Affirmative Litigation: The Municipality as Plaintiff

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1. Merits of Municipal Affirmative Litigation
2. Municipal Causes of Action
3. Municipal Cases

1. Merits of Municipal Affirmative Litigation:

Financial - bring revenues to locality, not reliant on statehouse

Injunctive - stop bad actors, require beneficial actions

Policy - prevent state/federal overreach

Access - take a seat at the table

Impact - play a role in effecting change

2. Municipal Causes of Action:

A. False Claims

B. Consumer Fraud /Unfair Business Practices

C. Public Nuisance

D. Antitrust

E. Environmental

F. APA/Regulatory

G. Taxation

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A. False Claims:

Federal False Claims Act (31 U.S.C. § 3729 et seq):

"[A]ny person who **knowingly presents . . . a false or fraudulent claim** for payment . . . is liable to the United States Government for . . . **3 times the amount of damages** which the Government sustains because of the act of that person."

-Does not apply to income taxes.

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False Claims:

-also enacted in 28 states, 8 municipalities

-Analogous to FCA, but differing claims (taxes), statutes of limitation, penalties, duration of sealed complaint

-Similar remedies: Texas Medicaid Fraud Prevention Act *(Texas Human Resources Code § 32.039)*

False Claims:

Minnesota FCA (Minn. Stat. Ann. §§ 15c.01-14):

Claim - "request or demand … for money or property … to an officer, employee, or agent of the state or a political subdivision"

Knowing - "actual knowledge," "deliberate ignorance," or "reckless disregard" for falsity

Civil penalty - "not less than $ 5,500 and not more than $ 11,000 per false or fraudulent claim, plus three times . . . damages"

Prosecuting attorney - "attorney general . . . or county attorney, city attorney, or other attorney representing a political subdivision"

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False Claims - Qui Tam:

"*Qui tam pro domino rege quam pro se ipso in hac parte sequitur*"

Minnesota FCA (Minn. Stat. Ann. §§ 15c.05): "a person may maintain an action … on the person's own account and that of the state [and/or] political subdivision"

Prosecuting attorney may intervene, settle, dismiss
-relator entitled to 15% to 30%
-relator protected against retaliation

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False Claims - Major FCA Qui Tam Actions:

- GlaxoSmithKline
- Bank of America
- J&J
- HCA

More than 2/3 of $2.2 billion recovered by US in FY 2020 was via Qui Tam; more than $300 million paid to relators.

False Claims - State/Local Qui Tam Actions:

- ***State of California ex rel Hunter Laboratories LLC v. Quest Diagnostics, Inc.*, no. 34-2009-00048046 (Cal. Super. Ct. May 6, 2011)**

  (California sues medical lab company for overcharging and kickbacks; $241 million recovery; $70 million to relator).

- ***State of New York ex rel Tooley LLC v. Sandell,* no. 101494/2018 (Sup. Ct. Feb. 19, 2021)**

  (State/City sue hedge fund manager for unpaid taxes on City income; $105 million recovered; $22 million to relator).

B. Consumer Fraud / Unfair Business Practices:

False advertising
Bait and switch
Empty guarantees
Noncompliance with manufacturing standards
Phony discounts

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Consumer Fraud / Unfair Business Practices:

Arizona Consumer Fraud Act, Ariz. Rev. Stat. § 44-1522(A) prohibits "any deception . . . or concealment, suppression or omission of any material fact with intent that others rely on [it] in connection with the sale or advertisement of any merchandise."

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Consumer Fraud / Unfair Business Practices:

Municipal Code of Chicago § 2-25-090:

(a) No person shall engage in any act of consumer fraud, unfair method of competition, or deceptive practice while conducting any trade or business in the city.

(e) [T]he corporation counsel may issue . . . a subpoena . . .

(g) [A]ny person who violates . . . this section shall be subject to a fine of not less than $500.00 nor more than $10,000.00 for each offense. Each day . . . shall constitute a separate and distinct offense . . .

C. Public Nuisance:

Restatement (Second) of Torts § 821B:

"A public nuisance is an unreasonable interference with a right common to the general public."

-existence of a public right,

-substantial and unreasonable interference,

-proximate causation,

-injury.

-broader than negligence or products liability

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Public Nuisance:

American Tort Reform Association:

> "Today's public nuisance lawsuits are vastly different and widely expanded from the legal theory's original intent. **It has evolved such that merely selling an everyday product can create virtually unlimited liability."**

http://www.atra.org/the-alarming-evolution-of-public-nuisance-law/

Public Nuisance:

Okla. Stat. Ann. Title 50: A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.

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Public Nuisance:

California Civil Code §3479: Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property . . . **is a nuisance**.

D. Antitrust:

Sherman Act (15 U.S.C. §§ 1-7) prohibits "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."

Clayton Act (15 U.S.C. §§ 12-27) outlaws price discrimination, requires M&A clearance

- Treble damages and attorney's fees

Antitrust:

Ariz. Rev. Stat. § 44-1403:"The establishment, maintenance or . . . attempt to establish a monopoly of trade or commerce, any part of which is within this state, by any person for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful."

Rev. Code Wash. § 19.86.030: "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

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E. Environmental:

Federal framework provides broad protections:

- Clean Air Act
- Clean Water Act
- National Environmental Protection Act
- Resource Recovery and Conservation Act
- Comprehensive Environmental Response, Compensation, and Liability Act

But states can pass more stringent standards

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Environmental:

Minnesota Environmental Response and Liability Act Minn. Stat. § 115B.04 (MERLA): "[A]ny person who is responsible for a release . . . of a hazardous substance from a facility . . . is strictly liable, jointly and severally, for . . . (3) all damages for any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing, such injury, destruction, or loss."

F. APA/Regulatory:

Administrative Procedure Act, 5 U.S.C § 500 et seq:

-governs formalities that agencies must employ in rulemaking

-allows challenge of agency actions that are “arbitrary, capricious, or abuse of discretion

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G. Taxation:

Continual challenge to keep pace with new modes of commerce that undercut traditional revenue sources: online travel companies, short term rentals, streaming services, rideshare, etc.

Major breakthrough in taxing web-based sales of goods under *South Dakota v. Wayfair* (U.S. 2018).

3. Municipal Affirmative Litigation Actions:

A. E-cigarettes
B. Pharma
C. PFAS/PCBs
D. Opioids
E. Climate Change
F. APA/Regulatory
G. Streaming Services

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A. E-cigarettes:

- marketed as means to curb cigarette use
- contains nicotine, leads to addiction
- shown to cause cardiovascular, renal, and lung damage
- flavored products targeted youth market
- NY Times: 27% of high schoolers, CDC: 5% middle schoolers

E-cigarettes:

City of Chicago v. Equte LLC and Vapes.com, 21-cv-00518 (N.D. Ill. Jan. 29, 2021)

MCC § 4-64-355(c): "No person shall sell . . . any flavored liquid nicotine product."

MCC § 4-64-345: "No person shall sell . . . any tobacco product . . . to any individual under 21 years of age."

MCC § 4-64-910: any person "who violates Section 4-64-345 shall be punished by a fine of not less than $1,000 nor more than $5,000 for each offense. Each day . . . shall constitute a separate . . . offense."

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E-cigarettes:

***Mesa Public Schools v. JUUL Labs, Inc.*, 21-cv-01247 (D. Az. July 16, 2021)**

- public nuisance, RICO, negligence
- marketed to minors, understated nicotine and addiction
- also names Altria Group, Phillip Morris USA, directors
- enjoin marketing to minors, youth-oriented flavors
- damages for education, detection, prevention, discipline

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E-cigarettes:

***In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation*, 19-md-2913 (N.D. Ca. Oct. 2, 2019)**

- public nuisance, RICO, unjust enrichment, negligence, fraud
- 272 plaintiffs (including many school districts)
- **"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"**

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E-cigarettes:

***State of North Carolina ex el Joshua Stein v. Juul Labs, Inc. Liability Litigation*, 19-cv-2885 (Sup. Ct. May 15, 2019)**

-action for damages/injunctive relief under North Carolina Unfair or Deceptive Trade Practices Act

-**Settled for $40 million on June 28, 2021 (paid over 6 years)**

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E-cigarettes:

State of North Carolina settlement -- injunction:

- Stop targeting underage users.
- No advertising near schools.
- No sponsorships at sports events/concerts.
- Stop comparing health effects of Juul to combustible cigarettes.
- No online sales unless age-verified through independent system.
- No new pod flavors / nicotine content levels without FDA approval.

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E-cigarettes:

September 9, 2021-*New York Times:*

“F.D.A. Delays Decision on Juul’s E-Cigarettes but Orders Others Off the Market”

-during past year, FDA has denied application for 946,000 flavored e- cigarette products to remain on market

-promises rapid consideration of Juul, could cripple company

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B. Pharma:

- Repeated enforcement actions / fines by FTC for impeding competition and excessive pricing:
    - Agreements not to compete
    - Prevention / delay of generic competitors
    - Horizontal mergers

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Pharma:

***Mayor and City Council of Baltimore v. Actelion Pharmaceuticals Ltd.,* 18-cv-03560 (D. Md. Nov. 19, 2018)**

- Class action - Sherman Act / Clayton Act violations and violation of 25 states' antitrust and business practices laws: treble damages, injunction and / or per-instance penalties

-"Tracleer" patent expired, Actelion refused to provide samples to generic makers, extending monopoly, keeping prices high

- Dismissed by District Court (statute of limitations) but Fourth Circuit reversed and remanded; now in discovery.

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Pharma:

In re Generic Drug Pricing Antitrust Pricing Litigation, 16-md-02724 (E.D. Pa. Aug. 5, 2016)

- Sherman Act, 26 state antitrust and deceptive business practices laws
- Bid rigging, price fixing, customer allocation
- Price rise 2012 to 2014: doxycycline – 8,281%, digoxin - 884%; many other drugs
- Includes *City of Providence v. Allergan plc*

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C. PFAS/PCBs:

3M and Dupont produced PFAS (per- and polyalkylflouro substances) used in Scotchguard, AFFF, carpeting, etc.

-understated persistence/toxicity of “forever chemicals”

-enter aquifers, requires abatement via water treatment

Monsanto produced PCBs (polychlorinated biphenyls) used in insulating fluid, caulking, paint, adhesives, etc.

-harmful to reproductive, immune, and nervous systems

-enters stormwater runoff, requiring abatement

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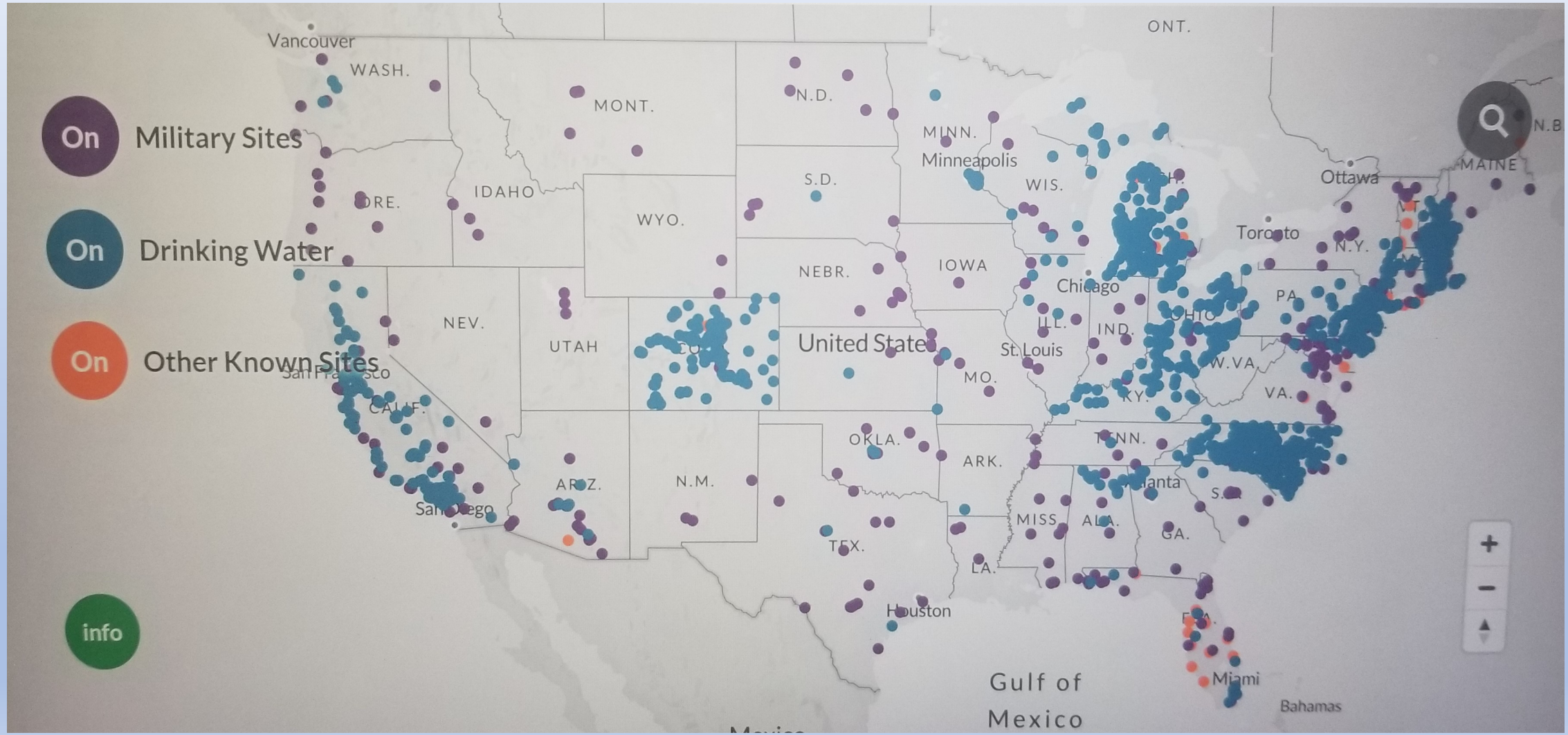
PFAS:

2,337 sites in 49 states:



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PFAS:

***State of Minnesota v. 3M Company*, no. 27-cv-10-28862 (Dist. Ct. Dec. 12, 2010)**

- action under MERLA: any person responsible for a release of hazardous substance from a facility is **strictly liable, for "(3) all damages for any injury to, destruction of, or loss of natural resources,** including the reasonable costs of assessing, such injury, destruction, or loss."

-$850 million settlement in February 2018

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PFAS:

City of Dayton v. United States of America, no. 21- cv-00135 (S.D. Ohio May 3, 2021)

-public nuisance, FTCA and state environmental/water quality laws

"The acts and omissions of WPAFB unreasonably and significantly . . . interfere with, the common rights of the City of Dayton and its residents, businesses, and contract water customers, to a safe source of drinking water . . . thus creating a public nuisance."

-seeks $300 million damages / injunctive relief; moved to MDL

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PFAS:

***Aqueous Film-Forming Foams Product Liability Multi-District Litigation,* no. 18-md-2873 (D.S.C. Dec. 7, 2018)**

-public nuisance, federal and state environmental/water quality laws
-seeks damages, costs and injunctive relief
-more than 100 municipalities as plaintiffs, more to follow

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PFAS:

***Aqueous Film-Forming Foams Product Liability Multi-District Litigation,* no. 18-md-2873 (D.S.C. Dec. 7, 2018)**

-House just passed PFAS Action Act of 2021 -- EPA directed to:

- designate PFAS as hazardous substances under CERCLA
- issue drinking water PFAS limits
- issue final rule adding PFAS to air pollutants list

-also provides incentives/grants to help localities abate PFAS

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PCBs:

***City of Long Beach v. Monsanto Company, no.* 2:16-cv-03493 (C.D. Cal. May 19, 2016)**

-stormwaters polluted, costly to comply with MS4/TDML laws

-public nuisance, equitable indemnity

-converted to class action

-settlement agreement proposed -- $550 million to 2528 localities with PCB-contaminated watersheds

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D. Opioids:

-Purdue and other manufacturers promoted opioids for chronic pain, understated addiction

-Distributors shipped huge quantities without filing suspicious order reports

-Pharmacies filled orders indiscriminately

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Opioids – State Settlements:

***State of Oklahoma ex. rel. Mike Hunter v. Purdue Pharma L.P.*, no. CJ 2017-816 (Cleveland Cty. Cir. Ct. Aug. 26, 2019).**

-Public nuisance
-Purdue settled for $270 million; $465 million judgment vs. J&J

***In re Opioid Litigation-County of Nassau/Suffolk v. Purdue Pharma L.P.*, no. 400000-2017 (Suffolk Cty. Sup. Ct. July 31, 2017).**

-Public nuisance, fraud, deceptive advertising, social services
-more than $1 billion in settlements; only Teva, Allergan remain

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Opioids – MDL:

***In re National Prescription Prescription Opiate Multi-District Litigation*, no. 17-md-2804 (N.D. Ohio Dec. 5, 2017)**

-3,300+ municipalities, tribes, NAS, hospitals, third-party payors
-Public nuisance, RICO, negligence, deceptive business practices, unjust enrichment
-$26 billion* offered by “Big Three”/ J&J on July 21, 2021
-Pharmacies, other manufacturers still litigating

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Opioids - MDL:

***In re National Prescription Prescription Opiate Multi-District Litigation*, no. 17-md-2804 (N.D. Ohio Dec. 5, 2017).**

-accepted by 42 states
-Big Three/J&J approved "critical mass" on Sept. 4, 2021
    -subdivisions now have until Jan. 2, 2022
    -state-local allocation agreements showing 85% to abatement
-first payments deposited in escrow by September 30, 2021

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Opioids-Municipalities Selected as MDL Bellwethers:

-Chicago, IL
-San Francisco, CA
-Huntington and Cabell County, WV – (awaiting judgment)
-Santa Fe County, NM
-Tarrant County, TX
-Durham County, NC
-Cobb County, GA
-Lake/Trumbull/Montgomery/Cuyahoga/Summit Counties, OH

-Cherokee Nation – settled September 28, 2021 for $75 million

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E. Climate Change:

-linkage between fossil fuels and climate change increasingly clear

-suits against fossil fuel industry—refiners, coal powered energy, natural gas

-seek to curb usage and develop alternatives

-seek damages for air quality, flooding, other effects

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Climate Change:

King County v. B.P. Plc., 2:18-cv-00758 (W.D. Wa. May 25, 2018)

-also names Chevron, Conoco, Exxon, and Royal Dutch Shell
-public nuisance, seeking damages and injunction

"Defendants . . . did not simply produce fossil fuels. They engaged in **large scale, sophisticated . . . campaigns to promote pervasive fossil fuel usage and to portray fossil fuels as environmentally responsible** and essential to human well being—even as they knew that their fossil fuels would contribute . . . to dangerous global warming. These promotional efforts continue . . . even in the face of overwhelming scientific evidence that fossil fuels are altering the climate and global warming has become an existential threat to modern life."

Affirmative Litigation: The Municipality as Plaintiff

Climate Change

Mayor and City Council of Baltimore v. B.P. Plc., no. 24 c-18-002419 (Balt. Cir. Ct. July 17, 2018).

-public nuisance, trespass, negligence, Maryland Consumer Protection Act
-damages and injunctive relief vs. 26 multinational oil companies
-removal to federal court sought; remanded to Maryland court
-Fourth Circuit affirmed, only reviewed federal officer jurisdiction
-SCOTUS reversed--must review all grounds raised by defendants
-pending in Fourth Circuit -- defendants argue state common law public nuisance claim raises federal question

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F. APA / Regulatory

Mayor and City Council of Baltimore v. Azar, no. 19-1614/20-1215 (4th Cir. 2020).

-HHS rule prohibited medical providers who receive Title X funding from giving abortion referrals; must physically separate Title X services from abortion-related services
-violates APA—arbitrary and capricious; inter alia, ignored numerous medical ethics opinions against the rule
-District Court issued preliminary / final injunction, affirmed by Fourth Circuit
-Supreme Court granted cert, but Biden administration agreed to dismiss

Affirmative Litigation: The Municipality as Plaintiff

APA / Regulatory:

City and County of San Francisco/County of Santa Clara v. USCIS, no. 19-17213 (9th Cir. 2020).

-In 2019, DHS rule expanded definition of "public charge" to include non-cash, means-tested benefits (eg Medicaid and food stamps), disqualifying potential green card recipients
-various municipalities challenged: new rule violates APA—arbitrary and capricious; reinterpretation of Congressionally-specified definition is beyond DHS' authority
-Second, Seventh and Ninth Circuits invalidated rule
-Supreme Court granted cert on Second Circuit case, but Biden administration agreed to dismiss

Affirmative Litigation: The Municipality as Plaintiff

G. Taxation/Fees:

States/municipalities see declining revenues as technologies migrate from traditional sources

- as consumers “cut the cord” and drop cable in favor of streaming services, new taxing statutes emerge

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Taxation/Fees:

Missouri Video Services Providers Act, Mo. Rev. Stat. § 67.2675:

"video services" include "the provision of video programming provided through wireline facilities located at least in part in the public right-of-way . . . "

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Taxation/Fees:

***City of Creve Coeur v. DirecTV LLC*, no. 21-cv-00122 (E.D. Mo. Aug. 17, 2021):**

-state class action seeking 5% of revenues from DirecTV, Netflix, Hulu et al for transmission of services over facilities in public right-of-way

-more than 40 Missouri localities represented

-remanded: Tax Injunction Act, principles of comity compel state forum

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Taxation/Fees:

***City of Reno v. Netflix*, no. 20-cv-00499 (D. Nev. Sept 3, 2021):**

-class action vs. Netflix and Hulu

-dismissed: "video services" does not include "[a]ny video content provided solely **as part of**, and through, a service which enables users to access content, information, electronic mail or other services that are offered via the public Internet." Nev. Rev. Stat. § 711.141(3)(a);

-also, no private right of action – AG must bring the case.

-Ninth Circuit appeal filed Sept. 22

To participate in IMLA's Affirmative Litigation Group please contact Erich Eiselt eeiselt@imla.org or Sara Gross sara.gross@baltimorecity.gov.

Thank you.