Michigan House Bill 4290 Prevents Unnecessary, Citizen-Funded Legal Fees

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In 2002, local governments agreed to a rare exception to the immunity provided them in the process of delivering services. Local governments agreed to be held liable in certain situations when their negligence was the primary cause of a basement backup.

But, for over 15 years, some lawyers have been making millions organizing class action lawsuits suing governments for basement flooding even when it is clear that negligence is not the primary cause of the backup. This is resulting in massive legal fees funded by taxpayers because there are certain cases where it is clear that the criteria already in the law for determining negligence won't be met.

When the amount of rain exceeds the state's required carrying capacity for sewers, that rain is clearly the primary reason for any basement backups that occurred! A proposed bill in Lansing would close a loophole and save millions in ratepayer dollars while preserving a property owner's ability to sue when the cause of backups might be the result of governmental negligence.

This issue became especially problematic in August 2014. Rainfall was so intense that widespread flooding occurred in both basements and on our roads. Even though it was declared a **major natural disaster** by the President of the United States, class action lawsuits were filed and lawyers have made numerous assertions of negligence as the primary cause of basement backups! Allowing this practice is poor, costly policy. It needs to be fixed.

The key opponent of the bill from the legal profession is the one filing these class action lawsuits. Some of the key **opposing** comments include:

- The law is working fine. No communities have filed for bankruptcy as a result of the lawsuits.

  Response: To a large extent, the law is working well but for this issue. Using bankruptcy as a test for determining the legitimacy of a proposed amendment is curious. The implication is that unless or until bankruptcies are occurring, there is no problem to fix.

- Using the number of claims filed would be a better alternative for gauging negligence than the amount of rain.

  Response 1: The lawyers filing these class actions can have control of how many notices of claims are filed because they directly solicit these claims. Obviously, they would make sure no threshold was exceeded.

  Response 2: The exception to immunity is based on a service provider failing in some serious way. How is it even possible to be negligent if the amount of water from rainfall exceeds the sewer capacity required by the state? Rejecting the proposed amendment amounts to accepting two state policies in conflict: even when a community has followed state requirements for sewer systems, the possibility remains they will be sued and pay damages for meeting the state's requirements.

The other key opposing comment from a few organizations represents a legitimate, but misplaced concern. Some feel that climate change is resulting in more frequent, intense precipitation so the rainfall values in the proposed amendment should be higher.

> Response: The sewer system performance expectations of the Michigan Department of Environmental Quality (MDEQ) are based on decades of rainfall data and have resulted in billions and billions of expenditures throughout Michigan. Ignoring this and benchmarking negligence against something new that may be happening would create havoc. Imagine holding businesses that comply with government standards liable because some feel new information indicates the existing standards should now be made more stringent. Businesses could relocate to flee such destructive policy, but sewer systems and our homes can't be picked up and moved.

Advocates for redesigning, rebuilding, and paying for new sewer systems should present their case in a public forum. The costs of the proposed expansions should be documented along with the benefits. If, after public discourse and disclosure, the state determines a more stringent sewer performance standard is warranted and adopts one, then future claims of negligence would be based on the new requirement.

In fact, the proposed legislation clarifies that claims of negligence would be based on the most recent state requirements imposed on a sewer system!

(*Side note*: fixed costs are a major component of utility rates. Expanding to a greater capacity that is infrequently used would greatly increase fixed costs. The trend is the opposite as utilities are seeking to control costs by making more use of the capacity they already have.)

Assertions that the proposed legislation would return local government to blanket immunity are patently untrue, false, and dangerously misleading. While they garner attention, they distract from public discourse on the merits of the proposed legislation.

The proposed legislation does nothing to change the standard of liability. It is based on a policy that says if the amount of rain is near or exceeds the state required design; the test of negligence can't be met. Doing so precludes spending millions to prove the inevitable – it is the rain that caused the backup.

Opponents of this policy should be prepared to explain to the public why they should be footing the bill for lawsuits allowed because one hand of the state disregards what the other requires.

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