

The “New” Enforcers: How States and Localities Are Changing the Landscape of Regulatory Authority

WRITTEN BY

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Introduction

Over the last decade, observers have noted that states have begun to play a greater role as regulatory enforcers – a trend that increased with the federal regulatory roll-back that began with the advent of the Trump Administration. Within the last couple of years, localities, including counties, cities, and towns, have joined the states in flexing their muscles as key players in areas of regulatory enforcement traditionally dominated by the federal government. By enacting their own statutory protections, performing their own investigations independent of their federal counterparts, or pursuing overlapping litigation against potential violators, states – and now localities – are becoming an increasingly important source of regulatory authority. This article explores how state and local enforcement is changing the landscape of regulatory authority, particularly in the areas of (1) False Claims Act investigations and litigation, (2) consumer protection, (3) other regulatory litigation and enforcement, and (4) regulation through taxation.

I. False Claims Act Investigations and Litigation

A. The Traditional Role of the Federal Government

Traditionally, the federal government was the only active regulator pursuing False Claims Act (“FCA”) violations.^[1] The FCA, 31 U.S.C. §§ 3729–3733, provides that any person who knowingly submits false claims to the government is liable for treble damages plus a penalty that is linked to inflation.^[2] The FCA additionally allows private citizens to file suits on behalf of the government. These private citizens, or “relators,” can receive 15-30 percent of the amount recovered for bringing these claims in the name of the federal government. Just last year, the Department of Justice (“DOJ”) highlighted “tireless efforts” to “investigate, litigate, and try these important cases.”^[3] To underscore the significance of these actions, the DOJ points to its recovery of more than \$62 billion utilizing the FCA statute.^[4]

B. The States Expand Laws Beyond Pursuing Medicaid Fraud

In today’s modern regulatory landscape, the federal government is no longer the only key player. Rather, states and localities have joined in prosecuting FCA claims. This trend originally was prompted by the federal government’s decision to incentivize states to pass state FCAs that corresponded to the federal FCA, so that a coordinated effort could be utilized to maximize recovery. This type of cooperation has been important in the health care arena, especially in prosecuting Medicare and Medicaid fraud involving state and federal dollars.

Cooperative recovery efforts, however, is not limited to health care, and many states have expanded their False Claims Act to other areas, allowing them to work – alone or with the federal government – to identify and prosecute alleged fraud in a variety of government-funded programs from military contracts to farming subsidies.

In 2019 alone, six states amended their false claims acts to expand their authority to more closely mirror the broad regulatory authority previously reserved for the federal government. All told, twenty-nine states and the District of Columbia and Puerto Rico have some form of false claims act in place.

C. Cities and Other Localities Adopt False Claims Ordinances

Most recently, large localities have sought new ways to flex the same regulatory muscle. For example, localities such as Jacksonville, Florida; Chicago, Illinois; New York, New York; Miami-Dade County, Florida; and Philadelphia and Allegheny County, Pennsylvania (encompassing Pittsburgh), all have adopted false claims act ordinances. As a result, these localities no longer must rely on the Federal Government or State Attorneys General to champion their cause.

II. Consumer Protection Activity

States likewise have picked up the regulatory baton from the federal government in leveraging unfair and deceptive acts and practices (“UDAP”) statutes to enforce consumer protection laws. For example, in 2019 Kansas filed a consumer protection action against Fiat Chrysler for allegedly manufacturing diesel vehicles with software designed to intentionally circumvent federal and state emissions, resulting in a \$72,500,000 multi-state settlement.^[5]

Further, the Federal Trade Commission (“FTC”) has made clear its continued intention to work closely with State Attorneys General in enforcement matters. Speaking at the National Association of Attorneys General in March 2019, FTC Chairman Joseph Simons emphasized the importance of the FTC’s collaboration with State Attorneys General to protect consumers and promote fair competition.^[6] Similarly, the Consumer Financial Protection Bureau (“CFPB”) has teamed up with state law enforcement to protect against allegedly illegal debt-collection practices, as evidenced by the CFPB Director’s announcement of a lawsuit it filed in partnership with the New York Attorney General’s Office: “The Bureau is committed to holding these companies and individuals accountable for threatening, harassing, and deceiving consumers. I thank Attorney General James and her staff for working with us on this matter.”^[7]

Even more recently, in the wake of COVID-19, State Attorneys General are actively working alongside federal regulators and creating task forces to combat fraud, abuse, and misuse related to COVID-19 response and relief efforts. For example, the Attorney General of North Carolina filed a lawsuit against Stephen Gould Corporation to enforce North Carolina’s laws against price gouging and unfair and deceptive trade practices relating to the sale of personal protective equipment. ^[8] Similarly, the Attorneys General of Alabama, Connecticut, Georgia, and Pennsylvania (just to name a few) have created joint state-federal COVID-19 fraud task forces to stamp out consumer fraud and other scams related to the pandemic.^[9] As the U.S. Attorney of the Western District of Pennsylvania put it when announcing its partnership with the Pennsylvania Attorney General’s Office, “[o]ur goal is simple: we seek to ensure there is no gap between the shields of federal and state law enforcement in protecting the public from fraudsters”^[10]

III. State and Local Regulation through Litigation

States and cities are also increasingly using litigation as a tool to effectuate regulatory compliance and to recover monetary damages. Nowhere is this better illustrated than in the sprawling opioid litigation consuming the country in the current “opioid crisis.” [11]

A. State Regulators Target Opioids

Over the last several years, state and local governments have initiated thousands of lawsuits against opioid manufacturers, distributors, and pharmacies for their alleged role in fueling the epidemic. While many of these cases have been filed or joined in the multi-district opioid litigation in the Northern District of Ohio, an increasing number of plaintiff states and, most recently, localities have been strategically filing their own lawsuits in state courts hoping to gain a home court advantage and recover local tax payers’ dollars spent responding to the opioid crisis.[12]

Moreover, state Attorneys General have shown an increasing willingness to investigate and prosecute opioid manufacturers and distributors, regardless of pending litigation in federal court. Complaints by state Attorneys General typically allege that opioid manufacturers deceived medical professionals and the public for decades about the addictiveness of opioids, causing more opioid prescriptions to be written at higher doses and for longer periods of time. As a result, thousands of citizens became addicted to opioids, overdosed, or died, leaving the states to deal with the financial and emotional consequences while opioid manufacturers and distributors reaped billions in profits.[13]

State-level enforcement actions seeking to hold opioid manufacturers liable are not, however, the exclusive domain of the Attorney General. Other state agencies can pursue different types of charges based on similar (if not identical) allegations, such as state financial services departments, which have brought insurance fraud charges against opioid companies for misleading marketing.[14]

B. Localities Join in Opioid Lawsuits

Localities are also jumping into the fray of opioid litigation and creating messy and complicated litigation as a consequence. Since most localities lack authority to enforce UDAP laws, localities, often represented by plaintiffs’ firms, are getting creative and using other legal theories such as fraud, negligence, unjust enrichment, and public nuisance to recoup costs incurred in responding to the opioid crisis. As a result, litigation is now being brought by the state, counties within the state, and municipalities within counties, thus creating potential conflicts among plaintiffs, problems with overlapping jurisdiction, and a lack of clarity in how to negotiate potential settlements.

C. States and Localities Employ Creative Mechanisms to Deal with Overlapping Enforcement Authority

In efforts to streamline and encourage settlements in this complicated environment, plaintiffs are using unprecedented mechanisms to streamline negotiations and settlements. For example, in the multi-district opioid litigation in the Northern District of Ohio, U.S. District Judge Dan Aaron Polster approved a novel “negotiation class” mechanism —ultimately overturned by the Sixth Circuit —allowing cities and counties to join together for purposes of settlement negotiations.[15]

At the state level, another innovative negotiation mechanism has come in the form of an agreement between the Ohio Governor, Ohio Attorney General, and local governments of Ohio to jointly approach opioid negotiations and litigation as “OneOhio.”^[16] The “OneOhio agreement” provides a detailed mechanism for the distribution of any settlement funds, and specifically outlines how those funds will be used.

While these mechanisms may serve as a model for future coordinated efforts between states and localities, they also add an additional layer of complexity to already extremely complicated litigation. Further complicating the situation, plaintiffs’ counsel (who often represent states and localities on a contingent fee basis) effectively wield regulatory authority by proxy, and often have their own financial motivations at stake when doing so.

Although opioid litigation has garnered the most attention in recent months, the rise in regulation through litigation by states and localities is not limited to the pharmaceutical sector. For example, states and localities are also filing lawsuits against companies to hold them liable for damages allegedly linked to climate change.^[17]

IV. Regulation through Taxation

Regulators long have recognized that the power to tax not only involves “the power to destroy,”^[18] as Chief Justice John Marshall famously observed, but also involves the power to regulate. Historically, taxation has been used to discourage the use of cigarettes and other tobacco products. Given the recent rise in the electronic-cigarette (e-cigarette) industry, states and localities are using taxation as a means to combat a perceived “youth vaping crisis” that has stemmed from the popularity of e-cigarettes.

To date, twenty-three states and the District of Columbia have enacted some kind of excise tax on e-cigarettes to discourage vaping. These taxes vary in form: some are based on wholesale costs, and others are per milliliter of liquid nicotine, often referred to as “e-liquid.” In order to pay these taxes, e-cigarette retailers and distributors often have to register with the state and in some instances, localities. These registrations are typically governed by the agency that regulates the jurisdictions’ commerce, e.g., the department of revenue. This requirement is not only placed on businesses with a presence in the state, but in some cases extends to remote sellers that cause products to enter the state.

We note that any excise tax levied on e-cigarettes is in addition to state sales tax, which can also apply to out-of-state sellers after the Supreme Court’s decision in *South Dakota v. Wayfair*.^[19] Tax and licensing schemes are just one-way states and localities are making it clear that they will ensure the regulation of e-cigarettes if the federal government does not do so.

The gaming industry has been similarly regulated through taxation by states and localities. After the Supreme Court found the Professional and Amateur Sports Protection Act of 1992 (the federal law blocking states from authorizing sports betting) unconstitutional in 2018^[20], states became free to legalize sports betting. For the most part, states that chose to do so have imposed taxes on revenue, which is typically withheld by facilities prior to providing individuals with their winnings. While states are currently imposing traditional tax models on the industry, some have considered using integrity fees—a payout to the state or sports league to maintain the industry.

As with e-cigarettes, these taxes may not be limited to betting that occurs in retail locations. Some states have imposed a tax and licensing scheme on online betting as well. For example, New Hampshire passed a law that

allows “[n]o more than 5 mobile sports wagering agents” to be in operation at any given time and does not tax bettors directly, but has arranged to obtain 51% of the winning bidder’s mobile revenues.^[21] New Hampshire’s law also highlights the roles localities may play in regulating the industry, in that it allows towns and cities to permit or prohibit sports book retail locations at their discretion.^[22]

V. Conclusion

The above examples highlight the ways in which today’s regulatory landscape is expanding. Over the past decade, businesses have begun to recognize that they cannot rely on the federal government as the sole source of regulatory guidance, but must consider the role of state regulators, as well. Today, businesses must also consider the role of the newest entrants to the regulatory stage – local governments. Businesses must fully understand federal, state, and local laws and ordinances to account for the costs and risks of doing business in areas where states – and now localities – are increasingly asserting regulatory authority.

[1] See Press Release, Department of Justice, *Justice Department Recovers over \$2 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020),

<https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

[2] Department of Justice, *The False Claims Act*, (Jan. 10, 2020), <https://www.justice.gov/civil/false-claims-act>.

[3] *Supra*, fn. 1.

[4] *Id.*

[5] *Kansas v. FCA US LLC, et al.*, No. 2019-CV-000121 (Kan. Dist. Ct. Feb. 28, 2019).

[6] Prepared Remarks of Chairman Joseph Simons (March 5, 2019), <https://www.ftc.gov/public-statements/2019/03/prepared-remarks-chairman-joseph-j-simons-national-association-attorneys>.

[7] Newsroom, *Consumer Financial Protection Bureau and New York Attorney General Take Action Against Debt Collection Operation and Its Owners and Managers* (Sept. 8, 2020),

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-new-york-attorney-general-take-action-against-debt-collection-operation/>.

[8] Press Release, *Attorney General Josh Stein Takes Action to Protect NC Health Care Systems from PPE Price Gouging* (Aug. 25, 2020), <https://ncdoj.gov/attorney-general-josh-stein-takes-action-to-protect-nc-health-care-systems-from-ppe-price-gouging/> (press release announcing North Carolina’s lawsuit against Stephen Gould Corporation for allegedly pitching extremely high-priced N95 face masks to the North Carolina Emergency Management Unit of the North Carolina Department of Public Safety, Duke Health, UNC Health, and the Charlotte Chapter of the American Red Cross).

[9] See, e.g., Press Release, *Connecticut Announces Joint State-Federal COVID-19 Fraud Task Force* (May 6, 2020), <https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Connecticut-Announces-Joint-State-Federal-COVID19-Fraud-Task-Force>) (press release announcing Connecticut Attorney General, U.S. Attorney, FBI, and Chief State's Attorney's formation of joint federal-state task force to combat COVID-19 related fraud); see also Press Release, *Three Alabama U.S. Attorneys and the Alabama Attorney General Partner to Protect Alabamians* (Apr. 2, 2020), <https://www.justice.gov/usao-ndal/pr/three-alabama-us-attorneys-and-alabama-attorney-general-partner-protect-alabamians> (announcement that Alabama U.S. Attorney's Office and Alabama Attorney General's Office joined forces to "uncover, investigate, prosecute, and dismantle" fraud relating to COVID-19); Press Release, *Top federal and state prosecutors form Georgia COVID-19 Fraud Task Force* (April 7, 2020), <https://www.justice.gov/usao-sdga/pr/top-federal-state-prosecutors-form-georgia-covid-19-fraud-task-force> (announcement of Georgia's leading state and federal prosecutors forming new COVID-19 fraud task force to protect the citizens of Georgia from criminal fraud arising from the pandemic); Press Release, *U.S. Attorney Scott Brady and Pennsylvania Attorney General Josh Shapiro Announce Formation of Joint Western Pennsylvania COVID-19 Task Force* (March 19, 2020), <https://www.attorneygeneral.gov/taking-action/covid-19/u-s-attorney-scott-brady-and-pennsylvania-attorney-general-josh-shapiro-announce-formation-of-joint-western-pennsylvania-covid-19-task-force/>.

[10] Press Release, *U.S. Attorney Scott Brady and Pennsylvania Attorney General Josh Shapiro Announce Formation of Joint Western Pennsylvania COVID-19 Task Force* (March 19, 2020), <https://www.attorneygeneral.gov/taking-action/covid-19/u-s-attorney-scott-brady-and-pennsylvania-attorney-general-josh-shapiro-announce-formation-of-joint-western-pennsylvania-covid-19-task-force/>.

[11] In 2017, the Department of Health and Human Services ("HHS") declared a nationwide public health emergency regarding the opioid crisis, encouraging agencies to use emergency authorities and other relevant authorities to respond to the crisis. See Press Release, Department of Health and Human Services, *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis* (Oct. 26, 2017), <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html>.

[12] See generally Shen W. Wen, *Overview of the Opioid Litigation and Related Settlements and Settlement Proposals*, Congressional Research Service Legal Sidebar Prepared for Members and Committees of Congress, LSB10365 (Nov. 25, 2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10365> (describing the types of damages typically sought by states and localities relate to costs expended to provide law enforcement services, emergency response efforts, and healthcare to residents affected by the opioid crisis).

[13] See, e.g., *Commonwealth of Massachusetts v. Purdue Pharma L.P., et al.*, C.A. No. 1884-cv-01808 (BLS2) (Mass. Super. Ct. Jan. 31, 2019) (Second Amended Complaint).

[14] See, e.g., *New York State News, Governor Cuomo Announces First Insurance Fraud Action Against Major Opioid Manufacturer in New York Market* (April 21, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-first-insurance-fraud-action-against-major-opioid-manufacturer-new> (press release announcing insurance fraud charges against Mallinckrodt plc and its subsidiaries); *Governor Cuomo Announces Insurance*

Fraud Action Against Global Opioid Manufacturer (June 10, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-insurance-fraud-action-against-global-opioid-manufacturer> (press release announcing insurance fraud charges against Endo International plc and its subsidiaries).

[15] See Overlay, Jeff. *Opioid MDL ‘Negotiation Class’ Wins Approval*, Law360 (Sept. 11, 2019), <https://www.law360.com/articles/1184460/opioid-mdl-negotiation-class-wins-approval>; Order Certifying Negotiation Class and Approving Notice, *In Re: National Prescription Opioid Litigation*, 1:17-md-02804-DAP (N.D. Ohio Eastern Div. Sept. 11, 2019) (No. 2591) (order certifying negotiating class in multi-district opioid litigation); see also Field, Emily. *Opioid MDL Negotiating Class Struck Down By Sixth Cir.*, Law360 (Sept. 24, 2020), <https://www.law360.com/articles/1313426/opioid-mdl-negotiating-class-struck-down-by-6th-circ-> (article reporting on Sixth Circuit’s decision to reverse negotiation class procedure approved in the multi-district opioid litigation on grounds that the class isn’t authorized by the Federal Rules of Civil Procedure for class actions).

[16] See News Releases, *Governor, Attorney General Announce OneOhio Agreement* (March 11, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/governor-attorney-general-announce-oneohio-agreement>.

[17] See Chase, Randall. *Delaware Joins List of States and Localities Suing Big Oil*, Washington Post (Sept. 10, 2020), https://www.washingtonpost.com/national/delaware-joins-list-of-states-and-localities-suing-big-oil/2020/09/10/297ebcaa-f3b6-11ea-8025-5d3489768ac8_story.html

[18] *McCulloch v. Maryland*, 17 U.S. 327 (1819) (Marshall, C.J.)

[19] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), which generally permits a state to impose sales tax on an out-of-state seller where the seller has a “substantial nexus with the taxing State.”

[20] *Murphy v. National Collegiate Athletic Association*, No. 16-476 (U.S. May 14, 2018).

[21] N.H. Rev. Stat. § 287-I:7.

[22] N.H. Rev. Stat. § 287-I:6.

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