

Kansas Seeks to Stop Ford County From “Usurping” its Sovereignty

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In January, Ford County, Kansas joined a class action [complaint](#) filed in Missouri against eleven plastics manufacturers, seeking to represent “*all persons or entities*” in **35 states** who purchased relevant plastics since 1990. In a prior [complaint](#) relating to these same issues, Ford County declared that the “plastics problem” requires a “a national, 50-state solution,” and proposed a class consisting of “[a]ll counties located within the State of Kansas which have incurred and will continue to incur sanitation costs.” That complaint was dismissed when Ford County joined the Missouri action.

The State of Kansas recently intervened in the Missouri case to prevent “usurpation by one of its counties.” We detail Kansas’s primary arguments below.

- **Right to Intervene Under FRCP 24(a):**

- Kansas first argued that, unlike the State, Ford County has narrow authority and is not empowered to bring suits on behalf of all Kansas citizens and its subdivisions. The State asserted that intervention is therefore warranted to protect its “recognized interest in defending its *parens patriae* authority” and to ensure the proper party is bringing suit on behalf of the State.
- Moreover, Kansas asserted that it has recognized “economic and property interests” in a potential judgment entered in Ford County’s favor, given that the State enforces relevant sanitation laws and would bear increased costs in investigating and coordinating the administration of the judgment.
- Kansas further explained that, given Ford County’s broad class allegations, the State faces a “tremendously high risk of being foreclosed” from bringing similar claims in the future based on the doctrines of *res judicata*, collateral estoppel, and *stare decisis*.

- **Permissive Intervention Under FRCP 23(b)(1)(B):** Alternatively, Kansas argued that even if it is not entitled to intervention as a right, then it should be permitted to intervene under FRCP 24(b) because (i) Kansas shares a common question of law with the underlying suit (i.e., whether Ford County is “attempting to improperly usurp” Kansas’s authority) and (ii) Kansas’s intervention would not burden the parties because the litigation is in early stages.

- **Permissive Intervention Under FRCP 23(b)(2)(A):** Lastly, the State argued that intervention was alternatively justified under FRCP 23(b)(2)(A), which permits timely intervention by a state governmental officer who administers a statute or regulation at issue.

The court recently granted the State's motion to intervene and permitted the State to file a separate motion to dismiss. That motion is still being briefed.

Ford County's action reflects a larger trend of political subdivisions asserting claims on behalf of their citizens. For example, the City of Annapolis and Anne Arundel County, Maryland filed suit against twenty members of the fossil fuel industry (that action was recently [dismissed](#) on grounds unrelated to the subdivisions' authority to bring suit). Similarly, the City of Oakland filed suit against fossil fuel manufacturers (that [case](#) was recently dismissed on jurisdictional grounds).

There are a few takeaways to note from this trend. It is important to recognize that, depending on the state, political subdivisions may have similar or identical consumer protection authority as the state. Some states specifically permit subdivisions to file suit through their UDAP statutes. For example, California counties are well organized in an "autorenewal taskforce" which has recovered millions in actions with companies offering subscriptions for goods or services in the state. Similarly, Texas [allows](#) subdivisions to bring UDAP cases with attorney general permission, but does not allow the subdivisions to obtain civil penalties or attorneys' fees. The Harris County Attorney, for instance, operates an independent consumer protection division, where it accepts consumer complaints and enforces the Texas Deceptive Trade Practices Act. New York City operates the Department of Consumer and Worker Protection, which similarly operates independently from the state attorney general and conducts its own consumer protection related investigations.

Many times these actions, brought on behalf of a subset of a state's population, seemingly overlap the claims that the state itself has (or may be asserting). In the case of opioid litigation, where almost every state and territory filed actions against manufacturers, distributors, and/or pharmacies, thousands of cities, counties, and other subdivisions filed almost identical actions. While this created a complex web of cases that made settlement negotiations extremely challenging, it also ultimately forced states and their subdivisions to work together to ensure that money coming into the states was spent on abating the opioid crisis.

Some states are enacting laws to address this reality. The State of Texas, for example, has a [statute](#) requiring political subdivisions using contingent fee arrangements with private attorneys to first seek the attorney general's approval. The attorney general can reject a contract if the subdivision's action overlaps a state action and would not aid in resolving the matter. Other states have considered but rejected similar measures.

Although there are broader sovereignty issues in play, this issue is likely to be addressed on a state-by-state basis. We are monitoring Ford County's lawsuit, and other similar suits, and will update this analysis accordingly.