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MUNICIPAL BULWARKS: THE BATTLE FOR CORPORATE ACCOUNTABILITY

Local governments are a transformative force in redressing a wide range of injuries to their communities, achieving significant settlements and changing corporate behavior.

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EDITOR
Erich R. Eiselt

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

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Municipal Bulwarks: Battling for Corporate Accountability

By: DANIEL HINKLE, *Senior State Affairs Counsel, American Association for Justice*



Introduction

In the battleground of public interest litigation, municipalities have emerged as valiant defenders of community rights, tirelessly combating corporate entities determined to evade accountability and offloading their impacts onto society. The resulting damage takes various forms: treating and rehabilitating injured constituents, first responder and law enforcement expenses, new infrastructure requirements, and myriad indirect costs. This fight for accountability underscores that communities pay the price when corporations profit from public nuisances. Municipal litigation against malfeasant corporate actors has proven to be a critical tool in balancing the scales of justice. In the past 20 years, municipalities have been leaders in holding multinational corporations accountable for the harms they have inflicted on localities – from opioids, that killed hundreds of thousands and caused incalculable harm on communities, to PFAS-contaminated drinking water, excessive insulin prices charged by drug manufacturers, and hooking another generation on dangerous tobacco products.

The Corporate Challenge

The municipalities' success in these arenas has not gone unnoticed by corporate defendants and corporations who fear they could be future defendants. These companies are now using their trade associations and membership organizations to coordinate a nationwide response that would significantly reduce the capacity of local governments to assert their legal rights.

This corporate line of attack was first telegraphed in a 2019 report published by the U.S. Chamber Institute for Legal Reform (ILR) titled "Mitigating Municipal Litigation."[1] The U.S. Chamber (Chamber) proposes a state legislative assault plan that would dramatically limit municipalities' legal autonomy. It seeks to restrict municipalities' ability to sue, by defining permissible defendants, altering available legal actions, and limiting the court's jurisdiction. The two most likely proposals include stripping municipalities of the power to hire outside counsel on a contingency fee basis and allowing the state Attorney General (AG) to usurp municipal litigation in almost every circumstance.

If this playbook sounds familiar, that's because you've seen it before. In the aftermath of the Tobacco Master Settlement Agreement (MSA), where state AGs negotiated a global settlement of claims against the top four cigarette companies, tort reform organizations responded with a coordinated campaign aimed at undermining impact litigation brought by the AG's office. They worked through the American Tort Reform Association (ATRA), which was co-founded by the tobacco industry in 1986, and the American Legislative Exchange Council (ALEC), a 501(c)(3) organization with a hybrid membership structure of state legislators and corporate interests. ALEC corporate members write model policy that ALEC public members bring back to their statehouses.

By 1998, ALEC had adopted the Private Attorney Retention Sunshine Act (PARSA),[2] which targeted an AG's ability to contract with outside legal counsel on a contingency basis. Although it was presented as promoting "transparency," the primary consequence of the legislation was imposing price controls that effectively cut off the ability for outside counsel to represent the state. That same year, the Chamber established ILR, whose sole purpose is to limit the liability of major corporations. ATRA, ALEC, and ILR share many

of the same corporate members. The PARSA model legislation was written and advocated for solely to protect ATRA, ALEC, and ILR members from being held accountable for their actions.

As the opioid litigation is coming to a beneficial resolution for municipality plaintiffs represented by outside counsel, it is inevitable that these corporations and their trade associations will turn their corporate lobbying power toward squashing future claims. Johnson & Johnson (J&J), who is contributing $5 billion to the nationwide opioid settlement agreement[3] has held a board seat on ILR since 2003. The Center for Political Accountability found that J&J gave the Chamber and ILR at least $2,637,500 from 2015 through 2021[4] during the height of the opioid litigation.

It is anticipated that over the next few years, hundreds of bills will be introduced in dozens of statehouses that would prevent municipalities from protecting their communities. Many of these threats are outlined below. Local governments need to be aware that their rights are under a coordinated and extremely well-funded campaign to evade accountability. Fortunately, there is a way to fight back.

The Evolution of Municipal Litigation

Municipal litigation has evolved significantly over the past decade, enabling local governments to independently tackle harms inflicted on their communities by major corporations. Historically, municipalities relied on state or federal actions to redress corporate wrongdoing, but now they actively initiate lawsuits for community-specific issues. This shift has empowered cities to directly address a wide range of harms.

The lawsuits referenced above have led not only to significant financial settlements, but also policy changes that directly benefit local communities. For instance, school districts on the front line of the vaping epidemic demanded marketing restrictions to stop JUUL from targeting youth; those demands were ultimately reflected in settlements[5] entered into by state AGs before separate resolution of the school district claims. In the opioid context, distributors must now increase and improve their drug diversion monitoring practices and will henceforth operate under the oversight of an independent third-party.[6]

Such outcomes not only offer immediate redress, but also set precedents for addressing similar issues that will deter future harm. Wrongdoers, not taxpayers, should pay when corporate actions cause harm to the community. This underscores the critical role of municipal litigation in ensuring corporate accountability and community welfare.

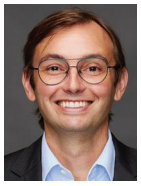
Role of Outside Counsel in Empowering Municipalities

As municipalities face complex legal challenges, outside counsel becomes invaluable, providing specialized knowledge and expertise that municipal legal teams might not possess, especially in niche or technically intricate domains. Beyond their legal acumen, outside counsel offers strategic guidance, drawing from their experience in similar cases and their awareness of broader legal trends. This collaboration equips municipalities with the necessary tools to navigate these challenges effectively, ensuring they are well-prepared to protect and advocate for their communities' interests. Most municipalities also do not have the annual budget necessary to devote staff time to litigate these years-long, complex, and expensive legal battles. Hiring outside counsel on a contingency fee basis keeps valuable law department personnel focused on their important responsibilities to the community.

Contingency fee arrangements are both ethically and practically beneficial for municipalities in these cases. Under contingency arrangements, municipalities pay legal fees only if the litigation is successful, aligning the interests of the municipality with those of the outside counsel. This model reduces financial risks for municipalities, enabling them to pursue important legal battles that would otherwise be financially prohibitive. For example, it would be impossible for any individual municipality to take legal action against opioid manufacturers, distributors, and other parties responsible for the harms caused by the opioid crisis, due to the overwhelming expenses and high risk of failure. Such cases rely on the support of outside counsel willing to work on contingency and front the costs of litigation.

The effort put into the opioid multidistrict litigation (MDL) is a vivid example of how outside counsel make certain cases possible. Over 400 lawyers and staff members devoted an astounding 2 million hours to this complex case. Their meticulous efforts encompassed the review of over 50 million documents to find the damning evidence implicating manufacturers and distributors in the epidemic. Furthermore, these legal professionals conducted over 800 depositions, cumulatively lasting more than 5000 hours, generating a vast amount of detailed testimony spread across an untold number of pages. Remarkably, these attorneys and their teams invested nearly $150 million of their own funds into this legal battle, including a staggering $65 million spent on experts alone, highlighting the depth of their commitment to building a robust case.

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Daniel Hinkle is the Senior State Affairs Counsel for the American Association for Justice. He provides legal, legislative, and policy research and analysis of state legislation, works with state trial lawyer associates across the country, and testifies before both Congress and state legislatures to support AAJ's advocacy efforts.

This financial undertaking was made without any guarantee of compensation, illustrating the significant risk they shouldered in pursuing justice on behalf of the affected municipalities. It underscores the critical role of outside counsel in supporting municipalities through intricate legal challenges, particularly when the stakes are high and the odds daunting.

Breaking Down the Corporate "Mitigating Municipal Litigation" Document

ILR published a roadmap to its proposed immunity legislation in "Mitigating Municipal Litigation,"[7] referenced above, which outlines a campaign aimed at reducing the power of municipalities to hold corporations accountable. Authored by experienced state legal figures now working as corporate defense counsel, the paper systematically proposes reforms targeting every aspect of the legal process to shield corporate defendants.

1. **Restricting Outside Counsel:** Proposes requiring AG approval and statutory fee caps for contingency fee contracts, all aiming to restrict municipalities' access to competent outside counsel. Based on precedent, these proposals are likely to come first.
2. **Limiting Municipal Plaintiffs:**
   - Revoking Litigation Rights: Proposes eliminating municipalities' ability to file certain lawsuits, drawing from past examples like legislation targeting firearms litigation. This includes barring local governments from suing certain industry groups and removing punitive damages for public entities.
   - Removing Parens Patriae Standing: Suggests revoking this right where it exists, diminishing municipalities' capacity to represent residents.
   - Requiring AG Approval for Lawsuits: A proposal, like Ohio Attorney General Yost's in 2020, would expand "state concern" principles, centralizing litigation under state AGs, limiting local government affirmative litigation and potentially diverting settlement recoveries away from municipalities.
   - Reinforcing Municipal Cost Recovery Rule: Aims to prevent municipalities from recouping tort-based expenses on the grounds that those costs are pre-existing municipal responsibilities, discouraging lawsuits and shifting corporate-created financial burdens to taxpayers.
3. **Granting Corporate Immunity or Preempting Municipal Claims:** Encourages states to immunize specific industries from municipal lawsuits. Points to examples in the agriculture and food industries. Promotes collusive settlements with the AG that override municipal claims.
4. **Revising Tort Law to Insulate Corporate Defendants**: Advocates for redefining public nuisance claims, shortening claim periods, and implementing stricter legal standards to obstruct municipal litigation against various industries.
5. **Stripping Courts of Jurisdiction:** Proposes limiting state courts' authority in hearing certain claims and their power to order specific types of relief, further reflecting corporate interests.

These reforms are the end goal of a comprehensive strategy to weaken municipal litigation capabilities, prioritizing corporate defendants over public safety and accountability. To counter these proposals, local governments need to dig into the justifications offered by corporate defendants for their implementation.

Building the Municipal Bulwark

Municipalities themselves are the most effective advocates for the primacy of municipal litigation. Sharing constituents with state legislators, municipal officials have a deep understanding of local concerns. They can engage with state legislators within their communities, showcasing new infrastructure, introducing new social workers or police officers, and demonstrating firsthand the benefits of settlements or judgments. This local, personal connection is pivotal in countering the extreme rhetoric they are likely to encounter in the state legislature.

The companies responsible for causing harm to municipalities and their citizens fail to acknowledge their accountability. To maintain political tact, they justify their reform proposals by claiming to address various issues: streamlining settlements, protecting state power from usurpation, protecting consumers' piece of the pie, and protecting municipalities themselves from trial lawyers. These justifications are weak, and educating lawmakers on their shortcomings is essential.

Navigating Settlement Complexities to Provide Municipal Remedies

A primary justification raised by corporate defendants for shielding themselves from accountability is the complexity of widespread municipal litigation. This litigation, they argue, hinders the achievement of "finality and predictability" that encourages corporate settlements. Instead of negotiating with 51 state AGs and federal entities like the Department of Justice or Federal Trade Commission, corporations face settlements with thousands of municipal defendants, each presenting distinct demands.

When companies cause widespread harm, they face widespread litigation. Providing a sufficient remedy to satisfy all claimants is always a sticking point that corporate defendants lament, but the MDL process and other procedural devices provide a mechanism to address this issue. In addition, negotiating with 30,000 local governments, though significant, may

be less complex than resolution of other claims corporations face, such as the nearly 285,800 claimants that 3M negotiated with in the combat earplugs litigation.

Corporate proposals to address the complexity in settling cases are often self-serving and contradictory. While they decry the lack of coordination among municipalities, their proposals aim to prevent municipalities from coordinating through outside counsel who could effectively organize claims. Instead of working to harmonize state laws for consistent, robust damages across jurisdictions, they advocate for eliminating municipal plaintiffs and muddling state tort law to complicate legal proceedings.

More tellingly, the ILR is simultaneously leading the attack on the federal MDL process used to coordinate the opioid litigation.[8] Their primary grievance is the supposed over-inclusion of opioid claims in the MDL proceedings, suggesting that an excessive number of claims are being coordinated.

This contradiction raises a critical question: Is their issue with municipal litigation its perceived decentralization, or its potential for effective coordination?

The inherent contradictions in such critiques are manifest. The harm caused to municipalities by corporate defendants will only be remedied if the municipality is represented in litigation. These contradictory arguments citing a lack of coordination in municipal litigation and over-coordination in private plaintiff MDLs, are rooted in an indefensible policy stance: an aversion to being held accountable for the harm they cause.

Resisting State Overreach in Municipal Legal Affairs

It is anticipated that one type of legislation addressing municipal litigation prerogatives will focus on the "usurpation of state power." The argument is that municipal litigation encroaches upon the state legislature's power to "regulate product sales and marketing practices," and subverts the AG's power to sue private companies for wrongs done to the public.

While state legislators and AGs may agree with this talking point, the argument is little more than a transparent effort to shield dangerous corporations. Nothing about municipal litigation undermines a state legislature's power to regulate dangerous products. For instance, state legislatures have implemented drug monitoring programs, regulated PFAS in water systems, and mandated energy transitions to combat climate change. AGs have similarly been involved in addressing public nuisance claims. Municipal litigation does not restrict the actions of these state actors; it can act as a complementary tool to remedy these problems.

It can also be the last line of defense when state legislators and regulators are slow to act. For example, polluters have poured hundreds of millions of dollars[9] over the past decade into limiting PFAS liability,[10] often successfully. Legislation in North Carolina that would hold polluters accountable has been consistently defeated, transferring the cost of clean drinking water to ratepayers. Municipal litigation offers an avenue for addressing corporate harms when the legislature or the AG will not.

The Chamber is at the heart of these efforts to avoid accountability. In 2022, it led a coalition[11] to oppose using the EPA's Superfund program to expedite PFAS cleanup. The Chamber often supports usurping state power for their corporate members, as seen in their support for Altria in 2021[12] and in an amicus brief for McKinsey[13] in the opioids MDL.

Ultimately, the Chamber's corporate members have no interest in promoting the AGs' capacity either. In 2019, the Oklahoma AG collaborated with external counsel to sue opioid industry defendants and recover over $900 million for the state—one of the highest per-capita recoveries nationwide. This was despite a bench trial against J&J that resulted in a loss after the Supreme Court overturned the verdict. Nevertheless, the state enacted a law curtailing the AG's power to hire outside counsel in the future. It is noteworthy that the legislature did not enact a law expanding public nuisance claims to cover the conduct that caused the state's opioid epidemic. Instead, they voted to curtail future litigation that depends upon the expertise of outside counsel.

Expanding Compensation to Remedy Harms

The Chamber argues that municipal litigation diverts money from other plaintiffs, as though settlements are a pie and municipalities are taking more than their fair share, leaving just a slice for everyone else. To the contrary, the reality is that the inclusion of municipalities in litigation forces corporations to bake a bigger pie that will serve everyone at the table.

This argument is specious in the wake of the opioid litigation. Despite years of Department of Justice and state AGs' efforts, the opioid defendants ultimately agreed to a $55 billion settlement specifically to avoid municipal litigation. Municipalities, in the opioid litigation and in the other claims discussed in this article, are in the best position to articulate the concrete harms that the defendants have caused. If they are not involved in litigation to hold these companies accountable, then these companies pass off the cost of the harms they cause onto local taxpayers and ratepayers.

More importantly, restitution paid to municipalities goes toward remedying the harms. The Tobacco MSA is instructive here. While the settlement was an important tool for accountability, it was not without its flaws. The AGs' settlement

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with Big Tobacco gave state legislatures full control over the distribution of funds meant to pay for ballooning Medicaid budgets and to reeducate citizens who had been lied to for decades about the "safety" of smoking. The settlement awarded funds to states for Medicaid and anti-smoking education, but many states diverted these funds from their intended purposes. Only around 2.5 percent of the funds[14] have gone toward tobacco control and only two states[15] fund their state tobacco control program at the level recommended by the CDC. North Carolina even used 75 percent of its settlement funds for tobacco production.[16] Many states securitized their settlement proceeds, resulting in annual payments to Wall Street in exchange for a one-time cash infusion that is long forgotten.

In contrast, the National Opioid Settlement demands that at least 70% of the funds[17] are to be used to fund future opioid-remediation efforts. This is in line with how Orange County California voters[18] mandated that 80 percent of money from the tobacco settlement be spent on smoking-related programs—creating one of the most effective smoking cessation programs in America. The difference between states and municipalities is clear —municipalities are appropriate stewards of these funds because they are closer to the harm and see the urgency in addressing it.

Protecting Contractual Freedom as a Means to Corporate Accountability

The Chamber's final attack is leveled at the personal injury bar. Lawyers working on contingency are criticized because they "advocate for positions taken by local government officials" and force "large, rapid settlements" that direct funds into municipal budgets. More seriously, they suggest that hiring outside counsel is unethical, and unfair to corporate defendants because contingency fee counsel is financially motivated to seek the largest possible judgment. This argument can be effective when deployed against the ignorant.

To counteract this narrative, it is critical to highlight the harms, and remedies, at the heart of any litigation. For instance, the impact of opioid abuse on municipalities has been devastating. Local governments face an array of challenges, necessitating increased funding across several key areas:

1. Medical and Treatment Needs: There is a pressing need for more social workers, family advocates, and treatment facilities to address opioid addiction. This includes funding for medication-assisted treatment programs, detox centers, and educational services for opioid use disorder (OUD). Additionally, municipalities need resources to re-educate the medical community on proper opioid prescription practices.

2. Law Enforcement and Administrative Requirements: Law enforcement requires funding for opioid task forces, training in overdose response, and purchase of life-saving treatments like Narcan and Naloxone. The surge in drug court cases also demands increased funding for court administrators, prosecutors, public defenders, and social workers.

3. Emergency Medical Services Supplementation: Emergency medical services, including firefighters and ambulance crews, require additional resources to handle the surge in opioid-related incidents. They need extra funding for emergency medical personnel, specialized training, and essential supplies to effectively manage and respond to the escalating volume of opioid overdose emergencies.

The widespread impact of opioid abuse even extends to hindering municipalities' access to capital,[19] affecting their ability to provide basic public services and infrastructure.

Fully comprehending the scope of harm from opioid and other public nuisances on municipalities can be critical to framing the need to stop that harm from happening and obtain the resources necessary to address it. Hiring competent outside counsel working on contingency is simply the means for obtaining that remedy.

It should go without saying that suing well-financed and powerful corporations is an immense and risky undertaking. Few municipalities could sustain the attorneys' fees, discovery costs, expert witness charges, and other costs of litigation over the years it could take to reach resolution. Even if the funds were available, the chance of unsuccessful litigation is real, and no municipal government would authorize such a gamble. For instance, in the opioid MDL, the plaintiffs' legal team invested well over $100 million and thousands of hours over many years—all with the risk that it would have been for not if juries were unpersuaded or the legal theories foundered (as happened in the Oklahoma AG's case against J&J). Thus, engaging outside counsel on a contingency basis—where top lawyers waive hourly fees and cover litigation costs for a share of any recovery—is the most viable way for municipalities to hold corporations accountable.

It is no wonder that the Chamber would attack the contingency fee arrangement. This opposition isn't limited to legislative contexts; corporate defendants often claim ethical breach and due process deprivation in court when facing government plaintiffs represented by contingency-based firms. These arguments, based on the idea that state lawyers should not be personally motivated to enforce the law, have been rejected time and again by courts across the country because the municipal client retains ultimate control over the litigation.

Unlike corporate defense counsel who work on an hourly rate and may be incentivized for prolonged

litigation to increase legal fees, contingency fee counsel are motivated to work efficiently and maximize recovery for their clients. The American Bar Association (ABA) Rules guide this representation and Rule 1.2(a) provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued…" and "[a] lawyer shall abide by a client's decision whether to settle a matter." While it is true that a client may defer to the lawyer's expertise in technical, legal and tactical matters, municipal clients retain ultimate control over the litigation.

Conclusion

The role of municipal affirmative impact litigation in championing public interest cannot be overstated. Nor can the legislative threat it is under. It is a powerful tool that municipalities use to protect the rights and welfare of their communities, largely made possible through partnerships with outside counsel. This collaborative approach not only strengthens the legal expertise available to municipalities, but also enhances their ability to effectively represent the interests of their citizens.

To protect this capacity, it is crucial to connect with lawmakers and counteract any narratives that seek to undermine municipal authority and litigative capabilities. It is also imperative that this community collaborates to counteract an extraordinarily well-funded corporate campaign. The trial lawyer associations in your states will be valuable partners in tracking and responding to these legislative threats. Doing so not only defends the autonomy of local entities, but also provides checks on abuse while upholding the democratic values embedded in our multilevel system of governance. ML

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