Mass Torts Come to Main Street

By Adam K. Levin, Rebecca C. Mandel, and William M. Burgess

# The Rise of Political Subdivisions as Mass Action and MDL Plaintiffs

Recent years have seen an explosion around a relatively new front in U.S. mass and multidistrict litigation: claims asserted by cities, counties, towns, and other state political subdivisions—often represented by outside counsel on a contingency fee basis—against corporate defendants across a broad range of industries. While opioid-related claims have attracted the most attention in this space, political subdivision lawsuits are popping up in everything from environmental to e-cigarette cases. Indeed, such lawsuits represent the most prominent current—and likely future—trend in mass litigation. As discussed below, the resulting legal and practical implications are significant and should be monitored carefully nationwide.

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## Political Subdivisions Pursue Their Own Claims

Beginning in the mid-1990s, state attorneys general (AGs) coordinated their claims against tobacco manufacturers, which had traditionally been brought by private plaintiffs. The complex, industry-wide litigation that followed produced a $206 billion master settlement agreement between tobacco manufacturers and forty-six states (four states reached separate settlements), which largely precluded political subdivisions from receiving any of the settlement funds.

The political subdivisions took note and have since been directly asserting claims against corporate defendants across a broad range of industries. In 1998, as the tobacco litigation was ending, the city of New Orleans sued gun manufacturers, and dozens of other cities and counties soon followed with suits against gun retailers, distributors, and manufacturers, asserting, among other things, that guns had created a public nuisance.

Political subdivisions continued to pursue mass injury claims in the 2000s as plaintiffs in other contexts, including against manufacturers of lead paint, producers of polychlorinated biphenyls (PCBs), and energy companies that used a gasoline additive, methyl tertiary butyl ether (MTBE). The scale of suits brought by political subdivisions then accelerated exponentially with the current opioid-related litigation, which involves over 3,000 lawsuits in the federal MDL alone—the vast majority of which are asserted by political subdivision plaintiffs.

But opioid liability is hardly the only area to have witnessed new, municipal lawsuits in recent years. Political subdivisions have also lodged claims against, among others, (1) energy producers for costs associated with climate change; (2) manufacturers of per- and polyfluoroalkyl substances (PFAS) for costs associated with water pollution; (3) manufacturers of e-cigarettes for costs associated with vaping; (4) drug manufacturers for the costs of insulin; and most recently, (5) video streaming services for franchise fees under laws originally aimed at cable television operators.

The rise in this type of litigation shows no sign of slowing, and many of these claims resemble each other. They often include allegations that a defendant manufacturer knew, or should have known, of a product's alleged harmful effects and took steps to conceal those allegedly harmful effects. Political subdivisions also frequently assert similar causes of action including, but not limited to, strict liability based on a product design defect theory or a failure to warn theory (or both), public nuisance, and negligence.

## Legal Issues When Political Subdivisions Are Plaintiffs

The increasing number of suits brought by political subdivisions has raised novel legal and practical challenges.

First, political subdivisions may not even have standing to litigate these kinds of cases. Unlike federal and state governments, which both have certain inherent powers under the U.S. Constitution, local government subdivisions only have powers granted to them by their respective states. The extent to which states have granted authority to cities, counties, and other political subdivisions to sue corporate defendants varies by state. Political subdivisions may thus be completely barred from bringing suit, may have broad authority to sue, or may have authority to sue on some issues but not others.

Even where factually related claims can be centralized or coordinated to enhance judicial efficiencies, resolving standing questions requires analyzing the legal frameworks for multiple states. And there are political calculations, too. Many state AGs, for example, view suits brought by political subdivisions within their borders as a dilution of their own authority and ability to settle cases. In the opioid litigation, a coalition of state AGs supported a petition for mandamus, arguing that only the states themselves (not local governments) have the power to pursue certain claims. *See* Brief of Amici Curiae States in Support of the State of Ohio's Petition for Writ of Mandamus, *In re: Nat'l Prescription Opiate Litig.*, No. 19-3827, (6th Circuit Oct. 10, 2019). Although the petition was denied, state AGs likely will continue to view suits by political subdivisions as a threat to state sovereignty—and courts and litigants may continue to challenge their standing—absent a clear grant of power to the political subdivisions that allows them to sue.

Moreover, recent lawsuits by political subdivisions have advanced expansive, and sometimes novel, legal theories that often go too far. Most prominently, they have relied on an unrestrained, and largely untested, read of public nuisance laws. The results so far, unsurprisingly, have been mixed. For instance, a state court in North Dakota dismissed an opioid-related public nuisance claim after finding that the public nuisance doctrine does not extend to cases involving the sale of goods under North Dakota law. *See State Ex Rel. Stenehjem v Purdue Pharma L.P.*, No. 08-2018-CV-01300, 2019 WL 2245743, at *13 (N.D. Dist. May 10, 2019). But other courts have allowed opioid-related public nuisance claims to go forward. *See, e.g., In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672 (N.D. Ohio 2019) (denying a motion for summary judgment a public nuisance claim).

Further, in June 2018, a federal district court dismissed a climate change-related public nuisance claim after finding it proper to "defer to the legislative and executive branches when it comes to such international problems." *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018). But that decision was reversed and remanded on jurisdictional grounds when the Ninth Circuit held that Oakland and San Francisco's public nuisance claims did not raise "a substantial federal question" despite the cities' argument that the claims implicated "federal interests" such as energy policy, national security, and foreign policy. *See City of Oakland v. BP PLC*, 960 F.3d 570, 575 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020). Thus, after lengthy jurisdictional battles, state courts may be poised to determine the validity of expansive claims made under state laws—including public nuisance laws—that aim to hold oil and gas companies responsible for costs related to climate change.

## Practical Challenges Abound

Substantive legal questions aside, the sheer number of political subdivisions raises significant case management challenges and concerns about judicial efficiency. There

are more than 30,000 incorporated cities, towns, and villages in the U.S., a substantial number of which have brought or explored claims in mass litigation. And there are many other types of subdivisions that have started filing claims, too, including school districts, hospital districts, public university systems, and water management districts. For instance, over 100 school districts have sued JUUL and other e-cigarette manufacturers, seeking to recover costs of programs designed to prevent students from becoming addicted to e-cigarettes, as well as for counseling and treatment programs for addicted students.

The federal MDL process and similar mechanisms in state courts are designed to conserve judicial resources by centralizing claims before one judge or panel for management of discovery and pretrial motions. The efficiencies of MDL actions do, however, have their limits. When hundreds or even thousands of political subdivisions advance their individualized and diverse interests, the results can be unwieldy: excessive discovery burdens across multiple cases, duplicative motions under the laws of each jurisdiction, and skyrocketing costs for defendants. Claims asserted by political subdivisions may also overlap with claims brought by state AGs or even other political subdivisions, who seek to recover on behalf of portions of the same populations, and yet may pursue different litigation strategies. Political subdivision litigation has proliferated to such an extent that a state, a county within that state, a city within that county, and a school within that city may all file claims based on the same alleged underlying conduct, using different counsel, and without any clear mechanism for addressing the overlap of their claims and alleged harm.

Further complicating matters, some political subdivisions file their claims outside of the MDL process altogether. Although some states have court systems akin to the federal MDL process, many do not, creating the potential to overwhelm smaller, rural courts. Where claims that relate to a common set of facts proceed in multiple courts, the demand on judicial resources, the parties' resources, and even fact witnesses can multiply exponentially.

The sheer number of political subdivisions also frustrates resolution efforts. With so many plaintiffs and *possible* plaintiffs, it can be difficult for a matter to be resolved in a manner that provides any real closure for defendants. Plaintiffs, of course, may also disagree about how a matter should be resolved. In the opioid litigation, for example, the State of Ohio formed a coalition with Ohio political subdivisions dubbed "One Ohio," in an attempt to present a united position for all of Ohio in settlement negotiations, while ensuring that political subdivisions have a say. Similarly, in May 2020, the Texas Attorney General announced an agreement with Texas cities and counties, and six law firms representing them, about how to distribute Texas's share of a potential nationwide opioid settlement. But these are only two of the fifty states—and efforts to agree on how proceeds from any global opioid settlement would be distributed are ongoing.

All of these challenges, in turn, can create a temptation to bend the rules in the name of efficiency at great risk of prejudicing the parties' rights. But as the Sixth Circuit has directed, the requirements of the Federal Rules of Civil Procedure are "binding upon court and parties alike, with fully the force of law," and apply equally to individual cases that have been centralized through the MDL process as to others. *See In re Nat'l Prescription Opiate Litig.*, No. 20-3075, 2020 WL 1875174, at *3 (6th Cir. Apr. 15, 2020).

## Looking Ahead

There is little doubt that the trend of political subdivisions filing lawsuits in new industries will continue. But there are also legislative and other efforts on the horizon that might slow the trend.

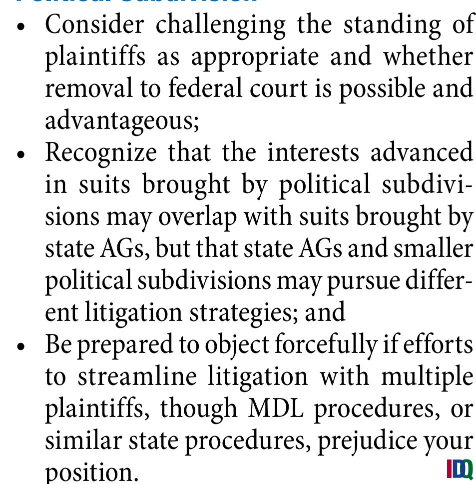
For example, Texas has enacted a law that limits the ability of political subdivisions to sue corporate manufacturers. This statute, which became effective in September 2019, subjects political subdivisions' contingent fee arrangements with private attorneys to AG oversight, and it authorizes the AG to refuse to approve contingent fee contracts if (a) the legal matter that is subject to 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 (b) pursuit of the matter by the political subdivision will not promote the just and efficient resolution of the matter. Additionally, the U.S. Chamber of Commerce Institute of Legal Reform has published a paper identifying other legislative action that states might take to reduce litigation by political subdivisions, and similar legislation has been introduced, but not yet enacted, in other states, including Arizona, California, Kansas, and Tennessee.

Despite these proposals, for now, it appears that cities, counties, and other political subdivisions will continue to look for opportunities to advance litigation against corporate defendants in various contexts and industries. Corporations should track developments in these types of suits closely and prepare to navigate the unique challenges they present.

## Steps to Take Now in Preparation for Future Suits Brought by Political Subdivisions

- Develop an understanding of public nuisance laws in the jurisdictions in which you operate and pay close attention to political subdivisions' efforts to expand the applications of these laws;
- Examine other novel legal theories asserted in complaints brought by political subdivisions; and
- Track legislative efforts to curtail the ability of political subdivisions to sue corporations in jurisdictions in which you operate.

## If Your Client Is Sued by a Political Subdivision



- Consider challenging the standing of plaintiffs as appropriate and whether removal to federal court is possible and advantageous;
- Recognize that the interests advanced in suits brought by political subdivisions may overlap with suits brought by state AGs, but that state AGs and smaller political subdivisions may pursue different litigation strategies; and
- Be prepared to object forcefully if efforts to streamline litigation with multiple plaintiffs, though MDL procedures, or similar state procedures, prejudice your position.