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## COMMENTS

### **In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance**

STEVEN SARNO\*

On February 22, 2006, a Rhode Island jury\*\* found defendant lead paint manufacturers<sup>1</sup> liable for the costs of abating the lead health hazard that their products had created in the state's housing stock.<sup>2</sup> This marked the first time that an American jury found lead paint manufacturers liable under a public nuisance theory. This group of defendants previously had been sued in several states by both private plaintiffs and governmental entities. Virtually all of these claims failed.<sup>3</sup> Against the backdrop of the *Rhode Island* case, this paper examines the recent decisions from other state courts wrestling with the application of public nuisance doctrine to the lingering lead-paint contamination in our national housing.

This paper works from the premise, as articulated in the *Restatement (Second) of Torts*, that public nuisance is a viable and flexible tool available to state entities in the exercise of their du-

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\*\* Author's note: Since the writing of this paper, the Rhode Island Supreme Court decided the appeal by lead paint manufacturers, reversing the trial court's denial of defendants' motion to dismiss. A brief analysis of this decision and its impact on the reasoning in this article is discussed in the addendum.

1. As used in this paper, the term "lead paint manufacturers" includes manufacturers and distributors of lead-based paint and lead pigment, successors-in-interest to such manufacturers and distributors, trade associations for both the paint and lead industries, and lead extraction and processing companies.

2. See *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2007 R.I. Super. LEXIS 32, at \*1 (Super. Ct. Feb. 26, 2007) (decision on post-trial motions, filed February 26, 2007, discussing the unanimous jury verdict for the state).

3. See notes *infra* 7, 56 & 59; discussion *infra* part IIB.

ties to protect the public health, safety, welfare, and comfort.<sup>4</sup> In many of the lead paint lawsuits brought by private plaintiffs, as well as by governments not alleging public nuisance, plaintiffs sought damages and restitution for the costs of treating lead poisoned individuals. Lead paint manufacturers successfully defended against these claims by making a two-part argument: (1) plaintiffs failed to show product identification<sup>5</sup> (and thus could not prove a causal link to the defendants), and (2) alternative liability theories, such as market share liability, do not apply to lead paint (and thus could not relieve a plaintiff from the burden of causation).<sup>6</sup> On the whole, courts accepted this argument.<sup>7</sup> Capitalizing on the success of these arguments, defendant manufacturers reasserted them in subsequent lawsuits brought by state entities alleging public nuisance. The court in *Rhode Island* found these arguments inapposite and the jury subsequently found the defendants liable for abatement. Other courts, however, have not been as careful in their review of public nuisance law and have prematurely or erroneously rejected the theory as it applies to lead paint.

Recent decisions dealing with claims brought by state entities against lead paint manufacturers suggest a certain amount of judicial confusion. This confusion is understandable, but cannot be acceptable. Several factors combine to create this confusion, chief among them, and the focus of this paper, is: the misapplication of a *negligence* causation standard to states' public nuisance claims. Unlike negligence actions, which focus on the causation of injury to an individual and a defendant's liability for it, public nuisance

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4. See generally RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979); see also *infra* notes 68, 84 & 121.

5. This argument, often called the "product identification requirement," stems from the notion that any claim based on negligence requires plaintiffs to identify particular product made by a particular defendant-manufacturer at a particular location that caused injury to a particular individual. See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. 2007) (citing *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (en banc) ("[s]trict liability in tort continues to provide a remedy to those plaintiffs who satisfy the identification requirement.")).

6. See, e.g., *City of Chicago v. American Cyanamid Co.*, No. 02-CH\_16212, 2003 WL 23315567, \*1-\*3 (Ill. Cir. Oct. 7, 2003) (noting both that market share liability could not be applied to lead paint in Illinois and City's failure to demonstrate product identification was fatal to its public nuisance claim).

7. See, e.g., *Spring Branch Indep. School Dist. v. NL Indus.*, No. 01-02-01006-CV, 2004 WL 1404036 (Tex. App. June 24, 2004) (holding that plaintiff's failure to produce direct evidence of product identification and the inapplicability of alternative liability to lead paint hazards justified the dismissal of plaintiff's product liability action against lead paint manufacturers).

actions are concerned only with the causation of the nuisance itself.<sup>8</sup> In order to see clearly why some courts have mistakenly blended these issues, and why public nuisance is a viable theory for state entities pursuing lead paint abatement, we must briefly examine the legal journey that lead paint has taken through the American judiciary.

Part I lays out the factual foundation of lead paint hazard lawsuits and identifies the attributes particular to lead and lead-based paint that become dispositive issues in each type of action (whether products liability, nuisance, conspiracy, etc.). This section recounts the emergence of lead poisoning as a public health concern, the rise of government regulation, and the failure of state programs to eliminate adequately enduring lead hazards.

Part II describes the kinds of claims brought against lead paint manufacturers in the context of this country's early toxic products litigation. Here, causation, and the role it plays in negligence actions,<sup>9</sup> can be teased out from the ultimate disposition of the suits. By way of illustration, this section also compares the relevant facets of the initial lead paint cases to asbestos litigation involving public nuisance claims. Here, the relative merits of alternative liability theories, and their inapplicability to lead paint, are explained.

Part III considers five recent lead paint cases, each of which features a government entity's attempt to use public nuisance doctrine to secure abatement funds from lead paint manufacturers, and compares them to the outcome in *Rhode Island*. These five

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8. See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 117 (Mo. 2007) (Wolff, C.J., dissenting) (noting that issues in alternative liability cases are irrelevant to public nuisance claims because the focus is on contribution to the problem and not individual injury); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 892-93 (Wis. Ct. App. 2004) (drawing a critical distinction between causation of the nuisance, at issue, and the causation of the injury, not directly at issue).

9. This concept will be expanded upon later in this paper, but readers should note now that "negligence actions" here refers to claims based on negligence, products liability, and strict liability since these claims all stem from original tort principles underpinning the Roman conception of the law of care and carrying forth, among other elements, identical causation and damages requirements. The tort of nuisance, by contrast, is not rooted in the negligence tradition or any of its later reincarnations (i.e. products liability, strict liability, alternative liability, etc.). See, e.g., Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3 (2004) (discussing the evolution of individual liability for intentional torts, negligence, and strict liability). See also, Abed Awad, *The Concept of Defect in American and English Products Liability Discourse: Despite Strict Liability Linguistics, Negligence is Back with a Vengeance!*, 10 PACE INT'L L. REV. 275 (1998) (observing a blurring of the distinction between strict liability and negligence in the context of products liability).

cases are: *City of Chicago v. American Cyanamid Co.*,<sup>10</sup> (“*American Cyanamid*”); *County of Santa Clara v. Atlantic Richfield Co.*,<sup>11</sup> (“*Santa Clara*”); *City of Milwaukee v. NL Indus., Inc.*,<sup>12</sup> (“*Milwaukee*”); *In re Lead Paint Litigation*,<sup>13</sup> (“*New Jersey Consolidated Lead*”); and, *City of St. Louis v. Benjamin Moore & Co.*,<sup>14</sup> (“*St. Louis*.”). Half of these cases (*American Cyanamid*, *New Jersey Consolidated Lead*, and *St. Louis*) have reached the end of their judicial journey while the other half (*Santa Clara*, *Milwaukee*, and *Rhode Island*)<sup>15</sup> were still pending at the time of this writing;<sup>16</sup> nonetheless, all inform the argument made in this paper. Since *Rhode Island* is the only example in which a jury found the defendants liable, the analysis in this paper is best couched in terms of why the state prevailed there and why other government entities have not.

In conclusion, Part IV argues that the classification of lead paint contamination as a public nuisance is not a significant part of the debate. Rather, this paper argues that courts dismissing the public nuisance claims misconstrue the causation burden that plaintiffs must bear in arguing a public nuisance. Unlike claims sounding in some version of negligence, the public nuisance doctrine does not require product identification and to the extent that courts blend the notion of negligence-type causation with public nuisance-type causation, they commit error. In closing, this section argues that government entities bringing public nuisance actions against lead paint manufacturers must diligently reframe the issues before the court. Failure to clarify the requirements of a public nuisance claim, with respect to causation, will likely allow defendant manufacturers to distract busy courts with inappropriate negligence arguments.

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10. 823 N.E.2d 126 (Ill. App. Ct. 2005).

11. 40 Cal. Rptr. 3d 313 (Ct. App. 2006).

12. 691 N.W.2d 888 (Wis. Ct. App. 2004).

13. 924 A.2d 484 (N.J. 2007).

14. 226 S.W.3d 110 (Mo. 2007) (en banc).

15. Only *Rhode Island* and *Milwaukee* have reached a verdict. In *Rhode Island*, the verdict was for the plaintiff-State. See *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2007 R.I. Super. LEXIS 32, at \*1 (Super. Ct. Feb. 26, 2007). In *Milwaukee*, the verdict, by a vote of 10-2, found that defendant-manufacturers were not liable for the public nuisance. See Marie Rohde, *Lead Paint Suit Fails*, MILWAUKEE J. SENTINEL, June 22, 2007, available at <http://www.jsonline.com/story/index.aspx?id=623662>.

16. Author's note: *Rhode Island* has been decided since the writing of this paper. The implications of this decision are considered in the addendum.

**PART I: AN INTRODUCTION TO LEAD PAINT**

Lead is a useful substance. It powers our car batteries; it protects us from excessive x-rays; it insulates millions of miles of cable; it is indispensable to welders as the primary source of solder because of its high malleability and fusibility.<sup>17</sup> In paint, lead was added to increase the vibrancy of color, to reduce drying time, and to create a durable, washable surface. These qualities were particularly cost-effective for hospitals, schools, and public housing (where small budgets demand function at the lowest cost), but also appealed to the general public. Until the federal ban in 1978,<sup>18</sup> lead paint was sold in U.S. markets for many purposes, including exterior and interior residential decoration, coatings on toys and furniture, and industrial applications. Although the toxic qualities of lead paint were known within the industry,<sup>19</sup> the medical profession,<sup>20</sup> and the government,<sup>21</sup> lead paint went virtu-

17. See Iain Thornton, et al. *Lead: The Facts*, IC Consultants Ltd., London (Dec. 2001) available at <http://www.ila-lead.org/factbook/chapter1.pdf>.

18. The ban became effective on February 27, 1978. See Establishment as Banned Hazardous Products, 42 Fed. Reg. 44,193, 44,199 (Sept. 1, 1977) (to be codified at 16 C.F.R. pt. 1303).

19. *The Chameleon*, Sherwin-Williams newsletter in 1889, noted that "It is also familiarly known that white lead is a deadly cumulative poison . . ." *The Sherwin-Williams Co and their Role in the Lead-Based Paint Business*, Sherwin Williams: Covering Our Communities with Toxics (Ass'n of Cmty. Orgs. For Reform Now, New Orleans, La.), June 28, 2006, at 9 (citing *The Chameleon* (Sherwin-Williams, Cleveland, Ohio), Dec., 1899). *The S.W.P.*, another company newsletter, stated that, "white lead is poisonous in a large degree, both for the workmen and for the inhabitants of a house painted with white lead colors." *The Sherwin-Williams Co and their Role in the Lead-Based Paint Business*, Sherwin Williams: Covering Our Communities with Toxics (Ass'n of Cmty. Orgs. For Reform Now, New Orleans, La.), June 28, 2006, at 9 (citing *The S.W.P.* (Cleveland, Ohio), July, 1904). Note: Sherwin-Williams reversed its position after acquiring a white lead processing plant in 1910. See *The Sherwin-Williams Co and their Role in the Lead-Based Paint Business*, Sherwin Williams: Covering Our Communities with Toxics (Ass'n of Cmty. Orgs. For Reform Now, New Orleans, La.), June 28, 2006, at 9. In 1928, the company joined the Lead Industries Association. Markowitz, *infra* note 20.

20. Gerald Markowitz & David Rosner, "Cater to the Children": *The Role of the Lead Industry in a Public Health Tragedy, 1900-1955*, 90 AM. J. PUB. HEALTH 36, 36 (2000) [hereinafter "Markowitz, *Cater to the Children*"] (citing M. D. Stewart, *Notes on Some Obscure Cases of Poisoning by Lead Chromate Manifested Chiefly by Encephalopathy*, 1 MED. NEWS 676, 676-81 (1887); A. Hamilton, *Industrial Diseases, With Special Reference to the Trades in Which Women are Employed*, 20 CHARITIES & COMMONS 655, 658 (1908)).

21. *Manufacture, Sales, etc., of Adulterated or Mislabeled White Lead and Mixed Paint: Hearing on H.R. 21901 Before H. Comm. on Interstate and Foreign Commerce*, 61st Cong. (1910) (testimony of Marion E. Rhodes of Missouri speaking to the general consensus that lead is a poison). See also G. B. Heckel, *The Outlook for Paint Manufacturers*, 34 Annals of the American Academy of Political and Social Science 69, 73 (1909) (noting that several states introduced legislation to prohibit white lead paint

ally unregulated throughout the late 1800s and into the 1960s.<sup>22</sup> While several American cultural realities contributed to this regulatory delay,<sup>23</sup> the effectiveness of a proactive information campaign coordinated by lead manufacturers, and later the Lead Industries Association (LIA),<sup>24</sup> was arguably the most important factor in delaying regulation.<sup>25</sup> Despite individual state efforts to regulate lead paint, LIA and its member companies promoted lead across the national market in order to “meet” the issue of lead poisoning and “protect the good name of lead.”<sup>26</sup> This proactive effort, similar to the practices of both asbestos and tobacco trade groups, is, of course, the normal function of trade groups.<sup>27</sup> How-

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due to its toxic properties, but were successfully opposed by the industry); Frederick J. Schlink, *What Government Does and Might Do for the Consumer*, 173 *Annals of the American Academy of Political and Social Science*, 125, 138 (1934) (noting that government agencies were aware of the hazards of lead paint for indoor use but had suppressed this information from public view).

22. Many other countries, by contrast, after recognizing the dangers of lead, banned lead paint outright. See Markowitz, *Cater to the Children*, *supra* note 20, at 37 (by 1934 many industrialized countries had restricted the use of white lead in paint).

23. See Christian Warren, *Toxic Purity: The Progressive Era Origins of America's Lead Paint Poisoning Epidemic*, 73 *BUS. HIST. REV.*, 705 (1999) (exploring the independence of Master Painters and the social acceptance of heightened health risks in the name of industrial expansion).

24. The Lead Industries Association (LIA) was formed to prevent other metal industries, such as zinc and titanium, from replacing lead as the principal paint pigment. See Markowitz, *Cater to the Children*, *supra* note 20, at 36. The LIA functioned as a clearinghouse for information related to lead mining, processing, manufacturing, and sale. See *id.*

25. In 1923, National Lead ran advertisements in *National Geographic* claiming “Lead helps to guard your health.” See David Rosner, *Plumbing the Plumbing*, 95 *AM. SCIENTIST* 541 (2007) citing National Lead, Lead helps guard your health, *NAT'L GEOGRAPHIC*, Nov. 1923, at 44 (advertisement). In 1949, Maryland passed a ‘toxic finishes’ law that required children’s furniture and toys finished with lead paint to be labeled. See GERALD MARKOWITZ & DAVID ROSNER, *DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION* 95 (University of California Press 2002). LIA immediately held several private conferences with Maryland governmental authorities and succeeded in having the law repealed a year later. See *id.* Similar attempts to regulate lead paint were thwarted in state legislatures, including Massachusetts. See *Rhode Island v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2007 R.I. Super. LEXIS 32, at \*177-78 (Super. Ct. Feb. 26, 2007).

26. Markowitz, *DECEIT AND DENIAL*, *supra* note 25, at 93-94. For an illustrated summary of the Gerald Markowitz’s lead advertising timeline in *Cater to the Children*, visit History of Lead Advertising <http://www.cincinnatichildrens.org/research/project/enviro/hazard/lead/lead-advertising> (last visited Nov. 29, 2008).

27. In several cases, however, these efforts went beyond information sharing and advocacy, reaching levels of conspiracy sufficiently cognizable to warrant scrutiny in several lawsuits. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (tobacco); *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1381 (11th Cir. 1990) (asbes-

ever, these efforts to delay regulation extended the period of mass exposure much longer than it otherwise might have been.<sup>28</sup>

While most early studies demonstrating lead's toxicity were easily dismissed as inconclusive,<sup>29</sup> over time, as the medical evidence became impossible to ignore, manufacturers shifted tone and asserted that regulation was unnecessary because lead hazards could be neutralized by consumers.<sup>30</sup> However, medical experts have publicly criticized the notion that the risks of lead exposure can be neutralized.<sup>31</sup> In response, lead manufacturers asserted that painters (owners or landlords) assumed the responsibility and risk by painting the walls with lead paint.<sup>32</sup> In assuming this risk, the manufacturers argued, the responsibility to manage the danger lead paint posed to human health fell on the individual consumer, not the companies that initially made the product.<sup>33</sup>

Given that interior use of lead paint was banned in 1978, the recent appearance of public nuisance cases might seem anachronistic; however, recent municipal health investigations, in addi-

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tos); *In re* New York City Asbestos Litig., 842 N.Y.S.2d 333 (Sup. Ct. 2007) (asbestos); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 895-96 (Wis. 2005) (lead paint).

28. As a practical consequence, this broad window of exposure makes market share liability theory difficult to apply to lead paint cases. *See infra* notes 52 & 54.

29. The first medical study, written in English, was conducted in Australia by J. L. Gibson, who concluded that the lead-based paint on walls and porch railings was the source of the lead poisoning observed in his patients. The lead industry dismissed these findings as anomalies, calling them inconclusive. *See* J. Julian Chisolm, Jr., et al., *The Road to Primary Prevention of Lead Toxicity in Children*, 107 PEDIATRICS 581, n16 (2001), citing J. Lockhart Gibson, *A Plea for Painted Railings and Painted Rooms as the Source of Lead Poisoning Amongst Queensland Children*, 23 AUSTL. MED GAZETTE 149-53 (1904); *see also* Markowitz, *Cater to the Children*, *supra* note 20, at 36-37 citing same.

30. This remains a prominent argument in public nuisance cases today where companies point to the responsibility of landlords to maintain the habitability of their buildings and prevent deterioration of lead paint. *See infra* note 37.

31. *See* Transcript of Record at 28, *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2007 R.I. Super. LEXIS 32 (Super. Ct. 2007 Feb. 26, 2007) (testimony of Dr. James Girard, chemist and witness for the plaintiff, stating that lead paint deterioration was inevitable and efforts to neutralize the dust and chips would fail); Transcript of Record at 124-26, *Rhode Island*, No. 99-5226, 2007 R.I. Super. LEXIS 32 (Super. Ct.) (testimony of Dr. Philip Landrigan, public health specialist and witness for the plaintiff, noting that even intact paint presented an immediate hazard when used in certain places (i.e. window frames, door jambs, floors, banisters, etc.)).

32. *See, e.g.*, Brief of Defendants-Respondents at 35-36, *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, (Wis. Ct. App. 2004) (No. 01-CV-3066).

33. This argument, however, rings hollow in the public nuisance context because individual injury is not the focus of the claim. Rather, government entities seek abatement of a nuisance that affects the public at large and so the public (through the government representative) is the party seeking relief.



tion to documenting the enduring existence of lead paint hazards despite the ban, have begun to quantify the long-term developmental effects of lead on children.<sup>34</sup> Considering that pediatric studies have determined that the level of lead necessary to poison is surprisingly small,<sup>35</sup> the quantity of lead that remains in older houses is often sufficient to create a potential hazard, and if any painted surface is abraded, sanded, renovated, or chewed, the potential hazard becomes immediate. Because lead affects neurological development in children, the damage is irreversible and symptoms of poisoning, absent screening, occur too late to allow preventive intervention.<sup>36</sup> Thus, unless lead is abated in advance, eventual lead poisoning victims will be permanently injured.

To achieve complete abatement, however, is costly and governments cannot afford simply to engage in large-scale remediation,<sup>37</sup> nor can most tenants exposed to lead paint hazards afford

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34. See, e.g., Scott Grosse, et al., *Economic Gains Resulting from the Reduction in Children's Exposure to Lead in the United States*, 110 ENVTL. HEALTH PERSP. 563 (2002).

35. To get a workable idea of how much lead is required to poison a child, take a packet of sweetener, divide it into 1 million piles. Discard 999,990 piles and place the remaining 10 piles in a 1/5 cup of water. This would approximate 10 micrograms per deciliter, the current limit as set by the EPA. See U.S. EPA, ADDRESSING LEAD AT SUPERFUND SITES, <http://www.epa.gov/superfund/lead/health.htm> (last visited Nov. 29, 2008). However, recent studies have indicated that the current "safe" level is not stringent enough to protect children from injury. See WORK GROUP OF THE ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION, A REVIEW OF EVIDENCE OF ADVERSE HEALTH EFFECTS ASSOCIATED WITH BLOOD LEAD LEVELS < 10 µG/DL IN CHILDREN, in CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN (2005).

36. See Herbert L. Needleman, et al., *Deficits in Psychologic and Classroom Performance of Children with Elevated Dentine Lead Levels*, 300 NEW ENGLAND JOURNAL OF MEDICINE 689 (1979). While chelation therapy can lower the blood lead level of a child, the physiological damages, once wrought, cannot be repaired by current medical science. See also Patrick Breysse, et al., *The Relationship Between Housing and Health: Children at Risk*, 112 ENVTL. HEALTH PERSP.S 1583 (2004) (noting the irreversibility of the neurodevelopmental effects of lead poisoning); Chisolm, *supra* note 29, at 581 (urging reduced reliance on chelation therapy to protect children from lead hazards).

37. In 2001, a State Inter-Agency Task Force in New Jersey estimated that total lead paint abatement would cost the state \$50 billion. See *In re Lead Paint Litig.*, 924 A.2d 484, 507 (N.J. 2007). At the individual property level, the cost of abatement (\$12,000) is similarly beyond the reach of many owners. See *id.* In *Rhode Island*, considering only the *future* costs of lead abatement in residential homes, the state estimated the cost to be between \$1.37 and \$3.74 billion. See *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2007 R.I. Super. LEXIS 32, at \*285-86 (Super. Ct. Feb. 26, 2007). While a municipality or state could, in theory, appropriate sufficient funds to remove lead paint from the existing housing stock, such an exercise would ignore consideration of the potential responsibility resting on the manufacturers and would render an exploration of recent litigation purposeless.

to abate the problem themselves. As a result, most lead poisoned individuals sought damages from landlords, whether private or state-owned.<sup>38</sup> This individualized model for remediation cannot solve the problem of lead paint hazards because private plaintiffs are limited in their recovery by statutes of limitations, judgment-proof defendant-landlords, the inefficiency of this piecemeal approach, and, in some cases, statutory protections for the landlords themselves.<sup>39</sup> Even for private plaintiffs who do not face these additional, practical obstacles, there are several legal principles that will get in the way.

**PART II: WHY GOVERNMENTS ARE BEST SUITED  
TO SEEK REMEDIES FOR LEAD PAINT  
CONTAMINATION AND WHY NEGLIGENCE-  
TYPE CLAIMS WILL FAIL**

**A: Finding a Claim**

Lead paint is not the first mass product from which individuals and governments have sought relief from the original manufacturers; nor is public nuisance the first theory to be asserted in lead paint cases. Rather, plaintiffs often started (and many continue to assert) claims sounding in negligence or its offshoots.<sup>40</sup> Negligence, the most basic tort claim, has expanded and given rise to related theories such as strict liability and products liability.<sup>41</sup> What began as a theory applied especially to protect consumers from tainted foods and beverages,<sup>42</sup> has evolved into the settled theory of strict liability, employed to do justice, as conceived by

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38. See, e.g., *Gould v. Hous. Auth. of New Orleans*, 595 So. 2d 1238 (La. Ct. App. 1992) (suing a public housing authority for damages based on lead poisoning); *Scroggins v. Dahne*, 645 A.2d 1160 (Md. 1994) (suing private landlord for injuries caused by lead paint ingestion).

39. Donald Gifford & Paolo Pasicolan, *Market-share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Cases?*, 58 S.C. L. REV. 115, 127 (2006). Professor Gifford notes in a 2005 article that in the Washington Metro region, plaintiffs have not been unsuccessful in their claims against landlords when the landlords can afford to pay. See Donald Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613, 626 (2005).

40. See Edmund J. Ferdinand, III, *Asbestos Revisited: Lead-Based Paint Toxic Tort Litigation in the 1990s*, 5 TUL. ENVTL. L.J. 581, 595 (1992) (discussing the initiation of suits against lead paint manufacturers in the late 1980s).

41. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (treating strict liability as a special form of liability, under negligence, for a seller of a product causing harm to the user).

42. See *id.* (Reporter's Notes, Section 1, gathering cases from the 1930s through the 1960s).

the judiciary and applied to a host of different products.<sup>43</sup> Individuals in such cases, injured by defective products, can recover from the particular manufacturer by proving defective design or failure to warn. Once a defect or failure to warn is proven, plaintiffs then bear the same causation and injury burden that a plaintiff would be required to bear in a pure negligence case.<sup>44</sup> Meaning, plaintiffs must prove “not only that the actor’s conduct [was] negligent toward the other, but also that the negligence of the actor [was] a legal cause of the other’s *harm*.”<sup>45</sup> This, as we will see, presents evidentiary difficulties (namely product identification) for people injured by lead paint and ultimately makes negligence-type theories a poor choice for resolving the problem.

For tenants living in housing that contains lead paint, identifying the manufacturer of the paint on the walls is an evidentiary nightmare. Because a housing structure inevitably outlasts its paint job, multiple coats of different paint are applied and removed over the course of time. Similarly, ownership of the housing structure will often change hands many times over the decades just as manufacturers will alter paint formulations many times over the life of the product line, further muddying a particular house’s paint history. Getting provable facts to line up in favor of a lead poisoned plaintiff, such that the injury to the individual can be traced to a particular exposure of a particular manufacturer’s lead paint product, becomes virtually impossible. Proving this negligence-type causal link (essentially product identification) in cases where the injury from a product is not readily traceable to a particular manufacturer was a legal impossibility until the asbestos cases in the 1970s, in which courts began to recognize the liability of multiple possible defendants for individual injuries involving delayed or latent diseases.<sup>46</sup>

The first instance in which an individual, exposed to multiple sources of asbestos, successfully recovered damages against a

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43. See, e.g., *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (D. Conn.1960) (insecticides); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) (en banc) (power tools); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (automobiles).

44. See RESTATEMENT (SECOND) OF TORTS § 281(c) (1965) (relevant here is the fact that the *same* causation burden is common to all negligence-type claims).

45. RESTATEMENT (SECOND) OF TORTS § 430 (1965).

46. See Pamela A. Meyer et al., *Global Approach to Reducing Lead Exposure and Poisoning*, 659 MUTATION RES. 166, 167 (2008) (discussing the range of adverse health effects of lead poisoning, and the higher vulnerability of children to long-term impairment of cognitive and behavioral development).

manufacturer of insulation containing asbestos materials, *Borel v. Fibreboard Paper Products Corp.*,<sup>47</sup> sparked a flood of subsequent lawsuits.<sup>48</sup> The *Borel* court, in discussing the complications for multiple exposure victims observed:

In the instant case, it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to Borel. It is undisputed, however, that Borel contracted asbestosis from inhaling asbestos dust and that he was exposed to the products of all the defendants on many occasions. It was also established that the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury. We think, therefore, that on the basis of strong circumstantial evidence the jury could find that each defendant was the cause in fact of some injury to Borel.<sup>49</sup>

The physical similarities between toxic lead paint and toxic asbestos would seem to suggest that the reasoning in asbestos cases would bolster lead paint claims.<sup>50</sup> However, the success of the plaintiff in *Borel* does not readily translate to lead poisoned plaintiffs or the governments that represent them. Unlike asbestos cases, where individuals are exposed to multiple products from *identifiable* manufacturers, lead poisoned individuals are exposed to multiple products from *unidentifiable* manufacturers.<sup>51</sup> Thus,

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47. 493 F.2d 1076 (5th Cir. 1973).

48. As of 2005, individuals injured by asbestos had filed over 600,000 claims. See Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting From Mass Products*, 64 MD. L. REV. 613, 620 (2005).

49. *Borel*, 493 F.2d at 1094.

50. Indeed, as the dissent in *New Jersey Consolidated Lead* remarked: "There is no meaningful difference between the manufacturing of asbestos and the production of toxic lead pigment." *In re Lead Paint Litig.*, 924 A.2d 484, 509 (Zazzali, C.J. dissenting).

51. Lead paint cannot be traced to a particular source through any scientific testing process because the operative toxin in lead paint is uniform and has no identifiable chemical attributes. The court in *Brenner v. Am. Cyanamid Co.*, No. 12596/93, 1999 N.Y. Misc. LEXIS 440, at \*4 (Sup. Ct. Feb. 2, 1999), found that all white lead pigment is identical in its chemical structure. See also Amicus Brief of National Paints & Coating Association in Support of Respondents, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (No. SC88230) (asserting the impossibility of determining the source of a particular paint formula because they were historically kept secret); *Milwaukee v. NL Indus.*, 691 N.W.2d 888, 893 (acknowledging the impossibility of identifying specific paint in particular houses); Brief of Defendants-Respondents at 53, *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, (Wis. Ct. App. 2004) (No. 03-2786) (also arguing that the city cannot demonstrate sufficient facts to warrant the inference that each defendant's paint is present at particular locations).

the harm caused to a particular individual by lead paint cannot be attributed to a particular manufacturer, except in highly unlikely circumstances.<sup>52</sup> As a result, plaintiffs cannot make the requisite product identification to satisfy the negligence-type causation standard. This makes reliance on negligence-type claims unwise for lead poisoned individuals, as well as government entities since the injury from the product will still be measured at the individual/citizen level and thus will require a similar showing of causation.

### **B: Looking Beyond Negligence**

The causation problem that lead paint plaintiffs face in strict liability cases is the same limitation faced by daughters whose mothers took DES and that led to the creation of market-share liability theory, developed in the landmark California case *Sindell v. Abbott Laboratories*.<sup>53</sup> There, plaintiffs were allowed to use data demonstrating the individual market share for each defendant-drug company in order to determine the allocation of liability for damages. Based on public policy reasons, the court decided that the normal causation requirements should not apply.<sup>54</sup> For lead-poisoned plaintiffs facing causation proof problems, market-share liability theory, a special kind of alternative liability,<sup>55</sup>

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52. Such circumstances would require a child to be born and raised in a single home, the paint in which came from a single batch of proprietary paint and that paint can, by unshakable testimony, be traced from the wall to the can to the retailer and back to the manufacturer. Such instances are exceedingly rare, but can happen. See *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764 (Miss. 2007) (reversing dismissal and remanding claim for trial where testimony of a minister and others demonstrated that defendant's lead paint had been applied from time of construction in the 1930s through the 1978 ban on lead paint).

53. 607 P.2d 924 (Cal. 1980). The Court in *Sindell* authored the first decision that excused injured plaintiffs from establishing which defendant's product actually caused their injuries, allowing them instead to rely on market-share data to allocate liability. This doctrine allowed courts, in jurisdictions where it was adopted, to craft fair solutions in cases where (1) defendants' conduct was tortious, (2) plaintiffs suffered serious injuries as a result, and (3) the *only* obstacle to relief is an inability to match each injury to a particular defendant. See *id.* The Court reasoned: "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." *Id.* at 936.

54. The court reasoned that the particular facts of the case allowed the market-share theory to be applied fairly. Specifically, the court found that the product in question was fungible (identical and easily substituted), the exposure window was narrow (nine months in utero), and the resulting rare form of cancer was a signature injury that was not likely caused by another source. *Id.* at 924, 926.

55. See *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948) (defining alternative liability as a theory that shifts the causation in fact burden to defendants once innocent plaintiff proves tortious conduct by a single, unidentifiable defendant). For an example of

would seem an excellent alternative and, in fact, many plaintiffs have asserted it.<sup>56</sup> However, most courts have refused to extend this alternative liability theory to lead paint. The decision by the Supreme Court of Pennsylvania in *Skipworth v. Lead Industries Association*<sup>57</sup> is representative of those jurisdictions refusing to add lead paint to the short list of products that meet the requirements for the market-share liability theory.<sup>58</sup> Confusion arises, however, because the *Sindell-Skipworth* line of cases, as well as those rejecting claims that appear to rely on *Sindell*, focus judicial attention on causation without emphasizing the further distinction between causation of the injury and causation of the hazard.<sup>59</sup> The former is the basis for arguments for defendant-lead paint manufacturers,<sup>60</sup> while the latter is the actual issue in public nuisance cases.<sup>61</sup> It is telling that government plaintiffs in *Santa Clara* and *Milwaukee* suing in the two states most accom-

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enterprise liability, recall the seminal case *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), where a federal court found that the sparsely populated blasting caps industry could be held collectively liable for the injuries their products caused to children because the industry had adhered to a common safety standard, which was insufficient to protect the children.

56. *See, e.g.*, *Jackson v. Glidden Co.*, 647 N.E.2d 879 (Ohio Ct. App. 1995) (individual plaintiff claimed manufacturers were liable in enterprise liability, alternative liability, and market-share liability); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993) (city alleged manufacturers were liable in alternative liability, enterprise liability, and market-share liability).

57. 690 A.2d 169 (Pa. 1997).

58. Courts, such as the one in *Skipworth*, tend to reject market-share theory for two reasons. First, unlike the chemical compound in *Sindell*, courts tend to find that lead pigment is not fungible. Rather, it has many chemical formulations that create differing levels of toxicity. This conclusion, while the majority rule, has not been universal. *See supra* note 38. Aside from fungibility, the *Skipworth* court also found that the relevant time period for market activity (spanning eight decades) and the time period for exposure to the lead paint (a period of years – often ages 0-6) were too broad to allow for any precision that would fairly apportion liability among the lead paint manufacturers operating over the course of many decades. *See Skipworth*, 690 A.2d at 234.

59. *See, e.g.*, *Spring Branch Indep. Sch. Dist. v. NL Indus., Inc.*, No. 01-02-01006-CV, 2004 WL 1404036, at \*3-\*4 (Tex. App. June 24, 2004) (after finding no direct evidence of product identification, turning immediately to the jurisdiction's earlier rejection of market-share liability theory); *Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 134 (Ill. App. Ct. 2005) (mistakenly treating the public nuisance and products liability claims as having identical causation requirements).

60. *See, e.g.*, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (en banc) (discussing the application of legal causation requirement as it is conceived of in negligence claims to the plaintiff's public nuisance claim).

61. Whether defendant-manufacturers assert these arguments with the intention of distracting the court or whether they are simply genuinely mistaken is irrelevant to the extent that the court itself articulates the ultimate decision and intention by the parties does not carry over into the opinion.

modating to market-share liability theory chose not to pursue such a claim, suggesting that parties familiar with market-share liability theory understand that it is not in conflict with public nuisance nor are the facts sought to be proven in support of a public nuisance dependent on the acceptance of market-share liability theory.<sup>62</sup>

Beyond negligence, but still well within the realm of tort law, lies nuisance. Nuisance is admittedly a difficult concept to define,<sup>63</sup> and the very murkiness of the concept contributes to its misinterpretation. Because public nuisance is a common law principle inherited from English law, it has become ensconced in American tort law and its existence is generally not questioned. However, its status as a common law principle also leads to state-specific jurisprudence and codification that makes minor alterations to its specific attributes. Courts divide nuisance into two types: public and private. A private nuisance is defined in the *Restatement* as “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”<sup>64</sup> Logically, lead paint, once applied to the walls of a house located on land, could affect the enjoyment of that land without amounting to a trespass when it becomes abraded or deteriorated through normal use, thus creating a health risk to family members.<sup>65</sup> However, like negligence-type claims, private nuisance claims also require a form of product identification at the property-specific level because the injury is measured by the impact on the use and enjoyment of *land* not on the type of conduct involved.<sup>66</sup> Private plaintiffs are thus unable to make much headway under this theory.<sup>67</sup> Public nui-

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62. Neither the *Santa Clara* court, nor the *Milwaukee* court addressed the market-share theory whether as an alternative, a fall back position, or a preferred avenue. See *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Ct. App. 2006); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004).

63. See *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d at 130, 130 n.2 (quoting the Illinois Supreme Court’s dissatisfied observation that “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance’”) (internal citations omitted). See also *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

64. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

65. See *id.* cmt. a (noting that the nature of the interest includes harm to members of the family and to chattel).

66. See RESTATEMENT (SECOND) OF TORTS § 822 cmt. b (1979) (noting that the “[f]ailure to recognize that private nuisance has reference to the interest invaded and not the type of conduct that subjects the actor to liability has led to confusion”).

67. Private nuisance would also limit government entities to bringing actions based solely on properties it owns. See RESTATEMENT (SECOND) OF TORTS § 821D(a)

sance, then, remains the only viable claim to deal efficiently with widespread lead hazards.

Public nuisance is different. Public nuisance is generally defined as “an unreasonable interference with a right common to the general public.”<sup>68</sup> To satisfy this definition, the plaintiff’s burden can be broken down as requiring proof:

1. of the existence of a public right,
2. that the right has been interfered with,
3. that the interference was unreasonable, and
4. that the plaintiff has a right to bring the action.

Whether the interference is with a public right is not a strict ‘population affected’ test, but rather must be a right that is public in nature.<sup>69</sup> For example, toxic waste dumped into a stream may affect dozens of downstream riparian owners, but an interference with waterfront property does not affect a public right. If the toxic waste killed fish and forced the public beach to close, however, then a public right has been affected.<sup>70</sup> In the case of lead paint, the elimination of private rights of action to remediate lead paint hazards has shouldered the government with the cost of investigating and abating lead hazards, finding and treating lead poisoned citizens, and educating children whose cognitive development has been negatively affected by lead exposure. The public right, namely protection of public health, must be paid for by public tax dollars.<sup>71</sup> In determining whether there has been interference, the court must determine whether the facts support a finding that the defendants created or assisted in the creation of a nuisance that caused or threatened to cause harm to the public

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(1979) (noting that the interests protected by private nuisance actions are use and enjoyment of land itself).

68. RESTATEMENT (SECOND) TORTS § 821B(1) (1979). *Accord Am. Cyanamid*, 823 N.E.2d at 130; *Rhode Island v. Lead Indus. Ass’n*, No. 99-5226, 2007 R.I. Super. LEXIS 32 at \*144 (Super. Ct. Feb. 26, 2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 118 (Mo. 2007); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 891 (Wis. Ct. App. 2004) (using the phrase “a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community”). California law, at issue in *Santa Clara*, is even broader. See CAL. CIV. CODE §§ 3479-80 (West 2008).

69. See RESTATEMENT (SECOND) OF TORTS § 821(B) cmt. g (1979).

70. *Id.*

71. See, e.g., Brief of Appellants-Plaintiffs at 24, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (No. SC88230).



that the public ought not to have to bear.<sup>72</sup> This element is closely tied to the causation requirement discussed later. In determining whether the interference with public health is unreasonable, a court generally looks at three areas, any of which alone may support a finding of unreasonableness:

- (a) Whether the conduct involves a significant interference with the public health . . . safety . . . peace . . . comfort or . . . convenience, or (b) whether the conduct is proscribed by statute . . . , or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>73</sup>

In the case of lead paint, plaintiffs must show that the effect on public health from the lingering presence of lead paint rises to the level of significant effect or that the defendant-manufacturers knew or should have known that their marketing and distribution activities would create a permanent effect on public health.<sup>74</sup>

### **C: Why the Government is Best Suited to Pursue a Public Nuisance Claim**

To meet the final requirement in asserting a claim in public nuisance, the plaintiff must have a right to bring the action. Originally, a public nuisance was a crime against the Crown, and the Crown was responsible to prosecute offenders.<sup>75</sup> Today, public nuisance is still primarily a claim for the government, but where the interference with a public right affects an individual in a special and different way, she will have the right to sue in public nuisance.<sup>76</sup> Absent such a special harm, the government is the only party with the right to sue in public nuisance, and that right is

72. See Jury Instructions at 10-11, *Rhode Island v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2007 R.I. Super. LEXIS 32, (Super. Ct. Feb. 26, 2007). Accord, *In re Lead Paint Litig.*, 924 A.2d 484, 511 (N.J. 2007); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 327 (Cal. Ct. App. 2006).

73. RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979).

74. Indeed, this was the position taken by all plaintiffs in the major cases discussed in Part III. See, e.g., *Santa Clara*, 40 Cal. Rptr. 3d at 324-25, 324 n.4 (articulating the plaintiffs' contention that defendant-manufacturers were aware of the hazards presented by lead paint and actively promoted the product).

75. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979) (discussing the state as the original public authority to bring a public nuisance action and the 16th century development of a private right of action).

76. RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979).

limited to a suit in its representative capacity.<sup>77</sup> Given the uniform nature of the interference created by lead paint manufacturers, and the relative failure of government entities to meet the special harm requirement in the most agreeable circumstances (California), to expect a private citizen to be able to show a special harm sufficient to carry the burden in a public nuisance action seems, at best, ineffective and, at worst, foolish.

Aside from legal obstacles to private plaintiffs, there are practical reasons why a government entity is better suited to bring a public nuisance action. Reliance on individual plaintiffs to seek redress for conduct that interferes with a public right puts too much pressure on the individual plaintiff to discover all the necessary facts. A public nuisance, by its nature, will affect the entire community and that requires decades of historical data, population-wide statistical information, and significant costs in finding and joining all the relevant defendants.<sup>78</sup> The government is best suited to carry out these tasks.<sup>79</sup>

### **PART III: CHARTING THE ACTUAL CASES AND WHY RHODE ISLAND GOT IT RIGHT**

#### **A: What Is A Nuisance?**

In 1999, the State of Rhode Island filed suit against the Lead Industries Association, and several paint manufacturers, including Sherwin Williams Company, NL Industries, Inc. (formerly National Lead Company), and Millennium Holdings, LLC. After an initial mistrial, the case ended in the first jury verdict in the country to find lead paint manufacturers liable, on a public nuisance theory, to abate the hazard their products had caused to the State

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77. In *Santa Clara*, the government plaintiffs sued both in a representative capacity and an individual capacity for damage to public buildings, but the court upheld the defendants' demurrer to the cause of action in an individual capacity because the county was merely seeking "damages for injuries caused to plaintiffs' property by a product." *Santa Clara*, 40 Cal. Rptr. 3d at 331 (emphasis omitted).

78. In *Rhode Island*, defendants even requested site-specific discovery at up to 330,000 properties after having been allowed initially to take property specific evidence at 114 properties. See *Rhode Island v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2005 R.I. Super. LEXIS 79, at \*2-\*3 (Super. Ct. May 18, 2005).

79. See Brief of Appellant-Plaintiffs at 31, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (No. SC88230); Economically speaking, an industry has more to fear from the committed actions of several states than it does from the action of a hundred individual plaintiffs. Cf. Master Tobacco Settlement Agreement, Nov. 23, 1998, available at [http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724\\_1032468605\\_cigmsa.pdf](http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf).

of Rhode Island.<sup>80</sup> The jury instructions articulate succinctly Rhode Island law as determined by the court and deserve quotation in full:

[Y]ou will be asked to decide whether each Defendant individually or whether more than one Defendant through collective conduct is or are responsible for *creating, maintaining or substantially contributing to the creation or maintenance* of such public nuisance in Rhode Island . . . . A public nuisance is something that *unreasonably interferes with a right common to the general public*; it is something that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community. An essential element of a public nuisance claim is that persons *have suffered harm or are threatened with injuries* that they ought not to have to bear.<sup>81</sup>

The court went on to define ‘an interference’ as “an injury, invasion, disruption, or obstruction of a right held by the general public.”<sup>82</sup> In considering the unreasonableness of the interference, the jury was instructed to “consider a number of factors including the nature of the harm, the numbers of the community who may be affected by it, the extent of the harm, the permanence of the injuries and the potential for likely future injuries or harm.”<sup>83</sup> This interpretation is substantially similar to the rules articulated in the *Restatement* and does not indicate some radical departure unique to Rhode Island.<sup>84</sup> The courts in *American Cyanamid*, *Santa Clara*, *Milwaukee*, *New Jersey Consolidated Lead*, and *St. Louis*, are generally in agreement with the *Restatement* (or offer a definition that is more accommodating from the plaintiff’s perspective) and therefore support the argument that public nuisance could include lead paint hazards in housing stock.<sup>85</sup>

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80. The case is currently before the court to approve the appointment of a special master to oversee the implementation of the order to abate. *See Rhode Island v. Lead Indus. Ass’n, Inc.*, 2007 R.I. Super. LEXIS 32 (Super. Ct. Feb. 26, 2007). [Ed. note: Since this was written, the Rhode Island Supreme Court reversed the lower court’s order. No special master will be appointed since the case has now been dismissed. For more information, see *infra* Addendum at end.]

81. Jury Instructions at 10-11, *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5226 (Super. Ct. Feb. 26, 2007).

82. *Id.* at 11.

83. *Id.* at 12.

84. *See* RESTATEMENT (SECOND) OF TORTS §§ 821A cmt. b, 821B cmt. e, g, i & 825 (1979).

85. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 130 (Ill. App. Ct. 2005); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325-27 (Ct. App. 2006); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 892 (finding that plain-

The *American Cyanamid* court, after hinting that a public right may not be at issue,<sup>86</sup> chose to base its dismissal of the plaintiff's public nuisance claim on a failure to show causation. The court relied heavily on an opinion by the Illinois Supreme Court in *City of Chicago v. Beretta U.S.A. Corp*<sup>87</sup> issued two days after oral arguments in *American Cyanamid*. The *American Cyanamid* court found that plaintiffs failed to *allege* causation in fact because they failed to prove product identification.<sup>88</sup> Despite acknowledging that the proper test in determining causation (the substantial factor test) was fact-specific and a matter for the jury, the court upheld the dismissal of the complaint, doing so without any citation or analysis.<sup>89</sup> Instead, the court moved immediately to a discussion of market-share liability and the requisite causation proof for that claim. This is a clear example of the court mistaking the issue. The *American Cyanamid* court relied on the *Beretta* decision in asserting the need for product identification, but the *Beretta* opinion makes no mention of product identification. Rather, the court there was concerned with the superceding acts of illegal handgun purchasers. As the *Beretta* court remarked and the *American Cyanamid* court quoted: "legal cause will not be found where the criminal acts of third parties have broken the causal connection and the resulting nuisance is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the original wrong."<sup>90</sup> The analogy to lead paint cannot be maintained. Handgun manufacturers do not sell their product knowing that, when used legally, the product will create a public health risk. Lead paint manufacturers, on the other hand, were well aware of the toxic nature of the product and when selling it fully intended the paint to be applied to walls. There are no intervening criminal

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tiff must prove harm to the public, that defendants were a substantial factor in causing the harm, and abatement was reasonable); *In re Lead Paint Litig.*, 924 A.2d 484, 511 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007).

86. The court made much of one commentator's opinion that "public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned . . . in [a] private residence[ ]," but was forced to concede that "a different panel of this court has stated that allegations substantially similar to those in the instant case 'sufficiently alleged the violation of a public right.'" *Am. Cyanamid*, 823 N.E.2d at 132-33 (quoting *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 (Ill. App. Ct. 2003)).

87. 821 N.E.2d 1099 (Ill. 2004).

88. *Am. Cyanamid*, 823 N.E.2d at 134.

89. *Id.* at 136.

90. *Id.* at 138 (quoting *Beretta*, 821 N.E.2d at 1099).

acts in the application of lead paint. Furthermore, the *Beretta* court noted that the *third person* is not under the control of the handgun manufacturers when she shoots the gun. Thus, the manufacturers cannot be said to have caused the injury. Lead paint is not an intervening person. It causes injury by itself when used in the manner anticipated by the manufacturers.

The *American Cyanamid* plaintiffs were also working against an earlier legislative pronouncement that *intact* lead paint was not a hazard.<sup>91</sup> To account for this, plaintiffs argued that lead paint is a public nuisance because it will *inevitably* deteriorate.<sup>92</sup> The court was not persuaded by that argument but chose, instead, to take issue with the causation element. The court in *New Jersey Consolidated Lead* dismissed the plaintiff's public nuisance claims as soon as it reached a perceived statutory limitation.<sup>93</sup> The New Jersey Supreme Court, in a split 4-2 decision, decided that New Jersey's Lead Paint Act (LPA) and the Product Liability Act (PLA) effectively barred plaintiff's public nuisance action because, rather counter-intuitively, the legislature affirmatively declared lead paint in homes a public nuisance<sup>94</sup> and therefore, because *landlords* are regulated under the act, this bars plaintiffs from seeking relief from the original *manufacturer*.<sup>95</sup> Contrary to every other court in the country to consider the issue, the New Jersey Supreme Court found that lead paint hazards are best pursued under a products liability theory.<sup>96</sup>

The dissent, citing substantial case law, rightly pointed out that the legislature cannot be deemed to have extinguished a common law right unless it expressly does so in the statute<sup>97</sup> and thus, the definition of nuisance under common law should be left

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91. See Lead Poisoning Prevention Act, 410 ILL. COMP. STAT. ANN. 45/8(1)(E) (West 2000). The Act, however, deals only with inspection duties of the Department of Health and requires an inspection report that, among other things, must "[s]tate either that a lead hazard does exist or [not]. . . The existence of intact lead paint does not *alone* constitute a lead hazard for the purposes of this Section." *Id.* (emphasis supplied). This does *not* mean that lead paint might not still constitute a public nuisance.

92. See *Am. Cyanamid*, 823 N.E.2d at 132.

93. See *In re Lead Paint Litig.*, 924 A.2d 484, 504-05 (N.J. 2007).

94. N.J. STAT. ANN. 24:14A-5 (West 2007). The LPA directs local boards of health to abate the nuisance and attaches liability for costs to property owners. *Id.* § A-8.

95. See *In re Lead Paint Litig.*, 924 A.2d at 501.

96. *Id.* at 503. The court characterized lead paint as a consumer product, relief from which would be actionable only under products liability, disregarding the equally reasonable view that the widespread, inevitable deterioration of that lead paint could *also* constitute a public nuisance. See *id.*

97. *Id.* at 508 (Zazzali, C.J. dissenting).

to the courts. The dissent observed further: “In fact, the [LPA] does not even concern tort liability. Rather, it is an enabling statute authorizing local health boards to enforce lead paint regulations.”<sup>98</sup> There is simply no language in the LPA that limits the government’s public nuisance action, even if such a limitation were allowed. Much like the dissent in *New Jersey Consolidated Lead*, the *Rhode Island* court found that Rhode Island’s Lead Poisoning Prevention Act (LPPA) “does not preclude the State from maintaining [a] public nuisance action.”<sup>99</sup> Much like the LPA in New Jersey, the LPPA in Rhode Island was “not intended to ‘authorize’ the presence of lead paint [as defendants argued] or otherwise insulate actors such as the Defendants from public nuisance liability.”<sup>100</sup> Accordingly, the *New Jersey Consolidated Lead* dissent would hold, and the *Rhode Island* court did hold, that statutory directives to government health departments and landlords do not preclude common law claims against lead paint manufacturers.<sup>101</sup>

We see, then, that lead paint statutes should not, by themselves, define a nuisance for purposes of common law nor limit manufacturer liability under a public nuisance theory and the New Jersey Supreme Court’s decision to do so is simply bad law. This position is supported by the fact that California,<sup>102</sup> Missouri,<sup>103</sup> and Wisconsin<sup>104</sup> all have similar lead poisoning prevention laws and *none* refer to manufacturer liability or immunity, public nuisance, or common law rights. Nor did the courts in *Santa Clara*, *St. Louis*, or *Milwaukee* even mention potential conflicts with these acts. Defining lead paint hazards as a public nuisance, then, should not be a significant hurdle for plaintiff

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98. *Id.* at 508. The dissent goes further into the inherent inconsistency between the majority’s characterization of the legislature’s broad sweeping effort to reduce lead hazards and the conclusion that the legislature meant to subsume all nuisance litigation over lead paint. *Id.*

99. Jury Instructions at 10, *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2007 R.I. Super. LEXIS 32 (Super. Ct. Feb. 26, 2007).

100. *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2007 R.I. Super. LEXIS 32, at \*52 (Super. Ct. Feb. 26, 2007).

101. The Appellate Court of Illinois in *American Cyanamid*, though it did not base its decision on such, would be forced to come to the same conclusion with respect to the Illinois equivalent of the LPA. *See supra* note 91.

102. *See* Childhood Lead Poisoning Prevention Act of 1991, ANN. CAL. HEALTH & SAFETY CODE § 105275 (West 2008).

103. *See* Lead Abatement and Prevention of Lead Poisoning 1998 Amendments, MO. REV. STAT. § 701.300 (2008).

104. *See* WIS. STAT. ANN. § 254.11 (West 2008). Note that this is the same subchapter dealing with asbestos and other toxic substances.

governments.<sup>105</sup> Rather, it is the element of causation that has given government plaintiffs the most trouble in proving a public nuisance claim.<sup>106</sup>

### **B: How to Prove Causation of a Public Nuisance**

Disagreement among the courts in these cases occurs when determining how a nuisance is caused and how that causation can be linked to the defendant-manufacturers. The critical distinction this paper attempts to make is between causation of harm to individual lead-poisoned citizens and causation of a public nuisance that interferes with a public right. As the *Rhode Island* court told the jury: “You are not asked to decide whether each separate property that may contain such lead pigment is by itself a public nuisance, but rather whether the cumulative presence of all such pigment on properties throughout the State constitutes a single public nuisance.”<sup>107</sup> This essentially does away with the product identification requirement present in negligence-type claims. The focus, instead, is on harm to the general public. As the *Milwaukee* court remarked: “Were it otherwise, the concept of public nuisance would have no distinction from the theories underlying class action litigation, which serves to provide individual remedies for similar harms to large numbers of identifiable individuals.”<sup>108</sup> Rather, the *Milwaukee* court found that the plaintiffs “must show that defendants’ conduct or products were ‘substantial factors’ in causing the injury.”<sup>109</sup> In the words of the *Santa Clara* court,

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105. Indeed, the jury in *Milwaukee* returned a 10-2 verdict finding that lead paint in the City’s housing was a public nuisance. It was on the second issue, whether the defendants had unreasonably engaged in activity that caused the nuisance, that the jury split 10-2 against the plaintiffs. This information comes from a real-time blogger who monitored the court proceedings. See Posting of Milwaukee v. NL – Now We Know [Judge Rules Flawed Jury Verdict] to Law and More, [http://lawandmore.typepad.com/law\\_and\\_more/2007/06/page/4/](http://lawandmore.typepad.com/law_and_more/2007/06/page/4/) (June 22, 2007, 13:18 EST).

106. The court in *Santa Clara* similarly remarked: “Clearly [plaintiff’s] complaint was adequate to allege the existence of a nuisance . . . The next question is whether defendants could be held responsible.” *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006).

107. Jury Instructions at 10, *Rhode Island v. Lead Indus. Ass’n*, No. 99-5226 (Super. Ct. Feb. 26, 2007). In an earlier decision on a motion for summary judgment, the court stated specifically that the State did not have to “identify a particular paint containing a lead pigment manufactured by any particular defendant at any particular location within the State.” *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2005 R.I. Super. LEXIS 95, at \*2 (June 3, 2005).

108. *City of Milwaukee v. NL Indus. Ass’n, Inc.*, 691 N.W.2d 888, 893 (Wis. Ct. App. 2004).

109. *Id.*

phrased in a more useful way: “the critical question is whether the defendant created or assisted in the creation of the nuisance.”<sup>110</sup> In essence, the defendants are on trial for causing the nuisance or the injury that *is* the nuisance. Plaintiffs are not required to prove that each defendant caused injury to an individual person.

Bound up in the determination of the cause of a public nuisance is a subordinate issue often called ‘control of the instrumentality.’ This issue arose in *American Cyanamid, Santa Clara, New Jersey Consolidated Lead, and Rhode Island*. In *Rhode Island*, the defendants argued that they must have control over the nuisance before they can be liable to abate it. The court dismissed this notion stating: “The Court has consistently rejected the proposition that control of specific property is required to find liability, so long as it can be shown that the Defendants substantially participated in the activities which caused the public nuisance, and that public nuisance causes continuing harm.”<sup>111</sup> This is the crux of the paper. The *Rhode Island* court’s interpretation is consistent with the *Restatement*<sup>112</sup> and consistent with other case law outside the context of lead paint.<sup>113</sup> The court in *American Cyanamid* cited the *Restatement*, but evidently stopped reading after the phrase “carried on” because it stated: “Defendants here are not carrying on or participating in carrying on anything”<sup>114</sup> and thus “plaintiff’s reliance on substantial participation as a substitute for control misreads the Restatement.”<sup>115</sup> Had the court continued a bit further in the *Restatement*, it would have encountered the phrase transcribed in note 112, which imposes liability “even though he [who caused the nuisance] is no longer in a position to

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110. *Santa Clara*, 40 Cal. Rptr. 3d at 325 (emphasis and internal quotation marks omitted) (quoting Modesto Redevelopment Agency v. Superior Court, 119 Cal. App. 4th Supp. 28, 38 (Cal. App. Dep’t Super. Ct. 2004)).

111. *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5225, 2007 R.I. Super. LEXIS 32, at \*148 (Super. Ct. Feb. 26, 2007).

112. See RESTATEMENT (SECOND) OF TORTS § 834, cmt. f (1979) (providing, “if the activity has resulted in the creation of a physical condition which is, of itself, harmful after the activity that created it has ceased, a person who carried on the activity which [sic] created the condition or who participated to a substantial extent in such activity is subject to liability [for a nuisance], for the continuing harm. . . . This is so even though he is no longer in a position to abate the condition and to stop the harm.”) (emphasis added).

113. See, e.g., *Northridge Co. v. W.R. Grace & Co.*, 556 N.W.2d 345, 351-52 (Wis. Ct. App. 1996) (collecting cases in support of the notion that control of the property has never been a requirement to finding liability in the one who originally caused the nuisance).

114. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 137 (Ill. App. Ct. 2005).

115. *Id.*



abate the condition.”<sup>116</sup> Without the support of the *Restatement*, the *American Cyanamid* court is left with its reliance on *Beretta*. That reliance is misplaced because, by its own words, the argument in *Beretta* was based on two elements: (1) that the alleged harm resulted from the criminal acts of third parties, and (2) that the conduct was too remote from the alleged injury for liability to attach.<sup>117</sup> These elements are absent from the lead paint context because there are no intervening criminal acts and the lead paint manufacturers knew of the toxic nature of the product and knew that in its ordinary use it would mobilize and present a hazard.<sup>118</sup>

The court in *Santa Clara*, faced with a similar lack of control argument, quickly dispatched with defendants’ argument that they cannot be held liable for the public nuisance because they lacked the ability to abate, instead finding that: “Liability for nuisance does not 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.”<sup>119</sup> The dissenting opinion in *New Jersey Consolidated Lead* quotes this same phrase, as well as other case law, in opposition to the majority’s finding that control of the property is a necessary prerequisite to finding liability for the causation of a public nuisance.<sup>120</sup> The majority in *New Jersey Consolidated Lead* adopted a more restricted view of public nuisance. The majority would place blame on owners who applied the lead paint because it is they, in accordance with the *Restatement*, who have “engaged in the conduct that involves a significant interference with the public health” not the manufacturers.<sup>121</sup> This argument, again, fails to consider the difference between public and private nuisance. In a private nuisance,

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116. See RESTATEMENT (SECOND) OF TORTS § 834, cmt. f (1979).

117. See *Am. Cyanamid*, 823 N.E.2d at 133.

118. The remaining issue, cause-in-fact, was for the jury to decide. See *Chicago v. Beretta U.S.A. Corp.*, 281 N.E.2d 1099, 1132 (stating “[w]e are unwilling to state as a matter of law that plaintiffs have failed to raise an issue of material fact with regard to cause in fact”).

119. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006) (quoting *Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th Supp. 28, 38 (Cal. App. Dep’t Super. Ct. 2004)).

120. *In re Lead Paint Litig.*, 924 A.2d 484, 510 (N.J. 2007) (Zazzali, C.J. dissenting) (citing several federal cases, including a 1993 case from the District of New Jersey, in which the courts “held that defendants are liable for abatement costs. . . even if the defendant no longer has control over the property where the nuisance exists.”) (internal citations omitted).

121. *Id.* at 500-01 (quoting RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979)).

where an individual sues for damages caused by lead paint, the owner of the particular house in which the plaintiff was exposed to lead paint might bear a more direct responsibility for those injuries than the original manufacturer. In the context of a public nuisance, however, the owner of the property becomes irrelevant because the injury is the threatened harm to the public health. To be in control of *that* property would require ownership of the entire political subdivision represented by the government plaintiff and surely that cannot be the outcome implied by the section of the *Restatement* quoted by the majority opinion. Having articulated the ill-founded finding that control of the property was relevant, the majority went on to find that the absence of control translates into an absence of causation. How the majority makes this leap is not clear. The majority tried to buttress this finding by referring to the LPA's focus on landlords, but for reasons already stated the LPA should not apply to the government's public nuisance claim.

Aside from the effect of the LPA, the majority of the New Jersey court held that the public nuisance action would have failed even if "the continuing presence of lead paint in homes qualifie[d] as an interference with a common right sufficient to constitute a public nuisance for tort purposes."<sup>122</sup> To support this, the court says only that "plaintiffs' complaints aim wide of the limits of [the public nuisance] theory."<sup>123</sup> The court then reasoned that the true cause of the lead paint crisis was poor maintenance by owners and that to ignore this, plaintiffs "would separate conduct and location and thus eliminate entirely the concept of control of the nuisance."<sup>124</sup> Aside from the legal error in making control a requirement, this argument also fails to account for a critical factual reality: even well-maintained houses still threaten to harm public health because people, in the normal use of their home, will abrade painted surfaces (whether opening a window, closing a door, or renovating the kitchen) and mobilize the toxic lead dust.<sup>125</sup> Lead paint manufacturers were aware of this reality and lobbied strenuously to keep this information from the public.<sup>126</sup>

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122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.* at 506 (Zazzali, C.J., dissenting).

126. It is this sense of injustice that animates the dissent's conclusion: "The majority's holding unfairly places the cost of abatement on taxpayers and private property owners, while sheltering those responsible for creating the problem." *Id.* at 512.

### C: The Effect of the Remedy Sought

While not a central consideration when determining causation, the type of remedy sought by a government entity in a public nuisance action perhaps has the starkest impact. The *St. Louis* case outlines the ramifications of remedy choice most succinctly. In *St. Louis*, the city sued in public nuisance seeking reimbursement for the costs of lead paint abatement. Like in *American Cyanamid*, the *St. Louis* court, sitting in a jurisdiction that had previously rejected *Sindell* market-share liability<sup>127</sup>, found that market-share evidence could not be the sole evidence of causation. Over a vigorous dissent, the *St. Louis* court held, 4 to 3, that the product identification requirement announced in *Zafft* applied to the city's claim despite the city's assertion that "the damage was not an individual injury, but a widespread health hazard."<sup>128</sup> The court observed that this was not the case:

The damages [the city] seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous properties. In this way, the city's claims are like those of any plaintiff seeking particularized damages allegedly resulting from a public nuisance.<sup>129</sup>

As the majority suggests: "The city's argument, accepted by the dissent, . . . does not apply to the damage suit [the city] has actually brought."<sup>130</sup> Implicitly, had the city argued only for an injunction to stop the nuisance, it would not have been seeking particularized damages and so would not have to bother with site-specific product identification.<sup>131</sup>

Compare to this outcome, the *Rhode Island* case. After dismissing the state's claims for indemnification, unjust enrichment, and compensatory damages, the court allowed the public nuisance claim, seeking only abatement, to go to the jury. The state was

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127. See *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (en banc).

128. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007).

129. *Id.*

130. *Id.*

131. By contrast, the *Santa Clara* court merely noted that "[t]he remedy sought was abatement from all public and private homes and property so affected" and never had cause to consider a tension between remedies. See *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 324 (Ct. App. 2006).

prohibited from presenting evidence on past damages.<sup>132</sup> According to the *Restatement*:

- (1) In order to recover damages in an *individual action* for a public nuisance, one must have suffered [particularized harm].
- (2) In order to maintain a proceeding to *enjoin to abate a public nuisance*, one must
  - (a) have the right to recover damages, as indicated in Subsection (1), or
  - (b) *have authority as a public official* or public agency to represent the state or a political subdivision in the matter, or
  - (c) have standing to sue 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.<sup>133</sup>

There is no requirement to show damages, and thus the causation of those damages, when the state only seeks an injunction to abate a public nuisance. The court in *Rhode Island* expressly communicated this difference, saying on one hand: "abatement means the public nuisance is to be rendered harmless or suppressed . . . if you decide that abatement shall take place, it will be for the Court to determine the manner in which such abatement will be carried out."<sup>134</sup> Separately, the court noted: "the jury never considered damages during its deliberations."<sup>135</sup> This distinction has a significant bearing on causation. In the first instance, where an entity seeks damages, the injury has already occurred and should, at the time of trial, be quantifiable. Such quantification would include the particular source or cause of that individual injury. However, if the relief sought is abatement of a nuisance, the injury is by its very nature unquantifiable because relief is sought as a preventive measure. To be sure, evidence of past injury may be relevant to prove that the nuisance is unreasonable or an interference, but it should not complicate a simple showing that defendant-manufacturers substantially contributed to the creation of the nuisance itself.

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132. See *Rhode Island v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2007 R.I. Super. LEXIS 32, at \*6 (Super. Ct. Feb. 26, 2007).

133. RESTATEMENT (SECOND) OF TORTS § 821C (1979) (emphasis added).

134. Jury Instructions at 16, *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2007 R.I. Super. LEXIS 32 (Super. Ct. Feb. 26, 2007).

135. *Rhode Island*, 2007 R.I. Super. LEXIS 32 at \*100.

In perhaps the most glaring misconstruction of the public nuisance theory, the court in *American Cyanamid*, discussing the nature of the remedy sought, remarked: "Defendants argue that plaintiff cannot escape the requirement of showing causation in fact by stylizing a products liability claim as a public nuisance action."<sup>136</sup> Admittedly, this is a paraphrasing of the defendants' position, yet the court does not reject nor correct it. Rather it builds on the premise, essentially accepting the assertion that plaintiff's 'real' claim is actually in products liability. Moreover, the plaintiffs are not seeking to escape any causation requirement, rather they argue that they are "not seeking to recover for an injury to a particular person or property but, instead [are] asserting the right of the public as a whole to be free from threats to its health and safety."<sup>137</sup> How a *threat* to public safety can be conceived of in terms of money damages is unclear. The *New Jersey Consolidated Lead* court took a more reasoned approach noting: "the complaints seek damages rather than remedies of abatement . . . . Plaintiffs . . . cannot identify any special injury."<sup>138</sup> As indicated in section 821C of the *Restatement (Second) of Torts*, absent a showing of special or particularized injury, the state cannot maintain such an action.<sup>139</sup>

Wisconsin, evidently, follows a more liberal rule. As the court observed with approval in *Milwaukee*: "The City asks that defendants pay the costs associated with the City's abatement program. Specifically, the suit seeks: (1) compensatory and equitable relief for abatement of the toxic lead hazards . . . (2) restitution . . . and (3) punitive damages."<sup>140</sup> The court also quoted from a 1929 Wisconsin Supreme Court case, *Brown v. Milwaukee Terminal Ry. Co.*, which held: "The damage that may be recovered in actions based upon nuisance must always be the natural and proximate consequence of the danger created by the nuisance."<sup>141</sup> The court there made no distinction between public and private nuisance,

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136. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 135 (Ill. App. Ct. 2005).

137. *Id.*

138. *In re Lead Paint Litig.*, 924 A.2d 484, 502-03 (N.J. 2007).

139. Ironically, the court in *New Jersey Consolidated Lead* found that all the injuries plaintiffs identified were general to the public at large, a finding that any other plaintiff would be thrilled to have. *Id.* at 503. Here, however, because of the perceived conflict with the abatement requirements in the LPA, this finding works against the plaintiffs. *Id.* at 502.

140. *City of Milwaukee v. NL Indus. Ass'n, Inc.*, 691 N.W.2d 888, 891 (Wis. Ct. App. 2004).

141. *Brown v. Milwaukee Terminal Ry. Co.*, 224 N.W. 748, *on reargument*, 227 N.W. 385, 386 (Wis. 1929).

but seemed to allow for recovery of damages under either theory. Imbedded in this reference to an early twentieth century case, however, is a distinction that bears heavily on the central issue in this paper. The court in *Brown* spoke of the *danger* created by the nuisance and not the activity of the defendants. Expounding on this idea is the function of the next section.

#### PART IV: WHERE CONDUCT YIELDS TO DANGER

In thinking about the difference between conduct and danger, and how that distinction affects proof of causation of a public nuisance, several terms must be distinguished. Consider the word 'harm'. In some instances, harm might refer to the injury actually sustained by an individual from contact with a toxic product. In such an example, the individual sustains damages and might seek to recover from whomever is responsible for the presence of the toxic product. Alternatively, 'harm' could refer to the threat of a condition that may affect a public right, as when a toxic substance is dumped on a public beach. Here, no one sustains a personal injury, but there is still harm to the public right. Harm, then, does not always require a demonstrated injury. Consider the word 'cause'. Take the broad example of flagging investor confidence that in turn *causes* the stock market to decline, yet no single devaluation of stock can be traced to the actions of a single investor. The term 'cause' is used, but we understand it to mean 'led directly to an outcome' because it is the *condition* to which investors contribute (through their lack of confidence) that we blame for the subsequent turn of events. It is not the individual actions of a single investor that concerns us.

Applied to the case of lead paint, these terms are equally mutable. However, by drawing a critical distinction, part of the judicial confusion surrounding public nuisance might be explained. Conceptually, the causation element in public nuisance must be bifurcated so that each plaintiff actually has two steps to prove: (1) that each defendant-manufacturer engaged in activities that were a substantial cause of the public nuisance, and (2) that the nuisance itself was a substantial factor in causing harm, whether actual or threatened, to the public. Viewed in this fashion, it is easier to see why each government plaintiff considers public nuisance a viable argument. Evidence introduced to show the first part need not be the same evidence introduced to prove the second. For instance, the state could submit market share data to demonstrate that each manufacturer operating in the jurisdiction

affirmatively engaged in conduct that was a substantial cause of the distribution and application of lead paint. This would not raise the specter of market-share liability because damages are not being sought for any particular injury and so fair apportionment (the basis for *Sindell*-type departure from negligence principles) is not yet an issue. The state could then offer evidence that lead paint is a substantial factor is causing a public health risk.

In the *Milwaukee* case, the court carefully articulated the position of the plaintiffs, namely:

[D]efendants are responsible for [abatement costs] because their conduct in marketing and selling substantial quantities of lead [paint] in the City of Milwaukee and after the construction of these dwellings, when they knew the hazards of lead poisoning related to their product, was a substantial factor creating the public nuisance.<sup>142</sup>

This quotation is perhaps most important for what it does not say. The plaintiffs in *Milwaukee* did not claim (and the court did not require them to prove) that the defendants were responsible for the lead paint hazard on the walls of houses in Milwaukee, rather the city focused on the defendants' individual and collective conduct in the marketing and selling of lead paint. Absent this marketing and selling, lead paint would not have entered Milwaukee and would never have been applied to walls there. The marketing and distribution was the conduct creating the nuisance. The court in *Santa Clara* encountered similarly targeted allegations that claimed defendants were "liable in public nuisance in that they created . . . contributed to . . . or assisted in the creation . . . or were a substantial contributing factor in the creation of the public nuisance by engaging in a massive campaigning to promote the use of Lead . . ." <sup>143</sup> Again, the defendants were not accused of causing injury to anyone by causing harmful contact between an individual lead product and an individual person. Rather, the plaintiffs, and the courts in both cases, were focused on the danger created by the defendants. Where the danger was sufficient to constitute a public nuisance, the court then turned *separately* to the effect of that nuisance on the public right. This was precisely the approach that the court in *Rhode Island* instructed the jury to

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142. *Milwaukee*, 691 N.W.2d at 890-91.

143. *County of Santa Clara v. Atl., Richfield Co.*, 40 Cal. Rptr. 3d 313, 324 (Ct. App. 2006) (internal quotation marks omitted).

take.<sup>144</sup> In the end, that jury returned a unanimous verdict for the state. Had the courts in *American Cyanamid*, *New Jersey Consolidated Lead*, and *St. Louis* been handed similarly straightforward guidance, perhaps the outcomes would have been in keeping with the principles underlying public nuisance.

To give all of these observations practical meaning, we must return to the underlying principles at stake in each of the central cases. Public nuisance, as a common law theory, is admittedly broad. But that is its charm. It is designed to relieve the unfairly burdened public from an interference it ought not to have to bear. It is designed to be used when all other theories fail. No one seriously disputes the premise that lead paint presents a hazard to the public. The operative question, rather, is who can fairly be held liable? Making that determination is the province of the jury and, as we have seen in both Wisconsin and Rhode Island, it can be difficult.<sup>145</sup> It is imperative, therefore, that plaintiff-governments ensure clarity of the issues to minimize the distraction often created by defendants' misplaced negligence-type arguments. Plaintiffs must be more nimble in the public relations game by taking every opportunity to reframe the issues, always returning to the notion that a lead-free housing stock is a right and companies that profited from the sale of a toxin should pay their fair share to fix the problem. To get to a jury, however, the plaintiff must plead a cause of action that can survive summary judgment. Public nuisance is that cause of action. What happens once the jury is sworn in is very far beyond the scope of this paper.

### Addendum:

On July 1, 2008, the Rhode Island Supreme Court issued a decision reversing the Superior Court's ruling on lead-paint manufacturers' earlier motion to dismiss.<sup>146</sup> The Supreme Court held unanimously that the trial justice had misapplied the law of public nuisance by finding a causal connection between defendant manufacturers' acts and the subsequent lead poisoning of Rhode Island's children. Although it framed the problem in terms of cau-

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144. See Jury Instructions at 12, *Rhode Island v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2007 R.I. Super. LEXIS 32 (Super. Ct. Feb. 26, 2007).

145. Recall that the jury in *Milwaukee* was split on both questions (existence of a nuisance and liability for that nuisance) and that the *Rhode Island* case went through one mistrial and a deadlocked jury before a unanimous verdict for the plaintiff was reached. See Marie Rohde, *Lead Paint Suit Fails*, MILWAUKEE J. SENTINEL, June 22, 2007, available at <http://www.jsonline.com/story/index.aspx?id=623662>.

146. See *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 435 (R.I. 2008).



sation, the court actually addressed issues not related to causation, *per se*, but rather to policy limitations and other legal guidelines that govern the application of the public nuisance doctrine. With respect to the issues the court *did* address, it did not apply the common law of nuisance accurately.

While the Rhode Island Supreme Court mentioned the trial court's failure to respect the separation of powers and failure to observe the dictates of the Rhode Island General Assembly, its ultimate legal analysis focused on two issues: (1) whether freedom from lead paint hazards in the state's housing stock was a public right, and (2) whether liability would attach where defendants did not have control of the pigment at the time of injury. The court held that plaintiffs had failed to allege a public right and defendants could not be liable unless that had control of the pigment at all times.<sup>147</sup> However, the court overstepped its role on the first issue and misapplied the law of public nuisance on the second issue.

The right to be free from lead paint hazards has not been codified as a public right in Rhode Island law, nor has it been announced in any prior State Supreme Court decisions. But then, public rights are not enumerated exhaustively anywhere, so the fact that it hasn't been ruled on in Rhode Island before should not preclude finding so here. The court's opinion identifies several rights that are commonly recognized as public: air, water, rights of way.<sup>148</sup> The court states that "[t]he term public right is reserved more appropriately for those indivisible resources shared by the public at large" and then concludes that the housing stock of the State of Rhode Island is not an indivisible resource.<sup>149</sup> While this may be a rational conclusion to reach, it does not say anything about the causal link between a nuisance and a defendant's conduct (the focus of this article).<sup>150</sup> In identifying what rights are

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147. *Id.* at 443.

148. *Id.* at 453.

149. *Id.*

150. It is unclear how the court defined indivisible. Housing has surely become a resource that governments make great efforts to preserve, expand and make affordable by grants, loans and legislation. Public housing, in particular, is available to the "public at large" although not everyone could be accommodated at once. Indivisible use (or use *en masse*) of a resource cannot be the test for determining a public right. Rather, the *potential* for interference with anyone's right, available *because they are a member of the public*, must be the appropriate test. "The public" is nothing more than the citizenry, thus potential interference with anyone who would temporarily use public housing, for example, should be sufficient to create interference with a shared, indivisible resource like housing. After all, the court considers water an indivisible

public in nature, courts tend to rely on policy determinations. Here, the court refuses to honor the jury's determination that interference with a public right had occurred because they feared the "widespread expansion of public nuisance law that never was intended."<sup>151</sup> While such a determination is certainly within an individual court's purview to make, it does not follow that the limitation is somehow imbedded in public nuisance law.<sup>152</sup> Tellingly, the court does not cite a single Rhode Island case, but instead relies heavily on *Chicago v. Beretta*,<sup>153</sup> an Illinois handgun case, and the assertion of one commentator.<sup>154</sup> The reliance on *Beretta* is misplaced, however, as another Illinois panel, the *American Cyanamid* court, makes clear. An Illinois court has already held that plaintiffs bringing a public nuisance action against lead paint manufacturers "sufficiently alleg[e] the violation of a public right" where:

the plaintiffs . . . asser[t] that the defendants promoted, manufactured, sold, and distributed lead pigment for use in paints to be used on residential interior surfaces and that such paint exposed all children in this state to the risk of lead poisoning.<sup>155</sup>

The Rhode Island Attorney General filed an identical pleading. As such, the jury's implicit determination, that there was a public right with which defendants had interfered, should not have been disturbed.

The second issue on which the Rhode Island Supreme Court hung its hat was the "requirement" of control of the instrumentality. In order to prove a public nuisance, the court said, the state "would have had to assert that defendants not only manufactured the lead pigment but also controlled that pigment at the time it caused injury to children in Rhode Island."<sup>156</sup> The court then

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resource even though it can be temporary owned (as with temporary ownership of a house) and that does not preclude finding a public nuisance if it is polluted or altered.

151. *Id.*

152. In contrast to the Rhode Island Supreme Court, the court in *Santa Clara* found no such limitation, stating: "[Plaintiffs] alleged that lead causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property. Clearly their complaint was adequate to allege the existence of a public nuisance for which these entities, acting as the People, could seek abatement." *County of Santa Clara v. At. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006).

153. 821 N.E.2d 1099 (Ill. 2004)

154. *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 454 (R.I. 2008).

155. *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 878 (Ill. 2003); *See also supra* note 85.

156. *Rhode Island*, 951 A.2d at 455.

cited *New Jersey Consolidated Lead* for the general proposition that upholding the case would “stretch the concept of public nuisance far beyond recognition.”<sup>157</sup> Aside from the fact that the New Jersey court did not base its decision on the “control” issue, the Rhode Island court also fails to find language that is specifically supportive of its narrow assertion that control of the lead paint at the time of injury is a universally accepted principle.<sup>158</sup> As discussed earlier, both the *Restatement (Second) of Torts* and general public nuisance case law recognize that control of the property or instrumentality is not a requirement in demonstrating a public nuisance. Rather, plaintiffs must demonstrate that the defendants substantially contributed to the creation of the nuisance.<sup>159</sup> Had the Rhode Island Supreme Court given more consideration to the nuanced history of the public nuisance action and dug deeper into the cases it was citing, the outcome may have been different. In any event, the central thrust of this article, that causation should not prohibit the application of the public nuisance doctrine to lead paint remediation cases, I believe, remains undisturbed.

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157. *Id.*

158. On the issue of control, the court in *New Jersey Consolidated Lead* stated: “a public nuisance, by definition, is related to conduct, performed in a location within the actor’s control, which has an adverse effect on a common right.” *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007). This does not say that defendants must have control over individual houses in order to abate lead hazards. Rather, this language addresses the need to identify a causal link between the defendants’ *conduct* and the place where they performed that conduct. In the case of lead paint, the defendants controlled their factories, their distribution systems, and the marketing tools that caused lead-based paint to reach Rhode Island’s housing stock. There is no requirement stated by the New Jersey court that the control must overlap temporally with the injury to children. *Id.* at 510 (Zazzali, C.J. dissenting) citing N.J. Dep’t of Env’tl. Prot. & Energy v. Gloucester Env’tl. Mgmt. Servs., 821 F.Supp. 999, 1012 (D.N.J.1993) (“It is enough for a nuisance claim to stand that the defendants allegedly contributed to the creation of a situation which, it is alleged, unreasonably interfered with a right common to the general public.”); *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 633 (D.R.I.1990) (“This court has discovered no state precedent that bars recovery of nuisance damages simply because the defendants no longer control the instrumentality.”); *Anderson v. W.R. Grace & Co.*, 628 F.Supp. 1219, 1222 (D.Mass.1986) (holding defendants liable even though they did not control nuisance); *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 306, 40 Cal.Rptr.3d 313 (2006) (“Liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property”) (internal punctuation omitted).

159. See *Santa Clara*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006) (holding that liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance); see also *supra* notes 111 & 112.