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Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation

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If by fire Of sooty coal th' empiric alchymist Can turn, or holds it possible to turn, Metals of drossiest ore to perfect gold.

—Milton, *Paradise Lost* (Bk. V, l. 439)

PREFACE

One of the principal agents behind many of the changes in the common law over the past half-century has been judges finding themselves unable to achieve justice when faced with "modern" problems because of perceived "archaic" rules of law. The creation of strict products liability by

common law courts is an example of this phenomenon. In that context, the difficulty with prior common law existed, not because a product defect could not be proved, but because it was nearly impossible to prove culpability of the manufacturer.[1]

Despite the availability of these judicially-created "shortcuts," some judges still found themselves frustrated when confronted with cases that involved injuries allegedly caused by products made by unknown manufacturers. These judges were uncomfortable with dismissing claims merely because the injured plaintiff could not establish the identity of the manufacturer of an allegedly defective product with reasonable certainty. This situation caused a few courts to develop common law doctrines known as "alternative liability," "enterprise liability," and "market share liability."[2] Unlike strict products liability, however, these attenuated doctrines have not been widely accepted. As a result, the move toward "absolute liability" halted, and the new doctrines proved to have limited utility.

Over the past decade, American jurisprudence has been experiencing another "assault upon the citadel"[3] in suits against asbestos, gun, and former lead paint manufacturers, and the target is once again well established prod-

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1. Citing the injustice of the situations, many courts adopted the doctrine of strict products liability, based either upon consumer expectations of reasonably safe products or upon public policy principles that recognized the social utility of shifting the responsibility for injuries from consumers to manufacturers who were better able to bear the costs. Although "fault" remains relevant in some products liability cases (e.g., cases based upon marketing defects), the general principles of strict products liability are firmly established in most states. *See generally* Richard O. Faulk, *"Absolute Liability": Historical Perspectives and Political Alternatives*, 37 OKLA. L. REV. 569 (1984).

2. *See* John S. Gray & Richard O. Faulk, *'Negligence in the Air?': Should 'Alternative Liability' Theories Apply in Lead Paint Litigation?*, 35 Product Safety & Liability Rep. (BNA) No. 14, at 341 (Apr. 9, 2007). These doctrines allow plaintiffs to shift the burden of proof (that they did not manufacture or supply the product that caused plaintiffs' injuries) from themselves to the defendants. If they could not do so, the defendants were held either jointly or severally liable or, alternatively, liable for a percentage of the damages that corresponded to their "market share." Here again, courts found that public policy favored placing liability on the manufacturers, who were in a position to insure against the losses, rather than upon the injured consumer.

3. *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) (coining the phrase "assault upon the citadel" in this landmark article advocating the demise of fault-based causes of action in favor of strict products liability).

ucts liability laws.[4] This assault was started by counsel who endured decades of defeat in courts as a result of traditional common law rules. They resolved to change the theory of their cause of action from strict products liability to the lesser-known tort of "public nuisance."[5] Using the same sympathetic reasoning that enabled the development of strict products liability, these attorneys attempted to graft new principles onto the law of public nuisance—and some controversial new "growth" indeed appeared on the "common law" tree.[6]

Currently, governmental authorities represented by private contingent fee counsel are spearheading this new assault on behalf of unnamed and non-consenting persons (i.e., the public). Curiously, these same authorities remained comparatively silent and, indeed, relatively indifferent to the plight of their constituents—until they joined with private counsel to file suit. In their "public nuisance" actions, the authorities ignored the obvious liability of negligent property owners and the possible continuing threat against the occupiers of contaminated properties, and instead pursued the deep pockets of a few selected product manufacturers.[7] At the same time, the authorities attempted to deprive manufacturers of many established defenses otherwise available to products liability litigants (e.g., statutes of limitations and product identification) by claiming that they are not applicable in public nuisance litigation.[8] Indeed, at least one court—in Rhode Island—excused the state from offering any proof that a particular defendant's product was actually present in any specific location.[9]

The issues raised by the emerging "public nuisance" controversy involving lead paint can only be understood fully by appreciating (1) the pervasive historical presence of lead in our society, (2) the myriad opportunities for exposure, (3) the confluence of the overlapping regulatory and litigation environments, and (4) the development of the science associated with low-level exposure to lead. In prior publications, we examined this tapestry of laws and regulations, as well as the historical and scientific background of the controversy.[10] We demonstrated that lead's pervasive benefits and

4. *See infra* Subsection I.A.5.

5. *See infra* Section I.B. Representing states, counties, and cities, private contingent fee attorneys filed suits asking that products manufactured and sold decades ago be declared a "public nuisance" so that the manufacturers could be ordered to pay for their removal. *See infra* Subsection I.A.5. These attorneys hope to escape judicial resistance to further expansions of strict liability by encouraging judges to accept and expand the scope of an entirely different tort—one which has been traditionally considered completely unsuitable for compensating persons injured by defective products. *See infra* Subsection I.A.6.

6. *See infra* Section III.C.

7. *See infra* Section III.C.

8. *See infra* Section III.C.

9. *See infra* Section III.C.

10. *See generally* Richard O. Faulk & John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel*, 21 Toxics

risks penetrated virtually all societies that ever left records of their existence—and how it probably impacted thousands of those about whom the historical record is now silent.[11] We also established that the toxic effects of lead probably have been known and appreciated longer than any other substance on the planet,[12] and conversely, that probably no other substance has a longer history of use in the face of known risks.[13] Following that analysis, we demonstrated that, as a consequence of society's appreciation of the dangers posed by lead, a statutory and regulatory network of protective laws was enacted across the full range of our federal system (from the national agencies to state and increasingly local administrations), and we studied how vast sums of money have been (and still are) appropriated to investigate and remediate properties with lead hazards, to enforce laws designed to protect the public from lead hazards, and to fund exponentially expanding research projects into lead-related health effects, precautionary measures, and education.[14]

This Article continues our study of the public nuisance controversy regarding lead paint. Although lead paint cases are certainly not the only claims where public nuisance principles are being advocated, they are the most conspicuous claims, and they have attracted the most attention from advocates, courts, and commentators. For that reason, we have focused on the lead paint paradigm. Moreover, as will be seen, the allegations asserted in these claims are not unique to lead paint but can be applied generically by ingenious counsel to virtually any product or conduct imaginable.[15] Hence,

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L. Rep. (BNA) Nos. 46-48, at 1071-98, 1124-52, & 1172-96 (Nov. 30, Dec. 7, Dec. 14, 2006), *available at* http://www.gardere.com/Content/hubbard/tbl_s31Publications/FileUpload137/1578/Faulk_BNA_LeadPaint_1-3.pdf.

11. *Id.* at 1085-89.

12. *Id.* at 1084-85, 1089-93, 1124-30.

13. *Id.* at 1076-77, 1080-84.

14. *Id.* at 1130-52.

15. This is illustrated by a recent "subprime" public nuisance lawsuit filed by Cleveland, Ohio. *See, e.g.*, Henry J. Gomez & Thomas Ott, *Cleveland Sues 21 Banks over Subprime Mess*, PLAIN DEALER, Jan. 11, 2008, *available at* http://blog.cleveland.com/metro/2008/01/cleveland_sues_21_investment_b.html; Complaint, City of Cleveland v. Deutsche Bank Trust Co. (Ohio Ct. Common Pleas, Cuyahoga County filed Jan 10, 2008) (No. 08-646970), *available at* http://online.wsj.com/public/resources/documents/cleveland.pdf (Cleveland complaint). In this case, the plaintiffs are apparently using public nuisance to avoid the necessity of proving fraud. Public nuisance claims are also being advocated in claims addressing global climate change. *See generally* Richard O. Faulk & John S. Gray, *Stormy Weather Ahead? The Legal Environment of Global Climate Change*, at 93-101 (Gardere 2007), *available at* http://www.gardere.com/Content/hubbard/tbl_s31Publications/FileUpload137/1770/Climate_Paper.pdf; State of New Hampshire's Summary Statement with State of New Hampshire's Position on Superior Court Rule 62 Issues, New Hampshire v. Amerada Hess Corp. (N.H. Super. Ct. filed Dec. 11, 2007) (No. 03-C-0550) (suggesting that New Hampshire adopt and follow the Rhode Island court's public nuisance decision as its model for this litigation).

examining the lead paint controversy provides insight into how the "public nuisance" pseudonym can be unreasonably manipulated to challenge other products and how adhering to the historic underpinnings of the tort can encourage political responsibility and deter abusive litigation.

We will review how, despite these decades of efforts to deal with lead hazards—and perhaps intrigued by the lucrative results of the tobacco litigation—certain public authorities decided to pursue "public nuisance" litigation against the manufacturers of lead paint products and pigments merely because they historically manufactured, marketed, and sold lead paint products—an "absolute liability" scenario unsuitable for products liability litigation. We will examine the extremism of this position, which is belied by "common sense" observations that manufacturing and even *using* lead paint products did not "create" the nuisance—if one exists. Instead, the alleged nuisance was only "created" when property owners allowed the paint to decay and deteriorate, thereby creating the opportunity for lead to be ingested. Even then, a vast array of alternative sources of lead in the environment renders attribution to particular factors impossible, especially when "nuisance" is assessed *en masse* in an "aggregate tort" context, as opposed to individual claims where particularized information can be evaluated. The injuries allegedly attributed to lead paint—subtle neurotoxic injuries such as lowered IQ—can result from a variety of causes, most of which are associated with non-toxic insults, such as genetics, socio-economic concerns, nutrition, and other confounding factors.[16] To attribute cause to just one factor, such as lead paint, in the face of this plethora of variables is not only naïve, but also compromises the public health concerns to which the advocates so earnestly profess allegiance.

As will be seen below, the pursuit of protracted litigation and the maintenance of the status quo, coupled with lax enforcement of existing laws and the waste of public resources allocated to address the situation, belie the existence of a true public health concern. The alarm bells should ring loudly in America when sovereigns bypass their traditional political responsibilities, ignore truly responsible parties, fail to consider alternate causes, and pursue pseudonymous remedies against parties they unilaterally choose to demonize. Most importantly, if a true public nuisance really exists, it is time for those officials to protect the public's health as a matter of their highest priority. It is time to use the resources, regulations, and statutes already enacted to address these issues, which are demonstrably adequate and have already produced remarkable results—not to delay and defer essential action by courtroom theatrics. Indeed, if public officials and their private contingent fee counsel are truly concerned about protecting our chil-

16. Faulk & Gray, *supra* note 10, at 1124-26.

dren,[17] public officials should stop litigating about it, avail themselves of existing resources and laws, and start protecting them.

I. THE TORT OF PUBLIC NUISANCE

Legally, the term "nuisance" is traditionally used in three ways: (1) "to denote [an] activity or . . . condition that is harmful or annoying to others" (e.g., "indecent conduct," a "rubbish heap," or a "smoking chimney"); (2) "to denote the harm caused by the [before-mentioned activity or condition]" (e.g., "loud noises or . . . objectionable odors"); and (3) "to denote . . . the legal liability that arises from the combination of the two."[18]

Nuisance law arose from the need to abate "bothersome activities [or conduct], usually conducted on a defendant's land, that unreasonably interfered either with the rights of other private landowners or, in the case of public nuisance, with the rights of the general public."[19] Traditional nuisance law therefore seems obviously inapplicable to claims arising from products where the item's condition, as opposed to the manufacturer's conduct, is the focus.

The law of public nuisance has been poorly understood by courts and has been the subject of heated debate for more than a century. It has been described as being "notoriously contingent and unsummarizable," and "[g]enerations of legal writers expressed their frustration with [it] in the most unhappy terms."[20] "As early as 1875, when the first American treatise on nuisance was published, its writer Horace Wood already described the doctrine as a 'wilderness of law.'"[21] "William Prosser, the reporter for the Restatement (Second) [of Torts], adopted Wood's locational metaphor in

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17. *See generally* Aileen Sprague & Fidelma Fitzpatrick, *Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children*, 11 ROGER WILLIAMS U. L. REV. 603 (2006).

18. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979). Originally developed as a private tort tied to the land, a nuisance action was generally brought when a person interfered with another's "use or enjoyment of land." William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966). However, the "interference" was not the result of a neighbor dispossessing a person of his or her land (i.e., *disseisin*) or an actual trespass upon another's land. *Id.* Instead, the "interference" arose from activities taking place on another person's land that affected the enjoyment of that land. "For this kind of interference a special remedy was developed early in the thirteenth century in the form of the assize of nuisance . . . ." *Id.*

19. Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 484-85 (2002) (citing D.B. DOBBS, THE LAW OF TORTS §§ 463, 467 (2001); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 87, 90 (5th ed. 1984)).

20. Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 90 (1998).

21. *Id.* (citing HORACE WOOD, THE LAW OF NUISANCES iii (3d ed. 1893)).

calling nuisance law an 'impenetrable jungle.' He said it was a 'legal garbage can' full of 'vagueness, uncertainty and confusion.'"[22] "More recently, . . . Richard Epstein, though saying it is 'much-maligned,' concedes nuisance 'does not work on a moral or deductive principle.'"[23] "The common law of nuisance has a reputation as a messy and dated doctrine," and, according to "Justice Blackmun: 'one searches in vain . . . for anything resembling a principle in the common law of nuisance.'"[24]

The vagueness of public nuisance jurisprudence is currently being exploited in new and unprecedented ways as a substitute for products liability claims by some public authorities and their private counsel. They are pursuing their claims against manufacturers under the guise of "public nuisance" to overcome obstacles and defenses that ensured fairness for products liability defendants and to sidestep comprehensive statutory schemes created by state and federal legislatures that address the alleged problem.[25]

Using this device, creative counsel "are attempting to move public nuisance theory far outside its traditional boundaries by using it [against] product manufacturers"—presumably because they have found these "once-progressive" and now "well-defined" principles of products liability inadequate to assure recoveries.[26] This Part chronicles the development of public nuisance law and explains the ambiguities that claimants are currently exploiting—ambiguities used to create a "catch-all" tort that is useful in situations where recoveries are otherwise barred.

A. The Tort's Imprecise and Ambiguous Definitions Cause Confusion

The tort of nuisance developed as a common law crime during the Middle Ages.[27] Over the past millennium, it has been used as a remedy that allowed governments to use the tort system to stop conduct that was considered quasi-criminal because, although not strictly illegal, it was deemed unreasonable in view of its propensity to injure someone exercising a com-

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22. *Id.* at 90 (citing William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942)).

23. *Id.* (citing Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with* Euclid, 5 N.Y.U. ENVTL. L.J. 277, 282 (1996)).

24. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)).

25. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745 (2003); *see, e.g.*, Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639 (Cal. Ct. App. 1971) (filed during a time of increasing use of the public nuisance theory in environmental protection cases, this case broke new ground because it included manufacturers of products).

26. Schwartz & Goldberg, *supra* note 25, at 541.

27. Gifford, *supra* note 25, at 745.

mon societal right.[28] Traditionally, actionable conduct involved the blocking of a public roadway, the dumping of sewage into a public river, or the blasting of a stereo in a public park.[29] To stop public nuisances, governments sought injunctions either enjoining the activity that caused the nuisance or requiring the responsible party to abate the nuisance.

Back in 1966, Dean Prosser recognized that courts were applying "some of the same substantive rules of law" to both public and private nuisance causes of action and warned that the two should not be confused.[30] Still, courts and legislatures continue to apply vague and ill-defined definitions to describe what constitutes a public nuisance. For example, Florida's Supreme Court has proclaimed that "a public nuisance may be classified as something that causes 'any *annoyance* to the community or harm to public health.'"[31] State legislatures, such as those in California and Iowa, have defined public nuisance as anything "injurious to health" or "indecent" or "unreasonably offensive to the senses" that interferes "with the comfortable enjoyment of life or property," or "unlawfully obstructs the free passage or use."[32] Rhode Island's Supreme Court held that public nuisance is "harm" that people are either suffering or threatened with that they "ought not have to bear."[33] Thus, in Rhode Island, liability in nuisance (as distinguished from negligence) arguably focuses on unreasonable injury rather than unreasonable conduct. Consequently, plaintiffs in Rhode Island cases argue that they may recover damages for "nuisance" conduct that is otherwise not tortious. As we show later in this Article, interpreting Rhode Island law to permit this "ad hoc" approach to public nuisance liability has led to some extraordinarily unjust and oppressive results.[34]

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28. Prosser claimed that "a public . . . nuisance is always a crime" and that "[f]or a few centuries after its origin . . . public nuisance remained only a crime." Prosser, *supra* note 18, at 997. *But see* Gifford, *supra* note 25, at 781 (disagreeing with Prosser by arguing that civil liability has always been an "incidental aspect of public nuisance").

29. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979) (noting that in popular speech the term "public nuisance" loosely refers to "anything harmful, annoying, offensive, or inconvenient" and that this "careless usage" has occasionally and wrongfully crept into a court opinion).

30. Prosser, *supra* note 18, at 999 (noting that public and private nuisance "are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in common name") (citations omitted).

31. *See* Gifford, *supra* note 25, at 774 (citing Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 1036 (Fla. 2001)).

32. CAL. CIV. CODE § 3479 (West 1997); IOWA CODE ANN. § 657.1 (West 1998); *see also* Gifford, *supra* note 25, at 775 (discussing same).

33. Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) (citing Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980)).

34. *See* Richard O. Faulk & John S. Gray, *The Mouse that Roared?: Novel Public Nuisance Theory Runs Amok in Rhode Island*, WASH. L. FOUND. (Mar. 2007) (Critical Legal Issues: Working Paper Series No. 146), *available at* http://www.wlf.org/upload/FaulkGrayWP.pdf.

With such imprecise and ambiguous definitions, it is not surprising that courts have imposed liability in a wide variety of circumstances, ranging from environmental harms[35] to activities deemed to violate public peace, comfort, and morals.[36] As one commentator noted:

> With such a broad concept in existence, backed with such broad remedies, what need have we of any other criminal offence?—or torts?—or remedies in administrative law? . . . Everything in public nuisance runs contrary to modern notions of certainty and precision in criminal law—and indeed, in civil law as well. How ever did we get an offence of such incredible breadth?[37]

Although the elements of the two nuisance causes of action—"public" nuisance and "private" nuisance—have changed over time, some important principles remain firm. First, only a limited number of persons may bring a "public" nuisance claim. Second, those persons are limited in the type of remedy they may seek. For example, governmental plaintiffs may only seek an abatement or injunction, not monetary damages. Conversely, individual plaintiffs who claim to have sustained a particular injury (e.g., unique harm to their personal property) may seek compensatory damages.[38] Thus, under a "public" nuisance cause of action, private citizens cannot seek to stop or abate conduct, and governmental entities cannot seek large sums of money (in lieu of abatement or injunction) in an effort to financially punish defendants, spread the risk of harm from industrial enterprises, or financially grow their coffers.[39]

Nevertheless, as we will develop below, public authorities are now "pushing the envelope" in an attempt to recover the *cost* of abating nuisances *before the abatement actually begins*.[40] The difference between an order advancing costs and a judgment awarding damages is illusory, to say the least, especially to the person ordered to pay the money.

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35. Gifford, *supra* note 25, at 776 (citations omitted) (identifying the discharge of untreated sewage, the maintenance of an automobile junkyard, the operation of a hog farm and sewage lagoon, and the storage of coal dust).

36. Gifford, *supra* note 25, at 776 (citations omitted) (identifying street gangs, a flea market with an unsightly appearance, loud music, and anti-abortion protests that blocked access to an abortion clinic).

37. J. R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 55 (1989).

38. Schwartz & Goldberg, *supra* note 25, at 542.

39. *Id.*

40. *See infra*, Subsubsection III.C.5 (discussing the Rhode Island district court's decision to proceed with abatement even though the remedy decision would not include the participation of all liable parties and that, in the court's opinion, the defendants should seek future actions for contribution, *toties quoties*, against those parties at a later date).

1. *English Common Law*

The tort of nuisance dates back to twelfth century English common law.[41] It began as a criminal writ, belonging only to the Crown. It was used in cases that involved encroachments upon the King's land or the blocking of public roads or waterways. The King sought to punish these criminal infringements, commonly known as "purprestures," through criminal proceedings.[42] Over time, activities prosecuted as public nuisances included everything from embezzling public funds to having a tiger pen next to a highway, from assisting a homicidal maniac to escape to placing a mutilated corpse on a doorstep, and from selling rotten meat to "subdividing houses to the point where they become 'overpestered' with the poor."[43] As these examples demonstrate, early authority to commence public nuisance actions was derived from the sovereign's "police power."[44]

By the fourteenth century, public nuisance principles were extended to include rights common to the public,[45] such as roadway safety, air and water pollution, disorderly conduct, and public health (e.g., to stop the spread of disease).[46] During this period—long before any governmental regulations existed—nuisance provided a flexible judicial remedy to address conflict land use and social welfare. Flexibility was needed because in medieval times, and indeed long thereafter, the sovereign's power was not divided into "branches" as we know it today. As a result, judges sitting with the

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41. C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 3-5 (1949) (dating the roots of nuisance back to ancient writs in twelfth century England).

42. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979). The King, through a sheriff and later an attorney general, could bring suit to stop an infringement and force the offending party to repair any damage to the King's property. *See* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 361-62 (1990) (citing Spencer, *supra* note 37, at 56-59).

43. See Abrams & Washington, *supra* note 42, at 362 for a more complete list of past public nuisances.

44. *Id*.

45. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979).

46. Schwartz & Goldberg, *supra* note 25, at 543-44 (citing Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002)). Early public nuisance actions involved problems with roadways and streams (everything from encroachment to pollution to man-made flooding problems). Other public nuisances involved food (everything from wandering sick animals to selling unfit food or cheating on the amount or size sold, to catching immature fish or hunting out of season). Finally, courts also considered the following to also be public nuisances: bawdy-houses and disorderly ale-houses, night-walkers, eavesdroppers, and common scolds. *See* Spencer, *supra* note 37, at 59-60; RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979) (noting that in each instance "the interference with the public right was so unreasonable that it was held to constitute a criminal offense").

power of the sovereign used the common law with the widest discretion to adapt their rulings to remedy wrongs as each individual case arose.[47] In modern society, however, opportunities for "common law" discretion are substantially reduced by the presence of a vast array of statutes and regulations, all of which must be considered and balanced when a court deliberates a "common law" question. Hence, courts are not free to act independently to provide flexible judicial remedies[48] without considering the entire tapestry of laws relevant to issues, especially when those laws originate in other branches of a government carefully entrusted with investigative resources and deliberative diversity that far exceed those of the judiciary.

Throughout medieval times, public nuisance remained only a crime—no private tort actions were allowed because the remedy was reserved for the King's benefit.[49] That changed in the sixteenth century, when an English court allowed individuals to sue and recover damages under the doctrine. Scholars, treatises, articles, and even the *Restatement (Second) of Torts* uniformly cite an "anonymous" King's Bench decision as the seminal case articulating this infamous rule[50] that came from a judge's dissenting opinion about a hypothetical person riding a horse.[51] England's early treatise writers used this judge's dissent to create the rule that a private plaintiff (as compared to the Crown) may sue for public nuisance if he suffered a "particular" or "special" injury that was not common to the public.[52] It allowed individuals to recover damages through public nuisance suits as long

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47. Judges had extraordinary power and flexibility until the signing of the Magna Carta set forth laws limiting the King's (and thus the court's) power. Magna Carta 1215, *available at* http://www.fordham.edu/halsall/source/mcarta.html (last visited Apr. 1, 2008).

48. *See, e.g.*, *In re* Lead Paint Litig., 924 A.2d 484, 494 (N.J. 2007) ("It is only in light of [the state's] statutory framework that the arguments of the parties concerning the viability of a cause of action sounding in public nuisance can be evaluated.").

49. At the time, it was argued that if a private claim for damages were allowed, the defendant would be faced with hundreds of such actions for the same offense. Gifford, *supra* note 25, at 800.

50. Anon., Y.B. Mich. 27 Hen. 8, f.27, p1. 10 (1535).

51. RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (1979). *See also* Prosser, *supra* note 18, at 1005; Gifford, *supra* note 25, at 800; Schwartz & Goldberg, *supra* note 25, at 544-45.

52. *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 571 (1941). According to one commentator, Lord Edward Coke's 1628 treatise, *Commentary upon Littleton*, was the first to focus on the idea of a "'particular'" and "'special injury'" requirement by placing scholarly attention on his interpretation of this 1535 case. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 794-95 n.171 (2001) (citing 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAW OF ENGLAND § 56a (1979 ed.) (1832)); *see also* Eric L. Kintner, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance against the Gun Industry*, 90 IOWA L. REV. 1163, 1190 (2005).

as their injuries were different in kind from the general public.[53] To be "different in kind" required more than simply being more severe—it had to be different—and then individuals could only recover monetary damages.[54] As a result, the law of nuisance co-mingled aspects of criminal law, real property law, and tort law.[55]

2. *Public Nuisance Law in the United States*

English common law was generally adopted without change in Colonial America. With respect to public nuisance, early American cases fell into one of two categories. Initially, they focused on obstruction of public highways or navigable waterways, but over time, the tort was used to address other perceived invasions of public morals and the public welfare.[56]

As time passed, America shifted from an agrarian culture to an industrial society. This shift resulted in new land uses that conflicted with older customs. New inventions brought speed, machinery, emissions, smells, discharges, noise, and steam.[57] When the Industrial Revolution began, there were few regulations limiting industrial operations, and, as a result, air and water pollution problems provided the first tests for American public nuisance law based either on (1) the long tradition of finding noxious trades to be public nuisances, or (2) the fact that "unpleasant" vapors usually arise from pollution.[58]

Regardless of the justification, the absence of environmental and industrial regulations resulted in public nuisance being used where the government "could not anticipate and explicitly prohibit or regulate through

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53. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979) (referencing RESTATEMENT (SECOND) OF TORTS § 821C); *see also* Schwartz & Goldberg, *supra* note 25, at 544 (citing William A. McRae Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 36 n.14 (1948)) (noting that "[t]hough this view eventually prevailed, it was not accepted without dissent, the dissent being that a public offence should not give rise to a private right").

54. Prosser, *supra* note 18, at 1005-07.

55. Halper, *supra* note 20, at 99 (noting that "[N]uisance [law] came to partake of them all").

56. Gifford, *supra* note 25, at 800-01 (citation omitted).

57. Halper, *supra* note 20, at 101 (citing John P.S. McLaren, *Nuisance Law and the Industrial Revolution: Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155, 161 (1983)).

58. Gifford, *supra* note 25, at 802 (citing Price v. Grantz, 11 A. 794 (Pa. 1888) (dust from manufacture of lead pipe and shot); People v. Gold Run Ditch & Mining Co., 4 P. 1152 (Cal. 1884) (dumping debris and waste into river); Chenowith v. Hicks, 5 Ind. 224 (1854) (slaughterhouse wastes dumped into waterway); Luning v. State, 2 Wis. 215 (1849) (erection of dam creating mill-pond with stagnant waters); Commonwealth v. Brown, 54 Mass. 365 (1847) (unwholesome smokes and vapors from manufacture of Neat's-foot oil; indictment held invalid); Smiths v. McConathy, 11 Mo. 517 (1848) (vapors from distillery and hog waste)).

legislation all the particular activities that might injure or annoy the general public."[59] During this era, public nuisances were defined as violations of public rights, producing the same injury to all, having a common harm and producing common damage. Public nuisance was considered an indictable offense "at law" whose redress must be pursued by criminal prosecution on behalf of the public.[60]

During the 1930s, public nuisance cases dwindled as President Roosevelt's New Deal policies became implemented.[61] The need for public nuisance suits was supplanted by laws that subjected entire industries to "comprehensive statutory and regulatory schemes" that determined what were and what were not acceptable societal behaviors.[62] Consequently, the first *Restatement of Torts* did not even include a reference to the tort of public nuisance when it was published in 1939.[63] According to one commentator, the "troubled history of nuisance law should thus have been no more than a footnote in any casebook on landuse planning or environmental protection" because it was replaced by tools more suited to large-scale solutions, such as zoning and local, state, and federal regulations.[64] These tools "enabl[ed]

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59. Gifford, *supra* note 25, at 804. The exceptions to these early cases were the ones brought against railroads for noise and air pollution affecting the communities near the tracks. Court rejection of both public nuisance claims and private nuisance claims against a railroad was often premised upon the sanctioning of the railroad's operations by legislative authority and the absence of negligence. "Where the operation of the railroad was pursuant to a legislative charter or license and the operation of the railroad was in accordance with the expectations of the legislature, courts generally held that the railroad constituted neither a public nuisance nor a private nuisance." *Id.* at 802-04 (citing Lexington & Ohio R.R. v. Applegate, 38 Ky. (8 Dana) 289 (1839); Pres. & Dirs. of the Bordentown & S. Amboy Tpk. Rd. v. Camden & Amboy R.R. & Transp. Co., 17 N.J.L. 314 (N.J. 1839)).

60. *See* 1 H. G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY § 14, at 34 (3d ed. 1893); *see also* JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES WITH PARTICULAR REFERENCE TO ITS APPLICATION TO MODERN CONDITIONS AND COVERING THE ENTIRE LAW RELATING TO PUBLIC AND PRIVATE NUISANCES § 14, at 22 (1906); 2 H. G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY § 674, at 881 (3d ed. 1893).

61. According to Professor Gifford, from 1890 through 1929, there were more than 750 written opinions concerning public nuisance-related criminal prosecutions and more than 125 opinions in which public officials sought injunctive relief against a public nuisance. Likewise, he estimates that there were a little less than 100 opinions during the same time period in which individuals brought suits seeking damages for public nuisance. Gifford, *supra* note 25, at 805.

62. *Id.* at 805-06.

63. *Id.* at 806. Nuisance law was purportedly assigned to the *Restatement of Property* during the *First Restatement* because of its focus on property. These drafters focused only on private nuisance. When nuisance was eventually transferred to torts, public nuisance was not included. Thus, at least initially, nuisance was treated as though it were solely an issue of interference or an invasion of interests in the private use of land. *See* Schwartz & Goldberg, *supra* note 25, at 546 n.30 (citing Halper, *supra* note 20, at 120-21).

64. Halper, *supra* note 20, at 91.

city planning, environmental protection, historical preservation, wilderness conservation, access for the disabled, density restrictions, and many other limitations, restrictions, adjustments, prohibitions, and restraints on land use."[65]

3. *The Environmental Law Movement's Impact on Public Nuisance*

Despite these observations, public nuisance was not permanently relegated to "footnote" status. Instead, it reappeared in mainstream American jurisprudence in the late 1960s during the drafting of the *Restatement (Second) of Torts* when Dean Prosser sought to limit its use to violations of criminal statutes.[66] Environmental activists, however, thought this was too restrictive in light of emerging environmental jurisprudence and their belief that administrative agencies were not up to the task of regulating pollution.[67] They wanted to use public nuisance law to combat pollution, including pollution that was state sanctioned through permits or allowed by local regulatory regimes or zoning regulations (i.e., no criminal violation).

Although the activists failed to remove the references to the quasi-criminal nature of public nuisance,[68] they succeeded in sending the public nuisance sections back for further study and reconsideration in 1970.[69] In May 1971, the American Law Institute adopted a "compromise" version of *Restatement (Second) of Torts* Section 821B that defined public nuisance as an "unreasonable interference" with a public right.[70] Nevertheless, the *Re-*

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65. *Id.*

66. Gifford, *supra* note 25, at 806 (citing RESTATEMENT (SECOND) OF TORTS § 6, at 16-44 (Tentative Draft No. 15, 1969)). *Id.*

67. Antolini, *supra* note 52, at 839 n.433.

68. Dean Prosser wrote in 1966 that "[a] public or 'common' nuisance is always a crime . . . a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure." Prosser, *supra* note 18, at 997, 999. *But see* Gifford, *supra* note 25, at 781 (disagreeing with Prosser and suggesting that public nuisances were not always criminal actions); Halper, *supra* note 20, at 118 (paraphrasing Judge Benjamin Cardozo as stating that "where a use is not in itself unlawful or hazardous, negligence is the appropriate liability standard for the injuries attributable to that use").

69. Gifford, *supra* note 25, at 807 n.342 (citing ALI Proceedings 287-305 (1970)).

70. RESTATEMENT (SECOND) OF TORTS § 821B (1979) states that:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

statement's comments warned that if "a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard."[71] While it gave individuals and organizations standing to enjoin or abate a public nuisance,[72] it still required they prove that they were suffering an injury different in kind from the general public.[73]

Ultimately, the expanded language in Section 821B allowed courts, in a narrow way, to find the existence of a public nuisance in cases involving conduct that previously was not considered tortious. Section 821B includes and defines three factors to be used in guiding courts as to the meaning of "'unreasonable,'" two of which—factors (a) and (c)—use very nebulous, open-ended language.[74] As we will see below, these ambiguities and vagaries have unfortunately proved irresistible to creative advocates and jurists. Instead of untangling the "jungle" grown by 900 years of confused jurisprudence, and despite the clear warnings contained in the *Restatement*'s comments, Section 821B has become a license for some judges and jurors to provide their own definitions of "unreasonable interference" and "a right common to the general public" without any meaningful guidance.[75]

4. *Public Nuisance and Environmental Activism*

Early efforts to use public nuisance to combat pollution had mixed success. California courts denied class certification in 1971 in a case against a multitude of companies alleged to have contributed to air pollution in Los Angeles.[76] The court found public nuisance ill-suited in cases involving manufacturers whose emissions are governed by federal and state air pollution regulations.[77] In contrast, in 1980, a federal court in New York

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(c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

71. *Id.* § 821B cmt. e.

72. *Id.* § 821C(2)(c) (giving individuals or groups standing if they are suing "as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action").

73. *Id.* § 821C(1); *see also* Schwartz & Goldberg, *supra* note 25, at 548.

74. Gifford, *supra* note 25, at 809.

75. City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 130 n.2 (Ill. App. Ct. 2005) (acknowledging the "confusion surrounding the law of nuisance").

76. Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639, 639 (Cal. Ct. App. 1971) (seeking an injunction against 293 named corporations and municipalities, as well as 1,000 unnamed defendants, for air pollution).

77. *Id.* at 642-46 (noting that the "plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the dis-

used public nuisance in the famous "Love Canal" case to impose liability even though the defendant never owned or controlled the land where the pollution occurred.[78] Although the court acknowledged that imposing clean-up liability "is essentially a political question to be decided in the legislative arena," it nonetheless allowed the public nuisance claims to proceed because someone had to be made responsible.[79]

The Love Canal case stands out as an exception to the traditional rule that public nuisance involves an activity tied to the land.[80] Products are not tied to the manufacturer's land, and they leave the manufacturer's control when they are sold to third parties who consume them or attach them to property that the manufacturer neither owns nor controls. This is the rule that was followed in *City of Bloomington v. Westinghouse Electric Corp.*, where the Seventh Circuit Court of Appeals refused to hold a PCB manufacturer liable under public nuisance for the PCB-containing hazardous waste discarded by another company.[81]

5. *Early Efforts to Use Public Nuisance against Product Manufacturers*

Municipalities and school districts brought the first non-pollution-related public nuisance cases in the 1980s and 1990s against manufacturers of asbestos-containing products, seeking to recover the costs of removing asbestos from their buildings. They argued that asbestos-containing products—by their very existence—constituted a public nuisance by interfering with the public's right to health or safety even though the products were lawfully manufactured, distributed, and sold.[82] Most courts rejected their argument, finding that the creation of a product is not the same as the crea-

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charge of air contaminants in this county, and enforce them with the contempt power of the court").

78. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 963-70 (W.D.N.Y. 1989). The court used a CERCLA-based "strict liability" analysis and applied it to the public nuisance claims, finding that Occidental was liable "for creation of the 'public health nuisance.'" *Id.* at 967.

79. State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971, 977 (N.Y. Sup. Ct. 1983) (stating that "[s]omeone must pay to correct the problem").

80. Cleary, *supra* note 46, at 280 (citing Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993) (holding that the state's nuisance statute did not apply to products liability cases)).

81. 891 F.2d 611, 614 (7th Cir. 1989) (noting that the city had failed to cite any case that upheld a public nuisance claim in a products liability action); *see also* E.S. Robbins Corp. v. Eastman Chemical Co., 912 F. Supp. 1476, 1493-94 (N.D. Ala. 1995) (holding that the manufacturer of a chemical that had been spilled by others was not liable under the tort of public nuisance).

82. Schwartz & Goldberg, *supra* note 25, at 553; Gifford, *supra* note 25, at 751.

tion of a nuisance,[83] with some courts finding that "a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality."[84]

Undeterred by judicial rejection of public nuisance in asbestos cases, it found its way into the tobacco litigation of the 1990s. Even today, many people wrongly credit the use of public nuisance claims with turning the tide against the tobacco industry.[85] However, most of those claims remained unresolved when the tobacco litigation ended with a massive settlement. The plaintiffs added the public nuisance claims as a means to overcome defenses against products liability claims by claiming that the defendants had harmed the states and had profited from that harm.[86] Using public nuisance and other equitable theories of recovery, states argued that they were not required to prove specific causation in any individual case and that defenses based upon a smoker's own conduct were not applicable to their case.[87] But, because only one state adjudicated and rejected the use of public nuisance, its validity and vitality in lawsuits against product manufacturers were never established legally.[88]

As the tobacco litigation was winding down, government entities began using public nuisance as the vehicle to sue gun manufacturers, claiming

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83. *See* City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876 (Cal. Ct. App. 1994); Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920-21 (8th Cir. 1993); County of Johnson, Tenn. v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("[A]llowing . . . this action under a nuisance theory would convert almost every products liability action into a nuisance claim"); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (stating that "manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by [a product] defect").

84. Corp. of Mercer Univ. v. Nat'l Gypsum Co., No. 85-126-3-MAC, 1986 WL 12447, at *6 (M.D. Ga. Mar. 9, 1986) (noting that even if asbestos were considered a nuisance, "[t]he 'nuisance' creating property . . . was in possession and control of the plaintiff from the time it purchased the asbestos-containing products"); *see also* City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133 (D.N.H. 1984).

85. This misconception is based on the fact that, before the mid-1990s, tobacco lawsuits were wholly unsuccessful because, under products liability law, courts found that the harmful effects of smoking were unforeseeable "at the time that plaintiffs began smoking and that 'the manufacturer is not the insurer against the unknowable.'" *See* Gifford, *supra* note 25, at 754-57 (quoting Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 40 (5th Cir. 1963)). The real turning point followed two dramatic events: the disclosure that tobacco companies concealed documents showing their knowledge of the addictive nature of smoking, and the nationwide coordinated effort of state-sponsored lawsuits. *Id.* at 757-58.

86. *Id.* at 759 (noting that states were not directly injured by the use of tobacco and that "the traditional theories of recovery used by individual smokers were therefore inappropriate").

87. *Id.*

88. *See* Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) (refusing to extend the concept of public nuisance to allow recovery).

that their policies and practices were responsible for creating a black market that permitted criminals to acquire guns, thereby interfering with the public health.[89] Most, but not all, courts rejected the use of public nuisance against gun makers on the following grounds: (1) the sale of lawful products (e.g., handguns) does not inherently interfere "with a right common to the general public," (2) the defendants lacked the requisite control over the source of the alleged public nuisance, (3) "product manufacturers and distributors simply cannot be held liable on a public nuisance theory," (4) the government's injuries are too indirect or remote from the gun makers' conduct to allow recovery, and (5) balancing the harm and utility of the sale and marketing of guns is a policy question better suited for the legislature than the courts, particularly because these activities are already well-regulated.[90] One court that allowed gun-related public nuisance suits to proceed acknowledged that it was acting without precedent but justified its decision on economic grounds, stating that manufacturers can price the cost of litigation into their products.[91] Today, public nuisance suits against gun manufacturers have been restricted, if not precluded, by the enactment of the Protection of Unlawful Commerce in Arms Act of 2005.[92] This Act precludes tort actions against firearm manufacturers in federal or state courts based on criminals' unlawful use of their products. But for congressional intervention, it is highly likely that public nuisance litigation against gun manufacturers would still be ongoing.

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89. *See, e.g.*, City of Gary, Ind. *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1231 (Ind. 2003) (alleging that the gun makers, distributors, and dealers created the public nuisance by knowingly participating in a distribution system that provided guns to criminals and juveniles); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141 (Ohio 2002) (alleging that the defendants knew or should have known that their conduct would "cause handguns to be used and possessed illegally," such that a public nuisance was created); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 115 (Conn. 2001) (alleging that the existence of the nuisance [the presence of illegal guns] increases the cost of running the city).

90. *See* Gifford, *supra* note 25, at 766-69 (analyzing the reasons courts rejected the use of public nuisance in gun litigation) (citations omitted).

91. City of Gary, Ind., *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1231, 1234 (Ind. 2003) (acknowledging that under Indiana law, courts have recognized public nuisance claims only when the claims involve land use or illegal activities).

92. Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901-7903, 18 U.S.C. §§ 922, 924) ("To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.").

6. *Present and Future Efforts to Use Public Nuisance against Product Manufacturers*

Although lead pigment manufacturers became the target for negligence and products liability in the late 1980s, these efforts did not gain traction until recently. Like earlier asbestos suits, plaintiffs sought to place the responsibility for poorly maintained lead paint on these companies. Lawsuits have been brought on behalf of individuals and classes of plaintiffs alleging personal injury due to exposure to lead paint. Governmental entities have also brought lawsuits seeking reimbursement for childhood lead exposure programs and/or funding for lead paint abatement. There have even been a few cases involving adult painters blaming their current health problems on long-ago exposure to lead paint.[93] Most of these cases, however, are fact specific and involve individual issues. Thus, entrepreneurial plaintiffs' lawyers have a difficult time turning them into an aggregate mass tort. To get around these problems, these attorneys have brought public nuisance claims, seeking costs for screening, monitoring, and abatement. Perhaps most importantly, they have sued former lead pigment manufacturers because they have deeper pockets than landlords.[94]

The Motley Rice law firm was one of the first to attempt to use public nuisance in lead paint litigation. In 1999, the firm's lawyers convinced Rhode Island's Attorney General to hire them on a contingency fee basis to bring a state-sponsored public nuisance lawsuit against the former lead companies.[95] In his complaint, the Attorney General alleged that the mere presence of lead paint in homes and buildings constituted a public nui-

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93. *See, e.g.*, Jefferson v. Lead Indus. Ass'n, 106 F.3d 1245 (5th Cir. 1997) (brought by parents of child); City of Phila. v. Lead Indus. Ass'n, 994 F.2d 112 (3d Cir. 1993) (brought by city and housing authority); Santiago v. Sherwin-Williams Co., 782 F. Supp. 186, 193 (D. Mass. 1992) (brought by injured plaintiff); Cofield v. Lead Indus. Ass'n, No. MJG-99-3277, 2000 WL 34292681 (D. Md. Aug. 17, 2000) (brought by home owners); Brenner v. Am. Cyanamid Co., 699 N.Y.S.2d 848 (N.Y. App. Div. 1999) (brought by parents of child); Skipworth v. Lead Indus. Ass'n, 690 A.2d 169 (Pa. 1997) (brought by parents of child); Court's Decision, *infra* note 121, at 17-18 (brought by State Attorney General); *see also* Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 DEF. COUNS. J. 119, 120 (2004) (discussing history of cases brought against lead manufacturers, including those of adult workers).

94. *See* Bruce R. Kelly & Ingo W. Sprie, Jr., *Public Nuisance Cases as the Next Mass Tort: The Lead Paint Experience*, 21 Toxics L. Rep. (BNA) 695-700, 696 (July 27, 2006).

95. Retainer Agreement, App. 4 to Pet. for Cert. at ¶ 1, Rhode Island v. Lead Indus. Ass'n (R.I. Super. Ct. filed Mar. 2, 2004) (No. 99-5226). *See also* Smith, *supra* note 93, at 119 (stating that "lead paint and pigment defendants had never lost or settled a case" since 1987); Editorial, *Rhode Island Rhapsody*, WALL ST. J., Aug. 16, 2006, at A10 (discussing Rhode Island's use of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that has the potential to generate hundreds of millions—or billions—of dollars in contingent fees).

sance.[96] With a contingent fee contract giving him a financial stake in the recovery, Mr. Motley asked the court and jury to make the former manufacturers pay for removing lead paint from every building in Rhode Island. Armed with the power of the sovereign, Mr. Motley was so sure of his lawsuit that he publicly boasted that he would "bring the entire lead paint industry to its knees."[97] Over the past decade, the plaintiffs' bar has partnered with governmental entities to bring public nuisance claims on behalf of numerous other states, counties, and municipalities.[98] The current epicenter in the lead litigation lies in Rhode Island, where a Rhode Island jury found three companies liable for creating a "public nuisance" during the century before residential sale of lead paint was banned in 1978, and the trial court issued a long-awaited decision upholding the verdict despite numerous alleged errors and misconduct.[99]

While lead litigation is the present fora, it appears that global warming represents the near future arena for public nuisance litigation. Over the past few years, plaintiffs have been bringing public nuisance claims in global warming lawsuits against power companies,[100] automobile manufacturers,[101]

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96. *See, e.g.*, Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2001 WL 345830 (R.I. Super. Ct. Apr. 2, 2001). It is widely accepted that when the paint is allowed to crack or peel, young children who ingest the lead paint chips can contract lead poisoning. Lead poisoning can impair cognitive function, stunt growth, and lead to behavioral problems. *See, e.g.*, *In re* Lead Paint, No. MID-L-2754-01, 2002 WL 31474528, at *2 (N.J. Super. Ct. Law Div. Nov. 4, 2002).

97. Mark Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, DALLAS MORNING NEWS, Oct. 31, 1999; Michael Freedman, *Turning Lead into Gold*, FORBES, May 14, 2001, at 122, *available at* http://www.forbes.com//forbes-/2001/0514/122.html (explaining that Mr. Motley targeted the former lead companies as his "next big-game hunt," found victims, and "demonized" the industry because they were a "fat target"). Mr. Motley's claim is reminiscent of Texas Attorney General Dan Morales's 1996 claim that the goal of the tobacco litigation was "to bring this industry to its knees." Mark Curriden, *Up in Smoke: How Greed, Hubris and High Stakes Lobbying Laid Waste to the $246 Billion Tobacco Settlement*, A.B.A. J. (Mar. 2007), at 26 (noting that "[t]he only big winners in the [tobacco] litigation [were] the tobacco companies, the state treasurers and the lawyers").

98. Together, they filed public nuisance suits in California; Chicago, Illinois; New Jersey; Ohio; St. Louis, Missouri; and Milwaukee, Wisconsin.

99. *See infra* Section III.C (discussing in detail issues raised during the trial).

100. Complaint, Native Vill. of Kiviliana v. ExxonMobil Corp. (N.D. Cal. filed Feb. 26, 2008) (seeking monetary damages), *available at* http://www.adn.com/static/-adn/pdfs/Kivalina%20Complaint%20-%20Final.pdf; Complaint, Connecticut v. American Electric Power Co. (S.D.N.Y. 2005) (No. 04 Civ. 5669) (seeking to have climate change declared to be a "public nuisance" and to have the defendants enjoined to abate their contribution to the nuisance by first capping carbon dioxide emissions and then reducing them). *See also* ROBERT MELTZ, CONGRESSIONAL RESEARCH SERVICE REPORT RL32764, CLIMATE CHANGE LITIGATION: A GROWING PHENOMENON 11 (2007), *available at* http://www.ncse-online.org/NLE/CRSreports/07Jun/RL32764.pdf.

101. Complaint, California v. General Motors Corp. (N.D. Cal. 2007) (No. C06-05755 MJJ), 2007 WL 2726871 (seeking compensation for the state's expenses for planning,

and the oil and coal industries.[102] The majority of these lawsuits are still working their way through the judicial system, and it remains to be seen whether public nuisance claims will gain traction in climate change litigation.

Most courts have rejected public nuisance claims against product manufacturers, stating that public nuisance theory has always targeted how properties or products are used, not manufactured.[103] Allowing plaintiffs to use public nuisance law against manufacturers of lawful products will fundamentally change the entire character of the public nuisance doctrine, as well as undermine products liability law. If merely manufacturing and marketing a product is sufficient to impose liability on a defendant, then products liability law will truly be swallowed up by the amorphous concept of "public nuisance." Plaintiffs would never again sue under products liability where they have to prove that the product was defectively designed, manufactured, or marketed. Instead, they would sue claiming the product was a nuisance (perhaps even an attractive nuisance) because they were harmed by the product (e.g., obese people suing fast food establishments and food manufacturers, not because the product was defective, but because they are in ill-heath for consuming the products).

B. What Exactly is a Public Nuisance?

1. *It is Something that Interferences with a Public Right*

The classic black-letter definition of a public nuisance is "an act or omission 'which obstructs or causes inconvenience or damage in the exercise of rights common to all.'"[104] According to the *Restatement (Second) of Torts*, "[a] public nuisance is an unreasonable interference with a right common to the general public."[105] The key element of a public nuisance claim (in contrast to a private nuisance claim) is that the "inconvenience," "damage," or "interference" must be to a public right—not a private one.[106]

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monitoring, and infrastructure changes associated with climate change and to holding the automakers liable for all future damages caused by greenhouse gases emitted from their products). *See* MELTZ, *supra* note 100, at CRS-11.

102. Complaint, Comer v. Nationwide Mut. Ins. (S.D. Miss. 2006) (No. 1:05 CV 436 LTD RHW) (seeking monetary damages); s*ee also* AMERICAN BAR ASSOC., GLOBAL CLIMATE CHANGE AND U.S. LAW 201 (Michael B. Gerrard ed. 2007).

103. *In re* Lead Paint Litig., 924 A.2d 484, 501 (N.J. 2007) (concluding that traditional public nuisance concepts recognized that the appropriate target of abatement and enforcement must be the premises owner whose conduct effectively created the nuisance).

104. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 566 (1941).

105. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

106. The Connecticut Supreme Court noted that the "test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights." Ganim v. Smith & Wesson Corp., 780 A.2d 98, 104 (Conn. 2001).

This requires proof that the injury is common to the general public.[107] The *Restatement (Second) of Torts* states that a person's

> [c]onduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.[108]

The "key inquiry" is whether the public will be injured by the offending conduct while exercising its common rights.[109] Consider the classic public nuisance claim against a party for allowing a tree to block a public road. Everyone would agree that the fallen tree interferes with the public right to drive on that road. Thus, a government could seek an injunction to stop the blockage even if no one ever actually drove down the road. Conversely, if the tree blocked a neighbor's driveway, or the entrance to a commercial shopping plaza or church, a governmental entity could not bring a public nuisance claim because no public right was violated because the public does not own the property on which the tree fell, and there is no public right of access to private property.[110]

The manufacture and distribution of lawful products will rarely, if ever, cause a violation of a public right. Products tend to be purchased and used by individual consumers. Therefore, any harm a product causes is to individuals. This is true even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable. For example, even if a fast-food chain sold millions of defectively produced cheeseburgers,

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107. Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957 (R.I. 1994) (citing Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980)).

108. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979) (noting that water pollution does not become a public nuisance simply because fifty or even a hundred lower riparian owners are deprived of their ability to use the water; the pollution becomes a public nuisance only when all members of the community are deprived of the right to bathe or fish in the water). "Nuisances are public where they violate public rights, and produce a common injury" to public rights. Ganim v. Smith & Wesson Corp., 780 A.2d 98, 131 (Conn. 2001) (citations omitted) (noting that "[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights").

109. Schwartz & Goldberg, *supra* note 25, at 562. Numerous commentators, including the authors of this Article and authors who do not favor the expansion of public nuisance, severely criticize courts that allow plaintiffs to use public nuisance as a means to address what are essentially personal injury cases. *See* Antolini, *supra* note 52, at 771 n.54 (agreeing "that allowing purely personal injury claims to masquerade as public nuisance claims is inappropriate" because a "personal injury does not reflect injury to the community").

110. Schwartz & Goldberg, *supra* note 25, at 562-63. Some courts appear willing to blur the boundaries of what constitutes a public nuisance to include conduct that interferes with the public's right to "the health, safety, peace, comfort or convenience of the general community." *Id.* at 563 (quoting Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980)). Still, most courts have held that communal-based injuries are "wholly distinguishable" from personal injuries based on the use of a product. *Id.*

causing millions of people who ate them to become obese and have poor health, the violations committed by fast-food chains are to the private rights of each individual (i.e., standard consumer tort or contract rights), and not a violation of the rights of the general public. The sheer number of violations cannot transform individual injuries into a communal injury unless the term "public right" is altered and expanded beyond its understood boundaries of the past 900 years.[111]

2. *Its Harm Must be "Substantial" and "Unreasonable"*

To be a nuisance, a defendant's interference with the public right must be "substantial." It cannot be a "mere annoyance," a "petty annoyance," a "trifle," or a "disturbance of everyday life."[112] The interference must be substantial, objectionable to the ordinary reasonable man, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions.[113]

The harm must also be unreasonable. Traditionally, this requires a risk-benefit analysis weighing the gravity and probability of a risk occurring against the utility of the activity or conduct. This test was a judicial attempt to control the potentially "disproportionate consequences of injunctive relief" and allowed courts to find that some interferences with the use and enjoyment of land were not actionable.[114]

3. *It Involves "Quasi-Criminal" Conduct*

Historically, the conduct associated with a public nuisance claim has been described as being quasi-criminal in that it could injure someone exercising a common, societal right.[115] Dean Prosser thought that a public nuisance was "a criminal interference with a right common to all members of the public."[116]

While the *Restatement (Second) of Torts* lowered the requisite conduct from that of "criminal interference" to just "unreasonable interference" with a public right,[117] it states that the following factors should be considered

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111. Gifford, *supra* note 25, at 817.

112. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941); *see also* Antolini, *supra* note 52, at 772.

113. Prosser, *supra* note 18, at 1002-03; *see also* Antolini, *supra* note 52, at 772 n.57 (citing FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 631 (2d ed. 1861)).

114. Antolini, *supra* note 52, at 772-73 n.59 (citation omitted).

115. Public nuisance is "a species of catch-all criminal offense[s]." KEETON ET AL., *supra* note 19, § 86, at 618.

116. Antolini, *supra* note 52, at 826 (quoting RESTATEMENT (SECOND) OF TORTS (Presentation of Tentative Draft No. 15, 46 A.L.I. Proc. 267, 282, (1969))).

117. *See* RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

when deciding whether conduct is unreasonable: whether the conduct involves a significant interference with public health, safety, peace, comfort, or convenience; whether it is proscribed by a statute; and whether it is of a continuing, long-lasting nature and the defendant knows that it has a "significant effect" on his ongoing harm.[118] Yet, when examining conduct, "the role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers [of products] seem totally alien"[119] because nuisances are not created when a product is sold; they are created when a product's purchasers or another third party uses or disposes of the project.

4. *The Defendant "Controls" the Nuisance*

Historically, the party who controlled the public nuisance was the party who owned or operated the property at the time of abatement.[120] Control is a necessity because a primary purpose underlying public nuisance is the ability of public authorities to have a legal remedy available to terminate conduct of a defendant that is violating a public right and injuring the public safety, health, or welfare.[121] Manufacturers give up "ownership and control of their products" after they are sold and ownership and possession are transferred to the buyers.[122]

Noting that "nuisance cases 'universally' concern the use or condition of property, not products,"[123] one court cited Prosser for the proposition that

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118. RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979); *see also* City of Chicago v. Am. Cyanamid Co., No. 02 CH 16212, 2003 WL 23315567 (Ill. Cir. Ct. Oct. 7, 2003).

119. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (quoting 63 AM. JUR. 2D *Products Liability* § 593 (2007)).

120. *Detroit Bd. of Educ.*, 493 N.W.2d at 521-22 n.8 (quoting 58 AM. JUR. 2D *Nuisances* § 123, at 764) ("[L]iability of a possessor of land is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others"). Thus, "a remedy directed against them is of little use." *Id.* at 522.

121. Gifford, *supra* note 25, at 820-21. Professor Gifford also notes that other courts have held defendants liable for merely creating or participating in carrying on a public nuisance, even if they are not in control of the product that caused the nuisance's creation at the time of the injury. But other courts have held defendants liable for a public nuisance when they create or participate in carrying on a nuisance, even if they are not in control of the *instrumentality* causing the nuisance at the time of the injury. *See, e.g.*, Rhode Island v. Lead Indus. Ass'n, Inc., No. PC 99-5226, at 17-18 (R.I. Super. Ct. Feb. 26, 2007), *available at* http://www.courts.state.ri.us/superior/pdf/99-5226-2-26-07.pdf [hereinafter Court's Decision]; *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 628-29 (S.D.N.Y. 2001).

122. *Detroit Bd. of Educ.*, 493 N.W.2d at 522.

123. City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994).

"[i]f 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected either with land or with any public right, as mere aberration."[124] In the context of the lead paint litigation, a court found that "the conduct that has given rise to the public health crisis is, in point of fact, poor maintenance of premises where lead paint may be found by the owners of those premises."[125] The court chastised the plaintiffs' attempt to "ignore the fact that the conduct that created the health crisis is the conduct of the premises owner," noting that plaintiffs' theories to separate conduct and location "eliminate entirely the concept of control of the nuisance."[126]

C. Statutes and Regulations Determine "Reasonableness"

Through legislation, regulations, and ordinances, federal, state, and local governments are able to define specific activities as being a public nuisance. If a public nuisance claim is based on such statutes, a court or jury need not make a finding of unreasonableness because the legislature has already made that determination.[127] However, when governmental entities have actively regulated a particular kind of conduct or human activity by statute, ordinance, or administrative regulation, conduct that could be characterized as unreasonable under common law no longer subjects the actor to tort liability if it complies with the statute, ordinance, or regulation.[128] This is particularly true in pollution cases, which were almost routinely dealt with by filing nuisance suits until federal, state, and local governments established comprehensive sets of legislative and administrative regulations dealing with pollution.

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124. *Id*.

125. *In re* Lead Paint Litig., 924 A.2d 484, 501 (N.J. 2007) ("[P]resence of lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed;" thus "it is the premises owner who has engaged in the 'conduct [that] involves a significant interference with the public health . . . and therefore is subject to an abatement action.").

126. *Id. See also* City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 130 n.2 (Ill. App. Ct. 2005) (stating that the promotion and lawful sale of "lead-containing pigments decades ago . . . cannot be a legal cause of plaintiff's complained-of injury, where the hazard only exists because landowners continue to violate laws that require them to remove deteriorated paint").

127. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979) (noting that some statutes declare plants that harbor parasites that are destructive to food crops or timber to be public nuisances).

128. RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (1979). The only means of pursuing a public nuisance claim for such lawful conduct would be to show that "the law regulating the defendant's enterprise is invalid." City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1124 (Ill. 2004). In these instances, courts accept that the legislative or regulatory body has determined that such conduct is acceptable to society and is therefore not unreasonable.

In the context of lead paint litigation, many states have products liability acts (setting boundaries for lawsuits seeking damages based on harm caused by a product) and lead paint acts (addressing harm caused by exposure to deteriorating lead paint).[129] Some courts look to these acts for guidance, respecting the role of the legislature and the separation of powers between the branches of government.[130] Other courts, however, claim the statutes are irrelevant for claims brought under the "common law."[131] As we will discuss below, it seems unreasonable, however, to assume that the common law operates in a "vacuum" uninformed by a jurisdiction's overall legal environment.

D. No Intervening Causes Created the Nuisance

Traditionally, a plaintiff must show that it was foreseeable that each defendant's conduct would create the public nuisance.[132] Therefore, the plaintiff's injury must be the type of injury that a reasonable person would see as a likely result of the defendant's conduct. Otherwise, the tort of public nuisance becomes limitless if courts allow a defendant's liability to be based on something other than independently tortious conduct, violation of a statute, or conduct that is intentional and unreasonable. A New York court rightly received adverse reactions after stating that "fault is not an issue, the inquiry being limited to whether the condition created, not the conduct creating it, is causing damage to the public."[133] The Eighth Circuit

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129. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 17920.10(a) (West 2006) (California); 410 ILL. COMP. STAT. 45/2, 45/9 (2005) (Illinois); MD. CODE ANN., ENVIR. § 6-819 (Supp. 2006) (Maryland); MASS. GEN. LAWS ch. 111, § 197 (2003) (Massachusetts); N.Y. PUB. HEALTH LAW § 1373 (McKinney 2002) (New York); *see also In re* Lead Paint Litig., 924 A.2d 484, 494 (N.J. 2007).

130. *See In re Lead Paint Litig.*, 924 A.2d at 494 ("It is only in light of this statutory framework that the arguments of the parties concerning the viability of a cause of action sounding in public nuisance can be evaluated.").

131. Whitehouse v. Lead Indus. Ass'n, Inc., No. 99-5226, 2003 WL 1880120, at *3-5, 11 (R.I. Super. Ct. Mar. 20, 2003) (not requiring the state to adopt statutory and regulatory definitions of lead poisoning because such rules and regulations have no bearing on a common law claim).

132. Under the doctrine of remoteness, plaintiffs alleging "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover." Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268-69 (1992). "Remoteness is an aspect of the proximate cause analysis, in that an injury that is too remote from its causal agent fails to satisfy tort law's proximate cause requirement . . . ." Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 921 (3d Cir. 1999).

133. Gifford, *supra* note 25, at 828-29 (citing United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 968 (W.D.N.Y. 1989) (quoting State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971, 979 (N.Y. 1983))); *see also* New York v. Fermenta ASC Corp., 608 N.Y.S.2d 980, 985 (N.Y. Sup. Ct. 1994) ("[A] plaintiff in an action to abate a

Court of Appeals went so far as to state that to allow recovery for public nuisance "regardless of the defendant's degree of culpability or the availability of other traditional tort law theories of recovery" would allow nuisance to become "a monster that would devour in one gulp the entire law of tort."[134] The New Jersey Supreme Court recently agreed with this sentiment in the context of the lead paint litigation.[135]

II. GOVERNMENT USE OF CONTINGENCY FEE PRIVATE COUNSEL

Currently, governmental authorities represented by private contingent fee counsel are spearheading the effort to transmute public nuisance claims from a conduct-based tort into a harm-based tort, and as an alternative mean to sue manufacturers in lieu of products liability actions. State use of private counsel contingency fee contracts, long regarded as ethically suspect if not unthinkable, can be traced back to a case in the 1980s when Massachusetts decided to hire private lawyers to pursue claims over asbestos removal.[136] The innovation quickly spread to other states and reached its zenith in the late 1990s during the tobacco litigation that resulted in multibillion-dollar payouts to both states and their lawyers,[137] and the creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that could generate hundreds of millions in contingent fees.[138] Now many states no longer think twice about entering into contingency fee contracts with private plaintiff law firms.[139]

Obvious incentives exist for both private trial lawyers and states to use contingent fee contracts. Even aside from the chance to rack up stupendous fees, trial lawyers love these deals because they confer a mantle of legitimacy and state endorsement on lawsuit crusades, the merits of which might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee.[140] There is no fee because the state gener-

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public nuisance is not required to demonstrate negligence or willful conduct on behalf of the defendant.").

134. Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

135. *In re* Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007).

136. Walter Olson, *Tort Travesty*, WALL ST. J., May 18, 2007, *available at* http://www.manhattan-institute.org/html/_wsj-tort_travesty.htm.

137. *Id.*

138. Editorial, *Rhode Island Rhapsody*, WALL ST. J., Aug. 16, 2006, at A10.

139. The same contingent fee counsel that prosecuted the tobacco litigation is also prosecuting the lead paint litigation for various states. *See, e.g.*, Rhode Island v. Lead Indus. Assoc., Inc., 898 A.2d 1234 (R.I. 2006); County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

140. Olson, *supra* note 136. In addition to the majority of state attorneys general entering contingent fee arrangements in the tobacco litigation, the mayors of over thirty cities

ally will pay nothing for the private counsel's services unless the state wins at trial or obtains a lucrative settlement. There are no salaries to pay because private contingent fee counsel are not salaried government employees. There are no expenses to pay because private contingent fee counsel generally advance the expenses associated with maintaining and prosecuting the lawsuit, subject to later reimbursement by the client. The fee contemplated in this type of arrangement is generally subject to court approval. If approved, the agreement is a "win-win" situation for the state! Or is it? Government use of private contingent fee counsel raises many ethical issues including, but not limited to, the hiring of friends or campaign contributors (political cronyism)[141] and whether the neutrality and fairness expected of state-sponsored lawsuits are comprised or even nullified by the profit motive that contingent fee contracts necessarily inject into the litigation. At stake is nothing less than public confidence in our judicial system when it appears that these "assisting" private counsel are pursuing the lawsuit primarily for their own profitability instead of in the public interest.

Once an attorney hires private counsel to pursue litigation, the counsel are referred to as "special assistants." Although they are representing the

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signed contingent fee contracts to sue gun manufacturers. These suits were gaining momentum until Congress stepped in to pass a law against them. Authorities in New Jersey, California, and elsewhere have hired percentage-fee lawyers to pursue groundwater contamination claims; in the resulting litigation, other environmental aims have tended to be subordinated to the overriding goal of maximizing deep-pocket dollar payout. *Id.*

141. Contingency deals raise the question of whether state attorneys general are pursuing the public interest or merely rewarding campaign donors with lucrative business. For example, in 2001, West Virginia Attorney General Darrell McGraw hired four outside law firms—three based outside of the state—to sue Purdue Pharmaceuticals, the maker of OxyContin, on behalf of the state's workers' compensation fund and other state agencies. The one in-state law firm just happened to be a major contributor to McGraw's re-election campaign. The contingent fee lawyers split a third of a $10 million settlement. Editorial, *Rhode Island Rhapsody*, WALL ST. J., Aug. 16, 2006, at A10. Additional examples can be found in the tobacco litigation experience. *See* Brief for Chamber of Commerce of the United States and the Am. Tort Ass'n as Amici Curiae in Support of Petitioners at 10-13, State v. Lead Indus. Ass'n, Inc. (R.I. May 13, 2005) (No. 2004-63-M.P.) (on Writ of Certiorari to the Superior Court of Rhode Island) (discussing criminal and ethical issues raised in Texas (where the law firms hired by the Attorney General had contributed about $150,000 to his reelection campaigns and from whom he sought additional political contributions after they were hired, and how he was later arrested, tried, and ultimately sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees to a friend barely connected to the case); in Kansas (where the Attorney General hired her former law partners and how they housed her campaign staff after being hired); and in Connecticut (where the Attorney General hired his own former law firm, a firm whose name partner is married to a partner in his former firm, and a firm whose managing partner served as personal counsel and counselor to the Governor, all the while not giving other law firm fair consideration)) (citations omitted).

states, they are not considered state employees.[142] While it is not uncommon for state attorneys general to hire outside counsel to assist them, most outside attorneys are normally paid an hourly fee. Hiring outside counsel on a contingent fee basis, however, introduces an improper profit motive to the state-sponsored litigation, which is particularly troubling when the state is exercising its police powers (as compared to collecting a debt). In addition to the profit motive, private attorneys have an ethical obligation to "zealously" represent their client, while the ethical goal of a government attorney is not to "win" but to promote "justice."

A. Government Attorneys Have an Obligation to Act Impartially

Our nation's highest court has stated that a government attorney's duty is not necessarily to prevail or to maximize recovery; rather, "the Government wins its point when justice is done in its courts."[143] This means that government attorneys are required to use the sovereign's power to promote justice for all citizens because they are "the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[144]

The idea of impartial justice is not just a lofty aspiration. It is grounded in state laws and regulations. For example, attorneys general and assistant attorneys general take an oath to "faithfully and impartially discharge the[ir] duties" and to "support the Constitution and laws of this state, and the Constitution of the United States."[145] They are paid a salary[146] and are forbidden from using their positions for private financial gain or advantage. Thus, government attorneys are prohibited from having a direct or indirect financial interest in the areas they are administrating. Such interests are deemed to be "in substantial conflict with the proper discharge of [their] duties or employment."[147] However, private contingent fee counsel hired as special assistants are not bound by these principles. In fact, contingency fees are antithetical to the conflict-of-interest prohibitions applicable to

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142. JOHN CONTRUBIS, CRS REPORT FOR CONGRESS No. 97-883 A, ATTORNEYS' FEES IN THE STATE TOBACCO LITIGATION CASES (Sept. 23, 1997).

143. Brady v. Maryland, 373 U.S. 83, 87 n.2 (1963).

144. Berger v. United States, 295 U.S. 78, 88 (1935).

145. Brief for Chamber of Commerce, *supra* note 141, at 18 (citing R.I. GEN. LAWS §§ 36-1-2, 42-9-9).

146. *Id.* at 18-19 (citing R.I. GEN. LAWS §§ 42-9-1, 42-9-10).

147. *Id.* at 19 (citing R.I. GEN. LAWS §§ 36-14-1, 36-14-5(a)); *see also* R.I. GEN. LAWS § 36-14-1 (stating that it is state policy that public officials and employees avoid the appearance of impropriety, and not use their positions for private gain or advantage); R.I. GEN. LAWS § 36-14-7(a) (stating that a substantial conflict of interest exists when he "has reason to believe or expect that he . . . will derive a direct monetary gain . . . by reason of his . . . official activity").

most *elected* attorneys general. If attorneys general are prohibited by law from having a financial interest in the outcome of litigation they bring on behalf of their states, how can they contractually give that right to private counsel they hire? In other words, how can government officials contractually transfer a right they themselves are legally and ethically prohibited from possessing?[148] By inserting a financial motive for pursuing litigation, state attorneys general effectively transform "public" litigation into something that undeniably furthers the *private* interests of the *private* attorneys pursuing it.

B. Contingent Fees and Public Representation—Diverging Interests?

Historically, poor people who could not afford to pay a lawyer's hourly fee generally used contingent fee arrangements. Sovereign states, however, have the resources to afford competent counsel—and the power to obtain additional funding through taxes. All states have their own attorneys who work solely for them under the direction of the state's attorney general. Contingent fee agreements seem entirely inappropriate for suits on behalf of state governments, which have the power to tax, condemn, and exercise police powers.

Contingent fee contracts (through the potential to earn huge profits or nothing at all)[149] create powerful incentives for private attorneys *wielding the power of government* to make decisions based on their own best interest, instead of what is in the best interest of *justice*.[150] The profit incentive is fine in private litigation, but it has no place in government. This does not mean that governments cannot, or should not, ever use private counsel. Paying a flat or hourly rate to private counsel allows the government to ac-

148. In the Rhode Island lead paint case, the Attorney General hired two law firms on a contingent fee basis to prosecute its case. Their contract stated that the firms were to receive $16^{2/3}$ percent of any monies recovered by the State and delegated "full authority and responsibility for all case management, trial strategy, and other decisions necessary or incident to the necessary prosecution of the claims" to their outside counsel. *See* Rhode Island v. Lead Indus. Ass'n, 898 A.2d 1234, 1235 n.2 (R.I. 2006) (deferring to determine the constitutionality of the state's use of a contingent fee contract in this case because the issues was not ripe). Thus, Rode Island's Attorney General gave its outside counsel full power and authority to prosecute the suit—including the choice of who to sue and who not to sue, and complete discretion to exercise the state's police powers.

149. One has to look no further than the litigation against big tobacco to find examples of the types of outrageous windfalls these special assistants seek. *See* Brief for Chamber of Commerce, *supra* note 141, at 14 (describing the legal fees paid out in Kansas (where $27 million of the $55 million to be received was paid to law firms at a rate of about $2,700 per hour), in Texas (where $3.3 billion of the $15.3 billion to be received was paid to law firms for an estimated rate of about $105,022 per hour) and in Maryland (where the attorney hired to represent the state demanded the full contractual 25% share of the state's $4.4 billion national settlement; also refusing to submit his claim to arbitration) (citations omitted).

150. Berger v. United States, 295 U.S. 78, 88 (1935).

cess additional resources without adding headcount. But counsel paid on a flat rate or by the hour do not have the same incentive to make decisions—they are not influenced by the chance of getting a windfall or the risk of getting nothing. Given these influences—or even the possibility of such an influence's effect—contingent fee arrangement government-sponsored litigation obviously does not guarantee the objectivity required of those who represent the public interest.

C. The Problem of Neutrality

Public nuisance lawsuits brought by governmental entities are unique and differ fundamentally from those brought by private citizens. Common and accepted actions and decisions made by private practitioners in the course and scope of dealings with ordinary clients may be completely unacceptable when that client is a "sovereign." These problems are compounded when the representation of a public authority is controlled by a contingent fee agreement that impacts the representation of governmental interests in a variety of adverse and unacceptable ways. A sovereign is not an ordinary client; it is the "people," which necessarily also encompasses the defendants. As stated earlier, when the sovereign is the client, its attorneys have an "obligation to govern impartially" and to promote justice for *all* citizens.[151] Thus, the sovereign's goal is to achieve justice, not necessarily the maximum economic results. Under this standard, once private practitioners are hired to represent the sovereign and are vested with all the power and authority of the state, their focus must shift from representing an individual client to the broader interests of every citizen within their client's jurisdiction.

Contingent fee contracts, by their very nature, impede an attorney's ability to shift his focus from profit to justice because they tie the attorney's compensation to the financial results of the litigation. They plant the seeds of their own abuse by potentially distracting private counsel from the singular goal of serving the public interest—an issue that is wholly absent when governmental employees pursue the same claims. They create an "appearance of impropriety," and the public is entitled to know that the agreements that secure their representation will not even *tempt* their counsel to stray.[152]

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151. *Id.*

152. City & County of S.F. v. Cobra Solutions, Inc., 135 P.3d 20, 24 (Cal. 2006) (quoting People *ex rel.* Dep't of Corps. v. SpeeDee Oil Change Sys., Inc., 980 P.2d 371 (Cal. 1999)) ("[T]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar."). The American Bar Association's Code of Professional Responsibility states that "[a] lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." MODEL CODE OF PROF'L RESPONSIBILITY EC 8-8 (1983). "[A]n attorney holding public office should avoid all con-

A California court recently issued an order "precluding Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation" because such agreements interfere with the standard of neutrality required of governmental attorneys.[153] The court's decision was based on *People ex rel. Clancy v. Superior Court*, a case in which California's Supreme Court held that contingent fee arrangements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action."[154] The judge found that even if the private attorneys are only co-counsel, "[t]hey are performing work as attorneys for the plaintiff government entities, and consequently they are subject to the standard of neutrality articulated in *Clancy*," and "[o]versight by the governmental attorneys does not eliminate the need for or the requirement that outside counsel adhere to the standard of neutrality."[155] The judge ultimately granted the motion to bar the use of contingent fee contracts in this litigation.[156] It certainly makes sense that an attorney cannot guarantee neu-

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duct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. No. 192 (1939).

153. Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, County of Santa Clara v. Atl. Richfield Co., No. 1-00-CV-788657 (Cal. Super. Ct. Apr. 4, 2007) [hereinafter April 2007 Order]. In this case, a number of California counties and cities hired private outside counsel to bring a public nuisance suit against lead paint manufacturers. As usual in such suits, the private outside attorneys were hired on a contingent fee basis that obligated the state to pay them a percentage of any recovery. Order Regarding Plaintiffs' Motion for Stay, County of Santa Clara v. Atl. Richfield Co., No. 1-00-CV-788657 (Cal. Super. Ct. May 22, 2007) [hereinafter May 2007 Order].

154. *See* April 2007 Order, *supra* note 153, at 2 (citing People *ex rel.* Clancy v. Superior Court of Riverside County, 705 P.2d 347, 353 (1985) (noting that it "evaluate[d] the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance")). In barring the use of contingent fee agreements by governmental entities, the *Clancy* court stated:

> Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. A person who maintains or commits a public nuisance is guilty of a misdemeanor. "A public or common nuisance is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large. . . . As in the case of other crimes, the normal remedy is in the hands of the state." A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney.

Clancy, 705 P.2d at 352-53 (citations omitted).

155. April 2007 Order, *supra* note 153, at 3. The court noted that some of the contingent fee agreements gave the private attorneys "absolute discretion" in litigating the case, while other agreements were being revised to purportedly allow the government attorneys to retain decision-making authority and responsibility for the case. *Id.* at 3 n.1.

156. *Id.* at 4.

trality in a case in which he will not be paid unless he wins. Likewise, a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring that he is not a public official because the "public" responsibility follows the job.[157] This concern was not lost on the federal government. On May 16, 2007, President Bush signed an executive order prohibiting governmental agencies from entering into contingent fee contracts for legal or expert witness services.[158]

In addition to ensuring that lawyers representing the government are neutral when exercising police powers, courts must recognize and avoid sanctioning the usurpation and circumvention of their states' legislative and carefully crafted regulatory schemes that address public health issues.

D. Regulation through Litigation

At the heart of many of these lawsuits are governmental authorities seeking funding so that they can continue providing or perhaps even expanding services that the public needs and that they may be obliged to provide.[159] If they cannot afford to pay for these services, they should increase their revenues, cut their services, or operate more efficiently. Otherwise, government officials will routinely look to the courts to achieve the regulatory and tax outcomes they desire through litigation, "rather than through the normal—and constitutionally appropriate—legislative channels" because they do not believe in the political will to approach the legislature or they believe that courts represent the path of least resistance to achieve their goals.[160] Such court-sanctioned usage of the tort system violates the fundamental principle of the separation of powers. With a public thirsty for benefits of all kinds, the court system should not be turned into "an oasis for governments that do not or cannot fulfill their public obligations because of political or fiscal irresponsibility."[161]

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157. *Clancy*, 705 P.2d at 351.

158. *See* Exec. Order No. 13,433, 72 Fed. Reg. 28,441-42 (May 16, 2007) ("To help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States.").

159. *See, e.g.*, Court's Decision, *supra* note 121, at 171 ("The State urges the Court . . . to design an abatement plan 'consistent with the evidence in this case and the public health needs' . . . [suggesting] that [it] could include, *inter alia*, 'education, prevention, identification, hazard reduction, and monitoring' . . . .") (citations omitted).

160. Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 490 (2002) (citing Michael Debow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 565 (2001)).

161. *Id.* at 490-91. We are not saying that governmental entities should never resort to the tort of public nuisance; it has its place. But we do think that they should not seek massive damages for the past sale of legal products that only became a health hazard because property owners negligently allowed them to deteriorate.

Another problem with state attorneys general using contingency fee agreements is the "end-run" the lawyers make around the state's legislative procurement process. By using contingency fee agreements, state attorneys general are able to avoid asking the state legislature for appropriations to file the lawsuit,[162] and in the process they create the illusion that the lawsuit is being pursued at no cost to the taxpayers. With respect to the lead paint litigation, Motley Rice set its sights on manufacturers of lead pigment, and Rhode Island became its accomplice by allowing a private law firm to bring suit instead of resolving the issue through legislation. Did Rhode Island's attorney general bring the suit to further the will of the state or merely as a possible means to raise new revenue?

In 1991, Rhode Island's General Assembly directly addressed the state's lead paint problem when it created a "comprehensive approach," called the Lead Poisoning Prevention Act (LPPA),[163] to address potential dangers of lead paint after considerable debate, research, taking of testimony, and balancing of policy considerations.[164] In 2003, the General Assembly supplemented its efforts to address childhood lead poisoning by creating and enacting the Lead Hazard Mitigation Act (LHMA).[165] That legislation, in turn, has been implemented through extensive state regulations.[166] These acts reflect the state legislature's policy decisions about how to reduce lead hazards found in homes, buildings, and other dwellings in

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162. *See, e.g.*, City & County of S.F. v. Philip Morris, Inc., 957 F. Supp. 1130, 1136 n.3 (N.D. Cal. 1997) (finding unconvincing "plaintiff's argument that, as a matter of public policy, a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources with the wealthy [corporate] defendants").

163. *See* R.I. DEP'T OF HEALTH, RULES & REGULATIONS FOR LEAD POISONING PREVENTION, R23-24.6-PB, §§ 6.1 (setting standards for lead in paint), 11.1 (applicability and scope of lead hazard reduction rules), 12.1 (identifying approved lead hazard reduction techniques for painted surfaces) (2001). The LPPA directed RIDOH to "promulgate regulations for acceptable environmental lead levels in dwellings . . . including standards for lead on painted surfaces . . . ." R.I. GEN. LAWS § 23-24.6-5(c) (1991).

164. *See* R.I. GEN. LAWS § 23-24.6-2(7) (1991). The LPPA was enacted to protect the public from the health hazards associated with lead paint exposure by establishing "a comprehensive program to reduce exposure to environmental lead." *Id.* § 23-24.6-3 (amended 2002).

165. R.I. GEN. LAWS § 42-128.1-1 to -13. Rhode Island's legislature passed the LHMA after the Attorney General filed its public nuisance lawsuit in 1999 and after the first trial of that case in 2001. Yet, despite knowing the Attorney General's belief that lead pigment manufacturers should be made responsible, the legislature chose not to change or alter its public policy of placing full responsibility for the state's lead paint problem on property owners.

166. *See generally* 14 R.I. CODE R. § 000.013 (Weil 2005) ("Rules and Regulations for Lead Poisoning Prevention"); 96 R.I. CODE R. § 200.003 (Weil 2005) ("Lead Hazard Mitigation Regulations").

Rhode Island.[167] They also reflect the legislature's determination that complete removal would be enormously expensive; would on balance provide no greater public-health benefits than the legislative "lead safe" approach; and would actually create additional hazards resulting from the dust and debris generated by the lead-paint removal efforts.[168] The LPPA, LHMA, and the regulations promulgated by the Rhode Island Department of Health (RIDOH) determined that the appropriate means to address the state's lead paint problem was to require property owners to maintain painted surfaces so that old lead paint remained covered or intact.[169]

In March 2003, however, the Rhode Island court ruled that the Attorney General was not bound or constrained by the statutory and regulatory definition of lead poisoning or by what constitutes an elevated blood lead level (BLL) because his claim was based on the "common law."[170] While this decision liberated the trial court's creativity from the constraining orbit of legislative authority, it is inconsistent with the role and responsibility of the judiciary under traditional common law principles and Rhode Island law. Essentially, the court stressed that the statutes and regulations were "silent" regarding the liability of manufacturers, and then construed that

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167. *See, e.g.*, R.I. GEN. LAWS § 23-24.6-26 (stating that "[a]ll [RIDOH] rules and regulations promulgated by the director shall provide for the use of 'lead safe' reduction as the preferred method where possible to meet the requirements of this chapter").

168. *See* R.I. DEP'T OF HEALTH, EXPANDING CHILDHOOD LEAD POISONING IN RHODE ISLAND (1994). The legislature, unlike the attorney general, also sought to address alternative sources of lead. *See* R.I. GEN. LAWS § 23-24.6-12(1) (instructing RIDOH to develop and promulgate regulations for "[c]onducting comprehensive environmental lead inspections" of properties for lead hazards including procedures for "[i]nspecting, testing, and/or sampling of drinking water, household dust, painted surfaces, soil, and/or other appropriate fixed surfaces that may contain lead").

169. The LPPA directed RIDOH to "promulgate regulations for acceptable environmental lead levels in dwellings . . . including standards for lead on painted surfaces . . . ." R.I. GEN. LAWS § 23-24.6-5(c). It also requires that all rules and regulations promulgated by RIDOH "shall provide for the use of 'lead safe' reduction as the *preferred method* where possible to meet the requirements of this chapter . . . ." R.I. GEN. LAWS § 23-24.6-26 (emphasis added). RIDOH's regulations require removal of old lead paint only where it is a "significant lead hazard." R.I. GEN. LAWS § 23-24.6-17(a)(1); RULES & REGULATIONS FOR LEAD POISONING PREVENTION, R23-24.6-PB, § 1 (defining significant lead hazard). Old lead paint that is covered by layers of non-lead paint and is intact is not a hazard and need not be removed. *See* RULES & REGULATIONS FOR LEAD POISONING PREVENTION, R23-24.6-PB, § 6.1 (setting standards for lead in paint), 11.1 (applicability and scope of lead hazard reduction rules), 12.1 (identifying approved lead hazard reduction techniques for painted surfaces).

170. Whitehouse v. Lead Indus. Ass'n, Inc., No. 99-5226, 2003 WL 1880120, at *5, 11 (R.I. Super. Ct. Mar. 20, 2003); *see also* Transcript of Hearing at 23, Whitehouse v. Lead Indus. Ass'n, Inc. (R.I. Super. Ct. argued Aug. 31, 2006) (No. 99-5226) ("You also said in March of 2003 that the Court did not find that the plaintiff in this common law claim is required to adopt the statutory and regulatory definition of lead poisoning or of elevated blood levels. . . . But what you said is the Department of Health can define lead poisoning any way they want in their rules and regulations, but that's got no bearing on how it's defined here").

"silence" to infer a legislative intent to permit common law suits against manufacturers to proceed.[171]

Clearly, the Attorney General's litigation is at odds with the state legislature's public policy choices set forth in the LPPA, LHMA, and regulations promulgated to address lead paint problems. In fact, LPPA defines when lead paint becomes a "public nuisance."[172] Through its regulations, the legislature pervasively regulated the field of childhood lead poisoning and also provided for the mitigation of lead hazards in Rhode Island's homes, buildings, and other dwellings. In the face of this comprehensive framework, the creation of a "common law" system that sets *different priorities*, against *different persons*, and applies *different standards* to redress the *same problem* is just wrong. Under these circumstances, one has to question the motive of the Attorney General and his "special assistants" for bringing the litigation. As Robert B. Reich, Secretary of Labor during the Clinton Administration, sagely observed, "[t]he strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy."[173]

Such a decision is fundamentally one of public policy, and in the judicial sphere, it can only be explained if it can be plausibly derived from policies that originate outside the courtroom. As Justice Linde explained in his critical article: "[T]he explanation must identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well or better than legislators, but it cannot derive public policy from a recital of facts."[174]

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171. Court's Decision, *supra* note 121, at 58 (ruling that the LPPA is inapplicable because it does not "address in any fashion the actions of these defendants" and because "[t]he statutes and regulations do not authorize the existence of the claimed public nuisance"). *But see* DeSantis v. Prelle, 891 A.2d 873, 881 (R.I. 2006) (stating that courts are not "to assume a legislative function when the General Assembly chooses to remain silent," because that "would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government").

172. *See* R.I. GEN. LAWS § 23-24.6-23(d) (citing *id*. § 34-44-2 and defining the circumstances under which such situations are created, stating that property "may be considered . . . a public nuisance" only after the issuance of a second notice of violation "for failure to meet applicable lead hazard reduction [regulations]").

173. Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22.

174. Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994). According to Justice Linde,

> Style shapes how a court functions as well as how it is perceived. The decisive difference, to repeat, is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles

III. LITIGATION AGAINST LEAD PAINT AND PIGMENT MANUFACTURERS

Lawsuits against former lead pigment manufacturers are premised on new research that associates subtle neurological and psychological impairments in children with elevated BLLs at low levels. While federal and state laws and regulations enacted beginning in the 1970s[175] virtually eliminated new releases of lead into the environment, these laws did little to abate all the lead placed into the environment during the last 400 years. Plaintiffs seek to make the remaining former manufacturers solely responsible for abating 400 years' worth of lead paint use. Moreover, plaintiffs seek to make them liable even though many states and municipalities have enacted regulations requiring landlords to maintain existing lead paint in a manner that does not create a hazard, because lead-based paint only becomes a health hazard if it is allowed to deteriorate.[176]

Manufacturers have raised a number of defenses. They argue that they have no control over the building or home causing the nuisance.[177] They point out that the product at issue was legally made and sold anywhere from 40 to 300 years ago—and that their control over the product ended when it was sold. They argue that they were not the ones who applied it to the buildings or allowed it to deteriorate to the point of being a hazard. They claim that they have no legal right or ability to force property owners to maintain lead paint in a safe condition—that legal responsibility belongs to the current landlords. Finally, they argue that the lawsuits are about private rights as compared to a public right common to all people.[178] The rest of this Article discusses four recent developments: trial decisions in Wisconsin, California, and Rhode Island, and appellate review on a motion to dismiss in New Jersey.

A. The Wisconsin "Solution"

The City of Milwaukee filed a lawsuit against Mautz Paint (now part of Sherwin-Williams) and NL Industries in 2001 seeking millions of dollars

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without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.

175. *See* Faulk & Gray, *supra* note 10, at 1130-35.

176. *See infra* Subsection III.C.5. *See also In re* Lead Paint Litig., 924 A.2d 484, 502 (N.J. 2007) (stating that lead paint is only a hazard "if it is deteriorating, flaking, or otherwise disturbed"). Clearly, landlords are in better positions to prevent the hazard by properly maintaining the paint.

177. *See supra* Subection I.B.4.

178. At issue in these cases is the right to be free of lead paint in private residences. It is not the general public that is allegedly injured, but specific individuals or classes of individuals. *See supra*, Subsection I.B.1.

to abate lead paint in roughly 41,000 Milwaukee homes.[179] The suit was originally based on public nuisance and false advertising for allegedly failing to warn the public of the dangers of lead-based paint,[180] but the false advertising and conspiracy claims were quickly dismissed.[181] The trial court dismissed the rest of Milwaukee's case in 2003 because the City could not prove that the defendants' conduct or products substantially caused the injury. The court held that the City failed to prove that a defendant's paint was present on any property and that the defendants' conduct somehow caused the paint to become a hazard to the City's children.[182] Milwaukee appealed, and the Wisconsin Court of Appeals reversed the trial court in 2004, holding that the issue of whether the defendants' product and conduct contributed to the harm was a question of fact for a jury to decide.[183] The defendants appealed, but their petition to the Wisconsin Supreme Court was dismissed in 2005.[184] In June 2007, in a trial against NL Industries, a jury decided that the presence of lead paint on houses amounted to a public nuisance, but that NL Industries' conduct did not cause the nuisance.[185]

B. California Litigation

City officials in Oakland and San Francisco joined other California counties and municipalities in 2000 to file a lawsuit in Santa Clara County against eight U.S. paint and pigment manufacturers, the Lead Industries Association, and "up to 50 fictitiously named companies."[186] In their com-

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179. Tom Held, *City's Lawsuit against Lead Paint Makers Can Go to Trial; State Appeals Court Overturns '03 Dismissal, Orders that Jury Decide on Nuisance Claim*, MILWAUKEE J. SENTINEL, Nov. 10, 2004, at B1.

180. *City's Lead Paint Lawsuit Dismissed*, BUS. J. OF MILWAUKEE, July 29, 2003.

181. Tom Held, *Judge Dismisses Lawsuit Against Lead Paint Companies; Ruling Leaves Milwaukee City Officials Weighing Legal Options*, MILWAUKEE J. SENTINEL, July 30, 2003, at B1.

182. Mem. from Rudolph M. Konrad, Deputy City Att'y, City of Milwaukee to Jennifer Gonda, Legis. Fiscal Manager-Sr., City of Milwaukee, Regarding Assemb. B. 778 Relating Actions against Manufacturers, Distributors, Sellers, and Promoters of Products (Nov. 5, 2005), *available at* http://legistar.milwaukee.gov/Attachments/766aca86-56d9-4d4b-aea5-9ce37159b0d2.DOC.

183. *Id.*

184. *Id.* Though the Wisconsin Supreme Court's *Thomas* decision is not directly applicable to Milwaukee's case, in light of the court's decision in that case, Mautz Paint and NL Industries dropped their request to the Wisconsin Supreme Court to stop the City's lawsuit. Alliance for Healthy Homes, Alliance Alert, *Wisconsin Supreme Court Gives Green Light to Teenager's Lawsuit Against Lead Pigment Companies* (Aug. 2005), *available at* http://www.afhh.org/res/res_alert_archives_aug05.htm#thomas (last visited Apr. 1, 2008).

185. Marie Rohde, *Lead Paint Suit Fails*, MILWAUKEE J. SENTINEL ON-LINE, June 22, 2007, http://www.jsonline.com/story/index.aspx?id=623662.

186. County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

plaint, they alleged that the defendants engaged in a concerted campaign opposing government regulations by challenging warnings, attacking the credibility of public health workers, and orchestrating a public relations campaign to mislead consumers. The trial court dismissed the plaintiffs' claims in 2003, and the plaintiffs appealed to the California Sixth District Court of Appeals.[187]

In reversing the superior court, the appellate court held that the public nuisance cause of action was not premised on a product defect or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition (i.e., the defendants' liability was based on their promotion of lead paint for interior use). While the court agreed that the negligence and strict liability claims could not be supported without pleading that the buildings were physically injured, it held that the plaintiffs should have been allowed to rectify that error. It also reinstated the fraud claim based on evidence that defendants knew, but concealed, the fact that low levels of lead exposure could be hazardous. Moreover, it held that the claim was not barred by the state's three-year limitations period.[188] In June 2006, the California Supreme Court refused to review the appellate court's decision, and the case was remanded for further proceedings.[189] In another twist in this case, on May 22, 2007, the trial judge considered and granted the defendants' motion to void the contingent fee contract between the governmental entities and the private attorneys hired to prosecute the public nuisance litigation on their behalf.[190] The plaintiffs' halted prosecution of their case until this issue is resolved.

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187. Rita Cicero, *Calif. Appeals Court Reinstates Claims in Lead-Paint Lawsuit*, 23 Toxic Torts Litig. Rep. 3 (Mar. 15, 2006) (discussing County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006)).

188. County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006). The government entities sued the paint manufacturers on behalf of the public in March 2000, long after the industry had pulled lead paint from the market, but only two years after scientific studies showed in 1998 that even low-level exposure could cause serious physical harm. Since the complaint was filed in 2000, the plaintiffs filed their action within the three-year window, and their claims were not time-barred.

189. Mike McKee, *Calif. High Court Denies Review of Lead Paint Case*, THE RECORDER, LAW.COM, June 23, 2006, http://www.law.com/jsp/article.jsp?id=1150-967116599.

190. *See supra* Part II. On April 8, 2008, an appellate court ordered the trial court to vacate its order voiding the contingent fee contracts after holding that the California Supreme Court's decision in *People ex rel. Clancy v. Superior Court of Riverside County*, 705 P.2d 347 (1985) was distinguishable on the facts of the case and did not "bar all contingent fee arrangements in public nuisance abatement actions . . . ." County of Santa Clara v. Superior Court, No. H031540, 2008 WL 934044, at *1 (Cal. Ct. App. Apr. 8, 2008) (holding that Clancy's prohibition is not applicable when some evidence of control is established).

C. The Showdown in Rhode Island

On a cold gray February day in 2006, a Rhode Island jury found three companies liable for creating a "public nuisance" during the century before residential sale of lead paint was banned in 1978.[191] In that case, *Rhode Island v. Atlantic Richfield Co.*,[192] the Attorney General of Rhode Island sued four former manufacturers of lead pigment. The case made national headlines because, for the first time, lead pigment manufacturers were found liable for problems allegedly caused by poorly maintained lead-based paint in privately owned homes.

One year later, on another cold gray February day, the Rhode Island trial court issued a long-awaited decision regarding the defendants' post-verdict motions. In a 198-page decision, the court found that a multitude of alleged legal errors by the court and alleged misconduct by the state's trial team either did not occur or were not sufficiently serious to require a new trial. In the same decision, the court ruled that the state's "non-delegable" duty to perform lead abatements was in fact *partially* delegable—so long as the state remained ultimately responsible.[193]

The court's ruling was much more than a lengthy disposition of procedural and substantive issues regarding the trial and the verdict. It dispensed with one of the most fundamental requirements of American tort law when it held that merely *manufacturing and marketin*g a product is sufficient to impose liability on a defendant—even in the absence of any evidence that a defendant's product harmed anyone where the nuisance allegedly exists. With this broad stroke, the court ruled that neither product identification nor evidence of specific injuries attributable to a particular defendant is necessary before a defendant is ordered to abate a nuisance.[194] As a result, this Rhode Island court has created a tort where liability is based upon *unidentified* ills allegedly suffered by *unidentified* people caused by

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191. *See* Peter B. Lord, *3 Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006, at A1 [hereinafter Lord, *3 Companies Found Liable*]. *See also* 42 Fed. Reg. 44,192 (Sept. 1, 1977); *CPSC Announces Final Ban On Lead-Containing Paint*, Release No. 77-096 (Sept. 2, 1977), *available at* http://www.cpsc.gov/cpscpub/prerel/prhtml77/77096.html.

192. No. 99-5226 (R.I. Super. Ct. 1999).

193. Court's Decision, *supra* note 121, at 17-18.

194. According to the Court,

> based on the evidence that a public nuisance exists . . . and on common sense, the jury properly could have concluded that whoever sold and promoted lead pigment in Rhode Island proximately caused the public nuisance. In effect, the sale and promotion would complete the chain of causation that begins at manufacture and ends with the existence of the public nuisance.

Id. at 17-18. We wonder if "common sense" also dictated that the court ignore all of the landlords and property owners who improperly maintained the lead-based paint or allowed it to deteriorate to where it became a health hazard.

unidentified products in *unidentified* locations. There are no rational restraints on a jury's discretion or a court's power to impose undefined and unlimited liability if neither the scope nor the extent of the alleged nuisance is relevant. Such a vague rule unfairly forces defendants to defend claims without the most basic information necessary to evaluate them. If this decision is upheld, Rhode Island's products liability law has been swallowed up by the amorphous concept of "public nuisance."

1. *Background of the Rhode Island Litigation*

The extensive trial held in 2006 was not the first trial in this case. In 2002, a jury deadlocked 4-2 against the Attorney General's original public nuisance claim.[195] The jury deadlocked because it was unable to agree as to whether the Attorney General had established the existence of a public nuisance.

In response, the Attorney General persuaded the court to lower the threshold for finding a public nuisance. Additionally, in the second "all-in" trial, the court allowed the Attorney General to try the manufacturers not on their own conduct, but on the conduct of their trade associations—conduct that did not occur in Rhode Island but rather happened in other states.[196] In this second trial, the Attorney General also refused to disclose new evidence that, by the state's own standards, the childhood lead poisoning "problem" in Rhode Island was *eliminated* before the trial ended.[197] In spite of this evidence, known only to the state, the Attorney General argued to the jury that the level of childhood lead poisoning in the state reached a "plateau," and was no longer declining.[198] Thus, the jury was deprived of critical evidence—unknown to defendants until after the verdict was returned—that flatly undermined the presence of the "nuisance" the state claimed existed.

As a result of the court's jury instructions and the Attorney General's trial tactics, the jury's decision against the defendants now seems predictable and, indeed, inevitable. Although the second jury was also initially deadlocked 4-2 in favor of the defense, post-verdict interviews indicated that the court's jury instructions essentially directed a finding of liability.[199] According to one juror, the jury instructions "didn't give the paint companies much of a window to crawl through."[200]

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195. Peter B. Lord, *Trailblazing Lead-Paint Trial Ends in Deadlock*, PROVIDENCE J., Oct. 30, 2002, at A1.

196. *See infra* Subsubsection III.C.2.

197. *See infra* Subsubsection III.C.4.

198. *See infra* note 253.

199. *See* Lord, *3 Companies Found Liable*, *supra* note 191.

200. Peter Krouse, *Verdict Raises Risk for Paint Companies: Lead Hazard Case in Rhode Island Could Prove Pivotal*, THE PLAIN DEALER, Apr. 2, 2006, at A1.

2. *The Jury Charge*

a. Did the Court Improperly Define "Public Nuisance" as the "Cumulative Presence" of Lead?

The trial court defined a public nuisance injury simply as "the *cumulative presence* of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island."[201] This wrongly suggests that an injury to a large number of individuals is the same as an injury to the community as a whole.[202] Case law clearly states that "harm to individual members of the public" (no matter how many) is not the same as harm "to the public generally."[203] As one court explained, "[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence."[204]

The trial court also required no proof (and the state offered none) that the "nuisance" existed anywhere except in *private residences*. Accordingly, the alleged problems did not threaten the exercise of any rights held by the public at large, such as the use of public buildings or resources, but rather related to the exercise of *private* rights by *private* individuals in their *pri-*

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201. Jury Verdict Form at 1, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. Feb. 22, 2006) (No. 99-5226) (Question No. 1) (emphasis added); *see also* Jury Instructions at 10, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. Feb. 13, 2006) (No. 99-5226) ("You are being asked whether the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island constitutes a public nuisance."); Peter B. Lord, *Lead-Paint Case Now in Jury's Hands*, PROVIDENCE J., Feb. 14, 2006, at B2 (quoting Judge Michael A. Silverstein).

202. The court altered, even ignored, the language in the RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979), which states that "[a] public right is one common to all members of the general public," when it instructed the jury that:

> A right common to the general public is a right or an interest that belongs to the community-at-large. It is a right that is collective in nature. A public right is a right collective in nature and not like an individual right that everyone has not to be assaulted, defamed, or defrauded, or negligently injured.

Jury Instructions, *supra* note 201, at 11. Defendants' requested instruction that conduct "does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons," RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979), was denied. In fact, the court further instructed that "[w]hen you consider the unreasonableness of the interference, you may consider a number of factors including . . . the numbers of the community who may be affected by it . . . ." Jury Instructions, *supra* note 201, at 12.

203. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1115 (Ill. 2004); *see also In re* Lead Paint Litig., 924 A.2d 484, 497 (N.J. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979)) ("[T]he right with which the actor has interfered must be a public right, in the sense of a right 'common to all members of the general public,' rather than a right merely enjoyed by a number, even a large number, of people.").

204. Nolan v. City of New Britain, 38 A. 703, 706 (Conn. 1897).

vate abodes.[205] Since no "collective" right was impacted that applied to the general public, the trial court's instructions overstepped the bounds of public nuisance as defined by the common law and dissolved the distinction between public and private nuisance as separate causes of action.[206]

b. Did the Court Improperly Tie Its Definition of "Unreasonable Interference" to the Mere Presence of Harm and Not to a Defendant's Conduct?

The court instructed the jury that "either a present harm or the potential for a likely future harm" was enough to support a finding of a public nuisance.[207] The jury was told that it could find "unreasonable interference" so long as it found that children "ought not to have to bear" the injury of lead poisoning; there was no requirement to find that the defendants engaged in any unreasonable conduct.[208] This instruction erroneously suggests that it "is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another."[209]

According to the court's jury instructions, a public nuisance concerns more than the community's right to be free from harm caused by existing conditions. Specifically, the court instructed the jury that a public nuisance can exist if it finds that the public ought not to have to bear the *possibility* that someone might be harmed in the future "as a result of a condition

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205. *In re Lead Paint Litig.*, 924 A.2d at 436 (noting the "inescapable fact that carefully read, the claims asserted [can] . . . be cognizable only as products liability claims").

206. Thus, for the first time in common law jurisprudence, the Rhode Island court held that the characterization of a nuisance as "public" or "private" depends not upon its impact on rights held by the community at large but rather upon the number of persons allegedly affected by the problem. *See supra* Subsection I.B.3.

207. Jury Instructions, *supra* note 201, at 11-12.

208. *Id.* at 11 ("Interference is unreasonable when persons have suffered harm or are threatened with injuries that they ought not have to bear."); *see also id.* at 12 ("When you consider the unreasonableness of the interference, you may consider a number of factors including the nature of the harm, the numbers of the community who may be affected by it, the extent of the harm, the permanence of the injuries and the potential for likely future injuries or harm.").

209. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1116 (Ill. 2004). A public nuisance requires interference with a public right. *See, e.g.*, Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957-58 (R.I. 1994); Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980). "Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public." RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

which exists today."[210] Accordingly, Rhode Island's "standard for finding a public nuisance speaks only of 'likelihood' of future harm and not of absolute certainty."[211] Thus, to be liable, *a nuisance does not have to presently exist*. Under these instructions, "intact" paint, which presents no present risk, can also qualify as a public nuisance.[212] Most courts, however, have concluded that there is no public right to be free from the threat that someone may use a legal product in a way that creates risk of harm to another.[213]

c. Did the Rhode Island Trial Court Improperly Conclude that Lack of Proof of "In-state" Sales Does Not Bar Liability?

In one of the most incredible developments of the trial, the court instructed the jury that it could find the defendants liable *even if the Attorney General was unable to show that they sold lead pigment in Rhode Island*. The court instructed the jury that it "need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable."[214] In fact, the court did not even require any defendant to have "sold lead pigment in Rhode Island."[215] Common sense assumptions and speculation by experts that sales *must have occurred* were enough to support submission of the case to the jury[216]—even when the only evidence

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210. Jury Instructions, *supra* note 201, at 11-12 ("The threat of likely future harm means harm likely would occur in the future which the public ought not to have to bear as a result of a condition which exists today.").

211. Court's Decision, *supra* note 121, at 37 (stating that "while it may be true that some paint which contains lead pigment has lasted 300 or 400 years, the jury was entitled to conclude that even intact paint is likely to cause harm").

212. *Id.*

213. *City of Chicago*, 821 N.E.2d at 1114-15. In dismissing a public nuisance claim against gun manufacturers in New Jersey, the United States Court of Appeals for the Third Circuit wrote, "[i]f defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity." Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001).

214. Jury Instructions, *supra* note 201, at 14; *see also* Court's Decision, *supra* note 121, at 13 (citing State v. Lead Indus. Ass'n, No. 99-5226, 2005 R.I. Super. LEXIS 95, at *2 (R.I. Super. Ct. June 3, 2005)) ("[T]he Court found that the State did not have to 'identify a particular paint containing a lead pigment manufactured by any particular defendant at any particular location within the State.'"). "The Court finds that this type of argument is merely a restatement of an argument that the Court has rejected in the past." *Id.*

215. Jury Instructions, *supra* note 201, at 14 ("[N]or do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that the conduct of such Defendants, or of any of them, is a proximate cause of a public nuisance.").

216. Although no evidence of any particular product sales was adduced, the court relied upon the following testimony of one of the state's expert witnesses, Dr. David Rosner, who, when asked if his testimony was just assumptions, testified:

allegedly regarding sales by one of the defendants was (1) the existence of an agreement with a Massachusetts company allowing the company to sell its product in Rhode Island, and (2) the presence of branch stores that were opened *after* the defendant stopped manufacturing lead pigment.[217]

Thus, according to the Rhode Island trial court, the jury could find a defendant liable for a public nuisance even if there is no proof that a defendant sold lead paint in Rhode Island. Although the court characterized the evidence as "circumstantial," the testimony was, on its face, based upon assumptions by an expert witness, not sales records or even anecdotal evidence of sales by customers. Indeed, the court even allowed the jury to infer "circumstantially" that agreements with third parties, from a different state that permitted sales in Rhode Island, necessarily resulted in such transactions—an inference that in a jurisdictional or commercial litigation context would never be indulged.[218] Moreover, instead of limiting testimony to defendants' conduct in Rhode Island, the court allowed the Attorney General to present evidence of the conduct of the defendants and their trade associations' activities in other states,[219] and then instructed the jury to con-

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> Well, it's . . . more than an assumption. I know you had stores here. You had one over on Traverse Street, you had a warehouse, you had salesmen here. You had outlets for ACME paint and other paints here. You had a representative who lived in Pawtucket who was here selling something, *and I would assume it's various products of Sherwin Williams*, or I know was various products of Sherwin Williams. And *I must assume that you were selling what you usually advertised in throughout the nation, you were selling the same products here. So, therefore, I would assume that they're here*.

Court's Decision, *supra* note 121, at 29 (emphasis added). The entirety of the state's causation evidence is based on this expert's legally inadequate conclusory opinion. Mere assumption of what occurred is not evidence. *See* Montuori v. Narragansett Elec. Co., 418 A.2d 5, 11 (R.I. 1980) (stating that directed verdict was appropriate where expert acknowledged he was speculating).

217. The court found sufficient evidence of sales of lead pigment by one defendant based on Dr. Rosner's testimony that the defendant had branch stores and an independent dealer selling lead pigment in Rhode Island. Court's Decision, *supra* note 121, at 22-23. However, the court ignored Dr. Rosner's testimony that he did not know when those Rhode Island stores opened or that they in fact opened in 1958—the year Dr. Rosner testified that this same defendant stopped manufacturing lead pigment. *See* Trial Transcript at 147-48, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. argued Jan. 20, 2006) (No. 99-5226). Thus, the only evidence of Rhode Island sales of lead pigment for this particular defendant was a contract giving a Massachusetts company the right to sell in Rhode Island. Nevertheless, according to the court, the expert and jury were "entitled to infer" Rhode Island sales from this showing. Court's Decision, *supra* note 121, at 29 n.28.

218. Court's Decision, *supra* note 121, at 29 n.28.

219. *Id.* at 28, 29-30. The court's conflicting positions on the use of trade association evidence are difficult to reconcile:

> Although the Court ruled that acts of the [trade association] are not attributable to the Defendants, this is still relevant circumstantial evidence to show the extent that the lead-pigment products of [trade association] members were marketed nationally and in Rhode Island. Such evidence permitted the jury to infer that the [trade

sider that evidence in determining whether any of the defendants may have sold their products in Rhode Island.[220] While the court referred to this piecemeal collection of assumptions and speculations as a "mosaic of circumstantial evidence,"[221] seeing a cohesive design in such speculations requires considerable artistic liberty.

3. *The Jury Instructions and the Elements of a Public Nuisance*

a. Proximate Cause and the "Creation" of a Nuisance

To prove "proximate cause," the court required the Attorney General to prove that each defendant was a "substantial cause" of the public nuisance and that the public nuisance was a substantial factor in harming the public.[222] More specifically, the court instructed the jury that a defendant was liable if it substantially contributed to the "creation" of the public nuisance.[223] As a standard for evaluating liability, "the role of the 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien."[224]

Unfortunately, the Rhode Island court never instructed the jury about what constituted creation. Instead, the court permitted the Attorney General to argue that the defendants broadly created the nuisance by manufacturing lead pigment and placing it into the stream of commerce. Surely, merely manufacturing and selling a product cannot be sufficient to impose liability.

> association] was marketing the products of its members—the Defendants—who admittedly were in the business of manufacturing and selling lead-pigment. *So while the [trade association's] activities are not attributable to any Defendant, the evidence is still competent to demonstrate that the Defendant's products reached Rhode Island.*

Id. at 28 (citations omitted) (emphasis added). How evidence "not attributable to any Defendant" can be used to support a claim against those same defendants seems inexplicable, to say the least. *Id.*

220. Jury Instructions, *supra* note 201, at 14 ("Instead, you must consider the totality of each Defendant's conduct . . . ."); *see also* Court's Decision, *supra* note 121, at 12-13.

221. Court's Decision, *supra* note 121, at 30 ("Therefore, the Court finds that a sufficient mosaic of circumstantial evidence exists on this record to support a Rhode Island nexus, and will not order a new trial on this basis.").

222. Jury Instructions, *supra* note 201, at 12.

223. *Id.* at 13-14. "The act or failure to act by a Defendant need not be intentional or negligent to impose liability for creating a public nuisance. . . . Liability for public nuisance arises when the Defendant's acts set in motion a force or chain of events which proximately cause the public nuisance." *Id.* at 14.

224. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (quoting 63 AM. JUR. 2D *Products Liability* § 593 (1984)). Traditionally, public nuisance law has not supported recovery simply because the "manufacture and sale of a product [was] later discovered to cause injury." City of Chicago v. Am. Cyanamid Co., No. 02 CH 16212, 2003 WL 23315567, at *7 (Ill. Cir. Ct. Oct. 7, 2003).

If that were so, then *any* product could be transformed into a "public nuisance" decades after it is sold—even when, like virtually all products, it produces harm only as a result of use by others and because of its own physical decay. So when does creation of a nuisance begin? How far back in the chain should the law go to impose liability?

Consider the classic "public nuisance" example of a tree that falls and blocks a public road. Everyone will agree that the fallen tree is a public nuisance—but who is responsible for creating the nuisance? Did the tree's *current owner* create the nuisance merely because it was on his property, or because he failed to maintain the tree and allowed it to become diseased, or because it died and he failed to cut it down before it fell? Was the nuisance created by a *prior owner* of the property who initially bought the tree from a store and decided to plant the tree along the road? Was it created by the *store* that sold the tree to the customer who decided to plant the tree along the road? Or was the nuisance created by the *nursery* that planted the seed, grew the tree, and sold it to a lawn and garden shop? Using the Rhode Island trial court's reasoning, the nursery is liable for creating a public nuisance merely because it placed the tree into the "stream of commerce." It is immaterial that the nursery did not know where the tree would be planted or that some future property owner would not maintain it. In fact, under the court's ruling, it is not even necessary to prove that a particular nursery sold the offending tree. It is sufficient if the nursery merely *promoted* its trees nationally because, in Rhode Island, jurors and experts are free to assume, speculate, and infer that actual sales took place within that state.

The absurdity of this result is apparent. Because all products, whether cultivated or manufactured, decay and deteriorate, and because their use and decay typically occur in a third party's possession, the law justly requires some inherent "defect" in a product attributable to the manufacturing process or, alternatively, some unreasonable misconduct by the manufacturer before liability is imposed. Otherwise, the decision becomes a mere exercise in economics and social policy, rather than justice. Naming such a socialistic transfer of wealth after a traditional common law remedy, such as "public nuisance," changes nothing. In fact, the Rhode Island trial court did not employ the common law "public nuisance" cause of action at all. Instead, it created an entirely *new* cause of action that imposed *absolute liability* under a jurisprudential alias.[225]

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225. The true character of this pseudonymous remedy is plainly revealed in the court's opinion. The court plainly held that the only evidence needed to find a defendant liable for "creating" a public nuisance is evidence that defendants manufactured and marketed lead pigment or paints containing lead pigments. So long as the defendant promoted its product nationally and had agreements that permitted others to market its products in Rhode Island, jurors were free to speculate and, indeed, *assume* that the defendants' products

Even the bare existence of a sales agreement with a Massachusetts-based company granting the right to sell products in Rhode Island was apparently sufficient to conclude that the defendant's products were actually sold to stores in Rhode Island in significant quantities.[226] Such a ruling allows "expert witnesses" to opine, assume, and speculate that actual sales occurred, and further permits jurors to base their decisions on proof that is wholly unreliable.[227] Even a courtroom observer noted the lack of evidence and questioned the reasoning of the court's decision, stating "I was present in the court room during direct and cross and no, [the State's expert] did not provide any concrete evidence of direct business transactions in RI by the defendants."[228]

By adopting the Attorney General's "cumulative presence" definition of what constitutes a public nuisance, the court did something foreign to most "common sense" observers: *it relieved the state of its burden to prove that the defendants did anything wrong*. The Attorney General was not required to prove that any particular child actually had been injured by lead-containing pigment or that any particular home in Rhode Island actually contained lead pigment manufactured by any of the defendants. Instead, the

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were actually sold in Rhode Island. See Court's Decision, *supra* note 121, at 27, where the court piles inference upon inference to build a questionable evidentiary edifice:

> The jury could properly have concluded from this testimony that the Defendants substantially participated in the sale and promotion of lead pigment nationally. Then, in combination with [the state's expert] . . . opinion that each Defendant sold and promoted lead pigment in Rhode Island, the jury could have inferred . . . that each Defendant's participation in Rhode Island was similarly substantial. . . . [T]he jury could still have concluded that the Defendants' lead pigment is still on Rhode Island buildings in substantial amounts. On the basis of the foregoing, the Court concludes that the evidence was sufficient to make a prima facie case that the Defendants substantially participated in activities which proximately caused the public nuisance.

Id.

226. *See id.* at 29 n.28 (noting that the defendant's "re-cross-examination was designed to show that the sales agency agreement only provided the Massachusetts company with a right to sell goods in Rhode Island—but did not directly prove that such sales took place. However, [the state's expert] was entitled to infer, as was the jury, that a sales agreement to sell goods in Rhode Island actually resulted in sales in Rhode Island") (citation omitted).

227. *Id.*; *see also* Waldman v. Shipyard Marina, Inc., 230 A.2d 841, 844-45 (R.I. 1967) (precluding a jury from drawing a "pyramid[ing] of inferences" and recognizing that, although a jury may be permitted to infer a fact, if the inference is reasonable, from an established fact, it may not draw a further inference from the initial inference it chose to draw); Carnevale v. Smith, 404 A.2d 836 (R.I. 1979) (finding that a motion for directed verdict should have been granted where the non-moving party relied on a "pyramid of inferences" to establish the defendant's negligence).

228. Jane Genova, *Providence Journal's Lord Reviews RI Lead Paint Ruling*, LAW AND MORE, Feb. 27, 2007, http://lawandmore.typepad.com/law_and_more/2007/02/index.html.

court allowed the Attorney General to introduce general evidence that many children had elevated blood lead levels, that lead-containing paint probably contributed to those blood lead levels, and that the defendants historically made lead paint. No individual child's condition, history, or circumstances were evaluated to determine whether, in fact, lead paint actually caused any child's injuries. No individual residences of those children were evaluated to determine whether they actually contained lead paint or whether alternative sources of lead might have caused the alleged problems. Instead, once the jury found that a defendant historically made lead paint and promoted its product, the jury *assumed* that the defendant contributed to the nuisance and *deemed* it responsible for causing the alleged harm to *all* children who suffered from lead poisoning in the state. Nothing in this unjust scenario remotely resembles the cause of action traditionally known as "public nuisance." Despite the familiar "common law" moniker, the court has, by eliminating the essential element of causation, unmistakably crafted a new and dangerous program of social insurance that merely masquerades as a tort.[229]

b. Did the Defendants' Inability to Control the Nuisance Preclude Liability?

Historically, Rhode Island courts have required plaintiffs to prove that a defendant controlled the instrumentality causing the nuisance when the damage occurred.[230] Furthermore, Rhode Island law has consistently held that once a product enters the stream of commerce, the manufacturer loses

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229. Proof of causation is a fundamental requirement of not only public nuisance but of all tort law. *See, e.g.*, Clift v. Vose Hardware, Inc., 848 A.2d 1130, 1132 (R.I. 2004); Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59-60 (R.I. 1980); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 269 (5th ed. 1984) ("A mere possibility of . . . causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.") (citations omitted). "Proof of negligence in the air, so to speak, will not do." SIR FREDERICK POLLOCK, THE LAW OF TORTS 455 (11th ed. 1920). This quote was famously cited by Justice Cardozo in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) for the proposition that negligence in the air is not a basis for imposing liability.

230. *See, e.g.*, City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) (applying New Hampshire law) ("[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise."); *see also* Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 633-34 (D.R.I. 1990) (applying Rhode Island law) ("[T]he paramount question is whether the defendant was in control of the instrumentality alleged to have created the nuisance when *the damage occurred*.") (emphasis added); Friends of Sakonnet v. Dutra, 749 F. Supp. 381, 395 (D.R.I. 1990) (emphasizing that liability for public nuisance "depends primarily on the question of control and duty to maintain" and thus, "[o]ne who controls a nuisance is liable for damages caused by that nuisance").

control over the use (or misuse) of the product and cannot be held liable for any nuisance flowing from the product.[231] By not insisting on proof that defendants controlled the circumstances that produced the nuisance, the court removed all notions of personal (i.e., landowner) responsibility by making the defendants insurers of how purchasers used and maintained their products.[232] Moreover, because the defendants do not presently have the ability to abate the alleged problem except through the voluntary cooperation of landowners,[233] they lack the ability to implement any overt remediation orders.

If the Attorney General now argues that the defendants should be required to abate the "cumulative presence" of lead paint in Rhode Island, it is unclear how such an order could be enforced. Since feasibility and consideration of the privacy interests of the public are essential elements of any remedial action, rushing to judgment before determining how such a plan can be implemented is patently premature. Unless such matters are addressed before ordering a remedy, the problem could persist indefinitely—not because the defendants are recalcitrant, but rather because the affected property owners prove uncooperative or resist the plan's implementation.[234]

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231. *See City of Manchester*, 637 F. Supp. at 656 (holding that manufacturers of asbestos cannot be held liable for nuisance because the manufacturers did not have control over the product after sale); *see also* RESTATEMENT (SECOND) OF TORTS § 834 cmt. d (1979).

232. In Rhode Island and in many other states, manufacturers of products are not the insurers of all possible subsequent uses and misuses of their products. *See* Buonanno v. Colmar Belting Co., 733 A.2d 712, 716 (R.I. 1999) ("[A] component part supplier should not be required to act as an insurer for any and all accidents that may arise after that component part leaves the supplier's hands."); LaBelle v. Philip Morris, Inc., 243 F. Supp. 2d 508, 516 n.5 (D.S.C. 2001) ("A manufacturer is not the insurer against all injuries caused by its product."); *accord* Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 190 (S.D. Ga. 1982); Zimmerman v. Volkswagen of Am., Inc., 920 P.2d 67, 73 (Idaho 1996); Sutowski v. Eli Lilly & Co., 696 N.E.2d 187, 190 (Ohio 1998); Webb v. Navistar Int'l Transp. Corp., 692 A.2d 343, 350 (Vt. 1996); Elliott v. Lachance, 256 A.2d 153, 156 (N.H. 1969).

233. Court's Decision, *supra* note 121, at 179 (acknowledging that "Defendants do not have a right simply to enter properties and abate lead" but that they can be "ordered to provide lead abatement services to those property owners who voluntarily permit them to enter").

234. Such a development is not improbable. Many property owners may understandably resist the *de facto* condemnation of property values that results from a finding that their walls are coated with lead paint. Moreover, many owners may also decide that the risks created by remedial action, such as sanding walls and replacing windows, are greater than the problems associated with covering the lead with fresh and unleaded coatings. The defendants do not have the power to compel property owners to even allow *inspections*, much less remediation, and one doubts that the state has the political will to challenge property owners who flatly refuse to cooperate. Such problems illustrate the issues that arise when courts, with their limited resources and jurisdiction, presume to solve problems that require comprehensive reconciliations of competing considerations. Such solutions are uniquely *legislative* in nature because they require truly democratic solutions generated by the representatives of the *public at large*, as opposed to the narrow perspectives generated by litigants.

To be blunt, one wonders what will happen when property owners who are not parties to the case refuse to open their doors to inspection, evaluation, and remediation. What enforceable orders, if any, can the court issue to compel their obedience when, throughout these proceedings, they have been absent? The question is critical because, unless the court's remedial order is designed to do nothing more than coerce the payment of substantial sums of money—something the court expressly denies[235]—it is entirely possible that the remedial orders will be inhibited by property owners who resist *de facto* condemnation, increased health risks caused by remediation of otherwise encapsulated lead, and the substantial inconvenience that results from abatement.

c. Did the Court Improperly Ignore the Role of Property Owners?

The defendants argued that they could not be liable for the public nuisance because it was caused by and created by poorly maintained paint, and Rhode Island law provides manufacturers immunity from lawsuits arising out of injuries caused by alterations of their products (e.g., improper maintenance).[236] Relying on established Rhode Island precedent, the defendants also argued that the property owners' failure to correct a known, dangerous condition (the deteriorated paint) superseded and eliminated their liability as a matter of law:

> [W]hen a second actor has become aware of the existence of a potential danger caused by the negligence of a first actor and the second actor acts negligently with regard to the dangerous condition, thereby bringing about an accident with injurious consequences to others, the first actor is relieved of liability. *This is so because the condition created by the first actor is merely a circumstance and not the proximate cause of the accident*.[237]

Hence, if the owners failed to perform their statutory duties, that failure should be a superseding cause of the nuisance that breaks the chain of causation. In its decision, the court acknowledged that under Rhode Island law, property owners have a duty to maintain lead-based paint in a safe manner,[238] but the court dismissed this duty as irrelevant because the duty did not exist when the lead-based paint was sold.[239] According to the court, although post-sale laws were enacted that required property owners to

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235. Court's Decision, *supra* note 121, at 177.

236. *See* R.I. GEN. LAWS § 9-1-32 (2007); *see also* La Plante v. Am. Honda Motor Co., 27 F.3d 731, 736 (1st Cir. 1994) (describing that section 9-1-32 prohibits liability where consumer failed to maintain product).

237. Walsh v. Israel Couture Post, 542 A.2d 1094 (R.I. 1988) (emphasis added); *see also* Drazen v. Otis Elevator Co., 189 A.2d 693, 695 (R.I. 1963).

238. Court's Decision, *supra* note 121, at 32 (identifying the 2002 Lead Hazard Mitigation Act and the 1991 Lead Poisoning Prevention Act).

239. *Id.*

safely maintain areas covered with lead-based paint, the laws were not "intended to 'authorize' the presence of lead paint or otherwise insulate actors such as the Defendants from public nuisance liability."[240]

Traditionally, if defendants' conduct created the condition (the presence of lead pigments), but subsequent acts of third parties (property owners allowing the paint to deteriorate) caused the state's injuries (elevated blood lead levels in children under six), the defendants would not be liable.[241] Although the court correctly noted that the laws were not designed to "authorize" the presence of lead-based paint, it ignored the fact that these statutes were passed to prevent the creation of the very "nuisance" that allegedly exists.[242] Indeed, the court's opinion disregarded a critical point, namely, that the factual foundation of the lawsuit existed only because property owners did not do what Rhode Island law required them to do.[243] Given the comprehensive and clear mandates laid down by the Rhode Island legislature,[244] the court's indifference to the responsibilities of property owners is perhaps the best illustration of its intent to not only ignore but actually *change the existing public policy declared by the state's legislature*.[245] Such a declaration dangerously threatens the careful balance between governmental branches that is essential to our form of representative democracy.

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240. *Id.*

241. Contois v. Town of West Warwick, 865 A.2d 1019, 1027 (R.I. 2004) (defining intervening causation).

242. *See* Rhode Island Lead Hazard Mitigation Regulations §§ 5.1, 9 (2003) (describing legislative determination that it is the owners' responsibility and burden to keep their properties in a safe condition); *see also id.* § 5 (setting minimum conditions that property owners must meet to keep all painted surfaces in a good condition, free from chalking, chipping, and/or peeling); 14 R.I. CODE R. 000 013 § 2.5(a)(1) & 2.5(b)(1) (Weil 2007) (requiring property owners to maintain their properties in at least lead-safe condition); *id.* § 11.1(a) (requiring property owners to abate any "lead hazards" that are identified).

243. If landowners had simply obeyed the law and maintained their properties in, at the very least, a "lead safe" condition, no health concerns would exist presently. Equally important, no health concerns will arise in the future if these statutory mandates are followed.

244. *See* Marchakov v. Champagne, No. 00-1861, 2004 WL 1542227, at *3 (R.I. Super. Ct. July 8, 2004). "[T]he Rhode Island Housing Maintenance and Occupancy Code, the Rhode Island Residential Landlord and Tenant Act, the Lead Poisoning Prevention Act, and the Rules and Regulations for Lead Poisoning Prevention were enacted to protect the public from the health risks associated with lead paint exposure." *Id*. (citing R.I. GEN. LAWS §§ 23-24.6-2 to .6-3 (1956) (1996 Reenactment)).

245. Court's Decision, *supra* note 121, at 33 (not finding "as a matter of law that the failure of property owners to prevent harm, arising from an alleged duty which did not exist when the Defendants acted, is an intervening, superseding cause").

d. Did the Court Improperly Instruct the Jury to Ignore the Role of Alternative Sources of Lead in Creating the Nuisance?

The defendants also complained that the judge improperly narrowed the scope of the trial to lead pigment contained in paints and coatings, instead of allowing the jury to consider the role of alternative sources of lead in creating the alleged nuisance. Although the harm threatened by the situation was lead poisoning, lead poisoning can be caused by exposure to *any* source of lead. Thus, the court implicitly instructed the jury to ignore critical facts, namely, that lead poisoning can result from common sources such as (1) lead in the water systems of children's homes or schools, (2) lead in the soil outside of their homes (associated with decades of leaded gasoline use) that is also tracked into their homes, or which contaminates the food they eat, and (3) children placing toys containing lead in their mouths or, in the case of sidewalk chalk, their chalk-dusted fingers in their mouths.[246] According to the defendants, the court essentially directed a verdict on these disputed issues. Although the court acknowledged that the jury could have read the instructions in the manner that the defendants requested,[247] it nonetheless held that when considered as a whole, the instructions merely advised the jury not to blame the defendants for other sources of lead.[248] Thus, this objection to its jury charge was "without merit."[249]

By precluding consideration of the myriad alternative sources of lead, and by failing to require the state to identify and quantify the extent to which those sources contributed to cause childhood lead poisoning within Rhode Island, the jury was forced to presume that lead paints were the *sole* cause of those health concerns—a presumption that flies in the face of decades of extensive action by regulatory bodies, a host of scientific evidence, and a growing body of current developments. To call the inevitable conclusion of such a truncated inquiry a *de facto* "directed verdict" is an understatement. Without the ability to determine the true nature, scope, and causes of childhood lead poisoning in Rhode Island—something a legislative body would surely develop before passing a comprehensive statute—the jury necessarily concluded that the defendants were responsible for causing the entire situation.[250] Without the benefit of the "rest of the

246. *See* Faulk & Gray, *supra* note 10, at 1085-89.

247. Court's Decision, *supra* note 121, at 97 ("It is arguably possible that the jury could have discerned from that instruction the meaning suggested here by the Defendants.").

248. *Id.* at 98. ("The juxtaposition of these two sentences should have made abundantly clear to the jury that a finding of public nuisance could be based only upon lead pigment found in paints and coatings on buildings, and that evidence of other sources of lead could be used to rebut the existence of a public nuisance.").

249. *Id.*

250. Indeed, this entire conundrum was created by an improper judicial intrusion into the legislative sphere—a sphere which, as we will see below, has already acted in a salutary

story,"[251] the jury inevitably concluded that the defendants should be required to abate all properties containing lead paint even though the beneficial impact of such abatements on the rate of childhood lead poisoning could not be determined without evaluating the role of alternative sources. Simply stated, pervasive problems with multiple potential causes cannot be solved by arbitrarily focusing on an isolated factor.[252]

4. *The False "Plateau"*

Relying on 2004 data, the Attorney General and his experts argued at trial that Rhode Island's lead-poisoning prevention programs had reached the limits of their effectiveness as shown by the fact that the reduction in the number of children with elevated BLLs stalled and had "plateaued."[253]

After the trial, the defendants complained about this argument and the government attorneys' conduct for a fundamental reason: it was simply untrue—there was no plateau. The *truth* is that there was a 47% drop in elevated blood lead levels in Rhode Island during 2005 (621 new elevated blood lead levels for all of 2005 compared to 1,167 in 2004).[254] More im-

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manner to eliminate childhood lead poisoning in Rhode Island. *See* R.I. DEP'T OF HEALTH, CHILDHOOD LEAD POISONING IN RHODE ISLAND: THE NUMBERS 2006 EDITION 17-18 (2006) [hereinafter CHILDHOOD LEAD POISONING 2006].

251. The phrase is used with all deference to and respect for noted commentator Paul Harvey.

252. Here, the court not only ignored the role of other responsible parties who needed to participate in order to effectuate a solution; it also ignored the role of other causes of lead poisoning, thereby depriving the defendants, the jury, and ultimately the court itself of the facts and resources necessary to determine the existence, scope, and causes of the problem. Without those tools, the efficacy of any remedial orders cannot be projected reliably, and there is no assurance that the vast resources consumed in litigating the controversy will produce any meaningful results.

253. Trial Transcript at 23-24, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. argued Nov. 1, 2005) (No. 99-5226); s*ee also* Trial Transcript at 80, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. argued Feb. 9, 2006) (No. 99-5226) ("[W]e also know that in 2004 more than 1,100 Rhode Island children—there's actually 1,167 children, real children with real families, who tested positive for lead poisoning. . . . We know that Rhode Island has made great strides but that today too many children still have lead poisoning. . . . But if you'll remember what Dr. Shannon told you, he was asked if lead poisoning and the treatment of lead poisoning was a public health success story, and he said yes because the numbers have come down. But he said there's been a *plateau* recently and that it is still a public health menace.").

254. *Compare* CHILDHOOD LEAD POISONING 2006, *supra* note 250, at 17, *with* R.I. DEP'T OF HEALTH, CHILDHOOD LEAD POISONING IN RHODE ISLAND: THE NUMBERS 2005 EDITION 14 (2005), *available at* http://www.health.ri.gov/lead/databook/2005_Databook.pdf. It should also be noted that the number of elevated BLLs has continued decreasing. They dropped another twenty percent during 2006 (from 621 to 500). R.I. DEP'T OF HEALTH, CHILDHOOD LEAD POISONING IN RHODE ISLAND: THE NUMBERS 2007 EDITION 4-5 (2007), *available at* http://www.health.ri.gov/lead/databook/2007_Databook.pdf.

portantly, the Attorney General knew this no later than January 31, 2006 (during the trial), when Rhode Island's Department of Health prepared a draft report documenting the 2005 numbers.[255] Yet, the Attorney General still allowed his contingent fee counsel to continue claiming that a "plateau" existed, despite knowing that the new 2005 data directly contradicted his "plateauing" theme.[256] The defendants strongly argued to the trial court that this misrepresentation was sufficient grounds for granting a new trial.

The defendants also complained about the failure of the Attorney General and his "'special assistants' to disclose this relevant and critical information after they became aware of the new data."[257] They refused to disclose the new data even though there was a discovery request seeking that very information, and efforts to obtain the new data were made during the trial.[258] The defendants claimed that the Attorney General breached his duty of candor to the court and his Rule 26(e) duty to supplement his discovery responses. They claimed that this undisclosed information went to the very heart of the issue in this trial—whether a public nuisance existed in Rhode Island—and was crucial to their case.[259]

Not surprisingly, the Attorney General's "special assistants" disagreed, claiming their obligation to supplement discovery ended in May 2005 with a discovery cutoff. Accordingly, the defendants' only recourse was to seek a court order requiring the Attorney General to supplement dis-

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255. REP. OF THE INTERAGENCY COUNCIL ON ENVTL. LEAD TO THE GOVERNOR, ELIMINATING LEAD POISONING IN RHODE ISLAND (Draft, Jan. 31, 2006) (noting that there were only 621 new cases of lead poisoning at the end of 2005). This draft report was provided as part of the Report of the Interagency Council on Environmental Lead that was submitted to Rhode Island's governor on March 17, 2006.

256. *See* Trial Transcript at 173, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. argued Feb. 9, 2006) (No. 99-5226) ("Ladies and gentlemen, we've reached a plateau. We've gone as far as the secondary measures of enforcement and the screening program can take us. And the only ones who should do more, I submit, and that would be the first time for the defendants . . . ."); *id.* at 80-81 ("Just because it's a public health success story doesn't mean that we leave the rest of the kids who have been unaffected behind. It's not getting worse, but it's not getting better.").

257. The state's "special assistants" were attorneys with the Motley Rice law firm, which holds a contingent fee interest in any recovery awarded to the state.

258. R.I. R. CIV. P. 26(e)(2) states: "A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . (B) the party knows that the response though correct when made is no longer true or complete and the circumstances are such that a failure to amend the response is in substance a knowing concealment."

259. During the trial, on January 10, 2006, the defendants asked counsel for the state to "[p]lease provide us with the most current version of the [LESS] database [Rhode Island's Lead Poisoning database]. We understand that this version will include blood lead data through the end of 2005. As the State is scheduled to conclude its case shortly, please forward this . . . ." Transcript of Hearing, Aug. 31, 2006, *supra* note 170, at 171. The state's response was "not only is this an overly burdensome request to comply with while in the midst of trial but discovery has been closed for over eight months." *Id.* at 171-72.

covery.[260] The Attorney General and his "special assistants" argued that the defendants waived their right to complain when they did not seek a court order after their request was refused.[261] They also argued that at the latest their duty to supplement ended once the trial began[262] because injecting the 2005 numbers into the case "totally changes the playing field of numbers."[263] They claimed that they should not be penalized just because the facts changed, as long as their arguments throughout trial were consistent with the facts as they existed before the trial started and before the 2005 numbers were finalized.[264]

Finally, the Attorney General and his "special assistants" tried to diminish the impact of their refusal to supplement discovery by arguing that the defendants were not harmed because (1) the defense rested its case-in-chief without putting on any evidence (obviously deciding that the jury did not need any additional information),[265] and (2) the court previously ruled that because this lawsuit was based on the "common law," the statutory definition of what constitutes lead poisoning or an elevated blood lead level under the law of Rhode Island was not relevant.[266] Yet, by refusing to supplement discovery with the knowledge that the new data harmed his case, the Attorney General knowingly denied the defendants an opportunity to show the jury, with the state's own numbers, that the alleged "plateau" was false, and he denied the jury the opportunity to base its decision on the best and most current information available.

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260. According to the Attorney General, if defendants wanted "additional discovery," beyond May 30, 2005, they were to work it out by agreement, if possible, or show the court good cause for the discovery and ask it to order the discovery. Transcript of Hearing, Aug. 31, 2006, *supra* note 170, at 189.

261. *Id.* at 245.

262. In explaining why it considered the trial date to be an appropriate date for discovery cut off, the Attorney General argued that they told defendants that he was not going to rely on "[a]ny of the 2005 data for trial." Instead, the state thought it was appropriate to limit discovery of the state's blood lead levels to 2004 "because that was the last full year of data that was available before the trial started." Pursuant to this decision, a couple of weeks before the trial started, the state produced "the LESS database with the first three quarters of the 2005 data." According to the Attorney General, he produced more than was required by the court's May 30 discovery cutoff, but did so because it was "still a couple of weeks pretrial" and they "could have the information." *Id.* at 201.

263. *Id.* at 246 ("On January 10 we sent an e-mail saying, 'Time out, we're in the middle of trial, not supplementing discovery anymore. We have been limited to the 2004 numbers. If we go and give the additional 2005 numbers, it totally changes the playing field of numbers. We don't agree. We are not going to give it to you.'").

264. *Id.* at 247.

265. *Id.* at 207-08.

266. *Id.* at 189 ("But what you said is the Department of Health can define lead poisoning any way they want in their rules and regulations, but that's got no bearing on how it's defined here.").

In considering this problem, the court aptly noted that "[i]t has been said that there are three types of lies: lies, damn lies, and statistics."[267] The court acknowledged that the Attorney General's method of determining the number of childhood lead poisoning cases changed (from what the state was telling the jury),[268] that the actual numbers on which the Attorney General was basing its plateau argument were wrong, and that the Attorney General probably should have provided the accurate numbers.[269] Still, the court sidestepped this impropriety by simply finding that "the [d]efendants did not exercise due diligence to obtain the last three months of data" and that "the data is merely cumulative of issues that the [d]efendants could have and should have raised at trial."[270]

Incredibly, the court stated that "it is difficult to see how that [disclosing the complete 2005 data to the defendants when requested] constitutes a concealment—knowing or otherwise."[271] The court went so far as to say "even if the [c]ourt assumes the worst case scenario: that the State knew the content of the 2005 LESS data; believed that it would destroy their case; and consciously took a frivolous position to ignore a properly interposed discovery request, the [c]ourt still could not find that a new trial was warranted" because the defendants chose not to present any evidence in their case-in-chief.[272] Apparently, the court believed that the Attorney General's wrongful conduct was vitiated because the defendants did not present a case-in-chief. Of course, this reasoning begs the question whether the defendants would still have chosen not to present a case-in-chief if the Attorney General fully disclosed all the relevant facts.[273] Short of clairvoyance,

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267. Court's Decision, *supra* note 121, at 150.

268. *Id.* at 155 (stating that even though the defendants "were not given notice of the changed counting methodology, they still are not entitled to a new trial" because in the court's opinion the changed methodology was merely additional evidence that the old method being used was flawed [even though it was admitted] and thus, it was "merely cumulative or impeaching" of evidence already presented).

269. *Id.* at 159 (noting that "the testimony of [the Attorney General's expert] regarding annual data would have weighed in favor of an order compelling production of the 2005 data in January, 2006").

270. *Id*. at 157.

271. *Id*. at 168.

272. *Id*. at 168-69.

273. Defendants' decision not to present a case-in-chief was made without full knowledge/disclosure that one of the state's primary trial themes—that blood lead level reductions had "plateaued"—was not true. Had the Attorney General disclosed the 2005 numbers, the defendants would have had the opportunity to show the jury (with the state's own information) that blood lead levels had significantly declined in 2005, that there was no plateau, and that the state had in fact "eliminated" childhood lead poisoning based on the state's definition of elimination. CHILDHOOD LEAD POISONING 2006, *supra* note 250, at 18. But, the Attorney General knowingly withheld that information denying the defendants the opportunity to rebut or debunk their "plateau" trial theme and show effectively that the General Assembly's comprehensive statutory program to address childhood lead poisoning was

the court can only speculate that disclosure would not have altered the defendants' decision.

Although the court correctly noted its requirement to seek a court order for additional discovery once the Attorney General refused defendants' requests, nothing in the rules "freezes" the truth.[274] The 2005 data contradicted the 2004 data on which the Attorney General was relying to make his case. Nothing in the rules *prohibited* the Attorney General from telling the court, the jury, and the defendants the truth. Even if the Attorney General was "technically" correct, this issue vividly illustrates the problem with hiring private counsel as "special assistants" to exercise the state's police powers pursuant to contingent fee agreements where private counsel is compensated, not based on whether "justice is done," but based on whether he wins his case.[275] Thus, contingent fee contracts, by their very nature, impeded the private attorney's ability to shift his focus from profit to justice. Indeed, this issue exposes the conflict between public service and private interests that undercuts the fundamental duties owed by those representing the sovereign and leads to the inevitable inquiry of whether such alliances should ever be permitted.[276]

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working. Instead of trumpeting the truth, for purposes of trial strategy, the Attorney General left the jury with the impression that the state's programs had stalled.

274. According to the United States Supreme Court, a government attorney's duty is not necessarily to prevail or to achieve the maximum recovery in a particular case; rather, "the Government wins its point when justice is done in its courts." Brady v. Maryland, 373 U.S. 83, 88 n.2 (1963) (quoting Judge Simon E. Sobeloff, Address before the Judicial Conference of the Fourth Circuit (June 29, 1934)). A government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all" and, therefore, the government attorney is required to use the power of the sovereign to promote justice for all citizens. Berger v. United States, 295 U.S. 78, 88 (1935).

275. *See supra* Part II.

276. When an attorney's fee is contingent on the outcome of the litigation, the attorney's goal (profit maximization) and the client's goal (justice) are undeniably and irrevocably in conflict. *See* Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601, 640-41 (1998) ("Those members of the plaintiffs' bar [serving as private contingent fee counsel] are now hopelessly conflicted, serving as government contractors with financial incentives proportionate to their hoped-for conquest. The sword of the state is brandished by private counsel with a direct pecuniary interest in the litigation. On the one hand, they are driven by the contemplation of a huge payoff; on the other hand, they fill a quasi-prosecutorial role in which their overriding objective is supposedly to seek justice. How could such lawyers possibly evaluate with impartiality the prospect of a settlement, say, or the tradeoff between injunctive and monetary relief?"). The question is not whether attorneys can generally be counted upon to place their client's goals above their own. Nor is the question whether they can be trusted to "do their best" to do so. Instead, the issue is whether private counsel, as human beings, can always be trusted to do so. Even if promises are made, the existence of unnecessary temptations raised by the combination of extraordinary potential rewards with extraordinary power raises obvious appearances of impropriety. *See* MODEL

Moreover, mere "technical compliance" does not excuse the Attorney General's continued knowing reliance on *incorrect data* in his closing arguments when he still claimed the existence of a plateau. According to the court in Rhode Island, such actions are allowed to stand unless the defendants can "show 'by clear and convincing evidence that the alleged fraud' prevented them from fully presenting their case."[277] Thus, because the Attorney General provided a partial year's worth of data in discovery, the court found that the "[d]efendants were not prevented from presenting data of a decline in the 2005 incidence rate."[278] It also found that the Attorney General was not relying solely on the "plateau" argument.[279] Accordingly, the court refused to grant a new trial—thereby perpetuating a recurrent theme of this unjust proceeding, namely, depriving the jury of all of the facts relevant to its deliberations.[280] This time, however, the jury was not simply denied the right to weigh disputed evidence, and it was not merely denied the right to determine the credibility of controversial proof. Instead, it was denied the right to consider evidence that flatly undermined the existence of the very harm the alleged nuisance was purported to have created—an unexpectedly high number of children with lead poisoning in Rhode Island.

Allowing such an important decision on the facts of the case to hinge upon an incomplete record—much less a technical "waiver"—seems inconceivable, especially when the complaining party is a state charged with "doing justice" through its designated counsel. Did the "profit motive" underlying the aggressive efforts of the "special assistants" cause the state's counsel to forget the admonition of the United States Supreme Court that a government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery, in a particular case? Rather, "the Government wins its point when justice is done in its courts."[281] Did the rush to claim the contingent fee bounty blur the truth that a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all" and, therefore, blur the requirement that public counsel must use the

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CODE OF PROF'L RESPONSIBILITY EC 8-8 (1983); *see also* Exec. Order No. 13433, 72 Fed. Reg. 28441-42 (May 16, 2007).

277. Court's Decision, *supra* note 121, at 160-61.

278. *Id*. at 165.

279. "However, the State based its theory upon more than merely the LESS data when it argued that primary prevention techniques are required to completely eliminate lead poisoning. The Court finds ample evidence in the record to support the State's use of that [plateau] argument . . . ." *Id*.

280. Recall that a similar result was obtained when the jury was not allowed to consider alternative causes for lead poisoning. As will be developed later, the jury was also deprived of the opportunity to consider the responsibilities of property owners and landlords.

281. Brady v. Maryland, 373 U.S. 83, 88 n.2 (1963).

power of the sovereign to promote justice for all citizens?[282] Even if the participating counsel deny these inquiries, does the situation nevertheless present an unacceptable "appearance of impropriety," especially when representation of the public interest is concerned? These questions are undeniably worthy of asking, and, as such, they surely deserve better answers than procedural gamesmanship.

5. *Predicting the Future: What Happens Next in Rhode Island?*

a. Will the Court Adjudicate the Liability of the Third Party Defendants?

Missing from the courtroom table during the first two Rhode Island trials were some—but by no means all—landlords and property owners who were joined by the defendants. Clearly, these persons had control over the alleged nuisance, and they were unquestionably required by Rhode Island law to keep their properties in a lead safe manner.[283] They were also the persons that Rhode Island law requires to abate lead hazards on their properties.[284] Most importantly, they were the ones responsible for allowing the lead-based paint in their properties to deteriorate to the point that a health hazard was created—and they were in the best position to prevent and abate any resulting "public nuisance." These critical parties were missing from the table because, at the Attorney General's request, they were severed from the trial.[285]

Now that the liability of the lead pigment manufacturers has been decided, will the court adjudicate the liability of the severed landlords and

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282. Berger v. United States, 295 U.S. 78, 88 (1935); *see also* State v. Powers, 526 A.2d 489, 494 (R.I. 1987) ("The primary duty of a prosecutor is to achieve justice, not to convict."). It is beyond dispute that this solemn duty applies "with equal force to the government's civil lawyers." Freeport-McMoran Oil & Gas Co. v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992). Thus, it has long been recognized that a government lawyer in a civil proceeding should be held to a higher standard than a private lawyer, and that in civil proceedings "government lawyers have 'the responsibility to seek justice,' and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Id.* (citation omitted).

283. *See* R.I. GEN. LAWS §§ 23-24.6-15(b)(3) & 17(a)(6); 14 R.I. CODE R. 000 013 § 11.1(a), 23-24.6-21.3(b) to (c) (Weil 2005); *see also* R.I. Lead Hazard Mitigation Rules and Regulations §§ 5.1 & 9 (2003).

284. R.I. GEN. LAWS § 23-24.6-11.1(a).

285. The state of Rhode Island actually opposed the joinder of landlords and property owners in the trial against the pigment manufacturers—despite Rhode Island's clear regulatory mandate that recognizes that such persons are primarily responsible for preventing lead exposures in their properties. Incredibly, the trial court agreed with this argument and severed the manufacturers' claims against the landlords and property owners from the proceedings. Decision and Order, Rhode Island v. Lead Indus. Ass'n, No. 99-5226 (R.I. Super. Ct. Mar. 22, 2004).

property owners? After all, these parties are already before the court and "common sense" dictates that their liability should be determined before any fair, informed, and just remedy can be crafted. Nevertheless, "common sense" aside, it remains to be seen whether the Attorney General or the court will take any early action regarding persons whose poorly maintained properties comprise the "public nuisance" the state seeks to remedy.

In its recent decision, the court "telegraphed" its intentions. With respect to these parties, the court stated: "[t]o the extent participation in an abatement remedy occurs without the participation of these unidentified liable parties, the Defendants should seek future actions for contribution, *toties quoties*, against those parties."[286] The court also stated that "[i]f the Defendants feel that it is an appropriate time to prosecute their third party complaint, they may take appropriate steps leading to a trial."[287]

Clearly, the court intends to proceed "full speed ahead" with the remedy phase of this trial without first adjudicating the liability of all potentially responsible parties. According to the court, it "sees no reason to delay the formation of a remedial plan merely because there may exist other liable parties somewhere."[288] The import of such a statement is unmistakable: it is not the court's "goal" to adjudicate the liability of all parties who contributed to the creation of this public nuisance, even those who, like the property owners, are "primarily responsible" under Rhode Island law. The court believes that if it attempted to adjudicate the liability of "every possible party who contributed to the public nuisance found by the jury . . . then abatement would never occur."[289]

To us, the court's statements are a frank admission that "fixing the problem" is more important than deciding the responsibilities of those who must do the fixing. By seeking a remedy prematurely, the court not only unfairly places the burden on those who are conveniently sued first—persons unilaterally chosen by the state—but also denies the landowners a meaningful voice in the remedy selection. The entire scenario eerily resembles a "common law" CERCLA[290] replete with all of CERCLA's ambiguities and problems, while lacking its safeguards. Surely, at least insofar as the currently joined landowners are concerned, determining their liabilities so that they may participate in fashioning remedies for which they may be responsible is not too much to ask. Although excluding the entire range of owners from the debate remains unjust, denying involvement by some own-

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286. Court's Decision, *supra* note 121, at 176.

287. *Id*. at 177.

288. *Id*. (emphasis added).

289. *Id*.

290. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675) (2007).

ers who are already parties to the suit disregards all the statutory priorities Rhode Island's legislature so carefully crafted. If such a ruling prevails, there will be little doubt that, similar to CERCLA, Rhode Island's pseudonymous "public nuisance" claim is not a tort—but rather a means to impose liabilities on "deep pockets" arbitrarily selected to ensure that a result is achieved, irrespective of whether it is just.

b. What Relief Is Available?

In its complaint, the state sought the funding of various specific programs, including (1) a public education campaign regarding the continuing dangers posed by lead, (2) lead poisoning detection and preventative screening programs, (3) treatment of lead-related health issues, and (4) detection and remediation of lead-containing paint in all pre-1978 homes in the state.[291] The defendants argued that this type of relief was monetary in nature and not available in public nuisance actions.

Public nuisance theory was not developed to allow private citizens the power to stop or abate conduct, to allow government to grow its coffers, to spread the risk of an enterprise, or to punish defendants.[292] Traditionally, under public nuisance theory, governmental entities (such as the state of Rhode Island) may only seek an injunction to stop the activity causing the public nuisance or force the party to abate the public nuisance itself, but they may not seek monetary damages.[293] In its decision, the court acknowledged that it "[could not] order an injunction for the payment of money damages,"[294] but it rejected the conclusion that the relief requested by the state was merely a "veiled request" for a monetary-based injunction.[295]

The court observed that an injunction could be issued that, in addition to requiring defendants to abate the public nuisance in the private homes, required the defendants to conduct a testing and monitoring program and/or to conduct a public education campaign.[296] Although such programs did not address or redress the nuisance directly, the court apparently believed that it had discretion to require the defendants to create and pay for such programs

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291. *See* Transcript of Hearing at 18-19, Rhode Island v. Atl. Richfield Co. (R.I. Super. Ct. argued May 22, 2006) (No. 99-5226).

292. *See supra* Section I.A.

293. Schwartz & Goldberg, *supra* note 25, at 542. Unlike government plaintiffs, private individuals cannot seek an injunction or abatement. Other members of the general public, even if inconvenienced by the public nuisance, cannot use the tort at all.

294. Court's Decision, *supra* note 121, at 177 (citing Jaffee v. United States, 592 F.2d 712, 715 (3d Cir. 1979)).

295. *Id*. The state has urged the court to appoint a special master to design an abatement plan and has requested that the abatement plan could "include, *inter alia*, 'education, prevention, identification, hazard reduction, and monitoring.'" *Id*. at 171.

296. *Id*. at 178.

"as a 'structural' injunction akin to those used in school desegregation cases."[297] The court apparently perceived that its equitable discretion enabled it to address issues beyond investigation, evaluation, and, if necessary, cleanup of residences.[298]

On September 14, 2007, Rhode Island's Attorney General unveiled what he suggests is an appropriate "nuisance abatement plan."[299] Under this plan all doors and doorframes, windows and window frames, interior and exterior trim, cabinets and shelving, and radiators and pipes must be removed and replaced if they are covered with actionable lead.[300] Floors, ceilings, interior and exterior walls, and other "surfaces" covered with actionable lead must be covered with "new" dry wall, paneling, flooring, or siding.[301] Surprisingly, the Attorney General requested that the defendants be ordered to fix all "building deficiencies [that] are known to contribute to paint deterioration, dust lead and soil lead."[302] Thus, in every building included in the Attorney General's plan, the defendants would be required to repair, fix, or replace leaking "[r]oofs and plumbing," substandard, "leaky or missing gutters and downspouts," "holes" in exterior walls and "broken windows," "[i]mproper grading," "[i]mproperly hung doors," as well as any "[s]tructural problems that prevent application of additional weight from enclosure systems (e.g., collapsing wall or ceiling)."[303] The plan requires all of this to be done in four years (i.e., at a rate of 60,000 buildings per year) and claims that this can be done if the court orders the defendants to hire and train a workforce of 10,000 abatement workers.[304] The Attorney General estimates that his plan will cost about $2.4 billion, and commentators have described it as being "the single biggest construction job in [Rhode

297. *Id*.

298. Unfortunately, the problem of the "unwilling homeowners" who resist the court's altruistic intrusions remains unsolved, and no injunction issued against any defendant can, consistently with due process, coerce such persons to open their doors or tolerate "abatement" involuntarily. However grand the design of the court's ultimate remedy may appear, the lack of such power remains the "Achilles heel" that is fatal to the entire program. After all, social engineering is best accomplished by society itself through its elected legislatures, and no court, no matter how knowledgeable or powerful it may appear, can yet transform a non-participant's private home into anything other than their personal and sovereign castle.

299. R.I. DEP'T OF ATTORNEY GENERAL, RHODE ISLAND LEAD NUISANCE ABATEMENT PLAN (Sept. 14, 2007), *available at* http://www.riag.state.ri.us/documents/RILeadNuisanceAbatementPlan9-14-07.pdf.

300. *Id.* at 7-8, 16, 25.

301. *Id*. at 16 (noting that defendants may be ordered to build "new" porches, cabinetry, and stairs, and be ordered to replace complete radiator heating systems).

302. *Id.* at 52.

303. *Id.*

304. *Id.* at 9 (acknowledging that this amount is greater than the total number of registered construction contractors in Rhode Island and a little less than half of the total number of construction workers believed to be in Rhode Island).

Island] state history," if approved.[305] In response, the defendants described this plan as being "ridiculous," "completely unprecedented, unworkable and, indeed, harmful to the state."[306]

c. Overcoming the State's Non-delegable Duty to Run Its Lead Abatement Program

According to Rhode Island's Attorney General, the state "owes a non-delegable, legally imposed duty to the residents of the State to make lead-related expenditures."[307] Because of this non-delegable duty, the defendants have repeatedly insisted that the state, rather than the defendants, must run any abatement program and that the state must then seek reimbursement.[308] This argument presented a major problem for the court. On the one hand, the law precluded the court from awarding the state any monetary damages, and the only permissible remedy was an injunction ordering defendants to abate the nuisance. On the other hand, if the state has a non-delegable duty to run the lead abatement program and make lead-related expenditures, the court could not enjoin any other party to perform that role. Unless the court could overcome the preclusive effect of the state's non-delegable duty, it was powerless to award any relief.

To get around this problem, the court creatively used the jury's verdict to "bifurcate" the state's non-delegable duty. First, the court ruled that

> [a] necessary implication from the jury verdict is that the cumulative presence of lead pigment in paint imposes a burden on the State that it ought not have to bear. Therefore, to the extent that an abatement remedy relieves the State of some of its burden, the Court does not see how that relief would be improper.[309]

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305. *Id.* at 122; Peter B. Lord, *Lead Paint Cleanup: a $2.4-billion Solution*, PROVIDENCE J., Sept. 15, 2007, *available at* http://www.projo.com/news/content/Lead_Cleanup_09-15-07_CB738JA.3274607.html.

306. Lord, *supra* note 305.

307. Court's Decision, *supra* note 121, at 180 n.130 (citing Rhode Island v. Lead Indus. Ass'n, 2001 R.I. Super. LEXIS 37, *52-53 (R.I. Super. Ct. Apr. 2, 2001)).

308. The defendants claimed that under the doctrine of *toties quoties*, the state could not be awarded future damages in this lawsuit because the state can bring future actions seeking to recover those monies it spends. *Id*. at 174.

> *Toties quoties* is Latin for 'as often as occasion shall arise.' . . . [Accordingly], once the State actually performs abatement in a particular area, those costs will no longer be unrecoverable future damages, but will be recoverable as past damages. The amount of those costs will also be readily ascertainable because the state will have already spent the money, and presumably will keep accurate records of those expenditures. Therefore, a future action is required to recover future damages.

Court's Decision, *supra* note 121, at 174 n.128 (citation omitted).

309. *Id*. at 180 (citing Jury Instructions, *supra* note 201, at 11).

Second, the court held that only the "the ultimate responsibility for performance is [] non-delegable."[310] Finally, the court ruled that the performance of the non-delegable duties was delegable to third parties, such as the defendants.[311]

Additionally, the court held that requiring the state to spend money to perform the abatement itself and bring future actions to recover monies it spent would be inequitable.[312] Surprisingly, the court opined that if the state was required to perform the abatements and seek cost recovery, "it is doubtful that such abatement would ever be performed."[313] The court further opined that although it was "theoretically possible" that the state could bring cost recovery actions, the court did not think the state had adequate resources to bring such actions even though the state would be benefited by the preclusive effect of this litigation.[314] Thus, the court ruled that because the state is incapable of effectively abating the lead problems on its own and would not have the resources to bring future cost recovery actions, requiring the state to fully perform its non-delegable duties was inequitable and an inadequate remedy. As the court so poignantly put it: "Defendants . . . cannot seriously comprehend that after a finding of liability by the jury, the 'form' of abatement ordered by this Court would be no abatement at all."[315]

One wonders how the court—which was obviously aware that, by Rhode Island's own standards, the childhood lead poisoning danger had been eliminated by the state's existing program while the case was pending—could ignore that development and insist that abatement was still necessary. Incredibly, the court did not even refer to the precipitous drop in elevated blood lead levels in Rhode Island in 2005—a drop of forty-seven percent from the previous year[316]—in any part of its remedial discussion. Of course, this decline occurred solely as a result of the state's existing programs, which were developed by the legislature and implemented by the state's administrative agencies.[317]

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310. *Id*. at 180 n.130.

311. *Id*.

312. *Id*. at 175 ("[T]his Court does not find it 'adequate' after over six years of litigation for the non-liable party [i.e., the state] to have to take primary responsibility for abating the nuisance, for which other parties have been found liable, and then be required to engage in more litigation to recover its costs."). Of course, as discussed earlier, the court found no problems forcing the defendants to do so, even though the parties that should have been pursued—the landowners—are, by statute, primarily responsible for lead paint concerns. Even here, the court's exercise in "liability relativity" is obviously illogical.

313. *Id*. at 176.

314. *Id*.

315. *Id*. at 181.

316. CHILDHOOD LEAD POISONING 2006, *supra* note 250, at 5.

317. In 1991, the Rhode Island General Assembly enacted the Lead Poisoning Prevention Act (LPPA) to establish "a comprehensive program to reduce exposure to environmental lead and thereby prevent childhood lead poisoning." R.I. GEN. LAWS § 23-24.6-3

It is one thing for the court to rule erroneously that the *jury* did not need to consider this evidence in determining whether a nuisance existed, but it is quite another for the *court* to ignore those facts in determining whether additional programs were needed to maintain the elimination that the state had already achieved so admirably.[318] Although the court may be justifiably frustrated that its docket has been unnecessarily consumed by two lengthy trials to resolve liability for a nuisance that no longer exists, that frustration will only be compounded if it plunges ahead to order a remedy for a non-existent risk. To paraphrase the court's opinion, perhaps the *statistics* show us, after all, what the "lies and damn lies" are in actuality.

On December 27, 2007, the Rhode Island Supreme Court set the appellate schedule for its review of the liability, damages, and contempt phases of this case, as well as the contingent fee issue. Briefing by the parties is to be completed in April with oral argument to take place on May 15, 2008.[319]

D. The New Jersey Rebuke

1. *The New Jersey Trial Court Dismisses the Lawsuits*

In 2001, Motley Rice, acting on behalf of twenty-six public entities in New Jersey, filed multiple public nuisance lawsuits against lead-paint manufacturers and distributors, seeking to recover costs for lead detection and abatement programs, medical screening and monitoring, and programs educating residents on the dangers of lead paint.[320]

(1991). The LPPA authorized the Rhode Island Department of Health (RIDOH) to implement regulations and oversee the implementation of the Act. *Id.* § 23-24.6-26. RIDOH implemented rules and regulations for Lead Poisoning in 1992. RULES AND REGULATIONS FOR LEAD POISONING PREVENTION §§ 1.0, 3.0 (1992). The Rhode Island General Assembly also passed the Lead Hazard Mitigation Act, R.I. GEN. LAWS § 42-128.1-1 to -13 (2002), which became effective November 1, 2005. In 2003 and pursuant to the Lead Hazard Mitigation Act, the Rhode Island Housing Resource Commission (RIHRC) promulgated regulations requiring most owners of property constructed before 1978 rented to "at risk occupants" to evaluate their properties for potential lead hazards and to abate those hazards consistent with Rhode Island's rules and regulations. RULES & REGULATIONS FOR LEAD POISONING PREVENTION, R23-24.6-PB (2003).

318. Although the court did not consider the 2005 data before concluding that Rhode Island's public nuisance is huge, "the Court finds that the priority of any abatement remedy should not be to duplicate programs run by the State, but rather to focus on areas in which the State's programs are inadequate and need supplementation." Court's Decision, *supra* note 121, at 180.

319. Order on Briefing Protocol at 2, Rhode Island v. Lead Indus. Ass'n, Inc. (R.I. filed Dec. 27, 2007) (No. 04-63-M.P., No. 06-158-A, & No. 07-121-A).

320. *In re* Lead Paint Litig., 924 A.2d 484, 487 (N.J. 2007). On February 11, 2002, New Jersey's Supreme Court designated "'all pending and future litigation involving damages or other relief arising out of the manufacture, sale, distribution and/or use of lead-based

In 2002, the trial court granted the defendants' motion to dismiss[321] after concluding that local governmental entities were not permitted to sue and recover damages from manufacturers of a legal product deemed to have created a public nuisance. The court based its decision on a number of reasons, including the fact that the lawsuits were precluded by New Jersey's Lead Paint Statute[322] and Hotel and Multiple Dwelling Law.[323] The trial court believed that plaintiffs were masking their products liability claims as common law claims. It noted that "(1) [the] defendants had no control of the instrumentality (lead paint) after [the paint] was sold; (2) the lead paint did not flow with the land; and (3) the remedy sought for the harm caused to plaintiffs [was] not sought within the confines of the Products Liability Act."[324] In dismissing the plaintiffs' lawsuits, the judge stated that:

> Plaintiffs seek an unwarranted and impermissible expansion of their role as local government entities to act on behalf of the public. Unlike the Attorney General or other appropriate executive branches of the state government, these plaintiffs over-

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paint' as a mass tort" and transferred all of the cases "to a single vicinage and assigned [them] to one judge." *Id*.

321. *In re* Lead Paint Litig., 2002 WL 31474528 (N.J. Super. Ct. Law Div. Nov. 04, 2002), *rev'd per curiam*, 2005 WL 1994172 (N.J. Super. Ct. App. Div. Aug. 17, 2005), *rev'd*, 924 A.2d 484 (N.J. 2007). The trial court believed that the plaintiffs were masking their products liability claims as common law claims. It noted that the defendants (1) had no control of the instrumentality (lead paint) after the paint was sold; (2) that the lead paint did not flow with the land; and (3) that the remedy sought for the harm caused to the plaintiffs was not sought within the confines of the Products Liability Act. *Id*.

322. N.J. STAT. ANN. § 24:14A-1 to -11 (West 1997). This statute declares that the presence of lead paint on any surface accessible to children is a "public nuisance." *Id.* § 24:14A-5. It confers upon the municipal boards of health the authority to investigate violations and enforce the Act. *Id.* § 24:14A-6. The health board's enforcement mechanisms include ordering a property owner to remove or cover the paint. *Id.* § 24:14A-8. If the property owner fails to do so, the board may abate the hazard itself and then civilly sue the owner to recover the costs. *Id.* § 24:14A-9.

323. N.J. STAT. ANN. § 55:13A-1 to -28 (imposing a duty on property owners to abate lead paint in rentals).

324. *In re Lead Paint Litig.*, 2002 WL 31474528, at *16.

> [T]o narrowly examine a [party's] conduct without the concomitant considerations of control, causation and duty is insufficient for maintaining the action. To merely cloak the action in *parens patriae* without having pled a substantial cause of action is impermissible. As currently pled, this court holds that these plaintiffs are prohibited from proceeding with their lawsuits in New Jersey.

Id. at *23. "The remedial usage of this theory by these plaintiffs is in direct conflict with statutory, constitutional and case law provisions." *Id.* "Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce." *Id.* at *16 (citing Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001)). "Even if public nuisance law could be stretched far enough to encompass the lawful distribution of lawful products, the County has failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right." *Id.* (citing *Camden County*, 273 F.3d at 541).

> step their role and authority by bringing suit against the defendants cloaked under the guise of public interest litigation. Such actions violate the constitutional doctrine of separation of powers and fail under the doctrine of remoteness and existing New Jersey case law.[325]

After the intermediate appellate court reversed the dismissal of the public nuisance claim,[326] the defendants appealed to the New Jersey Supreme Court.

2. *The New Jersey Supreme Court Refuses to Create a "New and Entirely Unbounded Tort"*

In its opinion, New Jersey's Supreme Court carefully examined the nature of lead and the childhood lead poisoning problem.[327] It considered federal and New Jersey laws and regulations addressing the childhood lead poisoning problem, along with the boundaries and scope of the public nuisance claim on which plaintiffs were basing their claims. After this review, the court concluded that New Jersey's legislature did not wish to create a wave of nuisance litigation when it passed the Lead Paint Act and remanded the case for dismissal of the complaints. In what may become a landmark decision, New Jersey's Supreme Court exposed this "new tort" that cleverly masqueraded under the "public nuisance" pseudonym for what it was—a lawyer-created cause of action specifically designed to sue product manufacturers without the burden of traditional products liability defenses.

The New Jersey Supreme Court recognized that if it were "to permit these complaints to proceed, [it] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[328] It then stated that if allowed to continue

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325. *In re Lead Paint Litig.*, 2002 WL 31474528, at *8.

326. *In re* Lead Paint Litig., 2005 WL 1994172, at *5-6 (N.J. Super. Ct. App. Div. Aug. 17, 2005) (agreeing with the plaintiffs that the lawsuit would not subvert the goals of the Lead Paint Statute, and, in fact, would foster those goals because "[t]he relief demanded in the complaint—funding future programs and compensating the municipalities for their abatement and health-care expenses—would not interfere with the municipalities' ongoing enforcement efforts under the Lead Paint Statute"). The court relied on its 2003 opinion in a gun litigation case involving public nuisance claims that was also dismissed. *Id.* at *5. In that case, the court held that rules barring public nuisance claims involving harm to people "no longer represents desirable public policy in any context, as it tends to unfairly shield corporate tortfeasors, who are better able to bear the risk of their own conduct." *Id.* at *9 (citing James v. Arms Tech., Inc., 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003) (allowing negligence and public nuisance claims premised on the theory that defendants' acts encouraged an illegal gun market by selling more guns than was warranted by the legitimate gun market without adequate supervision or regulation)).

327. *In re* Lead Paint Litig., 924 A.2d 484, 489-91 (N.J. 2007).

328. *Id.* at 494 (noting that in contrast to the plaintiffs' complaints, the New Jersey legislature's "use of the term 'public nuisance' in the Lead Paint Act is in keeping with the

on its current path, the court "would be creating a remedy entirely at odds with the pronouncements of our Legislature."[329] The court noted that New Jersey's legislature had recognized the scope and seriousness of the adverse health effects caused by exposure to, and ingestion of, deteriorated lead paint in 1971, and that it acted swiftly to address that public health crisis by creating a careful and comprehensive scheme in conformity with traditional concepts of common law public nuisance.[330] According to New Jersey's highest court, the viability of a cause of action sounding in public nuisance can only be evaluated in light of the statutory framework the legislature has set up to address problems posed by neglected and deteriorating lead paint.[331] In New Jersey, the legislature declared the continued use of lead paint to be a public nuisance punishable by a criminal penalty. It then ordered New Jersey's local boards of health to abate the nuisance. Finally, as part of the remedy, the legislature focused on the owner of the premises as the actor responsible for the public nuisance itself and directed that the owners of the premises where the public nuisance was found be liable for the costs of the abatement.[332]

The court concluded that the governmental authorities' "loosely-articulated" public nuisance claims could not find their basis in the "historical antecedents of public nuisance."[333] It then noted that there was no evidence to suggest that the legislature intended to vest the public entities with a general tort-based remedy or create an ill-defined claim that would essentially take the place of the enforcement, abatement, and public health funding scheme the legislature enacted. It stated that there was even less evidence that the legislature intended to permit governmental authorities to turn an ordinary products liability claim into a separate cause of action as to

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term's historical meaning and intent"). The court also recognized that if it were to allow the public nuisance claim to proceed, it "would be creating a remedy entirely at odds with the pronouncements of our Legislature." *Id.* The court stated that it could not find "any basis on which [it could] conclude that the Legislature, in using the term 'public nuisance' . . . expected that its use of that term would be the springboard for the expansive reading that plaintiffs suggest." *Id.* at 500.

329. *Id.* at 494.

330. *Id.* at 491-94. *See, e.g.*, Lead Paint Act, 1971 N.J. Laws ch. 366, § 1; Lead Poisoning Abatement and Control Act, 1985 N.J. Laws ch. 84, § 10 (repealing the general directive creating the lead poisoning program and enacting a far more detailed program to be established by the Department of Health); 1995 N.J. Laws ch. 328 (creating a "universal lead screening program" for pre-school children); Lead Hazard Control Assistance Act, 2003 N.J. Laws ch. 311 (providing for further assistance in lead paint remediation through the creation of the Lead Hazard Control Assistance Fund and the Emergency Lead Poisoning Relocation Fund).

331. *In re Lead Paint Litig.*, 924 A.2d at 494 ("It is only in light of this statutory framework that the arguments of the parties concerning the viability of a cause of action sounding in public nuisance can be evaluated.").

332. *Id*. at 492-93.

333. *Id.* at 494.

which there were apparently no bounds.[334] Prophetically, the court endorsed an earlier observation that, were it to find a cause of action here, "nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'"[335]

The court compared New Jersey's Lead Paint Act with traditional public nuisance considerations. In particular, the court found the Lead Paint Act's focus on "premises owners" as the "relevant actors" of the lead poisoning problem "to be instructive."[336] According to the court,

> [t]he significance is that *the* presence *of lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed*, and if it therefore can be ingested either directly or indirectly by being eaten, inhaled, or absorbed through the soil. Viewed in this light, we must conclude that the Legislature, consistent with traditional public nuisance concepts, recognized that *the appropriate target of the abatement and enforcement scheme must be the premises owner whose conduct has, effectively, created the nuisance.* In public nuisance terms, it is the premises owner who has engaged in the "conduct [that] involves a significant interference with the public health," [Restatement (Second)] § 821B(2)(a), and therefore is subject to an abatement action. *The Legislature's clear focus on the owner of the premises as the party engaging in the conduct that gives rise to the nuisance is in careful accord with the historical meaning of the tort*.[337]

Based on its analysis of how the public health nuisance is created, the court concluded that the plaintiffs' theory attempted to "separate conduct and location and thus eliminate entirely the concept of control of the nuisance."[338] In rejecting the plaintiffs' theory, the court stated that it could not "ignore the fact that the conduct that created the health crisis is the conduct of the premises owner."[339] The crux of this holding is the court's recognition that the conduct of the defendants, who manufactured and sold a product that was legal at the time of its distribution, was not the type of conduct that "created" a public nuisance. Instead, the nuisance was only "created"

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334. *Id.* at 505.

335. *Id.* (citing Camden County Bd. of Chosen Freeholders, 273 F.3d at 540 (quoting Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993))).

336. *Id.* at 501 ("Assuming, based on the legislative declaration in the Lead Paint Act, that the continuing presence of lead paint in homes qualifies as an interference with a common right sufficient to constitute a public nuisance for tort purposes, plaintiffs' complaints fail nonetheless.").

337. *Id.* (emphasis added). The court found that "the conduct that has given rise to the public health crisis is, in point of fact, poor maintenance of premises . . . by the owners of those premises." *Id.* This poor maintenance in turn "creates the flaking, peeling, and dust that gives rise to the ingestion hazard and thus creates the public nuisance." *Id.* Thus, the "Lead Paint Act's focus on owners maintains the traditional public nuisance theory's link to the conduct of an actor, generally in a particular location." *Id.*

338. *Id.*

339. *Id.* (noting that "[u]nlike the Legislature's adherence to traditional public nuisance motions, plaintiffs' complaints aim wide of the limits of that theory").

when the premises became dangerous through deterioration and poor maintenance by the past and present property owners.

In New Jersey, as in Rhode Island and many other states, the legislature and regulatory authorities have allocated the primary responsibility for detecting and preventing lead risks to property owners. Both New Jersey and Rhode Island require the property owners to maintain their property in a safe condition, and, if lead hazards are present, both states require the property owner to abate the hazard.[340] Yet, the difference was striking between the two courts' treatments of their respective legislatures' enactments.

In Rhode Island, the trial court flatly ignored the impact of these mandates from other branches of government, holding that they were irrelevant to the "common law" remedy sought by the state.[341] With all the turmoil surrounding Rhode Island's recent constitutional battle for the separation of powers, it is hard to believe that a trial judge would completely ignore the legislature's decisions on how best to address the state's childhood lead poisoning, and the emphasis placed on property owners being the creator of the nuisance and the party responsible for abating lead hazards in their properties.[342] In New Jersey, however, the New Jersey Supreme Court paid careful attention to the legislative mandates and properly recognized that these requirements were essential considerations in evaluating the scope and meaning of the remedy being pursued.

Upon reviewing the genesis and evolution of the tort of public nuisance, the New Jersey court stated:

> The significance, then, of the evolution of public nuisance law is threefold. First, a *public nuisance, by definition, is related to conduct, performed in a location within the actor's control,* which has an adverse effect on a common right. Second, a private party who has suffered special injury may seek to recover damages to the extent of the special injury and, by extension, may also seek to abate. Third, a *public entity which proceeds against the one in control of the nuisance* may only seek to abate, at the expense of the one in control of the nuisance. These time-honored elements of the tort of public nuisance must be our guide in our consideration of whether these complaints have stated such a claim. That analysis requires us to

340. Under New Jersey's Lead Paint Act, responsibility for the costs of abatement rests largely on the property owners. The act specifically empowers local boards of health to sue owners to recover abatement costs. Lead Paint Act, 1971 N.J. Laws ch. 366, §§ 8, 9 (codified at N.J. STAT. ANN. 24:14A-8 to A-9). The Rhode Island legislature determined that it is the owners' responsibility and burden to keep its properties in a safe condition. R.I. GEN LAWS § 23-24.6-17(c) ("The owner of any dwelling, dwelling unit, or premises who fails to provide for lead hazard reduction as required by department regulations shall be issued a notice of violation . . . ."); R.I. GEN LAWS § 23-24.6-23 (compliance and enforcement).

341. Court's Decision, *supra* note 121, at 30 (stating that Rhode Island's laws are not applicable to the lawsuit because they were not "intended to 'authorize' the presence of lead paint or otherwise insulate actors such as the Defendants from public nuisance liability").

342. *See* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77 (2004).

> address not only the claims, but the nature of the plaintiffs, as well as the capacity in which they propose to proceed.[343]

With this guidance, the court examined who was in control of the nuisance and considered their conduct and its relationship to the New Jersey Lead Paint Act. The court stated that the legislature focused on property owners who are in control of the nuisance and whose conduct created the nuisance, while "plaintiffs seek to base their complaints on conduct of another."[344] According to the court, this created two insurmountable obstacles for the governmental authorities whose focus was on the conduct of "pigment manufacturers."[345]

First, the public health crisis is caused not by the mere presence of lead pigment, but by a premise owner's poor maintenance of the lead paint on his premises. It is that conduct (the poor maintenance) that causes the lead paint to begin to flake, peel, and dust, which creates an ingestion hazard for children (i.e., the alleged public nuisance).[346]

Second, the act of placing an ordinary, lawful, and unregulated product into the stream of commerce is not the traditional type of conduct that leads to liability for the creation of a "public nuisance."[347] Any interpretation that allowed plaintiffs to bring public nuisance claims against persons for "merely offering an everyday household product for sale" would stretch the cause of action too far.[348] The court wisely dismissed the idea of the "foreseeable" public nuisance argument by concluding that:

> Although one might argue that the product, now in its deteriorated state, interferes with the public health, one cannot also argue persuasively that the conduct of defendants in distributing it, at the time when they did, bears the necessary link to the current health crisis. Absent that link, the claims of plaintiffs cannot sound in public nuisance. Indeed, the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, and although sold no more recently than a quarter

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343. *In re* Lead Paint Litig., 924 A.2d 484, 499 (N.J. 2007).

344. *Id.* at 501.

345. *Id.*

346. *Id.* This court noted that while the plaintiffs may have ignored this fact, it was not lost on the state's legislature when it enacted the Lead Paint Act. According to the court, the Act's focus on owners "maintains the traditional public nuisance theory's link to the conduct of an actor, generally in a particular location," while the plaintiffs' theory tried to "separate conduct and location and thus eliminate entirely the concept of control of the nuisance." *Id.*

347. *Id.* ("[T]he very meaning of conduct in the public nuisance realm is separate, and entirely different, from the only conduct of these defendants [i.e., selling lawful products].").

348. *Id.*

> of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers.[349]

Thus, as a matter of law, product manufacturers cannot be held responsible for damages or equitable abatement because the conduct does not bear the necessary link to the current health crisis. This reasoning eliminates any rational distinction between the New Jersey decision and the scenario in Rhode Island. Public nuisance law, both traditionally and under the New Jersey and Rhode Island statutes and regulations, does not focus on the conduct of third parties, but rather on the conduct of the property owner in creating the nuisance. Such a requirement "is in careful accord with the historical meaning of the tort."[350]

This decision is jurisprudence at its finest—a thought process that inclusively evaluates the involvement of all branches of government in an issue, reconciles their stated purposes, and reflects their complementary relationships. Although the "common law" may have its sources solely within the judiciary, the people have increasingly imposed policies that regulate the judiciary's discretion. These began as early as the Magna Carta and have proceeded through the Industrial Revolution to mature into today's complex legislative and regulatory environment. The impact of these mandates cannot be ignored, as they were in Rhode Island, merely because a court is faced with a "common law" cause of action. Instead, they are a part of the overall legal fabric our society has woven—a fabric that can only be appreciated when viewed as a completed tapestry.

Although the New Jersey decision may not end the efforts by public authorities and their private contingent fee counsel to distort public nuisance claims in other forums, it clearly unmasks those schemes and exposes them as efforts to pursue unprecedented relief that is at odds with both the common law and public policies declared by the people's representatives. Hopefully, the extraordinary insight of the New Jersey jurists is as persuasive as their wisdom.

CONCLUSION

As this Article has shown, nothing accomplished (or accomplishable) in any pending or resolved public nuisance case against lead paint manufacturers can reasonably, rationally, or constitutionally "get the lead out" of our national environment. Indeed, the litigation and its surrounding hype have served to distract and delay public authorities from honestly evaluating and confronting the true public health situations in their communities. This in-

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349. *Id.* at 501-02.
350. *Id*. at 501.

justice is dangerously close to realization in some U.S. courts, particularly in Rhode Island.

In Rhode Island, the immediate public interest in protecting residents from lead contamination was ignored for years by indifferent public authorities, and even now little is being done to coerce landlords and property owners to remediate their contaminated residences. Meanwhile, the manufacturer defendants' claims against those same persons for contribution are severed and abated from the main action, which now proceeds against the manufacturers only. Moreover, not all of the parties potentially responsible for lead contamination in Rhode Island are before the court. Conspicuously absent are legions of other manufacturers of lead-based paint. Even more surprisingly, none of the manufacturers and suppliers of tetraethyl lead, the greatest source of lead contamination in American history, are named as defendants. Indeed, the state and its assisting private counsel now insist that the defendants should be ordered to abate the "cumulative presence"[351] of lead paint within Rhode Island to the point of eliminating any incidence of lead in children's blood—*notwithstanding the impact of alternative sources of lead not attributable to lead paint*. Such an argument places the defendants in the impossible position not only of eliminating situations they did not create but also of abating problems over which they have no control.

Even a casual reading of comments by plaintiffs' counsel from the Rhode Island litigation reveals that they have distorted the law of products liability by grafting its principles onto the law of public nuisance, a cause of action that was never designed to include those concepts.[352] Thus, a Rhode Island trial court has allowed the state's Attorney General to inexplicably blend products liability—a *private* remedy intended to serve the interests of individual parties—and public nuisance—a *public* remedy intended to serve the interests of the general population. It has allowed this to occur by ignoring the presence of alternative sources of lead and the responsibility of property owners, while narrowly focusing on just a few defendants never shown to have contributed to contamination in a single household. Of course, this conflation is mirrored by the equally unjust fusion of the advocates responsible for advancing those views: *elected* public attorneys charged with protecting public health and *selected* private counsel who seek massive fees without political accountability to the persons they are charged to protect. This distortion stretches the otherwise salutary goals of products liability beyond any reasonable utility and transforms the law of public nuisance into an oppressive tool designed to transfer huge amounts of wealth without any findings of personal involvement or responsibility.

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351. *See* Jury Instructions, *supra* note 201, at 10 ("You are being asked whether the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island constitutes a public nuisance.")

352. *See generally* Sprague & Fitzpatrick, *supra* note 17.

This oppressive and distorted cause of action not only deprives defendants of a reasonable opportunity to be heard—a hallmark of procedural due process—but also disenfranchises citizens by distributing significant portions of recoveries to private law firms selected without meaningful public involvement. As a result, both the legislative branch of government—the branch responsible for appropriating money for public projects—and the executive branch—the branch responsible for ensuring that those funds are properly applied for the public good—are circumvented by the judiciary—the branch least capable of investigating and resolving broad issues of public policy.[353] Most significantly, these vast expenditures of time and resources against remote manufacturers delay remediation by those most immediately responsible, namely, the landlords and property owners who continue to expose residents to risks with impunity. Although these problems were created by overly zealous common law courts, those same courts, including the United States Supreme Court, have the power to solve them. Their failure to do so should surely motivate legislative intervention, but until that occurs, parties must insist upon the primacy of traditional nuisance law over the oppressive expansion of those principles, especially where the expansion serves narrow private interests, as opposed to the public interest generally.

353. Pegram v. Herdrich, 530 U.S. 211, 221 (2000) ("[C]omplicated factfinding and such a debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value."); *In re* C.K.G., 173 S.W.3d 714, 731 (Tenn. 2005) ("The General Assembly is better suited than the courts to gather data, to investigate issues not subject to current litigation, and to debate the competing values and the costs involved in such an issue . . . ."); Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 60 (R.I. 2001) (Flanders, J., concurring in part, dissenting in part) (suggesting that the court "defer to the General Assembly, which is far better equipped to make such difficult policy decisions"); Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985) (noting that only the General Assembly "can provide an appropriate forum for a full and open debate of all of the issues . . . . Unlike courts of law, the General Assembly can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit."); Brawner v. Brawner, 327 S.W.2d 808, 812-13 (Mo. 1959) ("Obviously, the general assembly is not only better equipped than this court to investigate and develop the facts pertinent to a determination of this phase of public policy but also has greater authority to deal with the particular problem and at the same time the related ones.").