, and reflect, to date the largest legal actions taken against the industry.

Discovery in the Juul cases also resulted in revealing data on the industry's marketing and advertising practices aimed at youth users, which was made available as result of the settlement. In this way, the lawsuits increased public awareness and education related to industry practices and harms from the products.

More than $2 billion in damages have been recovered from suits to date, much of it to state and local governments or school districts. How this funding is spent varies from state to state based on the terms of the settlement and state laws. Virginia's agreement, for instance, designates funds to various cessation programs, research, and even the enforcement of regulations against companies that continue to target residents under the age of 21 "to the *maximum extent practicable.*"[28] By contrast, North Dakota's simply states that the funds can be used "for any lawful purpose."[29] Comparatively, Minnesota legislation places settlement monies into a dedicated account, restricting settlement monies to cessation, prevention, public information, and education as directed by the Minnesota Commissioner of Health, and subject to prioritization of prevention of youth use and racial and health equity.[iii] [30] [31]

[iii] The law also requires evidence-based strategies, and conduct community engagement to ensure funding is in line with communities' priorities.

# 6. Train Derailment

## 6. Train Derailment: Regulatory issues and Damages as a Means of Repair and Resiliency

**Introduction**

On February 3, 2023, a Norfolk Southern freight train derailed due to mechanical failure near the community of East Palestine, Ohio. Of its 149 cars, 50 were involved in the derailment, with 38 leaving the tracks altogether.[1] Surveillance cameras along the route recorded that the train's mechanical issues began at least an hour prior to the wreck, with sparks and fires igniting in the undercarriage of the train cars as it passed through neighboring communities.[2] The train also passed over numerous track-mounted infrared cameras — known as hot bearing detectors (HBDs) — which signaled alerts regarding the sparking by the train's bearings, but these initial signs of trouble went unnoticed by the train's crew and by the company itself.

Of the 38 derailed cars, 11 were tanker cars containing hazardous materials, including known carcinogens like vinyl chlorides and benzene.[3] Five of the cars were DOT-111, while six were the significantly more resilient DOT-105 model. Recognizing safety issues in DOT-111s, the 2015 Federal FAST Act requires their phase out and replacement with safer models by 2029.[4]

Shortly after derailment, several train cars caught fire, including the DOT-111s, which led to the more resilient DOT-105s catching fire. In their report, the National Transportation Safety Board (NTSB) found that had the DOT-105s not caught fire, they would have remained intact. The agency also found that if the DOT-111 cars were not carrying hazardous materials, as recommended by the FAST Act, the likelihood of fire and hazardous discharge would have been reduced. The report noted, however, that compliance with the FAST Act prior to the 2029 deadline is voluntary and unlikely to happen "because of economic and business disincentives."[5]

First responders arrived on scene at 9 p.m. local time and attempted to control the blaze, but water alone was unable to suppress the fire. As fires continued, it took Norfolk Southern approximately an hour to provide details of the hazardous materials to first responders.[6] [7] At some point, on-scene representatives of Norfolk began to express concerns that the vinyl chloride would potentially cause an explosion within the five cars containing it, although representatives from Oxy Vinyls, the manufacturer and shipper of the vinyl chloride, strongly disagreed with this assessment. [8]

Three days later, on February 6, after strong and unwarranted pressure from Norfolk, the incident command team met and decided to vent and burn the cars to avoid explosion, a move considered an option of last resort.

Norfolk compromised the integrity of the decision by creating unwarranted urgency and not communicating expert opinions and information completely and accurately to the incident commander."[9] The unnecessary vent and burn, which released chemicals that were previously

contained in the cars, resulted in significant airborne and waterborne discharge of the toxic chemicals into the surrounding community.

Beyond the one million pounds of vinyl chloride that were burned and released into the atmosphere, approximately 100,000 gallons of hazardous materials spilled in the derailment and entered the local watershed.[10] The result of the derailment included evacuation orders for residents, long-term displacement, and exposure to airborne toxic chemicals. Tests performed by railroad, EPA, and independent researchers conflicted concerning the extent of the harm from exposure to waterborne toxic chemicals and significant ongoing pollution at the crash site. Locals also reported suffering ailments, including bleeding, nausea, bronchitis, and confusion because of exposure to chemicals released during the crash and subsequent fire.[11]

## The Lawsuit

The State of Ohio, DOJ (on behalf of EPA), and residents of the community sued Norfolk Southern in March 2023 for their role in the derailment, alleging violations of the Clean Water Act and CERCLA (colloquially known as "Superfund").[12] It specifically *did not* include charges of violations of the Clean Air Act for the vent and burn, or violations of federal railroad safety laws.[13] The federal suit was settled prior to the release of the final NTSB report finding Norfolk Southern responsible for not acting reasonably.

A class action civil justice lawsuit was brought by residents of East Palestine for personal injury and economic loss/hardship against Norfolk Southern and other relevant parties.[14] The class includes any resident, property owner, or business located within 20 miles of the derailment site.[15] The class action alleged 17 claims against defendants, including (among others) gross negligence, statutory, private, and public nuisance, trespass, state-law statutory claims, medical monitoring, and spoilage.[1617] The suit also highlights violations of the federal safety regulations, and the harms caused by Norfolk Southern and its contractors in advocating for the vent and burn.[i] [18]

### Community Protections

Both the federal and the class action suits have settled. The recovery achieved in the federal settlement is limited to the scope of the reasonably narrow causes of action brought under CERCLA and the Clean Water Act, and the Department of Justice has acknowledged that it "does not and cannot provide everything this community wants and deserves."[19] That said, the federal settlement does have a number of provisions that will benefit community health — for East Palestine, surrounding communities, and, through improved safety regulations, the 22 states (and Washington, DC) that lie within Norfolk Southern's operational footprint.

[i] Norfolk Southern attempted to dismiss the suit on grounds of pre-emption but could only dismiss one count (medical monitoring).

Norfolk Southern must take responsibility for the environmental impact of the derailment, particularly as it relates to groundwater: cleaning all spilled chemicals and paying back the EPA for taxpayer monies spent thus far ($235 million from the settlement, with additional expenses approaching $900 million). The company will also spend $15 million to engage in ground and surface water monitoring for 10 years (including private wells), remediating where necessary,[20] as well as $6 million to improve impacted streams and wetlands.[21] It will pay an additional $25 million to establish a community health fund for medical monitoring, first response budgets, mental health services, and public education, among other services.[22] Finally, Norfolk Southern must pay a $15 million civil penalty for violating the Clean Water Act and $175,000 for natural resource damages.[23]

Norfolk Southern is also required to adopt many of the NTSB report's recommendations — which are viewed as best practice but not required by regulators. This includes installing HBDs every 15 miles on its tracks,[24] creating new guidelines in conjunction with EPA for emergency response, including vent-and-burn decision processes,[25] and phase out use of DOT-111s in an expedited manner, rather than by 2029 as required by the FAST Act.[26]

The class action suit, meanwhile, settled for $600 million, representing more than 450,000 people, with fewer than one percent of eligible class members electing to opt out of the settlement.[27] The settlement provides compensation largely based on proximity to the derailment site, with personal injury cases largely being contained to a 10-mile radius.[28] However, the individual settlement value, especially for those farther from the derailment site, is fairly low and not commensurate with medical, relocation, and other losses suffered (additionally, the company previously issued some funds for relocation and is allowed to use these to offset settlement payments).[29]

The long-term impact of toxic exposure, particularly from the vent-and-burn, will take years to evaluate. Unfortunately, analysis and data on these points have not been made public.[30] Five class members have filed an appeal of the settlement certification based on the fundamental unfairness in the settlement, as well as the lack of these disclosures, to improve public knowledge and drive future community protections.[31]

# 7. Lead Paint


DANGER
LEAD HAZARD
WORK AREA KEEP OUT
NO SMOKING, EATING, OR DRINKING

## 7. Lead Paint: Open Access to Remedies and Damages as a Means of Repair and Resiliency

**Introduction**

In 2000, several counties and cities in California sued defendants Sherwin-Williams, ConAgra Grocery Products Co., and NL Industries (formerly known as National Lead Industries) based on a theory of public nuisance tied to the manufacture and sale of lead-based paint for use in residential homes prior to the 1978 federal ban on the practice.[1]

Lead-based paint in residential buildings represents a continuing health risk to residents, as chipping and deteriorating paint can result in high levels of exposure, particularly in the form of lead dust in homes.[2] This is of primary concern for lower-income families, who are more likely to live in older housing stock, and for whom financial concerns preclude effective removal and remediation.[3] Lead exposure, although detrimental to the health of everyone, is particularly dangerous to children, where it can lead to permanent intellectual disabilities and behavioral disorders, representing a permanent cost to both families and communities for ongoing care.[4]

The dangers of lead exposure have been known since the 19th century, but despite this, defendants (and their corporate precursors) knowingly manufactured and promoted use of lead-based paint in residential homes well into the 20th century while publicly dismissing or marginalizing the hazards.[5]

Although a federal ban on the use of lead-based paint did not occur until 1978, numerous public health departments began to either ban or require a phase-out of the products (including marketing) within their jurisdictions, starting in the 1950s.[6] Subsequently, the use of lead-based paint fell out of common use.[7] An estimated 24 percent of homes built between 1960 and 1978 have some level of lead-based paint in them,[8] and the prevalence of lead-based paint in homes built prior to 1950 is significantly higher.[9]

### The Lawsuits

The County of Santa Clara, California, joined by numerous other California counties and cities, sued lead manufacturers in 2000, based on a variety of legal theories including negligence, strict liability, California's Unfair Competition Law, and public nuisance.[10] Following a lengthy procedural history, the case was refiled in 2011 with a focus on public nuisance.[11]

In 2014, plaintiffs won a bench trial against the defendants and were awarded damages of $1.15 billion to be used for lead remediation in residential homes built in the plaintiff communities before 1978. The court found the defendants had actual knowledge of lead-based paint's public health hazards yet still promoted and distributed it; this conduct caused the nuisance to occur; and that the nuisance was abatable.[12] This award was reduced by an appellate decision that set

limits on eligibility.[i] [13] Following this ruling, the parties agreed to settle in 2019 for $305 million, and the settlement fund is not subject to the appellate restrictions.[14] This money will go largely to remediation efforts to reduce risk of further exposure.[15] [16]

**Community Protections**

Funds from this settlement have been split amongst the plaintiffs, and individual counties have created their own mechanisms for disbursement, with the $305 million being apportioned to plaintiff cities and counties based on the number of homes impacted by lead-based paint within their jurisdictions.[17]

Santa Clara County, the original lead plaintiff, received $16.8 million, which it has set aside for its newly created lead-safe homes program within the county's Department of Environmental Health.[18] The program will provide low- or no-cost lead inspections, abatement, and no-cost temporary housing assistance, with a focus on low-income households with pregnant women, children, or home-based daycares, and homes in areas with demonstrated high levels of lead-based paint contamination.[19] Los Angeles County received $134 million to provide free testing and remediation for homeowners, property owners, and tenants, as well as educational materials related to lead-based paint and its health impacts.

This case is representative of nearly 20 years of continued litigation to hold manufacturers accountable for harmful products sold to the community at large and to secure damages that allow for testing and abatement to protect community residents from toxic lead exposure. It represents a major undertaking, not only by county and city attorneys, but also by a number of private civil justice law firms litigating on behalf of, and under the supervision of, county and city attorneys.[20]

In its initial lawsuit, the County of Santa Clara retained private counsel, providing $150,000 to cover initial costs, with all other costs accrued by private counsel working on a contingency basis (for 17 percent of net recovery under a successful suit).[21] This arrangement allowed local government agencies to substantially reduce the costs to their department while retaining control of the ultimate decision-making. Notably, this arrangement was challenged by defendants, citing a prior California Supreme Court decision barring certain contingency agreements,[22] but the contingency arrangement in this case was upheld by the court in 2010, affirming the ability of private civil justice lawyers to litigate for the good of communities.[23]

[i] Restrictions included limitations on the age of the housing stock eligible to be considered in the lawsuit and as such buildings that could benefit from the settlement funds.

# Conclusion

## Conclusion

As highlighted throughout these seven case studies, civil litigation is a crucial tool for redressing harms to communities and creating frameworks to mitigate against, or prevent, future harm by funding ongoing interventions and consent agreements to compel action, subject to court review. Most directly, and present in each of the case studies, this protection comes through the assignment of damages, both compensatory and punitive, at trial, as well as through settlement agreements that hold corporations and others financially responsible for their harmful actions.

Notably, through civil justice litigation brought by states and localities on behalf of the communities they represent, monies recouped can be used to repair impaired public health and safety systems, delineate funding for environmental restoration to reduce toxic exposures, and bolster public health and safety programs to alleviate future causes of harms. This is particularly the case in instances of addiction or long-term exposures, including harm reduction, drug aversion programs, or long-term ecological and medical monitoring. Pursuing robust civil justice litigation, and recoveries from the corporations that caused the harm, has the dual benefit of generating a set of funds not only to remediate the harm, but to prevent the injustice of requiring harm remediation to be borne by the aggrieved community through taxpayer funded initiatives.

Communities have learned how to settle civil justice lawsuits since the 1998 tobacco master settlement. Although the efficacy of application of pooled settlement monies varies across the case studies, or from plaintiff to plaintiff within a given case, there has been a positive trend in utilization of these funds for community restoration and empowerment. The best examples exist where the monies are dedicated to restricted funds for use of delineated health and safety purposes — reflective of outreach and engagement with affected communities to identify what is needed to restore and protect the community.

Continuing from the success of the tobacco settlements of the 1990s, states and localities have made use of private civil justice counsel to support community-improving litigation. Local counsel, working on a contingency basis, can significantly offset upfront costs for state and local governments by bringing a civil action, with the firm's recovery tied to success either at trial or through settlement. Especially in the context of long-term litigation, this provides flexibility to state and local agencies and provides them with specialist expertise to assist in the success of the suit while leaving major case decisions within the hands of public agents.

Although damages recovery is a critical facet of the value of robust civil justice litigation, the *process* of litigation includes a key community protection — namely the discovery process. As has been highlighted in almost every case study presented in this report, communities have been able to bring to light "hidden" data related to both the nature of the harm itself, as well as the conduct of the corporation that is at once causing the harm and hiding it (often in violation of laws that compel disclosure to regulators).

The process of discovery provides three critical benefits to communities: first, that latent harms are inherently difficult, if not impossible, for consumers and communities to make educated decisions about, leading communities to unwittingly expose themselves to dangerous products, drugs, and services; second, that discovery allows for scrutiny by experts to draw a causal connection between a given exposure and the resulting injury suffered by community members and establish the necessary nexus of causation to prevail in a civil justice suit; and third, that discovery and establishment of causation can foster public education to avoid the harmful product and creates pressure on regulators to take steps to regulate conduct and establish safety standards to prevent future harms to the community through the creation of new, or at least, more rigorously enforced legal frameworks for community protection.

This question of the intersection between the protections provided by civil litigation and regulation is a key one and speaks to the need for robust protection through access to the courthouse, both now and in the future.

Regulation can, and will, fail to protect communities from harm. The reasons for this can vary. In some instances, the harm has been a historically latent one and largely brought to light through discovery in the civil justice litigation process, rather than relying on industry self-reporting. In other instances, industry pressure, through lobbying and industry-sponsored research that is designed to favor those funding it, can result in regulators simply failing to address the issue, or worse, provide sign-off and attendant legal cover for dangerous products and practices. Finally, regulators may simply lack legislative authority to enact sufficiently strong regulations to protect a community or lack sufficient funding and staffing to effectively monitor and enforce regulatory protections.

In these instances, civil justice litigation is crucial to ensure that communities have a means of redress. In addition to the value of information and analysis that comes out of the process, civil justice litigation can allow for scientific and community standards to be used to assess causation and hold wrongdoers accountable despite flaccid regulatory protections. Negotiated settlements also can include requirements for compelled action to remediate or alleviate sources of harm, often much faster, and with the backing of a court order, than regulators who may lack staffing or a mandate to do so. Examples include requiring Norfolk Southern to adopt both "best practices" in certain of its railroading procedures, as well as adopting an accelerated implementation of the FAST Act, or holding marketers of flavored e-cigarettes accountable under court order.

The value of civil justice litigation, as a guardian of community protections alongside regulation, is likely to be more important than ever in the coming years. The federal government is undergoing a sea change in its approach to regulation, and widespread staff reductions, industry-friendly agency appointments, and funding cuts will significantly hamper the protections available from regulations. This includes a lack of monitoring and enforcement, a reduction in the scope of protections, and an increased risk of industry-friendly determinations about the safety of given products, drugs, and services. This, in turn, could set a

low threshold for protections and potentially preempt state-based litigation aimed at holding wrongdoers responsible.

Now more than ever, robust access to civil justice litigation is needed to ensure that communities are protected from harm.

# Endnotes

### INTRODUCTION

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**2. PFAS: ACCESS TO REMEDIES AND THE POWER OF DISCOVERY AND PUBLICLY VISIBLE TRIALS AS A MEANS OF REPAIR AND RESILIENCY**

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### 3. PESTICIDES: REGULATORY ISSUES, THE POWER OF DISCOVERY AND PUBLICLY VISIBLE TRIALS, AND "VOLUNTARY" COMPLIANCE

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#### 4. Utility-Caused Wildfires: Holding Utility Companies Accountable

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