ALAN WILSON
ATTORNEY GENERAL

March 9, 2018

The Honorable Chip Huggins, Member
South Carolina House of Representatives, District No. 85
202 Blatt Building
Columbia, SC 29201

Dear Representative Huggins:

You seek an opinion regarding the opioids crisis. Specifically you state the following:

> In light of the number of counties and municipalities of South Carolina contemplating litigation against manufacturers, distributors and retailers of opioid products what is the current law of South Carolina concerning these lawsuits?

We will address below the various court decisions which relate to this question. However, as we discuss herein, the law in this area is far from clear in South Carolina.

Law/Analysis

As you are aware, the Attorney General, on behalf of the State, has sued the opioid manufacturer, Purdue Pharma. Other manufacturers have not been sued by the Attorney General, nor have distributors. However, the Attorney General is involved with settlement discussions with other manufacturers and with distributors. The lawsuit against Purdue asserts causes of action under the South Carolina Unfair Trade Practices Act ("SCUTPA"), [§ 39-5-10 et seq.], an action for public nuisance and for unjust enrichment, as well as one for a violation of a consent order entered into with Purdue in 2007. We will discuss the specifics of this complaint more fully below.

Pursuant to SCUTPA, the Attorney General's complaint contends that Purdue engaged in numerous deceptive and unfair acts and practices in violation of §§ 39-5-20, 39-5-50(b), 39-5-110 and 39-5-140, as well as alleging that Purdue engaged in unfair competition in violation of these same provisions of SCUTPA. As part of the Purdue litigation, the State seeks recovery not only for public nuisance, but ascertainable loss under § 39-5-50(b) of SCUTPA. The ascertainable loss sought would, as we understand it, overlap with losses of counties and municipalities who choose to sue.

Of course, we summarize herein only the allegations of the complaint and not the merits. The issue which you raise here is the governing law with respect to any lawsuit brought by a county or municipality in South Carolina against opioid manufacturers, distributors, retailers or physicians. In question is the authority or standing of cities and counties to bring such suits, as well as the effect, if any, that the State's action might have upon any lawsuits brought by counties and municipalities This is, indeed, a difficult question with no clear answer forthcoming from our cases. As will be seen below, the decisions elsewhere do not speak with one voice either. Ultimately, of course, this will be up to the South Carolina courts to resolve and we attempt herein only to summarize the law as it currently exists both in South Carolina and in other jurisdictions.

The Attorney General

We begin with the role of the Attorney General in this matter. In Op. S.C. Att'y Gen., 2011 WL 5304078 (October 26, 2011), we summarized as follows the broad duties of the Attorney General in South Carolina as the State's chief legal officer:

> Our courts have repeatedly emphasized that the Attorney General of South Carolina is the State's chief legal officer with broad authority to direct and control the State's legal affairs. For example, as our Supreme Court noted in Cooley, et al. v. South Carolina Tax Commission, 204 S.C. 10, 28 S.E.2d 445, 450 (1943), "[t]he office of Attorney General is created by the Constitution." According to the Court, the various statutes relating to the Office demonstrate the "wide scope of authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." 28 S.E.2d at 451. The Court, in Cooley, recognizing the creation of the Office of Attorney General by the state Constitution, as well as the broad powers of the Office, concluded that "we find the situation to be that the State of South Carolina, acting by counsel for whom provision is made in the Constitution and statutes of the State [Attorney General], with the knowledge and acquiescence of the State agency directly charged with the handling of the problem in question [Tax Commission], came to the conclusion that the best interests of the State lay in the settlement of the litigation." 28 S.E.2d at 449-450.
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> Furthermore, in State ex rel. Wolfe v. Sanders, 118 S.C. 498, 110 S.E. 808, 810 (1920), our Supreme Court recognized that the Attorney General "is the highest executive law officer of the state," who is "charged with the duty of seeing to the proper administration of the laws of the state, and his duties are quasi-judicial." Thus, the Court concluded that leave of the circuit court is unnecessary when the Attorney General brings an action for quo warranto to challenge the right of an officer to the office. Moreover, in State v. Peake, 353 S.C. 499, 504, 579 S.E.2d 297, 299-300 (2003), the Court, cognizant of the Attorney General's duties as chief prosecuting officer of the State pursuant to the State Constitution, concluded that
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> > Petitioner would read this statute [48-1-220] to grant DHEC the authority to determine whether to pursue a criminal prosecution, while

> acknowledging the Attorney General's sole authority to control the process once the decision to prosecute is made. We agree with the Court of Appeals that reading this statute in this way would cause it to run afoul of S.C. Const. Art. V, § 24. This constitutional provision vests sole discretion to prosecute criminal matters in the hands of the Attorney General. In State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994), this Court held that a statue purporting to require an executive agency to refer a case before a criminal violation could be prosecuted was violative of this provision. If § 48-1 -220 were read to make DHEC the gatekeeper of criminal prosecutions arising under the Act, the statute would be unconstitutional.

Importantly also, in State ex rel. Condon v. Hodges, 349 SC. 232, 562 S.E.2d 623 (2002), our Supreme Court addressed the question of the Attorney General's statutory and inherent common law authority as the State's chief legal officer. In Condon, the Court confronted the issue of the Attorney General's power to enforce the Constitution and laws of the State in the context of the improper or illegal expenditure of public funds. There, the Court stated:

[the General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes when required by the Governor or either branch of the General Assembly. . . . The General Assembly has also provided that the Attorney General, upon written request of a state officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986). . . . The Attorney General also must give his opinion upon questions of law submitted to him by either branch "of the General Assembly or by the Governor. S.C. Code Ann § 1-7-90 (1986). . . . Further, "[a]s the chief law officer of the State [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority, as public interests may from time to time require, and may institute, conduct, and maintain all such proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights."

State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), affd. 282 U.S. 187, 51 S.Ct. 94, 75 L.Ed. 287 (1930) (citation omitted and italics added by Daniel Court). Cf. State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978) (while Attorney General has broad statutory authority, and arguably common law authority, to institute actions involving welfare of Stale, that authority is not unlimited).

The Attorney General has a dual role. He is an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the State. See Porcher v. Cappelman, 187 S.C. 491, 198 S.E. 8 (1938) (Attorney General represents sovereign power and general public). Allowing the Attorney General to bring an action against the Governor when there is the possibility the

Governor is acting illegally is consistent with the duties of this dual role. Further, because the office of the Attorney General exists to properly ensure the administration of the laws of this State, the Attorney General is merely ensuring that Proviso 72.109 is being administered the way in which the General Assembly intended. See Langford v. McLeod, 269 S.C. 466, 238 S.E.2d 161 (1977) (office of attorney general exists to properly ensure administration of laws of this State).

Hodges, 349 S.C. at 238-240, 562 S.E.2d at 627-628. (emphasis added). And, in State ex rel. McLeod v. McInnis, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Court explained that

> [t]he Attorney General, by bringing this action in the name of the State, speaks for all its citizens, and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

Moreover, in Condon v. State, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), the Court reiterated that "[t]his Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State." The Court stressed that the Attorney General must be a party in the case to be heard regarding attorneys fees; nevertheless, Condon v. State emphasized the broad authority of the Attorney General to speak for the State in legal matters. See also, State v. Cooper, 110 S.C. 256, 96 S.E. 398 (1918) ["The history of the case satisfies us that the Attorney General would have been well within his rights to have directed the solicitor not to hand out a bill [of indictment] against the defendant. As the case stands, the anomalous spectacle is presented of one of the state's solicitors prosecuting one of the state's public servants engaged in a difficult and important charity and that servant is defended by the state's chief law officer."]; State v. Southern Ry. Co., 82 S.C. 12, 62 S.E. 1116 (1908) [Court expresses concern that legislative directive to Attorney General not deny "him the power and responsibility of conducting the litigation according to his judgment."].

And, as former Attorney General McLeod noted in 1968,

> [t]he office of the Attorney General is an ancient office in this State, dating back to 1696. The Attorney General is the head of the legal department of the State of South Carolina. He supervises all litigation in which the State or any of its departments, boards, commissions, or institutions are parties. He advises all State officers, departments, agencies and institutions on legal matters. He is required to attend the sessions of the General Assembly and advise the members thereof. In addition to representing the State and its departments and agencies, he is required to represent the County Treasurers in any litigation against them. He additionally has supervisory power over the solicitors of the State.

Thus, our Supreme Court has concluded that the South Carolina Attorney General possesses broad and sweeping statutory and common law authority to initiate parens patriae suits, as well as other actions, on behalf of the people of South Carolina, and on behalf of the State for wrongs inflicted. In short, the Attorney General is the chief officer to protect the health and safety of the State's citizens through the litigation process.

Furthermore, the Attorney General possesses the authority to abate public nuisances. As one authority has noted,

> [t]he Attorney General of South Carolina has long had broad authority to institute proceedings to abate public nuisances . . . and continues to have that authority today. "The Attorney General when, in his judgment, the interest of the State requires it shall file and prosecute information or other process against persons who intrude upon the lands, rights or property of the State or commit or overact any nuisance thereon.

23 S.C. Jur. Public Nuisance § 29 (citing State el rel. Lyon v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909)) (common law nuisance); (§ 1-7-120). Thus, there can be no doubt that the Attorney General, as chief legal officer of South Carolina, may initiate actions to protect the people of South Caroline and the State from harms imposed.

Worthy of note also is the Supreme Court's decision in Langford v. McLeod, 269 S.C. 466, 238 S.E.2d 161 (1977). There, the Court held that the Attorney General is authorized to represent municipal employees in their official capacities in civil actions. The Court rejected the argument that § 1-7-50, authorizing the Attorney General to represent municipal employees, violated due process by "pitting the power of and authority of the State against him in a civil action with which the State is not concerned. . . ." 269 S.C. at 473, 238 S.E.2d at 163-64. Plaintiff also attacked the statute as violative of equal protection. The Court, however, held that the Attorney General is empowered to file a counterclaim on the employees' behalf as a "defense mechanism" rather than for "personal grievances." 269 S.C. at 474. According to the Court, "the Attorney General may represent [municipal] public officials in civil suits as well as criminal ones" pursuant to § 1-7-50. Id.

Cities and Counties Capacity to Sue

By contrast, South Carolina cities and counties are political subdivisions of the State. As our Supreme Court observed long ago in Walker v. Bennett, 125 S.C. 389, 118 S.E. 779, 781 (1923),

> [c]ities, towns, and counties are mere political subdivisions of the state, and are at all times subject to legislative control, and may be divided, subdivided, or abolished.

Of course, with the adoption of Article VIII of the South Carolina Constitution, cities and counties now possess broad "home rule" powers. As our Court noted in Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000),

> [o]ur Constitution mandates "home rule" for local governments. S.C. Cons. Art. VIII." Implicit in Article VIII is realization that different local governments have different problems that require different solutions." (quoting Hosp. Assn. of S.C. v. County of Charleston, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995).

Further, counties and municipalities possess the longstanding authority to sue and be sued. See Wheeler v. County of Newberry, 18 S.C. 132, 135 (1882) [a county "'is a body politic and corporate,' and as such [is] authorized to sue and be sued."]. As the Court stated in City Council of Abbeville v. Leopard, 61 S.C. 99, 39 S.E.248, 250 (1901), "[t]he power is always given to municipal corporations in this State to sue and be sued."

In addition, Home Rule has ensured that counties and cities possess general police power. In Sandlands C&D, LLC v. County of Horry, 394 S.C. 451, 461, 716 S.E.2d 280, 285 (2011), for example, the Court held that a solid waste ordinance "represents a valid exercise of Horry County's police powers." Moreover, in Richards v. City of Cola., 227 S.C. 538, 88 S.E.2d 683 (1955), the Court found that an ordinance requiring the alteration or repair of houses deemed unfit for human habitation was a valid exercise of the City of Columbia's police power. And, in Williams v. Town of Hilton Head Island, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993), the Court concluded that – thanks to Home Rule – the so-called "Dillon's Rule" –which requires that counties and municipalities must possess express statutory authority to take a particular action – is no longer applicable. The Court explained that "by enacting the Home Rule Act . . . the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."

However, notwithstanding the advent of Home Rule, our Court has made it clear that a county or municipality may not bring certain kinds of suits on behalf of its citizens or residents. In Capital View Fire Dist. v. County of Richland, 297 S.C. 359, 377 S.E.2d 122 (1989), the Court of Appeals concluded that a fire district was foreclosed from bringing an action seeking to invalidate a fire service agreement between the city and county. According to the Court, the district lacked standing to bring a suit which sought to invalidate the imposition of an unlawful tax upon the citizens of the district in that the complaint contained "no allegations that the agreement violates Capital View's own proprietary interests or statutory rights in any way." 297 S.C. at 361, 377 S.E.2d at 124. Further, the Court rejected any argument that Capital View "has standing under the doctrine of parens patriae to challenge the validity of the fire service agreement on behalf of the taxpayers and residents in its district." The Capital View Fire District Court stated:

> [t]he doctrine of parens patriae applies only to sovereigns asserting at least quasi-sovereign interests apart from the interests of particular private citizens. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 102 S.Ct. 3260, 73 L.Ed.2d

> 995 (1982). Political subdivisions, such as cities and counties, however, lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of parens patriae. See Board of County Commissioners v. Denver Board of Water Commissioners, 718 P.2d 235 (Colo. 1986) (counties lack the element of sovereignty that is a prerequisite for parens patriae standing); United States v. City of Pittsburg, California, 661 F.2d 783 (9th Cir. 1981) (only the states and the federal government may sue as parens patriae); cf. Board of Supervisors of Fairfax County, Virginia v. United States, 408 F.Supp. 556, 566 (E.D. V a. 1976) ("Fairfax County, however, is not a sovereign, but rather a political subdivision whose powers are derivative of the sovereign State of Virginia.").
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> Capital View is a political subdivision of the state. As such, it lacks the element of sovereignty that is a prerequisite to parens patriae standing.

297 S.C. at 362-63, 377 S.E.2d at 124.

Subsequently, in County of Lexington v. City of Cola., 303 S.C. 300, 400 S.E.2d 146 (1991), our Supreme Court reaffirmed Capital View Fire District's reasoning. There, the Court held that a county lacked standing to maintain an action unless such action was based upon an infringement of the county's own proprietary interest or statutory rights or the county was asserting an issue of overriding public concern. The Court reasoned as follows:

> Generally, a county has the power to sue and be sued as a political body. S.C. Code Ann. § 4-1-10 (1986). As a political subdivision of the State, however, it lacks the sovereignty to maintain a suit under the doctrine of parens patriae. Capital View Fire District v. County of Richland, 297 S.C. 359, 377 S.E.2d 122 (Ct. App. 1989). Absent an issue of overriding public concern, a political subdivision must establish it is a real party in interest in order to maintain a suit. Richland County Recreation District v. City of Columbia, 290 S.C. 93, 348 S.E.2d 363 (1986); see also Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976) (wherein this Court entertained suit in its original jurisdiction brought by law enforcement official to determine constitutionality of an act affecting enforcement of public drunkenness laws). It must allege an infringement of its own proprietary interests or statutory rights to establish standing. Richland County Recreation District, supra; Capital View Fire District, supra. County has failed to allege any such infringement. Moreover, we find no issue of overriding public concern. We hold County lacks standing to maintain this action. The judgement of the circuit court is REVERSED.

303 S.C. at 301, 400 S.E.2d at 147.

Thus, based upon Capital View Fire District and Lexington County, the Court has made it clear that a city or county possesses no standing to bring a parens patriae action on behalf of its citizens. Any action by a city or county must, therefore, be in "its own proprietary interest" or of "overriding public importance."

Our Supreme Court has steadfastly adhered to this "parens patriae versus proprietary" distinction. For example, in City of Sptg. v. County of Sptg., 303 S.C. 393, 395, 401 S.E.2d 158, 159 (1991), the Court stated:

> [i]n City of Myrtle Beach v. Richardson, 280 S.C. 167, 311 S.E.2d 922 (1984), this Court held a municipality has no standing to challenge the creation of a special taxing district that is not within the city limits. This ruling is consistent with the general requirement that a governmental entity must allege an infringement of its own proprietary interests or statutory rights to establish standing. Richland County Recreation District v. City of Columbia, 290 S.C. 93, 348 S.E.2d 363 (1986). City has alleged no such infringement.

(emphasis added). And, in Glaze v. Grooms, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the Supreme Court recognized that "[t]he general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." (citing City of Sptg., supra). Moreover, in Bft. County v. Trask, 349 S.C. 522, 528, 563 S.E.2d 660, 663 (Ct. App. 2002), the Court of Appeals affirmed the trial court's determination that the county lacked standing because it "'cannot show that there has been an infringement of its own proprietary interests or statutory rights.'"

In addition, in Town of Arcadia Lakes v. S.C. Dept. of Health and Environmental Control, 404 S.C. 515, 745 S.E.2d 385 (2013), the Court of Appeals concluded that the Town of Arcadia Lakes lacked standing to challenge the decision of DHEC to grant coverage "for certain land-disturbing activities under a State General Permit." According to the Court,

> [t]he ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting Glaze v. Grooms, 324 S.C. 249,255,478 S.E.2d 841,845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case. Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary Lake, which l.es partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal: and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

404 S.C. at 529, 745 S.E.2d at 393. Thus, in order to possess the requisite standing to sue, a city or county must demonstrate an infringement of its own proprietary rights or of a statutory right bestowed upon it.

Public Nuisance

We now address the case law regarding the standing of a city or county to sue to abate a public nuisance. In Town of Cheraw v. Seaboard Air Line Ry., 88 S.C. 490, 77 S.E. 40, 41 (1911), our Supreme Court commented briefly upon the standing of a municipal corporation to bring a public nuisance action. There, the Court stated:

> [t]he obstruction of a public street is a public nuisance, and the remedy is by indictment, unless the person instituting proceedings on the civil side of the court can show special or peculiar damages differing in kind from those to which all others in common with him are exposed. McMeekin v. Power Co., 80 S.C. 515, 61 S.E. 1020, 128 Am. St. Rep. 885.
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> But a municipality, because of its peculiar duties and liabilities in reference to the maintenance of its streets for public use, may bring a civil action to prevent or remove a threatened or continued obstruction constituting a nuisance. State v. Water Power Co., 82 S.C. 191, 63 S.E. 884, 22 L.R.A. (N.S.), 129 Am. St. Rep. 876.

Thus, Town of Cheraw appears to reinforce a "proprietary" requirement for standing of a political subdivision. Certainly, interference with the municipality's rights over its own public streets is such a proprietary interest.

Furthermore, the decision of our Court of Appeals in Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984) is particularly instructive with respect to an action for public nuisance. In Neal, a chemical company sued Chester County, challenging the constitutionality of its ordinance "pertaining to the handling and storage of hazardous chemicals." Chester County counterclaimed, "alleging the company's landfill site is a public nuisance." The circuit court agreed that the site constituted a common law nuisance and permanently enjoined further disposal by the company at the site. The Court of Appeals affirmed the circuit court's ruling, stating as follows:

> [t]he company first argues the trial judge did not give sufficient weight to its state and federal permits. Although it concedes the South Carolina Hazardous Waste Management Act and the Federal Solid Waste Disposal Act do not preempt South Carolina common law nuisance actions, the company argues deference should be given to state and federal environmental authorities. As support for this proposition, the company cites City of Milwaukee v. Illinois, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), and New England Legal Foundation v. Costle, 666 F.2d 30 (2d Cir.1981). In City of Milwaukee, the Supreme Court held the Federal Water Pollution Control Act displaces federal common law with respect to claims brought by states. States cannot maintain federal common law actions to abate nuisances or impose more stringent standards than those of the federal act. However, the Court slated that, as to in-state discharges, states may adopt more stringent limitations through stale nuisance law. In addition, the federal citizen-suit provision there, similar to that in the Solid Waste Disposal Act here, preserves common law actions. New England Legal Foundation, which

relied on City of Milwaukee, held only that federal courts should not fashion federal equitable remedies (based on federal common law) to enjoin activity approved by a federal agency. Obviously, the trial court here applied state, not federal, common law.

Furthermore, contrary to the company's argument, the trial judge devoted two pages of his opinion to consideration of its state and federal permits. Concluding a nuisance is not excused by the fact it arises from a lawful business, the trial judge quoted the following language from Young v. Brown, 212 S.C. 156, 170, 46 S.E.2d 673, 679(1948):

> A lawful business should not be enjoined on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-sensitive person, but on the other hand no one, whatever his circumstances or condition may be, should be compelled to leave his home or live in mental discomfort, although caused by a lawful and useful business carried on in his vicinity.

We find the trial judge balanced the interests involved and gave sufficient weight to the state and federal permits held by the company.

Secondly, the company argues the trial judge erred in finding the landfill constitutes a public nuisance by virtue of its location and method of operation.

A nuisance is anything which works hurt, inconvenience, or damage; anything which essentially interferes with the enjoyment of life or properly. Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 125 S.E.2d 628 (1962). A nuisance per accidens is an act, occupation or structure which is not a nuisance per se, but which may become a nuisance by reason of circumstances, location or surroundings. Strong. To constitute a public nuisance, a nuisance must be in a public place or where the public frequently congregates, or where members of the public are likely to come within the range of its influence. Morison v. Rawlinson, 193 S.C. 25, 7 S.E.2d 635 (1940). If the use of property is in a remote and infrcquented locality, it will not be a nuisance per se unless malum in se, or a wrong in itself. Morison. A public nuisance will be enjoined where injury is inevitable and undoubted. Morison.

The finding that a business operation constitutes a nuisance is one of fact. Strong. Based upon our view of the preponderance of evidence previously discussed, we do not find the landfill is in a remote and infrequented locality. Instead, we find it is a public nuisance by virtue of its location near residential areas and the primary water source as well as its influence on members of the public. In light of this finding, we need not address the question of whether the landfill is also a public nuisance by virtue of its method of operation.

262 S.C. at 284-286, 318 S.E.2d at 22-24 (emphasis added). Here, the County was deemed by the Court to possess standing to sue for a public nuisance. It is not clear as to the precise rationale of the Court, but the location of the nuisance "near residential areas and the primary water source" seemed to have played a pivotal role. See also Edgefield County v. Georgia Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916) [county could sue for damages for public nuisance].

Another decision which is instructive along these same lines is New York Trap Rock Corp. v. Town of Clarkstown, 299 N.Y. 77, 85 N.E.2d 873 (N.Y. 1949). There, the New York Court of Appeals quoted with approval an earlier decision, City of Yonkers v. Fed. Sugar Refinancing Co., 136 App. Div. 701, 121 N.Y.S. 494, aff'd. 207 N.Y. 724, 101 N.E. 1098. Quoting Judge Burr, speaking for the Appellate Division in Yonkers, the Clarkstown Court reasoned as follows:

> Justice Burr stated the rule as follows, 136 App.Div. at page 704, 121 N.Y.S. at page 496: 'A nuisance which is exclusively common or public cannot lawfully be abated at the suit in equity of any private individual or corporation. The remedy is by indictment or criminal prosecution, or, under some circumstances, by an action in equity on behalf of the sovereign power, either through the Attorney-General or some other agent to whom the sovereign power has been delegated.' The court concluded that no express statutory authority had been conferred upon the plaintiff to maintain the action, and that, in the absence of such authority, the municipal corporation could not maintain an action to enjoin a nuisance of that character. The court said, 136 App.Div. at page 710, 121 N.Y.S, at page 501; 'This precise question does not seem to have been before presented in this state; but upon reason and the best authorities in other stales we are of the opinion that, in the absence of express statutory authority, a municipal corporation cannot maintain an action in equity to enjoin a public nuisance of this character which does not specially affect corporate property, or property in connection with which it occupies some relation of trust or responsibility, even though the private property of a considerable number of its citizens may be affected thereby.' We left open the question whether such an action could be maintained by a municipal corporation where the public nuisance affected the health of its citizens. In addition to restricting the language throughout the opinion to nuisances affecting private property of citizens, it was specifically said 136 App.Div. at page 703, 121 N.Y.S. at page 496: 'We do not now consider its power in reference to nuisances affecting the public health, since the nuisance complained of is not of such a character. '
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> The City of Yonkers case, supra, is authority for the proposition that, under the common law and in the absence of statutory authorization, a municipal corporation, such as the defendant Town of Clarkstown in the instant case, may not bring an action to restrain a public nuisance which causes damage to the private property of its citizens. Defendants contend, however, that the cause of action set forth in the counterclaim may be maintained by the Town to the extent that it seeks to restrain a public nuisance which has injured the health of its citizens. On that question, the City of Yonkers case, by express limitation, is not decisive and the question is an open one.'

85 N.E.2d at 876-877 (emphasis added).

However, the Court of Appeals in Clarkstown ultimately concluded that the municipality could bring a public nuisance action based upon the threat to public health. Interestingly, the

Court explained that a threat to the citizenry of the municipality constituted a threat to the existence of the town itself:

> Wc think that a municipal corporation such as the defendant Town in the instant case has the capacity and is a proper party to bring an action to restrain a public nuisance which allegedly has injured the health of its citizens. That conclusion is dictated by policy and principle and finds warrant in both the common law and statutes of this State.
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> In the instant case, the defendant Town was created by and exists as a civil subdivision of the State. It carries on the business of government on a local plane. It is empowered to act to promote the health, safety and general welfare of the community. Town Law, Consol.Laws, c. 62, s 130, subd. 15. The representatives of the citizens of the Town on the Town board are familiar with local problems and are in a peculiarly advantageous position to observe the need for, and to take, effective and immediate action through the Town when necessary to safeguard the health of the citizens of the Town. Furthermore, the Town board is given general power to authorize the institution of any action in the name of the Town. See subdivision 1 of section 65 of the Town Law, which provides in part as follows: '*** The town board of any town may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, in the name of the town, as in its judgment may be necessary, for the benefit or protection of the town, in any of its rights or properly. * * *'
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> No sound reason is advanced why the Town cannot maintain an action to restrain a public nuisance affecting the health of its citizens and there is no case in this State which has denied such power to a municipal corporation such as the Town, in cases involving the public health. One of the basic reasons for the origin of the rule generally limiting the bringing of actions to restrain public nuisances to the Attorney-General was the danger of multiplicity of suits. That danger is obviously eliminated when the action to restrain a town nuisance is brought by the town which has general power to sue, and not by a private individual. The other consideration which led to the establishment of the general rule was largely theoretical and conceptual, i.e., that the offense, being one common to the public, should be enjoined at the suit of the sovereign's law officer. <u>There may be practical basis for such reasoning when the public nuisance affects only the private property of the citizens of a municipality. However, where the public health is involved, the right of the town to bring such an action to restrain a public nuisance may be tantamount to its right of survival.</u> In permitting the creation of such local subdivisions, the Legislature obviously conferred upon them the right to protect their own existence, and it is clear that a public nuisance which injures the health of the citizens of a municipality imperils the very existence of that municipality as a governmental unit. The right to exist necessarily implies the right to take such steps as are essential to protect existence. Pomeroy in his work on Equity Jurisprudence, Vol. 4, 5th Ed., s 1349, recognizes that, while the Attorney-General is the proper one to bring such actions in England, the power may be exercised more generally by other representatives of the people in this country. He says: 'A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at

> the suit of the attorney-general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country. ' (Emphasis supplied.)

85 N.E.2d at 877-88 (emphasis added). Clarkstown's reasoning appears similar to that in the Chester County and Edgefield County cases, discussed above.

Cities and counties in South Carolina are also empowered to adopt public nuisance ordinances. This authority falls generally within the police power of these political subdivisions. See generally § 5-7-30 (municipalities); § 4-9-30 (counties). In City of Cayce v. Norfolk Southern Ry., 391 S.C. 395, 706 S.E.2d 6 (2011), the Court held that a Cayce public nuisance ordinance was preempted by federal law. However, most cities and counties have adopted ordinances to abate public nuisances.

Unfair Trade Practices Act ("SCUTPA")

The Unfair Trade Practices Act provides relief for "unfair" or "deceptive" practices. Our Supreme Court recently discussed SCUTPA at length in State of S.C. ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceutical ("Janssen"), 414 S.C. 33, 777 S.E.2d 176 (2015). In Janssen, the Court concluded that there are two basic causes of action created by SCUTPA – an action brought by private citizens and an "enforcement action" brought by the State through the Attorney General. The Court explained as follows:

> The SCUTPA was modeled after the Federal Trade Commission Act, which provides "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). SCUTPA "declares unfair or deceptive acts or practices in trade or commerce unlawful." Singleton v. Stokes Motors. Inc., 358 S.C. 369, 379,595 S.E.2d 461,466 (2004) (citing S.C. Code Ann. § 39-5-20(a) (2002)). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." deBondt v, Carlton Motorcars, Inc., 342 S.C. 254,269, 536 S.E.2d 399, 407 (Ct.App.2000) (citing Young v. Century Lincoln-Mercury, Inc., 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct.App.l989), aff'd in part, rev'd in part on other grounds, 309 S.C. 263, 422 S.E.2d 103 (1992)). "A deceptive practice is one which has a tendency to deceive." Id. "Whether an act or practice is unfair or deceptive within the meaning of the [SC]UTPA depends upon the surrounding facts and the impact of the transaction on the marketplace." Id. (citing Young, 302 S.C. at 326, 396 S.E.2d at 108).
>
> The terms "unfair" and "deceptive" are not defined in SCUTPA; rather, in section 39-5-20(b) of the Act, the legislature directs that in construing those terms, the courts of our state "will be guided by" decisions from the federal courts, the Federal Trade Commission Act (FTCA), and interpretations given by the Federal Trade Commission (FTC). Thus, South Carolina has been guided by federal law, which recognizes the public interest involved and requires a showing

> of a "tendency to deceive." See State ex rel. McLeod v. Brown, 278 S.C. 281, 285,294 S.E.2d 781,783 (1982) (quoting U. S. Retail Credit Assoc., Inc. v. FTC, 300 F.2d 212,221 (4th Cir.l962)) ("'It is in the public interest generally to prevent the use of false and misleading statements in the conduct of business ... [and] actual deception need not be shown; a finding of a tendency to deceive and mislead will suffice. '") (ellipsis in original). In State ex rel. McLeod, we followed the "Fourth Circuit Court of Appeals ['] [holding] that the requisite capacity to deceive could be found without evidence that anyone was actually deceived." 189 Id. at 285, 294 S.E.2d at 783 (citing Royal Oil Corp. v. FTC, 262 F,2d 741 (4th Cir.1959)).
>
> SCUTPA provides for both civil actions brought by private citizens and enforcement actions brought by the Attorney General on behalf of the State. S.C. Code Ann. §§ 39-5-50(a), -110(a), -140(a) (1985). While the only section of SCUTPA at issue in this case is an enforcement action brought by the Attorney General, we note the distinction between the two types of actions. In an action brought by a citizen under section 39-5-140(a) of the South Carolina Code, there is a requirement beyond the tendency to deceive element that the person suffer an "ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice." Thus, SCUTPA requires that a private claimant suffer an actual loss, injury, or damage, and requires a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices. S.C. Code Ann. § 39-5-140(a).
>
> Conversely, in an enforcement action brought by the Attorney General, there is no actual impact requirement. See S.C. Code Ann. § 39-5-50(a). The Attorney General "may recover on behalf of the Slate a civil penalty of not exceeding five thousand dollars per violation." S.C. Code Ann. §39-5-110(a). "The legislature intended ... [SCUTPA] to control and eliminate the large scale use of unfair and deceptive trade practices within the state of South Carolina." Noack Enters, v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475,477, 351 S.E.2d 347, 349 (Ct.App.l986) (quotations and citations omitted).

414 S.C. at 56-58, 777 S.E.2d at 188-189 (emphasis added).

In addition, the Court in Janssen discussed the various causes of action under SCUTPA in terms of the parties who could bring an action as follows:

> Janssen argues that the State's SCUTPA claims fail as a matter of law because the State failed to show that Janssen's unfair and deceptive conduct had an adverse impact within South Carolina. We disagree, for the conflicting evidence presented a jury question as to whether Janssen had violated SCUTPA. Concerning the "adverse impact" legal argument, we reject Janssen's attempt to ascribe an injury-in-fact element in an individual claim to an Attorney General directed claim. Janssen's attempt to judicially impose an injury-in-fact element to an Attorney General initiated SCUTPA claim is nothing more than an "if we lied, nobody fell for it" defense, which we reject.

The provisions of SCUTPA allow three types of enforcement actions: (1) lawsuits initiated by the Attorney General seeking injunctive relief; (2) lawsuits by the Attorney General seeking civil penalties; or (3) lawsuits by private parties who have suffered ascertainable losses. S.C. Code Ann. §§ 39-5-50, -110, -140; see also Michael R. Smith, Note, Recent Developments Under the South Carolina Unfair Trade Practices Act, 44 S.C.L. Rev. 543, 543-44 (1993) (discussing generally various provisions of SCUTPA). Although this case is an appeal from a lawsuit by the Attorney General seeking civil penalties, we note some important distinctions between actions brought by the Attorney General and those brought by private parties.

To recover actual damages under SCUTPA, a private claimant must suffer an actual loss, injury, or damages, and the claimant must demonstrate a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices. S.C. Code Ann. § 39-5-140(a). Additionally, a private party may recover treble damages if the unlawful acts at issue are determined to be willful or knowing. Id. On the other hand, where the Attorney General files suit on behalf of the State, he is not required to show any injury-in-fact to recover a civil penalty. See S.C. Code Ann. §§ 39-5-110. -140. Rather, SCUTPA allows the Attorney General to recover statutory damages of up to $5,000 per violation upon a I S showing that the unlawful acts at issue are willful. S.C. Code Ann. § 39-5-110(a). If the Attorney General determines that an enforcement action "would be in the public interest," he is statutorily authorized to proceed without making any such showing of injury-in-fact or reliance. S.C. Code Ann. § 39-5-50(a). As noted above, the Attorney General must establish that a defendant's conduct has a tendency to deceive.

Indeed, the "in the public interest" aspect of an Attorney General SCUTPA claim mirrors one of the underlying purposes of the FTCA – namely, "to make clear that the protection of the consumer from unfair trade practices, equally with the protection of competitors and the competitive process, is a concern of public policy." Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8349 (1964). As the Federal Trade Commission has stated, most enforcement actions are brought "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking." Federal Trade Commission, Policy Statement on Unfairness (Dec. 17, 1980) [hereinafter Unfairness Policy Statement], available at https;//www.ftc.gov/public-statements/l980/12/ftc-policy-statement-unfairness.

Thus, Janssen misconstrues the legislature's manifest purpose in providing for an Attorney General directed claim, for a SCUTPA action brought by the State is to protect the citizens of South Carolina from unfair or deceptive acts in the conduct of any trade or commerce. Janssen's contention to the contrary is not only fundamentally at odds with unambiguous legislative intent in authorizing an Attorney General SCUTPA claim, but is also inconsistent with well-established law.

414 S.C. at 62-64, 77 S.E.2d at 191-92. While the issue of a county's or municipality's authority to bring a SCUTPA action was not squarely before the Court in Janssen, the Court's dicta is indeed striking. At least on the surface, such language does not appear to contemplate a SCUTPA action brought by a political subdivision. While Janssen is not definitive on this score, it certainly will be cited in any litigation brought by a city or county. We believe the Court will likely address the question of the standing of a municipality or county on its own merits rather than be bound by the language of Janssen.

In this regard, there is the decision of the District Court of South Carolina in City of Chas. v. Hotels.Com LP, 487 F.Supp. 676 (D.S.C. 2007). There, District Judge Duffy concluded that the City of Charleston was a proper plaintiff under SCUTPA. That Court stated:

> [a] SCUTPA cause of action may be asserted by an "person" who suffers an ascertainable loss of money or property as a result of a defendant's unfair or trade practice. The South Carolina lawmakers clearly contemplated that county or municipal governments would bring SCUTPA causes of action, as the ACT itself provides that "any solicitor or county or city attorney with prior approval of the Attorney General may institute and prosecute actions hereunder." S.C. Code Ann. § 39-5-130. Moreover, the definition of "persons" under the Act includes "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." S.C. Code Ann. 39-5-10(a). As such, both Charleston and Mt. Pleasant are "legal entities" authorized to bring – with the prior approval of the Attorney General – a SCUTPA cause of action to protect their interests.

478 F.Supp. at 680, n.1 (emphasis added). See also City of North Myrtle Beach v. Hotels.Com, 2008 WL 11349992 (D.S.C. 2008) [citing with approval City of Chas. v. Hotels.com, supra]. Thus, Judge Duffy left no doubt that a political subdivision is a "person" capable of bringing an action under SCUTPA with the permission of the Attorney General.

Also instructive is a decision by Circuit Judge Keesley, subsequently affirmed by the Supreme Court. See Health Promotion Specialists v. S.C. Bd. Of Dentistry, 2010 WL 11199641 (Order of June 25, 2010), aff'd. 403 S.C. 623, 743 S.E.2d 708 (2013). In that case, the Supreme Court considered whether a corporation employing dental hygienists could sue the South Carolina Board of Dentistry for violations of the South Carolina Unfair Trade Practices Act regarding an emergency regulation relating to the ability of hygienists to provide dental care in school settings. The circuit court (Judge Keesley) ruled that this claim could not be brought, as the Board is not a "person" under SCUTPA and its actions did not constitute trade or commerce. Judge Keesley addressed the scope of SCUTPA in the context of whether a State agency is a "person" for purposes of being sued under the Act. In his Order, Judge Keesley wrote:

> The Court concludes as well that the Board, as a state agency, is not a "person" under § 39-5-10(a). That section defines a "person" as including "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." Plaintiff argues, as set forth more fully

> in the footnote below, that the statute was intended to include governmental agencies as potential defendants as shown by the use of the term "other legal entity" in the definition quoted above. The Court, however, concludes that Plaintiff's interpretation of the statute is precluded by the doctrine of ejusdem generis. That doctrine provides that "[w]hen the Legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated." Swanigan v. American Nat. Red Cross, 313 S.C. 416,419,438 S.E.2d 251, 252 (1993).
>
> The statute does not mention governmental entities. Instead, it lists six different types of private actors: natural persons corporations, trusts, partnerships, and incorporated or unincorporated associations. The Court concludes that by only listing private actors, and by omitting any reference to any sort of public entity, the legislature intended only to include private entities within the definition of those persons who can be liable under the UTPA. In Charier Communications Entertainment J, LLC V. University of Connecticut, Bd. of Trustees, 2000 WL, 350464. *2 (Conn. Super. 2000), the court held that similar language to that of the South Carolina UTPA should not be read to include the State. The court applied both the rule of ejusdem generis cited above, and the rule that any statutory waiver of sovereign immunity must be narrowly construed.
>
> Finally, there is a general principle of longstanding that "'general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof." Hansen v. Com., 344 Mass, 214. 219. 181 N.E.2d 843. 847 (1962). As the U.S. Supreme Court has expressed it, "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." United States v. United Mine Wkrs. Of America, 330 U.S. 258, 275 (1947). Accord Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42. 44 (1939), overruled in part on other grounds, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)("neither the State nor any of its political divisions, is bound by general words in a statute restrictive of a prerogative right, title or interest, unless expressly named").
>
> For all of the following reasons, then, the Board is not a "person" within the meaning of the Act. and this action is dismissed for that reason as well.

On appeal, the Supreme Court did not consider the question of whether a governmental entity is a "person" under SCUTPA, instead analyzing whether the Board of Dentistry was engaged in trade or commerce. Interestingly, the Court, as it did subsequently in Janssen, noted that SCUTPA provides two avenues for enforcement – one by the Attorney General and one by a "private party." The Supreme Court explained:

> Health Promotion argues the circuit court judge erred in finding that Health Promotion could not sustain a cause of action for violation of the SCUTPA as the Board is not a "person" and its actions were not within "trade or commerce" for the purposes of the SCUTPA.

> The SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985) (emphasis added). Although the SCUTPA provides for enforcement by the Attorney General, it also provides for an action by a private party "who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." Id. § 39-5-140(a) (emphasis added); F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 415-16 (4th ed.2011) (discussing provisions of the SCUTPA and quoting section 39-5-140 of the South Carolina Code).
>
> "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." Wright v. Craft, 372 S.C. I, 23, 640 S.E.2d 486, 498 (Ct.App.2006). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." Id.
>
> Even assuming arguendo that the Board constitutes a "person" susceptible to suit under the SCUPTA, we find Health Promotion's claim fails as the Board's action of promulgating the Emergency Regulation cannot satisfy the requirement that the alleged unfair act occurred "in the conduct of any trade or commerce."
>
> As defined by the SCUTPA, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any *639 services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C.Code Ann. § 39–5–10(b) (1985). By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.
>
> Furthermore, by its very definition, "trade or commerce" involves "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic." Black's Law Dictionary (9th ed.2009); see Bretton v. State Lottery Comm'n, 41 Mass.App.Ct. 736, 673 N.E.2d 76, 78–79 (1996) (recognizing that "the proscription in § 2 of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context" (citations omitted)).
>
> In the instant case, the Board's sole action was the promulgation of a regulation. We find this act, which is alleged to have been unfair, does not fall within the definition of "trade or commerce" as it did not involve advertisement, sale, or distribution of services or property within a business context.

403 S.C. at 637-38, 743 S.E.2d at 815-16. Thus, while the Supreme Court did not address the question of "persons" under SCUTPA, Judge Keesley's Order clearly found that governmental

entities are not encompassed within the definition of "person" under the Act. Moreover, the Supreme Court in Janssen noted that suit under SCUTPA was either brought by private parties or the Attorney General.

Likewise, we concluded in Op. S.C. Att'y Gen., 1987 WL 245498, Op. No. 87-90 (1987) that a governmental entity is not authorized to file a claim under the Tort Claims Act. As part of our analysis, we noted that

> [t]he general law elsewhere is seemingly well established that, it is a widely accepted rule of statutory construction that general words in a statute such as "persons" would not ordinarily be construed to include the State or political subdivision thereof.
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> Perez v. Boston Housing Authority, 331 N.E.2d 801 (Mass. 1975); In re: McLaughlin's Estate, 174 N.E.2d 644 (Oh. 1960); Rapp v. New Mexico State Highway Department, 531 P.2d 225 (N.Mex. 1975); Kilbane v. Secretary of Human Services, 438 N.E.2d 89 (Mass. App. 1982). When general language of a statute is susceptible to being construed as applicable to both government and private parties, the general rule is that government is exempt from the operation of the statute. Sutherland Statutory Construction, § 62.01 (4th Ed.); 82 C.J.S. Statutes § 317.

Decisions In Other Jurisdictions Relating To Suits By Municipalities and Counties

We have located a number of decisions addressing the standing of municipalities and counties to bring suit for a public nuisance, for negligence, pursuant to the Unfair Trade Practices Act, etc. in various contexts. These decisions reach different conclusions regarding the standing of the particular political subdivision. We will briefly review these decisions below.

In Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001), the Court concluded that the City of Bridgeport, Connecticut and its mayor lacked standing to sue gun manufacturers, trade associations and retail gun sellers. Plaintiffs sued under the Products Liability Act, and for violations of the Connecticut Unfair Trade Practices Act, for public nuisance, negligence and conspiracy, as well as for unjust enrichment resulting from gun violence. According to the Court, "we cannot read the general provisions of the Home Rule Act on which the plaintiffs rely to provide them with standing to bring these specific claims." In the view of the Connecticut Supreme Court, "[w]e have no doubt that the legislature could, by appropriate legislation, confer standing on a municipality to bring a suit such as this. The Home Rule Act, however, is not that legislation." 280 A.2d at 130.

The Ganim Court proceeded to conclude specifically that the mayor and municipality could not bring an action for common law public nuisance or under the Connecticut Unfair Trade Practices Act. With respect to the public nuisance claim, the Court rejected the argument that plaintiffs sought to recover for losses "'that are not derivative because the government incurs

them regardless of whether individuals are also harmed.'" Id. at 131. The Court stated that "we have found no case, and the plaintiffs have suggested none, in which a plaintiff situated as remotely as the defendants' conduct as these plaintiffs are, or who presented a chain of causation as lengthy and multifaceted as these plaintiffs have, nonetheless has been held to have standing to assert a public nuisance claim." Id. at 133.

Likewise, the Supreme Court of Connecticut dismissed the Unfair Trade Practice cause of action, affirming the reasoning of the trial court that "in order to have standing to assert a CUTPA claim: (1) one must be either a consumer, competitor or in some commercial relationship with the defendants and, in that capacity, be affected by the defendants unfair or deceptive conduct; and (2) the plaintiffs did not fall into any of these categories." According to the Connecticut Court:

> [w]e conclude that the ascertainable loss requirement of CUTPA does not displace the remoteness doctrine as a standing limitation, and that the same reasons of remoteness and derivativeness that we have explained earlier apply to the CUTPA claim.

780 A.2d at 133 (emphasis added). In other words, the City could not use CUTPA as a means of claiming harm to itself.

Also instructive is the decision, In re Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir. 1973). There, the Court discussed at some length, the concept of parens patriae and what entities may bring a parens patriae lawsuit:

> [a]t common law, the concept of parens patriae invested the English Sovereign with powers and duties – the "royal prerogative" — to protect certain interests of his subjects. See Hawaii, supra, 405 U.S. at 257-260, 92 S.Ct. 885. In this country the parens patriae function expanded somewhat and devolved upon the states that, to some extent, ceded it to the federal government. See Massachusetts v. Mellon, 262 U.S. 447,485-486, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); Public Utilities Commission v. United States, 356 F.2d 236, 241 n.l (9th Cir.), cert, denied, 385 U.S. 816, 87 S.Ct. 35. 17 L.Ed.2d 54 (1966). Hence, the federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as parens patriae to vindicate interests of their citizens. E. g.. Hawaii, supra; Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); North Dakota v. Minnesota, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342 (1923); Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); New York v. New Jersey, 256 U.S. 296, 41 S.Ct. 492, 65 L. Ed. 937 (1921); Georgia v. Tennessee Copper Co., 206 U.S. 230. 27 S.Ct. 618, 51 L.Ed. 1038 (1970): Kansas v. Colorado, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956 (1907); Missouri v. Illinois, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901); Louisiana v. Texas, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347 (1900).

481 F.2d at 131 (emphasis added). On the other hand, political subdivisions such as cities and counties, "whose power is derivative and not sovereign, cannot sue as parens patriae, although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." Id.

Further, in James v. Arms Technology, Inc., 820 A.2d 27 (N.J. 2003), the Appellate Division of New Jersey addressed the validity of the action brought by the City of Newark against gun manufacturers, trade organizations, and gun distributors or retailers. The Appellate Court affirmed the trial court's dismissal of the City's claims for strict liability and unjust enrichment and also affirmed the lower court's denial of a motion to dismiss with respect to the City's claims for negligence, public nuisance and punitive damages.

First, the James Court commented as to the many cases filed against gun manufacturers previously. The Court noted that

> [s]ince 1995, over thirty cities and counties have filed lawsuits in other jurisdictions against gun manufacturers seeking to recover the cost of governmental services associated with gun violence. . . . Many of the cases have been dismissed on the pleadings on the bases, among others, that: (1) the public entity lacked standing; (2) its alleged damages were too remote to satisfy the proximate cause element; and (3) the gun manufacturers' conduct did not constitute a public nuisance. . . . In others, courts have addressed each of these issues, denied the motions to dismiss and permitted the case to go forward beyond the pleadings stage. . . .

820 A.2d at 33-34.

Concerning the issue of standing, the New Jersey Court held that the City of Newark did indeed possess standing to sue. According to the Court, the protection of the City's fisc is a sufficient corporate interest to bestow standing:

> [a]pplying these principles, we conclude that the City has standing to prosecute this action. The City is not asserting the right of a third party; it clearly has a "sufficient stake" in seeking redress for damages to it directly attributable to defendants' conduct. In fact, no other party has a more direct interest in protecting the public fisc than the City itself. Moreover, as previously noted, the expenses incurred by the City are "direct" and independent of the costs of treating the victims of gun violence.
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> Indeed, even the District Court in Camden County [Camden County Bd. Of Chosen Freeholders v. Beretta USA Corp., 123 F.Supp.2d 245 (D.N.J. 2000)], supra, which dismissed the County's complaint on remoteness grounds, held that:
>
> > The harm alleged by the County – the governmental costs of preventing, prosecuting and punishing handgun crimes – would exist to some extent even if no individual had been injured, and that the County's alleged

> injury is distinguishable from that of its citizens. For instance, there are some cases where a gun-related charge is prosecuted even though no shots have been fired. The alleged costs of combating illegal gun possession do not flow solely from harm visited upon a third party; they are alleged to exist as a result of separate and direct harm defendants have visited upon the County itself. Accordingly, the County has alleged that it has suffered an "injury in fact."
> [123 F.Supp.2d at 256].

The Cincinnati court [City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002)] is in accord. See Cincinnati, supra, 768 N.E.2d at 1148.

820 A.2d at 45.46. Thus, James rested standing on the fact that the City had been directly injured as a result of costs to it, irrespective of whether any citizen had suffered injury. This is an example of direct injury to the municipality rather than derivative harm.

Other decisions reach varying results. See Village of McCook v. Illinois Bell Tel. Co., 780 N.E.2d 335 (Ill. 2002) [only Attorney General may bring action for enforcement of Emergency Telephone Systems Act; Village lacked standing to do so;]; St. Charles Co. v. Dardenne Realty Co., 771 S.W.2d 828 (Mo. 1989) (en banc) [county could not sue to enjoin public nuisance on state highway; action was not brought in name of, and on behalf of, the State]; White v. Smith & Wesson, 97 F.Supp.2d 816 (N.D. Ohio 2000) [city had standing to bring suit in state court against gun manufacturers and sellers asserting claims under the Ohio Products Liability Act and state common law claims of negligent design, unjust enrichment and public nuisance]. In the latter case, the Court held that Ohio's "firefighters rule" – that an owner or occupant of private property is not liable to firefighters or police officers who enter the premises and are injured while performing their job duties did not apply. Characterizing defendants' attempts to apply the rule to the situation before the court as a "'radical new principle,'" the White Court held:

> [i]t would be a defining amplification of Ohio law that would allow the firefighter's rule to bar Plaintiffs' suit. Defendants argue that this Court should prohibit municipal recovery for all governmental functions, such as police, medical, fire and emergency services, and other related expenditures, because these are "the kinds of traditional services and functions that a municipality is expected to provide" and which "are most efficiently and fairly spread among the public." . . . However, Defendants fail to cite a single case from Ohio that even comes close to advocating such a view. . . .
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> Far from a firefighter attempting to recover for an injury received while on duty on private property, the City of Cleveland is attempting to recover for the costs of the services of police officers, firefighters, doctors, nurses, ambulance attendants, judges, prosecutors, jailors, social workers, and others, imposed on the City by an alleged unreasonably dangerous product and public nuisance. The Defendants here are not landowners or occupiers of private property, but rather manufacturers and promoters of a product concerning which Plaintiffs have filed

> suit under Ohio's product liability, public nuisance, and unjust enrichment laws. The Plaintiffs here cannot turn to a workers compensation scheme or other means for obtaining compensation for their alleged injuries. In addition, the Plaintiffs have alleged that Defendants wrongdoing was willful, intentional and purposeful, and involved affirmative negligence, mens rea and circumstances to which the firefighters rule does not apply.

97 F.Supp.2d at 823.

On the other hand, Penelas et al. v. Arms Technology, Inc., 1999 WL 1204353 (Fla. 1999) reached the opposite conclusion. There, the Court held that the County lacked standing to sue a gun manufacturer. The Court concluded that "[w]hile an individual complaining of a specific product and alleging a specific default may be able to proceed under certain circumstances, the Court rejects the notion that the County itself can proceed in the broad manner it proposes in this action." Specifically, the Court rejected the idea the County could recover the costs of services rendered as a result of gun violence against the manufacturer. According to the Court,

> . . . the County's claim for damages, based on the costs to provide 911, police, fire, and emergency services effectively seeks reimbursement for expenditures made in its performance of governmental functions. Costs of such services are not, without express legislative authorization, recoverable by governmental entities. See Koch v. Consolidated Edison Co. of New York, Inc., 568 N.E.2d 1 (N.Y. 1984); District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984). No Florida statute authorizes the County to seek recovery for costs of services provided.

See also City of Phil. v. Beretta U.S.A. Corp., 126 F.Supp.2d 882, 894-95 ["At least three courts have already held that the municipal cost recovery rule bars cities' suits against the gun industry. . . . The City routinely provides police and law enforcement to protect its citizens from criminals who use guns and some health services to victims of youth firearm violence. These unquestionably are municipal costs which cannot be recovered."]; Canyon County v. Syngenta Seeds, 519 F.3d 969, 977 (9th Cir. 2008) [". . . the County cannot satisfy the requirement of injury to a 'specific property interest' based solely on its expenditure of money to provide public services. . . . (Nor does) the government possess a property interest in the law enforcement or health care services that it provides to the public; therefore a governmental entity is not 'injured in its property' when greater demand causes it to provide additional public services of this type.").

Other decisions may also be cited. See City of Toledo v. Sherwin Williams Co., 2007 WL 4965004 (Ohio, 2007) [motion to dismiss against City of Toledo granted]; Sills v. Smith & Wesson Corp., 2000 WL 33113806 (Del. 2000) [Plaintiffs' Mayor of City of Wilmington's claim for public nuisance "cannot be remedied by money damages"]; Harris Co. v. Carmax Auto Superstores, Inc., 177 F.3d 306 (5th Cir. 1999) [Court upholds county's entitlement of

preliminary injunctive relief against Carmax]; City of Fairbanks v. Amoco Chemical Co., 46 F.3d 1139 (9th Cir. 1995) (unpublished decision) ["The City is a municipal corporation, incorporated under the laws of the State, and thus a "person" within the meaning of the (Unfair Trade Practices) Act"]; City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004) [municipal cost recovery rule, which provides that public expenditures made in the performance of governmental functions are not recoverable in tort, precluded city and county, in public nuisance action against firearm manufacturers, distributors, and dealers, from recovering for law enforcement and medical services expenditures allegedly incurred as a result of gun violence; remedy is best left to legislature]; City of San Jose v. Monsanto Co., 231 F.Supp.3d 357 (N.D. Cal. 2017) "[A public entity can bring a non-representative nuisance act for damages only if "'it has a property interest injuriously affected by the nuisance.'"; "the right to use the captured water under A.B. 2594 is a sufficient property interest on which to state a claim for nuisance." (citing In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 457 F.Supp.2d 455, 460 (S.D.N.Y. 2006)).

Legal Effect of Litigation Brought By Attorney General Against Perdue

Our Supreme Court has held that the Attorney General, by bringing an action in the name of the State "speaks for all of citizens. . . ." State ex rel. McLeod v. McInnis, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982). The question here is whether an action initiated by the Attorney General against a single pharmaceutical company who is a manufacturer of opioids, is binding upon or precludes similar suits brought by a county or municipality. As discussed above, our courts have made it clear that a political subdivision, such as a county or municipality, is not authorized to act in a sovereign capacity or to bring an action in parens patriae on behalf of its citizens. Capital View Fire District, supra; County of Lexington v. City of Columbia, supra. Thus, the question is narrowed to the binding effect upon a suit brought by a county or municipality in its proprietary capacity. We will now review the authorities.

The State's suit against Purdue seeks the following:

1. A claim under § 39-5-50(a) for injunctive relief to prevent Perdue from committing further violations of SCUTPA;

2. A claim under § 39-5-50(b) for the restitution of ascertainable losses to any person in the State who suffered them (to include individuals, businesses, municipalities, counties and State agencies other than Medicaid and PEBA;

3. A claim under § 39-5-110(a) for civil penalties of up to $5,000 per violation for Perdue's post-2007 conduct;

4. A claim under § 39-5-110(b) for civil penalties of up to $15,000 per violation of Perdue's violations of the 2007 consent judgment;

5. A claim under § 39-5-140 for damages, attorneys' fees and costs for PEBA and Medicaid;

6. A claim under common law for an injunction to prevent future public nuisance and requiring Purdue to abate the nuisance;

7. A claim under common law for damages caused by the nuisance created by Purdue;

8. A claim under common law for restitution and disgorgement of Purdue's unjust enrichment.

Any claim cities and counties may have for restitution or damages will largely depend upon how a court resolves the question of whether a city or county is a "person" under the SCUTPA. See §§ 39-5-10(a) and 39-5-50. If cities and counties are "persons," under § 39-5-10(a), the State can bring a claim for them under § 39-5-50. Moreover, if a city or county is a "person" under the Act, it may sue for ascertainable loss with the permission of the Attorney General. City of Charleston, supra. As discussed above, the issue of "person" has not been definitively resolved in South Carolina. Compare City of Chas. v. Hotels.com, supra and City of Myrtle Beach v. Hotels.com, supra with Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 2010 WL 1119964 (S.C. Ct. Com. Pl., June 5, 2010, affd. on other grounds, 743 S.E.2d 808 (S.C. 2013); In re Microsoft Corp. v. Antitrust Litigation, 2005 WL 906364 (D.Md. 2005). Moreover, while the Court in Capital View Fire Dist. v. City of Richland, supra and Cty. Of Lexington v. City of Cola., supra has held that cities and counties are not "sovereigns," and thus could not bring a restitution claim, the Attorney General can give permission to bring such a claim pursuant to § 39-5-130. City of Chas. v. Hotels.com, supra. Such a suit could also be deemed to fall within the "statutory rights" exception enunciated in Capital View Fire Dist. and County of Lexington, supra. However, our Supreme Court has not specifically addressed the question of whether a city, county or any governmental entity is a "person" for purposes of SCUTPA but has sent signals as to who are the proper parties. See Janssen, supra.

We will now review pertinent case law regarding claim preclusion.

In City of Rohnert Park v. Harris, 601 F.2d 1040 (6th Cir. 1979), the City was deemed to lack standing to sue under the Clayton Act or the APA to challenge actions by the United States Department of Housing and Urban Development. The City of Rohnert Park alleged that appellees devised a scheme to develop a regional shopping center in violation of federal antitrust laws and the City sought injunctive relief, not damages. The Court noted that Rohnert Park "essentially asserts standing here as parens patriae in behalf of its property owners, the taxpayers and inhabitants who might be injured by the loss of investment profits and tax revenues if the center is not built in Rohnert Park." However, the Court found that the allegations fail "'because political subdivisions such as cities and counties whose power is derivative and not sovereign cannot sue as Parens Patriae. . . .'" 601 F.2d at 1044 (quoting In re Multidistrict Vehicle Air

Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973)). On the other hand, the Court in Rohnert Park noted that "[p]olitical subdivisions may "'sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.'" Id. (quoting In re Multidistrict, 486 F.2d at 131). The Rohnert Court found the City's proprietary interests were not implicated. See also Snapp v. Puerto Rico, 458 U.S. at 602 [Quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace."].

In City of New York v. Beretta U.S.A. Corp., 315 F.Supp.2d 256 (E.D.N.Y. 2004) the City of New York sued gun manufacturers and importers of handguns and other firearms seeking monetary and injunctive relief. Subsequently, the City dropped its claim for money damages such that its claim was "solely an equitable claim seeking an injunction to abate a public nuisance." Defendants moved to dismiss the action on the grounds that

> (1) The City is precluded from bringing suit by the decisions of the New York Supreme Court in People v. Sturm, Ruger & Co. Inc., Index No. 402586/00 (Aug. 10, 2001), aff'd. 309 A.D.2d 91, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003), leave to appeal denied, 100 N.Y.2d 514, 769 N.Y.S. 200, 801 N.E.2d 421 (N.Y. 2003) ("Sturm Ruger"), a public nuisance suit brought by the State of New York in its parens patriae capacity; (2) the complaint fails to state a claim for public nuisance and (3) the injunctive relief demanded by the City places an impermissible burden on interstate commerce in violation of the Commerce Clause and Due Process Clause.

315 F.Supp.2d at 262. However, the District Court denied the motion to dismiss. In the Sturm Ruger case, the New York Supreme Court had ruled that the State's claim for public nuisance against the gun manufacturers was too remote to sustain the claim. Thus, the question in City of New York was the legal effect of the State's lawsuit upon that of the City of New York.

First, the Court refused to find that the State's case served to bar the City's action based upon res judicata. According to the Court, because the State suit "was dismissed for failure to state a cause of action for public nuisance . . . before answers were filed or discovery was taken, and the trial court specifically noted facts, which it allege, might be sufficient to state a cause of action . . . the decision does not constitute a final judgment on the merits of a similar claim." 315 F.Supp.2d at 263-64.

Further, the Court noted an additional reason for not finding res judicata – "[t]he substantial degree of autonomy historically enjoyed by New York City to act on matters of local concern, as well as the proper delineation of authority between the Corporation Counsel for the City of New York and the Attorney General of the State of New York, require that the City not be characterized as a privy of the State for res judicata purposes."

In terms of the parens patriae action by the State (which had been dismissed), the Court cited Snapp, noting that "[t]o maintain such an action [parens patriae] the State must assert a sovereign interest apart from the interests of particular private parties, such as a general interest

in the health and well-being of its residents." 315 F.Supp.2d at 265 (citing Snapp, 458 U.S. at 607).

The City of New York Court observed that "courts have held that when parens patriae authority is asserted, it can bind the citizens of a state as privies for res judicata purposes." Id. (citing numerous cases). According to the City of New York Court, "[s]uch cases generally focus on the distinction between public and private rights, permitting citizens to bring suit, notwithstanding a prior action by the State, where they allege violations of purely private interests that have caused particular damage to the individual." Id. at 266.

The City of New York Court then drew the distinction between successive government actions (State and local government) and an action by the State and a subsequent action by private citizens:

> [a]nalysis of public versus private rights in the context of parens patriae litigation has largely been limited to the federal courts and confined to consideration of successive government and citizen actions. Courts have engaged in a different analysis when considering successive governmental litigation:
>
> > [s]uccessive governmental litigation is most likely to require determination of the relative authority of different government agencies.... Successive government and citizen actions, on the other hand, ordinarily focus on distinctions between public and private rights and potential conflicts of interest; the relative authority of different government agencies is not often a problem.

315 F.Supp.2d at 266 (quoting 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4458 (2d ed. 2002).

According to the City of New York Court,

> [t]he City is not precluded under the doctrine of res judicata, however, simply because its residents, if suing as private plaintiffs, might be barred from bringing suit. The City's interest cannot be characterized as coterminous with that of its inhabitants; it has a municipal interest that is separate and distinct from, and is not duplicative of the interests of individual New Yorkers. Given that the instant case involves a subsequent suit by a sub-state governmental body, not a private citizen, it is appropriate to examine New York law governing the relative authority of governmental entities, particularly the relationship between the State and City of New York.

315 F.Supp.2d at 266. The Court noted that "[t]he law affords New York City a substantial degree from autonomy from the State." Id. at 268. Tracing the history of Home Rule in New York, the Court reasoned that "[p]recluding the City from bringing suit aimed at redressing the

problem of gun-related violence would interfere with the authority accorded it under New York's Home Rule provisions":

> [t]he New York Court of Appeals has recognized that where the public health is a factor, a municipality's right to bring "an action to restrain a public nuisance may be tantamount to its right of survival." New York Trap Rock Corp. v. Town of Clarkstown, 299 N.Y. 77, 85 N.E.2d 873, 877 (1949). To preclude the City of New York from doing so in the instant suit, especially when its experience with and attitude toward firearms is so distinct from that of the rest of the State, would be contrary to the current State-City legal relationship.

Id. at 273-274. Thus, the City's suit was not barred.

However Nash County Bd. of Ed. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981), the Fourth Circuit reached the opposite conclusion. There, the Court addressed the question of whether an action by the Attorney General of North Carolina, for antitrust against dairy companies which resulted in a consent judgment was binding upon a similar suit by the county board of education. The Fourth Circuit concluded that the consent judgment in state court was res judicata to the county's action in federal court. Not only was there sufficient identity of causes of action in the two suits, but the Court held that the county board of education was in privity with the Attorney General for purposes of res judicata. Speaking for the Fourth Circuit panel, Judge Russell made it clear that pursuant to the common law, the Attorney General spoke on behalf not only of all the citizens, but political subdivisions as well. The Court explained the common law as follows:

> The Attorney General in filing his state action, the judgment in which constituted the basis for the District Court's finding of res judicata, declared himself the legal representative, entitled to commence and maintain such suit on behalf of "each public school system in this state which received tax revenue directly or indirectly from the State of North Carolina ... (for the purchase of) fluid milk to be resold, or given gratuitously, to members of the student body while in registered attendance at such school." The plaintiff in this action was concededly such in school district. The authority of the Attorney General to sue as the representative of the school districts of the State, including the plaintiff School District, seems clear both at common law and under the relevant statutory law of North Carolina. At common law, an attorney general, in the absence of some restriction on his powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions "to recover damages (whether under state or federal law) alleged to have been sustained by any such agency or political subdivisions," even though those subdivisions may not have "affirmatively authorized suit." For an excellent discussion of this common law authority of the office of attorney general, see State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 270 (5th Cir. 1976) cert, denied, 429 U.S. 829, 97 S.Ct. 88. 50 L.Ed.2d 92 (antitrust suit instituted by the State Attorney General on behalf of State and various political subdivisions); State of Illinois v. Bristol-Myers Corp., 470 F.2d 127P6 (D.C.Cir. 1972) (antitrust suit on behalf of "all

> political subdivisions" of State); Wade v. Mississippi Cooperative Extension Serv., 392 F.Supp. 229 (N.D.Miss.1975); State of Illinois v. Associated Milk Producers, Inc., 351 F.Supp. 436 (N.D.Ill. 1972) (antitrust suit on behalf, among others, school districts, in purchases of fluid milk).
>
> There is no North Carolina statutory or constitutional provision limiting the authority of the North Caroling Attorney General. In fact, the thrust of the North Carolina statutory law is to the contrary.

Moreover, in In re Certified Question From the U.S. Dist. Ct. For The Eastern Dist. of Mich., 638 N.W.2d 409 (Mich. 2002), the Supreme Court of Michigan held that in setting an action against numerous tobacco companies, the Attorney General possessed the right to release claims of counties, notwithstanding that counties in Michigan possessed the right to home rule. In Michigan, the Attorney General possesses broad powers "to litigate matters on behalf of the people of the State." In short, "the Attorney General had the necessary statutory authority to litigate on behalf of the people of the State in the present case." 638 N.W.2d at 543-545. Such authority was, however, "limited to matters of state interest." Id. at 545:

> [t]he Attorney General of Michigan possesses the authority to represent the interests of the people of Michigan, and thus the Attorney General has the authority as part of this representation to represent the people of the county who are a part of these same people. Thus, although the Attorney General cannot sue on behalf of a county in a matter solely of local interest, the Attorney General can sue on behalf of a county in a matter of state interests.

Id. at 546.

Further, the Michigan Supreme Court concluded that the Attorney General possessed the authority to settle on behalf of the county:

> [g]iven that the Attorney General has the authority to bring claims, it inevitably follows that the Attorney General has the authority to settle and release such claims. . . . It is said that the Attorney General "may control and manage all litigation in behalf of the State and is empowered to make any disposition of the State's litigation which the Attorney General deems for its best interests." 7 Am. Jur.2d , Attorney General § 27, p. 26. Accordingly, while counties have broad authority to sue and settle with regard to matters of local interest, the Attorney General has broad authority to sue and settle with regard to matters of State interest, including the power to settle such litigation with binding effect on Michigan's political subdivisions.

Id. at 546-47.

And, in Yelsen Land Co., Inc. v. State, 397 S.C. 15, 723 S.E.2d 592 (2012), our Supreme Court opined that the key to determining privity (for purposes of res judicata) is not the

relationship between the parties, but where one party is "'so identified with another that he represents the same legal rights.'" 723 S.E.2d at 596. Thus, based upon the common law rule that the Attorney General represents the rights or interests of political subdivisions, it may be argued that the Attorney General's suit is representative of the localities' interests.

As discussed, above, the Attorney General of South Carolina is the State's chief legal officer, and possesses sweeping common law, statutory and constitutional powers in that regard. As our Supreme Court has stated, the Attorney General

> [a]s the chief law officer of the State [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require, and may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.

Condon v. Hodges, supra (emphasis added). This common law authority of the Attorney General could not be more broader.

In Cooley v. S.C. Tax Comm., the Attorney General was held to be empowered to settle litigation on behalf of the South Carolina Tax Commission. Based upon the analysis of the Michigan case, it can certainly be argued that the Attorney General may bind political subdivisions if the matter is considered a state rather than a local matter. We are aware of no "express legislative restriction" which prevents the Attorney General from representing the interests of a political subdivision where the State matters are concerned. While the Attorney General typically does not represent a county or municipality, there is nothing in our statutes which precludes the Attorney General from representing the interest of localities, at least in matters of State concern. See Op. S.C. Att'y Gen., 1973 WL 26575 (January 11, 1973) [Attorney General to represent Charleston County Election Commissioners in an election matter]. If the county's or municipality's claim is based upon a local "proprietary" interest, it will be more difficult to argue that the Attorney General's action is preclusive or binding because the Attorney General does not speak to local matters.

Conclusion

The opioids crisis has reached epic proportions. The Governor has recently declared a state of emergency due to the threat posed by opioids to health and safety. Opioids abuse is costing state and local governments inordinate amounts of tax dollars. Thus, this crisis requires an "all hands on deck" approach. Accordingly, we strongly support, consistent with applicable law, counties and municipalities being able to bring suit to protect their interests as a result of the opioids crisis.

As demonstrated herein, there is case law upholding the right of counties and municipalities to bring suit in this regard. A county or municipality possesses broad "Home

Rule" powers. Counties and municipalities possess police powers to protect health and safety. Moreover, these political subdivisions have historically held the right to sue and be sued.

However, as we have also discussed above, a word of caution is in order. As our Supreme Court has clearly held, counties and municipalities are not sovereigns and thus may not bring parens patriae actions on behalf of their citizens or residents. Instead, the Court has explained that any action by a county or municipality must be in that political subdivision's proprietary capacity, or must be a violation of a statutory right, or the county or municipality must allege an issue of "overriding public concern."

Such "proprietary" standing is certainly not an impossible burden for cities and counties to meet, and, while there is contrary authority, we have referenced cases in other jurisdictions where a county or municipality has been held to possess the requisite standing on this basis. This is by claiming harm to the municipal or county "fisc" or the demonstration of a severe public health hazard or threat which challenges the existence or well-being of the municipal or county entity. For example, in Neal v. Darby, supra, our Court of Appeals held that a county action for public nuisance met the legal requirements because of the landfill's "location near residential areas and the primary water source as well as its influence on members of the public." 282 S.C. at 286, 318 S.E.2d at 24.

Moreover, Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916) is also instructive. There, our Supreme Court allowed an action for damages by Edgefield County for a public nuisance to proceed. The Power Company's dam had caused a creek to flood and destroy a highway as well as the approaches to the County's ferry. The County alleged that the increased costs imposed for a bridge or an additional ferry greatly damaged it. The Court concluded that the Legislature had empowered "the counties to open new highways" and to impose taxes for the maintenance of roads. According to the Court, the County "has sued for damages, and the power company as shown no right to flood the highway, and is therefore liable to the plaintiff for the damages which have followed thereupon." 88 S.E. at 807. Thus, the County possessed the right to sue.

With respect to a suit by political subdivisions under SCUTPA, our Supreme Court has not definitively addressed the issue of whether a governmental entity is a "person" under the Act. However, Judge Duffy, in a District Court decision has ruled that a political subdivision is a "person" and may sue under SCUTPA with the permission of the Attorney General. Moreover, our Supreme Court has held in a different context that governmental entities are not necessarily excluded under § 2-7-30 from the word "person." See Southeastern Freight Lines v. City of Hartsville, 333 S.C. 466, 443 S.E.2d 395 (1994).

The issue of the effect of the Attorney General's litigation upon a suit brought by a county or municipality is difficult and is still an open question. As noted herein, our Supreme Court has consistently held that the Attorney General possesses broad common law authority to protect the public interest. State ex rel. Condon v. Hodges, supra. The Attorney General

possesses the power to protect the citizens of South Carolina through parens patriae actions, or public nuisance suits, including the protection of the interests of those in cities and counties who may decide to bring suit. As part of the Purdue litigation, the Attorney General is seeking recovery pursuant to a public nuisance claim as well as one for ascertainable loss pursuant to § 39-5-50(b) of SCUTPA. Such a recovery would necessarily include those losses by cities and counties who choose to sue in the opioids matter. Thus, there is considerable overlap between the Attorney General's action and those claims brought by cities and counties. One distinguishing factor is that the Attorney General has only sued Purdue. However, we note that there may be a set-off or offset to avoid double recovery.

Case law is divided as to any res judicata effect of the State's suit upon one brought by a county or municipality. The City of New York, case, for example, held that the City's interest as a corporate entity is distinct from its residents. Moreover, the "substantial autonomy" given local governments under Home Rule to deal with the issues of local concern was deemed paramount and thus there was held to be no res judicata effect by the State's action. Our Supreme Court may well follow this rationale, particularly given the Home Rule rights of cities and counties. But see Yelsen Land Company, supra (State agency is in privity with the State for purposes of res judicata).

In summary, your questions are difficult and are, at this point, incapable of a clear answer. We have attempted to summarize existing case law. It will be up to our Supreme Court to address these issues definitively. However, while there is case law to the contrary, we have located sufficient authorities, as discussed herein, to conclude that suits by counties and municipalities to combat opioids abuse have a foundation and support in the law. Again, we applaud the effort of counties and municipalities to protect their interests.

Sincerely,

Robert D. Cook
Solicitor General