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GAIL RUBIN

Taking the Offensive: New York City's Affirmative Suits

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The city of New York has been initiating litigation to protect its interests for over a hundred years. One of the older cases commenced by the city, which made its way to the United States Supreme Court, was brought in 1829.¹ In that case, the city sued a ship owner under a state statute for the failure of the shipmaster to report to the mayor the name and description of passengers who had been brought to the city in the ship.² The question before the Court was whether this statute was an exercise of the state's police power to prevent the influx of paupers, or whether it was a regulation of commerce and therefore subject to the Commerce Clause. In 1837, after hearing argument twice,³ the Supreme Court rejected the Commerce Clause challenge and upheld the statute as a valid exercise of the police power.⁴

While Commerce Clause and immigration jurisprudence have changed significantly, immigration and public assistance are still important themes for the city's affirmative litigation.

In 1982, Corporation Counsel Frederick A.O. Schwarz, Jr. established the Affirmative Litigation Division in the Office of the Corporation Counsel in order to better focus on advancing the city's interests through commencing litigation.⁵

This article describes lawsuits litigated by the Affirmative Litigation Division on behalf of the city in the recent past, and divides those lawsuits into two broad categories. In the first category, the city, like other business enterprises, sues to protect its financial or proprietary interests. In the second, the city sues as a governmental actor, and here policy and politics play a more obvious role than in the typical commercial lawsuit.

I. CITY AS COMMERCIAL ACTOR

In the commercial arena, the decision to sue is not at all mysterious. The city enters into commercial relationships just like other entities, signing contracts and leases and owning property. This "business" is run by the appropriate city agencies on behalf of the city. When a problem arises under such a commercial arrangement, the agency's commissioners, program staff, or general counsel seek Law Department help in enforcing obligations in accordance with the rules of commerce. Enforcement mechanisms usually take the form of damages suits, so that the city can recover its actual loss and deter future misbehavior. If private businesses know that the city will enforce its rights just like other businesses, they will be more likely to comply with contracts and leases. Just like any other attorney, the Corporation Counsel is looking out for the client's money, which in this case, is really the public's money or the taxpayer's money. The following are some examples of commercial suits initiated by the city.

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1. *See* *Mayor of N.Y. v. Miln*, 36 U.S. 102 (1837).
 2. *Id.* at 130. The statute required the commander of every ship from outside the state of New York arriving at the port of New York to give the mayor the information of every person on the ship, including his or her name, place of birth, last legal settlement, age, and occupation. *See id.* at 130–31.
 3. *Id.* at 106.
 4. *Id.* at 132.
 5. *See* Frederick A. O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y.L. SCH. L. REV. 375 (2009).

A. Asbestos Litigation

The city was one of the first municipalities to sue asbestos manufacturers to recover the cost of abating asbestos in schools and other public buildings.⁶ As the number of cases against asbestos manufacturers continued to rise, the city's recovery efforts shifted to bankruptcy court and to the assertion of claims against trusts created by the bankruptcies. When the Johns-Manville Corporation—the largest manufacturer of asbestos in the world—sought bankruptcy protection,⁷ Affirmative Litigation Division attorneys served on the committee that negotiated the plan that resulted in the first asbestos trust created to pay those injured by asbestos, including property owners such as cities and school districts. The city also played a major role in the bankruptcies of other defendants, such as National Gypsum, Kentile Flooring, U.S. Mineral, Keene, and Celotex. In fact, the city was the major claimant in the Celotex bankruptcy, which resulted in the creation of a trust of more than one billion dollars.⁸ Competition for this large pot of money was intense between personal injury claimants and property damage claimants, such as the city. After the city received more than \$11 million from the Celotex trust, the Celotex trustees, allied with personal injury lawyers, refused to pay the balance of the city's claims.⁹ The city took the lead in litigation challenging the actions of the trustees and won repeatedly in the bankruptcy court. The trust appealed, first to the district court and then to the Court of Appeals for the Eleventh Circuit. There, the court ruled largely in the city's favor, resulting in an additional payment of more than \$47 million.¹⁰

The city has thus far collected over \$130 million from asbestos-related defendants and is the single largest recipient of asbestos bankruptcy recoveries.

B. Insurance Litigation

The city requires its contractors and permittees to procure insurance coverage for both themselves and the city. A few years ago, attorneys in the Affirmative Litigation Division noticed that when the city and a contractor were sued in tort over an incident that arose in connection with the contractor's work, the contractor would be defended

6. See, e.g., *City of New York v. Keene Corp.*, 505 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1986), *aff'd*, 513 N.Y.S.2d 1004 (1st Dep't 1987) (upholding causes of action for indemnity and restitution). Discovery issues were litigated, see, e.g., *City of New York v. Keene Corp.*, 756 N.Y.S.2d 536 (1st Dep't 2003), as were issues of successor liability (compare *City of New York v. Charles Pfizer & Co.*, 688 N.Y.S.2d 23 (1st Dep't 1999) (finding Pfizer not liable as successor), with *City of New York v. Aaer Sprayed Insulations, Inc.*, 722 N.Y.S.2d 20 (1st Dep't 2001) (finding successor liability); see also *City of New York v. Aaer Sprayed Insulations, Inc.*, 583 N.Y.S.2d 911 (1st Dep't 1992) (declaring that the alter ego question is an issue of fact).

7. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

8. See *Asbestos Settlement Trust v. City of New York (In re Celotex Corp.)*, 487 F.3d 1320, 1325 (11th Cir. 2007).

9. *Id.* at 1326–27.

10. *Id.* at 1327. The court awarded the city \$40 million without interest.

by the insurance company, but the city would be left to defend itself. To remedy that, the city has developed an insurance and declaratory judgment practice that has so far resulted in over \$150 million in savings to the city.¹¹ When there is a tort suit that arises in connection with the work of a contractor or a permittee, the city now tenders that suit to the insurance company and demands defense and indemnification. In this respect, the city is behaving just like any other commercial actor in identifying and protecting its rights, and is reaping substantial financial benefits as a result.

C. *Foreign Mission Tax Litigation*

In order to establish the validity of tax liens on portions of buildings that house consulates and missions to the United Nations, the city sued three foreign governments—the Republic of the Philippines, the Permanent Mission of India to the United Nations, and the principal Resident Representative to the United Nations of the Mongolian People's Republic. With respect to the Philippines, the city claimed taxes were due on portions of the property used for a restaurant, a bank, and an airline office. With respect to India and Mongolia, the city claimed taxes were due on portions of the property used as residences for employees below the level of Head of Mission. The case involved the Vienna Convention on Consular Relations, the Vienna Convention on Diplomatic Relations, customary international law, the Federal Sovereign Immunities Act (“FSIA”), New York common law, and New York Real Property Tax Law.¹²

India and Mongolia moved to dismiss on the ground that they were immune from the jurisdiction of the federal courts under the FSIA.¹³ The motion was denied by the district court and affirmed by the Second Circuit.¹⁴ Corporation Counsel Michael A. Cardozo argued the case before the United States Supreme Court, which affirmed jurisdiction pursuant to the FSIA’s “immovable property exception” to

11. See generally *City of New York v. Evanston Ins. Co.*, 830 N.Y.S.2d 299, 301–03 (2d Dep’t 2007) (holding that where an endorsement provided coverage to the city only if the loss “is determined to be solely the negligence or responsibility of [the named insured],” and a stranger to the policy was held at least partly responsible for the accident, the city was still entitled to a defense, since it was “solely” the insured and not the city who was alleged to be liable); *City of New York v. Zurich-Am. Ins. Group*, 811 N.Y.S.2d 773 (2d Dep’t 2006) (holding that where Zurich defended the city’s co-defendant bus company, but ignored the city’s requests for counsel, and the city settled the underlying tort case, Zurich could not challenge the reasonableness of the settlement even though the city’s answer was stricken in the underlying tort case); *City of New York v. Cont’l Ins. Co.*, 805 N.Y.S.2d 391 (1st Dep’t 2005) (holding that there was no prejudice to the insurer due to the city providing a late notice of legal action where the insurer already had notice of suit from the named insured, was participating in the litigation, and had received a complaint against the city from its named insured); *City of New York v. St. Paul Fire and Marine Ins. Co.*, 801 N.Y.S.2d 362 (2d Dep’t 2005) (holding that the insurer’s delay of more than four months in disclaiming coverage was unreasonable when the alleged basis for denying coverage was readily apparent).

12. See *City of New York v. Permanent Mission of India to the United Nations*, 376 F. Supp. 2d 429 (S.D.N.Y. 2005), *aff’d*, 446 F.3d 365 (2d Cir. 2006), *aff’d*, 127 S. Ct. 2352 (2007).

13. *Permanent Mission of India*, 376 F. Supp. 2d at 430.

14. *Permanent Mission of India*, 446 F.3d at 377; *Permanent Mission of India*, 376 F. Supp. 2d at 439.

immunity.¹⁵ The Court held that a tax lien “inhibits one of the quintessential rights of property ownership—the right to convey. It is therefore plain that a suit to establish the validity of a lien implicates ‘rights in immovable property,’” and falls within the exception to immunity.¹⁶ After the jurisdictional ruling, the district court granted the city’s motion for summary judgment validating the tax liens and assessing taxes against India and Mongolia, and as to the Philippines, assessing taxes on the premises except for the portion occupied by the restaurant.¹⁷ The total judgment in favor of the city exceeded \$57 million.¹⁸

II. CITY AS GOVERNMENTAL ACTOR

The city also initiates litigation in its capacity as a governmental actor. Unlike the typical commercial lawsuit, these suits can easily reflect the policy preferences of elected officials, particularly the mayor. The city has long brought suits to further the policy initiatives of the city’s chief executive and to implement and enforce policy initiatives enacted into local law by the city council. As the examples below show, the interests of the city are often broadly construed in these lawsuits.

A. Public Health and Safety Litigation

First, the city has initiated regulatory litigation, as part of its mission to ensure public health and safety. These cases include gun litigation, suits over cigarette taxes, and immigration issues.

Gun Litigation

In 2000, the city brought suit against a group of gun manufacturers whose guns were recovered in New York City in connection with criminal activity.¹⁹ The suit alleged that the gun manufacturers knew, or should have known, that some of their dealers were disproportionately supplying the criminal market for guns through negligent or intentional sales practices,²⁰ and that those practices created a public nuisance within the city.²¹ The suit was stayed after September 11, 2001 because the offices of the Corporation Counsel were closed, making case files unavailable.²² The

15. *Permanent Mission of India*, 127 S. Ct. at 2358.

16. *Id.* at 2356.

17. *City of New York v. Permanent Mission of India to the United Nations*, 533 F. Supp. 2d 457, 469–70 (S.D.N.Y. 2008).

18. *City of New York v. Permanent Mission of India to the United Nations*, 538 F. Supp. 2d 701, 704 (S.D.N.Y. 2008). This decision, and the decision granting the city’s motion for summary judgment, *Permanent Mission of India*, 533 F. Supp. 2d 457, are currently on appeal to the Second Circuit as of the time of this writing.

19. *See City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004).

20. *See id.* at 284.

21. *Id.* at 276.

22. *Id.* at 262.

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parties were also awaiting a state appellate court decision on a suit brought by New York State.²³ The state's case was eventually dismissed.²⁴ The city's case, however, proceeded.²⁵

The city's continued prosecution of this suit resulted in running battles with Congress, starting in 2004, over the use of data collected in a previously-public firearms trace database by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATF").²⁶ In 2005, a few weeks before the trial date, President Bush signed the Protection of Lawful Commerce in Arms Act, which appeared to give the gun industry sweeping immunity from most tort lawsuits.²⁷ When the defendants moved to dismiss the case under the statute, the city successfully argued that the suit fell within a statutory exception for actions that alleged a violation of state or federal law applicable to the sale of firearms.²⁸ The defendants appealed, and the Court of Appeals for the Second Circuit reversed in a two-to-one decision dated April 30, 2008.²⁹ The court held that New York Penal Law Section 240.45, the nuisance statute under which the city claimed the exception, is a statute of general applicability that does not expressly regulate firearms, has not been applied by the courts to the sale and marketing of firearms, and cannot clearly be said to implicate the sale and marketing of firearms.³⁰ Therefore, the court concluded, the federal statutory exception does not encompass New York Penal Law Section 240.45.³¹

In 2006, the city brought two public nuisance suits against twenty-seven gun dealers whose guns were recovered in connection with crimes in the city.³² The

23. See *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (1st Dep't 2003).

24. *Id.* at 204.

25. See *Beretta*, 315 F. Supp. 2d at 286.

26. See generally *City of New York v. Beretta U.S.A. Corp.*, 234 F.R.D. 46 (E.D.N.Y. 2006) (holding that the 2006 Rider to the 2005 Consolidated Appropriations Act does not deprive the court of jurisdiction); *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517 (E.D.N.Y. 2006) (holding that the 2006 Rider to 2005 Consolidated Appropriations Act does not preclude the city from introducing data in its possession); *City of New York v. Beretta U.S.A. Corp.*, 228 F.R.D. 134 (E.D.N.Y. 2005) (holding that the 2005 Consolidated Appropriations Act does not preclude BATF production of trace data), *reh'g granted and aff'd*, 228 F.R.D. 147 (E.D.N.Y. 2005) (holding that the discovery order should have been complied with before the effective date of the 2005 Consolidated Appropriations Act); *Johnson v. Bryco Arms*, 222 F.R.D. 48 (E.D.N.Y. 2004), *aff'g City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51 (E.D.N.Y. 2004) (holding that the 2004 Consolidated Appropriations Act does not preclude BATF production of trace data pursuant to a subpoena and subject to a protective order).

27. See *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 251 (E.D.N.Y. 2005).

28. *Id.* at 261–64.

29. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3267 (U.S. Oct. 20, 2008) (No. 08-530).

30. *Id.* at 399–400.

31. *Id.*

32. See *City of New York v. Bob Moates' Sport Shop, Inc.*, No. 06-CV-6504, 2008 U.S. Dist. LEXIS 11699 (E.D.N.Y. Feb. 15, 2008) (denying motion to dismiss for lack of personal jurisdiction); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296 (E.D.N.Y. 2007) (denying motion to dismiss for lack of subject matter jurisdiction).

litigation followed an undercover investigation targeting dealers whose guns were most frequently recovered in connection with New York City crime. The lawsuits were recently resolved, with twenty-one of the defendant gun dealers reaching settlements with the city. The settlements generally provide for a court-appointed Special Master to provide training and education, recommend stringent sales practices, and monitor the dealers to assure compliance. The remaining defendants were either dismissed or defaulted.

Cigarette Taxes

The high tax on cigarettes sold in New York City gives rise to robust attempts at tax avoidance. Many attempt to purchase untaxed, “bootleg” cigarettes over the Internet. Internet sellers in a low-tax state will offer cigarettes stamped according to that state’s law, which, because of the negligible tax there, retail for far less than cigarettes sold in New York. The cigarettes are mailed to New York Internet customers, who have paid the out-of-state price to the out-of-state Internet seller. Under the federal Jenkins Act,³³ an out-of-state cigarette vendor selling to a New York buyer must report such sales to the New York tax authorities. The New York tax authorities can then collect the New York use tax from the New York buyer, who is liable for the tax regardless of where the purchase is made. In line with a major anti-smoking policy initiative by Mayor Michael A. Bloomberg and the Commissioner of Health, Thomas R. Frieden, the Affirmative Litigation Division brought several lawsuits seeking to stop the flow of untaxed cigarettes into the city. One suit is against approximately thirty-five out-of-state Internet cigarette sellers under the civil Racketeer Influenced and Corrupt Organizations Act (“RICO”), based on their failure to file Jenkins Act reports, and on state law consumer fraud and public nuisance claims.³⁴ After several defendants settled with the city, the case was dismissed against the remaining defendants but recently reversed on appeal.³⁵ The New York Court of Appeals found that the city had standing to sue under RICO where it has alleged a direct injury of lost taxes inflicted on it by reason of defendant cigarette retailers’ alleged commission of mail and wire fraud through the sale of cigarettes to residents of the city without complying with the Jenkins Act.³⁶

Another suit was brought against the principal wholesalers of untaxed cigarettes to New York Native American tribes under the Contraband Cigarette Trafficking

33. 15 U.S.C. § 376 (2006).

34. *City of New York v. Cyco.net, Inc.*, 383 F. Supp. 2d 526 (S.D.N.Y. 2005), *rev'd*, *City of New York v. Smoke-Spirits.com*, 541 F.3d 425 (2d Cir. 2008).

35. *Smoke-Spirits.com*, 541 F.3d at 425.

36. *Id.* The court also certified to the New York Court of Appeals two questions of state law: whether the city has standing to sue under the state’s General Business Law, N.Y. GEN. BUS. LAW § 349 (McKinney 2008), and whether the city may assert a common law public nuisance claim predicated on N.Y. PUB. HEALTH LAW § 1399-ll. *Smoke-Spirits.com*, 541 F.3d at 457–58.

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Act (“CCTA”).³⁷ The CCTA penalizes the sale and possession of untaxed cigarettes, provided the taxing locality has an “applicable” cigarette tax.³⁸ Although New York wholesalers are permitted to sell untaxed cigarettes to Native American tribes for consumption by tribe members, they are not permitted to sell untaxed cigarettes to reservation retailers who re-sell the cigarettes to the public.³⁹ The wholesalers moved to dismiss, claiming that New York State’s adoption of a “forbearance policy,” pursuant to which the state “forbears” from enforcing the legislative tax requirement and allows untaxed cigarettes to be sold to reservation-based retailers, made the CCTA inapplicable.⁴⁰ The court recently denied this motion, finding that the New York statute requiring tax stamps to be affixed to all cigarettes includes those sold by reservation retailers for resale to the public, and that the state’s policy of “forbearance” or non-enforcement does not bar liability under the CCTA.⁴¹

In addition, the city recently commenced litigation against eight cigarette sellers located on the Poospatuck Reservation in Mastic, Long Island, for selling massive quantities of cigarettes on which state and city taxes have not been paid, alleging violations of the CCTA and state law.⁴²

Immigration Issues

Various mayors have taken the view that there are public health and safety reasons, as well as fiscal reasons, to encourage so-called “undocumented” aliens—people in the country without papers legitimizing their presence—to come “out of the shadows,” in particular to ensure that the aliens are willing to report crime to the police and seek necessary health care.⁴³ In 1986, Congress passed the Immigration Reform and Control Act (“IRCA”) to provide legalization to those undocumented aliens who qualified and filed a timely application.⁴⁴ The program had a one-year application period and was to expire on May 4, 1988.⁴⁵ In 1988, the city, consistent with the policy view described above, joined with the state and a plaintiff class to challenge the regulations promulgated by the Immigration and Naturalization

37. *City of New York v. Milhelm Attea & Bros.*, 550 F. Supp. 2d 332 (E.D.N.Y. 2008). The CCTA is codified at 18 U.S.C. §§ 2341–2346 (2006).

38. *See* 18 U.S.C. § 2341.

39. *Milhelm Attea & Bros.*, 550 F. Supp. 2d at 337.

40. *Id.* at 337–39, 344 n.2.

41. *Id.* at 348.

42. *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-03966 (E.D.N.Y. filed Sept. 29, 2008).

43. *See generally* Exec. Order No. 41 (Sept. 17, 2003), *available at* http://home2.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf; Exec. Order No. 34 (May 13, 2003), *available at* <http://search.citylaw.org/isysquery/873c3005-348e-457c-8b7d-258626c0cae0/4/doc>; Exec. Order No. 124 (Aug. 7, 1989), *available at* http://www.courts.state.ny.us/library/queens/PDF_files/Orders/ord124.pdf.

44. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

45. Dep’t of Homeland Security IRCA Legalization Provisions, 8 C.F.R. § 245a.2.

Service (“INS”).⁴⁶ The statute provided that an alien had to demonstrate a history of employment evidencing self-support without receipt of public cash assistance.⁴⁷ However, the INS regulations expanded this by requiring the alien to demonstrate that his or her immediate family members also had not received any public cash assistance.⁴⁸ The parties also challenged the INS’s failure to broadly disseminate complete and accurate information about the legalization program.⁴⁹

As a result of the suit, the INS revised its regulations and reevaluated all applicants who had submitted timely applications.⁵⁰ The plaintiffs were unable, however, to persuade the court to extend the deadline for legalization applications.⁵¹

Various mayors, starting with Mayor Edward I. Koch in 1989, implemented executive orders setting forth the city’s policy of protecting the confidentiality of information regarding aliens and encouraging them to use city services.⁵² In 1996, Congress passed two statutes, the Personal Responsibility and Work Opportunity Act of 1996 (“Welfare Reform Act”)⁵³ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“Immigration Reform Act”),⁵⁴ which appeared to preempt the city’s authority under the executive order to prohibit city officials from transmitting information respecting aliens to the INS. In furtherance of the city’s confidentiality policy, the city brought a facial challenge to these federal laws, which was unsuccessful.⁵⁵

B. *Litigation over State and Federal Funds*

In addition to public health and safety litigation, the city, as a governmental actor, also initiates litigation against other levels of government over funding and revenues. These fiscal suits often involve political and policy issues as well. For example, the city has sued the state over funding for a wide variety of public programs,

46. *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992).

47. *Id.* at 801 (referring to 8 U.S.C. § 1255a(d)(2)(B)(iii) (2006)).

48. *Perales*, 967 F.2d at 802 (referring to 52 Fed. Reg. 16,209 (May 1, 1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992))).

49. *See Perales*, 967 F.2d at 801 (referring to 8 U.S.C. § 1255a(i) (2006)).

50. *Perales*, 967 F.2d at 814–15.

51. *See Perales v. Meese*, 685 F. Supp. 52 (S.D.N.Y. 1988), *aff’d*, 847 F.2d 55 (2d Cir. 1988) (denying preliminary injunction); *Perales v. Thornburgh*, 762 F. Supp. 1036 (S.D.N.Y. 1991) (upholding validity of INS public charge regulations), *rev’d*, *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992), *vacated*, 509 U.S. 917 (1993) (vacating the decision in light of *Reno v. Catholic Social Services*, 509 U.S. 43 (1993) and remanding *Perales v. Thornburgh*, 4 F.3d 99 (2d Cir. 1993) and *Perales v. Reno*, 48 F.2d 1305 (2d Cir. 1995)).

52. Exec. Order No. 124, *supra* note 43.

53. Pub. L. No. 104–193, 110 Stat. 2105 (1996) (codified in scattered sections of 7, 8, 21 and 42 U.S.C.).

54. Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

55. *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997), *aff’d*, 179 F.3d 29 (2d Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000).

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including foster care,⁵⁶ public assistance,⁵⁷ Medicaid,⁵⁸ correctional expenses,⁵⁹ and the administrative costs of the federal food stamp program.⁶⁰ However, any litigation against the state involves budgetary and political considerations that are broader than the particular public program at issue; the city is, after all, a political subdivision of the state and a creature of state law. There may be legislative initiatives or negotiations over revenues between the city and the state that are unrelated to the program under consideration, but such political negotiations might influence the decision of whether to sue. In addition, state agencies interpret state law or promulgate regulations that the city might view as inconsistent with statute, depending on the city's policy or fiscal view of the matter.

Policy—and money—also factor into deciding whether to sue for federal funds. The city's policy regarding aliens, for example, prompted the city to challenge federal regulations that denied prenatal care coverage under Medicaid to certain aliens. Furthermore, because pregnant alien women who are ineligible for Medicaid may seek prenatal care at city-funded facilities, the city had a fiscal interest in ensuring Medicaid coverage.

This Medicaid prenatal care coverage question was litigated in *Lewis v. Thompson*.⁶¹ This 1979 class action challenged the federal government's regulatory interpretation of the Medicaid statute to deny prenatal care coverage to certain aliens who were not permanent residents or were not otherwise permanently residing in the United States under color of law.⁶² The plaintiffs also challenged a companion New

56. *See Sabol v. Perales*, 82 N.Y.2d 685 (1993) (vacating state audit sanctions imposed on the city where the state ignored its own published interpretation of regulations); *City of New York v. Johnson*, No. 400110/42005, N.Y. Misc. LEXIS 3221 (Sup. Ct. N.Y. County Jan. 11, 2005) (holding that the state's formula for allocating foster care block grant monies was arbitrary and capricious).

57. *See Gross v. Perales*, 72 N.Y.2d 231 (1988) (holding that the city's challenge to a \$20 million penalty imposed for failure to comply with an unpromulgated internal state audit guideline could be heard in the New York State Supreme Court, as opposed to the court of claims, and that the New York State Supreme Court had authority to order incidental monetary relief); *Flowers v. Perales*, 565 N.Y.S.2d 504 (1st Dep't 1991) (holding that certain state audit standards were unpromulgated and therefore could not be a basis for penalty).

58. *See Krauskopf v. Perales*, 74 N.Y.2d 730 (1989) (upholding a state audit of the city where the state's standard was reasonable); *City of New York v. Wing*, 783 N.Y.S.2d 465 (1st Dep't 2004) (holding that the city's claim that the state's negligent programming of its computers caused the city to pay Medicaid benefits to ineligible persons must proceed in the court of claims), *appeal denied*, 4 N.Y.3d 705 (2005).

59. *See City of New York v. N.Y. State Dep't of Corr. Servs.*, 655 N.Y.S.2d 5 (1st Dep't 1997) (holding that the state must reimburse the city for inmates who have already been committed to state custody but are temporarily in city custody for open cases pending in city courts).

60. *See City of New York v. Lawton*, 515 N.Y.S.2d 903 (3d Dep't 1987) (remanding a suit for reimbursement of food stamp administrative costs for determination of whether the state had good reason for delay when the state Division of the Budget stalled implementation and lobbied to retroactively amend the statute to deny reimbursement).

61. 252 F.3d 567, 569 (2d Cir. 2001).

62. *Id.* at 571–72.

York State regulation.⁶³ The original lawsuit was brought against the city commissioner of the Department of Social Services, George Gross, as the local social services commissioner implementing state and federal law, along with state and federal defendants.⁶⁴

The Medicaid statute was subsequently amended. When the plaintiffs next went before the district court, the caption had changed to *Lewis v. Grinker*, with William Grinker now the city commissioner of the Department of Social Services. However, the city had previously intervened as a plaintiff, joining the plaintiff class against the federal and state defendants.⁶⁵ The Second Circuit affirmed a permanent injunction barring the denial of prenatal care to this category of aliens in what the court called “the extremely rare instance where we can discern a clearly expressed congressional intent contrary to the plain language of the statute.”⁶⁶ After the enactment of the Welfare Reform Act in 1996, the federal defendants sought reconsideration of the injunction.⁶⁷ Although the court agreed with the federal defendants that Congress had now made clear its intent to deny federally subsidized prenatal care to this category of aliens, it found that the denial of prenatal care to alien mothers violated the equal protection rights of their citizen children.⁶⁸ On appeal, the caption finally changed to reflect the city’s role as a plaintiff-intervener, rather than a defendant, but that satisfaction was short-lived, as the Second Circuit reversed on most of the merits.⁶⁹ However, the court did remand for a revised injunction that assured that the plaintiff class has the same automatic eligibility for their citizen children that is available to the children of citizen mothers.⁷⁰ Even though the city and the other plaintiffs lost in the end on most of the substantive issues, the litigation ensured that the class of alien women involved received prenatal care under Medicaid for approximately fourteen years, from the time of entry of an injunction in 1987 until it was vacated in 2001.

Similarly, the city’s policy regarding abortion factored into the city’s decision to challenge federal regulations under Title X of the Public Health Services Act.⁷¹ The city joined the state of New York and federally-funded providers of family planning

63. *Lewis v. Gross*, 663 F. Supp. 1164 (E.D.N.Y. 1986) (certifying class and granting summary judgment, finding no alienage restriction in Medicaid statute).

64. *Id.*

65. *Lewis v. Grinker*, 794 F. Supp. 1193 (E.D.N.Y. 1991) (granting a permanent injunction against state and federal officials from denying Medicaid coverage for prenatal care to alien pregnant women who were not residing in this country under color of law); *Lewis v. Grinker*, No. CV-79-1740, 1987 U.S. Dist. LEXIS 16780 (E.D.N.Y. 1987) (granting a preliminary injunction barring the denial of Medicaid coverage for prenatal care to the same class); *id.* at *5 (referring to the city as plaintiff-intervenor).

66. *Lewis v. Grinker*, 965 F.2d 1206, 1219 (2d Cir. 1992).

67. *Lewis v. Grinker*, 111 F. Supp. 2d 142, 144 (E.D.N.Y. 2000).

68. *Id.* at 185–86.

69. *Lewis*, 252 F.3d 567.

70. *Id.* at 591–92.

71. 42 U.S.C. §§ 300–300a-6 (2006).

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services to challenge these federal regulations, which prohibited Title X-sponsored clinics from providing nondirective counseling to pregnant clients about abortion and prohibited referrals to abortion providers.⁷² The regulations further provided that any Title X provider must both physically and financially separate any abortion services from the Title X family planning program.⁷³ This challenge was ultimately unsuccessful.⁷⁴

The city has also joined advocacy groups challenging the Social Security Administration's narrow interpretation of disability eligibility. The decision of whether to litigate such issues depends both on how the city's policy makers view the rights of the disabled and on fiscal considerations, since the city and the state have an interest in shifting eligible individuals from city and state funded public assistance programs to programs that are funded entirely by the federal government.

These disability issues were litigated in *Bowen v. City of New York*⁷⁵ and *Stieberger v. Sullivan*.⁷⁶ In *Bowen*, the city, the New York City Health and Hospitals Corporation, two state officials, and plaintiff class members sued the Secretary of Health and Human Services ("HHS") and the Social Security Administration ("SSA"), challenging their treatment of severely mentally ill applicants for benefits under the Social Security Disability Insurance Program and the Supplemental Security Income Program.⁷⁷ The suit alleged that SSA had a covert policy of presuming that certain applicants had a residual capacity to work, rather than making an individualized determination of work capacity.⁷⁸ The district court held that the covert policy was illegal and ordered the secretary to reopen the decisions denying or terminating benefits and to redetermine eligibility.⁷⁹ The court also ordered interim benefits to all who had been terminated.⁸⁰ The Second Circuit later affirmed the

72. *Rust v. Sullivan*, 500 U.S. 173, 179–80 (1991).

73. *Id.* at 180–81.

74. The Court held, among other things, that the regulations were a permissible construction of the underlying statute, *id.* at 187; that the government does not unconstitutionally discriminate on the basis of viewpoint when it chooses to fund a program to advance certain permissible goals, such as non-abortion family planning, *id.* at 193; that the regulations do not impinge on the doctor-patient relationship, *id.* at 200; and that if a state can constitutionally refuse to fund abortions (as already held by the Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)), then a decision to exclude abortion-related services from a family planning program would surely be constitutional, *Rust*, 500 U.S. at 202.

75. 476 U.S. 467 (1986).

76. 792 F. Supp. 1376 (S.D.N.Y. 1992).

77. *Bowen*, 476 U.S. at 469–72.

78. *Id.* at 473.

79. *Id.* at 476.

80. *Id.*

district court,⁸¹ and Corporation Counsel Frederick A.O. Schwarz, Jr. argued the case before the United States Supreme Court, which affirmed.⁸²

In *Stieberger*, the city and plaintiff class members again sued HHS and SSA to challenge their policy of “nonacquiescence,” pursuant to which SSA instructed its administrative law judges to disregard the decisions of the United States Court of Appeals for the Second Circuit if those decisions conflicted with the secretary’s own policies on whether an applicant is disabled.⁸³ The district court certified the class and enjoined the nonacquiescence policy.⁸⁴ On appeal, the Second Circuit vacated the injunction in light of a remedy that it had issued in another case, *Stieberger v. Bowen*.⁸⁵ In 1990, the district court dismissed some claims on statute of limitations grounds and granted injunctive relief to the plaintiffs on other claims.⁸⁶ In 1992, the court approved a settlement agreement,⁸⁷ which was soon thereafter amended.⁸⁸

C. *Litigation to Protect the City’s Power and Influence*

In addition to these public health and safety suits, and suits against other levels of government, the city as a governmental actor also may litigate in an attempt to protect its political power and influence. For example, the city tried for over fifteen years to enhance the accuracy of the census count, which the city believed significantly undercounted urban residents who were members of minority groups or lived in low-income neighborhoods. A more accurate census would influence congressional apportionment for the state, influence the city’s numbers in the state legislature, and would affect federal funding under programs that allocate resources based in part on population.

This litigation was started by Mayor Edward I. Koch as a plaintiff in a challenge to the 1980 census,⁸⁹ was defended by Rudolph W. Giuliani during his tenure as United States Attorney for the Southern District of New York, and it continued

81. *Id.* at 477.

82. *Id.* at 487.

83. *Stieberger v. Heckler*, 615 F. Supp. 1315, 1321 (S.D.N.Y. 1985).

84. *Id.* at 1400.

85. 801 F.2d 29 (2d Cir. 1986).

86. *Stieberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990).

87. *Stieberger v. Sullivan*, 792 F. Supp. 1376 (S.D.N.Y. 1992).

88. *Stieberger v. Sullivan*, 801 F. Supp. 1079 (S.D.N.Y. 1992).

89. *See Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987) (finding that state and city officials failed to prove that the Bureau of the Census’s decision not to adjust the 1980 census was unreasonable or arbitrary and capricious, and that the statistical methods proposed by the plaintiffs could not at the time be reliably used to adjust the census); *see also Carey v. Klutznick*, 508 F. Supp. 416 (S.D.N.Y. 1980), *aff’d*, 637 F.2d 834 (2d Cir. 1980) (granting city and state officials a preliminary injunction ordering the Bureau of the Census to compare records and process additional forms); *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980) (ordering the Bureau of the Census to use statistical methods to produce a more accurate census count than the unadjusted count and not certify New York’s population totals until there was compliance with the court’s order), *rev’d*, *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981).

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during Mayor Giuliani's mayoral term as a challenge by the city and others to the 1990 census.⁹⁰ It spanned the tenure of six Corporation Counsels starting with Allen G. Schwartz. When the suit began, Frederick A.O. Schwarz, Jr. of Cravath, Swaine & Moore LLP was representing the city (and other parties in the case); he later became Corporation Counsel and continued to represent the city in that capacity. When Peter L. Zimroth became Corporation Counsel, he came into the litigation and never left, remaining as special counsel to the city even after his tenure as Corporation Counsel was over. The litigation came to an end in 1996, when the United States Supreme Court rejected the challenge in *Wisconsin v. City of New York*.⁹¹

In addition to suits where the city itself is seeking to protect its power and influence, there are also cases where the mayor is seeking to protect or define his power and influence in relation to other city elected officials, often with respect to the city council's assertion of power.⁹² Generally, the Corporation Counsel represents

90. See *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 1124 (E.D.N.Y. 1993) (upholding the Secretary of the Department of Commerce's 1991 decision not to adjust the 1990 census), *rev'd*, 34 F.3d 1114 (2d Cir. 1994) (finding that the arbitrary and capricious standard used by the district court was incorrect, and that the district court should have utilized the heightened scrutiny test applied in the one-person, one-vote cases to determine whether the secretary's decision was "essential to the achievement of a legitimate governmental interest"), *rev'd*, *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (holding that the secretary's decision not to adjust the 1990 census was not subject to heightened scrutiny and had to "bear only a reasonable relationship to the accomplishment of an actual enumeration of the population"); *City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990) (finding that the Department of Commerce and officials administering the 1990 census fulfilled their obligations under a previously signed stipulation providing for the secretary to revisit the issue of adjustment and take advice from an expert panel); *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989).

91. *Wisconsin*, 517 U.S. at 1.

92. See *Mayor of N.Y. v. Council of N.Y.*, 9 N.Y.3d 23 (2007) (requiring the mayor to bargain with unions representing fire alarm dispatchers and emergency medical technicians, rather than with unions representing the majority of employees city-wide after local laws conferred "uniformed" status on these employees, did not usurp the mayor's powers); *Council of N.Y. v. Bloomberg*, 6 N.Y.3d 380 (2006) (finding that the Equal Benefits Law, which prohibited city agencies from entering into contracts with entities that fail to provide employment benefits to domestic partners of its employees equal to those provided to spouses, was preempted by state and federal law); *Mayor of N.Y. v. Council of N.Y.*, 789 N.Y.S.2d 860 (Sup. Ct. N.Y. County 2004) (finding that a 2001 council bill regulating apparel and related purchases by mandating wage and labor standards for contractors and others unlawfully curtailed mayoral powers by conferring additional contract-related powers on the comptroller and intruding on the mayor's power to determine bidder responsibility); *Mayor of N.Y. v. Council of N.Y.*, 780 N.Y.S.2d 266 (Sup. Ct. N.Y. County 2004) (finding that a 2002 council bill prohibiting the city from doing business with entities the council defined as "predatory lenders" was preempted by state and federal laws regulating banking and loans, and other state programs); *Mayor of N.Y. v. Council of N.Y.*, 721 N.Y.S.2d 39 (1st Dep't 2001), *rev'g* 696 N.Y.S.2d 761 (Sup. Ct. N.Y. County 1999) (finding that a 1997 local law, whereby the council would "designate" two members of a five member investigatory board, but the mayor would retain the ultimate authority to make these appointments or to refuse to make the appointments until the proposed designees meet with his approval, unlawfully curtailed the mayor's powers); *Giuliani v. Council of N.Y.*, 688 N.Y.S.2d 413 (Sup. Ct. N.Y. County 1999) (holding that a 1993 local law granting the council a veto over commuter van route approvals by the Taxi and Limousine Commission was inconsistent with the state's Transportation Law and the charter, and curtailed the mayor's powers); *Council of N.Y. v. Giuliani*, 679 N.Y.S.2d 14 (1st Dep't 1998) (giving priority to a

the mayor in these cases, and they typically arise when the mayor disagrees on a policy basis with the council and vetoes a local law, which then passes over his veto. It is also possible, however, that the mayor agrees on the policy issue, but has to defend the allocation of power under the City Charter, and he therefore might litigate over the validity of a local law even while agreeing with the policy it reflects.

Cases involving the allocation of power can either be affirmative cases brought by the mayor, or defensive cases in which the mayor defends his decision not to enforce a local law he believes to be invalid. For example, shortly before the effective date of the Equal Benefits Law, Mayor Bloomberg began a declaratory judgment action against the council, asserting that the law was inconsistent with, and preempted by, federal and state law, and that it curtailed the Mayor's powers.⁹³ The Mayor sought a temporary restraining order against the law's enforcement, which was denied. City attorneys then informed the supreme court justice hearing the matter that the Mayor would withdraw his motion for a preliminary injunction and would move promptly for summary judgment, and that in the meantime, the Mayor would not enforce the Equal Benefits Law. The next day, the city council initiated an Article 78 proceeding in the nature of mandamus to compel the Mayor and the city to immediately implement and enforce the Equal Benefits Law. The Mayor then raised as a defense the same assertions he had raised in his declaratory judgment action against the council. The New York Court of Appeals held that the Mayor was entitled to raise the invalidity of the law as a defense in the Article 78 proceeding, and that, while he had a duty to implement valid legislation passed by the city council, he also had a duty to comply with valid state and federal law.⁹⁴ According to the court, where the mayor concludes that a local law conflicts with a state or federal law, the mayor's obligation is to obey the latter, as the Mayor did in this case.⁹⁵ The court then went on to hold that the Equal Benefits Law was preempted by state contracting law and by federal law.⁹⁶

These are but a few examples of the kinds of suits the Corporation Counsel has initiated on behalf of the city over the last twenty-five years.⁹⁷ During that time

mayoral charter commission proposal over the council's effort to place a referendum on the ballot concerning the location of a new Yankee Stadium under the "ballot hierarchy" set forth in Municipal Home Rule Law); *Mayor of N.Y. v. Council of N.Y.*, 651 N.Y.S.2d 531 (1st Dep't 1997) (invalidating a 1995 local law that established an Independent Police Investigation and Audit Board and vested in the council the right to appoint two members of the five-member board, because the Municipal Home Rule Law and the New York City Charter require a referendum when a local law transfers the power of the mayor to the council).

93. *See Bloomberg*, 6 N.Y.3d at 380 (2006).

94. *Id.* at 389.

95. *Id.*

96. *Id.* at 390–95.

97. The Affirmative Litigation Division is not the only division at the Office of the Corporation Counsel handling affirmative claims. The Administrative Law Division commences affirmative regulatory cases under the Nuisance Abatement Law and litigated for years to close adult establishments. *See, e.g., City of New York v. Stringfellow's of N.Y.*, 96 N.Y.2d 51 (2001). The Commercial and Real Estate

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period, the Office of the Corporation Counsel has interpreted the city's interests broadly and has been willing to sue to vindicate those broad interests. The city and its elected officials have been interested, not only in maximizing city revenue through commercial litigation, but also in litigating on behalf of the broader interests of the city and the public.

Litigation Division's affirmative real estate unit brings a wide variety of affirmative litigation, including complex landlord-tenant proceedings, actions to enforce restrictive covenants, and actions to quiet title in cases of fraudulent transfer. *See, e.g.*, OFFICE OF THE CORPORATION COUNSEL, NEW YORK CITY LAW DEP'T, ANNUAL REPORT: 2004–2005, at 17 (2005). The Environmental Law Division has challenged several federal agencies for failing to regulate or for unlawfully regulating in response to harms, such as greenhouse gas emissions, that contribute to global warming, smog, and inefficient energy uses. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007).