

# CONTROLLING THE LEAD PAINT DEBATE: WHY CONTROL IS NOT AN ELEMENT OF PUBLIC NUISANCE

**Abstract:** This Note addresses the inconsistent approach to common law public nuisance claims that is ongoing in courts across the country. Currently, courts are divided over whether control of the instrumentality causing a nuisance is an element of a public nuisance claim against product manufacturers. This Note argues that control is not, and has never been, properly considered a separate element that a plaintiff must prove in a public nuisance case. Rather, it should be considered only a single factor in the proximate cause analysis. Thus, courts that profess to adopt common law public nuisance as reflected in the *Restatement* do not remain faithful to the tort when they impose the control element.

## INTRODUCTION

William Prosser suggested that “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”<sup>1</sup> Others have described public nuisance as part of “the great grab bag, the dust bin, of the law.”<sup>2</sup> Today, judges presiding over mass tort litigation in general, and the myriad of lawsuits directed at manufacturers of lead paint in particular, are no less vulnerable to losing their way in the public nuisance jungle than were their predecessors adjudicating matters involving insects found in pastries.<sup>3</sup> The uncertainty surrounding the contours of the tort creates a paradox for potential defendants.<sup>4</sup> Although defendants have an interest in building a body of case law that more clearly delineates the theory of public nuisance, they have no interest in losing

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<sup>1</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984); see also *Carroll v. N.Y. Pie Baking Co.*, 213 N.Y.S. 553, 553–54 (N.Y. App. Div. 1926) (analogizing nuisance actions in a case where the plaintiff became ill after discovering that several large cockroaches were imbedded in the bottom crust of a pie she had purchased).

<sup>2</sup> *Awad v. McColgan*, 98 N.W.2d 571, 573 (Mich. 1959).

<sup>3</sup> See *In re Lead Paint Litig.*, 924 A.2d 484, 501–02 (N.J. 2007); see also Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745–46, 775 (2003).

<sup>4</sup> See Gifford, *supra* note 3, at 763.

those cases.<sup>5</sup> In the last five years, however, product manufacturers slowly have built a small body of case law testing the limits of public nuisance.<sup>6</sup> And, for the most part, they are winning.<sup>7</sup>

As defined, a public nuisance is an unreasonable interference with a right common to the general public.<sup>8</sup> Historically, the tort was tied to the use of land.<sup>9</sup> In the United States, for example, the earliest public nuisance actions involved the obstruction of public highways or waterways.<sup>10</sup> In the typical case, the party causing the obstruction was ordered to “abate the nuisance,” or remove the obstruction, thereby restoring the public’s common right to use the highway or waterway in question.<sup>11</sup> Thus, the restoration of common rights through mandated abatement has long been the core purpose of public nuisance.<sup>12</sup> Accordingly, in most cases, the appropriate target of the abatement action is the actor whose conduct created the nuisance and who is currently in control of the instrumentality that caused that it.<sup>13</sup>

As society evolved, so too did the scope of public nuisance.<sup>14</sup> In addition to obstructions of thoroughfares, the tort also came to en-

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.,* *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint*, 924 A.2d 484; *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004).

<sup>7</sup> *See, e.g.,* *Benjamin Moore*, 226 S.W.3d at 116–17; *In re Lead Paint*, 924 A.2d at 506. *But see* Peter B. Lord, *3 Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006, at A-01.

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). The *Restatement* articulates three circumstances that may sustain a holding that an interference with a public right is unreasonable:

- (a) Whether the conduct involves a significant interference with the public health, the public safety or the public convenience, or
- (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation, 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.

*Id.*

<sup>9</sup> *In re Lead Paint*, 924 A.2d at 501.

<sup>10</sup> *See, e.g.,* *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (1 Pet.) 91, 94–95 (1838); *Van Valkenburgh v. Torrey*, 7 Cow. 252, 252 (N.Y. Sup. Ct. 1827).

<sup>11</sup> *See, e.g.,* *Alexandria Canal Co.*, 37 U.S. (1 Pet.) at 97–98; *Van Valkenburgh*, 7 Cow. at 252.

<sup>12</sup> *See* Gifford, *supra* note 3, at 781.

<sup>13</sup> *See In re Lead Paint*, 924 A.2d at 501.

<sup>14</sup> *See, e.g.,* *Seidenbender v. Charles’s Adm’rs*, 4 Serg. & Rawle 151, 153, 159 (Pa. 1818) (illegal lotteries); *Commonwealth v. Stewart*, 1 Serg. & Rawle 342, 344–45 (Pa. 1815) (keeping of a disorderly home).

compass activities that violated public morals or welfare, such as the operation of gaming or prostitution houses.<sup>15</sup> As the Industrial Revolution paved the way for new uses of land, the scope of public nuisance enlarged even further.<sup>16</sup> Government plaintiffs, for example, began filing public nuisance actions against industrial defendants for water and air pollution.<sup>17</sup> Although the scope of the tort grew, its core purpose remained constant—protecting rights common to the public.<sup>18</sup>

In addition to the basic requirements that an actor cause an unreasonable interference with a public right, courts sometimes impose a control element to public nuisance claims.<sup>19</sup> To be liable, that is, the defendant must control the instrumentality that causes the nuisance.<sup>20</sup> Courts fear that abandoning the control requirement would be tantamount to transforming public nuisance into a “monster” that would devour tort law.<sup>21</sup> These courts, however, take for granted that control is actually an element of a public nuisance claim.<sup>22</sup> It is not, and has never been.<sup>23</sup> Of course, states are free to develop their own common law, but those that profess to adopt the *Restatement (Second) of Torts* view on public nuisance do not remain faithful to that view by imposing a control element.<sup>24</sup>

In the summer of 2007, the New Jersey Supreme Court rejected a class action public nuisance claim against manufacturers of lead paint in *In re Lead Paint Litigation*.<sup>25</sup> The court grounded its decision to affirm the dismissal of the claim largely on the issue of control, reasoning that, because the manufacturers did not control the harm-causing paint at the time the harm was realized, they could not be liable.<sup>26</sup> In addition to highlighting the importance of abating the harmful ef-

<sup>15</sup> See, e.g., *Commonwealth v. Harrington*, 20 Mass. (3 Pick.) 26, 29 (1825) (house of prostitution); *Van Valkenburgh*, 7 Cow. at 252 (horseracing).

<sup>16</sup> See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 545–46 (2006).

<sup>17</sup> See, e.g., *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1159–60 (Cal. 1884) (dumping debris and waste into navigable river); *Luning v. State*, 2 Pin. 215 (Wis. 1849) (building of dam creating mill-pond with stagnant waters).

<sup>18</sup> See *Gifford*, *supra* note 3, at 781.

<sup>19</sup> See *In re Lead Paint*, 924 A.2d at 501.

<sup>20</sup> See *id.* Courts imposing this requirement reason that parties that do not control the instrumentality causing the nuisance are not in a position to abate it. See *id.*

<sup>21</sup> See *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

<sup>22</sup> See *In re Lead Paint*, 924 A.2d at 501.

<sup>23</sup> See RESTATEMENT (SECOND) OF TORTS §§ 821–840E (1979).

<sup>24</sup> See *id.*

<sup>25</sup> 924 A.2d at 506. For greater elaboration, see *infra* notes 159–164 and accompanying text.

<sup>26</sup> *Id.* at 501.

fects of lead poisoning, this opinion is important because the New Jersey court's unfaithful application of public nuisance law could have important consequences in other contexts.<sup>27</sup> This Note explores public nuisance and its potential applications.<sup>28</sup> *In re Lead Paint* and the nationwide lead paint litigation provide a window into the peculiarities and potentialities of public nuisance, as well as its limitations.<sup>29</sup>

Initially, public nuisance proved to be a highly successful theory on which lead paint plaintiffs could proceed.<sup>30</sup> In 2004, an appellate court in Wisconsin reversed the dismissal of a claim brought by the City of Milwaukee against manufacturers of lead paint and lead pigment.<sup>31</sup> One year later, in 2005, the Wisconsin Supreme Court held that a group of lead paint plaintiffs could recover under a public nuisance theory even if the identity of the manufacturers that caused the nuisance was unknown.<sup>32</sup> In that same year, a Rhode Island jury became the first to find lead paint manufacturers liable for creating a public nuisance by making and marketing lead-based paint.<sup>33</sup>

Lead paint manufacturers reversed this trend of success in 2007.<sup>34</sup> In Wisconsin, separate juries returned verdicts in favor of lead

<sup>27</sup> See *id.* at 490, 507; see also *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 619 (7th Cir. 1989).

<sup>28</sup> See *infra* notes 195–300 and accompanying text.

<sup>29</sup> See generally *In re Lead Paint*, 924 A.2d 484.

<sup>30</sup> See *State v. Lead Indus. Ass'n (R.I. Lead Case I)*, No. 99-5226, 2001 WL 345830, at \*8 (R.I. Super. Ct. Apr. 2, 2001) (dismissing lead paint plaintiffs' strict liability, negligence, and fraud claims, but allowing public nuisance claims to proceed); see also *Thomas*, 701 N.W.2d at 557 (holding that lead paint plaintiffs could recover in public nuisance action without knowing which manufacturer, precisely, caused the nuisance); *NL Indus.*, 691 N.W.2d at 890 (reversing dismissal of public nuisance claim against lead paint manufacturers); Lord, *supra* note 7 (noting that Rhode Island jury found paint manufacturers liable for public nuisance).

<sup>31</sup> See *NL Indus.*, 691 N.W.2d at 890.

<sup>32</sup> See *Thomas*, 701 N.W.2d at 557. In reaching its decision, the court permitted the application of risk contribution to determine liability. See *id.* Risk contribution is an alternative liability theory that was adopted by the Wisconsin Supreme Court in 1984. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49 (Wis. 1984). In *Collins*, the plaintiff contracted vaginal cancer as a result of her mother's ingestion of diethylstilbestrol ("DES"), a medication prescribed to prevent miscarriage. *Id.* at 41. Because it was difficult—if not impossible—to identify which defendant had manufactured the drug taken by the plaintiff's mother, the court held that liability could attach based on the defendant's contribution to the risk of injury to the public. *Id.* at 49. Risk contribution liability is a variant of market share liability, which was first adopted by the California Supreme Court. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980). Market share liability apportions risk based on a defendant's proportion of the market unless it demonstrates that it could not have made the product that caused the plaintiff's injuries. *Id.*

<sup>33</sup> Lord, *supra* note 7.

<sup>34</sup> See, e.g., *Benjamin Moore*, 226 S.W.3d at 116–17; *In re Lead Paint*, 924 A.2d at 506.

paint defendants.<sup>35</sup> First, the City of Milwaukee's effort to recoup \$52.6 million in abatement costs from NL Industries failed when a jury found that, although the presence of lead paint in much of the city's housing constituted a public nuisance, the defendant was not responsible for it.<sup>36</sup> Likewise, a second Wisconsin jury returned a verdict in favor of lead paint defendants in a private civil action later that year.<sup>37</sup> The unanimous jury rejected the plaintiff's claim that he had suffered mental disabilities as a result of ingesting lead-based paint, finding instead that other factors had caused his injuries.<sup>38</sup>

More importantly, in June 2007, the high courts of Missouri and New Jersey—the first state supreme courts to rule on the viability of a public nuisance action in the context of the lead paint litigation—each rejected public nuisance claims against manufacturers of lead paint.<sup>39</sup> *Benjamin Moore* and *In re Lead Paint* highlight two hurdles that courts have placed in front of lead paint plaintiffs.<sup>40</sup> One hurdle is proving causation.<sup>41</sup> The court in *Benjamin Moore* denied the plaintiff's claim based on its inability to identify which product manufacturer caused the alleged nuisance.<sup>42</sup> The other hurdle, introduced in both New Jersey and Rhode Island, is proving that the defendant controls the instrumentality causing the nuisance.<sup>43</sup> In other words, one hurdle facing litigants is a fundamental element (i.e., causation), deeply rooted in traditional tort law. The other is unique to public nuisance (i.e., control of the instrumentality causing the nuisance).<sup>44</sup>

In recent years, substantial scholarship has been devoted to the difficulties inherent in proving causation in the mass torts context, particularly when the claim involves conduct that occurred long before the

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<sup>35</sup> Marie Rohde, *Paint Makers Win Verdict*, MILWAUKEE J. SENTINEL, NOV. 6, 2007, at 1A [hereinafter Rohde, *Verdict*]; Marie Rohde, *Lead Paint Suit Fails*, MILWAUKEE J. SENTINEL, JUNE 23, 2007, at 1B [hereinafter Rohde, *Suit Fails*].

<sup>36</sup> Rohde, *Suit Fails*, *supra* note 35.

<sup>37</sup> Rohde, *Verdict*, *supra* note 35.

<sup>38</sup> *Id.*

<sup>39</sup> See *Benjamin Moore*, 226 S.W.3d 110; *In re Lead Paint*, 924 A.2d 484. In 2008, the Supreme Court of Rhode Island continued the trend against public nuisance claims. See *State v. Lead Indus. Ass'n (R.I. Lead Case II)*, 951 A.2d 428, 449 (R.I. 2008). There, the court, in a unanimous decision, reversed the jury verdict finding lead paint manufacturers liable under a public nuisance theory. See *id.* It joined New Jersey and held that control is an element of a public nuisance claim under Rhode Island law. See *id.*

<sup>40</sup> See *Benjamin Moore*, 226 S.W.3d at 116; *In re Lead Paint*, 924 A.2d at 501–02.

<sup>41</sup> See *Benjamin Moore*, 226 S.W.3d at 116.

<sup>42</sup> *Id.*

<sup>43</sup> See *In re Lead Paint*, 924 A.2d at 501–02; *R.I. Lead Case II*, 951 A.2d at 449.

<sup>44</sup> See *Benjamin Moore*, 226 S.W.3d at 116; *In re Lead Paint*, 924 A.2d at 501–02.

injury.<sup>45</sup> Ultimately, commentators have concluded that, for a government plaintiff to satisfy the causation element, the court must relax its traditional causation requirements by adopting alternative theories of liability.<sup>46</sup> The issue of control in the specific context of public nuisance, however, has received less scholarly attention.<sup>47</sup> Indeed, courts are divided over whether liability under public nuisance even requires that defendants control the instrumentality that caused the harm.<sup>48</sup>

This Note explores the New Jersey court's rejection of the public nuisance action against manufacturers of lead paint and lead pigment, analyzes its soundness based on the historical context out of which public nuisance emerged, and concludes that rejecting public nuisance claims on the grounds of control is both unsound and inconsistent with the purpose of the tort.<sup>49</sup> Part I reviews the history of public nuisance, beginning with its origins at English common law, and traces its emergence and evolution in the United States.<sup>50</sup> Part II discusses the modern use of the tort, particularly in the environmental and tobacco litigation during the final quarter of the twentieth century.<sup>51</sup> Part III explores the applicability of public nuisance in lead paint litigation.<sup>52</sup> Part IV argues that control of the instrumentality should be only one factor considered in the proximate cause analysis, and that the history and purpose of public nuisance dictates that it not be considered an independent element of the tort.<sup>53</sup> Finally, Part V discusses how rejecting the "control element" would affect other areas of law.<sup>54</sup>

<sup>45</sup> See, e.g., Mark P. Gagliardi, *Stirring Up the Debate in Rhode Island: Should Lead Paint Manufacturers Be Held Liable for the Harm Caused by Lead Paint?*, 7 ROGER WILLIAMS U. L. REV. 341, 343 (2002); Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115, 125–26 (2006); Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151, 154 (2004).

<sup>46</sup> See *Sindell*, 607 P.2d at 937 (applying market share liability theory in a DES context); *Thomas*, 701 N.W.2d at 549–51 (applying risk contribution theory in a lead paint context).

<sup>47</sup> For some limited discussion of the control issue, see Gifford, *supra* note 3, at 819–24.

<sup>48</sup> Compare, e.g., *City of Milwaukee v. NL Indus.*, No. 2007AP2873, 2008 WL 4977587, at \*22 n.20 (Wis. Ct. App. 2008) (noting that control is necessary to establish liability under public nuisance theory), with *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1234 (D. Mass. 1986) (denying in part defendant's motion for summary judgment, notwithstanding the fact that it did not control the instrumentality causing the nuisance).

<sup>49</sup> See *infra* notes 165–196 and accompanying text.

<sup>50</sup> See *infra* notes 55–90 and accompanying text.

<sup>51</sup> See *infra* notes 91–118 and accompanying text.

<sup>52</sup> See *infra* notes 119–164 and accompanying text.

<sup>53</sup> See *infra* notes 165–218 and accompanying text.

<sup>54</sup> See *infra* notes 219–300 and accompanying text.

## I. ORIGINS OF PUBLIC NUISANCE

In torts, a field of law where vague definitions, rules, and doctrines abound, no cause of action is as vaguely defined or as poorly understood as public nuisance.<sup>55</sup> Although a number of states now define public nuisance by statute, the statutory definitions often fail to improve upon those crafted by judges.<sup>56</sup> Thus, an appropriate starting point for any inquiry into the tort's applicability in a given context begins with its origins at common law.<sup>57</sup>

### A. *Public Nuisance in England*

The word “nuisance” first emerged in English law to describe interferences with servitudes or other rights to the free use of land.<sup>58</sup> The precursors of modern nuisance can be traced back to eleventh- and twelfth-century England.<sup>59</sup> During this time, the “assize of nuisance” emerged in the royal courts as a remedy for plaintiffs whose rights had been injured.<sup>60</sup>

<sup>55</sup> Gifford, *supra* note 3, at 774.

<sup>56</sup> *Id.* at 775. For example, the California public nuisance statute reads:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

CAL. CIV. CODE § 3479 (Deering 1997).

<sup>57</sup> See Gifford, *supra* note 3, at 749.

<sup>58</sup> KEETON ET AL., *supra* note 1, at 617.

<sup>59</sup> Gifford, *supra* note 3, at 791. In 1082, William the Conqueror issued an executive writ or royal order to Archbishop Lanfranc that ordered “the mill built by Picot at Cambridge [to] be destroyed if it injures the other.” *Id.* Until the reign of Henry II beginning in 1154, individuals harmed by their neighbors’ conduct, however, were left to self-help remedies—often violence—to cure nuisances. Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144, 144–45 (1978). No strong king could tolerate the “spasmodic upheaval and unjust results” of private quarrels, and Henry II intended to be a strong one. *Id.* at 145.

<sup>60</sup> Loengard, *supra* note 59, at 145. The assize was a model of justice administered with speed and simplicity. *Id.* The injured party sought a royal writ; the writ was issued to the sheriff of the county where the holding in question lay; the sheriff caused twelve “free and lawful men” (or “recognitors”) to appear before “the justices”; and the recognitors determined whether the defendant had committed the act complained of. *Id.* at 145–46. If the defendant was found to have committed the act, the offending structure was torn down, the water was turned back to its old path, or the hole was filled. *Id.* at 146. Sometimes damages were awarded. *Id.*

A parallel action emerged in twelfth-century English common law for infringing on the rights of the Crown.<sup>61</sup> The king could bring suit to stop an infringement and force the offending party to repair any damage to the king's property.<sup>62</sup> In the fourteenth century, the English courts extended the principle of public nuisance beyond the rights of the Crown to include rights common to the public.<sup>63</sup> The earliest such cases appear to have involved purprestures, which were encroachments upon the royal domain or the public highway.<sup>64</sup> The remedy for such a nuisance remained criminal punishment until the sixteenth century, when English courts recognized that private individuals who suffered special damages might have a civil action in tort for the invasion of the public right.<sup>65</sup> The primary purpose of public nuisance was to provide a vehicle through which public authorities could terminate conduct found to be harmful to the public health or welfare.<sup>66</sup>

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<sup>61</sup> Schwartz & Goldberg, *supra* note 16, at 543 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979)).

<sup>62</sup> Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 362 (1990).

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS § 821B cmt. a.

<sup>64</sup> KEETON, *supra* note 1, at 617 (citing EDMUND W. GARRETT & HENRY G. GARRETT, LAW OF NUISANCES 1 (3d ed. 1908)). "Purpresture is also a particular kind of nuisance." *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1155 (Cal. 1884). "The word is derived from the French word *pourpris*, which signifies an [e]nclosure." *Id.* There are more recent examples of purprestures. See *Jamison v. City of Zion*, 834 N.E.2d 499, 502 (Ill. App. Ct. 2005); *Adams v. Comm'rs of Trappe*, 102 A.2d 830, 834 (Md. 1954); *Sloan v. City of Greenville*, 111 S.E.2d 573, 576-77 (S.C. 1959).

<sup>65</sup> 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 424 (1926). For an early application of the "special damages" principle, see *Williams's Case*, 5 Co. Rep. 72b, 77 Eng. Rep. 163 (1595). In *Williams*, the court said:

A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished 100 times for one and the same cause. But if any particular person afterwards by the nuisance done has more particular damage than any other, there for that particular injury, he shall have a particular action on the case . . . .

*Id.*

The *Restatement (Second)* indicates:

In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

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

<sup>66</sup> Gifford, *supra* note 3, at 781.

### B. Public Nuisance in America

The English common law doctrine of public nuisance migrated to American courts.<sup>67</sup> In the eighteenth and nineteenth centuries, a typical public nuisance action involved the obstruction of public highways and waterways.<sup>68</sup> Activities that violated public morals or welfare also constituted public nuisances.<sup>69</sup> By the 1840s, in the wake of the Industrial Revolution, the scope of public nuisance extended even further.<sup>70</sup> The spread of urbanization and industrialization spawned new uses of land that resulted in greater conflict among citizens.<sup>71</sup> In the absence of significant regulation, public nuisance actions enabled governments to regulate through the judicial system particular activities that might injure or annoy the general public.<sup>72</sup> For example, governments began filing public nuisance actions against industrial defendants for water and air pollution.<sup>73</sup> Later, public nuisance actions were extended to cover other environmental harms, including the discharge of untreated sewage, the maintenance of an automobile junkyard, the operation of a hog farm and sewage lagoon, and the storage of coal dust.<sup>74</sup> Although the scope of activities amenable to public nuisance actions evolved over time, generally the remedies

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<sup>67</sup> See, e.g., *Barr v. Stevens*, 4 Ky. (1 Bibb.) 292 (1808); *Thayer v. Dudley*, 3 Mass. (2 Tyng) 296 (1807); *Olcott v. Banfill*, 4 N.H. 537 (1829); *Hendrick v. Andrick*, 3 Va. (1 Va. Cas.) 267 (1812).

<sup>68</sup> See, e.g., *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (1 Pet.) 95 (1838); *Burrows v. Pixley*, 1 Root 362 (Conn. 1792); *Barr*, 4 Ky. (1 Bibb.) 292; *Thayer*, 3 Mass. (2 Tyng) 296; *Lansing v. Smith*, 4 Wend. 9 (N.Y. 1829); *Lansing v. Smith*, 8 Cow. 146 (N.Y. Sup. Ct. 1828); *Hughes v. Heiser*, 1 Binn. 463 (Pa. 1808); *Dimmett v. Eskridge*, 20 Va. (6 Munf.) 308 (1819); *Hendrick*, 3 Va. (1 Va. Cas.) 267.

<sup>69</sup> See, e.g., *Commonwealth v. Harrington*, 20 Mass. (3 Pick.) 26, 29 (1825) (enabling prostitution held to be a common nuisance); *Van Valkenburgh v. Torrey*, 7 Cow. 252 (N.Y. Sup. Ct. 1827) (declaring the racing of horses for bets a common nuisance and an offense against the state); *State v. Kirby*, 5 N.C. (1 Mur.) 254 (1809) (affirming nuisance conviction for swearing in public); *Seidenbender v. Charles's Adm'rs*, 4 Serg. & Rawle 151 (Pa. 1818) (declaring lotteries to be a common nuisance); *Commonwealth v. Stewart*, 1 Serg. & Rawle 342 (Pa. 1815) (declaring a home that hosts "the fighting of cocks, boxing, playing at cudgels and misbehav[ior]" to be a nuisance).

<sup>70</sup> See *Schwartz & Goldberg*, *supra* note 16, at 545–46.

<sup>71</sup> See *id.*

<sup>72</sup> See, e.g., *Gold Run Ditch*, 4 P. at 1159–60 (dumping debris and waste into navigable river); *Luning v. State*, 2 Pin. 215 (Wis. 1849) (building of dam creating mill-pond with stagnant waters).

<sup>73</sup> See *Gold Run Ditch*, 4 P. at 1159–60; *Luning*, 2 Pin. at 215; see also *Commonwealth v. Brown*, 54 Mass. (13 Met.) 365, 365–66 (1849).

<sup>74</sup> *Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So.2d 857, 860–61 (Miss. 1988); *Leo v. Gen. Elec. Co.*, 538 N.Y.S.2d 844, 846 (N.Y. App. Div. 1989); *Mountrail County v. Hoffman*, 607 N.W.2d 901, 902–03 (N.D. 2000); *State v. Sprecher*, 606 N.W.2d 138, 139 (S.D. 2000).

available to plaintiffs did not.<sup>75</sup> In the civil context, the government could seek only abatement or an injunction; the private plaintiff who suffered a particular injury could seek only compensatory damages.<sup>76</sup>

### C. *The Restatement (Second) of Torts View*

The Progressive Era and the New Deal facilitated the development of comprehensive statutory and regulatory schemes.<sup>77</sup> With these in place, the need to remedy invasions of public rights in court diminished.<sup>78</sup> As a result, the number of public nuisance actions—whether initiated by private or public entities—decreased substantially.<sup>79</sup> Indeed, when the first *Restatement of Torts* was approved in 1939, it did not even mention public nuisance.<sup>80</sup> The American Law Institute sought to fill this gap in 1966 when it drafted the *Restatement (Second) of Torts*.<sup>81</sup> The *Restatement (Second)*, however, has done little to untangle the 900 years of confusion that surrounds the tort.<sup>82</sup>

The *Restatement (Second)* defines public nuisance as “an unreasonable interference with a right common to the general public.”<sup>83</sup> It articulates three factors pertinent to determining whether an interference is unreasonable: (1) whether the conduct involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) whether the conduct is proscribed by statute, ordinance, or regulation; or (3) whether the actor knows or has reason to know that the conduct is of a continuing nature or has produced a permanent or long-lasting effect.<sup>84</sup> Section 821C provides that only those parties who have suffered harm of a kind different from that suffered by other members of the public may recover damages under public nuisance.<sup>85</sup> Otherwise, the appropriate remedy for a public nuisance is abatement or injunction.<sup>86</sup> In addition, the *Restatement (Second)* provides that a party may be liable for carrying on an activity or for participating in an

<sup>75</sup> See Schwartz & Goldberg, *supra* note 16, at 542.

<sup>76</sup> *Id.*

<sup>77</sup> Gifford, *supra* note 3, at 805–06.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See RESTATEMENT OF TORTS (1939).

<sup>81</sup> See RESTATEMENT (SECOND) OF TORTS §§ 821A–840E (1979).

<sup>82</sup> See *id.*

<sup>83</sup> *Id.* § 821B.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* § 821C(1).

<sup>86</sup> RESTATEMENT (SECOND) OF TORTS § 821C(2).

activity to a substantial extent.<sup>87</sup> Moreover, if the activity results in the creation of a nuisance *after* the activity ceases, a person who participated to a substantial extent in the activity is subject to liability for the nuisance.<sup>88</sup> This is true even though that person is no longer in a position to abate the condition or stop the harm.<sup>89</sup> Although the *Restatement (Second)* attempted to provide clarity to an ambiguous tort, it has, instead, led to inconsistent application by courts.<sup>90</sup>

## II. MODERN PUBLIC NUISANCE

The history of public nuisance and the *Restatement* have afforded attorneys the opportunity to test the applicability of public nuisance in a number of different contexts over the last fifty years.<sup>91</sup> In 1971, a California court of appeals had the opportunity to hear one of the first modern nuisance claims against product manufacturers in *Diamond v. General Motors Corp.*<sup>92</sup> The class action, filed on behalf of over seven million plaintiffs, alleged that auto manufacturers had caused pollution in the atmosphere above Los Angeles county through the sale of exhaust-emitting motor vehicles.<sup>93</sup> The plaintiffs sought billions of dollars in damages as well as injunctive relief.<sup>94</sup> Without addressing the merits of

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<sup>87</sup> *Id.* § 834.

<sup>88</sup> *Id.* § 834 cmt. e.

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.,* Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001) (“For the interference to be actionable, the defendant must exert a certain degree of control over its source.”); City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 619 (7th Cir. 1989) (“[A] manufacturer almost by definition cannot ‘control’ the product past the point of sale and is therefore automatically exculpated from liability for any event after the sale.”); City of Manchester v. Nat’l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) (“But liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise.”). *But see In re Methyl Tertiary Butyl Ether Prod. Liab. Litig. (In re MBTE Litig.)*, 175 F. Supp. 2d 593, 629 (S.D.N.Y. 2001) (noting that there must be some circumstances under which a defendant can be liable for common law public nuisance even if another party, not within the defendant’s control, contributes to the nuisance); Friends of the Sakonnet v. Dutra, 738 F. Supp. 623, 633 (D.R.I. 1990) (“[I]t follows that suits should be allowed . . . against one who is alleged to have caused damages by a nuisance even if that person no longer controls the alleged nuisance.”); U.S. v. Hooker Chem. & Plastics Corp., 722 F. Supp. 960, 971 (W.D.N.Y. 1989) (entering summary judgment for plaintiffs despite fact that defendant did not control instrumentality causing the nuisance).

<sup>91</sup> *See, e.g.,* U.S. v. Hooker Chem. & Plastics Corp., 722 F. Supp. 960, 961 (W.D.N.Y. 1989); *Diamond v. Gen. Motors Corp.*, 20 Cal. App. 3d 374, 377 (1971).

<sup>92</sup> 20 Cal. App. 3d at 377.

<sup>93</sup> *Id.* at 376.

<sup>94</sup> *Id.*

the public nuisance claim, the court in *Diamond* affirmed dismissal of the case because the class certification was improper.<sup>95</sup> Although unsuccessful, the *Diamond* plaintiffs broke new ground by including product manufacturers among the hundreds of defendants facing liability under a public nuisance theory.<sup>96</sup>

After *Diamond*, states followed suit in bringing public nuisance actions against defendants who had created or contributed to the creation of an injurious condition at some point in the past.<sup>97</sup> A New York district court provided the forum for one of these successes in 1989 in *United States v. Hooker Chemicals*, one of the “Love Canal” cases.<sup>98</sup> The State of New York alleged that the defendant, a chemical manufacturing company, was liable under a public nuisance theory for disposing chemical wastes at the Love Canal landfill site nearly forty years earlier.<sup>99</sup> The court entered summary judgment in favor of the state, notwithstanding the defendant’s lack of ownership or control of the instrumentality that caused the nuisance.<sup>100</sup> Successful litigation in the Love Canal cases influenced attorneys to file public nuisance claims against a familiar and elusive defendant—big tobacco.<sup>101</sup>

The tobacco litigation of the 1990s—and the record-breaking settlement agreement in 1998—is perhaps the single greatest reason

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<sup>95</sup> *Id.* at 383.

<sup>96</sup> Gifford, *supra* note 3, at 750.

<sup>97</sup> See *Hooker Chem. & Plastics Corp.*, 722 F. Supp. at 961; *State v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010, 1011–12 (N.Y. App. Div. 1984).

<sup>98</sup> 722 F. Supp. at 971.

<sup>99</sup> See *id.* at 961.

<sup>100</sup> *Id.* at 961–62, 971. The defendant, Occidental Chemical Corporation (“OCC”), used the site for dumping purposes from 1942 until 1953, when it sold the property. *Id.* at 961. Thus, at the time the case against OCC was filed, it neither owned the Love Canal nor dumped waste at the site. See *id.* The court, however, found that public nuisance liability still attached. *Id.* at 969.

<sup>101</sup> The first major state nuisance action filed against tobacco manufacturers was filed by Mississippi Attorney General, Mike Moore, in 1994. See Complaint, Moore *ex rel.* State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994), available at [http://www.library.ucsf.edu/sites/all/files/ucsf\\_assets/ms\\_complaint.pdf](http://www.library.ucsf.edu/sites/all/files/ucsf_assets/ms_complaint.pdf). Within three years of filing the Mississippi complaint, at least forty states filed suits against tobacco manufacturers. Doug Levy, *Tobacco Turns over New Leaf*, USA TODAY, June 23, 1997, at 1B. In addition, municipalities, health care insurers, and labor union insurers filed similar complaints seeking reimbursement for the costs they claimed to have sustained as a result of tobacco-related illnesses. See, e.g., *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 917 (3d Cir. 1999); *Blue Cross & Blue Shield, Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345, 352 (E.D.N.Y. 2000); Complaint, County of Los Angeles v. R.J. Reynolds Tobacco Co., No. 07651 (Cal. Super. Ct., County of Los Angeles, filed Aug. 5, 1996), available at <http://www.library.ucsf.edu/tobacco/litigation/other/lacomplaint.html>.

that manufacturers of lead paint and lead pigment are defending public nuisance actions today.<sup>102</sup> Litigation directed against manufacturers of tobacco products traces its origins back to the 1950s.<sup>103</sup> Early litigants filed lawsuits attempting to recover under negligent failure to warn, breach of warranty, and deceit theories.<sup>104</sup> If these suits were not defeated by the tobacco companies' "king of the mountain" strategy—the often successful strategy of bankrupting plaintiffs before the suit could go to trial<sup>105</sup>—they were defeated when juries found that the harms of smoking were not foreseeable.<sup>106</sup> Plaintiffs were equally unsuccessful in the 1980s when they attempted to apply strict liability theories to tobacco defendants.<sup>107</sup> As in the earlier cases, tobacco defendants either bankrupted plaintiffs or prevailed before juries who found that plaintiffs themselves were to blame for engaging in such harmful conduct.<sup>108</sup> Indeed, before public nuisance, the road to successful tobacco litigation appeared to be a dead-end.<sup>109</sup>

After some successes in other contexts, public nuisance appeared as an attractive cause of action for attorneys general seeking to obtain

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<sup>102</sup> See, e.g., *State v. Lead Indus. Ass'n (R.I. Lead Case I)*, No. 99-5226, 2001 WL 345830, at \*1 (R.I. Super. Ct. Apr. 2, 2001).

<sup>103</sup> See *Cooper v. R.J. Reynolds Tobacco Co.*, 256 F.2d 464, 465 (1st Cir. 1958) (per curiam).

<sup>104</sup> *Green v. Am. Tobacco Co.*, 409 F.2d 1166, 1166 (5th Cir. 1969) (breach of warranty); *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F.2d 95, 95 (3d Cir. 1966) (negligent failure to warn); *Cooper*, 256 F.2d at 465 (deceit).

<sup>105</sup> See *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 423 (D.N.J. 1993). J. Michael Jordan, counsel for R.J. Reynolds, summarized the tobacco company's defense strategy in an internal memo:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.

*Id.* at 423 n.23. For more on the tobacco litigation strategies, see Richard A. Daynard & Graham E. Kelder, Jr., *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1998, at 34.

<sup>106</sup> *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 39–40 (5th Cir. 1963).

<sup>107</sup> See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988); *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988).

<sup>108</sup> See, e.g., *Horton v. Am. Tobacco Co.*, 667 So.2d 1289, 1292–93 (Miss. 1995) (jury finding that the defendant was at fault, but refusing to allow plaintiff to recover any damages); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 424 (Tex. 1997) (affirming summary judgment, in part, because defendants conclusively established the defense of common knowledge with regard to the general health risks of smoking).

<sup>109</sup> See *Horton*, 667 So.2d at 1292–93; *Grinnell*, 951 S.W.2d at 424.

judgments against the tobacco industry in the 1990s.<sup>110</sup> Unfettered by defenses based on statutes of limitations, assumption of risk, or contributory negligence—and emboldened by the potential of a seemingly boundless tort—attorneys general of at least forty states filed lawsuits against tobacco defendants alleging public nuisance.<sup>111</sup> What resulted was the largest settlement in the history of American tort law.<sup>112</sup> In 1998, the tobacco industry agreed to settle all of its pending claims for a staggering \$246 billion.<sup>113</sup> Two important aspects of the settlement warrant attention.<sup>114</sup> First, because the settlement was so large, the potential scope of a public nuisance claim against product manufacturers appeared enormous.<sup>115</sup> Second, despite the enormity of the tort's scope, because the cases settled there is very little precedent upon which litigants could rely to determine how successful such claims would be in the future.<sup>116</sup> In short, the first significant use of public nuisance theory against a product manufacturer reveals very little about public nuisance.<sup>117</sup> Nine hundred years later, public nuisance is still in the jungle.<sup>118</sup>

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<sup>110</sup> Copies of the complaints filed by the states may be accessed at the Galen digital library at the University of California San Francisco, available at <http://www.library.ucsf.edu/tobacco/litigation/states.html>.

<sup>111</sup> See *id.*

<sup>112</sup> For a description of the terms of the Master Settlement Agreement, see *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1254–55 (11th Cir. 2001).

<sup>113</sup> See *46 States Agree to \$206 Billion Tobacco Settlement*, LIABILITY WK., Nov. 23, 1998, at 1 [hereinafter *Tobacco Settlement*], available at 1998 WLNR 3654580. Four states—Florida, Minnesota, Mississippi, and Texas—had already settled their lawsuits prior to the Master Settlement Agreement for a total of \$40 billion, bringing the total settlement to \$246 billion. See *id.* Lawyers who represented the states received a windfall, too. See Barry Meier, *Lawyers in Early Tobacco Suits to Get \$8 Billion*, N.Y. TIMES, Dec. 12, 1998, at A1.

<sup>114</sup> See *Tobacco Settlement*, *supra* note 113; *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997).

<sup>115</sup> See *Tobacco Settlement*, *supra* note 113.

<sup>116</sup> See, e.g., *Am. Tobacco*, 14 F. Supp. 2d at 973 (dismissing public nuisance claim for failing to plead essential elements). Moreover, public nuisance was just one of several theories of recovery in the litigation resulting from the settlement, a fact that further obfuscates the potential scope of public nuisance claims. See *id.*; see also *Hughes v. Tobacco Inst.*, 278 F.3d 417, 420 (5th Cir. 2001); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219, 1221 (W.D. Wash. 1999).

<sup>117</sup> See *Hughes*, 278 F.3d at 420; *Wash. Pub. Hosp.*, 79 F. Supp. 2d at 1221; *Am. Tobacco*, 14 F. Supp. 2d at 973.

<sup>118</sup> See *Hughes*, 278 F.3d at 420; *Wash. Pub. Hosp.*, 79 F. Supp. 2d at 1221; *Am. Tobacco*, 14 F. Supp. 2d at 973.

### III. LEAD PAINT LITIGATION

#### A. *The Toxic Effects of Lead*

The toxic effects of lead are well known.<sup>119</sup> Lead affects virtually every system of the human body.<sup>120</sup> Although adults can suffer from excessive lead exposure, children, who absorb far more ingested lead than adults, constitute the demographic most frequently—and most seriously—harmed by lead poisoning.<sup>121</sup> Lead can harm a child's brain, kidneys, bone marrow, and other body systems.<sup>122</sup> The Centers for Disease Control (the "CDC") estimate that 310,000 American children under the age of six have greater than 10 micrograms of lead per deciliter of blood, the level at which harmful health effects are known to occur.<sup>123</sup> Such harmful effects include impaired cognitive function and hearing, behavioral difficulties, delayed fetal organ development, reduced stature, and, in rare cases, death.<sup>124</sup>

Lead-based paint in residential housing is the primary source of lead exposure among children.<sup>125</sup> Although the federal government banned the use of lead-based paint in residential housing in 1978,<sup>126</sup> lead-based paint is still found on the walls of millions of homes across the country, particularly those occupied by low-income families.<sup>127</sup> Peeling paint and lead contaminated dust in older homes are common sources of lead ingestion among children.<sup>128</sup>

<sup>119</sup> See DEP'T OF HEALTH & HUMAN SERVS., PREVENTING LEAD POISONING IN YOUNG CHILDREN: A STATEMENT BY THE CENTERS FOR DISEASE CONTROL AND PREVENTION 2 (2005), available at <http://www.cdc.gov/nceh/lead/publications/PrevLeadPoisoning.pdf>.

<sup>120</sup> Requirements for Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property, 61 Fed. Reg. 29,170 (June 7, 1996).

<sup>121</sup> See *id.*

<sup>122</sup> PRESIDENT'S TASK FORCE ON ENVTL. HEALTH RISKS & SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS 1 (2000) [hereinafter PRESIDENT'S TASK FORCE].

<sup>123</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., CHILDHOOD LEAD POISONING 1 (2005), <http://www.cdc.gov/nceh/publications/factsheets/ChildhoodLeadPoisoning.pdf>.

<sup>124</sup> PRESIDENT'S TASK FORCE, *supra* note 122, at 1.

<sup>125</sup> Requirements for Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property, 61 Fed. Reg. at 29,171.

<sup>126</sup> Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303.1 (1999).

<sup>127</sup> PRESIDENT'S TASK FORCE, *supra* note 122, at 2.

<sup>128</sup> Requirements for Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property, 61 Fed. Reg. at 29,171. Not only does lead-based paint cast a significant social toll on those whose health is harmed directly by exposure to it, but also it casts a correspondingly staggering financial toll on those attempting

Given the harmful effects of lead poisoning, scores of litigants have sought damages in court from those responsible.<sup>129</sup> One group of obvious targets is comprised of landlords who negligently maintain their properties by failing to remove lead-based paint from those properties.<sup>130</sup> Although they are obvious targets, landlords have not proven to be particularly appealing defendants.<sup>131</sup> Sometimes landlords are judgment proof or are shielded from liability by state statutes granting them immunity from civil and criminal liability.<sup>132</sup> In other cases, pollution-exclusion provisions in landlords' liability insurance contracts may preclude coverage, thus preventing victims from recovering from landlords' insurers.<sup>133</sup> Accordingly, lead paint plaintiffs most often have directed their claims at the original source of the harm—the manufacturing industry.<sup>134</sup>

### B. *Early Claims Against Manufacturers of Lead Paint and Lead Pigment*

Individual plaintiffs and local public housing authorities began to sue manufacturers of lead paint and lead pigment in the early

to abate it. See *In re Lead Paint Litig.*, 924 A.2d 484, 507 (N.J. 2007) (estimating that lead paint abatement in New Jersey alone cost \$50 billion). Property owners, municipalities, states, and the federal government have incurred substantial costs in preventing and treating lead poisoning. Gifford & Pasicolan, *supra* note 45, at 126. An estimated 19 million homes occupied in the United States in 1997 were constructed prior to 1940; most of these homes contain lead-based paint. *Id.* Another 44 million homes were constructed between 1940 and 1974, and many of these homes also contain lead-based paint. *Id.* The cost of abating the lead hazards in these homes is substantial. See Gagliardi, *supra* note 45, at 347. Estimates suggest that the cost of abatement ranges from \$7,500 to \$15,000 per home. Lord, *supra* note 7. One modest estimate reveals that applying interim control measures to only the most dangerous properties constructed before 1940 would yield a total cost of over \$19 billion. Gifford & Pasicolan, *supra* note 45, at 126.

<sup>129</sup> See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007); *In re Lead Paint*, 924 A.2d at 486–87; *State v. Lead Indus. Ass'n (R.I. Lead Case I)*, No. 99-5226, 2001 WL 345830, at \*1 (R.I. Super. Ct. Apr. 2, 2001); *Thomas v. Mallett*, 701 N.W.2d 523, 527 (Wis. 2005); *City of Milwaukee v. NL Indus.*, 691 N.W.2d 888, 890 (Wis. Ct. App. 2004).

<sup>130</sup> See, e.g., *Brooks v. Lewin Realty III, Inc.*, 835 A.2d 616, 627 (Md. 2003) (holding landlord liable for plaintiff's injuries from lead poisoning in premises liability action); *Brown v. Dermer*, 744 A.2d 47, 60–61 (Md. 2000) (holding landlord liable for negligence).

<sup>131</sup> Cf. WIS. STAT. ANN. § 254.173(2) (West Supp. 2005) (“An owner of a dwelling or unit of a dwelling and his or her employees and agents are immune from civil and criminal liability . . . if, at the time that the lead poisoning or lead exposure occurred, a certificate of lead-free status or a certificate of lead-safe status was in effect for the dwelling or unit.”).

<sup>132</sup> *Id.*

<sup>133</sup> See *Thomas*, 701 N.W.2d at 552–53.

<sup>134</sup> See, e.g., *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 547 (1st Cir. 1993); *City of Philadelphia v. Lead Indus. Ass'n (Phila. Lead Case)*, 994 F.2d 112, 114 (3d Cir. 1993).

1990s.<sup>135</sup> Often, plaintiffs alleged that the manufacturers had conspired to conceal information from the public about the dangers of exposure to lead-based paint in order to preserve the existing market for such products.<sup>136</sup> Even though lead paint plaintiffs alleged several different legal theories, these lawsuits were uniformly unsuccessful.<sup>137</sup> In some cases, the lawsuits failed because plaintiffs could not satisfy the basic standards of products liability law, including product defect, proximate cause, and product identification.<sup>138</sup> Some plaintiffs' cases were dismissed because the statute of limitations had run.<sup>139</sup> Lead paint manufacturers, it seemed, had erected an impregnable wall insulating them from liability.<sup>140</sup>

The tobacco settlement, however, offered hope: if there was a way to place a chink in that armor, public nuisance theory was the mechanism by which to do it.<sup>141</sup> Public nuisance was attractive for several reasons.<sup>142</sup> First, litigants hoped it would allow them to circumvent those requirements that had proven fatal to their claims in the past, such as product defect and the rule against recovery for purely

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<sup>135</sup> *Phila. Lead Case*, 994 F.2d at 120; *Hurt v. Phila. Hous. Auth.*, 806 F. Supp. 515, 536–37 (E.D. Pa. 1992); *Christopher v. Duffy*, 556 N.E.2d 121 (Mass. App. Ct. 1990).

<sup>136</sup> *See, e.g., Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1248–49 (5th Cir. 1997) (affirming dismissal of civil conspiracy claim against lead paint manufacturers); *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 174–75 (Pa. 1997) (affirming dismissal of civil conspiracy claim against lead paint manufacturers).

<sup>137</sup> *See, e.g., Jefferson*, 106 F.3d at 1248–49; *Santiago*, 3 F.3d at 552–53 (dismissing negligence, breach of warranty, and concert of action claims); *Phila. Lead Case*, 994 F.2d at 121–22 (dismissing negligence and strict liability claims); *Cofield v. Lead Indus. Ass'n*, No. MJG-99-3277, 2000 WL 34292681, at \*11–12 (D. Md. Aug. 17, 2000) (dismissing negligent product design, strict products liability, nuisance, indemnification, and fraud and deceit claims); *Skipworth*, 690 A.2d at 174–75.

<sup>138</sup> *See, e.g., Wright v. Lead Indus. Ass'n*, No. 1896, slip op. at 4 (Md. Ct. Spec. App. Sept. 1996) (holding that lead pigment is not defectively designed); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073 (N.Y. 1989) (noting that product identification is generally required).

<sup>139</sup> *See Phila. Lead Case*, 994 F.2d at 122 (holding that plaintiffs' claims were time-barred).

<sup>140</sup> *See, e.g., Jefferson*, 106 F.3d at 1248–49; *Santiago*, 3 F.3d at 552–53.

<sup>141</sup> *See Tobacco Settlement*, *supra* note 113, at 1.

<sup>142</sup> *See, e.g., R.I. Lead Case I*, 2001 WL 345830, at \*12–13 (denying motion to dismiss public nuisance claim because, unlike strict liability and negligence claims, the State's allegations claim harm resulting from lead in public buildings, and, therefore, “the State retains the *nullum tempus* exemption from the operation of a statute of limitations”); *see also Wade v. Campbell*, 19 Cal. Rptr. 173, 177 (Cal. Ct. App. 1962) (holding that neither prescriptive rights, laches, or the statute of limitations is a defense against a public nuisance claim); *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 925–26 (W. Va. 1997) (holding that the statute of limitations is not a defense to an action seeking abeyance a continuing nuisance).

economic loss.<sup>143</sup> Moreover, litigants would not be burdened by the statute of limitations or a statute of repose if a government entity, to whom limitations periods do not apply under the doctrine of *nullum tempus*, filed the public nuisance claim on behalf of the community.<sup>144</sup> Indeed, after years of unsuccessful litigation, lead paint litigants achieved their first victory in 2005 when a Rhode Island jury returned a verdict in favor of plaintiffs on public nuisance grounds.<sup>145</sup> The celebration surrounding the promise of public nuisance was short-lived, however, when, in the summer of 2008, the Rhode Island Supreme Court reversed the jury verdict.<sup>146</sup> The sting of defeat was felt elsewhere, too, as the state Supreme Courts of Missouri and New Jersey rejected government plaintiffs' public nuisance claims in 2007.<sup>147</sup>

### C. *The Missouri and New Jersey Decisions*

In *City of St. Louis v. Benjamin Moore & Co.*, government officials filed a public nuisance claim against companies that put lead paint into the stream of commerce and sought to recover the costs of the city's program to assess, abate, and remediate the lead paint problem.<sup>148</sup> The city argued that the defendants had produced, manufactured, and distributed products that they knew were toxic, and that the presence of lead paint in the city unreasonably interfered with the public health, safety, and welfare.<sup>149</sup> The government, however, faced a familiar obstacle plaguing lead paint plaintiffs: it is virtually impossible to identify specifically which manufacturer's products caused the nuisance.<sup>150</sup>

Because the city could not identify which defendant had manufactured the lead products that were present in the properties at issue, it invited the court to adopt a more relaxed causation standard: market share liability.<sup>151</sup> The crux of the government's argument was that market share liability was appropriate because the government was suing not to recompense an individual injury but rather to respond to

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<sup>143</sup> See *Wright*, No. 1896, slip op. at 4.

<sup>144</sup> *Phila. Lead Case*, 994 F.2d at 117. The doctrine of *nullum tempus* grants a state and its agencies immunity from the statute of limitations absent an explicit legislative directive to the contrary. *Id.* The English translation of "*nullum tempus occurit regi*" is "time does not run against the king." *Id.* at 120.

<sup>145</sup> Lord, *supra* note 7.

<sup>146</sup> *State v. Lead Indus. Ass'n (R.I. Lead Case II)*, 951 A.2d 428, 449 (R.I. 2008).

<sup>147</sup> See *Benjamin Moore*, 226 S.W.3d at 116–17; *In re Lead Paint*, 924 A.2d at 506.

<sup>148</sup> 226 S.W.3d at 113.

<sup>149</sup> *Id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 115.

a widespread health hazard that is uniquely public.<sup>152</sup> A lesser causation standard was proper, they argued, because the parties that substantially contributed to the creation of that health hazard, not the taxpayers, should assume the monumental task of cleaning up the toxic products.<sup>153</sup>

While noting the attractiveness of the argument, the court declined the invitation to adopt the lesser causation standard.<sup>154</sup> The court held that market share liability is unfair, unworkable, and contrary to Missouri law.<sup>155</sup> Moreover, the court reasoned, market share liability theory is contrary to sound public policy.<sup>156</sup> It risks that the actual wrongdoer is not among the named defendants, and it exposes defendants to liability greater than their responsibility.<sup>157</sup> Rather, the court held that a public nuisance action could prevail only if the plaintiff, whether a private individual or a government entity, could identify which defendant produced which product.<sup>158</sup>

In *In re Lead Paint Litigation*, the New Jersey government sought to recover the costs of detecting and removing lead paint, providing medical care to residents, and developing programs to educate the public about the dangers of lead paint.<sup>159</sup> Rejecting the government plaintiffs' claim, the New Jersey Supreme Court relied primarily on the requirement that a defendant in a public nuisance action must have control of the instrumentality that causes the nuisance.<sup>160</sup> The court noted that legislative enactments empowering local boards to sue property owners for abatement costs reflected the notion that, at common law, the liable party is the owner of the premises.<sup>161</sup> Indeed, public nuisance actions historically are tied to the land; accordingly, the appropriate target of the abatement action must be the premises owner whose conduct has created the nuisance.<sup>162</sup> To render product manufacturers liable under public nuisance, the court reasoned, would stretch the tort to such proportions that public nuisance "would become a monster that would de-

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<sup>152</sup> *Benjamin Moore*, 226 S.W.3d at 116.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 115.

<sup>156</sup> *Id.*

<sup>157</sup> *Benjamin Moore*, 226 S.W.3d at 115.

<sup>158</sup> *See id.* at 115–16.

<sup>159</sup> *In re Lead Paint*, 924 A.2d at 487.

<sup>160</sup> *Id.* at 501–02.

<sup>161</sup> *See id.* at 494, 501.

<sup>162</sup> *Id.* at 501.

vous in one gulp the entire law of tort.”<sup>163</sup> Rather, the court noted the “inescapable fact” that the plaintiffs’ claims were cognizable only as a products liability claim, and remanded the matter for an entry of judgment in favor of the defendants.<sup>164</sup>

#### IV. CONTROLLING THE INSTRUMENTALITY CAUSING THE NUISANCE: THE PROPER ROLE OF CONTROL IN THE PUBLIC NUISANCE ANALYSIS

The decisions in *City of St. Louis v. Benjamin Moore & Co.* and *In re Lead Paint Litigation* demonstrate two important things.<sup>165</sup> First, they demonstrate that the courts in this country may be unwilling to modify public nuisance law to accommodate claims against product manufacturers.<sup>166</sup> Second, they illustrate that there are both principled and unprincipled ways to insulate lead paint and lead pigment manufacturers from public nuisance lawsuits.<sup>167</sup> This Part argues that the *Benjamin Moore* opinion, which grounds its holding in the plaintiff’s failure to satisfy a traditional tort element, i.e., cause in fact, constitutes a principled application of tort law.<sup>168</sup> It further argues that the *In re Lead Paint* decision, although reaching the same outcome as *Benjamin Moore*, did so in a manner that undermines the history and purpose of common law public nuisance.<sup>169</sup> More importantly, the *In re Lead Paint* reasoning, if accepted in other jurisdictions, could have important implications in other litigation contexts.<sup>170</sup>

##### A. Control Is Not an Element of a Public Nuisance Claim

The New Jersey courts are not the only ones to read an element of control into the public nuisance cause of action.<sup>171</sup> Courts applying the

<sup>163</sup> *Id.* at 505 (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)).

<sup>164</sup> *In re Lead Paint*, 924 A.2d at 503, 506.

<sup>165</sup> See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007).

<sup>166</sup> See *Benjamin Moore*, 226 S.W.3d 110; *In re Lead Paint*, 924 A.2d 484.

<sup>167</sup> See *Benjamin Moore*, 226 S.W.3d 110; *In re Lead Paint*, 924 A.2d 484.

<sup>168</sup> See *Benjamin Moore*, 226 S.W.3d 110.

<sup>169</sup> See *id.*; *In re Lead Paint*, 924 A.2d 484.

<sup>170</sup> See *In re Lead Paint*, 924 A.2d 484.

<sup>171</sup> See, e.g., *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (“For the interference to be actionable, the defendant must exert a certain degree of control over its source.”); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 619 (7th Cir. 1989) (“[A] manufacturer almost by definition cannot ‘control’ the product past the point of sale and is therefore automatically excused from liability for

control element reason that only the party that has control over the instrumentality creating the nuisance is in a position to abate it; therefore, a party that does not have control over the instrumentality at issue may not be liable under common law public nuisance theory.<sup>172</sup> On the other hand, many jurisdictions reject the notion that control is itself a separate element of the tort.<sup>173</sup> These courts tend to rely on the history and purpose of public nuisance, as reflected in the *Restatement (Second)*,

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any event after the sale.”); *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (“[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise.”); *Corp. of Mercer Univ. v. Nat’l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at \*6 (M.D. Ga. Mar. 9, 1986) (“The [Court] can only conclude that as an elementary principle of tort law, a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality.” (quoting *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984))); *Town of Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984) (“[O]wnership and control of the asbestos products ceased at the time of sale.”); *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002) (noting that the “absence of a manufacturer’s control over a product at the time the nuisance is created is generally fatal to any nuisance or negligence claim”); *State v. Lead Indus., Inc. (R.I. Lead Case II)*, 951 A.2d 428, 449 (R.I. 2008).

<sup>172</sup> See, e.g., *Camden v. Beretta*, 273 F.3d at 541; *Manchester v. Nat’l Gypsum*, 637 F. Supp. at 656; *Hooksett*, 617 F. Supp. at 133.

<sup>173</sup> See, e.g., *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig. (In re MBTE Litig.)*, 175 F. Supp. 2d 593, 629 (S.D.N.Y. 2001) (noting that there must be some circumstances under which a defendant can be liable for common law public nuisance even if another party, not within the defendant’s control, contributes to the nuisance); *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990) (“[I]t follows that suits should be allowed . . . against one who is alleged to have caused damages by a nuisance even if that person no longer controls the alleged nuisance.”); *U.S. v. Hooker Chem. & Plastics Corp.*, 722 F. Supp. 960, 971 (W.D.N.Y. 1989) (entering summary judgment for plaintiffs despite fact that defendant did not control instrumentality causing the nuisance); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006) (“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.*” (quoting *City of Modesto Redevelopment Agency v. Superior Court*, 13 Cal. Rptr. 3d 865, 872 (Cal. Ct. App. 2004) (emphasis added))); *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of Am.*, 271 Cal. Rptr. 596, 606–07 & n.7 (Cal. Ct. App. 1990) (finding that the State may seek damages for alleged nuisance notwithstanding absence of control); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1132 (Ill. 2004) (“[W]hen the nuisance results from the use or misuse of an object apart from land, or from conduct unrelated to a defendant’s use of land, lack of control of the instrumentality at the time of injury is not an absolute bar to liability.”); *People v. Brockman*, 574 N.E.2d 626, 635 (Ill. 1991) (noting that policy interests attendant to the state contribution statute requires that courts not regard “control” as the dominant consideration); *Thomas v. Mallett*, 701 N.W.2d 523, 563 (Wis. 2005) (disagreeing with the argument that, because defendants were not in exclusive control of the risk their product created, risk-contribution theory should not be applied to them).

when articulating the parameters of the tort.<sup>174</sup> Analysis of the underlying purpose and history of common law public nuisance, as well the guidance provided by the *Restatement*, reveals that those courts that have rejected the control requirement are the ones that remain faithful to the core meaning of public nuisance.<sup>175</sup>

As indicated above, public nuisance traces its origins to twelfth century England.<sup>176</sup> Unlike private nuisance, which is narrowly restricted to the invasion of personal interests in the use or enjoyment of land, public nuisance encompasses a broad range of activities that infringe a public right.<sup>177</sup> It has been described as a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.<sup>178</sup> One court described public nuisance as embodying, at least in theory, a kind of collective ideal of civil life which the courts have vindicated by equitable principles since the sixteenth century.<sup>179</sup> At its core, public nuisance is about protecting the public welfare.<sup>180</sup> This emphasis on public welfare is reflected by one of its most distinctive features: unlike private nuisance or other torts, damages are not an appropriate remedy in a public nuisance action.<sup>181</sup> Rather, the appropriate remedy in a typical public nuisance action is an injunction requiring abatement of the nuisance.<sup>182</sup> This distinction is critical.<sup>183</sup> It reflects that public nuisance, unlike other torts, is centrally concerned with the nature and relative importance of the public interests infringed, not with the conduct causing the infringement.<sup>184</sup> It follows that, when analyzing an abatement action under common law public nuisance, a court that remains faithful to the principles underlying the tort should be less concerned with the

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<sup>174</sup> See, e.g., *Chicago v. Beretta*, 821 N.E.2d at 1128–32.

<sup>175</sup> See *id.*

<sup>176</sup> See Gifford, *supra* note 3, at 791.

<sup>177</sup> See KEETON ET AL., *supra* note 1, § 86.

<sup>178</sup> *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979) (noting that common law public nuisance came to cover a large, miscellaneous, and diversified group of minor criminal offenses).

<sup>179</sup> *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997).

<sup>180</sup> See *Gallo*, 929 P.2d at 603; RESTATEMENT (SECOND) OF TORTS § 821B cmt. b; KEETON ET AL., *supra* note 1, § 86.

<sup>181</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328 (“Here, the representative cause of action is a public nuisance action brought on behalf of the People seeking abatement.” Plaintiffs “are not seeking damages for injury to their property or the cost of remediating their property.”).

<sup>182</sup> See *id.* Plaintiffs may, however, seek damages for a public nuisance if they have suffered particularized or special damages allegedly resulting from a public nuisance. See *Benjamin Moore*, 226 S.W.3d at 116.

<sup>183</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328–29.

<sup>184</sup> See *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982).

conduct causing the infringement and more concerned with the nature of the public right infringed.<sup>185</sup> So long as there is a causal link connecting the defendant with the harm, the public welfare should not be sacrificed simply because a contributing actor did not control the instrumentality that caused the nuisance.<sup>186</sup> This notion is reflected in the treatment of the subject in the *Restatement*.<sup>187</sup>

Tellingly, the *Restatement* does not suggest that control of the instrumentality causing the nuisance is an element of common law public nuisance.<sup>188</sup> Rather, public nuisance is broadly defined in the *Restatement* as an unreasonable interference with a right common to the public.<sup>189</sup> Although this definition is broad and although it invites inconsistent judicial interpretation, the nearly one hundred pages that the authors of the *Restatement* devote to the topic, as well as the comments provided therein, elucidate the meaning and parameters of the ambiguous tort.<sup>190</sup> Comment b to section 834 defines “activity” to include “all acts that are a cause of harm to another’s interest in the use and enjoyment of land.”<sup>191</sup> Implicitly, then, an actor who no longer controls the instrumentality causing the nuisance, but whose conduct was a cause of the infringement of the public right, could be found liable.<sup>192</sup> This is contrary to the holdings of those courts that have required the control element.<sup>193</sup> As indicated above, the rationale behind the control requirement is that a defendant who is not in a position to abate the nuisance cannot be liable for its harm.<sup>194</sup> Section 834, comment e, however, expressly rejects this reasoning by declaring that a person who participated to a substantial extent in the activity is subject to liability for a nuisance even if the activity has ceased and “even though he is no longer in a position to abate the condition and to stop the harm.”<sup>195</sup> Thus, to the extent that the *Restatement* reflects the his-

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<sup>185</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328–29.

<sup>186</sup> See *id.*

<sup>187</sup> See RESTATEMENT (SECOND) OF TORTS §§ 821B, 834B.

<sup>188</sup> See *id.*

<sup>189</sup> *Id.* § 821B.

<sup>190</sup> See *id.* §§ 821A–840E.

<sup>191</sup> See *id.* § 834B cmt. b. (emphasis added).

<sup>192</sup> See RESTATEMENT (SECOND) OF TORTS § 834B cmt. b.

<sup>193</sup> See, e.g., *Camden v. Beretta*, 273 F.3d at 539; *Westinghouse*, 891 F.2d at 619; *Manchester v. Nat’l Gypsum*, 637 F. Supp. at 656; *Mercer v. Nat’l Gypsum*, 1986 WL 12447, at \*6; *Hooksett v. W.R. Grace & Co.*, 617 F. Supp. at 133; *Traube*, 775 N.E.2d at 216.

<sup>194</sup> See, e.g., *Camden v. Beretta*, 273 F.3d at 541; *Manchester v. Nat’l Gypsum*, 637 F. Supp. at 656; *Hooksett*, 617 F. Supp. at 133.

<sup>195</sup> RESTATEMENT (SECOND) OF TORTS § 834B cmt. e (emphasis added). This comment addresses the situation where a former landowner may be liable for a nuisance created on

tory and purpose of common law public nuisance, the courts requiring the element of control are not remaining faithful to it.<sup>196</sup>

### B. *Control Is a Consideration in a Proximate Cause Analysis*

This is not to suggest that control over the harm-causing instrumentality plays no role in a proper public nuisance analysis.<sup>197</sup> Rather, control ought to be a consideration in an analysis of whether the defendant's conduct substantially contributed to the infringement of the public right.<sup>198</sup> In other words, control is a factor in determining whether the defendant proximately caused the harm.<sup>199</sup> The source of the confusion surrounding the proper role that control plays in this analysis likely originates from the typical public nuisance case, where the nuisance arises from one's conduct on land.<sup>200</sup> Thus, in the typical case, control is a necessary precondition for liability.<sup>201</sup> The *Restatement*, however, makes clear that other parties may be liable when the nuisance results from conduct unrelated to land.<sup>202</sup> In the latter situation, the proper question is whether the defendant was a substantial contributor to the nuisance.<sup>203</sup>

Proximate cause is a policy question that asks how far liability should extend.<sup>204</sup> It seeks to determine whether a particular defendant's conduct was so far removed from the harm that, as a matter of policy, it would be inappropriate to hold the defendant responsible.<sup>205</sup> The crux of the proximate cause inquiry is whether the resulting

land he once owned. *Id.* Although this situation is clearly distinguishable from that of a product manufacturer, the rationale the courts have adopted in the context of product manufacturers would apply with equal force here. *See id.*

<sup>196</sup> *See id.* §§ 821B, 834B.

<sup>197</sup> *See Chicago v. Beretta*, 821 N.E.2d at 1132.

<sup>198</sup> *See* RESTATEMENT (SECOND) OF TORTS § 834B; *see also Chicago v. Beretta*, 821 N.E.2d at 1129.

<sup>199</sup> *See* RESTATEMENT (SECOND) OF TORTS § 834 cmt. d ("This is true because to be a *legal cause* of harm a person's conduct must be a substantial factor in bringing it about." (emphasis added)). Some have argued that negligence notions of foreseeability and proximate cause are inapplicable in the context of public nuisance abatement actions. *See People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 207–08 (N.Y. App. Div. 2003) (Rosenberger, J., dissenting).

<sup>200</sup> *See Chicago v. Beretta*, 821 N.E.2d at 1132.

<sup>201</sup> *See id.*; RESTATEMENT (SECOND) OF TORTS § 839 cmt. d (a possessor of land's liability is based "upon the fact that he has exclusive control over the land and the things done upon it").

<sup>202</sup> *See Chicago v. Beretta*, 821 N.E.2d at 1132; RESTATEMENT (SECOND) OF TORTS § 834.

<sup>203</sup> *See Chicago v. Beretta*, 821 N.E.2d at 1132; RESTATEMENT (SECOND) OF TORTS § 834.

<sup>204</sup> *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 136 (Ill. App. Ct. 2005).

<sup>205</sup> *Chicago v. Beretta*, 821 N.E.2d at 1132.

harm was a foreseeable consequence of the defendant's conduct.<sup>206</sup> Moreover, there may be more than one proximate cause of an injury.<sup>207</sup> In most cases, proximate cause is a question of fact to be resolved by a jury.<sup>208</sup> Thus, in the lead paint context, whether the nuisance was a foreseeable use of the manufacture and promotion of lead paint and lead pigment should be determined by a jury, rather than a judge on a motion to dismiss.<sup>209</sup> The New Jersey Supreme Court, however, deprived a jury of the opportunity to decide this question of fact.<sup>210</sup> Although a jury would properly consider control as a factor, it would serve as merely one factor in the overall analysis.<sup>211</sup> There are occasions that call for a court to decide the issue of proximate cause as a matter of law; however, courts should reserve such decision-making for instances in which culpability hinges on the "highly extraordinary" consequence of a defendant's conduct.<sup>212</sup> Determining proximate cause in the context of lead paint, however, should not require the court to decide the issue as a matter of law.<sup>213</sup> The typical lead paint public nuisance complaint pleads that the defendants were aware of the hazards of lead, sought to rebut research findings regarding its toxicity, lobbied against lead paint laws, and aggressively promoted its interior use in homes.<sup>214</sup> Taking these facts as true, no court could, in good faith, determine as a matter of law that no jury could find that the public nuisance was a foreseeable consequence of the defendant's conduct.<sup>215</sup>

Moreover, the pleading requirements of a public nuisance claim should not be strenuous because, given its broad applicability at

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<sup>206</sup> See *Selma Pressure Treating Co.*, 271 Cal. Rptr. at 608.

<sup>207</sup> *Chicago v. Beretta*, 821 N.E.2d at 1134.

<sup>208</sup> See Port Auth. of N.Y. and N.J. v. *Arcadian Corp.*, 189 F.3d 305, 315 (3d Cir. 1999); *Am. Cyanamid*, 823 N.E.2d at 133; *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 894 (holding that evidence that each defendant promoted the use of lead is a genuine issue of fact for a jury on the question of whether the defendants participated in the creation of the public nuisance).

<sup>209</sup> See *In re MBTE Litig.*, 175 F. Supp. 2d at 622 n. 43 (holding that the question of control is a fact question that cannot be decided on a motion to dismiss).

<sup>210</sup> See *In re Lead Paint*, 924 A.2d at 501.

<sup>211</sup> See *Chicago v. Beretta*, 821 N.E.2d at 1132.

<sup>212</sup> See *Arcadian*, 189 F.3d at 318 (holding that manufacturers of fertilizer were not a proximate cause of the 1993 World Trade Center bombing); *Griesenbeck v. Walker*, 488 A.2d 1038, 1043 (N.J. Super. Ct. App. Div. 1985) ("The idea of non-liability for the highly extraordinary consequence as a matter of law for the court has already been recognized by this state.").

<sup>213</sup> See *Arcadian*, 189 F.3d at 318.

<sup>214</sup> See, e.g., *Atl. Richfield*, 40 Cal. Rptr. 3d at 324–25; *Thomas*, 701 N.W.2d at 541.

<sup>215</sup> See *In re MBTE Litig.*, 175 F. Supp. 2d at 622 n.43.

common law, public nuisance eludes precise definition.<sup>216</sup> Thus, a sufficient pleading for public nuisance consists of facts alleging a right common to the public, transgression of that right, and resulting damages.<sup>217</sup> Thus, courts abandon established procedural rules governing motions to dismiss by deciding factual issues as matters of law.<sup>218</sup>

## V. PUBLIC NUISANCE IS NOT A MONSTER

The United States Court of Appeals for the Eighth Circuit once declared that, if public nuisance liability were extended to the manufacturer of asbestos-containing plaster, nuisance would “become a monster that would devour in one gulp the entire law of tort.”<sup>219</sup> This quip has become a familiar refrain for courts denying public nuisance actions in myriad circumstances.<sup>220</sup> The most common concern expressed by these courts is that a line must be drawn that separates products liability actions from public nuisance claims.<sup>221</sup> These public nuisance claims must fail, the argument goes, because they are merely products liability claims in disguise.<sup>222</sup> But, this rationale reflects a misunderstanding of both the nature of a public nuisance action and the consequences of permitting certain cases to go forward.<sup>223</sup> In short, these courts actually are blurring the line that distinguishes products liability law and public nuisance.<sup>224</sup> This Part argues that

<sup>216</sup> See *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 24 (Ill. App. Ct. 2002), *rev'd on other grounds*, 821 N.E.2d 1099 (Ill. 2004); see also *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159 (Ill. 1982).

<sup>217</sup> *Chicago v. Beretta*, 785 N.E.2d at 24, *rev'd on other grounds*, 821 N.E.2d 1099.

<sup>218</sup> See *Ruger*, 761 N.Y.S.2d at 206 (Rosenberger, J., dissenting).

<sup>219</sup> *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

<sup>220</sup> See, e.g., *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (“[I]f public nuisance were permitted to encompass product liability, nuisance law ‘would become a monster that would devour in one gulp the entire law of tort.’” (quoting *Tioga*, 984 F.2d at 921)); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (same); *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 197, 197 (same).

<sup>221</sup> See, e.g., *Camden v. Beretta*, 273 F.3d at 540 (“[T]he courts have enforced the boundary between the well-developed body of product liability law and public nuisance law.”); *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 313–16 (3d Cir. 1999); *Corp. of Mercer Univ. v. Nat’l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at \*6 (M.D. Ga. Mar. 9, 1986); *In re Lead Paint*, 924 A.2d at 503 (holding that it is an “inescapable fact” that these claims are cognizable only as products liability claims).

<sup>222</sup> See, e.g., *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 875, 884 (Cal. Ct. App. 1994).

<sup>223</sup> See *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328–30 (Cal. Ct. App. 2006).

<sup>224</sup> See *id.*

public nuisance abatement actions are distinguishable from products liability claims.<sup>225</sup> Further, it argues that abandoning the control requirement would not have the dire consequences that these courts predict.<sup>226</sup> Public nuisance is not a monster.<sup>227</sup>

### A. *Distinguishing Products Liability and Public Nuisance*

Because the goals of products liability and public nuisance are fundamentally different, the torts should be distinguished.<sup>228</sup> Whereas the general purpose of public nuisance actions is to abate an ongoing infringement of a public right, the purpose of products liability law is to compensate private plaintiffs for injuries sustained as a result of a defective product.<sup>229</sup> In other words, one tort has a preventative purpose and applies prospective remedies; the other applies retroactive ones.<sup>230</sup> Although there is a colorable argument that private individuals (or government entities) should not be able to seek damages from product manufacturers under a public nuisance theory, it does not follow that *abatement* actions against those manufacturers should not be cognizable.<sup>231</sup> Indeed, common law public nuisance offers litigants two crucial benefits that are not available under products liability law.<sup>232</sup> First, unlike public nuisance, products liability law does not afford government entities the opportunity to vindicate public rights.<sup>233</sup> Because the government has far greater resources with which to fund a lawsuit than does the ordinary private plaintiff, foreclosing the public nuisance avenue of relief would have important consequences.<sup>234</sup> Not only would it hinder the government's exercise

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<sup>225</sup> See *infra* notes 228–247 and accompanying text.

<sup>226</sup> See *infra* notes 248–300 and accompanying text.

<sup>227</sup> See *infra* notes 248–300 and accompanying text.

<sup>228</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328–30.

<sup>229</sup> See *id.* at 328; *Ruger*, 761 N.Y.S.2d at 211 (Rosenberger, J., dissenting).

<sup>230</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328–30.

<sup>231</sup> See *id.* at 331. There is, however, an equally compelling argument that such actions should be permitted to proceed against manufacturers of lead pigment because courts have held that those products are not defective. See, e.g., *City of Philadelphia v. Lead Indus. Ass'n (Phila. Lead Case)*, No. 90-7064, 1992 WL 98482, at \*3 (E.D. Pa. Apr. 23, 1992) (noting that the contention that lead pigment is defectively designed is “akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead”).

<sup>232</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328–29.

<sup>233</sup> See *id.*

<sup>234</sup> *Ruger*, 761 N.Y.S.2d at 207–08 (Rosenberger, J., dissenting).

of its police powers, but it would also force the public's continued exposure to widespread public health hazards.<sup>235</sup>

The second benefit of public nuisance involves the issue of ripeness.<sup>236</sup> Unlike products liability law, public nuisance litigants may obtain relief in the form of abatement *before* the hazard causes damages.<sup>237</sup> The benefits of obtaining relief before suffering an injury are self-evident.<sup>238</sup> On the other hand, a products liability action does not provide an avenue to prevent future harm from a hazardous condition.<sup>239</sup>

Although these benefits illustrate the point that public nuisance is a separate tort from products liability, they do little to assuage the judge concerned about public nuisance "devouring" products liability law.<sup>240</sup> Public nuisance, however, requires a showing of an infringement of a public right, whereas no such element is required under products liability law.<sup>241</sup> Indeed, as Dean Prosser explained, if nuisance is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected with any public right.<sup>242</sup> Thus, one method of distinguishing public nuisance actions from those arising under products liability law (aside from the remedy sought) is to determine whether the plaintiff alleges an infringement of a public right.<sup>243</sup> Conduct does not become a nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.<sup>244</sup> There must be some interference with a right common to *all* members of the general public.<sup>245</sup> By separating those claims that identify a public right from those that do not, a court may distinguish those cases that are properly identified as public nuisance actions from those that are not.<sup>246</sup> For these reasons, it is clear that not only are public nuisance claims distinct from those arising under products liability law, but also that stripping the government's ability to obtain pre-injury relief would undermine the entire purpose of common law public nuisance.<sup>247</sup>

<sup>235</sup> See *id.*

<sup>236</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328.

<sup>237</sup> *Id.*

<sup>238</sup> See *id.*

<sup>239</sup> *Id.* at 329.

<sup>240</sup> See *Tioga*, 984 F.2d at 921.

<sup>241</sup> See RESTATEMENT (SECOND) OF TORTS § 821B (1979).

<sup>242</sup> KEETON ET AL., *supra* note 1, § 86.

<sup>243</sup> See RESTATEMENT (SECOND) OF TORTS § 821B cmt. g.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* (emphasis added).

<sup>246</sup> See *id.*

<sup>247</sup> See *Ruger*, 761 N.Y.S.2d at 207-08 (Rosenberger, J., dissenting).

### B. *The Implications of Abandoning Control*

If *In re Lead Paint* improperly dismissed plaintiffs' lead paint claims based on their inability to demonstrate the control element, it does not necessarily follow that the result the court ultimately reached—that is, its holding that manufacturers of lead paint and lead pigment are not liable under public nuisance theory—was improper.<sup>248</sup> Rather, the New Jersey Supreme Court could have reached the same outcome had it grounded its decision in plaintiffs' inability to satisfy another traditional element of tort law: cause-in-fact.<sup>249</sup> This is important in two respects.<sup>250</sup> First, it illustrates that the fear of public nuisance “devouring” tort law is misplaced.<sup>251</sup> Second, and more importantly, it demonstrates that courts, in their zeal to cut off the monster's head, may actually be crippling the tort to such an extent that it will not be available in the very context in which it is needed most: protecting public rights.<sup>252</sup> This section analyzes the potential scope and limits of public nuisance if the courts were to abandon the control element altogether and discusses the viability of the tort in several different contexts.<sup>253</sup>

#### 1. Lead Paint

Abandoning the control element would not necessarily render manufacturers of lead paint and lead pigment liable in public nuisance lawsuits.<sup>254</sup> Control becomes a factor in the proximate cause analysis only *after* the plaintiff shows that the defendant's conduct was a cause-in-fact of the alleged harm.<sup>255</sup> It is virtually impossible for lead paint plaintiffs to identify which defendant manufactured the lead paint or lead pigment that caused the alleged harm.<sup>256</sup> This is because homes containing lead-based paint have often been painted several times, with lead-based paint buried under additional layers of lead-free paint.<sup>257</sup> Often, this re-layering occurs over an extended period

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<sup>248</sup> See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007); *In re Lead Paint*, 924 A.2d at 505.

<sup>249</sup> See *Benjamin Moore*, 226 S.W.3d at 116.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*; *In re Lead Paint*, 924 A.2d at 505.

<sup>252</sup> See *Atl. Richfield*, 40 Cal. Rptr. 3d at 328–29.

<sup>253</sup> See *infra* notes 254–300 and accompanying text.

<sup>254</sup> See *Benjamin Moore*, 226 S.W.3d at 116; *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 134 (Ill. App. Ct. 2005).

<sup>255</sup> See *Benjamin Moore*, 226 S.W.3d at 113–14.

<sup>256</sup> See *Thomas v. Mallett*, 701 N.W.2d 523, 557 (Wis. 2005).

<sup>257</sup> *Gifford & Pasicolan*, *supra* note 45, at 117.

of time, sometimes spanning decades or centuries.<sup>258</sup> In all but the rarest of instances there are no records in existence that would enable a victim to identify which manufacturer produced the harm-causing lead paint or pigment, nor are there means of determining with any degree of specificity when the harmful product was even applied.<sup>259</sup> In other words, in a system that considers cause-in-fact to be an essential element of traditional tort law, it is practically impossible for plaintiffs to prove their case.<sup>260</sup>

Plaintiffs have sought to avoid the inherent difficulty of proving cause-in-fact for a particular defendant by inviting the courts to adopt an alternative theory of liability.<sup>261</sup> These theories relax the plaintiffs' burden of proof on causation by apportioning a particular defendant's liability based, for example, on its contribution to the risk or its market share.<sup>262</sup> Alternative liability theories have both costs and benefits; however, it is the role of each state (whether through its judiciary or its legislature) to determine whether alternative liability applies within its jurisdiction.<sup>263</sup> Thus, the New Jersey court in *In re Lead Paint* could have disposed of the public nuisance action against the lead paint and lead pigment manufacturers by rejecting the application of an alternative liability theory, as the Missouri court did in *Benjamin Moore*.<sup>264</sup> Moreover, it could have reached that determination without requiring a control element.<sup>265</sup> Without regard to how desirable or undesirable that determination would have been, it, at the very least, would have properly applied tort principles while remaining faithful to the underlying purpose of common law public nuisance.<sup>266</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *See id.*

<sup>260</sup> *See id.*

<sup>261</sup> *See Thomas*, 701 N.W.2d at 557 (holding that risk-contribution liability applies to lead paint cases).

<sup>262</sup> *See id.* at 549.

<sup>263</sup> *Compare Thomas*, 701 N.W.2d at 549 (holding that, because each defendant shared some measure of culpability and because they were in a better position to absorb the cost of injury, it is better to have drug companies or consumers share the cost of the injury than to place the burden solely on the innocent plaintiff), *with Benjamin Moore*, 226 S.W.3d at 115 (holding that market share liability is unfair, unworkable, contrary to Missouri law, and unsound public policy).

<sup>264</sup> *See Benjamin Moore*, 226 S.W.3d at 115.

<sup>265</sup> *See id.*

<sup>266</sup> *See Atl. Richfield*, 40 Cal. Rptr. 3d at 328–29.

## 2. Asbestos

As in the lead paint context, abandoning the control element in public nuisance lawsuits brought against manufacturers of asbestos-containing materials will not necessarily open the courthouse doors to a flood of unmanageable asbestos litigation.<sup>267</sup> Asbestos litigation mirrors lead paint litigation in many ways.<sup>268</sup> Asbestos, like lead paint, is the source of a serious health crisis.<sup>269</sup> It is also virtually impossible for asbestos plaintiffs to identify which manufacturer caused their harm.<sup>270</sup> Clearly, by the time the harm is realized, the manufacturer of the asbestos-containing material is no longer in control of the instrumentality causing the harm.<sup>271</sup> Just as in the lead paint context, a court should abandon the control element and either dismiss or allow the case to proceed based on whether that particular jurisdiction has adopted an alternative liability theory with regard to causation.<sup>272</sup> Abandoning a control element would not “devour” tort law in this context either.<sup>273</sup>

## 3. Gun Manufacturers

A number of public nuisance lawsuits against handgun manufacturers arose in the wake of the tobacco settlement in 1998.<sup>274</sup> Although available tracing data alleviates the burden on plaintiffs’ efforts to identify the manufacturer of the gun that caused the injury, abandoning the control element would not fundamentally alter gun manufacturers’ tort

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<sup>267</sup> See *Benjamin Moore*, 226 S.W.3d at 115–16; see also *Mullen v. Armstrong World Indus., Inc.*, 246 Cal. Rptr. 32, 34 (Cal. Ct. App. 1988) (quoting plaintiff for the proposition that it is impossible for plaintiffs and the class to identify which defendants are responsible for mining, milling, fabricating, or manufacturing asbestos-containing products).

<sup>268</sup> See generally *Jackson v. Anchor Packing Co.*, 994 F.2d 1295 (8th Cir. 1993).

<sup>269</sup> See *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1226–27 (9th Cir. 2005) (“We cannot escape the fact that people are sick and dying as a result of [continued asbestos] exposure.”).

<sup>270</sup> *Anchor Packing Co.*, 994 F.2d at 1301 (“The courts have recognized that . . . [asbestos] plaintiffs (especially bystanders) face a formidable task in showing, after many intervening years, exposure to a particular defendant’s asbestos product and that exposure’s causation of the plaintiff’s injuries.”).

<sup>271</sup> See *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986).

<sup>272</sup> See *id.* (“[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise.”).

<sup>273</sup> See, e.g., *Benjamin Moore*, 226 S.W.3d at 115 (declining to adopt an alternative liability theory).

<sup>274</sup> See, e.g., *Camden v. Beretta*, 273 F.3d 536; *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *Ruger*, 761 N.Y.S.2d at 192.

liability.<sup>275</sup> Rather, public nuisance actions against gun manufacturers would be vulnerable on other grounds.<sup>276</sup> First, there may be doubt as to whether there is a public right, as opposed to an individual right, to be free from the threat of illegal conduct by others.<sup>277</sup> Given the history of public nuisance and its tendency to encompass a broad range of activities, most courts seem willing to accept the premise that the threat of harm to the public as a result of the distribution of handguns may constitute an infringement of a public right.<sup>278</sup> That does not mean that abandoning the control element necessarily results in unlimited liability for gun manufacturers.<sup>279</sup> A proper determination of a public nuisance action in this context hinges upon an analysis of proximate cause, which, of course, considers whether the gun manufacturer controlled the instrumentality that caused the infringement of the public right.<sup>280</sup> These claims are likely to fail, however, because the intervening *criminal* act of a third party severs the causal connection linking the manufacturer and the nuisance.<sup>281</sup> Moreover, this determination is one that may be made by a judge as a matter of law.<sup>282</sup> Indeed, as in the preceding examples, abandoning the control requirement likely would not fundamentally alter traditional notions of tort liability.<sup>283</sup>

### C. *Why Control Matters: Bloomington v. Westinghouse*

The aforementioned examples illustrate that abandoning the control element in common law public nuisance claims would not be as disastrous as some judges think.<sup>284</sup> This does not mean that abandoning the control element would have no consequences.<sup>285</sup> Indeed,

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<sup>275</sup> See, e.g., *Chicago v. Beretta*, 821 N.E.2d 1099 (rejecting the control requirement but dismissing public nuisance suit against gun manufacturers on other grounds).

<sup>276</sup> See *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001); *Chicago v. Beretta*, 821 N.E.2d at 1114–15.

<sup>277</sup> See *Chicago v. Beretta*, 821 N.E.2d at 1114–15 (noting the lack of an Illinois case recognizing a public right to be free from the threat that members of the public may commit crimes against individuals).

<sup>278</sup> See *Ganim*, 780 A.2d at 132.

<sup>279</sup> See *Chicago v. Beretta*, 821 N.E.2d at 1134.

<sup>280</sup> See *id.*

<sup>281</sup> See *id.* (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” (quoting *Merlo v. Pub. Serv. Co. of N. Ill.*, 45 N.E.2d 665 (Ill. 1942))).

<sup>282</sup> See *Arcadian*, 189 F.3d at 318.

<sup>283</sup> See *Chicago v. Beretta*, 821 N.E.2d at 1134.

<sup>284</sup> See *In re Lead Paint*, 924 A.2d at 505.

<sup>285</sup> See *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989).

it would have good consequences.<sup>286</sup> The 1989 U.S. Court of Appeals for the Seventh Circuit case *Bloomington v. Westinghouse* provides an illustration of a context in which liability could be extended to a manufacturer under a public nuisance theory notwithstanding that the manufacturer did not control the instrumentality causing the infringement of a public right at the time of infringement.<sup>287</sup>

In *Westinghouse*, the City of Bloomington, Indiana, filed a public nuisance claim against Monsanto, a manufacturer of polychlorinated biphenyls (“PCBs”).<sup>288</sup> PCBs are chemical mixtures used for various industrial purposes, including insulation of high voltage electrical equipment such as capacitors and transformers.<sup>289</sup> They are also dangerous.<sup>290</sup> Although Monsanto began using a warning label advising customers not to permit PCBs to enter the environment in 1970, they continued selling (and profiting from) PCBs until 1976.<sup>291</sup> Water containing PCBs from an industrial plant owned by Westinghouse, a Monsanto customer, was found in a city landfill and connected sewers.<sup>292</sup> The contamination forced the city to execute an environmental cleanup with an estimated cost in excess of \$100,000,000.<sup>293</sup>

The court dismissed the case against Monsanto, holding that it could not be liable on a nuisance theory because it did not retain the right to control the PCBs beyond the point of sale to Westinghouse.<sup>294</sup> Although the facts demonstrate that Monsanto’s conduct was far from irresponsible, the *Westinghouse* court, by effectively insulating all manufacturers from liability under public nuisance theory, set dangerous precedent.<sup>295</sup> Despite its efforts to reduce the likelihood of contamination, Monsanto profited from the distribution of a product that, although not defective, was known to be dangerous.<sup>296</sup> Despite

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<sup>286</sup> See *infra* notes 287–300 and accompanying text.

<sup>287</sup> See *Westinghouse*, 891 F.2d at 611.

<sup>288</sup> *Id.* at 612–13.

<sup>289</sup> *Id.* at 613.

<sup>290</sup> *Id.* Long-term exposure to PCBs can cause skin rashes and liver disturbances. *Id.*

<sup>291</sup> See *id.*

<sup>292</sup> *Westinghouse*, 891 F.2d at 613.

<sup>293</sup> See *id.*

<sup>294</sup> *Id.* at 614. The court also emphasized heavily the fact that Monsanto had taken additional affirmative steps to prevent environmental pollution. *Id.* at 613. Monsanto wrote a sales agreement requiring Westinghouse to use its best efforts to prevent PCBs from entering the environment. *Id.* Monsanto instructed Westinghouse on methods of disposing PCBs so that they would not enter water systems, and Monsanto also made recommendations to reduce PCB discharges by treating waters before their release to sewers. *Id.*

<sup>295</sup> See *id.* at 619–20 (Cudahy, J., dissenting).

<sup>296</sup> See *id.* at 613 (majority opinion).

knowingly introducing dangerous products into society, companies like Monsanto, as well as other companies who engage in more egregious behavior, will never be compelled to abate a hazardous condition to which they contributed so long as courts continue to require the control element.<sup>297</sup> Society, then, is a double loser—it suffers the harm and pays the costs.<sup>298</sup> Westinghouse, of course, could be liable under a public nuisance theory, but that should not insulate other contributors like Monsanto from liability as well.<sup>299</sup> Indeed, there is an equitable duty to share liability for the wrong done.<sup>300</sup>

### CONCLUSION

Public nuisance is a tort intended to protect the public welfare by creating a prospective remedy for substantial infringements of public rights. Courts have erred by imposing a control requirement on public nuisance claims because such a requirement unnecessarily undermines the core purpose of the tort. Rather, control is merely a factor to be considered in the proximate cause analysis. By confining control to the proximate cause analysis—and by applying traditional tort concepts—courts can remain faithful to the core purpose of public nuisance while ensuring that public nuisance does not become a “monster.” Accordingly, public nuisance law could have important implications in the context of lead paint or in lawsuits against other product manufacturers.

PETER TIPPS

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<sup>297</sup> *See id.*

<sup>298</sup> *See In re Lead Paint*, 924 A.2d at 511 (Zazzali, J., dissenting).

<sup>299</sup> *See* *People v. Brockman*, 574 N.E.2d 626, 635 (Ill. 1991).

<sup>300</sup> *Id.*