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'Locality Lawsuits' Threaten The Civil Justice System

By **Victor Schwartz and Markus Green** (December 17, 2019, 2:26 PM EST)

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Local governments in cities, counties and municipalities throughout the United States are increasingly bringing lawsuits to recover their alleged portion of harm that affects their entire states. These so-called locality lawsuits propose to supplant the role of state attorneys general in bringing a single lawsuit to remedy statewide harms and distributing any proceeds.

Proponents of this new brand of litigation argue that the intrusion is warranted to increase a local government's potential recovery. But are these lawsuits really in the public's interest? This article explains why locality lawsuits threaten to do more harm than good, both to the public and our civil justice system.

The Trickle-Down Trend

At the federal level, the U.S. attorney general, as the nation's chief legal officer, is responsible for pursuing a lawsuit that implicates the interests of the federal government. States operate with a similar design, whereby the state attorney general, as the state's chief legal officer, is responsible for pursuing a lawsuit that implicates the interests of the entire state or a significant number of its residents. Importantly, only the state attorney general can represent the sovereign interest of the state in litigation.

Local governments, however, now want a piece of this state law enforcement authority. Hundreds of cities, counties and municipalities have sued businesses for alleged harms that impact their entire state, seeking money for their individual city, town, county or other local governmental entity. They have done so in a variety of different litigations, including alleged harm resulting from the nation's opioid epidemic, potential violations of state data privacy laws, and purported local harm from global climate change, among others.

This is a relatively new phenomenon. While some municipalities were involved in tobacco litigation in the early 1990s, their involvement was in coordination with state attorneys general. A coordinated effort among state attorneys general led to a mass settlement that ended much of the nation's tobacco litigation. That result might have been very different, and perhaps impossible, if the settling tobacco companies, instead of dealing with a maximum of 50 state attorneys general, had to negotiate with hundreds or even thousands of local governments.

The recent wave of locality lawsuits stands in stark contrast to coordinated efforts by state attorneys general. This litigation, which is estimated to include more than 2,000 locality lawsuits, pits the local governments against the state attorneys general in a race to obtain a specific recovery for a city, county, town or municipality before the state obtains a recovery that would be shared among the state's inhabitants.

These locality lawsuits, though, allege harms that impact the entire state, not just one city or county. Ohio Attorney General David Yost expressed this fundamental concern with the litigation in seeking to consolidate the myriad of local government lawsuits alleging harm related to opioid use into a single state action.

Yost explained that the authority for bringing a lawsuit for alleged harm that extends beyond the borders of a local governmental entity rests exclusively with the state's chief legal officer, who represents the sovereign interest of the state. Yost's petition was supported by 14 other state attorneys general.

This group included a rare combination of state attorneys general whose affiliations run the gamut of liberal to conservative politics. These attorneys general recognize that the recent wave of locality lawsuits is not a partisan issue; it is a structural issue that could severely undermine the authority of the chief legal officer of any state.

These attorneys general understand that allowing local governments, which do not represent the state, to bring litigation that affects the entire state and its people can have major adverse consequences. Instead of a state attorney general suing for relief on a statewide basis, local governments that bring lawsuits stand to benefit over those that do not sue, creating an incentive for every local government to sue and not miss out on a possible recovery.

If numerous local governments pursue essentially the same lawsuit as the state, the state attorney general's ability to represent the state and determine what is in the collective best interests of everyone in the state is eviscerated. As a result, the state attorney general may be relegated to a less important role in the enforcement of state law than any city or county attorney.

Adverse Public Policy Effects of Locality Lawsuits

There are numerous public policy implications of allowing locality lawsuits for alleged harm felt statewide. First, the litigation is incredibly wasteful. Having potentially hundreds of locality lawsuits that allege essentially same wrong is needlessly duplicative. It has the potential to clog a state's courts and exhaust both limited judicial resources and the limited financial resources of local governments, especially in smaller towns or counties with comparatively fewer resources.

Second, the litigation may result in conflicting outcomes, which invites chaos in a state's legal system. Judges in different parts of a state may reach widely different conclusions on the merits of what are essentially the same claims, which means judges would end up picking winners and losers among local governments where harm to everyone in the state is implicated.

Third, the litigation often involves attempts by local governments to distort existing law in order to bring a lawsuit in place of the state attorney general. Local officials cannot enforce certain state statutes — for example, statutes governing consumer protection or false claims. Only the state attorney general is

authorized to enforce such laws to protect the health and safety of the people in the state.

To bypass existing state law restrictions, local governments have alleged novel liability theories that, if adopted by courts, would radically upset a state's civil justice system. A prominent example involves lawsuits alleging the liability theory of public nuisance. Local governments have endeavored to turn this relatively narrow liability theory designed to address unreasonable interferences with the public's right to access and use property — for instance the blocking of a public road — into a broad catchall liability theory for any alleged societal harm.

For instance, some local governments have sued energy companies, alleging their sale of fossil fuels constitutes a public nuisance of global climate change. They have sought to impose civil liability, in spite of the fact that the cities and counties themselves continue to demand, purchase and use these lawful products.

Fourth, locality lawsuits threaten to exacerbate unsound litigation driven by private lawyers working on a contingency fee basis. Many of the lawsuits brought by local governments are actually spearheaded by profit-motivated private lawyers who believe pursuing litigation on behalf of a public entity will increase the chances of a bigger payday.

This partnership between private lawyers and local public officials raises the significant potential for conflicts of interest, because the private lawyers' sole objective is to maximize the amount of a monetary award, which may not necessarily be the remedy in the public's best interest.

Motivations Behind Locality Lawsuits

An important question to ask: What is driving the recent influx of locality lawsuits? Why now? Several forces appear to be motivating the litigation.

Perhaps the most understandable one is that many local governments are starved for resources and searching for alternative ways to generate revenue. Putting aside the numerous public policy concerns, lawsuits in which private contingency fee lawyers bankroll the lion's share of costs provide a relatively low-risk means for a local government to potentially recover substantial funds. This desire for greater revenue, though, implicates matters that can and should be addressed through fiscal policy at the federal, state and local level, not through lawsuits that usurp the state's sovereign power.

Another major force behind locality lawsuits are the private contingency fee lawyers who campaign around the country to convince local officials to partner with them. These private lawyers stand at the front of the line to recover potentially enormous sums out of any money awarded to the local taxpayers. The private lawyers also realize that they can exert greater leverage over businesses and other civil defendants by signing up hundreds or even thousands of local governments and creating a logistical nightmare unrelated to the merits of any claim.

The motivations of private contingency fee lawyers to pursue locality lawsuits are also rooted in a long history of efforts by them to partner with the federal government and state governments to bring litigation on behalf of the public. Although private lawyers have collected enormous sums over the years pursuing public litigation — for example, in the tobacco litigation — they have been increasingly blocked from entering highly lucrative arrangements with friendly public officials behind closed doors.

At the federal level, President George W. Bush signed Executive Order 13433, "Protecting American

Taxpayers From Payment of Contingency Fees," in 2007, which prohibited the federal government from hiring private contingency fee lawyers to pursue litigation on behalf of the public. The public policy behind this executive order is that law enforcement authority should remain at all times with public officials, not be outsourced to private lawyers whose profit maximization goal may not align with the best interests of taxpayers.

Although adopted by a Republican president, Executive Order 13433 remained in effect during the Obama administration and continues in effect today. The plaintiffs bar has sought to reduce the impact of this executive order by inserting provisions in federal legislation that would empower state attorneys general, who are not prohibited from hiring private contingency fee lawyers, to enforce federal law. Through such provisions, plaintiff lawyers are able to leverage their relationships with state attorneys general and continue to pursue various types of federal enforcement litigation on behalf of the public.

At the state level, legislation has sought to limit, or at least provide transparency, in state attorney general hiring of private contingency fee lawyers. Around half of the states have adopted some form of law, with names like the Private Attorney Retention Sunshine Act, or PARSA, or Transparency in Private Attorney Contracting, or TiPAC, to limit the conditions under which the state attorney general may hire private contingency fee lawyers or require transparency for such outsourcing efforts.

Locality lawsuits provide private contingency fee lawyers with a new way to bring litigation on the public's behalf without any of the restrictions put in place at the federal or state level, such as with Executive Order 13433 and PARSA and TiPAC legislation. In this regard, locality litigation resembles a vast and untapped Wild West, in which greater numbers of private contingency fee lawyers may potentially partner with local governments to wage civil litigation.

Ways to Stop Wasteful Trickle-Down Locality Lawsuits

The effort by 14 state attorneys general of different political stripes to support Yost's initiative to stop wasteful and unnecessary locality litigation can serve as a model for the future. Organizations such as the National Association of Attorneys General can and should develop policies and coordinated efforts to protect the sovereign authority of state attorneys general against infringing locality lawsuits.

State legislatures may also consider proposals to limit locality lawsuits. The current lack of clear restrictions against localities suing for alleged harms that extend beyond the local government's borders and are duplicative of potential statewide enforcement action is plainly at odds with existing legislative restrictions on state attorneys general. At the very least, local government officials should not be permitted to avoid the types of restrictions in PARSA or TiPAC laws and stand in a superior position to sue than the state's highest law enforcement official.

Perhaps most important is that lawmakers and the general public understand that the main driver of the recent influx of locality lawsuits are private lawyers, whose objective is to use any litigation partnership with public officials to make money. This scheme, though, proposes to pit local governments and the state against each other, distort existing liability law and diminish the role of the public official charged with looking out for the best interests of everyone in the state.

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Disclosure: Pfizer is named as a defendant in five pending cases brought by local governmental entities.