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GAME OVER? WHY RECENT STATE SUPREME COURT DECISIONS SHOULD END THE ATTEMPTED EXPANSION OF PUBLIC NUISANCE LAW

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Introduction

Over the past decade, public nuisance theory has been the tort *de jour* for speculative, high-publicity, and high-stakes lawsuits brought by state attorneys general and contingency-fee lawyers against product manufacturers. Plaintiffs have been attempting to convert what are in reality class-action-size products

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liability lawsuits into government-led public nuisance claims in an effort to dodge traditional products liability defenses, such as product identification, causation, and statutes of limitation. Now, several of these cases have concluded, and four state high courts, a state legislature, and a jury have all reached the same result. In each instance, the attempt to expand public nuisance beyond its original moorings failed. As several high courts have now explained, these types of cases fit neither the character nor elements of the tort of public nuisance.

Four years ago, we looked at this budding trend and wrote an article discussing this novel application of public nuisance theory in the context of the tort's historical development.¹ As we wrote then, public nuisance is a centuries-old tort with a narrow application to a specific and well-defined set of elements.² The purpose of public nuisance has historically been to allow governments to use the tort system to stop private individuals from engaging in conduct that unreasonably interferes with a right that is common to the general public.³ Accordingly, public nuisance is a conduct-based tort—not a manufacturing-based tort⁴—and has most often been used in the absence of local ordinances prohibiting certain conduct.⁵

Consider, for example, a common right to quiet in the late night hours. The owner of a tavern who permits loud bands on the premises could be sued under public nuisance theory to reduce the noise level during these hours, even if the town's ordinances did not specifically outlaw that activity. The same is true for drunken vagrants who may interfere with the use of public sidewalks, or individuals who intentionally pollute public waterways. In none of these cases, however, is the manufacturer of the product that may have been an instrument in causing the harm subject to liability. The makers of the instruments played by the band, the alcohol drunk by the vagrant, or the chemicals dumped by the polluters are not responsible for policing consumers to ensure proper use of their products.

Recent lawsuits, however, have tried to break this mold. State, county, and municipal attorneys have sued manufacturers for harms allegedly caused by

1. See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

2. See *id.* at 543, 562-70.

3. See *id.* at 562.

4. See *id.* at 563-64.

5. *Id.* at 545-46.

their products' users, and as is often the case, misusers.⁶ The theory these plaintiffs advance is akin to suing an electric guitar manufacturer for all public nuisances caused by bands that play music too loudly. This type of lawsuit is illogical and contrary to the historical application of public nuisance law. Undeterred, plaintiffs tried to gain traction with this new approach by focusing on "unpopular" companies—those that manufacture products that may be used by third parties to harm others or that these plaintiffs view as contributing to some larger social ill.

Consider the main targets for these new public nuisance actions—cigarette manufacturers have been sued for states' medical costs of treating smokers,⁷ asbestos producers for exposure-related ailments,⁸ lead paint and pigment manufacturers for harms associated with ingestion of deteriorating lead paint by children,⁹ and energy producers for allegedly contributing to global climate change.¹⁰ In short, these plaintiffs have sought to distort public nuisance theory into an unrecognizable, catch-all cause of action that could be molded to fit the next mass-tort litigation.

The rulings and legislative enactments issued to date make clear that courts and legislatures are unwilling to redefine public nuisance or to morph it into a "super tort" capable of overcoming longstanding products liability principles. To this end, Section I of this Article provides a brief history of public nuisance law. Section II discusses the rejection of public nuisance theory for product-based suits in Illinois, Missouri, New Jersey, Rhode Island, Ohio, and Wisconsin. Finally, Section III looks to the future, assessing the public nuisance cases that are currently being litigated across the country.

I. A Brief History of Public Nuisance Law

Suing product manufacturers under public nuisance theory for alleged product-related injuries is a development of only the last few decades, and represents a far departure from the tort's centuries-old roots.

6. For a thorough exploration of the principal cases, see *id.* at 552-61 (discussing cases involving asbestos, tobacco, firearms, and lead paint pigment); see also discussion *infra* Part II.

7. See, e.g., *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997).

8. See, e.g., *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992).

9. See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007).

10. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009); see also discussion *infra* Part III.B.

A. *Development of the Public Nuisance Cause of Action*¹¹

The tort of public nuisance originated in twelfth-century English common law, where the king would enjoin infringement on the Crown's land and force an offending party to repair any damages.¹² From inception, then, public nuisance law was limited to providing injunctive relief or abatement for interferences with the property of the sovereign. In the fourteenth century, the tort was expanded beyond the king's land to include all "public rights," such as "the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases."¹³ Public rights were construed as those likely to be encountered equally by *any* member of society, but did not include damage to private property or other infringements of personal or private rights.¹⁴

As American courts adopted the English common law, public nuisance theory retained its narrow underpinnings and was used to enjoin nontrespassory invasions on the use and enjoyment of public lands.¹⁵ During

11. An important distinction must be made between the torts of *public* nuisance and *private* nuisance. The torts are often confused but "have almost nothing in common, except that each causes inconvenience to someone." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 618 (5th ed. 1984). Scholars suggest that "it would have been fortunate if they had been called from the beginning by different names." *Id.* The unifying factor between them, though, "is the interest invaded, namely either the public right or the private interest in the use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 822 cmt. a (1979).

The focus of a private nuisance suit is conflicting land uses that interfere with an individual's use of her *own* land, whereas public nuisance focuses on the impact to a right held by the public at large. See 66 C.J.S. *Nuisances* § 7 (2009). The Restatement (Second) of Torts defines "private nuisance" as "a nontrespassory invasion of another's interest in the *private* use and enjoyment of land" and limits recovery "only to those who have property rights and privileges in respect to the use and enjoyment of the land affected." RESTATEMENT (SECOND) OF TORTS §§ 821D, 821E (emphasis added). Four types of land uses have commonly been recognized by courts as potentially giving rise to a claim for private nuisance: noise, odor, physical invasion by particles, and safety or environmental hazards. Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 1 (2002).

12. See Schwartz & Goldberg, *supra* note 1, at 543 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. a).

13. Joseph W. Cleary, Comment, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002).

14. See 58 AM. JUR. 2D *Nuisances* § 31 (2002).

15. Schwartz & Goldberg, *supra* note 1, at 545. During the eighteenth and nineteenth centuries, public nuisance cases primarily involved obstruction of public highways and waterways, although a handful involved property uses that otherwise conflicted with the public

the Industrial Revolution of the mid-1800s, as changes in land use gave rise to suits over what uses should be permissible where,¹⁶ public nuisance theory “was used to address other perceived invasions of public morals and the public welfare.”¹⁷ Without significant state or local regulations in place, public nuisance suits became a substitute for such regulations, since governments “could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure . . . the general public.”¹⁸ By the 1930s, states and localities had begun enacting statutes and ordinances defining public nuisance and giving the government the authority to prohibit certain conduct.¹⁹ Tort action under public nuisance theory was seen as a preferable remedy to criminal prosecution in these instances because the cases dealt with low-level quasi crimes, and rather than simply penalize the offender, courts could require him or her to abate the harm he or she caused.²⁰ Thus, unlike criminal fines or jail time, a tort action for abatement could be used to minimize or eliminate any threat to the public health or safety.²¹ Furthermore, because criminal prosecution was (and is) largely ineffective against a corporate defendant, public officials had to turn to equitable remedies to ensure that the offending party was held responsible for the alleged harm.²²

Courts applying public nuisance theory have traditionally required that four specific elements be present to subject one to liability under the tort: (1) infringement of a public right—the injury must be to a right that is common to everyone in the general public; (2) unreasonable conduct—the defendant must have unreasonably interfered with that public right in creating the public nuisance; (3) control—the defendant must have been in control of the public nuisance, either at the time of abatement or when the injury occurred,

morals or social welfare, including gambling halls, taverns, and brothels. 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); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 769-70 (2001).

16. Schwartz & Goldberg, *supra* note 1, at 546.

17. Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 953.

18. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 804 (2003).

19. Schwartz & Goldberg, *supra* note 1, at 546.

20. See Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 551-52 (1999).

21. See *id.* at 551.

22. *Id.*

depending on the court; and (4) proximate cause—the defendant’s actions had to be the proximate cause of the public nuisance or the harm alleged.²³

Over time, courts have established and explained the boundaries of each of these elements:

Injury to a Public Right: The initial question in public nuisance cases is whether the alleged nuisance interferes “with a right common to the general public.”²⁴ A public right “is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”²⁵ Public rights traditionally included such rights as access to public highways and waterways.²⁶ Thus, an individual’s blockading of a public road may be a public nuisance. Blocking a private driveway, however, could never be a public nuisance because the act infringes only on the homeowner’s *private* right to use his or her driveway. Furthermore, the number of private driveways a person blocks is irrelevant, as an aggregation of infringements of private rights does not equal an infringement of a public right.²⁷ As one court explained, “The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.”²⁸

23. See Schwartz & Goldberg, *supra* note 1, at 562-70. Like governmental plaintiffs, private plaintiffs may also bring public nuisance action, but must establish an additional element—namely, that they suffered particular damages that are different in kind, not merely degree, from the damages suffered by the general public. See William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1005-06 (1966). The classic example involves an individual who is delayed by a man-made ditch in a public highway; the individual suffers no injury different from the rest of the general public from the delay alone, no matter its duration. See *id.* If the individual’s cart was damaged as a result of the ditch, however, the individual has suffered damages different in kind. See *id.* at 1005, 1008. In these circumstances, a private plaintiff is able to recover monetary damages. See *id.* at 1005-06. By contrast, abatement has traditionally not been a remedy available to private plaintiffs. See *id.*

24. *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 958 (R.I. 1994).

25. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979). The Restatement commentary continues:

Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

Id.

26. See Gifford, *supra* note 18, at 800.

27. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. g.; see also *supra* note 25.

28. *Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943) (quoting *Nolan v. City of New Britain*, 38 A. 703, 706 (Conn. 1897)). Moreover, no person need actually encounter the public nuisance for liability to exist. Schwartz & Goldberg, *supra* note 1, at 562.

Unreasonable Conduct: The interference with the public right must be unreasonable. Historically, conduct giving rise to public nuisance liability was quasi-criminal, such as running a house of ill-repute.²⁹ In recent years, however, courts have used the standard of unreasonable conduct articulated in the Restatement (Second) of Torts.³⁰ For example, blockading a public street pursuant to a government contract to repair the roadway would not be unreasonable. Blocking the same road as part of a protest without a permit, however, might be. Public nuisance theory excuses liability for conduct that occurs within a well-regulated regime, as conduct that is permitted by the government cannot be deemed unreasonable, even when that conduct is risky.³¹ For example, the Environmental Protection Agency sets the National Ambient Air Quality Standards, which permit manufacturers to emit certain amounts of chemicals into the air.³² The existence of such standards dictates that emissions within the established limits cannot give rise to public nuisance liability.

Control: Control of the instrumentality giving rise to the alleged nuisance is always an element of the tort of public nuisance, although courts tend to disagree over whether control should be evaluated at the time of abatement or at the time the injury occurred. One court described the control element as the “paramount” requirement for public nuisance liability.³³ Those courts evaluating control at the time of abatement have held that “[i]f the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use.”³⁴ Other courts assess the element of control at the time of injury.³⁵ For example, in *City of Bloomington v. Westinghouse Electric Corp.*, the Seventh Circuit Court of Appeals held that while Monsanto made polychlorinated biphenyls (PCBs) and sold them to Westinghouse, Monsanto as the manufacturer could not be held liable for any public nuisance that allegedly resulted when Westinghouse allowed the chemicals to leach into the

The only question for the court is whether a person *would* be harmed by the public nuisance if the person encountered it while exercising a public right. *Id.*

29. See Schwartz & Goldberg, *supra* note 1, at 564 (citing KEETON ET AL., *supra* note 11, § 86, at 618).

30. See RESTATEMENT (SECOND) OF TORTS § 821B.

31. See Victor Schwartz et al., *Can Governments Impose a New Tort Duty To Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 957-60 (2009).

32. *Id.* at 958.

33. See *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633-34 (D.R.I. 1990).

34. *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986).

35. See, e.g., *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989).

city's sewer system.³⁶ The court explained that "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product."³⁷

Causation: As with any tort, a plaintiff must establish causation to prevail in a public nuisance action. The causation analysis is the same as that for other torts and requires a showing of both factual cause and proximate (legal) cause. Thus, the defendant's wrongful conduct must be established as a cause in fact of the plaintiff's injury,³⁸ and "the injury to the plaintiff must be the type of injury that a reasonable person would see as a likely result of her conduct."³⁹

Only when all four elements are satisfied—injury to a public right, unreasonable conduct, control, and proximate causation—can a defendant be held liable under public nuisance theory. But once these elements have been established, the extent of liability is extremely limited. A government entity can only seek to enjoin the defendant's conduct or have the defendant abate the nuisance.⁴⁰ It is a "time honored" principle that governments cannot seek money damages when alleging public nuisance.⁴¹ Separate rules exist regarding when private plaintiffs have standing to pursue a public nuisance claim and the types of remedies they may seek; however, even in such cases, the same four elements outlined above must be shown in order to establish a defendant's public nuisance liability.⁴²

B. History of the Attempted Expansion of Public Nuisance Law

The initial push to expand public nuisance theory began with the environmental community during the drafting of the Restatement (Second) of Torts. Environmental lawyers understood that if the hardened elements of the tort were relaxed or eliminated, public nuisance theory could become a very

36. *See id.* at 612, 614.

37. *Id.* at 614 (citing *County of Johnson ex rel. Bd. of Educ., v. U.S. Gypsum Co.* 580 F. Supp 284, 294 (E.D. Tenn. 1984), *modified on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985)).

38. *See* 57A AM. JUR. 2D *Negligence* § 415 (2004). Cause in fact may be proved by satisfying a "but for" test, a "substantial factor" test, or a substitute causation analysis such as *res ipsa loquitur*. *See id.* § 446; 57B AM. JUR. 2D *Negligence* § 1163 (2004).

39. Schwartz & Goldberg, *supra* note 1, at 569.

40. *See In re Lead Paint Litig.*, 924 A.2d 484, 498-99 (N.J. 2007) (citing RESTATEMENT (SECOND) TORTS § 821C(1) (1979)).

41. *Id.*

42. *See supra* note 23 and accompanying text. This Article is intended to focus almost exclusively on suits pursued by governmental entities. Accordingly, a discussion of public nuisance suits brought by private plaintiffs and the accompanying rule variances is limited to a brief summary of emerging developments in Part III. *See infra* note 224.

powerful tool for overcoming traditional tort law concepts.⁴³ Reformists also appreciated that the same, or a similar, result could be reached by giving private citizens greater standing to sue, as is true of most torts.⁴⁴ For example, removing the element of breach from negligence actions or defect from products liability actions would greatly expand the applicability of those torts. But because public nuisance was a less understood cause of action, it was seen as a better target for this type of fundamental change.⁴⁵

The final version of the Restatement (Second) evidences that the environmental advocates achieved some victories to this end, including granting standing to individuals to sue as “a representative of the general public” in certain circumstances.⁴⁶ Although fully presented, none of these specific changes were included in the black letter of the Restatement (Second). The comments to the Restatement (Second), though, do discuss both the traditional applications of public nuisance theory as well as many of these alternatives. But few, if any, of their reforms have worked their way into American jurisprudence.⁴⁷ In *Diamond v. General Motors Corporation*, for example, a California court of appeal rejected a public nuisance suit brought by private plaintiffs against scores of companies for allegedly contributing to air pollution in Los Angeles, California.⁴⁸ Despite this loss, the plaintiffs’ activism planted the seeds for the public nuisance actions that are the focus of this Article.

The asbestos litigation of the 1980s and 1990s marked the first nonenvironmental attempt to apply public nuisance law to claims against

43. See generally Antolini, *supra* note 15.

44. Environmentalists’ attempts to broaden private-citizen standing would have significantly expanded public nuisance claims as state regulations restricting certain conduct became more common. Environmentalists and the drafters of the Restatement reached a compromise, by which individuals were given standing when 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.” RESTATEMENT (SECOND) OF TORTS § 821C(2)(c). Environmentalists also sought to expand the tort by conferring standing to anyone allegedly affected by a public nuisance. Schwartz & Goldberg, *supra* note 1, at 548. Such an expansion, however, was wholly rejected. *Id.* The drafters of the Restatement realized that such a broad interpretation of standing would have abrogated the traditional requirement that a private plaintiff must have suffered an injury different *in kind* from that suffered by the general public. See *id.*; see also *supra* note 23. By resisting this change, the Restatement maintained the well-reasoned difference-in-kind injury requirement. Schwartz & Goldberg, *supra* note 1, at 548. For additional information regarding environmentalists’ attempts to expand the tort of public nuisance, see Antolini, *supra* note 15.

45. See Antolini, *supra* note 15, at 819-843, 849.

46. See RESTATEMENT (SECOND) OF TORTS § 821C(2)(c).

47. See Antolini, *supra* note 15, at 856.

48. See 97 Cal. Rptr. 639, 641, 646 (Ct. App. 1971) (seeking an injunction against 293 named corporations and municipalities, as well as 1000 unnamed defendants, for air pollution).

product manufacturers.⁴⁹ In these suits, schools and municipalities sought to recover the cost of asbestos abatement and alleged that asbestos as a product constituted the public nuisance.⁵⁰ This represented a departure from previous theories where only unreasonable *conduct* could result in public nuisance liability.⁵¹ Courts resoundingly rejected this novel approach, holding, for example, “that manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the [product] defect.”⁵² These courts understood that if the product itself were deemed a public nuisance, then manufacturing the product “would give rise to a cause of action . . . regardless of the defendant’s degree of culpability or of the availability of other traditional tort law theories of recovery.”⁵³

The effort to expand public nuisance theory to product manufacturers gained some momentum with the tobacco litigation of the 1990s.⁵⁴ State attorneys general, working through contingency-fee attorneys, sued tobacco manufacturers seeking billions of dollars in reimbursements for state Medicaid and other health-program expenditures.⁵⁵ One of the myriad legal claims asserted was that the tobacco companies created a public nuisance by selling cigarettes.⁵⁶ The tobacco suits culminated with the 1998 Master Settlement Agreement, under which the defendant manufacturers transferred \$246 billion to the states and the states’ contingency-fee attorneys.⁵⁷ The only ruling on the public nuisance theory in the tobacco litigation, however, was *Texas v. American Tobacco Co.*, in which the court dismissed the claim as being outside the realm of public nuisance law.⁵⁸ The court stated that it was “unwilling to accept the state’s invitation to expand a claim for public nuisance.”⁵⁹ Even though public nuisance theory was not validated in single tobacco case, the plaintiffs’ victory in achieving a mass settlement in litigation

49. Faulk & Gray, *supra* note 17, at 957.

50. *Id.*

51. *See id.* at 957-58.

52. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992).

53. *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

54. *See* Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484 (2002).

55. *See id.* at 487; Schwartz & Goldberg, *supra* note 1, at 554. For a discussion of the rise of lucrative arrangements between state governments and contingency-fee attorneys, see Schwartz et al., *supra* note 31, at 931-35.

56. *See* Handler & Erway, *supra* note 54, at 487.

57. *See* Susan Beck, *The Lobbying Blitz over Tobacco Fees: Lawyers Went All Out in Pursuit of Their Cut of a Historic Settlement. And the Arbitrators Went Along*, LEGAL TIMES, Jan. 6, 2003, at 1, available at 2003 WLNR 18323549.

58. 14 F. Supp. 2d 956, 973-74 (E.D. Tex. 1997).

59. *Id.* at 973.

that included this novel theory gave it the hint of legitimacy the trial bar needed.

Using momentum from the tobacco settlement, plaintiffs next brought public nuisance claims against the manufacturers of guns and lead paint.⁶⁰ Just as with the asbestos and tobacco cases, the claims involved in this next round of cases again stemmed from failed attempts to hold the manufacturers liable under traditional tort theories, namely, products liability and negligence.⁶¹ The contingency-fee lawyers funded many of the gun and lead paint cases and used the various suits as research and development tools.⁶² The theory of what actually constituted the public nuisance—and why the named defendants should be subject to liability therefor—varied from case to case. Sometimes, the product itself was the alleged nuisance.⁶³ Other times, plaintiffs claimed that the defendants' marketing, sales, and distribution practices created the nuisance.⁶⁴ Regardless, the gun and lead paint manufacturers refused to settle, and since our last article, the appeals process has run its course in several high profile cases. The result: a report card showing that yet again the effort to expand the tort of public nuisance law beyond its original scope and purpose—this time as a end-run around products liability and negligence principles—failed.

II. Recent Attempts to Expand Public Nuisance Have Failed

Four state high courts—Illinois, Missouri, New Jersey, and Rhode Island—flatly rejected the application of public nuisance law to actions against

60. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); see also Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 564-65 (2001); Handler & Erway, *supra* note 54, at 487-90.

61. Handler & Erway, *supra* note 54, at 484.

62. See Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 129, 130 (Timothy D. Lytton ed., 2005); Rick Rabin, *The Rhode Island Lead Paint Lawsuit: Where Do We Go From Here?*, 16 NEW SOLUTIONS 353, 356 (2006), available at http://www.nycosh.org/workplace_hazards/Chemical/RI_LeadpaintLaw suit.pdf.

63. See, e.g., *State v. Lead Indus. Ass'n*, 951 A.2d 428, 443 (R.I. 2008).

64. See, e.g., *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1107 (Ill. 2004); see also David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172-73 (2000).

product manufacturers.⁶⁵ Additionally, the Supreme Court of Ohio's acceptance of this theory was short-lived, as the state's general assembly wasted no time before legislatively overturning the court's decision.⁶⁶ A Wisconsin jury even appreciated the limits of the cause of action when it returned a verdict for the defendant manufacturer before the case could be appealed to the state's high court.⁶⁷ Notably, plaintiffs' lawyers chose to file suits in the above states, believing that these jurisdictions provided opportunities for success with this approach. Repudiation of the plaintiffs' proposed application of public nuisance theory by these courts, then, carries special import.

A. Illinois: City of Chicago v. Beretta U.S.A. Corp.

In the late 1990s, several cities and counties filed suits against gun manufacturers seeking reimbursement for law-enforcement and public-health expenses incurred as a result of gun violence.⁶⁸ Plaintiffs argued that gun manufacturers, through marketing, sales, and distribution practices, facilitated the illegal secondary gun market and interfered with the public health and safety, thereby creating a public nuisance.⁶⁹ Both state and federal courts—at

65. See *Chicago v. Beretta*, 821 N.E.2d 1099; *Benjamin Moore*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); see also discussion *infra* Part II.A-D.

66. See *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, *superseded by statute*, 2006 Ohio Laws File 198 (amending OHIO REV. CODE ANN. § 2307.71(A)(13) (LexisNexis 2005)), as recognized in *City of Toledo v. Sherwin-Williams Co.*, No. CI 200606040, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007); see also discussion *infra* Part II.E.

67. See *City of Milwaukee v. NL Indus., Inc.*, 2005 WI App 7, 278 Wis.2d 313, 691 N.W.2d 888; see also discussion *infra* Part II.E.

68. See Faulk & Gray, *supra* note 17, at 958-59.

69. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001) (“The plaintiffs alleged that the existence of the nuisance is a proximate cause of injuries and damages suffered by Bridgeport[, CT], namely, that the presence of illegal guns in the city causes costs of enforcing the law, arming the police force, treating the victims of handgun crimes, implementing social service programs, and improving the social and economic climate of Bridgeport.”); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231 (Ind. 2003) (“The City allege[d] that the manufacturers, distributors, and dealers knowingly participate in a distribution system that unnecessarily and sometimes even intentionally provides guns to criminals, juveniles, and others who may not lawfully purchase them.”); *Cincinnati v. Beretta*, ¶ 7, 768 N.E.2d at 1141 (stating that the City alleged that the defendants “know, or reasonably should know, that their conduct will cause handguns to be used and possessed illegally and that such conduct produces an ongoing nuisance that has a detrimental effect upon the public health, safety, and welfare of the residents”).

the trial and appellate levels—rejected this theory,⁷⁰ but the Supreme Court of Illinois was the first state court of last resort to do so.⁷¹

The Illinois litigation began when the City of Chicago brought a lawsuit sounding in public nuisance against the manufacturers, distributors, and dealers of firearms.⁷² The suit alleged that “the residents of Chicago have a common right to be free from conduct that creates an unreasonable jeopardy to the public’s health, welfare and safety.”⁷³ The City further alleged that the defendants “intentionally and recklessly” designed, marketed, and distributed their products in such a way that they knew or should have known that their products would be taken into Chicago and create an ongoing public nuisance.⁷⁴ In a comprehensive, fifty-page opinion, the Illinois Supreme Court drew from the historical nature of public nuisance theory in concluding that the City failed to state a valid public nuisance claim.⁷⁵ The court focused on the core elements of the tort: public right, unreasonable conduct, proximate causation, and control.⁷⁶

The court first held that the plaintiffs were not asserting a public right, stating that there is no “public right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another.”⁷⁷ A contrary interpretation would have created a “right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”⁷⁸ To support its reasoning, the court provided examples of cell phones, DVD players, and other lawful products that may be misused by drivers to create a

70. See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 420-22 (3d Cir. 2002) (applying Pennsylvania law); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539-42 (3d Cir. 2001) (applying New Jersey law); *Ganim*, 780 A.2d at 131-33; *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001); *Chicago v. Beretta*, 821 N.E.2d at 1148; *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 203-04 (App. Div. 2003). But see *Gary ex rel. King*, 801 N.E.2d at 1232-34 (allowing a public nuisance claim to proceed); *Cincinnati v. Beretta*, 768 N.E.2d at 1150-51 (same); see also *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *14 (Mass. Super. Ct. July 13, 2000) (“To be sure, the legal theory is unique in the Commonwealth but . . . that is not reason to dismiss at this stage of the proceedings.”).

71. See *Chicago v. Beretta*, 821 N.E.2d 1099.

72. See *id.* at 1105-06. The county government of Cook County joined the city government as a plaintiff in the suit. See *id.* at 1105.

73. *Id.* at 1108.

74. *Id.* at 1109.

75. See *id.* at 1147-48.

76. See *id.* at 1113, 1148.

77. *Id.* at 1116.

78. *Id.*

risk of harm to others.⁷⁹ The court then rejected the plaintiffs' attempt to extend public nuisance theory to encompass such products, concluding "that there [was] no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by the plaintiffs."⁸⁰

Second, the court held that the defendants' allegedly wrongful actions were not the type of "unreasonable conduct" that results in public nuisance liability in Illinois.⁸¹ According to the City, the defendants acted unreasonably by designing, marketing, and distributing firearms despite knowledge that the products would end up in Chicago and create higher levels of crime, death, fear, and discomfort.⁸² The court explained that Illinois courts have only acknowledged two circumstances under which a public nuisance may arise: when "the defendant's conduct in creating the public nuisance involved the defendant's use of land, or [when] the conduct at issue was in violation of a statute or ordinance."⁸³ The court concluded that "the effect of lawful conduct that does not involve the use of land" does not satisfy the conduct requirement of the tort of public nuisance.⁸⁴ Ruling otherwise would improperly invade the right of the state legislature to regulate "the manufacture, distribution, and sale of firearms."⁸⁵ Indeed, the court recognized that the City was seeking "injunctive relief from th[e] court because relief ha[d] not been forthcoming from the General Assembly."⁸⁶

Finally, the court analyzed the elements of causation and control collectively, finding that the issue of control could be viewed as a "factor in both the proximate cause inquiry and in the ability of the court to fashion appropriate injunctive relief."⁸⁷ As with all torts, proximate cause in public nuisance actions is a question of foreseeability and public policy—a party may only be held liable for injuries a reasonable person would foresee as a consequence of his or her actions.⁸⁸ Here, the court found that the defendants'

79. *Id.*

80. *Id.* The court continued, "Further, because we conclude . . . that plaintiffs' claim does not meet all of the required elements of a public nuisance action, we need not decide whether to break new ground by creating such precedent." *Id.*

81. *See id.* at 1109, 1117.

82. *Id.* The court rejected the argument that the defendants were shielded from liability under public nuisance law solely because they complied with existing regulatory schemes. *See id.* at 1121-22. The court noted that a public nuisance may result from "conducting a lawful enterprise in an unreasonable manner." *Id.* at 1124.

83. *Id.* at 1117.

84. *See id.*

85. *Id.* at 1121.

86. *Id.*

87. *Id.* at 1132.

88. *See id.* at 1133.

conduct was not the proximate cause of the alleged injury because “criminal acts of third parties ha[d] broken the causal connection.”⁸⁹ The court continued that even the observance of “reasonable diligence” would not have prevented the harm because the third parties were “not under the control of the one guilty of the original wrong.”⁹⁰ Quoting the Appellate Division of the Supreme Court of New York, the Illinois Supreme Court stated, “[D]efendants’ lawful commercial activity, having been followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm.”⁹¹

The court concluded that the significant expansion of tort duties that the plaintiffs sought was of such a magnitude that it “must be the work of the legislature, brought about by the political process, not the work of the courts.”⁹²

B. Missouri: City of St. Louis v. Benjamin Moore & Co.

In *City of St. Louis v. Benjamin Moore & Co.*, the Missouri Supreme Court became the first state supreme court to address the application of public nuisance law to the manufacturers of lead paint and pigment.⁹³ The litigation involving lead paint stemmed from injuries to children that were allegedly caused by their ingestion of lead particles from flaking and deteriorating paint.⁹⁴ Lawsuits for this type of injury began in the 1960s and were then properly being filed against the individual landowners who failed to adequately maintain their properties.⁹⁵ The claims largely succeeded, serving the dual role of providing an avenue for recovery for those injured from the negligent maintenance and incentivizing landowners to adequately maintain their properties.⁹⁶ In the 1980s, however, plaintiffs’ attorneys switched their focus from individual landowners to the “deep-pocketed” lead paint and pigment manufacturers, asserting strict products liability and negligence claims.⁹⁷ The suits sounding in products liability were uniformly unsuccessful, as plaintiffs failed to establish the fundamental elements of defective design

89. *Id.* at 1134.

90. *Id.* (quoting *Merlo v. Pub. Serv. Co of N. Ill.*, 45 N.E.2d 665, 675 (1942)).

91. *Id.* at 1136 (quoting *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201 (App. Div. 2003)).

92. *Id.* at 1148.

93. *See* 226 S.W.3d 110 (Mo. 2007).

94. *See generally* Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46 (1990).

95. *See id.* at 58.

96. *See id.* at 58-60.

97. *See id.* at 60.

and proximate causation.⁹⁸ Furthermore, even if the plaintiffs could have alleged valid product liability claims, the statutes of limitations for the actions had long expired.⁹⁹

In an effort to circumvent the traditional elements and defenses of products liability law that proved to be obstacles to their theories (e.g., product identification), plaintiffs recast their claims as public nuisance suits. In *City of St. Louis v. Benjamin Moore & Co.*, for example, the City argued that it did not have to prove specific causation by identifying the particular manufacturers whose paint actually caused the alleged public nuisance.¹⁰⁰ From abatement records, the City could identify the individual homes from which lead paint had been removed, but could not trace the paint to any specific defendant.¹⁰¹ The City contended that, as a practical matter, it should not have to identify the actual manufacturer of the paint that was removed from the properties to prove causation.¹⁰² The City believed that product identification should not be required in public nuisance suits with governmental plaintiffs, particularly given the cumulative and widespread nature of the defendants' activity.¹⁰³ According to the City, it should instead only be required "to show that the defendants substantially contributed to the lead paint problem in the city"¹⁰⁴ and then that the court should divide the damages among the defendants in proportion to each's share of the lead paint market.¹⁰⁵

98. See Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 DEF. COUNS. J. 119, 124 (2004); see also *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 547 (1st Cir. 1993) ("Plaintiff could not and cannot identify . . . which, if any, of the defendants are the source of the lead she ingested . . ."); *Sabater ex rel. Santana v. Lead Indus. Ass'n*, 704 N.Y.S.2d 800, 805 (Sup. Ct. 2000) ("[T]here is no duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.").

99. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (noting that time-barring restrictions reflect "a pervasive legislative judgment that . . . 'the right to be free from stale claims in time comes to prevail over'" other considerations (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944))); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 121-22 (3d Cir. 1993) (holding that claims asserted in 1990 accrued in 1976 when Congress ordered the U.S. Department of Housing and Urban Development to begin eliminating lead paint from federally funded housing, thereby putting claimants on notice that lead paint was a health hazard); *City of New York v. Lead Indus. Ass'n*, No. 14365/89, 1991 WL 284454, at *2-3 (N.Y. Sup. Ct. Dec. 23, 1991) (explaining that the statute of limitations does not restart because of new damages), *aff'd*, 597 N.Y.S.2d 698 (App. Div. 1993).

100. See 226 S.W.3d 110, 114 (Mo. 2007).

101. See *id.* at 113.

102. *Id.*

103. See *id.* at 113, 116.

104. *Id.* at 113.

105. See *id.*

The Missouri Supreme Court swiftly rejected the City's theory.¹⁰⁶ Instead, the court held to the traditional legal principle that in all tort claims, the plaintiff must prove that the defendant's conduct was the actual cause of the injury, which "can be established only by identifying the defendant who made or sold that product."¹⁰⁷ The court specifically rejected the City's argument that its status as a governmental entity and the uniquely public nature of the alleged injury necessitated a departure from traditional causation standards.¹⁰⁸ The court explained that "[w]ithout product identification, the city can do no more than show that the defendants' lead paint *may* have been present in the properties where the city claims to have incurred abatement costs."¹⁰⁹

With regard to the division of damages in accordance with the defendants' market share, the court referenced previous rejections of other market-share-based theories as being "unfair, unworkable, and contrary to Missouri law, as well as unsound public policy."¹¹⁰ As the authors pointed out in an amicus brief to the Missouri Supreme Court, market-share theory, even in the half-dozen states where it has been accepted, was inapplicable in this situation because it was never intended to create industry-wide liability.¹¹¹ Rather, the sole purpose of market-share theory has been to reverse the burden of proof in a very narrow set of circumstances where each defendant is presumed to be in a better position to know the course of harm and to exonerate itself or to join culpable parties to the action.¹¹² With regard to deteriorated lead in residences, the paint manufacturer is not best situated to identify or alter the course of harm. Rather, property owners that caused the hazardous condition through neglect are best positioned to prevent any resulting injuries.

106. Courts have similarly rejected such attempts to expand public nuisance liability in asbestos and other lead paint cases. *See, e.g.,* *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (explaining that the new public nuisance theory would "give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery"); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838, at *2 (Ohio Ct. Com. Pl. Oct. 7, 1999) ("A separate body of law (strict product liability and negligence) has been developed to cover the design and manufacture of products. To permit public nuisance law to be applied to the design and manufacture of lawful products would be to destroy the separate tort principles which govern those activities."), *rev'd*, 768 N.E.2d 1136 (2002).

107. *Benjamin Moore*, 226 S.W.3d at 115.

108. *Id.* at 116.

109. *Id.* at 115-16 (emphasis added).

110. *Id.* at 115 (quoting *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. 1984)).

111. Brief of Amici Curiae Chamber of Commerce of the United States of America & American Tort Reform Ass'n at 11-18, *Benjamin Moore*, 226 S.W.3d 110 (No. SC88230), 2007 WL 833838, at *11-18.

112. *See* Schwartz et al., *supra* note 1, at 558 n.5.

Finally, the court rejected the City's claim because the remedy sought was not abatement, but money damages for expenses incurred from assessing, abating, and remediating lead paint in private residences.¹¹³ The court correctly pointed out that money damages are only appropriate in public nuisance actions brought by private individuals for particularized harms that result from encountering a public nuisance.¹¹⁴

C. *New Jersey: In re Lead Paint Litigation*

The New Jersey lead paint litigation began in 2001 when the City of Newark filed suit against former manufacturers of lead paint and pigment for the costs of assessing and abating lead paint from residences and buildings, providing medical care to those with lead poisoning, and educating the public on the hazards of lead paint.¹¹⁵ Twenty-five counties and municipalities soon filed similar lawsuits, and in February 2002, all twenty-six cases were consolidated and assigned to Supervising Mass Tort Judge Marina Corodemus in the Mass Tort Section of Middlesex County.¹¹⁶ Judge Corodemus granted the defendants' motion to dismiss for failure to state a claim in November 2002,¹¹⁷ and after a court of appeals reinstated the public nuisance claim, the New Jersey Supreme Court dismissed the suit.¹¹⁸

Considering lead paint and pigment suits in the context of public nuisance law, the New Jersey Supreme Court concluded that the "plaintiffs' loosely-articulated assertions here [could not] find their basis in this tort."¹¹⁹ The court looked specifically to the relief sought by the plaintiffs and the conduct of the manufacturers and, like the high courts of Illinois and Missouri, refused to recognize a cause of action under public nuisance for damages resulting from the ordinary use of lawful products.¹²⁰ The court stated that accepting the plaintiffs' claims "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."¹²¹

113. *Benjamin Moore*, 226 S.W.3d at 116-17.

114. *Id.* at 116.

115. *See In re Lead Paint Litig.*, 924 A.2d 484, 486-87 (N.J. 2007).

116. *Id.* at 487; *In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528 (N.J. Super. Ct. Law Div. Nov. 4, 2002).

117. *See Lead Paint*, 2002 WL 31474528, at *23.

118. *In re Lead Paint Litig.*, 924 A.2d at 488-89, 506.

119. *Id.* at 494.

120. *See id.* at 502-03; *see also* Steven P. Benenson & Borden R. Gillis, Analysis of the New Jersey Supreme Court in "In re Lead Paint Litigation," <http://www.nuisancelaw.com/print/131> (last visited Aug. 10, 2010).

121. *In re Lead Paint Litig.*, 924 A.2d at 494.

As the court explained, the claims fell far outside the traditional bounds of public nuisance theory, as the tort is defined by “clear and consistent parameters.”¹²² The court initially focused on the traditional limitation that monetary damages are not available in suits brought by public entities.¹²³ Yet again, the court properly recognized that public nuisance law permits monetary damages only in actions by private plaintiffs.¹²⁴ “[T]here is no right either historically, or through the *Restatement (Second)*’s formulation, for the public entity to seek to collect money damages in general.”¹²⁵ The court recognized the “time-honored” element of public nuisance law that “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.”¹²⁶

In addition, the court reasoned, the defendants did not engage in unreasonable conduct. Rather, the court emphasized that the state’s Lead Paint Act¹²⁷ placed the responsibility for abatement on the individual property owners.¹²⁸ Because lead paint is hazardous only when deteriorating or flaking, “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.”¹²⁹ Thus, the premises owners, not the manufacturers, “engaged in the ‘conduct [that] involve[d] a significant interference with the public health.’”¹³⁰ To conclude otherwise “would separate conduct and location and thus eliminate entirely the concept of control of the nuisance.”¹³¹ The court concluded that merely distributing lead paint was not sufficiently linked to the health crises alleged and, therefore, “the claims of plaintiffs [could not] sound in public nuisance.”¹³²

The court further exposed the lawsuits as products liability claims masquerading under the guise of public nuisance:

Our analysis of both traditional and modern concepts of the tort of public nuisance demonstrates that plaintiffs’ complaints cannot be

122. *Id.*

123. *See id.* at 498-99.

124. *See id.* at 498.

125. *Id.* at 498-99 (citing RESTATEMENT (SECOND) OF TORTS § 821(C)(1) (1979)).

126. *See id.* at 499.

127. *See* N.J. STAT. ANN. § 24:14A-1 to :14A-11 (West 1997 & Supp. 2010).

128. *See In re Lead Paint Litig.*, 924 A.2d at 501 (“In examining the Lead Paint Act and its relationship to public nuisance generally, we find its focus on premises owners as the relevant actors to be instructive.”).

129. *Id.*

130. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821(B)(2)(a) .

131. *Id.*

132. *Id.* at 502.

understood to state such a claim. Equally supportive of that conclusion, however, is the inescapable fact that carefully read, the claims asserted would instead be cognizable only as products liability claims.¹³³

The New Jersey Product Liability Act¹³⁴ (PLA), the court continued, “encompass[es] virtually all possible causes of action relating to harms caused by consumer and other products,” including the defendants’ products and the harms they allegedly caused.¹³⁵ The assertion that the defendants failed to warn of the dangers associated with lead paint represented a “classic articulation of tort law duties, that is, to warn of or to make safe, [and was] squarely within those theories included in the PLA.”¹³⁶

Finally, the court agreed with previous case law 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.”¹³⁷ Allowing plaintiffs to proceed would “creat[e] strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, . . . have become dangerous through deterioration and poor maintenance by the purchasers.”¹³⁸ Thus, “merely offering an everyday household product for sale [would] suffice for the purpose of interfering with a common right,” creating potential liability that “would far exceed any cognizable cause of action,” public nuisance or otherwise.¹³⁹

D. Rhode Island: State v. Lead Industries Ass’n

The Rhode Island lead paint litigation began in 1999 when the plaintiffs’ firm of Motley Rice solicited then Rhode Island Attorney General Sheldon Whitehouse to enter into a contingency-fee agreement to pursue former lead paint manufacturers for *billions* of dollars in damages.¹⁴⁰ Mr. Motley boasted

133. *Id.* at 503.

134. N.J. STAT. ANN. § 2A:58C-1 to :58C-11 (West 2000 & Supp. 2010).

135. *In re Lead Paint Litig.*, 924 A.2d at 503 (citing N.J. STAT. ANN. § 2A:58C-1(b)(3) (defining “product liability action”)).

136. *Id.* (citing N.J. STAT. ANN. § 2A:58C-2).

137. *Id.* at 505 (internal quotation marks omitted) (quoting *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001)).

138. *Id.* at 502.

139. *Id.* at 501.

140. See Michael Freedman, *Turning Lead into Gold*, FORBES, May 14, 2001, at 122, 125, available at 2001 WLNR 12246271; see also Joe Nocera, *The Pursuit of Justice, or Money*, N.Y. TIMES, Dec. 8, 2007, at C1. “The state alleged that the manufacturers or their predecessors-in-interest had manufactured, promoted, distributed, and sold lead pigment for use in residential paint, despite that they knew or should have known, since the early 1900s, that lead is hazardous to human health.” *State v. Lead Indus. Ass’n*, 951 A.2d 428, 440 (R.I. 2008).

at the time that he would “bring the entire lead paint industry to its knees.”¹⁴¹ Despite being filed later in time, the New Jersey and Missouri cases were the first to come to a final adjudication and, in some ways, served as a warm-up act of sorts for *State v. Lead Industries Ass’n*¹⁴²—the most watched effort to expand public nuisance law to cover product manufacturing: it was the first statewide lead paint nuisance action filed by a state attorney general,¹⁴³ the trial had ended in a plaintiff’s verdict,¹⁴⁴ and numerous public attorneys and Wall Street interests were watching closely to see if the new theory would be sustained.¹⁴⁵

The Supreme Court of Rhode Island categorically rejected the public nuisance claim, holding that the trial judge erred in denying defendants’ motion to dismiss.¹⁴⁶ According to the court, the nature and elements of public nuisance law did not support this kind of action: “[H]owever grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm. The state has not and cannot allege facts that would fall within the parameters of what would constitute public nuisance under Rhode Island law.”¹⁴⁷ The court reiterated the four historical elements required to maintain a claim for public nuisance—public right, unreasonable conduct, control, and proximate causation.¹⁴⁸ In its ruling, the court focused on the elements of public right and control in holding that nothing in the complaint could support any of these elements.¹⁴⁹

The complaint also alleged that the manufacturers failed to warn Rhode Islanders of the hazards associated with lead, failed to adequately test lead pigment, concealed the hazards from the public or misrepresented that they were safe, and that as a result of these actions, the State incurred substantial costs. *Id.*

141. Mark Curriden, *Tobacco Fees Give Plaintiffs’ Lawyers New Muscle for Other Litigation*, DALLAS MORNING NEWS, Oct. 31, 1999, at 1H, 5H, available at 1999 WLNR 6296780; see also Freedman, *supra* note 140, at 122-23 (explaining that Mr. Motley targeted the former lead companies as his “next big-game hunt,” found victims, and “demonized” the industry because it was a “fat target”).

142. See 951 A.2d 428.

143. See *id.* at 434.

144. See *id.*

145. See *Companies in Lead-Paint Case Won’t Pay Punitive Damages*, USATODAY.COM, Feb. 28, 2006, http://www.usatoday.com/money/industries/manufacturing/2006-02-28-lead-paint-wire_x.htm; Raja Mishra, *Rhode Island Wins Lead Paint Suit*, BOSTON GLOBE, Feb. 23, 2006, at B2, available at 2006 WLNR 3133915.

146. See *Lead Indus. Ass’n*, 951 A.2d at 435-36.

147. *Id.* at 435.

148. See *id.* at 446.

149. See *id.* at 435-36.

[D]efendants were not in control of any lead pigment at the time the lead caused harm to children in Rhode Island, making defendants unable to abate the alleged nuisance, the standard remedy in a public nuisance action. Furthermore, the

First, the court found that the plaintiffs failed to sufficiently allege that the defendants infringed on any public right.¹⁵⁰ The court explained that “[t]he interference must deprive all members of the community of a right to some resource to which they otherwise are entitled.”¹⁵¹ The “right to be free from the hazards of unabated lead” is not a public right.¹⁵² In fact, as the court concluded, “[t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right.”¹⁵³ The court further clarified that the cumulative effect of private claims does not create “a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.”¹⁵⁴ “The sheer number of violations does not transform the harm from individual injury to communal injury.”¹⁵⁵ An opposite interpretation “would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that was never intended.”¹⁵⁶

The court also found that the plaintiffs’ allegations did not demonstrate control of the lead paint by the former lead paint and pigment manufacturers at the time the injuries occurred, as required under longstanding Rhode Island law.¹⁵⁷ Yet “control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement.”¹⁵⁸ This remedial limitation is premised on the

General Assembly has recognized the defendants’ lack of control and inability to abate the alleged nuisance because it has placed the burden on landlords and property owners to make their properties lead safe.

Id.

150. *See id.* at 453-55. The court noted that “[a]bsent from the state’s complaint is any allegation that defendants have interfered with a public right as that term long has been understood in the law of public nuisance.” *Id.* at 453.

151. *Id.* at 453 (citing RESTATEMENT (SECOND) TORTS § 821B cmt. g (1979)).

152. *Id.*

153. *Id.* at 448 (alteration in original) (quoting Gifford, *supra* note 18, at 817).

154. *Id.* at 453 (quoting RESTATEMENT (SECOND) TORTS § 821B cmt. g). Earlier in the opinion, the court explained that “[a]s the *Restatement (Second)* makes clear, a public right is more than an aggregate of private rights by a large number of injured people. Rather, a public right is the right to a public good, such as ‘an indivisible resource shared by the public at large, like air, water, or public rights of way.’” *Id.* at 448 (citation omitted) (quoting *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. Ct. 2005)).

155. *Id.* at 448 (quoting Gifford, *supra* note 18, at 817).

156. *Id.* at 453.

157. *See id.* at 455. (“We conclude, therefore, that there was no set of facts alleged in the state’s complaint that, even if proven, could have demonstrated that defendants’ conduct, however unreasonable, interfered with a public right or that defendants had control over the product causing the alleged nuisance at the time children were injured. Accordingly, we need not decide whether defendants’ conduct was unreasonable or whether defendants caused an injury to children in Rhode Island.”).

158. *Id.* at 449.

rationale that “[t]he party in control of the instrumentality causing the alleged nuisance is best positioned to abate it and, therefore, is legally responsible.”¹⁵⁹ The lead paint defendants, like most manufacturers, relinquished control of the product at the time it was sold to consumers or distributors. As recognized by the Rhode Island Lead Hazard Mitigation Act, property owners exercised control of the lead-containing materials and, therefore, were in the best position to abate the nuisance.¹⁶⁰ Importantly, the court explained that its ruling did “not leave Rhode Islanders without a remedy.”¹⁶¹ Rather, plaintiffs could continue to seek injunctions, penalties, and fines against individual landlords under the Lead Poisoning Prevention Act¹⁶² or the Lead Hazard Mitigation Act.¹⁶³

The court further explained that any suit against product manufacturers “for the sale of an unsafe product is a products liability action,” and that “public nuisance and products liability are two distinct causes of action, each with rational boundaries that are not intended to overlap.”¹⁶⁴ Citing to the New Jersey and Missouri Supreme Court decisions, the court continued, “Courts in other states consistently have rejected product-based public nuisance suits against lead pigment manufacturers, expressing a concern that allowing such a lawsuit would circumvent the basic requirements of products liability law.”¹⁶⁵ The court went on to conclude that “these cases [cumulatively] demonstrate that even if a lawsuit is characterized as a public nuisance cause of action, the suit nonetheless sounds in products liability if it is against a manufacturer based on harm caused by its products.”¹⁶⁶

Less than two weeks after the Rhode Island ruling, the City of Columbus voluntarily dismissed its public nuisance suit against lead paint manufacturers,¹⁶⁷ becoming the tenth Ohio city to voluntarily dismiss such a

159. *Id.* The court discussed the New Jersey Supreme Court’s ruling in *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007), which similarly held that manufacturers of lead pigment could not be held liable for public nuisance under New Jersey law. *See Lead Indus. Ass’n*, 951 A.2d at 449. The Rhode Island court paraphrased the New Jersey court’s holding “that control at the time the damage occurs is a time-honored element of public nuisance.” *Id.* (citing *In re Lead Paint Litig.*, 924 A.2d at 499); *see also supra* text accompanying note 126.

160. *See* 2002 R.I. Pub. Laws 875, 879 (codified as amended at R.I. GEN. LAWS § 42-128.1-8 (2006)).

161. *Lead Indus. Ass’n*, 951 A.2d at 456.

162. *See* R.I. GEN. LAWS §§ 23-24.6-23, 23-24.6-27 (2006).

163. *See* R.I. GEN. LAWS §§ 42-128.1-10.

164. *Lead Indus. Ass’n*, 951 A.2d at 456.

165. *Id.* (citing *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 134 (Ill. App. Ct. 2005); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484, 503-05 (N.J. 2007)).

166. *Id.* at 457.

167. *Columbus Drops Nuisance Suit over Lead Paint*, DAYTON BUS. J., July 10, 2008,

suit.¹⁶⁸ In February 2009, Ohio Attorney General Richard Cordray dismissed Ohio's final public nuisance suit against the lead paint manufacturers "[a]fter assessing the law, facts, and adverse legal rulings in these types of cases nationally."¹⁶⁹ Cordray said in a press release, "I understand and strongly agree that exposure to lead paint is a very real problem But I also know that not every problem can be solved by a lawsuit."¹⁷⁰

E. Ohio and Wisconsin

The treatment of public nuisance cases in Ohio and Wisconsin is also instructive. Historically, efforts to expand liability using public nuisance theory have occasionally met with success.¹⁷¹ A few courts have yielded to plaintiffs' arguments, and "[a]rmed with a sense of moral imperative, [they have] . . . push[ed] the law to its outermost limits in order to obtain what they believe to be an equitable result."¹⁷²

Consider, for example, a New York case over improper dumping of waste that polluted certain grounds and waterways.¹⁷³ Even though the defendant did not control the contractor hired to dispose of the waste, nor the land where the waste was dumped, the court allowed a public nuisance case to proceed against the corporation that owned the waste.¹⁷⁴ With surprising candor, the court recognized that the decision over who should pay for the cleanup was "essentially a political question to be decided in the legislative arena," but proceeded to hold that the defendant could be subject to public nuisance liability because "[s]omeone must pay to correct the problem."¹⁷⁵ Whether these kinds of ends-justifies-the-means decisions are aberrations or trendsetters is the key issue.

<http://dayton.bizjournals.com/dayton/stories/2008/07/07/daily30.html>; Mark Ferenchik, *City Drops Lead-Paint Suit: Court Rulings Elsewhere Lead to Decision; Ohio Will Pursue Its Case*, COLUMBUS DISPATCH, July 10, 2008, at 1B, available at 2008 WLNR 12918860; *Paintmakers Win Public Nuisance Appeal; Columbus Drops its Suit*, CHEMICAL WK., July 14, 2008, at 4, available at 2008 WLNR 13476765.

168. John O'Brien, *Another Paint Suit Brushed Away*, LEGALNEWSLINE.COM, July 9, 2008, <http://www.legalnewsline.com/news/214039-another-paint-suit-brushed-away>.

169. Press Release, Ohio Attorney Gen. Richard Cordray, *Cordray Dismisses Lead Paint Lawsuit* (Feb. 6, 2009), available at <http://www.ohioattorneygeneral.gov/NewsReleases> (follow "February 2009" or "All News Releases" hyperlink; then follow "Cordray Dismisses Lead Paint Lawsuit" hyperlink).

170. *Id.*

171. See Frederick C. Schaefer & Christine Nykiel, *Lead Paint: Mass Tort Litigation and Public Nuisance Trends in America*, 74 DEF. COUNS. J. 153, 154 (2007).

172. *Id.*; see also *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455-56 (R.I. 2008).

173. See *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. 1983).

174. See *id.* at 976-77.

175. *Id.* at 977.

In the most recent attempt to expand public nuisance law, the aberrant cases were decided by the Ohio Supreme Court and the Wisconsin Court of Appeals. The impact of these two cases, however, has been marginalized. In Ohio, the General Assembly immediately overturned the supreme court's decision by legislatively declaring that all common law public nuisance suits against product manufacturers must be heard under the state's products liability laws.¹⁷⁶

In Wisconsin, after the court of appeals permitted the plaintiffs' nuisance claim to proceed despite their failure to establish causation,¹⁷⁷ a Milwaukee jury returned a defense verdict.¹⁷⁸ Due to this outcome, the case was never appealed to the Supreme Court of Wisconsin for a final ruling on the legitimacy of the plaintiffs' proposed expansion of public nuisance theory.

I. City of Cincinnati v. Beretta U.S.A. Corp.

In 1999, the City of Cincinnati brought a public nuisance suit against fifteen gun manufacturers, three trade associations, and one gun distributor.¹⁷⁹ The City sought both injunctive relief and monetary damages for an alleged increase in health-care and law-enforcement costs attributable to gun violence.¹⁸⁰

When the case made its way to the Ohio Supreme Court, Ohio became the first and only state whose high court permitted a public nuisance claim to proceed against a product manufacturer.¹⁸¹ Although Ohio's public nuisance law had only been applied to real property and statutory violations, the court observed that it had never strictly limited public nuisance to those types of actions.¹⁸² Instead, the court held that "under the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by

176. See *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, *superseded by statute*, 2006 Ohio Laws File 198 (amending OHIO REV. CODE ANN. § 2307.71(A)(13) (LexisNexis 2005)), *as recognized in* *City of Toledo v. Sherwin-Williams Co.*, No. CI 200606040, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007).

177. See *City of Milwaukee v. NL Indus., Inc.*, 2005 WI App 7, ¶¶ 17-19, 278 Wis.2d 313, ¶¶ 17-19, 691 N.W.2d 888, ¶¶ 17-19.

178. See *City of Milwaukee v. NL Indus., Inc.*, 2008 WI App 181, ¶ 17, 315 Wis.2d 443, ¶ 17, 762 N.W.2d 757, ¶ 17.

179. *Cincinnati v. Beretta*, ¶ 1, 768 N.E.2d at 1140. The City also alleged negligence and products liability. *Id.*

180. *Id.*

181. See *id.* ¶ 16, 768 N.E.2d at 1143-44 ("[W]e find that [the City] has adequately pled its public-nuisance claim and has set forth sufficient facts necessary to overcome appellees' motion to dismiss.").

182. *Id.* ¶ 9, 768 N.E.2d at 1142. Compare *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1117 (Ill. 2004) (refusing to expand conduct giving rise to public nuisance beyond statutory violations and use of the defendant's land), discussed *supra* Part II.A.

a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.”¹⁸³ Thus, where other courts have recognized such actions as truly sounding in products liability,¹⁸⁴ the Ohio Supreme Court willingly expanded the law, or at least found a broad interpretation in order to encompass the City’s claims.

The court also discounted the traditional public nuisance element of control, stating that it would not be “fatal to appellant’s public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred.”¹⁸⁵ Unlike similarly situated courts, the Ohio Supreme Court was satisfied with the plaintiffs’ allegations that the defendants controlled the *supply* of guns that created and perpetuated the alleged public nuisance, even if they were not in actual control of the instrumentalities: “Just as the individuals who fire the guns are held accountable for the injuries sustained, [the defendants] can be held liable for creating the alleged nuisance.”¹⁸⁶

Admitting that its legal construction serviced a policy goal, the court stated, “While no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence, such litigation may have an important role to play, complementing other interventions available to cities and states.”¹⁸⁷ These statements illustrate that the court relaxed the traditional elements of public nuisance law to encompass the City’s claim and correct a perceived societal harm. By maneuvering around longstanding tort principles, the court momentarily breathed life back into the expansive approach and risked creating an entirely new and unfounded cause of action.

Almost immediately, members of the Ohio General Assembly recognized the threat posed by the court’s ruling and introduced legislation to preclude public nuisance claims against product manufacturers.¹⁸⁸ Legislators appreciated that the ruling risked venturing down the slippery slope cautioned by courts around the nation—permitting such a suit would greatly expand the scope of liability for all product manufacturers by allowing any claim for harm caused by a lawfully manufactured product to be brought under a public nuisance theory. Representative Bill Seitz from Cincinnati perceived this

183. *Cincinnati v. Beretta*, ¶ 10, 768 N.E.2d at 1142.

184. *See, e.g.*, *State v. Lead Indus. Ass’n*, 951 A.2d 428, 457 (R.I. 2008); *see also supra* text accompanying note 166.

185. *Cincinnati v. Beretta*, ¶ 12, 768 N.E.2d at 1143.

186. *Id.* ¶ 13, 768 N.E.2d at 1143.

187. *Id.* ¶ 51, 768 N.E.2d at 1151.

188. *See* 2006 Ohio Laws File 198 (amending OHIO REV. CODE ANN. § 2307.71(A)(13) (LexisNexis 2005)).

threat and commented that the legislation was specifically “designed to prevent someone from getting around existing law by cleverly recasting a product liability case as a public nuisance case.”¹⁸⁹

Regarding existing public nuisance suits against manufacturers of lead paint and pigment, Seitz focused on product identification, stating that “[i]n a normal case, you have to prove who made the product.”¹⁹⁰ He explained that when plaintiffs cannot identify who manufactured the particular product, “[w]e’re not going to allow people to sue the whole industry That flouts the idea of who is responsible for the harm.”¹⁹¹ Seitz’s statement also implicates the public nuisance element of control. By permitting the complaint to proceed on the basis of the defendants’ marketing and distribution practices, the Ohio Supreme Court distorted the longstanding purpose of the control element in a public nuisance case—to ensure that those who actually created the nuisance or caused the injuries are looked to for redress.

The reaction from the Ohio legislature was decisive. In December 2006, the Ohio General Assembly amended the Ohio Product Liability Act¹⁹² (OPLA) to make clear that public nuisance claims for allegedly defective products must be brought under the state’s products liability laws.¹⁹³ Product liability claims

189. Peter Krouse, *Bill Could Thwart Cities’ Lawsuits on Lead Paint*, CLEVELAND PLAIN DEALER, Dec. 15, 2006, at C1 (internal quotation marks omitted), available at 2006 WLNR 21847013.

190. Mark Ferenchik et al., *Columbus Rethinking Lead-Paint Suit*, COLUMBUS DISPATCH, Dec. 1, 2006, at 1A, available at 2006 WLNR 20772528.

191. *Id.*

192. See OHIO REV. CODE ANN. §§ 2307.71 to 2307.80.

193. 2006 Ohio Laws File 198 (amending OHIO REV. CODE ANN. § 2307.71(A)(13)). The amending act, also known as Ohio Senate Bill 117, met with some opposition. The bill passed the General Assembly on December 14, 2006, and was sent thirteen days later to then Governor Taft, who opted to let the bill pass into law without his signature on his last day in office, January 5, 2007. See *State ex rel. Ohio Gen. Assem. v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶¶ 4-9. The Ohio Constitution provides that a bill becomes law if no action is taken by the governor within ten days of the bill being sent to the governor’s office. See OHIO CONST. art. II, § 16. The new governor, Ted Strickland, immediately attempted to veto the legislation on his first day in office. See *Brunner*, ¶ 2, 872 N.E.2d at 915. Granting a petition filed by the Ohio General Assembly, the Ohio Supreme Court then issued a writ of mandamus compelling the secretary of state to treat Ohio Senate Bill 117 as valid law, finding that Governor Strickland’s veto attempt was invalid since the ten-day period had expired. See *id.* ¶¶ 32-51, 872 N.E.2d at 921-25. In a subsequent action, the secretary of state sought a stay and reconsideration of the court’s decision that the bill became law on the tenth day. See *State ex rel. Ohio Gen. Assem. v. Brunner*, 115 Ohio St.3d 103, 2007-Ohio-4460, 873 N.E.2d 1232, ¶ 1. On review, the Ohio Supreme Court held that the ninety-day period in which citizens must be permitted to file a referendum petition against a bill required that the effective date of the legislation be the date on which the initial state supreme court decision was rendered. See *id.* ¶¶ 2, 16, 873 N.E.2d at 1232-33, 1235.

were redefined to “include[] any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.”¹⁹⁴

In 2007, an Ohio trial court relied on this clarification to dismiss a public nuisance claim against lead paint manufacturers in *City of Toledo v. Sherwin-Williams Co.*¹⁹⁵ There, the City alleged that paint manufacturers and distributors were liable for the damages stemming from their “roles in the manufacture, processing, marketing, supplying, distributing, and/or sale of lead based paint products.”¹⁹⁶ The court agreed with the defendants’ contention that the “[p]laintiff’s public nuisance claim [was] expressly subsumed by the OPLA” and granted the defendants’ motion to dismiss.¹⁹⁷

2. *City of Milwaukee v. NL Industries, Inc.*

In the same month that the New Jersey and Missouri supreme courts rejected the application of public nuisance against lead paint manufacturers, a Milwaukee jury returned a verdict in favor of a defendant lead paint manufacturer in a similar action.¹⁹⁸ Because the case resulted in a defense verdict, the defendants did not appeal the validity of the plaintiffs’ legal theory to the Wisconsin Supreme Court. The theory, therefore, is left standing with the court of appeals’ decision that allowed the public nuisance action to proceed.¹⁹⁹

In 2001, the City of Milwaukee sued NL Industries, Inc., and Mautz Paint, alleging that the defendants’ production and distribution of lead paint in Milwaukee created a public nuisance.²⁰⁰ The City sought compensatory and equitable relief for abatement of the alleged nuisance, restitution for \$52 million that the City spent in an abatement program, and punitive damages.²⁰¹

The trial court granted the defendants’ motion to dismiss the City’s public

194. OHIO REV. CODE ANN. § 2307.71(A)(13).

195. No. CI200606040, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007).

196. *Id.* at 1-2.

197. *Id.* at 4, 12.

198. Compare *City of Milwaukee v. NL Indus., Inc.*, 2008 WI App 181, ¶ 17, 315 Wis.2d 443, ¶ 17, 762 N.W.2d 757, ¶ 17, with *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007), and *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); see also discussion *supra* Part II.B-C.

199. See *NL Industries*, 2008 WI App 181, 315 Wis.2d 443, 762 N.W.2d 757.

200. *City of Milwaukee v. NL Indus. Inc.*, 2005 WI App 7, ¶¶ 2-4, 278 Wis.2d 313, ¶¶ 2-4, 691 N.W.2d 888, ¶¶ 2-4.

201. *Id.* ¶ 5, 691 N.W.2d at 891; see also Alan Ehrenhalt, *Torts for Tots: When It Comes to Consumer Product Safety, Litigation Is No Way to Regulate*, GOVERNING, Feb. 1, 2009, <http://www.governing.com/hidden/Torts-for-Tots.html>.

nuisance claim for lack of causation, “concluding that the City could not show that these particular defendants caused their lead-based paint to be applied to any of the specific buildings included in the alleged public nuisance.”²⁰²

On appeal, the Wisconsin Court of Appeals focused on the issue of causation and ultimately reversed the trial court’s order after finding that the City presented genuine issues of material fact as to whether the defendants’ conduct was a substantial factor in creating the nuisance.²⁰³

Citing Wisconsin case law, the appellate court stated that “the basis for liability in a public nuisance case is the damage done by or danger inherent in the *creation or maintenance* of that which constitutes a nuisance.”²⁰⁴ The court distinguished between creating and maintaining a public nuisance and held that “to establish a claim of creating a public nuisance, a plaintiff must prove that the defendant’s conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public.”²⁰⁵ The court continued, “Based on our review of the current record, we are persuaded that there are disputed material facts concerning the extent of both defendants’ sales in Milwaukee and whether those sales were a substantial cause of the alleged nuisance. We conclude, therefore, that this is an issue for the jury.”²⁰⁶

In June 2007, the jury found that while lead paint in the city constituted a public nuisance, the manufacturer defendants did not “intentionally and unreasonably engage in conduct” that caused the public nuisance and therefore could not be held liable.²⁰⁷ The Wisconsin Court of Appeals upheld the verdict on appeal, explaining that under the Restatement (Second) of Torts, “it is possible to have a nuisance and yet no liability.”²⁰⁸ For liability to attach, “the City was required to establish a causal connection between the nuisance and underlying tortious acts attributable to NL Industries.”²⁰⁹ On April 14, 2009,

202. *NL Industries*, ¶ 1, 691 N.W.2d at 890. The City argued that the defendants were responsible for the costs associated with the abatement “because their conduct in marketing and selling substantial quantities of lead pigments and/or lead-based paint in the City of Milwaukee . . . , when they knew the hazards of lead poisoning related to their product, was a substantial factor creating the public nuisance.” *Id.* ¶ 4, 691 N.W.2d at 890-91.

203. *See id.* ¶¶ 17-19, 691 N.W.2d at 893-94.

204. *Id.* ¶ 10, 691 N.W.2d at 892 (emphasis in original) (internal quotation marks omitted) (citing *Brown v. Milwaukee Terminal Ry. Co.*, 224 N.W. 748 (Wis. 1929)).

205. *Id.* ¶ 12, 691 N.W.2d at 892.

206. *Id.* ¶ 18, 691 N.W.2d at 894.

207. *City of Milwaukee v. NL Indus., Inc.*, 2008 WI App 181, ¶ 17, 315 Wis.2d 443, ¶ 17, 762 N.W.2d 757, ¶ 17.

208. *Id.* ¶ 22, 762 N.W. 2d at 766 (quoting *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 25, 277 Wis.2d 635, ¶ 25, 691 N.W.2d 658, ¶ 25).

209. *Id.*

the Wisconsin Supreme Court denied review of the appellate court's ruling without opinion.²¹⁰

III. What These Decisions Mean for Pending Cases

These four state supreme court opinions, the Ohio General Assembly's legislation, and the Milwaukee trial court verdict should serve as guides for courts across the country addressing public nuisance theories for broad-based claims against product manufacturers. This section looks at the future of the only remaining major state-level public nuisance suit, which is pending in California, and the viability of the global climate change public nuisance suits pending before several federal circuit courts.

A. State Case

County of Santa Clara v. Atlantic Richfield Co. stands alone as the last remaining major public nuisance suit involving lead paint.²¹¹ In 2000, Santa Clara County (later joined by numerous other counties and municipalities) filed a class action lawsuit on behalf of all public entities in the State of California against several manufacturers of lead paint and pigment and the Lead Industries Association for millions of dollars in costs and damages associated with lead paint.²¹² The plaintiffs "alleged that the defendants engaged in a concerted campaign opposing government regulation by challenging warnings, attacking the credibility of public health workers, and orchestrating a public relations campaign to mislead consumers."²¹³

In 2001, the trial court denied the plaintiffs' public nuisance claim as "sound[ing] in products liability rather than nuisance."²¹⁴ The court dismissed the remaining claims in July 2003.²¹⁵ In March 2006, the Sixth District of the California Court of Appeals reinstated the public nuisance claim.²¹⁶ In an effort to distinguish this case from precedent, the court found that the claim was not "essentially" a products liability claim, and that public nuisance causes of action may proceed where the plaintiff seeks abatement of a public nuisance that was created through the defendants' conduct.²¹⁷ It then eliminated the element of control from the public nuisance analysis: "[L]iability for nuisance does not

210. *City of Milwaukee v. NL Indus., Inc.*, 2009 WI 34, 316 Wis.2d 719, 765 N.W.2d 579.

211. *See* 40 Cal. Rptr. 3d 313 (Ct. App. 2006).

212. *See id.* at 320.

213. Faulk & Gray, *supra* note 17, at 980.

214. *County of Santa Clara v. Atl. Richfield Co.*, No. CV788657, 2001 WL 1769999 (Cal. Super. Ct. May 31, 2001).

215. *See Atlantic Richfield*, 40 Cal. Rptr. 3d at 323.

216. *See id.* at 348.

217. *See id.* at 324-25.

hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance*.²¹⁸

The defendants appealed the decision to the California Supreme Court, which denied review without opinion on June 21, 2006, and remanded the case to the trial court.²¹⁹ In May 2007, the trial judge granted the defendants' motion to void the plaintiffs' contracts with contingency-fee attorneys hired to prosecute the case.²²⁰ Citing *People ex rel. Clancy v. Superior Court*, the court held that contingency-fee arrangements between the governmental entities and private attorneys are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action."²²¹ The case was stalled until July 2010 when the California Supreme Court issued its long awaited ruling affirming the constitutionality of the governments' use of contingency-fee attorneys in suits brought on behalf of the state.²²² In an opinion that will be the subject of scrutiny and debate across the nation as other jurisdictions analyze the constitutionality of such a practice, the California Supreme Court sided with Rhode Island in permitting the state's use of contingency fee lawyers so long as the public entity retains complete control and veto power over the course of the litigation.²²³ Thus, the ruling provided that the state could use contingency fee attorneys in pursuing its public nuisance suit but did not touch on the underlying merits of the appropriateness of theory as applied to product-based harms. The trial court that will now face the substantive matter, however, should take heed of the recent rulings from around the country that rejected this latest attempt to expand public nuisance law into realm of products liability and dismiss the case as beyond the scope of the tort's narrow underpinnings.

B. Federal Cases

Recent claims against American corporations for allegedly contributing to "global climate change" represent the latest attempt to push the bounds of public nuisance theory. To date, four primary global climate change cases have been filed in federal courts around the nation. Two of these cases were filed by

218. *Id.* at 306 (alteration and emphasis in original) (quoting *City of Modesto Redevelopment Agency v. Superior Court*, 13 Cal. Rptr. 3d 865, 872 (Ct. App. 2004)).

219. *See id.* at 313.

220. *See County of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 844 (Ct. App., 2008), *rev'd*, 112 Cal. Rptr. 3d 697 (2010).

221. *See id.* at 848 (quoting *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985)).

222. *See Santa Clara*, 112 Cal. Rptr. 3d at 719-20.

223. *See id.* (citing *State v. Lead Indus. Ass'n*, 951 A.2d 428, 477 n.52 (R.I. 2008)).

state attorneys general for injunctive relief, and two sought damages in response to specific weather events.²²⁴ At the district court level, each attempt failed. The four district court judges hearing the claims dismissed the complaints as raising nonjusticiable political questions.²²⁵ Despite a consensus among the district courts, however, the Fifth and Second Circuit Courts each revived a public nuisance suit on appeal.²²⁶ In the Second Circuit case, the defendants are petitioning the United States Supreme Court for review.²²⁷ Meanwhile, the Fifth Circuit, which vacated its panel ruling, initially granted the defendants' motion for en banc review, but due to recusals lost its quorum and invited the plaintiffs to petition the United States Supreme Court for review.²²⁸

The political question doctrine notwithstanding, the cases raise issues that have long been the focus of the executive and legislative branches, and do not sound in public nuisance. As one team of legal scholars observed,

[The] exceedingly complex issues [of emission controls] must be confronted at the national and international levels by Congress, expert federal agencies, and the President. They cannot rationally be based through piecemeal and *ad hoc* tort litigation seeking injunctive relief—or, even worse, billions of dollars in retroactive and future money damages—against targeted industries for engaging in lawful and comprehensively-regulated conduct.²²⁹

The first of these suits was *Connecticut v. American Electric Power Co. (AEP)*, where the attorneys general of eight states, along with several nonprofit land trusts, filed a public nuisance action against six utility companies seeking abatement of the public nuisance of global climate change.²³⁰ The plaintiffs

224. The global climate change suits brought by private plaintiffs are briefly addressed here to summarize the future of public nuisance litigation. These private plaintiff suits address a slightly different issue than the product-based suits that were the primary focus of this Article. Given the potential for future litigation in this arena, the authors believe these lawsuits warrant a brief discussion in this section. For a more complete analysis of the global climate change litigation, see Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool Global Warming Suits*, 78 TENN. L. REV. (forthcoming 2011).

225. Theodore J. Boutros, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance"*, 35 ECOLOGY L. CURRENTS 80, 81 (2008).

226. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated*, 598 F.3d 208 (5th Cir. 2010), *as recognized in* 607 F.3d 1049 (5th Cir. 2010).

227. See Petition for a Writ of Certiorari, *Connecticut v. Am. Elec. Power Co.*, No. 10- ----, (U.S. Aug. 2, 2010), available at <http://www.masstortdefense.com/uploads/file/AEPcert.pdf>.

228. *Comer*, 607 F.3d at 1053, 1055.

229. Boutros & Lanza, *supra* note 225, at 81.

230. See 406 F. Supp 2d 265, 267-68 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009).

The State Plaintiffs, claiming to represent the interests of more than 77 million

alleged that the defendants' power facilities contributed to global climate change by emitting greenhouse gases.²³¹ To curtail the effects of global climate change, the plaintiffs sought

an order (i) holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the Defendants to abate its contribution to the nuisance by capping its greenhouse gas emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade.²³²

The U.S. District Court for the Southern District of New York dismissed the plaintiffs' claims as nonjusticiable political questions, as the court believed it could not decide the case without first making a policy determination that fell outside of its jurisdiction.²³³ According to the court, caps on emissions and annual reductions thereafter are remedies of a legislative or regulatory nature.²³⁴ The court noted "that Congress has recognized that carbon dioxide emissions cause global warming . . . but . . . has declined to impose any formal limits on [greenhouse gas] emissions."²³⁵ Therefore, resolving the issue would require a judicial determination of the appropriate emissions level and whether the costs of all emissions should rest with a small segment of the electrical industry, as well as an examination of the economic and national security implications of such a determination.²³⁶ The court concluded, "Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required."²³⁷

The Second Circuit disagreed. After citing the "high bar" for a finding of nonjusticiability, the court stated that "simply because an issue may have political implications does not make it non-justiciable."²³⁸ The court turned to the Restatement (Second) of Torts and the federal common law of public

people and their related environments, natural resources, and economies, and the Private Plaintiffs, non-profit land trusts, bring these federal common law public nuisance actions to abate what they allege to be Defendants' contributions to the phenomenon commonly known as global warming.

Id. at 268.

231. *Id.* at 268.

232. *Id.* at 270.

233. *Id.* at 274.

234. *See id.* at 272-73.

235. *Id.* at 268-69.

236. *Id.* at 272-73.

237. *Id.* at 274 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

238. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321, 323 (2d Cir. 2009).

nuisance as providing sufficient standards for determining whether the complaint sufficiently stated a public nuisance claim.²³⁹ The court also refused to impose a requirement on all federal common law nuisance claims that would require plaintiffs to trace any pollution directly to the defendants.²⁴⁰

In *California v. General Motors Corp.*, the State of California sought damages against six automakers for creating and contributing to the “alleged public nuisance [of] global warming.”²⁴¹ The State alleged that the manufacturers produce vehicles that emit “over twenty percent of human-generated carbon dioxide emission in the United States” and should be held jointly and severally liable for creating, contributing to, and maintaining a public nuisance.²⁴² The U.S. District Court for the Northern District of California dismissed this complaint, holding that it presented a nonjusticiable political question.²⁴³ Similar to the New York court in *AEP*, the California court stated that the claim required “an initial policy determination of a kind clearly for nonjudicial discretion.”²⁴⁴ The court also found that the claim implicated issues constitutionally committed to the political branches because they affect interstate commerce and foreign policy, and that there were no judicially discoverable, manageable standards by which to resolve the claim.²⁴⁵

Before the Ninth Circuit Court of Appeals could rule on the issue, California Attorney General Jerry Brown voluntarily withdrew the case after acknowledging the political nature of the claim.²⁴⁶ A spokesman for Brown stated, “With the new administration in Washington, the rules have radically changed The EPA and the federal government are now on the side of reducing greenhouse gasses and are taking strong measures to reduce emissions from vehicles.”²⁴⁷ The announcement of the withdrawal came the week before President Obama’s climate change plan narrowly passed the House of Representatives.²⁴⁸

239. *See id.* at 326-29.

240. *See id.* at 356.

241. *See* No. C06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007).

242. *Id.* at *1-2.

243. *Id.* at *16.

244. *Id.* at *6.

245. *See id.* at *13-16.

246. *See* Joanne Lichtman, *California v. General Motors: State Moves to Voluntarily Dismiss Climate Change Lawsuit Against Major Automakers*, GLOBAL CLIMATE CHANGE BLOG, June 23, 2009, <http://www.globalclimatelaw.com/articles/climate-change-litigation> (follow article title hyperlink).

247. Amanda Bronstad, *California’s Global Warming Suit Melts Away*, NAT’L L.J., June 26, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431782836>.

248. *See* John M. Broder, *House Backs Bill, 219-212, to Curb Global Warming*, N.Y. TIMES, June 27, 2009, at A1, available at 2009 WLNR 12297368.

Private plaintiffs bringing global climate change public nuisance suits suffered a similar fate at the district court level. For example, in *Comer v. Nationwide Mutual Insurance Co.*, a class of Mississippi residents sued more than a hundred oil, energy, and chemical companies (named and unnamed) for the damages caused in the wake of Hurricane Katrina.²⁴⁹ The complaint alleged that the defendants knowingly and willingly contributed to global climate change through emission of greenhouse gases, which in turn warmed the waters off the gulf, thereby causing the storm to intensify before making landfall.²⁵⁰ The district court ultimately dismissed the claim as a nonjusticiable political question.²⁵¹

On appeal to the Fifth Circuit, however, a three-judge panel reinstated that case in a brief opinion that echoed the Second Circuit's opinion in *AEP*.²⁵² The panel found that the plaintiffs had standing to assert their claims for public nuisance, private nuisance, negligence, and trespass.²⁵³ The opinion explained that "[t]he policy determinations underlying those common law tort rules present no need for nonjudicial policy determinations to adjudicate this case."²⁵⁴ The court limited the causation analysis to the minimum requirement necessary to show traceability sufficient for Article III standing, thereby postponing a more stringent analysis until the summary judgment stage of the proceeding.²⁵⁵ As mentioned above, however, the Fifth Circuit granted the defendants' motion for an en banc review of the case and vacated the panel's decision.²⁵⁶ Subsequently, several judges recused themselves from the case and the circuit no longer held a quorum to reach a decision.²⁵⁷

The United States District Court for the Northern District of California was home to the most recent global climate change suit, *Native Village of Kivalina v. ExxonMobil Corp.*, where an Alaskan village sued two dozen oil, coal, and power companies for damages it allegedly suffered as a result of global climate

249. See No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at *1 (S.D. Miss. Feb. 23, 2006)

250. See *id.* at *4.

251. See *Comer v. Murphy Oil USA, Inc.*, No.1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007).

252. See *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated*, 598 F.3d 208 (5th Cir. 2010), *as recognized in* 607 F.3d 1049 (5th Cir. 2010). The court stated that "[a]lthough we arrive at our own decision independently, the Second Circuit's reasoning is fully consistent with ours, particularly in its careful analysis of whether the case requires the court to address any specific issue that is constitutionally committed to another branch of the government." *Id.* at 876 n.15.

253. *Id.* at 879.

254. *Id.* at 875.

255. See *id.* at 864-67.

256. See *Comer*, 607 F.3d 1049, 1053.

257. See *id.* at 1055.

change.²⁵⁸ In this private plaintiff suit, the villagers argued that the defendants significantly contributed to global climate change, which prevented the formation of an Arctic Sea ice barrier that had historically protected the land surrounding the village from erosion.²⁵⁹ Like the other district courts, the *Kivalina* court also relied on the political question doctrine to dismiss the villagers' claim. The court, which issued its ruling only a few weeks after the Second Circuit reinstated *AEP*, found no "judicially discoverable and manageable standards" that would allow it to "render[] a decision that [was] principled, rational, and based upon reasoned distinctions."²⁶⁰ Furthermore, the claim required initial policy decisions best left to the other branches, such as the reasonableness of the defendants' conduct.²⁶¹ Importantly, the court disagreed with the Second Circuit's opinion in *AEP*. While the Second Circuit believed that "[w]ell settled principles of tort and public nuisance law provide appropriate guidance to the district courts in assessing" global climate change claims and that these claims can be "addressed through principled adjudication,"²⁶² the *Kivalina* court declared itself "not so sanguine."²⁶³ The court concluded, "While such principles may provide sufficient guidance in some novel cases, this is not one of them."²⁶⁴

Even the government attorneys bringing these cases have acknowledged that their global climate change public nuisance claims are primarily designed to advance policy agendas and motivate legislative and regulatory bodies to issue tighter controls over various emission standards. With respect to the *AEP* case, for example, Connecticut Attorney General Richard Blumenthal stated that

this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO₂ pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [My colleague and I were] brainstorming about what could be done.²⁶⁵

258. See 663 F. Supp. 2d 863, 868-69 (N.D. Cal. 2009).

259. See *id.* at 869 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)).

260. *Id.* at 874-75.

261. See *id.* at 876-77.

262. *Id.* at 875 (quoting *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009)).

263. *Id.*

264. *Id.*

265. Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 339 (2005). Attorney General Blumenthal led the first joint climate change action. See *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp 2d 265, 266 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309.

Maine Attorney General Stephen Rowe echoed, “I’m outraged by the federal government’s refusal to list CO₂ as a pollutant. . . . I think the EPA should be more active. . . . [I]t’s a shame that we’re here, here we are trying to sue [companies] . . . because the federal government is being inactive.”²⁶⁶ In short, these suits seek to use the tort system, via public nuisance law, as a pulpit to garner attention and bring about legislative or regulatory change.

In hearing the appeals, the courts should continue to keep public nuisance law within its rational bounds and uphold the district court decisions dismissing these cases as nonjusticiable political questions. Even if the appellate courts were to reverse the trial court decisions and reinstate the claims, the allegations would not satisfy the four elements of the tort of public nuisance. For example, emission standards for cars, energy products, and other targets of the litigation are heavily regulated, meaning that producing these products in compliance with the regulations is not unreasonable.²⁶⁷ Also, the challenge of showing that making cars, electricity, and other such products proximately caused global climate change or that the companies were in control of the nuisance appears insurmountable.

Conclusion

Public nuisance theory has developed over nine centuries of English and American common law to apply to a very specific set of facts—an injury to a right common to the public, resulting from unreasonable conduct, and proximately caused by a person in control of the nuisance, either at the time the nuisance was created or when it is to be abated. This limited applicability has been confirmed by the state supreme courts in the lead paint and gun manufacturer cases, and again by the federal district courts in the global climate litigation. These cases should signal to state attorneys general and other public attorneys, as well as contingency-fee lawyers, that public nuisance is not a catch-all cause of action capable of circumventing traditional tort principles and defenses.

266. Symposium, *supra* note 265, at 342-43. On December 7, 2009, the EPA issued its “Endangerment Findings,” which officially declared CO₂ and several other greenhouse gases to be pollutants and therefore within the purview of the Clean Air Act. *See* 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch.1). The findings became effective January 14, 2010. *Id.* at 66496.

267. *See supra* notes 31-32 and accompanying text.

