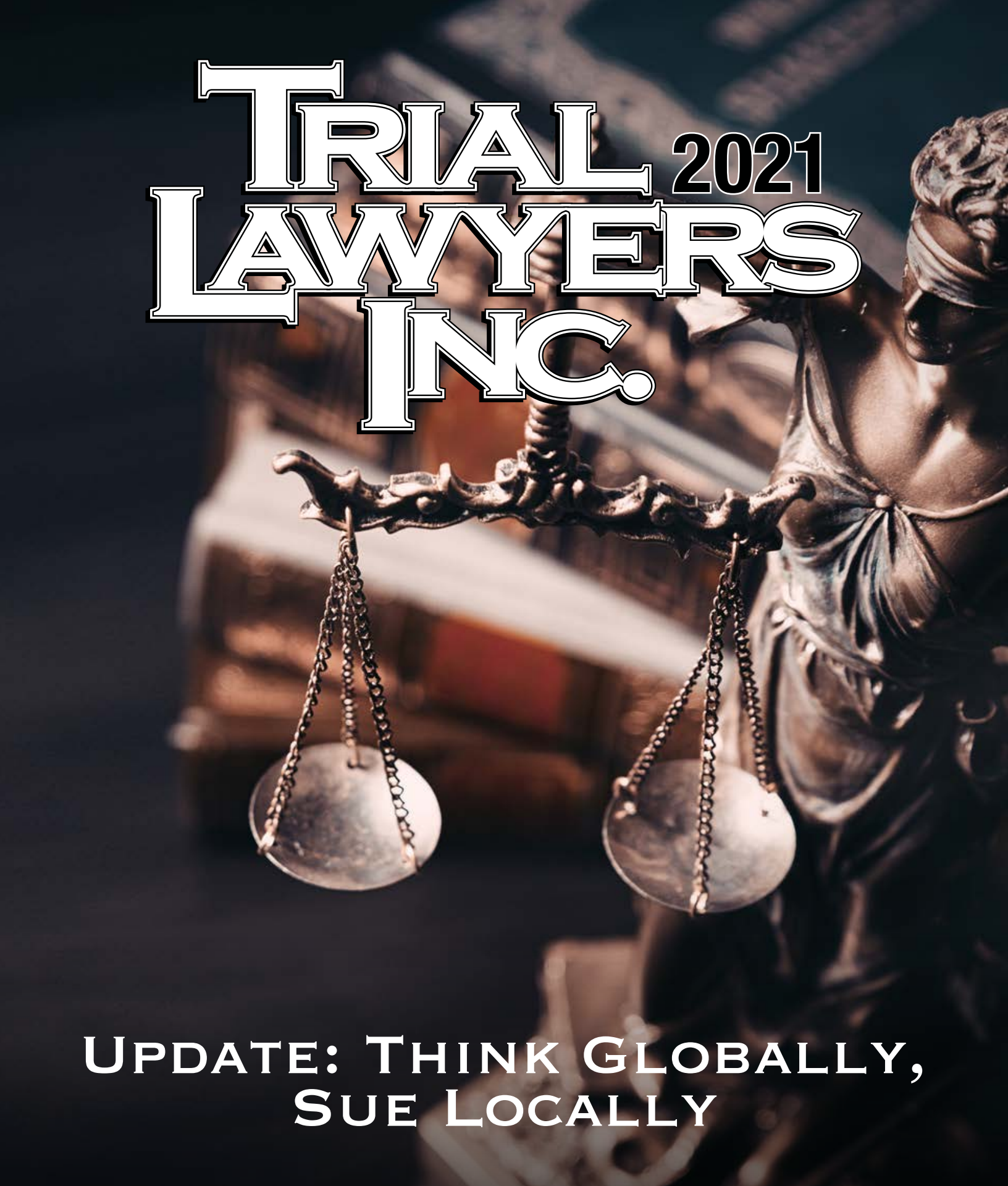

Trial Lawyers Inc. 2021

Update: Think Globally, Sue Locally

ABOUT THE AUTHOR

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Prior to joining MI, Copland was a management consultant with McKinsey and Company in New York. Earlier, he was a law clerk for Judge Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Copland has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. He holds a J.D. and an M.B.A. from Yale, where he was an Olin Fellow in Law and Economics; an M.Sc. in the politics of the world economy from the London School of Economics; and a B.A. in economics from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.

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LOCALITIES AS WELL AS STATES SHAPING NATIONAL ECONOMIC POLICIES THROUGH LITIGATION, WITH LAWYERS EXPECTING BIG PAYDAYS

Over the last 25 years, the big-ticket plaintiffs' bar—whom we at the Manhattan Institute have dubbed "Trial Lawyers, Inc."[1]—has formed a symbiotic relationship with state and local officials. The multistate tobacco litigation in the mid-1990s made billionaires out of several plaintiffs' lawyers and taught the litigation industry that there is, in many ways, no better plaintiff—with no bigger recovery—than a state government.

Today, private lawyers suing industries on behalf of states are tackling many of the most vexing public problems—from gun violence to opioid addiction to the most global of problems: climate change. As plaintiffs in civil lawsuits for damages, governments' sheer size creates potentially enormous dollar liability—and generates substantial pressure on defendants to settle. That's true even for the largest corporations, as settlements with tobacco and pharmaceutical companies have shown. And this settlement pressure gives state officials overseeing such lawsuits extraordinary discretion to shape the conduct of private business, even if unauthorized by any statute. It's hardly surprising that state attorneys general and local district attorneys find filing lawsuits a good way to pursue policy goals that are generally beyond their purview.

On the surface, such arrangements are typically "free" to the taxpayer. Notwithstanding that government clients are hardly impecunious, private lawyers work for the government on "contingency fee" arrangements—and collect only in the event of victory. But even though the up-front cost to the state for such lawsuits is negligible, the ultimate payouts to private counsel as a share of settlement proceeds can often be a hefty public expense. Moreover, the policy adventurism of state and local attorneys can largely escape legislative oversight. With funding streams largely outside the oversight of state legislators, litigators-as-regulators are often unconstrained.

Beyond their policy goals, state and local officials have more self-interested reasons to hire private plaintiffs' lawyers to sue for their constituencies. The private lawyers they hire—or, at least in some cases, those provided for them by deep-pocketed third-party benefactors—are easy connections to the fund-raising dollars they'll find useful to pursue their election campaigns. That the parties profiting from state enforcement actions also contribute hefty sums to fill campaign coffers gives, at a minimum, the whiff of a "pay to play" odor to the whole operation. In many cases, state and municipal officials relinquish much of their authority over the lawsuits—putatively on behalf of the public—to the private lawyers they've hired.[2]

But such rule-of-law, separation-of-powers, and appearance-of-corruption concerns are only part of the problem. In case after case, states and localities have sought to use lawsuits, often predicated on dubious legal theories, to resolve *national* controversies—sometimes in direct conflict with laws that Congress has enacted. State litigation contracted out to private parties thus inverts normal federalism and allows states and localities the power to direct national policy, as an end run around Congress's constitutional authority to regulate interstate commerce—especially for nationally controversial policy concerns, such as guns and climate.

Precisely such concerns—the "unneighborly regulations" of some states "interfering" with others' affairs—animated the Constitutional Convention in Philadelphia, as the Constitution's most prominent advocate, Alexander Hamilton, wrote at the time.[3] That the "New Antifederalists"[4] have formed a symbiotic relationship with the avaricious attorneys of Trial Lawyers, Inc. should give pause even to those sympathetic to their policy goals.

SMOKING GUNS: THE STATE AND LOCAL LAWSUIT-INDUSTRY BUSINESS LINE BEGINS

Suing tobacco companies on behalf of states made billionaires out of trial lawyers like Dickie Scruggs ©Getty Images

Governments allocating hefty contingent fees to private plaintiffs' firms—that, in turn, fund the campaigns of the political actors who hire them—traces back to 1994. That year, Mississippi trial lawyer Richard Scruggs reached out to his state's attorney general, Mike Moore, a fellow native of Scruggs's hometown of Pascagoula. Scruggs had an idea: Mississippi could sue the tobacco companies, seeking compensation for health-related costs imposed on the state by tobacco-related drug ailments—and the state could retain Scruggs's law firm to litigate the case.[5]

As a matter of legal reasoning, Scruggs's proposed lawsuit had problems: states had no contractual relationship with tobacco companies, they already levied excise taxes on cigarette sales to cover the cost of treating smoking-related illnesses,[6] and a 1969 federal law preempted state regulation of smoking.[7] But given the potential damages with states as plaintiffs, Scruggs bet—correctly—that tobacco companies would agree to settle the litigation. Eventually, nearly every state and several territories entered into a master settlement agreement with cigarette manufacturers.[8]

The litigation netted Scruggs and his fellow plaintiffs' lawyers who handled the case a staggering $30 billion.[9] The effective hourly rates for the lawyers exceeded $10,000 per hour when hours were accounted for.[10] Lawyers for some states never submitted a reckoning of their work, took no depositions, and nevertheless went home with hundreds of millions of dollars.[11]

In 1999, at a Manhattan Institute conference, Scruggs claimed that his tobacco lawsuit was "unique"; he argued that his pioneering lawsuit would not be the template for other state- and local-backed litigation against industry, on public health, or other rationales.[12] But other litigation using Scruggs's recipe was already brewing.

In October 1998—before the private tobacco lawyers' paydays had even been announced—the City of New Orleans announced that it was hiring private lawyers to sue gun manufacturers.[13] (For the supposed legal basis of this litigation, see sidebar, **Public Nuisance: Using an Ancient Writ to Resolve Complex Modern Problems**.) The lawyers leading the gun litigation were tobacco-lawsuit veterans, including Louisiana's Wendell Gauthier, Ohio's Stanley Chesley, and San Francisco–based Elizabeth Cabraser.[14] Ultimately, almost 30 municipalities joined in litigation filed against 40 entities associated with gun manufacture or use, including advocacy groups like the National Shooting Sports Foundation.[15]

Although private attorneys such as Gauthier, Chesley, and Cabraser were involved and stood to profit, the gun lawsuits were less about pecuniary gain than the tobacco suits because gun manufacturers have far lower cash flows than tobacco companies. But the cities and their private lawyers hoped to develop a comprehensive gun-regulation scheme, much as the state attorneys general and their lawyers had assumed the mantle of tobacco regulation through their master settlement agreement.[16] Chicago sought a settlement that required manufacturers to mandate a 30-day waiting period between firearms sales to individuals and outlaw all sales of "firearms that by their design are unreasonably attractive to criminals."[17]

After the gun lawsuits' initial success—helped in part by pressure from President Bill Clinton and his Secretary of Housing and Urban Development, Andrew Cuomo[18]—Congress stepped in. The 2005 Protection of Lawful Commerce in Arms Act preempted most litigation premised on the sale of legal guns if the theory was merely that the guns were used to commit crimes.[19] But just as Congress's 1969 law didn't stop the state-led tobacco litigation, gun lawsuits remain ongoing. On March 14, 2019, the Connecticut Supreme Court disagreed with a lower-court decision that found a lawsuit against the Remington firearms company filed in the wake of the 2012 Sandy Hook Elementary School shooting had fallen "squarely within" the "broad immunity" granted against such suits by Congress.[20] By that point, Remington had already filed for bankruptcy protection.[21]

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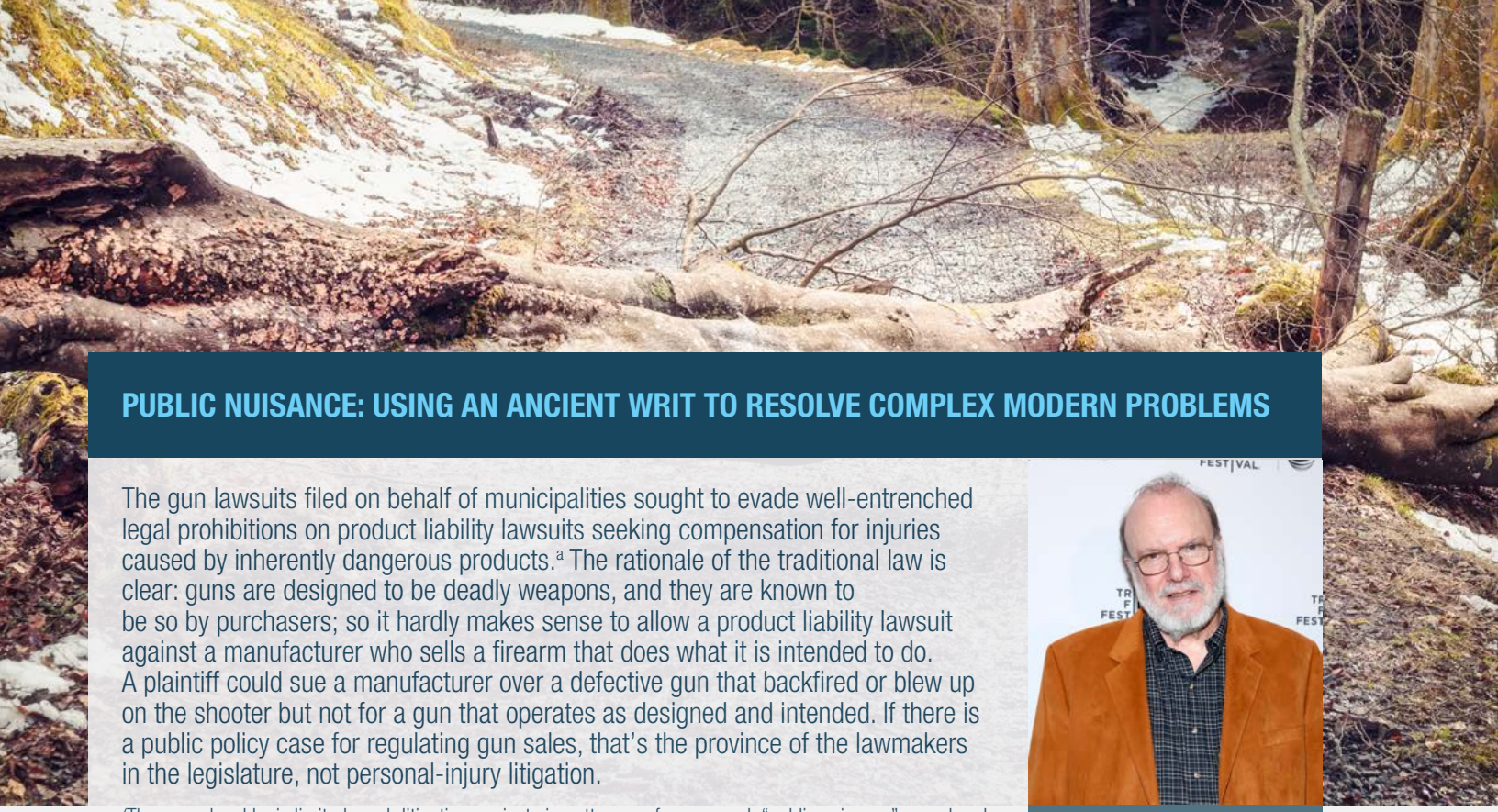


PUBLIC NUISANCE: USING AN ANCIENT WRIT TO RESOLVE COMPLEX MODERN PROBLEMS

The gun lawsuits filed on behalf of municipalities sought to evade well-entrenched legal prohibitions on product liability lawsuits seeking compensation for injuries caused by inherently dangerous products.[a] The rationale of the traditional law is clear: guns are designed to be deadly weapons, and they are known to be so by purchasers; so it hardly makes sense to allow a product liability lawsuit against a manufacturer who sells a firearm that does what it is intended to do. A plaintiff could sue a manufacturer over a defective gun that backfired or blew up on the shooter but not for a gun that operates as designed and intended. If there is a public policy case for regulating gun sales, that's the province of the lawmakers in the legislature, not personal-injury litigation.

Professor David Kairys ©Getty Images

(The same legal logic limited much litigation against cigarette manufacturers, before Scruggs's states-as-plaintiffs innovation. The Second Restatement of Torts, published by the legal research and reform organization American Law Institute [ALI] in 1966, expressly listed tobacco, along with whiskey and butter, as an inherently dangerous product not amenable to tort lawsuits.)[b]

But the municipal gun lawsuits advanced a novel theory: the manufacturers had created a "public nuisance" by selling too many guns.[c] The new theory applied an ancient cause of action: the "nuisance" tort dates to 12th-century England, when it was established to empower the king to police infringements on public lands, roads, or waterways.[d] Initially limited to lawsuits brought by the crown, the nuisance tort was opened up centuries later to permit private causes of action.[e] The private lawsuits were linked to landownership and allowed landowners who suffered "particular" injuries to recover damages against neighbors for offensive odors, sounds, or emissions.[f]

The "public nuisance" cause of action, imported to the United States, was limited to state enforcement—the descendant of the crown actions established centuries earlier in England. In the early American republic, states brought public-nuisance lawsuits against municipalities to require them to clear roads and waterways. Such lawsuits were early mechanisms for policing taverns, gambling houses, and brothels.[g]

The use of the nebulous and undefined public-nuisance tort waned, however, with the rise of the regulatory state—as elected legislatures crafted statutes governing "public" offenses. According to one legal scholar studying the history of nuisance law, the public-nuisance tort was but "a footnote" by the time of the New Deal; indeed, ALI's first Restatement of Torts, published in 1939, did not even mention it.[h] But when ALI revised its Restatement of Torts in the 1960s, environmental activists successfully lobbied the organization to include relatively broad language defining a public nuisance as "an unreasonable interference with a right common to the general public" that "involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," regardless of whether such "public nuisance" was already prohibited by a regulation or statute.[i]

In 1996, Temple University law professor David Kairys, whose academic specialty is civil rights law, suggested the public-nuisance tort as a mechanism for suing gun manufacturers.[j] The public-nuisance tort has subsequently been invoked in state- and municipal-backed lawsuits targeting a host of private companies, including the pharmaceutical manufacturers selling opioid-based drugs,[k] paint companies that decades ago sold lead-based products,[l] and energy companies selling carbon-based products linked to climate change.[m]

a. *See* Restatement (Second) of Torts § 402A cmt. i (a comment noting that tort law does not contemplate liability for a product that is "unreasonably dangerous" unless "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it").

b. *See id.*

c. Timothy D. Lytton, *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 132 (2005).

d. *See* C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 3–5 (1949).

e. Y.B. Mich. 27 Hen. 8, 10 (1535).

f. *See* generally Richard Epstein, *Cases and Materials on Torts* 639, 639–50 (8th ed. 2004).

g. *See generally* Larry Howard Whiteaker, *Seduction, Prostitution, and Moral Reform in New York, 1830–1860* (1997).

h. *See* Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Environmental Affairs L. Rev. 89 (1998).

i. *See* Restatement (Second) of Torts § 821B.

j. *See* Lytton, *supra* note c, at 132.

k. *See In re* Nat'l Prescription Opiate Litig., 927 F.3d 919 (6th Cir. Sept. 24, 2020).

l. *See* Manhattan Institute, *Trial Lawyers, Inc. Update: Judicial Leadership—State Courts Are Rebuffing the Trial Lawyers' Attack on Paint Manufacturers* (2007).

m. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

UNCERTAIN CLIMATE: STATES AND LOCALITIES SUE OVER GLOBAL WARMING

In 2004, New York City and eight states filed the first public-nuisance-based lawsuits intended to fight climate change.[22] The lawsuit alleged that five electricity companies had generated a public nuisance through their "greenhouse gas" emissions—much like rubbish blocking a waterway or a malodorous neighbor.[23] The lawsuits sought regulatory ends (to pressure the companies to agree to cap emissions) and money damages (to cover state and local costs to mitigate against rising shorelines, weather changes, and the like).

The lawsuit was based on an alleged federal law of public nuisance. In 2011, the Supreme Court unanimously rejected the theory underlying the suit.[24] In the Court's view, Congress had displaced any preexisting federal common law of public nuisance as applied to atmospheric pollutants when it enacted the Clean Air Act. Thus, any greenhouse gas regulation had to be based on a new law passed by Congress or regulations promulgated by the Environmental Protection Agency or other administrative agencies—not through litigation based on a nebulous public-nuisance tort.

But that rebuff hardly stopped state and local lawsuits premised on climate change. In June 2012, various climate-change activists held a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California, to plan the next steps.[25] Included in the discussion were plaintiffs' lawyers, including Matthew Pawa, who practices law in the Newton, Massachusetts, office of Seattle-based Hagens Berman Sobol Shapiro LLP.[26]

According to a recent Texas court decision, "Conference participants discussed strategies for getting energy companies' internal documents" and developed various "civil litigation" strategies—including by enlisting state and local government allies—to "pressure the energy industry to support legislative and regulatory responses to climate change."[27] The group coordinated efforts

Massachusetts Attorney General Maura Healy ©Getty Images

San Francisco City Attorney Dennis Herrera ©Getty Images

with billionaire hedge-fund investor Tom Steyer and the Rockefeller Family Fund office.[28] In March 2016, the activists assembled a group of 20 friendly state attorneys general. Among them were then–New York attorney general Eric Schneiderman, who, in the previous year, had sued ExxonMobil, alleging that it had violated the state's Martin Act securities law by making materially misleading disclosures.[29] Also among the group was Massachusetts attorney general Maura Healey, who, the very next month, filed an investigative demand against ExxonMobil, accusing the company of frauds that violated the commonwealth's consumer-protection laws.[30]

But the state-based lawsuits were merely the first. A subsequent wave of lawsuits, launched by municipal governments, soon followed:

- In July 2017, three California municipalities—San Mateo and Marin Counties, and the City of Imperial Beach—filed lawsuits against 30 energy companies in California state court, premised on a host of state-law legal theories, including public and private nuisance.[31]
- Two months later, the city attorneys for Oakland and San Francisco filed suit in state court against five oil and gas companies with their own cases, claiming that their contributions to global warming constituted a public nuisance.[32]
- New York City announced similar litigation against the same five companies being sued by Oakland and San Francisco in January 2018.[33]

Various outside plaintiffs' lawyers represented some of the municipal plaintiffs, including Pawa. Some of the parties expressly tied their cases to the earlier tobacco litigation. San Francisco city attorney Dennis Herrera claimed that the oil and gas companies had "copied a page from the Big Tobacco playbook" by launching "a multi-million-dollar disinformation campaign to deny and discredit what was clear even to their own scientists: global warming is real, and their product is a huge part of the problem. Now, the bill has come due."[34]

Such strong rhetoric notwithstanding, the climate-change lawsuits, to date, have not approached the tobacco lawsuits' success. A federal district judge threw out the New York City suit six months after it was filed—pointing to the exclusive jurisdiction of the Clean Air Act, as discussed in the Supreme Court's 2011 decision.[35] In May 2020, the U.S. Court of Appeals for the Ninth Circuit ultimately dismissed the San Mateo and Marin County suits, which had been removed to federal court on jurisdictional grounds[36]—although the same panel on the same day sent the Oakland and San Francisco cases back to lower court for further consideration.[37] Two days later, a federal district judge in Massachusetts similarly tossed Healey's lawsuit on jurisdictional grounds.[38]

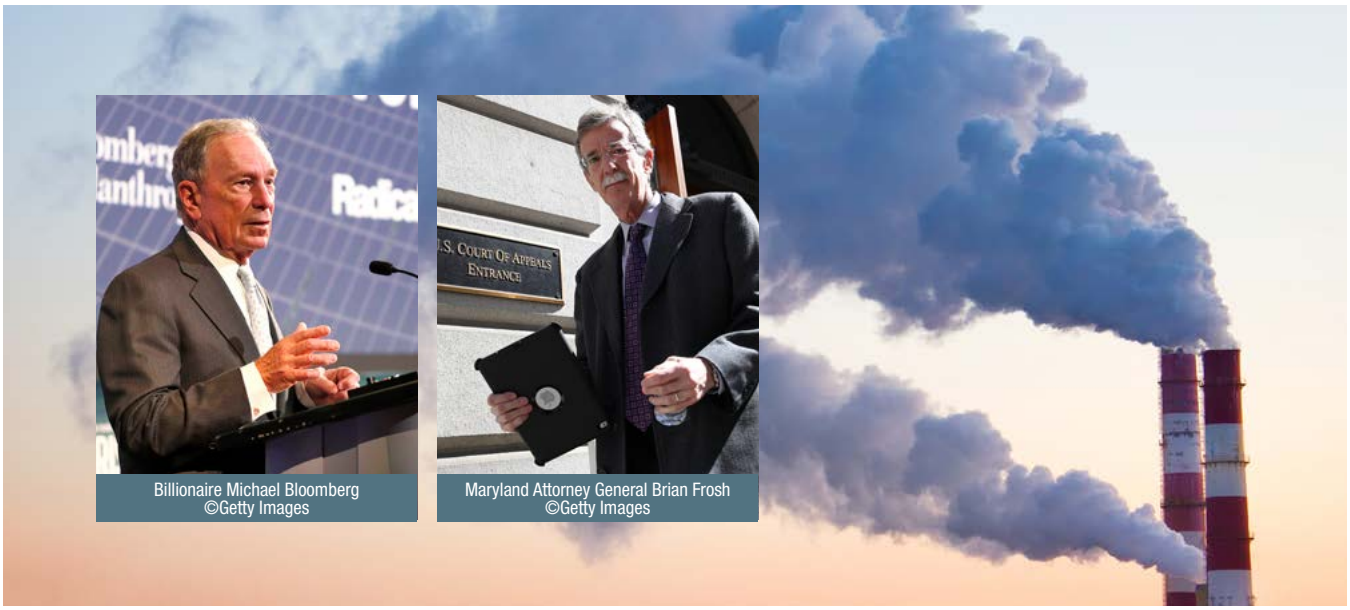
SUE FOR THE STATE, WORK FOR THE BILLIONAIRE

That the climate-change lawsuits have not had financial payoffs has not prevented private lawyers from teaming with the state to pursue them. As noted, billionaire backers—including Tom Steyer and the Rockefeller Family Fund office—have pumped significant funding into helping coordinate the litigation.

In 2017, another billionaire, former New York City mayor Michael Bloomberg, helped to connect private lawyers with state offices pursuing climate-related litigation. With an initial $5.6 million grant, Bloomberg Philanthropies underwrote the "State Energy & Environmental Impact Center,"[39] a public-interest legal center at the New York University School of Law. The new NYU Center was a vehicle for paying the salaries of "special assistant attorneys general" who "volunteered" their time pro bono to the government offices of nine Democratic state attorneys general, plus the District of Columbia.

For example, as uncovered in subsequent public-records litigation, Maryland attorney general Brian Frosh hired attorney Joshua Segal—whose $125,000 salary as a "research scholar" was paid by the NYU Center. The complaint filed in that public-records case characterized this arrangement as "an out-of-state, activist political donor" working "to utilize his vast wealth to harness the police powers of the state of Maryland by funding an assistant attorney general with the purpose of carrying out his preferred, special interest agenda."[40]

On June 24, 2020, the Minnesota attorney general's office, working with the NYU Center, filed suit against ExxonMobil, the American Petroleum Institute, Koch Industries, and other energy-industry defendants, advancing a consumer-fraud theory that echoed the unsuccessful suit previously introduced by Massachusetts attorney general Healey.[41] Two special assistant attorneys general funded by the NYU Center, Peter Surdo and Leigh Currie, are working on the case.



Billionaire Michael Bloomberg ©Getty Images

Maryland Attorney General Brian Frosh ©Getty Images

SUE FOR THE STATE, PROFIT FOR THE LAWYER


Jim Hood ©Getty Images

The ethical question of turning over the state's enforcement power to private counsel paid by billionaire backers is obvious, but the principle had already been breached in the private contingent-fee lawsuits conceived by Scruggs. In the state tobacco lawsuits and successor litigation, plaintiffs' lawyers stand to profit handsomely—and tend to conceive of the litigation and pitch it to their government clients, as opposed to being approached by government officials to execute ideas originating with the elected officials themselves.

Delegating state law-enforcement authority without financial control—either through a billionaire backer of pro bono counsel or through contingent-fee financing—creates potential conflicts between the state's obligation to serve the general welfare and the counsel's private interests. Government litigation funded by a billionaire backer effectively works as an end run around the appropriations power of state legislatures. The same is true for private attorneys suing for the government on contingent-fee agreements. Moreover, such contingent-fee counsel have a financial incentive to maximize money recoveries—an incentive that is generally congruent with clients' interest in private litigation but frequently in tension with the state's public-interest role. (For example, the state's principal goal with respect to tobacco companies would likely be to discourage cigarette smoking, especially among youth—not to maximize cash payouts from defendant companies. But a cigarette company reaching a settlement would be willing to pay a larger dollar settlement in exchange for higher expected future sales, a deal that self-interested private lawyers would be tempted to take.)

The nexus between campaign finance and state-sponsored litigation—whether contingent-fee-based or billionaire-backed—creates at least the appearance of impropriety. Michael Bloomberg is a leading donor to political campaigns.[42] So, too, are private plaintiffs' lawyers with a direct pecuniary interest in state-backed litigation:

- When Alabama attorney general Troy King, a Republican, sued 73 pharmaceutical companies on a price-gouging theory premised on Medicaid reimbursement, he farmed it out to the Montgomery personal-injury firm Beasley Allen. According to a report by the American Tort Reform Association, the firm and its lawyers had donated over $760,000 in the preceding five years to eight separate political action committees, which had given $240,000 to support King's campaigns.[43] The firm then took in more than $20 million of settlement dollars paid to the state.[44]
- The Texas firm Bailey Perrin Bailey handled litigation filed by Mississippi and Arkansas against drug manufacturer Eli Lilly, seeking to recoup Medicaid monies that paid for prescriptions for the company's antipsychotic drug Zyprexa. The Bailey Perrin firm received $3.7 million and $2.78 million in fees for settlements negotiated on behalf of the states. The firm and its lawyers also donated $75,000 to Mississippi attorney general Jim Hood's reelection campaign and $70,000 to the Arkansas Democratic Party.[45]
- Hood also raked in more than $120,000 in campaign donations from the large New York securities class-action firm Bernstein Litowitz Berger & Grossman—and subsequently hired the firm for a majority of the class-action securities cases litigated on behalf of Mississippi public-employee pension funds. In one case, the firm was awarded multiple no-bid contracts for such lawsuits—mere weeks after five firm partners had contributed to Hood's campaign fund.[46] The total settlement value of cases negotiated for Mississippi by Bernstein Litowitz exceeded $1.6 billion.[47]

The vast share of settlement proceeds funneled to private plaintiffs' lawyers given control of lawsuits filed on behalf of state and local governments—and the fact that such well-compensated plaintiffs' lawyers are often both out-of-state firms and generous past and future campaign donors to the state officials who hire them—can create at least the appearance of pernicious "pay to play" arrangements. A number of states have no formal process for overseeing private attorney contracts, which heightens these concerns.

LITIGATING DRUG REHAB

The newest and most significant major line of litigation against pharmaceutical companies incorporates the public-nuisance theories underlying gun and environmental lawsuits delegated to private attorneys. The goal is to hold manufacturers liable for the government's cost of dealing with opioid addiction. The opioid-addiction crisis is real enough: over the last two decades, almost 450,000 Americans have died from an overdose of opioid drugs—including illegal narcotics like heroin as well as prescription pharmaceuticals.[48] And the cost of opioid abuse is staggering: an estimated $1 trillion.[49] The lives lost to opioid and other addictions obviously cry out for government action and policy solutions. And perhaps it's just as obvious that state and local public officials would turn to private plaintiffs' lawyers to tackle the issue, given the previous precedents of doing so with tobacco addiction, gun violence, and environmental pollution.

All told, some 24,000 municipal governments have filed some 1,300 lawsuits against manufacturers that sold prescription drugs derived from opium.[50] Many of these cases have been consolidated in a federal district court in Cleveland.[51] Several corporate defendants have already settled claims for billions of dollars.[52] But on September 24, 2020, the federal appellate court overseeing the consolidated litigation threw out the trial judge's solution for negotiating a mass settlement[53]—meaning that the lawsuits will stretch on for some time to come (see sidebar, **A No-Class Action**).

However the lawsuits are ultimately resolved, they're unlikely to wean citizens off narcotics. Indeed, opioid lawsuits are nothing new. Among the earliest state lawsuits farmed out to private lawyers targeting a pharmaceutical company was that filed by West Virginia in 2001, against Purdue Pharma, for allegedly "aggressive" marketing of the manufacturer's opioid drug Oxycontin.[54] The lawsuit did little to curb opioid abuse. But it netted the state a $10 million settlement—$3 million of which went to four plaintiffs' law firms as a contingent fee.[55] Those same firms had contributed $47,500 to the campaigns of West Virginia attorney general Darrell McGraw.[56]

A NO-CLASS ACTION

To promote judicial economy, federal law permits civil lawsuits "involving one or more common questions of fact" to be consolidated from various trial courts around the country into "multidistrict" actions before a single judge.[a] That is how thousands of opioid lawsuits filed by municipalities around the country wound up in front of a single federal district judge in Cleveland. The appellate court (the U.S. Court of Appeals for the Sixth Circuit) objected to the novel way the court had proposed to settle these disparate claims: through a class-action negotiation.[b]

Federal courts and most state courts have long allowed lawsuits that join together multiple substantially similar lawsuits into a combined single class-action claim. But the joined cases have to meet certain requirements: they have to be "numerous" and must present "common" questions of law and fact.[c] The federal rules do not permit what the district judge proposed: a "new" type of "negotiation class" parallel to individual claims, which the appellate court deemed inconsistent with "the structure, framework, or language" of the federal class-action rule.[d]

a. 28 U.S.C. § 1407.
b. *In re* Nat'l Prescription Opiate Litig., 2020 WL 5701916.
c. Fed R. Civ. P. 23(a).
d. *In re* Nat'l Prescription Opiate Litig., 2020 WL 5701916, at *8.

INVERTING THE FEDERALIST MODEL

Mayor Bill de Blasio ©Getty Images

Aside from the perception of conflict inherent in state and local lawsuits that enrich private litigants—or effectively cede the state's business to attorneys paid by outside billionaires—most of these state and local lawsuits also invert the normal federalist structure. When he announced New York City's litigation against oil companies in January 2018, Mayor Bill de Blasio was unabashed in asserting authority over the most global of policy issues: "We never make the mistake of waiting on our national government to act when it's unwilling to. This city is acting. We want other cities to act."[57] The problem, of course, is that de Blasio was never elected by a national constituency.

In some cases—as in the opioid lawsuits and the multistate tobacco litigation that formed the template for this litigation industry line of business—most, if not all, states join the fray. But even when states and localities unite their cases for strategic purposes, they often assert different theories and interests and fight for the spoils. The emergence of local government plaintiffs complicates these matters even more; some of the state plaintiffs in opioid litigation have objected to local governments' involvement precisely because they want to retain more settlement proceeds themselves. One federal judge overseeing the cases recently characterized the mess as a "family feud" between "cities and counties and the states that they sit in."[58]

Cases settle largely because of the massive potential damages at risk, not because of the legal merits. In the Alabama drug-pricing litigation farmed out to Beasley Allen, three companies decided to roll the dice and take the state to trial. They ultimately won their case; the Alabama Supreme Court observed that there was no evidence that the companies had made any misrepresentations and that nothing prevented the state from negotiating its pricing with the companies in any event.[59] The supreme court's judgment reversed earlier jury verdicts totaling almost $340 million, highlighting why so many other companies had been willing to settle.

These issues are particularly acute when lawsuits are premised on nebulous "common law" theories like public nuisance, which predate the modern regulatory state. As Justice Ruth Bader Ginsburg observed for a unanimous Supreme Court in rejecting federal-law public-nuisance litigation to regulate climate change, "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[60] The problems are also pronounced when addressing complex problems like opioid addiction.

Lawsuits for money damages also encourage outside private lawyers to prioritize payouts over solutions. Similar temptations abound for state officials when they can hold on to settlement dollars to pad their agency or departmental budgets or allocate their budget dollars without legislative oversight. Indeed, some local plaintiffs have argued that they need to file their own opioid suits precisely because state attorneys general in earlier litigation misappropriated settlement proceeds. There is a reason that federal and state constitutions give the power to tax to legislatures, not to the executive branch or courts. There is also a reason that governments no longer "contract out" tax collection to private collectors who retain a share of the proceeds.

Moreover, not all cases are like tobacco or opioids, where states and localities are mostly jostling for their cut of the action. In other cases—as in lawsuits against gun manufacturers and energy companies linked to carbon emissions—a smaller fraction of states and municipalities get involved, as political leaders from other locales with different public views eschew the litigation or file briefs on the other side. As de Blasio suggested, state and local officials are often overtly trying to win policy debates through large-scale litigation—in a direct end run around Congress, which is vested with interstate regulatory authority by the Constitution.

REINING IN THE NEW ANTIFEDERALIST–TRIAL LAWYERS, INC. ALLIANCE

Is there a path forward? In general, state attorneys general have broad "police powers." However, Congress has the power to preempt states from action in fields, as it did with antigun litigation, consistent with its power to regulate interstate commerce. Climate change may be an area in which Congress should pursue a similar approach.

Even when Congress would prefer a role for the states, there is no reason generally to enable state-led shakedown lawsuits under federal law. Unfortunately, many federal statutes do just that: they empower states to enforce federal regulations through private "rights of action," without any limitation on contracting the job out to private attorneys.[61] Rather than inviting plaintiffs' lawyers to approach state officials to file damages suits on states' behalf, Congress should require transparent hiring principles that deter abuse when states enforce federal law.[62]

Although states may have little incentive to limit their own officials' interference with other states' policy prerogatives, state legislators should seek to cabin the discretion of attorneys general and other state elected officials to contract their services with private lawyers on contingent-fee contracts—or to delegate state enforcement to "volunteer" attorneys paid by third-party sources. The multistate legislative-drafting coalition American Legislative Exchange Council has promulgated a model bill, the Private Attorney Retention Sunshine Act,[63] to that end. Other similarly intended legislation also exists, and several states have enacted variations.[64] State legislatures should also consider legislation limiting localities' ability to engage in such litigation—often in serious tension with state interests.[65]

John Ketcham provided research support for this report. He is a Collegiate Fellow at the Manhattan Institute and a third-year student at Harvard Law School.

1. *See* Manhattan Institute, Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America (2003).
2. *See* Richard A. Samp, *Growing Concern over Contingency Fee Agreements Between Attorneys General and Private Attorneys*, Bureau of National Affairs (Sept. 14, 2012). *See generally* John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215 (1983) (explaining why the private attorney general model has failed to live up to its promises).
3. The Federalist Papers, No. 22 (1787) (Hamilton).
4. *See generally* James R. Copland, The Unelected: How an Unaccountable Elite Is Governing America (2020).
5. *See* Walter K. Olson, The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law 30–45 (2003).
6. Cong. Budget Office, Federal Taxation of Tobacco, Alcoholic Beverages, and Fuels (1990).
7. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 42 U.S.C. §§ 1331–1338); *see* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (holding that federal cigarette labeling precluded state law "failure to warn" and "duty to inform" claims by smokers after 1969).
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10. *See id*.; Editorial, *$30,000 an Hour*, Wall St. J., July 5, 2000, at A22.
11. *See* Levy, *supra* note 9.
12. Richard Scruggs, Comments to the Conference on the Politics and Economics of Government-Sponsored Litigation *in* Regulation by Litigation: The New Wave of Government-Sponsored Litigation 31 (1999) ("Tobacco is unique").
13. Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 St. Louis U. Pub. L. Rev. 247, 248 (1999).
14. *See* Castano v. Am. Tobacco Co., 908 F. Supp. 378, 379 (E.D. La. 1995).
15. *See* Siebel, *supra* note 13, at 248.
16. The multistate settlement agreement with tobacco companies curtailed various cigarette-company advertising and marketing practices; established new industry-funded public-relations antismoking campaigns; and mandated perpetual annual payouts from company revenues to state governments, purportedly to defray the costs of state-provided health services for ailments linked to smoking.
17. Michael I. Krauss & Robert A. Levy, *So Sue Them, Sue Them*, Weekly Standard, May 24, 1999.
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22. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).
23. *See id*.
24. *See id*.
25. City of San Francisco v. Exxon Mobil Corp, No. 02-18-00106-CV, 2020 WL 3969558, at *2 (Tex. App. June 18, 2020).
26. *See id*.; Hagens Berman, Partner: Matthew F. Pawa.
27. City of San Francisco v. Exxon Mobil Corp, at 6.
28. *See id*. at 4–7.
29. *See* New York v. Exxon Mobil Corp., 65 Misc.3d 1233(A) (NY Sup. Ct. 2019).
30. *See* Massachusetts v. Exxon Mobil Corp., No. 19-12430-WGY (D. Mass. 2020).
31. *See* County of San Mateo v. Chevron Corp., ELR 20125 Nos. 18-15499, 18-15502, 18-15503, and 18-16376 (9th Cir. 2020).
32. *See* City of Oakland v. BP P.L.C., 2020 WL 2702680 (9th Cir. 2020).
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60. Am. Elec. Power Co. v. Connecticut, 564 U.S. at 428.

61. *See* James R. Copland, Statement Before the House Committee on the Judiciary Subcommittee on the Constitution, Hearing on Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Abuses in State AG Contingent-Fee Litigation, and Dangers for Federal Delegation of Enforcement Authority, Feb. 2, 2012.

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