



U.S. CHAMBER
Institute for Legal Reform



Mitigating Municipality Litigation

Scope and Solutions

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U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

This white paper examines a growing phenomenon in public litigation: high-profile suits brought by cities and counties seeking monetary recoveries for widespread harms allegedly traceable to claimed corporate misconduct.

As the tobacco litigation of the 1990s attests, states have long been active as plaintiffs in such suits. Cities and counties have occasionally followed that lead, bringing suits against gun manufacturers in the early 2000s and subprime mortgage lenders a decade later, albeit with mixed success. Only recently, however, have municipalities emerged at the forefront of public litigation, claiming damages for themselves and their residents from wide-ranging harms that they attribute to a variety of causes, including opioid abuse, climate change, and data privacy breaches.

This recent surge in litigation by cities and counties warrants close scrutiny. Municipal suits have a number of significant consequences beyond the outcomes in individual cases. Not least is the threat of upending the balance of state and local power and of usurping the states' role in representing their residents' interests in litigation. As localities continue to test the boundaries of their litigation authority, this paper provides a timely and much-needed primer for corporate and state leaders seeking to understand and evaluate potential responses.

These issues are examined below in two parts: the first describes the rise of municipal litigation, its causes, and its effects; and the second identifies and analyzes the ways in which states could reduce the incidence of municipal litigation.

Part I, prepared by former Washington State Attorney General Rob McKenna, describes the municipal litigation trend, with reference to notable cases from past and present. Joining Mr. McKenna in Part I of this paper, and also contributing to Part II, is former Maine Attorney General Drew Ketterer. Beyond describing the types of claims and harms at issue, Part I analyzes the factors that may figure in municipalities' decisions to bring suit, other than the putative purpose of redressing an injury. For instance, local government leaders may eye the prospect of significant recoveries as a means of making up for budget shortfalls. They may aim to fill a perceived gap in state or federal enforcement. And they may seek to enhance their own public profiles. By contrast, there appear to be few countervailing pressures discouraging municipalities from suing. Local leaders may see little risk or cost in filing suit, since the private law firms that typically propose

the lawsuits and handle them as outside counsel tend to be funded through contingency fees. Perceiving significant upside potential and little downside, municipal leaders may merely be responding to structural incentives when they agree to be plaintiffs.

However, as Part I also discusses, the proliferation of individual municipal suits—opioid lawsuits now number in the thousands—threatens a variety of negative consequences. Municipal litigation limits the potential for global settlements, depriving parties of finality and predictability. It undermines the state’s power, by displacing the role of the legislature in regulating activities, as well as the role of the attorney general in determining and representing the interests of the state’s residents in litigation. And as commentators and courts have noted, although litigation can yield sizeable recoveries for municipal entities, it reduces the funds available to compensate injured individuals. Municipalities’ use of contingency fee arrangements to pay for outside counsel only exacerbates these negative consequences.

In light of those consequences, it is no wonder that states may be concerned about the huge increase in municipal litigation. Part II, prepared by former West Virginia Solicitor General Elbert Lin, responds to that concern by analyzing the ways in which states might use state law to reverse the growth in municipal litigation. Part II analyzes four different approaches to eliminating or reducing municipal litigation, each corresponding to the four essential elements that a lawsuit requires to be viable: a plaintiff able and willing to bring suit; a defendant capable of being sued; a

cause of action that can be brought; and an available forum.

First, states might modify state law to preclude or discourage cities and counties from serving as plaintiffs in particular kinds of lawsuits, such as nuisance suits involving certain subjects. Because municipalities are “creatures of the state,” generally they may exercise only the powers conferred on them by state law. Accordingly, states could eliminate municipalities’ power to bring suit or assert specific causes of action, subject to the limitations of a particular state’s constitutional or home rule provisions. Relatedly, states could impose additional hurdles on would-be municipal plaintiffs that lessen potential incentives for bringing suit.

Second, states could reduce municipal suits by limiting the range of defendants who may be targeted in litigation. Many states have already enacted statutes that protect particular industries from suit (whether brought by a municipality or any plaintiff). States could also immunize particular defendants from municipal liability by settling, on a state-wide basis, the claims raised or likely to be raised by localities.

Third, states could lower the incidence of municipal litigation by modifying the causes of action under which municipalities might bring suit. For example, states might narrow the circumstances susceptible to nuisance claims, the underlying theory of liability for many municipal suits. They might do so by expressly excluding some activities from the definition of nuisance, or reducing the time period in which nuisance claims may be brought. These traditional tort reform measures are likely familiar to many state legislators.

Fourth, states could amend the constitutional or statutory provisions that make state courts an available forum. By limiting those courts' jurisdiction to hear certain kinds of claims or order certain forms of relief, states could effectively deprive municipal plaintiffs of a forum in which to press their claims. Multiple states have considered such jurisdiction stripping measures in a variety of contexts, although examples are more common at the federal level.

Where possible, Part II illustrates these approaches with real-life examples drawn from state and federal law. While the approaches differ in their scope and novelty, they demonstrate that, as a general matter, states have a wide set of

options available for reducing municipal litigation. Whether a specific approach could be implemented or would succeed in a particular state, however, depends on the state's individual circumstances.

As the analysis in both Parts I and II suggests, the emergence of cities and counties as plaintiffs raises important questions for a variety of stakeholders. This white paper seeks to answer many of those questions. In describing the consequences of municipal litigation and identifying ways to reduce it, this paper provides guidance to help litigants and policymakers evaluate their options for responding as the litigation landscape shifts beneath them.

PART I: MUNICIPALITY LITIGATION LANDSCAPE

Municipal Affirmative Litigation: History & Incentives

Both historically and legally, cities, counties, and other local governments (which we refer to collectively and interchangeably in this paper as “municipalities”) have been considered creatures of the states in which they are created.

City charters, for example, are granted by states and confer levels of authority that vary widely depending on the charter’s particular language.¹ In most instances, a municipality’s power to conduct its own affairs is authorized and circumscribed by the state legislature. As a consequence, municipal attorneys traditionally have acted only as legal advisors and defenders in suits brought against their government.²

Beginning in the 1990s with suits against the tobacco industry, municipal attorneys began to explore filing claims as plaintiffs by joining *parens patriae* suits brought by

state attorneys general (AGs).³ These early municipal lawsuits—also called affirmative litigation and public tort litigation—asserted that tobacco companies had caused the municipal plaintiffs to incur the costs of care for citizens whose health was harmed by cigarette smoke.⁴ These suits, and the settlement that resulted from them, ushered in a new era of municipalities as active plaintiffs in a wide variety of public tort cases including lawsuits against the manufacturers of lead paint and handguns, as well as financial services companies. More recently, municipal plaintiffs have

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“ The incentives that drive municipal litigation are principally economic. ”

shifted focus to claims against pharmaceutical companies that sell opioids, companies whose customer and user data have been breached, and companies whose products or services are alleged by the municipalities to have contributed to climate change.⁵

Incentives for Localities

To understand the durability and explosive growth of municipal lawsuits against companies and industries, it is important to explore the factors that make them attractive vehicles for municipal attorneys seeking to address perceived public wrongs. The incentives that drive municipal litigation are principally economic. This section examines such incentives.

HISTORICAL HIGH RECOVERIES

Municipal affirmative litigation has entered a new phase. Massive numbers of suits are being filed that target industries previously absent from this type of litigation. This new era is informed by the first wave of major municipal litigation which began in the 1990s, as some municipalities joined state AGs who were suing cigarette makers. In May 1994, Mississippi Attorney General Mike Moore hired a plaintiffs' firm, on a contingency fee basis, to file suit against several major cigarette manufacturers and related entities for Medicaid expenses incurred by his state as a result of smoking-

related illnesses.⁶ Over 40 other state AGs eventually followed Mississippi's example by commencing litigation.⁷ In addition to this group of well-funded state AGs, the cities of New York, San Francisco, and Los Angeles, as well as Cook County, Illinois and Erie County, New York, joined the suits brought by the AG of their respective states.⁸ By 1997, the costs of litigating these suits—combined with the effects of negative publicity, whistleblower revelations, and defendant Liggett Corporation's disclosure of documents under the terms of their own settlement agreement—caused the major tobacco companies to pursue settlement.⁹

The Master Settlement Agreement (MSA) between 46 states and the four largest cigarette makers was entered into in November 1998.¹⁰ Beginning in 1997, Mississippi, Florida, Texas and Minnesota had reached their own separate, individual settlements with those tobacco companies, resulting in a total of \$35 billion recovered by the four previously settling states. The \$206 billion recovered by the 46 states under the MSA, payable over 25 years, was

“ [T]he MSA's actual impact on Medicaid spending has produced savings of less than one-fortieth of the tobacco companies' direct payments to the states under the MSA. ”

at the time the largest settlement in any civil litigation ever, and included payments to anti-smoking educational campaigns and restrictions on cigarette marketing and advertising.¹¹ Although the states claimed they were seeking to recover past smoking-related Medicaid expenses and to reduce future Medicaid spending on smoking-related illnesses, the MSA's actual impact on Medicaid spending has produced savings of less than one-fortieth of the tobacco companies' direct payments to the states under the MSA.¹²

The amount and allocation of the settlement certainly incentivized further forays into municipal litigation by local government leaders and their attorneys. The bulk of the settlement was paid out in direct payments to the plaintiffs totaling \$12.7 billion between 1999 and 2003, and as annual payments for Medicaid damages starting at \$4.6 billion in 2000 and rising to \$9 billion in 2018 and beyond.¹³ Importantly, the tobacco companies were also required to pay \$51.5 million to the National Association of Attorneys General for enforcement of the settlement. Other than the four local governments named in their respective states' filed and court-approved version of the MSA, municipalities were largely left out of these historically large payments to the states.

Municipal attorneys could not fail to notice the impact a settlement of this nature could have on their local budgets and even on their own offices' finances, to the extent enforcement payments were a feature of future settlements modeled on the tobacco MSA. In the wake of the tobacco settlement, municipalities sought similar results against lead paint manufacturers, gun manufacturers, and issuers of subprime mortgages.¹⁴ These claims have met with mixed success: the gun claims, for example, were preempted by a subsequently-passed federal law,¹⁵ but a group of 10 California plaintiff cities won a \$1.15 billion award against lead paint companies.¹⁶ Nonetheless, the promise of another historically huge settlement has been an important catalyst for the continued growth of municipal litigation. Local governments are promised large recoveries by the plaintiffs' firms that approach them and there are now a huge number of such firms, compared to the relative handful that earned billions in tobacco litigation contingency fees.

BUDGETS

Large settlements like those produced in the tobacco litigation are alluring to municipalities facing budget constraints. Most cities and counties, for example, rely on state and federal funding for significant

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portions of their budgets.¹⁷ The ability to raise taxes varies widely from one local jurisdiction to another, as determined by the constitution of the state in which each sits and, in the case of cities, by the city's own founding charter. Nearly all cities and counties can levy or at least fund municipal programs with property tax revenues and a majority can also collect local sales taxes. However, less than 10 percent of cities nationally can collect local income or wage taxes.¹⁸

Cities with strong home rule, the principle of municipal self-governance, typically have a greater capacity for raising revenues than do those with weak home rule, also called Dillon's Rule. The Illinois Constitution, for example, grants broad authority to home rule cities in the state, including the power to levy taxes other than income taxes.¹⁹ By contrast, all California cities other than the state's 121 charter cities (which include Sacramento and Los Angeles) are subject to the doctrine of Dillon's Rule. Under that doctrine, a municipality has authority to act only when the action (such as levying a particular tax) is expressly authorized in state law, or is necessarily or fairly implied in other express grants of power to the municipality.²⁰

As a result of their limited ability to assess and collect tax revenue, municipalities are disproportionately affected by national economic downturns.²¹ Additionally, long-term or regional recessions that cause citizens to leave areas with higher costs of living negatively impact larger urban areas.²² Municipalities' finances suffered this type of seismic blow beginning in 2007 with the implosion of the U.S. real estate market and the ensuing financial crisis. The "Great Recession" cost the U.S. economy \$650 billion in GDP,²³ as employment rates fell by

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6.2 percent and household net worth shrank by \$11.5 trillion.²⁴ Municipalities' budgets were similarly devastated between 2007 and 2010, when National League of Cities members' general fund revenues decreased more than seven percent.²⁵

Recovery has been slow for cities and other local governments in part because property tax revenues lag the recovery of property values by 18 to 24 months and are a major source of municipal revenue.²⁶ Lower employment rates and decreased salaries for those still employed likewise contributed to decreased sales and income taxes.²⁷ General fund revenues reached their lowest point in 2013-2014, and had still not reached pre-recession levels as of 2017, the last year for which data are available.²⁸ Severe, persistent municipal budget constraints have coincided with the rise of municipal litigation against opioid manufacturers as local governments are promised large recoveries with no risk to municipal budgets by contingency fee trial lawyers.

CONTINGENCY FEE MODEL

The contingency fee model is a lawsuit payment arrangement in which attorneys agree to represent a plaintiff in exchange for a fixed percentage of the amount recovered in the verdict or settlement of the case. If a defense verdict occurs or no settlement is reached, the attorney is not paid. These arrangements developed historically as a means to facilitate access to courts by litigants for whom legal expenses paid on an hourly or retainer basis are unaffordable.²⁹

In the context of municipal litigation, contingency fee arrangements have taken on a somewhat different role as risk-shifting tools. Municipalities are able to engage in costly and time-consuming litigation without incurring costs that could strain already thin budgets, but can still recover a portion of the proceeds if the suit

is successful.³⁰ The suits are also hugely profitable to the private plaintiffs' firms involved. For instance, the tobacco MSA resulted in contingency fee payments to private plaintiffs' firms of over \$13 billion.³¹ California cities and counties in particular have a history of these arrangements dating back to their participation in the tobacco lawsuits.³²

Perhaps not coincidentally, those jurisdictions continue to be centers for much of the recent municipal litigation, including contingency fee lawsuits over data privacy and climate change. And the growth of these types of claims may also evidence an increasing shift of power from Congress and the federal government to local governments. In particular, local elected leaders may see opportunities for publicity and political gain in taking up causes popular with their backers.

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Nature of Claims

Against this backdrop of powerful incentives for municipal attorneys to use outside contingency fee counsel to pursue litigation against private companies, more recent municipal litigation has evolved to be dominated by three types of claims: those against opioid manufacturers, distributors, and retailers; those against companies whose products allegedly contributed to climate change in some significant way; and those against companies alleged to have failed to protect private user information.

As a public health tort focused on a narrow class of addictive products, the opioid lawsuits bear the greatest resemblance to the tobacco litigation that preceded them. But all three new municipal litigation types have several common features:

- each addresses a harm alleged to be widespread, and to which considerable media attention has been devoted;
- each would be difficult for individual plaintiffs to prove due to difficulties in demonstrating harm, causation, and foreseeability; and
- each alleges more than mere negligence or nuisance, typically fraud or concealment on the part of the defendants.

This section discusses the unique features of this wave of municipal litigation.

Opioids

The dominant type of suit currently being brought by municipal plaintiffs is litigation against the companies that manufacture or distribute opioids, a class of prescription pain relievers that have the potential to become addictive.³³ Recently, a Connecticut state judge dismissed a suit brought by a coalition of 37 municipalities against Purdue Pharma and other large manufacturers of prescription opioids.³⁴ In *City of New Haven v. Purdue Pharma LP*, the Connecticut state judge found that the plaintiffs failed to adequately demonstrate how they have been harmed by the opioid crisis and the direct role of the defendant companies in causing the alleged harm.

Like the tobacco lawsuits, the plaintiffs claimed that they were burdened by the excessive medical costs caused by users of addictive products.³⁵ While the judge

acknowledged opioid abuse causes harm, he determined that the defendants did not directly cause the damages the plaintiffs sought to recoup. “It is fanciful to pretend we can credibly quantify the actual harm to cities and attribute that harm” to defendants, the judge wrote.³⁶ While an appeal is pending, the outcome of this case suggests that municipal plaintiffs bringing opioid lawsuits may face difficulty in proving they were harmed by the corporate defendants.

States began bringing suits against drug manufacturers in the early 2000s, along with the U.S. Department of Justice’s initiation of a criminal investigation of one manufacturer, Purdue Pharma.³⁷ The Justice Department reached a settlement with Purdue in 2007 for \$634.5 million, and states followed with their own settlements, including Kentucky’s for \$24 million in 2015.³⁸ Cities and counties soon followed with their own suits. By December 2017, federal cases brought by political subdivisions—including cities, counties, and states—numbered in the hundreds.³⁹ That month, the cases were consolidated in Multidistrict Litigation (MDL) 2804 in the Northern District of Ohio.⁴⁰ More cases brought by cities and counties have since been added, with the MDL docket alone now totaling over 1,200 cases—with at least another 500 lawsuits brought by cities and states proceeding outside the MDL.⁴¹

The opioid suits aggregated in the MDL allege that “the manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs—all of which contributed to the

current opioid epidemic.”⁴² In practice, these claims seek damages for costs incurred as a result of municipal responses to overdoses, health care for addicts, increased expenditures on 911 and emergency first responder services, and decreased property values associated with the crisis that resulted in lower tax revenues.⁴³

Judge Dan Aaron Polster, presiding over the MDL, initially pressed for early resolution of the claims.⁴⁴ The plaintiffs in the MDL, however, represent hundreds of geographically, economically, and politically diverse cities, towns, counties, and Native American tribes. The defendants likewise include drug manufacturers, distributors of varying size and geographic reach, retail pharmacies, and physicians.⁴⁵ The variety of claims and defenses at issue made early resolution impossible.

After defendants’ motion to dismiss was denied in October 2018, the parties instead agreed on a series of bellwether trials as tests of the relative strengths of their arguments and as indicators of potential damage awards.⁴⁶ The first of these trials is set to begin in September 2019.⁴⁷ Further

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evidencing the diversity of the claims and parties at issue, a second track of bellwether trials was recently set to address issues and parties not encompassed by the first track.⁴⁸

Given the untested nature of the claims involved, it is difficult to predict the future of municipal opioid litigation. Its similarity to the tobacco litigation that preceded it—as a public health tort with allegations of fraud, false advertising, and racketeering—provides some indication of potential outcomes. First, opioid litigation is likely to dominate the landscape of municipal litigation, at least in the near term, simply due to the high volume of cases and the considerable resources being expended by cities, counties, and plaintiffs’ firms involved.⁴⁹ Second, a mass settlement may be the eventual outcome of the bellwether trial process. Multidistrict litigation has become a

tool to facilitate mass settlement, and Judge Polster has aggressively advocated for that solution. Yet, as discussed below, the potential for settlement will likely hinge on how completely it resolves the claims at issue.

Environmental Lawsuits

Beginning in 2015, there has been publicity focused on the culpability of the energy industry for its role in contributing to global climate change. In particular, companies are under scrutiny for their alleged prior knowledge of the potential impact on climate from the release of fossil fuel-generated greenhouse gases.⁵⁰ In the wake of this publicity, a number of large municipalities, both cities and counties, have undertaken a new type of litigation seeking compensation for alleged present and future damages due to contributions to climate change and funding for mitigation measures such as seawalls.⁵¹

The first of these lawsuits, brought by San Francisco and Oakland, alleges that petroleum companies’ products will cause future harms to them in the form of sea level rise, coastal flooding, and property damage.⁵² Twelve other cities and counties, including New York City, Baltimore, the City of Boulder and two Colorado counties, King County, Washington, and several other California cities and counties, have filed similar lawsuits.⁵³ All of these municipalities are led by elected officials who have accepted proposals from a handful of plaintiffs’ firms who have been shopping these lawsuits in politically friendly jurisdictions.

These suits allege that energy companies knowingly contributed to damages supposedly caused by climate change.⁵⁴ Some lawsuits, including one brought by

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two California counties and a city, make novel legal claims. In *The County of San Mateo et al., v. Chevron Corp.*, the plaintiffs accuse fossil fuel companies of negligence and public nuisance.⁵⁵ They claim that the defendants knew that their business practices “correspond” with changes in “the Earth’s climate and sea levels,” and that they concealed such information from the public.⁵⁶

While public nuisance claims against greenhouse gas emitters are well-trodden territory, this suit applies “failure to warn” and “design defect” claims, echoing the charges made against the tobacco industry. In this new context, however, the plaintiffs will face a difficult legal hurdle to prove such claims. To attain the billions of dollars the plaintiffs seek in compensation, they must prove a chain of causation that is less direct than the relationship between tobacco consumption, nicotine addiction, and disease.⁵⁷ Despite a lack of evidence of direct causation, municipalities bringing climate change lawsuits against energy companies seek to convince the judges in their cases that energy companies are responsible for past and future harms to the plaintiffs and thus should be held liable for those harms.

The municipalities bringing these suits have faced a series of early litigation defeats, as

two federal judges have rejected their claims as inappropriate exercises of judicial power over a public policy issue that is better reserved for the political branches.⁵⁸ The municipalities have appealed these decisions, which ultimately could reach the U.S. Supreme Court.⁵⁹ The suits face an uphill battle for the reasons expressed by the federal district courts: they attempt to address a global problem with a local, non-uniform solution, and they seek damages for speculative future harms.

Data Privacy

Municipalities have also pursued a third type of litigation in recent years that is new for them: data privacy suits. These cases seek damages and injunctive relief against corporations whose customer data has been hacked or inadvertently released. They typically allege that the corporations knew of but did not disclose the breach, or that the company was aware of but failed to implement a mitigating fix to the breach.⁶⁰

California was an early mover in state data privacy legislation, adopting the nation’s first data breach notification law.⁶¹ Last year, its legislature adopted the California Consumer Privacy Act, a sweeping law aimed at creating powerful new consumer privacy rights that allow consumers to “take back control of [their] personal

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information.”⁶² Even more recently, Senate Bill 327 was enacted, becoming the first state law designed to regulate the security features of Internet of Things (IoT) devices and setting minimum security requirements for connected device manufacturers.⁶³

Not surprisingly, then, California is a leading venue for data privacy suits. San Francisco initiated an early example of such a municipal suit in September 2017 when it sued Equifax for a major data breach that occurred earlier that year.⁶⁴ Numerous cities in California and elsewhere also sued Facebook for release of user data in connection with the 2016 election.⁶⁵

Data privacy municipal lawsuits are likely to grow in prominence as public awareness of data breaches and undisclosed data collection grows. A recent lawsuit was filed by the City of Los Angeles against TWC Product and Technology, LLC, maker of the Weather Channel mobile app, claiming that TWC has been collecting user location data without consent.⁶⁶ Because of the ubiquity of location data collection among app manufacturers and other technology companies, this type of claim could become a major feature of subsequent municipal litigation. But technology companies are not the only businesses affected by the recent flood of data breach-related lawsuits. The ubiquity of data collection by many corporations now makes businesses vulnerable to security breaches and to municipal lawsuits.

For example, the City of Chicago recently filed a lawsuit against Marriott and its subsidiary over the hotel’s 2018 security breach affecting 500 million people worldwide.⁶⁷ The city claims that the defendants violated the city’s Municipal Code by violating the Illinois Consumer Fraud and Deceptive Business Practices Act, a statute typically enforced by the Illinois Attorney General.⁶⁸ The city’s suit argues that Marriott engaged in deceptive business conduct by failing to protect Chicago residents’ personal information; failing to detect the breach promptly; misrepresenting their security safeguards against cyberattacks; and failing to promptly alert the public about the incident.⁶⁹ Such alleged violations, in turn, resulted in “injured Chicago residents” now vulnerable to identity theft and financial fraud. As such, the city is asking for relief.⁷⁰

By citing its state consumer protection law, this case serves as a model for future municipal lawsuits against corporate victims of data breaches. Whether or not Chicago’s case is replicated by other municipalities targeting new data breaches may turn in part on its success in Illinois court. Nonetheless, this case, among the others cited, is indicative of the direction of municipal litigation.

Consequences of Spiraling Municipal Litigation

Municipal litigation appears likely to continue proliferating across the three main types of claims described above. Depending on the success of those claims and states' responses to these types of suits,⁷¹ one can imagine that other novel claims will be developed in the future, targeting additional industries and companies. Stakeholders in these cases—from municipal attorneys to state attorneys general to the public at large—should be aware of the potential consequences of this massive expansion of local litigation. While these lawsuits often receive press attention when they are filed, there are significant negative consequences of municipal litigation that have received little to no attention—until now.

Limitations on Settlement

Municipal litigation decentralizes and scatters government's redress of wrongs on behalf of its citizens. Traditionally, such responsibilities resided with the federal government, the executive branches of the 50 states, and the state legislatures. As a result, the authorities capable of addressing harms to citizens at large were limited and well defined. By contrast, there are over three thousand counties and almost thirty times as many local government entities in the United States.⁷² Municipalities involved in the lawsuits described above range from New York City (population 8.175 million) to

Wirt County, West Virginia (population 5,717).⁷³ They are politically, economically, and demographically diverse, giving rise to diverse factual bases for their claims.

Even in the opioid litigation where many suits have been consolidated in one forum for pretrial matters, plaintiffs and defendants face competing interests that can hinder settlement. In the opioid litigation, for example, approximately 500 lawsuits by municipalities and states are proceeding outside the MDL.⁷⁴ Any settlement in the MDL would not resolve these claims, depriving defendants of the certainty that is typically a major advantage of large, multi-case resolutions. This is particularly true for smaller defendants, such as regional pharmaceutical distributors, that now face bankruptcy in the wake of the thousands of city and county opioid lawsuits.⁷⁵ For these defendants, the possibility of unresolved

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liabilities can create concerns about the future solvency of a reorganized debtor. Mandatory class certification under Federal Rule of Civil Procedure 23(b)(1), whereby plaintiffs cannot opt out of a class, has the potential to solve this difficulty for the opioid litigants by precluding or limiting future lawsuits over similar claims, but is a highly unusual procedural device to which plaintiff municipalities would be unlikely to agree.⁷⁶

As a result, settlements that achieve the dual aims of addressing plaintiffs’ alleged harms while also providing defendants with finality and predictability are much more difficult to achieve when there is a flood of municipal litigation. Ironically, the tobacco Master Settlement Agreement that has helped inspire the current wave of municipal opioid litigation would likely have proved impossible to achieve had the states in question not negotiated as a largely unified group—a proposition that will likely be impossible to replicate with

thousands of plaintiffs.⁷⁷ The reduced capacity for settlement protracts litigation, increases costs for all parties, and delays the implementation of programs such settlements are meant to fund.

Usurpation of State Power

The shift of authority from state to municipal plaintiffs has other consequences beyond hindrance of settlements. In these suits, municipalities take on a role typically filled by state AGs, who historically have taken responsibility for suing private entities for wrongs done to the public.⁷⁸ State AGs can file such suits because of authority vested in them by their states’ consumer protection statutes, false claims acts, constitutional or judicially developed *parens patriae* authority, and other statutory grants of power.⁷⁹ They are elected in statewide elections to protect the public interest by exercise of this authority. In contrast, municipal attorneys gain their posts either by local elections or via appointment by elected municipal officials who are motivated by fiscal and political considerations to pursue large recoveries with little or no cost or risk to themselves or their governments.⁸⁰

“ Municipalities also may pursue litigation as a shortcut to solve public problems that otherwise would be addressed legislatively.”

Municipalities also may pursue litigation as a shortcut to solve public problems that otherwise would be addressed legislatively. The opioid litigation, like its predecessor involving tobacco, seeks to regulate product sales and marketing practices.⁸¹ Regulatory action is typically the province of state legislators who are also elected to represent constituents in a statewide body. Municipal attorneys, city and county councilmembers, and mayors and county executives are not as broadly accountable to the public as are state legislatures, governors, and attorneys general. Yet local officials' actions in municipal litigation may affect matters of statewide or national concern and impact people far beyond the bounds of their individual jurisdictions. Further, they act as agents of their municipality's executive branch, which encroaches upon the role state legislatures fill in promoting a balanced separation of powers.⁸²

Diversion of Consumer Compensation

However large and numerous the corporations that are targeted in municipal lawsuits, settlement funds are not unlimited. As demonstrated by two waves of corporate bankruptcies in the asbestos litigation context, the amount of money defendants can pay to compensate those allegedly injured by their conduct is, by definition, finite.⁸³ In the context of

settlements for harms that are predicted to last far into the future, courts have acknowledged the tension between the rights of now-existing claimants and those of future claimants.⁸⁴

As municipalities collect a greater share of recoveries from private defendants, the amount of compensation available to citizens for their actual injuries is reduced. Municipal recoveries typically recompense a particular type of injury: costs borne by the municipality as a result of defendants' conduct.⁸⁵ While these funds go towards programs to alleviate the problems caused by that conduct as a whole, they do not compensate any particular injured individual, and the amount of program funding produced by litigation is reduced by large contingency fees paid to outside plaintiffs' lawyers. For particular individuals whose loved ones overdosed on prescription opioids, public programs will do little to compensate their losses. Yet if the settlements funding those public programs either foreclose future liability for the defendant or drive it into bankruptcy, individuals who are harmed may not receive meaningful compensation at all.

“ Each of the negative consequences of unchecked municipal litigation described above is also exacerbated by the contingency fee model. ”

Negative Consequences Resulting from Contingency Fee Model

The general drawbacks of the contingency fee model, whereby private plaintiffs' attorneys take the active role in pursuing municipal litigation on behalf of a local government in exchange for a contingency fee, are well documented.⁸⁶ They include potential conflicts of interest and cumulative and duplicative litigation.⁸⁷ Each of the negative consequences of unchecked municipal litigation described above is also exacerbated by the contingency fee model. Where multiple plaintiffs' firms represent localities in a municipal lawsuit, they add yet another competing voice in settlement discussions.

Depending on the terms of their fee arrangements, private plaintiffs' lawyers' interests in collecting settlement payments for their clients may not fully align with those municipalities' own interests, as in the case where the plaintiffs' firm recovers its fees from payments to the municipality rather than as a percentage of the whole settlement. In such an arrangement, the municipality might be happy with a lower direct payment in exchange for funding of programs to address the alleged harm across the region (because the latter would substantially reduce the burden on the municipality itself), but the private plaintiffs' firm would not.

Similarly, diverting a public function to private attorneys further undermines the role of statewide elected officials and legislative bodies. Powerful plaintiffs' firms, which may have ties to officials in the urban and rural centers where their firms are based,⁸⁸ advocate the positions taken by local government officials, whether or not those positions align with the state's overall interests. The cycle of political contributions flowing from plaintiffs' firms to municipal officials while contingency fee litigation contracts flow in the opposite direction reduces political accountability to address the alleged wrongs at issue.⁸⁹

Finally, market forces among plaintiffs' firms, such as competition for contingency fee litigation and the time value of contingency fees earned in the near-term, can drive plaintiffs' firms to disregard future claimants' interests in preserving settlement funds. The contingency fee arrangements reward aggressive, duplicative litigation that forces large, rapid settlements. The potential to deplete available settlement funds to the detriment of late-arriving claimants is thus exacerbated by the contingency fee arrangements that are common to municipal litigation.

Conclusion

A convergence of factors is propelling municipalities to file affirmative lawsuits against corporate entities.

There is the “push” factor: municipalities face historic budgetary constraints and a public inundated with news reports on the opioid crisis, rising sea levels, and data breaches. And there is the “pull” of potential multimillion-dollar settlements and low-cost, contingency fee trial lawyers. As a consequence, municipalities are pivoting to the courts by the thousands.

This phenomenon threatens the effective administration of justice and harms the interests of the very consumers these lawsuits purport to protect and redress. The spiraling number of affirmative municipal lawsuits may lead to outcomes that undermine the fair and impartial legal system. This includes delayed settlements, crippling litigation costs for defendants, usurped state power, and a diversion of consumer compensation. More broadly, the legal system is distorted. When the normal barriers to accessing the legal system are lowered, more meritorious cases are given equal weight to speculative claims. Justice is diluted. Stakeholders in the justice system should advocate for measured reforms to address this alarming trend.

Fortunately, there are solutions available that policymakers and the private sector can support. These solutions are explored and explained in Part II of this paper.

“ *The spiraling number of affirmative municipal lawsuits may lead to ... delayed settlements, crippling litigation costs for defendants, usurped state power, and a diversion of consumer compensation.* ”

PART II: SOLUTIONS

Introduction

As described in Part I of this paper, the proliferation of municipal lawsuits under state law raises important questions about the allocation of power between states and localities.⁹⁰

By laying claim to litigation authority traditionally exercised by states (on the states' own behalf and on behalf of their citizens) in areas as diverse as climate change, opioids, data privacy, and mortgage lending, municipalities are upsetting the traditional balance of power and threatening the ability of states to recover damages on behalf of all their citizens. State leaders have noted this trend and are evaluating options to reverse it.

Against that backdrop, Part II of this paper surveys a variety of approaches that a state might take to reduce the incidence of municipal public nuisance lawsuits, while retaining its own ability to bring litigation. The focus on public nuisance lawsuits reflects the fact that municipalities have relied in significant part on nuisance theories to address perceived public harms. But many of the strategies would apply equally to other theories of liability advanced by municipalities—some of which are specifically noted in the discussion where relevant. Indeed, some strategies may be easier to implement for some of the other theories of liability, such as those derived purely from state statutes (e.g., state consumer protection laws).

Four distinct sets of approaches are discussed, corresponding to the four essential elements that a lawsuit requires to be viable:

- (1) a plaintiff able and willing to bring suit;
- (2) a defendant capable of being sued;
- (3) a cause of action that can be brought; and
- (4) an available forum.

“Because the municipal lawsuits in question are arising under state law, states have the ability to redefine these elements to make it more difficult or impossible to satisfy one or more of them.”

Because the municipal lawsuits in question are arising under state law, states have the ability to redefine these elements to make it more difficult or impossible to satisfy one or more of them. The four sections in this Part thus identify and examine ways in which states could reduce municipal nuisance litigation—or preclude it entirely—by depriving such lawsuits of one or more of the required elements.

First, a state could eliminate or reduce municipal plaintiffs by abolishing or circumscribing localities’ authority to bring suit. As creatures of the state, municipalities enjoy only the powers conferred on them (which vary from state to state), and states frequently preempt localities’ control over certain matters. The ability to sue is a power that could be removed, either generally or only in connection with specific types of claims. Among other examples, many states prohibit localities from bringing suit against firearm manufacturers.

Short of stripping localities of their power to sue, a state could instead make it more difficult to bring suit, perhaps by requiring that the state AG approve the filing of any suit by a municipality or intervene on behalf of the state in any such suit. Codifying the municipal cost recovery rule—under which governmental entities are precluded from recovering from a tortfeasor the costs of public services incurred as a result of the tort—and restricting localities’ ability to hire outside counsel would also disincentivize municipalities from becoming plaintiffs.

Second, a state could eliminate the defendants who can be targeted in municipal litigation. It is not uncommon for states to immunize certain industries or their activities from suit. Every state, for

instance, has enacted some level of statutory protection for agricultural operations by limiting their exposure to nuisance claims. And a majority of states have enacted so-called “commonsense consumption acts” to prevent food manufacturers and retailers from liability premised on weight gain or obesity. In addition to blanket statutory protections, a state may eliminate particular defendants by entering into settlements that waive claims against them. The massive tobacco settlement of 1998, for instance, released all claims that could have been brought on behalf of the general public—not just by states but also by political subdivisions.

Third, a state could limit the causes of action that form the basis for municipal litigation. A state might redefine the cause of action for public nuisance, for instance, to exclude certain activities, shorten the time periods in which a claim may be pursued, or impose greater requirements to maintain suit. These solutions are closer to the traditional tort reforms with which many state legislators are familiar.

Fourth, a state could deprive municipal plaintiffs of a forum in which to bring an action. Because states control the jurisdiction of their own courts, whether by constitutional or statutory provision, they could choose to limit what claims their courts hear or those courts’ ability to order certain relief. In recent years, for instance, several states have contemplated constitutional amendments to prohibit courts from adjudicating claims involving the adequacy of funding for K-12 education.

The approaches identified in these four categories vary in terms of their scope, novelty, and difficulty in implementation, whether politically or practically. Depending

on the state, the necessary measures could take the form of regulation, statute, or constitutional amendment. Those state-specific considerations—including the processes for initiating constitutional amendments, passing statutes, or promulgating regulations—are beyond the scope of this paper, as is the political

feasibility of any particular option. Whenever possible, however, illustrative examples from states that have enacted similar measures are discussed. Analogous examples from federal law are also referenced where relevant.

Reducing Municipal Plaintiffs

The most direct means of preventing or reducing municipal litigation would be to change laws relating to municipalities' power to sue. This section identifies and examines a variety of ways to accomplish that result, which range from eliminating that power in whole or in part, to discouraging municipalities from suing.

Before beginning that discussion, however, it is necessary to review several background principles about the relationship between states and localities.

Home Rule and State Control Over Municipal Powers

Cities and counties are, from a legal perspective, "creatures of the State." Despite a tradition of active local governments in the colonial period and beyond, our country's experience with federalism, as reflected in the Tenth Amendment, recognizes only "the States" as the repositories of the people's power not delegated to the United States. Thus, municipalities must be created by and derive their powers from the state. As one

leading treatise explains, "[u]nless restricted by the state constitution, the state legislature has plenary power to create, alter, or abolish at pleasure any or all local governmental areas."⁹¹ States can generally modify municipalities' powers, subject only to limitations imposed by the state constitution (and the political will in the legislative and executive branches).

What it means to be a "creature of the State," however, can vary from state to state. States have chosen different default presumptions about where certain powers reside between states and municipalities. Most states have adopted some version of the Dillon Rule (also called Dillon's Rule), which provides that municipalities enjoy only those powers that are expressly

“ [M]ost states also have some elements of ‘home rule,’ under which some or all localities are granted certain default powers that they are entitled to exercise independently from the states.”

granted by the state, those that are necessarily or fairly implied from those express powers, and those that are “essential” and “indispensable” to the municipalities’ purpose.

But most states also have some elements of “home rule,” under which some or all localities are granted certain default powers that they are entitled to exercise independently from the states. The allocation of powers to local governments has been explained as a means of freeing state legislators’ attention for matters of statewide magnitude and giving decisionmaking power over local matters to those with the greatest knowledge of them.⁹² Thus, under home rule, localities often are empowered to handle issues of local concern—such as land use and zoning, street cleaning, utilities, housing, and parks and recreation—free from state interference.

Home rule can be effectuated in different ways. In some states, home rule is guaranteed by the state constitution. New York’s constitution, for instance, vests localities with authority over a number of specific areas, confers additional powers to adopt local laws not inconsistent with the state constitution or laws, and identifies the process by which the state may add and withdraw additional powers.⁹³ Alaska’s constitution more simply provides that “[a] liberal construction shall be given to the powers of local government units” and that “[a] home rule borough or city may exercise all legislative powers not prohibited by law or by charter.”⁹⁴

In other states, home rule is accomplished by a statute. A city’s home rule status and scope of default powers may be dictated by

“ One upshot of these principles is that, regardless of municipalities’ degree of autonomy, ultimately the states retain control over what powers municipalities can exercise.”

its charter, resulting in some home rule and non-home rule jurisdictions exercising different degrees of authority. Just as with Dillon Rule jurisdictions, home rule jurisdictions rely on the state for their powers, which states can alter or eliminate altogether by revising the relevant statute or constitutional provision.

One upshot of these principles is that, regardless of municipalities’ degree of autonomy, ultimately the states retain control over what powers municipalities can exercise. Although a tradition of municipal self-governance may be stronger in some states than others, even a home rule municipality may not exercise a power that the legislature has affirmatively taken away. It may require amending the state constitution, but in all cases the state retains its authority to remove a power exercised by a municipality.

Another lesson is that the precise scope of municipal powers frequently shifts.

Statutory changes, judicial decisions, and state AG opinions (which may or may not be binding authority) can affect municipal powers in small and large ways, both intentionally and unintentionally. Consequently, the method and relative difficulty of implementing the approaches discussed below will inevitably vary by state and—given the independent treatment of some localities—could vary even within a state.

Preempting Municipalities' Power to Bring Suits

Assuming a home rule provision in the state's constitution did not bar it, a state could enact a statute stripping localities of the power to assert certain causes of action, including those arising from common law. For instance, Wisconsin once disallowed municipalities from bringing any nuisance suits, but has since changed its law.⁹⁵ States have also enacted statutory frameworks conferring enforcement authority on municipalities (usually in addition to the AG). In some states, for instance, municipalities are empowered to bring suit to prosecute violations of consumer protection laws.⁹⁶ Just as states have granted municipalities that statutory power to sue, they could remove those powers by statutory amendment or enact laws preempting localities from bringing suit.

Such an effort could take the form of a general prohibition on municipal lawsuits, but it is more likely to be limited to a specific area. Perhaps the most notable examples of such targeted prohibitions were enacted in response to the wave of municipal suits against the gun industry in the late 1990s. States began codifying a variety of protections for firearm manufacturers and dealers, including prohibitions on localities' power to bring suit against them. Virginia Code § 15.2-915.1—titled "Limitations on authority of localities to bring lawsuits"—is one example:

*No locality shall have the authority to bring suit against a firearms or ammunition marketer, manufacturer, distributor, dealer, seller, or trade association for damages, abatement, injunctive relief or any other remedy resulting from or relating to the lawful design, marketing, manufacture, distribution, sale, or transfer of firearms or ammunition to the public. The right to bring any such action is hereby reserved exclusively to the Commonwealth. Any action brought by the Commonwealth pursuant to this section shall be brought by the Attorney General on behalf of the Commonwealth.*⁹⁷

Among the many states that have adopted "firearm immunity" laws, a dozen include provisions, like Virginia's, that prohibit local governments from bringing suit against firearm manufacturers. The scope of these prohibitions varies, providing exclusions that allow suits for certain types of claims against firearm manufacturers. For instance, while some states' firearm immunity laws include specific protections against nuisance actions,⁹⁸ others do not.

Some states' laws were even enacted with retroactive effect; in Louisiana, defendant manufacturers successfully relied on the law's retroactive application to have a pending public nuisance suit dismissed.⁹⁹ These laws appear not to have been the subject of constitutional challenges, but for a suit filed last year by a number of Florida cities. The case challenges on free-speech grounds some of the provisions of Florida's preemption statute that prohibit local officials from even discussing enacting municipal gun ordinances that are tougher than the state's laws.

Another example of a state statute preempting municipal litigation was enacted in Louisiana in 2014, amid efforts by municipalities to hold dozens of oil and gas companies responsible for their drilling activities in coastal wetlands. In response, the legislature passed a bill with the express intention "to prohibit certain state or local governmental entities from initiating certain causes of action."¹⁰⁰ Louisiana law now provides that "no state or local governmental entity" may bring suit related to certain activities within the coastal zone.¹⁰¹

Notwithstanding these numerous examples, it is possible that a legislature could run into state-specific hurdles in disabling a municipality from bringing suit. Municipalities generally have the power to sue, which, depending on the state, is sometimes conferred expressly by statute but is at least implied.¹⁰² And if a home rule provision in a state's constitution gives municipalities authority to act in certain areas, and the authority encompasses the power to bring suit in that area, then a constitutional amendment would be necessary before the legislature could pass a limiting statute.

“ [T]he U.S. Supreme Court held long ago that the allocation of power between states and local governments does not implicate the federal constitution. ”

A city's authority to sue would likely need to be clearly defined, however, to avoid preemption. In the City of Bridgeport's suit against the gun industry, the court essentially stated that the burden is on the municipality to demonstrate that it can withstand state power. The plaintiffs there leaned heavily on Connecticut's Home Rule Act as the source of their purported authority to bring suit, including language that a municipality shall have the power to "sue and be sued" and "[r]egulate and prohibit the carrying on within the municipality of any trade, manufacturer, business or profession ... prejudicial to public health ... or dangerous to, or constituting an unreasonable annoyance to, those living or owning property in the vicinity ..."¹⁰³ The court rejected those authorities as insufficient, reasoning that "[i]n determining whether a municipality has authority for certain action pursuant to the Home Rule Act, the role of the trial court is ... 'not [to] search for a statutory prohibition against [what is sought]; rather, we must search for statutory authority for the enactment.'"¹⁰⁴

Municipalities might also argue that more generally applicable state or federal constitutional prohibitions preclude the state from statutorily stripping them of the power to bring suits in certain areas. These also are unlikely to succeed, even assuming that the municipality would be permitted under state law to challenge state legislation.¹⁰⁵ To begin with, the U.S. Supreme Court held long ago that the allocation of power between states and local governments does not implicate the federal constitution:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them ... The number, nature, and duration of the powers conferred upon these corporations ... rests in the absolute discretion of the state ... In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.¹⁰⁶

A municipality may have stronger claims under the state constitution that the state violated its rights in eliminating its power to sue—again, assuming a municipality is permitted under state law to challenge state legislation in court. Claims might be based on provisions mandating equal protection, guaranteeing “open courts” or “remedy” rights, and forbidding special legislation. While it is difficult to analyze these claims in the abstract, it seems likely that their strength would depend on whether the municipality is considered in its governmental or proprietary capacity. As a governmental entity, the fact that a

municipality is a creature of the state gives the state broad discretion. But the analysis would be different if the city were treated like a private landowner stripped of its power to vindicate its rights through litigation.

In light of the potential (if unlikely) problems with enacting a limiting statute, it is worth noting that a state can flex its power to preempt municipal lawsuits not just through statutory changes but also through parallel litigation, as demonstrated in *New Hampshire v. City of Dover*.¹⁰⁷ In that case, two municipal lawsuits against manufacturers of the gasoline additive MTBE were dismissed in the face of a competing state lawsuit against MTBE manufacturers. Notably, there were many differences between the state’s case and the municipal lawsuit: the state’s case was narrower in scope and in relief sought, the cities’ suits involved twice as many defendants, and the cities’ suits were not brought in the name of the state. Nevertheless, the Supreme Court of New Hampshire held that the municipal suits “must yield to the State’s suit.”¹⁰⁸ The court concluded that the municipal suits were unnecessary because “the cities’ interests are represented by the State’s suit.”¹⁰⁹

Codifying Localities’ Lack of *Parens Patriae* Authority to Bring Suit

In addition to stripping municipalities of the power to sue in certain subject areas, such as consumer protection, a state could curb municipalities’ litigation authority by limiting their bases for “standing” in state courts. Broadly speaking, to have standing to maintain a lawsuit in federal court, a plaintiff must demonstrate an actual interest or injury caused by the defendant

that the court can remedy.¹¹⁰ States have adopted a variety of standing tests for their own courts, some based on federal standards and some more difficult to meet than others. We discuss below one basis for standing particularly relevant to municipal suits.

While many municipalities bring actions based on their proprietary interests as landowners, they occasionally claim standing under the *parens patriae* doctrine, essentially claiming the right to remediate generalized harm to their residents. Originating in English common law, the doctrine—literally meaning “parent of the country”—conferred on the Crown the “right or responsibility to care of persons who are legally unable ... to take proper care of themselves and their property.”¹¹¹ Under that doctrine, governmental entities are permitted to bring claims in their quasi-sovereign capacity to vindicate the interests of their citizens’ health and well-being.¹¹²

The ability of municipalities to rely on *parens patriae* standing varies by jurisdiction. While federal courts have recognized the doctrine when asserted by states,¹¹³ they have generally held that municipalities cannot assert *parens patriae* standing.¹¹⁴ State courts have reached different results under state law, however. For instance, New York courts recognize municipalities’ *parens patriae* authority under New York law,¹¹⁵ while Colorado case law makes clear that counties lack *parens patriae* standing.¹¹⁶

Other states specifically recognize by statute that the state AG may pursue *parens patriae* actions on behalf of the state in certain contexts,¹¹⁷ but are silent as to municipalities.

No state appears to have codified the principle that the *parens patriae* doctrine does not apply to municipalities as a general matter, although a federal court has held that Pennsylvania’s Uniform Firearms Act extinguished whatever power Philadelphia had to sue the gun industry as *parens patriae*.¹¹⁸ To ensure that reliance on the doctrine is reserved only to the state, a legislature could clarify by statute that localities lack the authority to bring generalized claims on behalf of their residents. Doing so would preclude a contrary finding by a state court and, while it would not prevent all municipal suits, it could prevent some suits and eliminate individual claims in others.

Imposing a State-Level Check on Municipalities’ Power to Sue

Another means of reducing the number of municipal plaintiffs is to interpose a state-level check on municipal litigation. Instead of stripping municipalities of some or all authority to sue, a state could require that a state official approve of the filing or maintenance of municipal litigation for it to proceed. This oversight could be accomplished in a variety of ways, though all would impose an increased administrative burden on already busy state-level officials.

*“ While federal courts have recognized the doctrine when asserted by states, they have generally held that municipalities cannot assert *parens patriae* standing. ”*

“ Instead of stripping municipalities of some or all authority to sue, a state could require that a state official approve of the filing or maintenance of municipal litigation for it to proceed. ”

One such option would be to require the permission of a state official—most likely the AG—before certain suits could be filed. South Carolina adopted a measure like this in 2011 as part of a package of civil reforms, providing that a “circuit solicitor must obtain written approval of the Attorney General prior to ... filing a civil cause of action.”¹¹⁹ Although a “circuit solicitor” in South Carolina is akin to a state district attorney (rather than a city or county attorney), a state might enact a similar arrangement with respect to municipalities and their attorneys.

A second option would be to require that municipal suits raising specified claims be dismissed unless the state joins the suit. The process could be patterned on state *qui tam* laws, which require notifying the state AG of a suit and giving the state an opportunity to join it. But imposing a post-filing review and intervention requirement on municipal litigation would likely be less effective, and less efficient, than a pre-approval requirement. If they can file a suit first, municipalities have the ability to put more practical and political pressure on the

state, which is then faced with having to quash an already existing lawsuit rather than simply declining to allow one to begin.

Although these options place additional administrative burdens on a state AG, having a state-level check is especially important in cases where municipal suits raise interests that are shared with the state or that may conflict with state prerogatives. Because some proposed municipal suits raise purely local and legitimate interests, state-level approval could be required only for suits touching on matters of potential statewide concern (assuming that could be appropriately defined). Some level of oversight, however, may be critical if the municipal litigation trend continues.

As described in Part I of this paper, some over-ambitious municipal litigation jeopardizes the exclusive ability of a state AG, as the state’s chief legal officer, to advance the state’s legal interests, including by determining what suits should be maintained in the name of the state. Codifying a requirement that an AG authorize municipal suits (in one way or another) would reinforce the state’s primacy and avoid later disputes over who determines the interests of the state or its

“ A second option would be to require that municipal suits raising specified claims be dismissed unless the state joins the suit. ”

“Codifying a requirement that an AG authorize municipal suits (in one way or another) would reinforce the state’s primacy and avoid later disputes over who determines the interests of the state or its people.”

people. There are several recent examples of such state/locality disputes in Alabama and Arkansas.¹²⁰

Disincentivizing Localities From Bringing Suit

A final set of approaches to reducing the number of municipal plaintiffs involves removing the incentives for bringing suit, imposing barriers to obtaining relief, or otherwise making these lawsuits less attractive to municipalities. To be sure, these are the aims of more broadly applicable tort reforms, which seek to improve the efficiency and fairness of state tort suits generally and could arguably be discussed here, as well. Consistent with the focus of this paper, however, the solutions discussed below are ones with particular application to localities.

CODIFYING THE MUNICIPAL COST RECOVERY RULE

One way to discourage municipal suits is to ensure the application of the municipal cost recovery rule, sometimes called the “free public services doctrine.” Under this common law rule, municipalities are precluded from recovering from an alleged tortfeasor the costs of public services performed in response to, or as a consequence of, the tortfeasor’s conduct—e.g., the costs of emergency responses, fire suppression, and law enforcement. The justification for the rule is that those services are governmental functions that are funded by taxes and should be borne by society as a whole, rather than the individual or entity whose actions required the governmental response.¹²¹ Regular application of that common law rule might discourage municipal plaintiffs by lessening or eliminating their financial incentive to sue.

The rule ensures that the costs of public service responses remain the responsibility of municipalities and are not shifted to defendants through litigation. Depending on the nature of the activity challenged, application of the rule could bar most or all of a municipality’s asserted basis for recovery. The rule arguably bars at least some of the relief that municipalities seek in their current nuisance suits based on climate change and the opioid epidemic. As described in Part I of this paper, the plaintiffs in those suits have claimed financial injury stemming from their response to global warming and from their provision of emergency medical services, treatment, and incarceration in response to the use and abuse of pharmaceuticals.¹²² The costs of these services arguably fall within the ambit of what the rule excludes from recovery.

Left to the courts alone, it is possible that the municipal cost recovery rule would be applied to limit the costs recoverable by municipalities in nuisance cases. Despite the rule's relatively recent origins—coming to prominence only in the last 40 years—it has been followed by a variety of state and federal courts, including in the nuisance context. During the wave of municipal suits against the gun industry, for instance, some courts held that the rule barred the relief sought.¹²³ In *City of Chicago v. Beretta U.S.A. Corp.*,¹²⁴ The Illinois Supreme Court applied the rule in a nuisance case alleging harms from gun violence and seeking compensation for the costs of law enforcement. The court concluded that “even if plaintiffs properly pleaded a cause of action in public nuisance, money damages would not be available.”¹²⁵ “[T]he need for emergency response to shootings is a day-to-day occurrence, well within the predictable need for law enforcement and other municipal resources ...”¹²⁶

States are free to legislate changes to the default rule, however. In the landmark case *City of Flagstaff v. Atchison, Topeka and Santa Fe Railway Co.*, then-Judge Anthony Kennedy explained for the U.S. Court of Appeals for the Ninth Circuit that although the default rule is that the cost of public services “be borne by the public as a whole,” the decision whether to allocate the costs to municipalities is subject to “the legislature and its public deliberative processes.”¹²⁷ Taking up that invitation, some states have modified the default rule and authorized local governments to pass ordinances that allow cities to recover certain costs incurred, including costs stemming from public nuisance abatement by municipalities.¹²⁸

Of course, that legislative authority can also be used to lock in and even strengthen the default rule. Given the potential unreliability in the rule's application by courts, states that wish to guarantee the continued allocation of costs to municipalities could enshrine the common law rule in statute. And in doing so, a state could also consider including broader protections than courts interpret the common law rule to allow.

First, a statutory codification could eliminate an exception in the common law rule that has the potential to become a loophole for municipal nuisance suits. Courts have held that the municipal cost recovery rule does not apply “where the acts of a private party create a public nuisance which the government seeks to abate.”¹²⁹ Because municipal nuisance actions seek precisely that relief, a state would presumably want to avoid codifying the exception that broadly and may even want to expressly eliminate that exception with respect to claims brought on behalf of the state's citizens.¹³⁰

“ [A] statutory codification could eliminate an exception in the common law rule that has the potential to become a loophole for municipal nuisance suits. ”

Second, a statute could avoid potential debate over the rule’s applicability. The common law rule prevents municipalities from recovering costs related to the “normal” provision of public services.¹³¹ Critics have argued, and some courts have held, that the conduct alleged in municipal nuisance cases is far from “normal” and results in costs well beyond the expenses that a municipality might reasonably expect to incur.¹³² In a statute, a state could define more carefully the circumstances, if any, in which a municipality would be entitled to seek recovery.

Regardless of the precise language used, codification of the rule should provide a powerful disincentive to municipalities considering bringing suit. Faced with a more certain prospect of a limited recovery or a complete bar to their claims, municipalities (or their counsel) may be less likely to conclude that litigation is worth their while.

DISALLOWING OR DISCOURAGING MUNICIPALITIES FROM HIRING OUTSIDE COUNSEL

Another way to discourage municipal plaintiffs is to deprive them of a litigation resource that is usually essential to a municipal suit: outside counsel. State and local governments’ growing reliance on

outside counsel, paid through contingency fees, has been well documented and appropriately criticized.¹³³

As described in Part I, plaintiffs’ lawyers have been the driving force behind the current wave of municipal litigation involving climate change, opioids, and data privacy, just as they were in suits against lead paint and tobacco in previous decades.¹³⁴ Those lawyers often conceive of and pitch these cases to local officials. And local governments continue to outsource cases to those law firms because the municipalities are typically ill-equipped to carry on complex litigation, lacking the necessary personnel, resources, specialized knowledge, or experience.

Given that few local governments can maintain a suit on their own, a state may be able to discourage most municipal plaintiffs simply by prohibiting them from hiring outside counsel or limiting their discretion to do so. States regularly prohibit state agencies from hiring outside counsel except in specified circumstances, and those types of prohibitions could be extended to localities.

An alternative to a total prohibition on outside counsel is a requirement that a municipality apply to a state-level official—likely the AG—for permission to retain

“ And local governments continue to outsource cases to those law firms because the municipalities are typically ill-equipped to carry on complex litigation, lacking the necessary personnel, resources, specialized knowledge, or experience. ”

counsel. Louisiana has adopted such a requirement.¹³⁵ It forbids a local governing authority from retaining special counsel or paying for any legal services “unless a real necessity exists,” as documented in an official resolution that “shall be subject to the approval of the attorney general.”¹³⁶

But even if municipalities remain authorized to retain outside counsel, a state nonetheless might take steps to disincentivize outside counsel from signing on or municipalities from hiring them.

First, the state could impose limits on the fees that outside counsel may receive—including caps on any contingency fees. Nearly two dozen states have done just that, enacting versions of the Transparency in Private Attorneys Contracting Act (TIPAC). TIPAC governs the terms under which a state may hire outside counsel to represent the state and its agencies. Among other things, TIPAC forbids an AG from entering into a contingency fee contract without first determining that the representation would be cost-effective and in the public interest. It also includes a graduated schedule that puts ceilings on the fee percentages to which an AG is authorized to agree when retaining outside counsel.

Those limits are firm but can be quite high. North Carolina’s TIPAC, for instance, allows for a 25 percent fee for damages up to \$10 million and five percent for damages over \$25 million, with an absolute total cap of \$50 million.¹³⁷ Missouri’s version of TIPAC, revised in 2018, has fee tiers ranging from 15 percent down to two percent and an aggregate fee cap of \$10 million.¹³⁸ It also provides that a contingency fee “[s]hall not be based on any amount attributable to a fine or civil penalty.”¹³⁹

“To the extent that municipalities (or their outside counsel) are motivated to bring nuisance suits by the prospect of large punitive damage recoveries, a state could reduce their motivation by limiting the size of such awards.”

Although TIPAC applies to outside counsel hired to represent a state, the state could consider extending its provisions to municipalities or enacting a corresponding statute applicable to local government entities. The dimmed prospect of runaway fees might discourage some firms from taking on or seeking out municipal plaintiffs.

Second, the state could insist on transparency around the hiring and compensation of outside counsel by municipalities. TIPAC could be the model for this, too. At the state level, TIPAC requires public reporting of fee arrangements to reduce the possibility for favoritism and help keep public contracting fair and honest. The additional scrutiny and burden of the bidding process could be a deterrent to the municipal plaintiffs or their counsel.

REDUCING THE INCENTIVE OF PUNITIVE DAMAGES AWARDS

To the extent that municipalities (or their outside counsel) are motivated to bring nuisance suits by the prospect of large punitive damage recoveries, a state could reduce their motivation by limiting the size of such awards. The U.S. Supreme Court has indicated that, under the federal constitution, awards normally should not exceed a 10:1 punitive-compensatory damages ratio,¹⁴⁰ but many states also impose more limiting statutory caps on punitive damages awards. Constitutional challenges to such caps, usually based on the right to a jury trial or separation of powers, have met with mixed results.¹⁴¹

Limiting the Range of Municipal Suit Defendants

A second overriding approach to preventing municipal suits is to shrink or eliminate the pool of potential defendants. As detailed below, it is not uncommon for states to use statutory changes to immunize entire industries from suit. States also may enter into settlements with particular defendants, thereby waiving claims that municipalities might otherwise assert in separate litigation.

Immunizing Certain Industries or Operations From Suit

The statutory protections for the gun industry, discussed earlier, again provide a useful starting point. As the previous section showed, many states' statutory protections for the gun industry identify and prohibit particular entities, including local governments, from serving as plaintiffs in firearms litigation. But some states' statutes are framed by reference to defendants, precluding suits by any person or entity against firearm dealers and manufacturers.

Other industries enjoy corresponding protections and may be a model for preventing nuisance suits against particular industries. Every state, for instance, has enacted some form of a "right to farm act" (RTFA) limiting the exposure of agricultural operations to nuisance claims. North Carolina's RTFA, dating from 1979, was

one of the first and most influential such law, and was enacted with the express purpose of "reduc[ing] the loss to the State of its agricultural and forestry resources."¹⁴² That purpose is fulfilled by protecting certain defendants from suit: "[n]o nuisance action may be filed against an agricultural or forestry operation" unless certain conditions are satisfied.¹⁴³ Courts around the country have largely upheld RTFAs against constitutional takings challenges.¹⁴⁴

Similarly, many states have enacted so-called "commonsense consumption acts" that exempt food manufacturers and retailers from liability premised on weight gain, obesity, or related health conditions. Louisiana was the first state to enact such a law, in 2003, and its statute is typical:

Any manufacturer, distributor, or seller of a food or nonalcoholic beverage

intended for human consumption shall not be subject to civil liability for personal injury or wrongful death based on an individual's consumption of food or nonalcoholic beverages in cases where liability is premised upon the individual's weight gain, obesity, or a health condition related to weight gain or obesity and resulting from his long-term consumption of a food or nonalcoholic beverage.¹⁴⁵

More than half the states have enacted similar provisions to protect food manufacturers and retailers. Michigan's version of the statute, in addition to exempting manufacturers from civil liability, also specifies that a "political subdivision of this state shall not file, prosecute, or join" any action described.¹⁴⁶

In contrast to those more common state laws, Michigan has a "one of a kind" statute that functionally immunizes drug manufacturers and sellers from tort liability for property damage, personal injury, and death caused by their products. Its 1995 Product Liability Act provides, in a relevant part, that "in a product liability action against a manufacturer or seller, ... the manufacturer or seller is not liable" if the drug and its labeling complied with federal law "at the time the drug left the control of the manufacturer or seller."¹⁴⁷ This provision promises to be a hurdle for the more than 50 Michigan cities and counties that have brought lawsuits against opioid manufacturers (some of which raise public nuisance theories of liability).

Finally, measures designed to protect industry participants from suit, including nuisance suits, are not unique to the states. For instance, Congress built on and

“ [M]easures designed to protect industry participants from suit, including nuisance suits, are not unique to the states.”

supplemented states' firearm immunity laws when it passed the Protection of Lawful Commerce in Arms Act of 2005 (PLCAA), which prohibits "any person" from bringing suit against a firearm manufacturer or seller.¹⁴⁸ Other federal examples are the Childhood Vaccine Injury Act of 1986, which restricts product liability claims against vaccine manufacturers,¹⁴⁹ and the Airline Deregulation Act, which preempted state regulation of certain airline activities and, consequently, certain claims brought under state law.¹⁵⁰

The impetus for these laws varies. The Childhood Vaccine Injury Act was enacted in response to a realization that litigation could drive vaccine manufacturers out of the market, which "could create a genuine public health hazard in this country."¹⁵¹ The Airline Deregulation Act was intended to "further 'efficiency, innovation, and low prices,'" with the preemption provision added to "ensure that the States would not undo federal deregulation with regulation of their own."¹⁵²

Waiving Claims Against Particular Defendants

A second means for states to eliminate potential defendants is by waiving claims that municipalities could bring against them. As at least a few examples demonstrate, states have entered into settlements with defendants that waive claims that localities might have brought. Although this strategy would not eliminate all municipal claims, it could be used to great effect where states and localities have overlapping authority to bring claims.

Perhaps the most notable illustration of this option is the massive 1998 settlement entered into by cigarette manufacturers with 46 states, five territories, and the District of Columbia. Under the master settlement agreement (MSA) governing that settlement, the states agreed to give up any additional claims against the defendant manufacturers that could be asserted on behalf of the general public—whether by the states or by their political subdivisions—“to the full extent of the power of the signatories hereto to release” them.¹⁵³ The preclusive effect of this release was later established in litigation, when it was held to block Wayne County, Michigan from suing tobacco companies who were parties to the MSA.¹⁵⁴ As the opinion in that case showed, however, the preclusive effect could vary from state to state depending on “the power of the Attorney General to release claims.”¹⁵⁵

As the MSA also illustrates, the terms of the settlement could contain structural disincentives to municipal litigation,

incorporating other strategies discussed in this paper. It provides that if a “Releasing Party ... attempts to maintain a Released Claim against a Released Party,” the Released Party “may offer the release and covenant as a complete defense.”¹⁵⁶ But if, as to the new claim, the MSA’s release is determined to be “unenforceable or invalid for any reason (including, but not limited to, lack of authority to release such claim),”¹⁵⁷ any judgment resulting from the claim must be paid out of the state’s settlement amount.¹⁵⁸ The state AG must be provided written notice of the claim, and the state has a “right to intervene in such an action ... to the extent authorized by applicable law in order to protect the Settling State’s interest.”¹⁵⁹

Another illustrative settlement arose in *People ex rel. Divine v. Time*,¹⁶⁰ where a local state’s attorney had brought suit on behalf of the state against a company alleging violations of an Illinois consumer-fraud statute. While the suit was pending, the Illinois Attorney General entered into an agreement releasing the defendant from all claims that were or could have been asserted under the consumer fraud statute. On the basis of that release, the trial court dismissed the case, and the Appellate Court of Illinois affirmed.¹⁶¹

In sum, to the extent that a municipality has claims against a defendant that overlap with claims that a state could bring (or has brought) in parallel litigation against the same defendant, the state AG may be able to settle the claims and prevent (or seek dismissal of) the municipal lawsuit.

Modifying Causes of Action

A third approach to eliminating municipal suits is to reduce the availability of a valid cause of action under state law. More than the other approaches, the options identified in this section closely resemble traditional tort reform measures with which state lawmakers are likely well familiar.

This paper includes a discussion of these options to the extent that they could eliminate or avoid municipal litigation altogether. The paper does not discuss tort reform measures targeted at causes of action that might simply disincentive such suits. Three groups of legislative solutions are identified, according to the way in which each narrows the availability of claims: redefining the cause of action, shortening the periods defining when suit must be brought, and imposing greater requirements to maintain suit.

Defining a Nuisance (or Other Cause of Action) to Exclude Certain Activities

States have the authority to modify the nuisance cause of action—a common theory of recovery for municipalities—whether it is based in statute or, more frequently, the common law. Statutes, of course, may always be amended. As to the common law, it is generally recognized as an enforceable body of law, but only to the extent not modified by legislative

enactments.¹⁶² As the Illinois Supreme Court has explained it, the “legislature has the inherent authority to repeal or change the common law and may do away with all or part of it.”¹⁶³ Courts in other states have similarly indicated that, subject to limitations in the state’s constitution, legislatures can modify or repeal common law causes of action entirely,¹⁶⁴ or limit the remedies for such claims.¹⁶⁵ Although some

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states impose a higher threshold than others for modifying common law claims and remedies,¹⁶⁶ all states undoubtedly have discretion to modify the common law by statute.

It is theoretically possible for a state to eliminate entirely the public nuisance cause of action, but a more realistic option is for a state legislature to define more narrowly what constitutes a nuisance under state law. By expressly excluding certain activities from the scope of prohibited conduct, a state could preclude whole categories of municipal nuisance suits. For other causes of action, like those expressly authorized under some states' consumer protection statutes (which cover a narrower set of activities than nuisance), it may be practically easier to eliminate the cause of action entirely.

Because certain activities are associated with certain industries, an activity-specific approach to narrowing a cause of action might, in some cases, look quite similar to immunizing particular defendants from suit. The right to farm acts discussed previously are a good example. To protect the farming industry as a whole, the laws limit "the circumstances under which an agricultural or forestry operation may be deemed to be a nuisance."¹⁶⁷ They might be described as either protecting certain activities or protecting certain industries writ large.

There are similar laws in some states for certain manufacturing activities.¹⁶⁸ And some firearm immunity statutes might be described the same way, protecting a category of defendants by declaring that lawful activities involving firearms cannot be a nuisance.¹⁶⁹

But a state might also choose to disallow public nuisance claims premised on certain activities or theories, without reference to a particular industry or set of defendants. For instance, a number of states have provided protection from liability for employers who provide job references or disclose information about current or former employees.¹⁷⁰ Other states, before the turn of the millennium, enacted legislation to immunize businesses from contract liability for Y2K bugs.¹⁷¹ A state might follow this approach and choose to disallow nuisance claims that arise out of a particular context. Such legislation might be especially appropriate where the alleged nuisance activity relates to a large-scope issue with many contributing causes from many different industries—including examples discussed in Part I, such as climate change or the opioid epidemic.¹⁷²

Another way to protect certain conduct from municipal litigation would be to redefine the prohibited activity to exclude conduct that is compliant with relevant state or federal regulations. That is the

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central premise in Michigan’s Product Liability Act, discussed above, which eliminates the possibility of suit against drug manufacturers provided that the drug was approved by the FDA and the manufacturer complied with labeling rules.¹⁷³ Similarly, a Texas statute enacted in 2011 forbids nuisance lawsuits for damages allegedly due to greenhouse gas emissions from facilities that are federally permitted for those activities and compliant with the permits.¹⁷⁴

Finally, rather than directly modifying the cause of action, states might indirectly do so by simply engaging in regulatory activities that are inconsistent with municipal litigation. In the sphere of federal/state relations, this concept is described as implied “field” or “conflict” preemption. Lawsuits arising under state common law for certain activities are considered impliedly preempted by the existence of federal law—either because the federal government’s regulations have so fully occupied the “field” as to leave no room for state common law, or because state

common law would “conflict” with federal law by contravening the purpose of federal regulations or by making it impossible to comply with federal regulations. In those circumstances, the Supremacy Clause requires that the federal regulations trump state law, even though the federal regulations do not expressly and directly set aside state law.

States might follow a similar approach in seeking to displace certain municipal lawsuits. Because states are effectively supreme to municipalities, the fact of a state’s regulation alone should protect the regulated conduct from inconsistent obligations demanded by a municipality’s nuisance claim. For instance, some municipal suits challenging mortgage lending have been held to be preempted by state regulation of banking activities.¹⁷⁵ The same argument has been successful with respect to state regulation of firearms.¹⁷⁶ Logically, an activity that has been lawfully permitted or approved by a state legislature, agency, or official should not be considered an unreasonable interference with a public right and enjoined as a nuisance.¹⁷⁷

“ Reflecting the need for finality and certainty, a variety of statutes and doctrines in state law govern when claims must be brought or when liability on those claims runs out. ”

Shortening the Periods in Which Claims may be Brought

Shortening the time periods for bringing claims is another way of revising causes of action that would lessen the impact of municipal claims. Reflecting the need for finality and certainty, a variety of statutes and doctrines in state law govern when claims must be brought or when liability on those claims runs out. Modifying these periods is not a strategy unique to municipalities; it is a staple of tort reform

“ Indeed, some states have singled out certain nuisances for shorter limitations periods. ”

proposals that is likely familiar to many state legislators. Three common approaches are discussed next.

STATUTES OF LIMITATIONS

One approach would be to modify the statute of limitations for claims such as nuisance. The limitations period is the time within which a plaintiff must bring suit after a cause of action accrues. A nuisance claim accrues when the event causing the alleged liability is deemed to have occurred, which can depend on a variety of factors, including whether the nuisance is a continuing nuisance and when the nuisance is discovered. These factors are grounds for “equitable tolling” of the statute of limitations, delaying the time when the claim accrues and the limitations period begins. Under the common law principle of *nullum tempus occurrit regi*, statutes of limitations do not run at all against the state—at least when it is asserting a right belonging to the general public—but that principle generally does not apply to political subdivisions.¹⁷⁸ States can alter that presumption by statute, of course, and some have.¹⁷⁹

In many states, the limitations period for nuisance claims already tends to be lower—generally a case must be filed within two or three years of the alleged nuisance—than

for some other causes of action. But a state legislature could act to reduce it further. Indeed, some states have singled out certain nuisances for shorter limitations periods. Mississippi’s right to farm act, for example, provides that an agricultural operation’s existence for a year or more “is an absolute defense to [a] nuisance action” if the operation has been in compliance with applicable permits.¹⁸⁰ The Mississippi Supreme Court has read that language as imposing a one-year statute of limitations and enforced it accordingly.¹⁸¹

EQUITABLE TOLLING DOCTRINES

A second approach would be to limit the applicability of equitable tolling doctrines that postpone when the statute of limitations begins to run. For instance, the “continuing tort” or “continuing violations” doctrine provides that, in cases involving continuous or repeated injuries, the statute of limitations accrues on the date of the last injury. And applying the “discovery rule” means that the statute of limitations does not begin to run until a plaintiff discovers the injury. Although “application of the discovery rule in nuisance cases is rare,”¹⁸² states could choose to provide by statute that these doctrines do not apply at all in nuisance cases, as some states have done with respect to other causes of action.¹⁸³

STATUTES OF REPOSE

Finally, states could shorten statutes of repose and thereby cut off municipal plaintiffs’ ability to impose long-term liability on defendants. Unlike statutes of limitations, statutes of repose are triggered by an event other than the alleged injury, and are not subject to equitable tolling doctrines. “[T]he key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to

create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself.”¹⁸⁴ Such statutes fix a firm outer limit beyond which no action may be maintained, “curbing open-ended exposure” and conferring the “practical upside” of preventing “defendants from answering claims where evidence may prove elusive due to unavailable witnesses (perhaps deceased), faded memories, lost or destroyed records, and institutions that no longer exist.”¹⁸⁵

While a handful of state courts have struck down statutes of repose on various constitutional grounds,¹⁸⁶ most states still apply statutes of repose. Wisconsin’s product liability statute contains a straightforward example of a statute of repose. It provides simply that “a defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years.”¹⁸⁷

States similarly could bar public nuisance lawsuits if the relevant triggering event occurred sufficiently far in the past. For instance, at least one court relied on a statute of repose to dismiss a municipal public nuisance lawsuit against lead paint manufacturers, which had been filed long after the residential use of lead had been banned in 1978.¹⁸⁸

Imposing Tougher Requirements for Maintaining a Cause of Action

A final cause of action reform might be to make claims tougher to bring or maintain. In other contexts, states have enacted tort reforms that impose threshold requirements on plaintiffs or bar recovery under certain circumstances. Whether these reforms could be made to apply to municipal nuisance litigation would depend on the nature of the nuisance activity and the municipalities’ potential claims. No doubt there are a variety of reforms that a state might enact, but two are discussed below.

First, in response to asbestos litigation in the early 2000s, a number of states adopted a variety of reforms, including requiring that prospective plaintiffs demonstrate symptoms of an asbestos-related illness before they file suit. As a consequence of that reform, states such as Ohio, Georgia, and Florida reportedly saw a dramatic reduction in the number of suits filed. Their statutes were challenged on retroactivity grounds, with mixed results.¹⁸⁹

A similar reform may have useful applicability in the nuisance context. Indeed, in the current climate change litigation, where the municipal plaintiffs have alleged future harms (which defendants criticize as speculative), a proof of damages requirement could have posed a serious stumbling block.

Second, states could expand the doctrines that bar recovery when the plaintiff itself contributes to the alleged harms. As one court recently observed in scrutinizing nuisance and trespass claims based on climate change, “it is not clear that

Defendants' fossil fuel production and the emissions created therefrom have been an 'unlawful invasion' in New York City, as the City benefits from and participates in the use of fossil fuels as a source of power, and has done so for many decades."¹⁹⁰ Whether framed as "assumption of risk," "contributory negligence," or "unclean hands," plaintiffs arguably should be barred from recovery if they are part of the nuisance activity.

Courts and statutes, however, have increasingly adopted comparative negligence schemes in favor of contributory

negligence ones.¹⁹¹ As large-scale landowners and providers of public services, municipalities are likely far more vulnerable to such defenses than other plaintiffs. Strengthening these doctrines as potential bars to recovery could make it tougher for municipal plaintiffs to prevail, or at least reduce municipalities' willingness to bring suit in the first place.

Eliminating Available Forums

A final way to prevent a municipal suit from proceeding is to deprive the plaintiff of a forum in which to bring it, by stripping state courts of jurisdiction to hear certain claims. Of all the options available to states, this approach may be the most aggressive and have the most sweeping effect—but also may be the most difficult to implement.

State courts' jurisdiction is often defined by constitution rather than statute, thus possibly requiring a constitutional amendment to make certain changes. Separation of powers considerations could also pose a hurdle. It also bears noting that qualifying claims might still be brought in federal court, the jurisdiction of which state legislatures have no authority to control.

The concept of jurisdiction stripping is not a new one, even if examples are relatively uncommon. At the federal level, Congress historically has defined and redefined the classes of cases that Article III courts may hear. Some congressional efforts to strip courts of jurisdiction have been successful, while several modern efforts have failed to pass, including attempts to prevent courts from ordering mandatory busing in school desegregation cases or from hearing challenges to voluntary school prayer, the use of "under God" in the Pledge of Allegiance, and the Defense of Marriage Act.¹⁹² Last year, in *Patchak v. Zinke*,¹⁹³ the U.S. Supreme Court upheld against a

separation of powers challenge a very specific jurisdiction stripping provision enacted by Congress—one that prohibited federal courts from hearing suits related to a parcel of property that the Department of Interior had put in trust for the Gun Lake Tribe.¹⁹⁴

State legislatures likewise have the power to alter the jurisdiction of state courts, subject to any limitations imposed by their state's constitution.¹⁹⁵ Several state legislatures have recently contemplated constitutional amendments to prevent their courts from considering certain types of claims. Last year, for instance, Wyoming legislators voted down a proposed amendment stripping state courts of jurisdiction to determine the adequacy of K-12 funding; Kansas legislators considered a similar amendment to block courts from reviewing the legislature's spending decisions. In Missouri, constitutional amendments proposed in the General Assembly would allow Missouri voters to vote on the constitutionality of federal laws; if the voters

decide a federal law is unconstitutional, Missouri courts would be stripped of the jurisdiction to enforce the law and “the courts of this state shall lack jurisdiction to enforce any substantially similar state law or law of another state and shall decline to enforce any such law.”¹⁹⁶ Although these are all examples of efforts to strip state courts’ jurisdiction by constitutional amendment, that need not always be the case (as reflected in the federal system).

A state thus might act to strip its courts of jurisdiction to hear nuisance claims, or a certain subset thereof, based either on the municipal identity of the plaintiff or, more likely, on the alleged nuisance activity. Such an action is, in practical terms, simply a determination by the state’s political branches that particular activities and their alleged associated harms are not fit for judicial resolution. As discussed, this is not a novel principle, and it is one that courts themselves recognize and employ when they dismiss matters as nonjusticiable political questions.¹⁹⁷

In modifying the jurisdiction of state courts, however, a state’s legislative and executive branches would need to be mindful of potential separation of powers limitations. Although separation of powers boundaries are not typically defined as clearly at the state level as at the federal level, the same principles apply and could be violated by

legislation that improperly interferes with the power of the judicial branch. As U.S. Supreme Court precedent counsels, while a legislature is entitled to prescribe classes of cases for the judiciary to hear, it could overstep its authority if, for instance, it were to tell a court how to rule in a specific case.¹⁹⁸ Modifying courts’ jurisdiction through constitutional amendment rather than by legislation, of course, would avoid these concerns by redefining the separation of powers.

Finally, although this paper focuses on what states can do, it is worth noting that federal legislation can also affect what lawsuits may be brought in state courts. Depending on the nature of the public nuisance claim, Congress could preempt some claims that might otherwise be brought in state courts. For instance, the PLCAA discussed previously has, since 2005, barred certain claims against firearm manufacturers from being “brought in any Federal or State court.”¹⁹⁹ This law reflects the view that some subjects of litigation—especially those that are national or global in scope—may be best resolved not at the municipal or state level but at the federal level, and perhaps by the legislative rather than the judicial branch.

“ Such an action is, in practical terms, simply a determination by the state’s political branches that particular activities and their alleged associated harms are not fit for judicial resolution. ”

Conclusion

States have at their disposal a variety of tools to reduce the incidence of municipal litigation, including lawsuits based in nuisance.

Given the authority of states to control the powers of their constituent municipalities, the liability of defendants, the contours of nuisance claims, and the jurisdiction of state courts, a number of paths are available to states interested in curbing

municipal litigation. In weighing potential options, the examples cited in this paper may provide useful models, but state legislators should be careful to account for differences in their individual state's constitution and existing laws.

“ [A] number of paths are available to states interested in curbing municipal litigation.”

Endnotes

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- 58 Daniel Fisher, *Oakland, San Francisco Switch Lawyers as Climate Change Lawsuits Face Possible Reckoning*, *Forbes* (Nov. 28, 2018), available at <https://www.forbes.com/sites/legalnewsline/2018/11/28/oakland-san-francisco-switch-lawyers-as-climate-change-lawsuits-face-possible-reckoning/#7615b17b22eb>.
- 59 *Id.*
- 60 See notes 67-70, *infra*.
- 61 Cal. Civ. Code § 1798.82.
- 62 Californians for Consumer Privacy, *About*, [Caprivacy.org](https://www.caprivacy.org/about), available at <https://www.caprivacy.org/about>. See also Cal. Civ. Code § 1798.100.
- 63 Jennifer R. Martin and Kyle Kessler, *California Sets the Standard With a New IoT Law*, *Trust Anchor: Cyber Security, Data Privacy & Compliance – Orrick Blog* (Nov. 14, 2018), available at <https://blogs.orrick.com/trustanchor/2018/11/14/california-sets-the-standard-with-a-new-iot-law/>.
- 64 Yi Yuan, *People of the State of California v. Equifax: San Francisco becomes the first city to sue Equifax over the massive data breach earlier this year*, *Jolt digest* (Oct. 8, 2017), available at <https://jolt.law.harvard.edu/digest/people-of-the-state-of-california-v-equifax-san-francisco-becomes-the-first-city-to-sue-equifax-over-the-massive-data-breach-earlier-this-year>.
- 65 Lisa Lambert and Paresh Dave, *Facebook shares drop as data privacy fallout spreads*, *Reuters* (Dec. 19, 2018), available at www.reuters.com/article/us-facebook-data-cambridge-analytica-idUSKBN1O1241.
- 66 Avi Salzman, *Why a Data Privacy Lawsuit May Have Implications for Investors*, *Barron's* (Jan. 4, 2019), available at <https://www.barrons.com/articles/los-angeles-sues-the-weather-channel-over-data-privacy-5154663461>.
- 67 See *City of Chicago v. Marriott International, Inc.*, U.S. Dist. Ct. N.D.I.L. (Feb. 14, 2019), available at 1:19-cv-00948; *Marriott Announces Starwood Guest Reservation Database Security Incident*, *Marriot.com* (Nov. 30, 2018), available at <http://news.marriott.com/2018/11/marriott-announces-starwood-guest-reservation-database-security-incident/>; Brian Krebs, *Marriott: Data on 500 Million Guests Stolen in 4-Year Breach*, *Krebs on Security* (Nov. 30, 2018), available at <https://krebsonsecurity.com/2018/11/marriott-data-on-500-million-guests-stolen-in-4-year-breach/>.
- 68 *City of Chicago v. Marriott International, Inc.* (Specifically, the suit alleges that defendants violated MCC § 2-25-090(a) which “prohibits any ‘deceptive practice while conducting any trade or business in the city. Any conduct constituting an unlawful practice under the Illinois Consumer Fraud and Deceptive Business Practices Act ... shall be a violation of this section.’” (quoting MCC § 2-25-090(a)), *Id.* 18.).
- 69 *Id.*
- 70 *Id.*
- 71 Potential state responses to municipal litigation are discussed more fully *infra* at Part II.
- 72 See Daniel Fisher, *Opioid Lawyers Say Settlement May Hinge on Forcing Plaintiffs Into Class Action*, *Forbes* (Sept. 27, 2018); U.S. Census Bureau, *Census Bureau Reports There are 89,004 Local Governments in the United States*, available at <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>.
- 73 U.S. Census 2010.
- 74 See, e.g., Fisher.
- 75 *Id.*
- 76 *Id.*
- 77 See *Ausness* at 825, 829.

- 78 See, e.g., Neal Devins and Saikrishna Bangalore Prakash, *Fifty states, fifty attorneys general, and fifty approaches to the duty to defend*, 124 Yale L.J. 2100 (2015).
- 79 See, e.g., Patrick Hayden, *Parents Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of Mississippi ex rel. Hood v. AU Optronics Corp.*, Yale L.J. 124, no. 2 (2014): 563-75.
- 80 See, e.g., Miss. Code Ann. §21-15-25 (appointment of attorney-at-law for municipalities).
- 81 Ausness, at 899.
- 82 Ausness, at 900.
- 83 Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases*, Rand Corp. (2015).
- 84 See, e.g., *Findley v. Falise (In re Joint E. & S. Dists. Asbestos Litig.)*, 878 F. Supp. 473, 485-86 (E. & S.D.N.Y. 1995).
- 85 See, e.g., *City of New Haven v. Purdue Pharma LP* (It is notable that the plaintiffs chose to focus their claims on the costs resulting from addiction and crime due to opioid addiction rather than corporate fraud or misleading marketing. By contrast, the city of Seattle is suing similar defendants for their alleged "deceptive marketing" campaign. See *City of Seattle v. Purdue Pharma LP*, 2:2017CV01577 (W.D.W.A. 2017).
- 86 See, e.g., Maddigan.
- 87 *Id.*
- 88 *Id.* at 11.
- 89 *Id.*
- 90 Both cities and counties are plaintiffs in the nuisance litigation discussed in Part I. Just as states vary in the powers they allocate to local governments generally, they may also vary in the powers they allocate to cities on the one hand, and counties on the other. Despite those differences, we refer to them collectively and interchangeably as "municipalities" or "localities."
- 91 1 McQuillin Mun. Corp. § 1:23 (3d ed. 2018).
- 92 *Id.* § 1:43.
- 93 N.Y. Const. art. IX, § 2.
- 94 Alaska Const. art. X, §§ 1, 11.
- 95 Although Wisconsin currently allows municipalities to bring nuisance actions, see Wis. Stat. § 823.02, a previous version of the statute specifically prohibited it, see *City of Algoma v. Peterson*, 288 N.W. 809 (Wis. 1939) (decided under former statute).
- 96 See, e.g., Miss. Code Ann. § 75-24-21 ("The district attorney and county attorney shall, within their respective jurisdictions, have the same duty and responsibility under this chapter as that of the attorney general statewide in the enforcement thereof ..."). Interestingly, when district or county attorneys in Mississippi bring suit under this provision, they "must make a full report thereon to the attorney general." *Id.* In some other states, counties are expressly authorized to bring suits in consumer protection matters, but so too are any aggrieved citizens.
- 97 Va. Code Ann. § 15.2-915.1 (2018) (emphasis added).
- 98 See Okla. Stat. tit. 21, § 1289.24a ("The State Legislature declares that the lawful design, marketing, manufacturing, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance."); Ga. Code § 16-11-173(a)(2) (similar, but indicating that those activities do not constitute a "nuisance per se"); Tenn. Code Ann. § 39-17-1314(c) (same as Georgia's statute).
- 99 See *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001).
- 100 2014 La. Act No. 544.
- 101 See La. Rev. Stat. § 49:214.36(O)(1) (providing that "no state or local governmental entity shall have, nor may pursue, any right or cause of action arising from" any uses or activities subject to permitting). *But see* La. Rev. Stat. § 49:214.36(O)(5) ("Nothing in this Section shall alter the rights of any governmental entity, except a local or regional flood protection authority, for ... claims for damage to property owned or leased by such governmental entity.").
- 102 See 17 McQuillin Mun. Corp. § 49:2 (3d ed. 2018) ("The power to sue and the liability to be sued appears to be inherent and are assumed

- or taken for granted or regarded as an incident to the existence of a municipal corporation.”). *But see id.* (discussing the presumption in New York law that “governmental entities have neither an inherent nor a common law right to sue; rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate”).
- 103 *See Ganim v. Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909, at *5 (Conn. Super. Ct. Dec. 10, 1999), aff’d on other grounds, 780 A.2d 98 (Conn. 2001).
- 104 *Id.* at *6 (citations omitted) (noting that “a municipality has no inherent powers of its own; it is merely a creation of the state and its actions must be authorized by the state”).
- 105 *See, e.g., City of New York v. State of New York*, 655 N.E.2d 649, 651 (N.Y. 1995) (“[T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the state and state legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the state. Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the state, created by the state for the convenient carrying out of the state’s governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the state, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants.”).
- 106 *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (rejecting due process challenge to municipality’s increased taxation as a result of a state plan to consolidate cities). *See also Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) (“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.”). But that does mean all state action in regards to municipalities escapes constitutional scrutiny. *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (state initiative blocking implementation of Seattle’s mandatory busing plan to integrate its schools violated Equal Protection Clause).
- 107 891 A.2d 524 (N.H. 2006).
- 108 *Id.* at 534.
- 109 *Id.* at 531-32. *See also id.* at 531 (acknowledging the cities’ “direct economic interest in recovering for contamination to their water supplies,” but holding that “this economic interest is represented by the State’s suit”).
- 110 *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
- 111 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (punctuation and citation omitted).
- 112 Under the analysis set forth in *Alfred L. Snapp & Son, Inc.*, to maintain a *parens patriae* action a state must: “articulate an interest apart from the interests of particular private parties”; “express a quasi-sovereign interest” (such as in the “health and well-being—both physical and economic—of its residents in general”); and allege “injury to a sufficiently substantial segment of its population.” 458 U.S. at 607.
- 113 *See id.* at 603 (noting the “line of cases ... in which States successfully sought to represent the interests of their citizens in enjoining public nuisances”). *See also Massachusetts v. EPA*, 549 U.S. 497, 520-21 (2007) (holding that a state’s quasi-sovereign interests warrant “special solicitude” in the standing analysis); *Aziz v. Trump*, 231 F. Supp. 3d 23, 32 (E.D. Va. 2017) (Commonwealth of Virginia sufficiently alleged *parens patriae* standing to challenge executive order on basis of residents affected by travel ban).
- 114 *See, e.g., Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) (“[P]olitical subdivisions ... cannot sue as *parens patriae* because their power is derivative and not sovereign.”).
- 115 *See, e.g., Town of Riverhead v. Long Island Lighting Co.*, 685 N.Y.S.2d 792, 793 (1999) (“[T]he complaint states a cause of action to recover damages for breach of the public trust, and the Town properly brought this cause of

- action in its *parens patriae* capacity, on behalf of its residents To the extent that the first cause of action, sounding in nuisance, raises a claim of a public nuisance, ... it was proper for the Town to assert this claim on behalf of its residents as well (*see, Alfred L. Snapp & Son v. Puerto Rico, supra*) (citations omitted)).
- 116 *See Bd. of Cty. Comm'rs of Arapahoe Cty. v. Denver Bd. of Water Comm'rs*, 718 P.2d 235, 241 (Colo. 1986) ("Without belaboring the point, we hold that counties lack the element of sovereignty that is a necessary prerequisite for *parens patriae* standing."). *See also Capital View Fire Dist. v. County of Richland*, 377 S.E.2d 122, 124 (S.C. 1989) ("Capital View is a political subdivision of the state. As such, it lacks the element of sovereignty that is a prerequisite to *parens patriae* standing."); *City of Dover*, 891 A.2d at 528 (affirming dismissal of municipal suits and noting that "the State had *parens patriae* standing and that the doctrine of *parens patriae* required the cities' suits to yield to the State's suit").
- 117 *See, e.g., Md. Code Ann., Com. Law § 11-209(c)* (in the context of antitrust actions, recognizing that "[a]n action brought by the Attorney General as *parens patriae* ... is presumed superior to any class action brought on behalf of the same person"); *Conn. Gen. Stat. Ann. § 3-129c* (permitting the attorney general to bring an action "in the name of the state as *parens patriae* for persons residing in this state" in connection with taxation by New York City); *R.I. Gen. Laws § 40-8.2-6* (empowering the attorney general to bring "a civil action in superior court in the name of the state, as *parens patriae* on behalf of persons residing in this state" related to claims of medical assistance fraud).
- 118 *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 889, 893-94 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002).
- 119 2011 S.C. Act No. 52; S.C. Code § 1-7-750.
- 120 *Compare Ex parte Attorney General Troy King v. CVS Caremark*, 59 So. 3d 21, 29 (Ala. 2010) (*per curiam*) (upholding the attorney general's ultimate authority to determine the state's interest in the litigation, over the competing claims of a district attorney for the state), with *Order, State of Arkansas, ex rel. Leslie Rutledge, Attorney General v. Ellington*, No. CV-18-296 (Ark. Apr. 6, 2018) (denying the state's emergency petition requesting an order that a district attorney nonsuit the claims he had purported to bring on the state's behalf against opioid manufacturers).
- 121 *City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983) (explaining that the cost of public services "is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service").
- 122 *See, e.g., City of New Haven v. Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990, at *1 (Conn. Super. Ct. Jan. 8, 2019) ("The cities want the money for the indirect harm they say the drug companies caused them. They say they have been forced to pay for addicts' social and medical needs and have suffered other indirect expenses the addicts themselves caused, including extra emergency-responder expenses, consequences from drug-related crimes, etc.").
- 123 *See, e.g., Baker v. Smith & Wesson Corp.*, No. Civ.A. 99C-09-283-FS, 2002 WL 31741522 (Del. Super. Ct. Nov. 27, 2002); *City of Philadelphia*, 126 F. Supp. 2d at 895 (applying Pennsylvania law).
- 124 821 N.E.2d 1099 (Ill. 2004).
- 125 *Id.* at 1147.
- 126 *Id.*
- 127 719 F.2d at 323, 324. *See also id.* ("Recovery is permitted where it is authorized by statute or regulation").
- 128 *See, e.g., N.Y. City Admin. Code § 7-714(g)* (entitling the City of New York to reimbursement of expenses for investigating and bringing a nuisance abatement action).
- 129 *Flagstaff*, 719 F.2d at 324.
- 130 Another recognized exception to the rule are instances "where the government incurs expenses to protect its own property." *Id.* (citing *Town of East Troy v. Soo Line Railroad Co.*, 633 F.2d 1123 (7th Cir. 1980)). Although municipalities often assert their interests as landowners in nuisance actions, it would be considerably more aggressive, and potentially risk unintended consequences, to eliminate that exception by statute.

- 131 See, e.g., *id.*
- 132 See, e.g., *In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102, at *10 (N.Y. Sup. Ct. June 18, 2018) (noting the absence of case law to support contention that rule bars recovery of municipal expenses incurred “to remedy public harm caused by an intentional, persistent course of deceptive conduct”); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1149 (Ohio 2002) (“Although a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public, it should be allowed to argue that it may recover such damages in this type of case.”).
- 133 See, e.g., U.S. Chamber Institute for Legal Reform, *Big Bucks and Local Lawyers: The Increasing Use of Contingency Fee Lawyers by Local Governments* (Oct. 2016), https://www.instituteforlegalreform.com/uploads/sites/1/LocalProsecutorsPaper_WebPaper.pdf; U.S. Chamber Institute for Legal Reform, *The New LawsUIT Ecosystem: Trends, Targets and Players* at 193-56 (Oct. 2013), https://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-LawsUIT-Ecosystem-Report-Oct2013_2.pdf.
- 134 Local governments’ practice of retaining outside counsel, especially when in exchange for a portion of the recovery, raises serious legal and ethical questions stemming from the potential conflicts of interest created by the arrangement. As noted above, these questions have been examined in other reports and are worthy of continued scrutiny, but they are beyond the scope of this paper.
- 135 La. Rev. Stat. § 42:263.A.
- 136 *Id.*
- 137 N.C. Gen. Stat. § 114-9.5.
- 138 Mo. Rev. Stat. § 34.378.7.
- 139 *Id.* § 34.378.9(2).
- 140 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).
- 141 *Compare State v. Doe*, 987 N.E.2d 1066, 1071-72 (Ind. 2013) (Indiana’s statutory cap on punitive damages does not violate the jury trial right or separation of powers provision in Indiana Constitution); *Rhyme v. K-Mart Corp.*, 562 S.E.2d 82, 103 (N.C. Ct. App. 2002) (upholding North Carolina cap on punitive damages against various challenges, including based on separation of powers, equal protection, due process, and takings); *Bagley v. Shortt*, 410 S.E.2d 738, 739 (Ga. 1991) (rejecting constitutional challenge based on previous precedent that caps on compensatory damages are constitutional), *with Lindenberg v. Jackson Nat’l Life Ins. Co.*, 912 F.3d 348, 366 (6th Cir. 2018) (Tennessee’s statutory cap on punitive damages violates Tennessee’s constitutional right to trial by jury); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 831 (Ark. 2011) (broadly applicable punitive-damages cap violated state constitutional provision allowing General Assembly to limit the amount of recovery only in matters between employers and employees).
- 142 N.C. Gen. Stat. § 106-700.
- 143 *Id.* § 106-701(a).
- 144 See, e.g., *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637 (Idaho 2004) (rejecting challenge to Idaho’s RTFA under state and federal Takings Clauses); *Overgaard v. Rock Cty. Bd. of Comm’rs*, No. Civ.A.02-601, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003) (RTFA upheld against federal due process challenge). *But see Bormann v. Bd. of Supervisors In & For Kossuth Cty.*, 584 N.W.2d 309, 321 (Iowa 1998) (portion of Iowa’s RTFA violated state and federal Takings Clauses because it applied to agricultural operations regardless of expansions or when begun; it effectively gave operations an easement over neighbors’ land in the form of immediate immunity from nuisance liability).
- 145 See La. Rev. Stat. § 9:2799.6.A.
- 146 Mich. Comp. Laws § 600.2974.
- 147 See *id.* § 600.2946.
- 148 15 U.S.C. §§ 7902, 7903. The Ninth Circuit has concluded that the PLCAA bars claims brought under public nuisance statutes. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138 (9th Cir. 2009).
- 149 See 42 U.S.C. § 300aa-22(b)(1) (“No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by

- proper directions and warnings.”).
- 150 See 49 U.S.C. § 41713(b)(1) (“[A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier ...”); *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1344 (11th Cir. 2005) (per curiam) (passenger’s claim for breach of contract of carriage preempted).
- 151 See H.R. Rep. No. 99-908, at 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6347-48.
- 152 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).
- 153 MSA § II(pp), <https://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>.
- 154 See *In re Certified Question from the U.S. Dist. Ct. for the E. Dist. of Mich.*, 638 N.W.2d 409, 415 (Mich. 2002) (holding that the Michigan Attorney General has the authority to release claims of a Michigan county as part of a settlement agreement in an action that the Attorney General brought on behalf of the State of Michigan).
- 155 MSA § XII(b).
- 156 *Id.*
- 157 *Id.*
- 158 *Id.* § XII(b)(2)(A).
- 159 *Id.* § XII(b)(2)(C).
- 160 782 N.E.2d 761 (Ill. App. Ct. 2002).
- 161 *Id.* at 767 (noting the significance of the attorney general’s common law powers, such as “the competence to control all litigation on behalf of the State including intervention in and management of all such proceedings”) (quoting *People v. Massarella*, 382 N.E.2d 262, 264 (1978)). See also *id.* at 768 (“[W]e conclude that the Illinois Attorney General, as the chief legal officer of Illinois, had the authority to issue the release contained in the Assurance, thereby releasing Time from liability for ... the claims” brought by the state attorney.).
- 162 See, e.g., Mich. Const. art. III, § 7 (“The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.”); Va. Code § 1-200 (“The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.”).
- 163 *Mich. Ave. Nat’l Bank v. County of Cook*, 732 N.E.2d 528, 543 (Ill. 2000).
- 164 *McLean v. Maverik Country Stores, Inc.*, 135 P.3d 756, 761 (Idaho 2006) (“It is clear that, under the Idaho Constitution, the legislature has the power to modify or repeal common law causes of action.”); *DeLoach v. Elliott*, 710 S.E.2d 763, 765 (Ga. 2011) (recognizing “the General Assembly’s general authority to modify common law rights of action”).
- 165 *Zdrojewski v. Murphy*, 254 Mich. App. 50, 77, 657 N.W.2d 721, 737 (2002) (recognizing that “the Legislature has the authority to change or abolish common law tort claims, including the ability to limit remedies for such claims”).
- 166 See, e.g., *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802 (Tex. 2010) (noting that “abrogation of common-law claims is disfavored” and holding that “the enactment of a statutory cause of action ... abrogat[es] a common law claim if there exists ‘a clear repugnance’ between the two causes of action”).
- 167 N.C. Gen. Stat. § 106-700.
- 168 See, e.g., Utah Code § 78B-6-1103 (“[A] manufacturing facility or operation may not be considered a nuisance, private or public, by virtue of any changed circumstance in land uses near the facility after it has been in operation for more than three years if the manufacturing facility or operation was not a nuisance at the time it began operation.”).
- 169 See Ga. Code § 16-11-173(a)(2) (“The General Assembly further declares that the lawful design, marketing, manufacture, and sale of firearms and ammunition and other weapons to the public is not unreasonably dangerous activity and does not constitute a nuisance per se.”).
- 170 See, e.g., Alaska Stat. § 09.65.160 (“Immunity for good faith disclosures of job performance information”); Fla. Stat. § 768.095 (“Employer

- immunity from liability; disclosure of information regarding former or current employees”); Wash. Rev. Code § 4.24.730 (2005) (“Liability immunity—Disclosure of employee information to prospective employer”).
- 171 See, e.g., Cal. Civ. Code §§ 3272–3272.9 (“Year 2000 Problem Liability”) (became inoperative on July 1, 2001); Va. Code Ann. § 8.01-227.1–227.3 (“Year 2000 Liability and Damages”) (repealed in 2007); Okla. Stat. tit. 15, §§ 1021–1024 (“Y2K Protection Act”) (repealed in 2014).
- 172 For instance, as Virginia’s now-repealed Y2K statute recognized, Y2K is a “problem ... for which no one person is accountable and, therefore business enterprises of the Commonwealth should not have their ability to continue to deliver goods and services impaired by having to contest lawsuits arising from Year 2000 problems over which such business enterprises have no control.” Va. Code § 8.01-227.1 (1999).
- 173 See Mich. Comp. Laws § 600.2946(5).
- 174 See Tex. Water Code § 7.257.
- 175 See, e.g., *City of Cincinnati v. Deutsche Bank Nat. Tr. Co.*, 897 F. Supp. 2d 633, 639 (S.D. Ohio 2012) (“[T]o the extent that the declaratory and injunctive relief the City seeks would infringe on the Defendants’ practices governing the origination or collection of mortgage credit, such relief would be preempted.”); *City of Cleveland v. Ameriquest Mortg. Secs.*, 621 F. Supp. 2d 513, 519 (N.D. Ohio 2009) (holding that city’s nuisance claim was preempted by Ohio law “reserv[ing] to the state the sole authority to regulate the business of ‘originating, granting, servicing, and collecting loans and other forms of credit.’”), *aff’d on other grounds*, 615 F.3d 496 (6th Cir. 2010).
- 176 See *Ganim*, 1999 WL 1241909, at *7 (“The Connecticut legislature has enacted a statutory scheme of regulation on the sale, distribution and purchase of firearms within the State of Connecticut, further evidencing the absence of plaintiffs’ statutory authorization under the Home Rule Act for action that appears to conflict with state regulations.”).
- 177 See, e.g., *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 574 S.E.2d 48, 53 (N.C. App. 2002) (“Courts will not enjoin as a nuisance an action authorized by valid legislative authority.”).
- 178 See generally Kenneth E. Rubinstein et al., “Time Does Not Run Against the King – But What About the Prince? When Municipalities Can Assert Nullum Tempus,” 17 *Under Construction* (2016) (noting, however, that applicability may hinge on the governmental vs. proprietary function that the municipality is fulfilling).
- 179 See Miss. Code Ann. § 15-1-51 (in fraud cases, providing that “[s]tatutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof”); Or. Rev. Stat. Ann. § 12.250 (“Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit.”).
- 180 Miss. Code Ann. § 95-3-29.
- 181 *Bowen v. Flaherty*, 601 So. 2d 860, 861 (Miss. 1992).
- 182 *Schneider Nat’l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 279 (Tex. 2004), *holding modified by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014).
- 183 See, e.g., *Edmonds v. Cytology Servs. of Md., Inc.*, 681 A.2d 546, 563 (Md. Spec. App. 1996) (“emphasiz[ing] ... that we are not re-introducing a discovery rule into [the statute governing suit against health care providers]; the Legislature specifically abolished the discovery rule when it enacted that provision”), *aff’d sub nom. Rivera v. Edmonds*, 699 A.2d 1194 (Md. 1997); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985) (enforcing “Legislature’s intent in passing [a certain statute] ... to abolish the discovery rule in cases governed by the Medical Liability Act”).
- 184 *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 286 (Tex. 2010).
- 185 *Id.*
- 186 See, e.g., *Dickie v. Farmers Union Oil Co. of LaMoure*, 611 N.W.2d 168, 169 (N.D. 2000) (statute of repose for product liability violated equal protection clause in North Dakota constitution); *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 630 (Ariz. 1993) (statute of repose “abrogated [plaintiffs’] constitutional right by barring the action even before the

- injury occurred [T]he attempted statutory abrogation of their claim fails.”).
- 187 Wis. Stat. § 895.047(5). *But see id.* (creating exception for actions “based on a claim for damages caused by a latent disease”); *id.* § 895.047(6) (section “does not apply to actions based on a claim of negligence or breach of warranty”).
- 188 *See City of Toledo v. Sherwin-Williams Co.*, No. CI2000606040, 2007 WL 4965044 (Ohio Com. Pl. Dec. 12, 2007) (finding that claim was filed beyond the 10 year statute of repose and two-year statute of limitations provided in Ohio’s Product Liability Act, which was held to have subsumed plaintiff’s public nuisance claim). Notably, the Ohio General Assembly had recently amended the Product Liability Act in direct response to the lead paint litigation.
- 189 *Compare Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 60 (Tex. 2014) (pulmonary function testing requirement, as applied to plaintiffs, does not violate the Texas Constitution’s prohibition against retroactive laws), *with DaimlerChrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006) (because law imposed greater evidentiary burden, it could not be applied retroactively).
- 190 *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 473 (S.D.N.Y. 2018), *appeal docketed*, No. 18-2188 (2d Cir.).
- 191 *See, e.g.,* Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in its Place*, 46 U. Rich. L. Rev. 359, 360 (2011) (noting that “forty-six states to date have abolished this archaic doctrine of contributory negligence, by judicial or legislative action, and in its place have adopted the doctrine of comparative negligence”).
- 192 *See generally* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 Harv. L. Rev. 869 (2011).
- 193 138 S. Ct. 897 (2018).
- 194 *Id.* at 902-04 (citing Gun Lake Trust Land Reaffirmation Act, Pub L. 113-179, 128 Stat. 1913, § 2(b) (Sept. 26, 2014)).
- 195 For instance, Article VI, § 1 of the Constitution of Virginia describes the Supreme Court’s and trial courts’ jurisdiction, and additionally provides that “[s]ubject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth.”
- 196 H.J.R. 92, 99th Gen. Assemb., 2nd Reg. Sess. (Mo. 2018).
- 197 *See, e.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (a claim presents nonjusticiable political questions if its adjudication would not be governed by “judicially discoverable and manageable standards” or would require “an initial policy determination of a kind clearly for non-judicial discretion”). As noted in Part I, recent municipal nuisance lawsuits based on climate change have been dismissed partly on this ground. *See City of Oakland et al. v. BP PLC*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *appeal docketed*, No. 18-16663 (9th Cir.); *City of New York*, 325 F. Supp. 3d 466.
- 198 *Patchak*, 138 S. Ct. at 905 (impermissible to have law providing, “In *Smith v. Jones*, Smith wins”).
- 199 15 U.S.C. § 7902(a) (emphasis added).



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