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MUNICIPALITY LITIGATION: A CONTINUING THREAT

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Municipality Litigation: A Continuing Threat[†]

*In March 2019, ILR released its groundbreaking white paper **Mitigating Municipality Litigation: Scope and Solutions**,¹ which examined the worrisome surge in litigation by cities, counties, and other political subdivisions seeking to hold the business community responsible for a wide range of societal ills.*

Two years later, localities remain active as plaintiffs, asserting claims that, until recently, were understood to belong to states alone.² Undeterred by setbacks in some previously filed cases, municipalities have continued to use lawsuits—rather than policymaking—as their preferred vehicle for addressing alleged harms that are national, and even international, in origin and scope.

The upward trend in municipality litigation is unmistakable. The number of municipality suits against energy companies on the basis of global warming, for instance, has doubled since the release of *Mitigating Municipality Litigation*, with cities from Annapolis, Maryland to Honolulu, Hawaii jumping on the bandwagon.

Moreover, the areas targeted by municipal plaintiffs have grown from opioid abuse, climate change, and data privacy breaches to include e-cigarettes, content streaming services, and a variety of others. These new suits generally retain the features of previously filed ones: among other things, they seek to address harms that are alleged to be widespread (and often the subject of media coverage), and they involve claims that would be challenging for individual plaintiffs to prove, because of difficulties in demonstrating harm, causation, and foreseeability.³ Armed with novel theories of liability and supported by throngs of private contingency fee counsel, municipal plaintiffs remain an ongoing and disruptive threat to business.

Especially given its persistent expansion, municipality litigation continues to warrant scrutiny by policymakers. This edition of *ILR Briefly* provides an overview of the basic aspects of this trend, including the factors that are driving municipality litigation, the serious issues it raises, and recent developments in high-profile cases. Finally, this paper summarizes the various, mainly legislative solutions that state leaders might pursue—and that some have enacted already—to curb municipality litigation. This focus on lawmaking recognizes that, while federal and state courts have their part to play in rejecting meritless claims asserted by municipal plaintiffs, state legislators are uniquely situated to decelerate or reverse this trend.

Multiple Drivers of Municipality Litigation

As discussed in *Mitigating Municipality Litigation*, a variety of motivating factors explain why a municipality might turn to litigation. These pressures have become even more acute in the last two years, which could explain the uptick in lawsuits and suggest that more cases might be on the horizon.

First, municipalities may be suing businesses over nationwide problems because of their impatience with the pace at which national policymakers are tackling those problems.⁴ In the area of climate change, for instance, municipal plaintiffs (in some instances, reportedly under pressure from activist organizations) have asked courts to get involved,⁵ rather than calling on the political branches of government for solutions, as at least some courts have recognized that plaintiffs should do.⁶ Despite the different climate change policies and personnel of the Biden administration,⁷ however, plaintiffs continue to aggressively pursue litigation begun under the Trump administration.

Second, cities and counties may bring suit in the hope of a significant financial recovery, like the one that resulted from the tobacco settlement of the 1990s, as well as the fear that they must bring suit to secure their share of any proceeds.⁸ The prospect of a substantial recovery is reportedly even more attractive in times of reduced municipal funding like these, when localities may be looking to cover budget

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shortfalls.⁹ The opioid lawsuits illustrate this dynamic well. With settlement dollars from some of the many suits forthcoming, a coalition of 31 health organizations recently released a set of principles to guide state and local spending of these funds. Their first principle—to “use the funds to add to rather than replace existing spending”—recognizes the reality that, “[g]iven the

economic downturn, many states and localities will be tempted to use the dollars to fill holes in their budgets.”¹⁰

Third, municipalities might see little downside to bringing suit, given the attractive terms commonly proposed by the outside lawyers who pitch them on becoming plaintiffs. Under a typical arrangement, the municipality hires the outside lawyers to handle the

day-to-day litigation, thereby minimizing involvement by public employees, which is itself a cause for concern. The outside lawyers are then paid a significant portion of any recovery, which could climb to 35 percent or even higher.¹¹ This set-up obviates the need for cash-strapped

localities to pay for their lawyers’ services up front or even as they go—rather, they pay for it later and only if the suit succeeds. As a result, even the smallest municipalities are incentivized to participate in complex national litigation, despite lacking the necessary personnel, resources, specialized knowledge, or experience.



Problems With Municipality Litigation

The increase in municipality suits is worrisome for numerous reasons,¹² raising issues that have only become more apparent in the last few years.

DISPLACEMENT OF STATE AUTHORITY

By bringing expansive suits on behalf of themselves and their residents, municipalities arrogate to themselves an authority that traditionally only existed at the state level. It is generally a state attorney general (AG) alone who enjoys *parens patriae* authority to represent the state's citizens in litigation. Not surprisingly, some state AGs have resisted municipal plaintiffs' attempted usurpation of their role.¹³ What is more, in seeking to force corporate defendants to alter their conduct—conduct that often is already the subject of national or state regulation—municipal plaintiffs also improperly assume a policymaking function through the courts that squarely and solely belongs to Congress or state legislatures.¹⁴

PREVENTION OF GLOBAL RESOLUTION

Because the number of potential municipal plaintiffs could be in the thousands, their involvement threatens the potential for any global

resolution, as it ensures protracted litigation and prevents the certainty and finality on which businesses specifically, and defendants generally, rely. Again, one need look no further than the ongoing opioid lawsuits, which illustrate the complexity of negotiations involving so many plaintiffs—more than a 40-fold increase over the number of

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state AGs who brokered the comprehensive tobacco settlement in the 1990s. The enormous number of parties and their respective lawyers, representing competing interests and perspectives, increases the likelihood of disagreement and the

opportunity for holdouts. Unsurprisingly, there have been reports of disputes over the terms of the opioid settlement and control of the proceeds.¹⁵

UNEQUAL DISTRIBUTION OF RELIEF

A system that allows individual municipalities to bring suit creates a strong likelihood that any relief—assuming it is warranted—will not be equitably distributed to victims. The damages recovered in a state-brought suit can be shared on a statewide basis (as determined by state law or officials), but a series of municipality suits makes uneven outcomes more likely.

If successful, some municipalities and their residents might obtain large recoveries, far out of proportion to their claimed harms; other prevailing municipalities might receive less than they might otherwise be entitled to.¹⁶ Meanwhile, the residents of municipalities that lose their cases, or decline to bring suit, will receive nothing. The traditional approach of a state-brought suit minimizes the potential for a race to the courthouse by certain municipalities and the resulting inequities.

DIVERSION OF COMPENSATION

Finally, the common arrangement by which localities finance their lawsuits—contingency fee contracts with outside counsel—redirects billions of dollars in recovery

that otherwise would go to the localities and their citizens. Those contracts can eliminate 35 percent or more of the municipal plaintiffs' recovery. Providing that state AGs alone may represent state residents

in suits over matters of statewide concern would reduce the potential that compensation will be unnecessarily diverted.

A Range of High-Profile Targets

Notwithstanding the limited success their cases are achieving, localities have continued to use litigation to address a variety of high-profile issues.

ENERGY/ENVIRONMENTAL

Perhaps the most noticeable development in municipality litigation in the last two years has been the acceleration of suits by municipalities (as well as states) seeking to hold energy companies responsible for the effects of global warming. More than a dozen municipalities, mostly in coastal areas, are now pressing their claims in state and federal court. The newest plaintiffs are Honolulu, Hawaii;¹⁷ Hoboken, New Jersey;¹⁸ Charleston, South Carolina;¹⁹ Maui, Hawaii;²⁰ Annapolis, Maryland;²¹ and, just weeks before the publication of this paper, Anne Arundel County, Maryland.²² Like previous plaintiffs, they assert claims sounding in nuisance and products liability. Increasingly, however, municipal plaintiffs are

also alleging violations of their state consumer protection laws, which they claim as additional grounds for proceeding in state court.

Even as municipalities are initiating new lawsuits, earlier-filed suits have largely been stalled by arguments over whether they should proceed in state or federal court. These

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cases have foundered, both on jurisdictional grounds and the merits, in part because they are ill-suited to address an issue that is fundamentally global in nature. For instance, in *City of New York v. Chevron*

Corporation, the Second Circuit affirmed the dismissal of the city's claims, noting that “[g]lobal warming presents a uniquely international problem of national concern” that is “not well-suited to the application of state law.”²³ It explained that, although “numerous federal statutory regimes and international treaties ... provide interlocking frameworks for

regulating greenhouse gas emissions, as well as enforcement mechanisms to ensure that those regulations are followed,” the city “sidestepped those procedures and instead instituted a state-law tort suit against five oil companies to recover damages caused by those companies’ admittedly legal commercial conduct in producing and selling fossil fuels around the world.”²⁴

The court summarized well the central weakness in the plaintiffs’ case: “The question ... is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused



by global greenhouse gas emissions. Given the nature of the harm and the existence of a complex web of federal and international environmental law regulating such emissions, ... the answer is 'no.'"²⁵ Notwithstanding these setbacks, however, municipal plaintiffs appear determined to continue litigating their claims, whether in state or federal court.²⁶

OPIOIDS

Through sheer numbers of plaintiffs—numbering in the thousands—the many state and federal lawsuits relating to opioids continue to dominate the landscape of municipal litigation.²⁷ The multidistrict litigation consolidated before the U.S. District Court for the Northern District of Ohio is proceeding, though not without difficulties.²⁸ COVID-19 has delayed some trials, and the novel “negotiation class” mechanism adopted by the court—an attempt to solve the global-resolution and unequal-distribution issues discussed earlier—was overturned by the Sixth Circuit.²⁹ While some drug manufacturer and distributor defendants agreed to global resolutions, cases against other

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defendants remain, in part because of disagreement among state and municipal plaintiffs about the terms of a settlement.³⁰ At the time of publication, one bellwether trial involving drug distributors is underway in West Virginia federal court,³¹ another involving pharmacies is scheduled to start in October,³² and five cases against pharmacies have been chosen for future bellwether trials.³³ Numerous other cases remain pending in state court.³⁴ In the meantime, municipalities continue to sue new defendants in opioid-related lawsuits.³⁵

DATA PRIVACY

A third type of case brought by municipalities in recent years has targeted corporations whose customer data has been hacked or inadvertently released.³⁶ These cases have mostly been centered in

California, which adopted the nation's first data breach notification law and, in 2018, adopted a sweeping consumer privacy protection law. These suits (e.g., San Diego's against Experian;³⁷ San Francisco's against Equifax³⁸) often are filed alongside massive class actions. Although the municipalities' suits may result in only modest settlements,³⁹ their increasing

incidence shows a willingness to test new theories of liability. For instance, Chicago's suit against Marriott and a subsidiary for their 2018 security breach rests on the claim 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.”⁴⁰ The court upheld this claim against numerous challenges, concluding it was a “legitimate exercise of the City's home rule authority and does not violate the Illinois Constitution.”⁴¹

E-CIGARETTES

Since 2018, hundreds of lawsuits have been filed in state and federal court against e-cigarette maker JUUL Labs Inc., its part-owner Altria Group

Inc., and their individual officers and directors, alleging that they misleadingly marketed e-cigarette products, hid the products' health hazards, and inappropriately targeted teenagers. In October 2019, roughly 350 of these suits—including more than a hundred brought by municipalities and local school districts—were bundled together in multidistrict litigation (MDL) before the U.S. District Court for the Northern District of California, where they continue to be litigated.⁴² Earlier this year, the lawsuits brought by Rochester, New Hampshire and King County, Washington were chosen as two of the six bellwether cases to proceed to trial first.

The plaintiffs' cases rest on a variety of theories under California law and other states' laws, from racketeering and fraud to false advertising and products liability. Among other things, the local governments in particular pleaded public nuisance under Arizona, California, Florida, New York, and Pennsylvania law, and seek abatement, injunctive relief, compensatory, and punitive damages.⁴³ The MDL court has largely permitted these causes of action to proceed. For instance, during the first wave of motions to dismiss, the court accepted the government entities' nuisance theory—that defendants "created a public nuisance by producing, promoting, distributing, and

PUBLIC NUISANCE

Of the causes of action regularly asserted by municipal plaintiffs, public nuisance is frequently their favorite.⁸² Although the tort originally developed to address tangible injuries related to land, air, and water,⁸³ and traditionally required that individual plaintiffs demonstrate a special injury to assert a claim,⁸⁴ in recent years enterprising plaintiffs and their lawyers have aggressively tested the boundaries of the tort. Plaintiffs have sought to use public nuisance to combat a wide range of purported social ills, from asbestos and tobacco to firearms and lead paint. They have advocated, for instance, that courts recognize a "public right" to be free from the threats of certain products or conditions.

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Some courts have refused to recognize such invented “rights” and have dismissed plaintiffs’ theories, properly concluding that public nuisance cannot be used to sidestep compliance with the requirements of more appropriate causes of action.⁸⁵ For instance, as the Second Circuit recognized in affirming the dismissal of New York City’s climate-change suit, “the City effectively seeks to replace ... carefully crafted frameworks [imposed by federal statutory regimes and international treaties]—which are the product of the political process—with a patchwork of claims under state nuisance law.”⁸⁶ Defendants must be vigilant in ensuring that public nuisance does not gain judicial acceptance as a catch-all cause of action, lest it become “a monster that would devour in one gulp the entire law of tort.”⁸⁷



marketing JUUL products for underage use in their school districts and counties.”⁴⁴ It specifically rejected defendants’ argument that that theory would “expand public nuisance law beyond its traditional boundaries and into product liability.”⁴⁵ During a second wave of motions to dismiss earlier this year, it doubled down on that conclusion, despite an intervening Colorado state court decision dismissing the State of Colorado’s public nuisance claim against JUUL and holding that the sale of JUUL products cannot constitute a public nuisance under Colorado law.⁴⁶

While it is too early to draw many conclusions from these cases, already the influence of the opioid litigation is apparent. In denying the defendants’ motions to dismiss, for instance, the MDL court expressly found “instructive” the analysis of the federal court handling the opioid MDL in rejecting the municipal cost recovery rule,⁴⁷ under which 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.”⁴⁸ The court also repeatedly looked to opioid cases in considering defendants’ argument that plaintiffs’ public nuisance claims “are essentially product liability claims for economic damages under the guise of nuisance law,”⁴⁹ ultimately allowing the claims to proceed because “[s]imilar allegations have passed the pleadings stage in opioid cases.”⁵⁰

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OTHER EMERGING CASES

Several other categories of cases, although not as high-profile as those described above, appear to be coming into municipalities’ crosshairs. First, cities and water districts from Pennsylvania to California have begun bringing suit against

manufacturers of per- and polyfluoroalkyl substances (PFAS), asserting hundreds of millions of dollars in damages based on the alleged need to remediate drinking water sources.⁵¹ While private suits against PFAS manufacturers are not a recent development, suits by localities and water districts appear to be picking up, with several more filed this year.⁵² Second, numerous localities across the country have partnered with outside

contingency fee counsel and sued Hulu, Netflix, and other streaming services, demanding payment of utility fees on the theory that, like cable operators, those companies deliver services through wirelines located on public rights of way.⁵³ Although these latter cases differ in kind from others, they do

demonstrate localities’ increased litigiousness, especially in the face of budget crunches,⁵⁴ as well as their willingness to file copycat actions when another municipality provides a lead to follow.

A Number of Possible Solutions

Given the proliferation of suits by cities and counties, and its implications for the legal orders of the states, the timely resolution of claims, and the fulsome compensation of victims, it is not surprising that state-level policymakers would be interested in understanding their options for curbing this trend. Part II of *Mitigating Municipality Litigation* identified and analyzed four sets of

PRECLUDING OR DISCOURAGING PLAINTIFFS

Because municipalities are “creatures of the state” and generally may exercise only the powers conferred on them by state law, states could modify their law to preclude or discourage cities and counties from serving as plaintiffs (subject to limitations of the state’s constitutional or home-rule provisions).⁵⁶ States might

statutorily eliminate municipalities’ power to bring suit or assert specific causes of action,⁵⁷ or codify localities’ lack of *parens patriae* authority to bring suit.⁵⁸ States also could impose additional hurdles on would-be municipal plaintiffs—for instance, by requiring state-level approval to file or maintain a

suit.⁵⁹ Finally, states could discourage localities from bringing suit by limiting the use of (or compensation allowable to) outside contingency fee counsel,⁶⁰ or by statutorily reducing the types and amounts of damages that are recoverable.⁶¹

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“solutions” for keeping would-be municipal plaintiffs in check.⁵⁵ These strategies correspond to the four essential elements of a lawsuit: 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. Without one or more of these elements, a municipal lawsuit cannot be viable.

TRANSPARENCY IN PRIVATE ATTORNEY CONTRACTING

Transparency is an essential tool for ensuring that public contracts are necessary and fair. To that end, nearly half the states have enacted some version of the Transparency in Private Attorney Contracting Act (TIPAC), which 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. States could, at a minimum, consider extending these requirements to municipalities that enter into contracts for outside counsel.



LIMITING THE RANGE OF DEFENDANTS

States could reduce municipal suits by limiting the range of defendants who may be targeted in litigation.⁶² Like the federal government,⁶³ states often enact statutes that limit suits against particular industries. For instance, every state has a version of a “right to farm act,” to limit the exposure of agricultural operations to nuisance claims,⁶⁴ and many states have enacted so-called “commonsense consumption acts” to exempt food manufacturers and retailers from liability premised on weight gain, obesity, or related health conditions.⁶⁵ In particular cases, and depending on state law, a state AG also might regulate the liability of particular defendants by settling, on a statewide basis, the claims raised or likely to be raised by localities.⁶⁶

MODIFYING CAUSES OF ACTION

Another strategy for lowering the incidence of municipal litigation is to restrict the availability of the causes of action under which municipalities might bring suit.⁶⁷ To help curb the rampant abuse of the tort of nuisance, for instance, states could statutorily limit the circumstances under which activities “may be deemed to be a nuisance,”⁶⁸ or specifically exclude conduct that is compliant with relevant state or federal regulations.⁶⁹ Enacting traditional tort-reform measures—such as reducing the time period in which certain claims may be brought, and imposing tougher bars to suit and recovery—would also serve to limit suits.

LIMITING AVAILABLE FORUMS

States could limit the forums in which municipal plaintiffs can bring actions.⁷⁰ Because states control the jurisdiction of their own courts, whether by constitutional or statutory provision, they could choose to limit the claims that their courts can consider or the relief they may order. Some states have considered such measures,⁷¹ but examples are more common at the federal level.⁷²

States have at their disposal a variety of tools to reduce or eliminate altogether the incidence of municipal litigation. In weighing potential options, however, state legislators should be careful to account for differences in their individual state’s constitution and existing laws.

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State Responses

State leaders have demonstrated not only interest in these solutions, but a willingness to propose legislative changes to effectuate them.

In 2019, Texas enacted one of the solutions mentioned above: a state-level check on the ability of a political subdivision to enter into a contingency fee contract for legal services.⁷³ Under the new statutory requirement, before a proposed contract becomes “effective and enforceable, the political subdivision must” disclose its purpose and terms and “receive attorney general approval of the contract.”⁷⁴ The statute provides two substantive bases on which the AG may refuse to approve the contract: (1) “the legal matter that is the subject of the contract presents one or more questions of law or fact that are in common with a matter the state has already addressed or is pursuing”; and (2) “pursuit of the matter by the political subdivision will not promote the just and efficient resolution of the matter.”⁷⁵ The bill passed the legislature with overwhelming and bi-partisan

support,⁷⁶ and the statute has been applied several times to prevent municipalities from bringing suit.⁷⁷ Other states, including Tennessee and Kansas, have considered similar legislation.⁷⁸

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concern. The latter goal has also been the express aim of legislative efforts in other states. A bill introduced in Florida this year, for instance, would have given the state’s AG “sole authority to file a civil proceeding on behalf of the ... governmental entities in this state” that are “affected” by “a matter of great governmental concern” as declared by the

legislature and defined as “caus[ing] substantial economic loss or other harm of a similar nature to governmental entities in 15 or more counties in this state.”⁷⁹ The AG also would have been authorized to intervene, or “consolidate, dismiss, release, settle, or take action that he or she believes to be in the public interest[,] in any civil proceeding in state or federal court pertaining to a matter of great governmental concern.”⁸⁰ Another bill would have authorized the AG to determine when an action involves a “matter of great governmental concern”—defined there as “conduct or harm that adversely affects the interests of citizens of at least five counties of this

state”—as well as to stay any action involving such a matter while deciding whether to bring her own action.⁸¹ The legislature adjourned before final passage of the bills.

States are expected to continue considering changes to state law in upcoming legislative sessions.



Conclusion

Cities and counties, armed with private contingency fee counsel, continue to bring high-profile lawsuits that target a range of corporate conduct. As municipal plaintiffs grow in number and experience, their role at the forefront of public litigation is poised to become a permanent one, unless states act to confine their ability to bring and maintain suit. But, as described above, a number of sensible strategies are available to state leaders looking to curb municipality litigation. While it is difficult to predict the future trajectory of municipality litigation—which may depend on the outcome of pending cases—it remains a worrisome trend that warrants close scrutiny.

Endnotes

- † This edition of *ILR Briefly* was prepared by Trevor S. Cox and Elbert Lin, Hunton Andrews Kurth LLP.
- 1 Rob McKenna, Elbert Lin, and Drew Ketterer, *Mitigating Municipality Litigation: Scope and Solutions*, U.S. Chamber Institute for Legal Reform (Mar. 2019), <https://instituteforlegalreform.com/research/mitigating-municipality-litigation-scope-and-solutions/> (hereinafter *Mitigating Municipality Litigation*).
- 2 Although cities and counties may differ in the powers their states allocate them, we refer to them collectively and interchangeably as “municipalities” or “localities.”
- 3 *Mitigating Municipality Litigation* at 9 (also noting that cases typically allege “more than mere negligence or nuisance, typically fraud or concealment on the part of the defendants”).
- 4 See, e.g., James Rainey, *With Congress and Trump on sidelines, climate change battles moves to courts*, NBC News (Oct. 26, 2018) (“When the state of New York went to court this week to accuse Exxon Mobil of misleading investors, it was just the latest demonstration by cities, counties, states and even a group of young Americans that they are fed up waiting for corporations, Congress or the White House to take action on global warming.”), <https://www.nbcnews.com/science/environment/congress-trump-sidelines-climate-change-battle-moves-courts-n924651>.
- 5 Dino Grandoni, *States and cities scramble to sue oil companies over climate change*, Wash. Post (Sept. 14, 2020) (“Driving the legal actions from the ... cities is inertia in Congress, which has yet to pass major legislation addressing the causes or effects of climate change. In turn, activists are increasingly hoping to make progress by demanding that Democrats bring oil companies to court.”), <https://www.washingtonpost.com/climate-environment/2020/09/14/states-cities-scramble-sue-oil-companies-over-climate-change/>.
- 6 See, e.g., *City of New York v. Chevron Corp.*, 993 F.3d 81, 102 (2d Cir. 2021) (noting that “federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches”); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018) (“[C]ourts must ... respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches. The Court will stay its hand in favor of solutions by the legislative and executive branches.”), *vacated*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 2021 WL 2405350 (U.S. June 14, 2021).
- 7 For instance, President Biden’s climate adviser David J. Hayes was, in his previous role as executive director of the State Energy and Environmental Impact Center, an architect of the NYU Law Fellows program, which paid the salaries of environmental attorneys placed in the offices of a dozen state attorneys general—including several who later brought suit against the energy industry. See Editorial Bd., *State AGs for Rent*, Wall St. J. (Nov. 6, 2018), <https://www.wsj.com/articles/state-ags-for-rent-1541549567>.
- 8 See, e.g., Jef Feeley, *Burned in Tobacco Deal, Cities in Drug Fight Target McKinsey*, Bloomberg (Apr. 15, 2021), <https://www.bloomberg.com/news/articles/2021-04-15/burned-in-tobacco-deal-cities-in-opioid-fight-want-share-of-pot>.
- 9 Eriq Gardner, *Why Cash-Strapped Towns Are Suing Streaming Giants*, Hollywood Reporter (Sept. 17, 2020) (in response to the “budget-busting pandemic,” mayor “‘began looking for every opportunity to bring in revenue’” and therefore “filed a lawsuit against Netflix and Hulu”), <https://www.hollywoodreporter.com/business/business-news/why-cash-strapped-towns-are-suing-streaming-giants-4061489/>.
- 10 Johns Hopkins Bloomberg School of Public Health, *Principles for the Use of Funds from the Opioid Litigation*, <https://opioidprinciples.jhsph.edu/principle-1-spend-money-to-save-lives/>.
- 11 Daniel Fisher, *Texas Officials Were ‘In Over Their Heads’ When They Struck Deals With Opioid Lawyers*, Forbes (Aug. 15, 2018), <https://www.forbes.com/sites/legalnewsline/2018/08/15/texas-officials-in-over-their-heads-when-they-struck-deals-with-opioid-lawyers/?sh=d010be47e399>.
- 12 See *Mitigating Municipality Litigation* at 14–17.
- 13 See, e.g., Pet. for Writ of Mandamus at 15, *In re National Prescription Opiate Litig.*, No. 19-3827 (6th Cir. Aug. 30, 2019) (“Ohio, not its counties, has the power and the right to represent the people of the State; and only Ohio, not its counties or a federal district court, has the responsibility and the right to distribute proceeds of those claims. As a result, Ohio’s Attorney General is uniquely positioned to



- litigate on behalf of all Ohioans.”), <https://perma.cc/M6Z7-FUDJ>. The Sixth Circuit denied the petition as untimely and did not address the merits of the Ohio Attorney General’s argument. *See Order, In re National Prescription Opiate Litig.*, No. 19-3827 (6th Cir. Oct. 10, 2019), ECF 32-2, <https://perma.cc/6AVS-SXLA>.
- 14 *See, e.g.,* Br. of Indiana & 14 Other States as *Amici Curiae* in Supp. of Defs.-Appellees at 8, *City of New York v. Chevron Corp. et al.*, No. 18-2188, 2019 WL 656389, at *5 (2d Cir. Feb. 14, 2019) (“The City’s claims are not appropriate for judicial resolution because they present public policy questions that require a balancing of interests better suited to the political branches than courts.”). *See also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (“It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009), *aff’d*, 696 F.3d 849 (9th Cir. 2012) (noting that “the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch”).
 - 15 Feeley, *supra* n.8 (“U.S. cities and counties are increasingly at odds with their own state governments over how to divvy up \$641.5 million that consulting firm McKinsey & Co. has offered to settle its liability for work with the opioid industry.”).
 - 16 *See Fisher, supra* n.11 (noting that “Harris County agreed to pay a contingency fee of 35%, more than double the rate in Dallas County”).
 - 17 *See Compl., City & County of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 9, 2020), <https://tinyurl.com/t7kwpwpxp>.
 - 18 *See Compl., City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-003179-20 (N.J. Super. Ct. Sept. 2, 2020), <https://tinyurl.com/29w3xpyd>.
 - 19 *See Compl., City of Charleston v. Brabham Oil Co.*, No. 2020CP1003975 (S.C. Ct. Com. Sept. 9, 2020), <https://tinyurl.com/z2zzk5>.
 - 20 *See Compl., County of Maui v. Sunoco LP*, No. 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020), <https://tinyurl.com/xe4746sb>.
 - 21 *See Compl., City of Annapolis v. BP P.L.C.*, No. C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021), <https://tinyurl.com/4xb76shy>.
 - 22 *See Compl., Anne Arundel County v. BP P.L.C.*, No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021), <https://tinyurl.com/39z4887d>.
 - 23 *City of New York v. Chevron Corp.*, 993 F.3d 81, 85–86 (2d Cir. 2021).
 - 24 *Id.* at 86.
 - 25 *Id.* at 85.
 - 26 In *BP P.L.C. v. Mayor and City Council of Baltimore*, the first of these suits to reach the U.S. Supreme Court on any issue, the Court handed defendants a procedural victory on the question of whether Baltimore’s claims should proceed in federal court. 141 S. Ct. 1532 (2021). Although it expressly took no position on the merits of Baltimore’s claims, it held that the Fourth Circuit erred in refusing to consider all the grounds for removal raised by defendants—one of which is that global-warming claims necessarily arise under federal common law and therefore belong in federal court.
 - 27 The national prescription opioid multidistrict litigation alone now includes about 3,000 lawsuits, many of which were brought by municipalities. Indeed, plaintiffs there sought to create a “negotiation class” that would include “every city and county within the United States, some 34,458 municipal entities.” *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).
 - 28 *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio).
 - 29 *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 677.
 - 30 *See, e.g.,* Jan Hoffman, *Opioid Settlement Offer Provokes Clash Between States and Cities*, N.Y. Times (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/health/opioids-settlement.html>.
 - 31 *City of Huntington v. AmerisourceBergen Drug Corp. et al.*, No. 3:17-cv-01362 (S.D. W. Va.); *Cabell Cty. Comm’n v. AmerisourceBergen Drug Corp. et al.*, No. 3:17-cv-01665 (S.D. W. Va.).
 - 32 *County of Lake, Ohio v. Purdue Pharma LP et al.*, No. 1:18-op-45032 (N.D. Ohio); *County of Trumbull, Ohio v. Purdue Pharma LP et al.*, No. 1:18-op-45079 (N.D. Ohio).
 - 33 The municipal plaintiffs in those suits (each in a different federal court of appeals) are Durham County, North Carolina; Tarrant County, Texas; Montgomery County, Ohio; Santa Fe County, New Mexico; and Cobb County, Georgia. *See Jeff Overley, Opioid MDL Judge Picks New Bellwethers, Denies Retaliating*, Law360 (Apr. 7, 2021), <https://www.law360.com/articles/1373167/opioid-mdl-judge-picks-new-bellwethers-denies-retaliating>.

- 34 See, e.g., Amanda Bronstad, *Second Opioid Trial Opens in California Over ‘Crushing Burden’ of Epidemic*, Law.com, <https://www.law.com/therecorder/2021/04/19/second-opioid-trial-opens-in-california-over-crushing-burden-of-epidemic/>.
- 35 Feeley, *supra* n.8 (“In the past two months, McKinsey reached final agreements with all 50 states to resolve lawsuits claiming it helped boost sales of the addictive drugs. But since then, more than 20 cities, counties and Native American tribes have sued the consultant, hoping for their own payouts.”).
- 36 See *Mitigating Municipality Litigation* at 12–13.
- 37 See Compl., *People of the State of California v. Experian Data Corp.*, No. 37-2018-00011206-CU-BT-CTL (Cal. Super. Ct. Mar. 6, 2018), <https://www.law360.com/articles/1025174/attachments/0>.
- 38 See Compl., *People of the State of California v. Equifax, Inc.*, No. CGC-17-561529 (Cal. Super. Ct. Sept. 26, 2017), <https://perma.cc/BVV4-9AY9>.
- 39 For instance, Chicago’s suit against Equifax in connection with a 2017 data breach netted only \$1.5 million. Celeste Bott, *Chicago, Equifax reach \$1.5M Settlement Over Data Breach*, Law360 (Apr. 10, 2020), <https://www.law360.com/articles/1262642/chicago-equifax-reach-1-5m-settlement-over-data-breach>.
- 40 *Mitigating Municipality Litigation* at 13.
- 41 *City of Chicago v. Marriott Int’l, Inc.*, No. 19-2879, 2019 WL 6829101, at *13 (D. Md. Dec. 13, 2019).
- 42 See *In re JUUL Labs, Inc., Mktg., Sales, Practices, & Prods. Liab. Litig.*, No. 19-md-02913-WHO (N.D. Cal.).
- 43 *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 578 (N.D. Cal. 2020).
- 44 *Id.* at 645.
- 45 *Id.*
- 46 *In re Juul Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. 19-MD-02913-WHO, 2021 WL 1391540, at *13 (N.D. Cal. Apr. 13, 2021).
- 47 497 F. Supp. 3d at 643.
- 48 *City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983).
- 49 497 F. Supp. 3d at 645–46.
- 50 *Id.* at 650. See also *id.* at 646 (“The public nuisance claims alleged here are not as novel as [JUUL] characterizes them to be; similar claims have been alleged in numerous opioid and gun manufacturer cases.”); *id.* at 649 (“These allegations match the type of public nuisance allegations that have proceeded past the pleadings stage in cases addressing opioids and firearms.”).
- 51 See generally John Gardella, *PFAS Water Utility Lawsuit Shows an Increasing Trend*, Nat’l L. Rev. (Feb. 17, 2021), <https://www.natlawreview.com/article/pfas-water-utility-lawsuit-shows-increasing-trend>; Ellen M. Gilmer, *Forever Litigated ‘Forever Chemicals’: A Guide to PFAS in Courts*, Bloomberg Law (Jan. 13, 2020), <https://news.bloomberglaw.com/environment-and-energy/forever-litigated-forever-chemicals-a-guide-to-pfas-in-courts>.
- 52 See, e.g., Compl., *City of La Crosse v. The 3M Company*, No. 2021CV000124 (Wis. Cir. Ct. Mar. 4, 2021), https://www.wpr.org/sites/default/files/2021.03.04_-_dkt_25_-_summons_and_complaint.pdf.
- 53 See, e.g., Compl., *City of New Boston v. Netflix*, No. 5:20-cv-00135-RWS (E.D. Tex. Aug. 11, 2020), <https://www.classaction.org/media/city-of-new-boston-texas-v-netflix-inc-et-al.pdf>; Compl., *City of Creve Coeur v. Netflix Inc.*, No. 18SL-CC02819 (Mo. Cir. Ct. St. Louis Cty. Dec. 30, 2020), <https://tinyurl.com/yjec3e46>.
- 54 Dom DiFurio, *Dallas gives city attorneys go-ahead to sue Netflix, Hulu, other streaming services over franchise fees*, Dallas Morning News (Feb. 24, 2021) (“The action by the city comes as traditional tax revenue sources have felt the impact of the COVID-19 pandemic.”), <https://www.dallasnews.com/business/local-companies/2021/02/24/dallas-gives-city-attorneys-go-ahead-to-sue-netflix-hulu-other-streaming-services-over-franchise-fees/>; Gardner, *supra* n.9 (in response to the “budget-busting pandemic,” mayor “began looking for every opportunity to bring in revenue” and therefore “filed a lawsuit against Netflix and Hulu”).
- 55 See generally *Mitigating Municipality Litigation* at 19–45.
- 56 See generally *id.* at 22–33.
- 57 See, e.g., Kan. Stat. Ann. § 60-4501(a) (“The authority to bring civil suit and right to recover against any firearms or ammunition manufacturer or federally licensed firearms or ammunition dealer, by or on behalf of the state or any political subdivision of the state, for damages, abatement of nuisance or injunctive relief arising from or relating to the lawful design, manufacture, marketing or sale of firearms or ammunition to the public shall be reserved exclusively to the state.”).
- 58 See, e.g., *Bd. of Cty. Comm’rs of Arapahoe Cty. v. Denver Bd. of Water Comm’rs*, 718 P.2d 235, 241 (Colo. 1986) (holding that “counties lack the element of sovereignty that is a necessary prerequisite for



- parens patriae* standing.”); *Capital View Fire Dist. v. County of Richland*, 377 S.E.2d 122, 124 (S.C. 1989) (holding that, as a political subdivision of the state, “it lacks the element of sovereignty that is a prerequisite to *parens patriae* standing”).
- 59 Cf. S.C. Code § 1-7-750 (providing that a “circuit solicitor must obtain written approval of the Attorney General prior to ... filing a civil cause of action”).
- 60 See, e.g., La. Rev. Stat. § 42:263.A (forbidding 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”); N.C. Gen. Stat. § 114-9.5 (allowing for a 25% outside-counsel fee for damages up to \$10 million and 5% for damages over \$25 million, with an absolute total cap of \$50 million); Mo. Rev. Stat. § 34.378.7 (fee tiers ranging from 15% down to 2% and an aggregate fee cap of \$10 million).
- 61 For instance, a state might codify the municipal cost recovery rule, see *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d at 644 (observing that authority in each plaintiff’s state recognized an exception to the municipal cost recovery rule), or statutorily cap the punitive-damages awards, see, e.g., *State v. Doe*, 987 N.E.2d 1066, 1071–72 (Ind. 2013) (holding that Indiana’s punitive-damages cap does not violate the state constitution).
- 62 See generally *Mitigating Municipality Litigation* at 34–36.
- 63 See, e.g., Protection of Lawful Commerce in Arms Act of 2005, *codified at* 15 U.S.C. § 7902 (prohibiting “any person” from bringing suit against a firearm manufacturer or seller); Childhood Vaccine Injury Act of 1986, *codified at* 42 U.S.C. § 300aa-22(b)(1) (restricting product-liability claims against vaccine manufacturers).
- 64 See, e.g., N.C. Gen. Stat. § 106-700 *et seq.*
- 65 See, e.g., La. Rev. Stat. § 9:2799.6.A (“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.”); see also Mich. Comp. Laws § 600.2974 (specifying that a “political subdivision of this state shall not file, prosecute, or join” any of the described actions).
- 66 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).
- 67 See generally *Mitigating Municipality Litigation* at 37–42.
- 68 See, e.g., N.C. Gen. Stat. § 106-700 (involving agricultural and forestry operations); Utah Code § 78B-6-1103 (involving manufacturing facility and operations); Ga. Code § 16-11-173(a)(2) (involving firearms).
- 69 See, e.g., Mich. Comp. Laws § 600.2946(5) (precluding suits against drug manufacturers under Michigan’s Product Liability Act where a drug was approved by the FDA and the manufacturer complied with labeling rules).
- 70 See *Mitigating Municipality Litigation* at 43–44.
- 71 H.J.R. 92, 99th Gen. Assemb., 2nd Reg. Sess. (Mo. 2018) (proposed amendment to strip Missouri courts of jurisdiction to enforce a state law substantially similar to any federal law determined by Missouri voters to be unconstitutional); S.J.R. 9 (Wyo. 2017) (proposed amendment to strip courts of jurisdiction to order or enjoin a tax to fund public schools).
- 72 See, e.g., Protection of Lawful Commerce in Arms Act of 2005, *codified at* 15 U.S.C. § 7902(a) (prohibiting certain claims against firearm manufacturers from being “brought in any Federal or State court”).
- 73 Tex. Acts 2019, Ch. 857 (H.B. 2826), *codified at* Tex. Gov’t Code § 2254.1038.
- 74 Tex. Gov’t Code § 2254.1038(a).
- 75 *Id.* § 2254.1038(b)(3).
- 76 H.B. 2826 (Tex. 2019), <https://capitol.texas.gov/tlodocs/86R/billtext/html/HB02826F.HTM> (indicating a House vote of 103-39 and a Senate vote of 27-4).
- 77 See, e.g., David Yates, *AG Paxton rejects Juul litigation contingent contracts from Harris County, Waxahachie ISD*, Se. Tex. Record (Jan. 13, 2021), <https://setexasrecord.com/stories/572246312-ag-paxton-rejects-juul-litigation-contingent-contracts-from-harris-county-waxahachie-isd>.
- 78 S.B. 444 (Kan. 2020); H.B. 1103 (Tenn. 2020).

- 79 S.B. 102 (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/102/BillText/c1/PDF>.
- 80 *Id.*
- 81 H.B. 1053 (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/1053/BillText/c1/PDF>. The legislature adjourned before final passage of the bills.
- 82 See generally Joshua K. Payne, Jess R. Nix, *Waking the Litigation Monster: The Misuse of Public Nuisance*, U.S. Chamber Institute for Legal Reform (Mar. 2019), <https://instituteforlegalreform.com/wp-content/uploads/2020/10/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf>.
- 83 See *id.* at 3–5; Restatement (Second) of Torts § 821B cmt. a (Am. Law Inst. 1979).
- 84 Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 793, 800 (2003).
- 85 See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 494–95 (N.J. 2007) (concluding that “permit[ting] these complaints to proceed ... would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance”); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (dismissing nuisance suit against gun manufacturers; noting that “there is [no] public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another”).
- 86 *City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021).
- 87 *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).





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