

PUBLIC NUISANCE AS A MASS PRODUCTS LIABILITY TORT

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*The hardest thing of all is to find a black cat in a dark room,
especially if there is no cat.*

—Confucius**

I. INTRODUCTION

The tort of public nuisance has awakened from a centuries-long slumber. Traditionally regarded as “a species of catch-all low grade criminal offense”¹ and as part of “the great grab bag, the dust bin, of the law,”² public nuisance has emerged during the past several years as a conspicuous weapon—albeit with inconsistent results—in the arsenal of states and municipalities, as well as personal injury plaintiffs’ lawyers. These lawyers seek billions of dollars in compensation from product manufacturers for economic damages allegedly arising from tobacco-related diseases, firearm violence, and childhood lead poisoning.

Public nuisance provided the legal basis for one of only three causes of action in the first complaint filed by an American state against tobacco manufacturers,³ ultimately resolved in 1998 as a part of the largest settlement in the history of American tort law.⁴ More recently, in July 2002, the Ohio Supreme Court upheld the public nuisance claims brought by the city of Cincinnati against fifteen handgun manufacturers and reversed the lower courts’ denial of the defendant’s motion to dismiss.⁵ During the fall of 2002, the first phase of the trial of the state of Rhode Island’s public nuisance claims against former manufacturers of lead pigment seeking damages allegedly arising from children’s exposure to lead resulted in a hung jury.⁶

** Quoted in JULIAN BARBOUR, *THE END OF TIME: THE NEXT REVOLUTION IN PHYSICS* 17 (Oxford University Press paperback 2001) (1999).

1. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966).

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

3. Complaint, *Moore ex rel. State v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994), <http://www.library.ucsf.edu/tobacco/litigation/MS/2moore.html>.

4. See *McClendon v. Ga. Dep’t. of Comty. Health*, 261 F.3d 1252, 1253 (11th Cir. 2001) (description of Master Settlement Agreement).

5. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

6. *Judge Declares Mistrial in Lead-Paint Suit*, N.Y. TIMES, Oct. 30, 2002, at A20; see also Holly McDonough, *Poisoned by Paint*, ABA J. 43, 44 (July 2002); *State v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct., Apr. 2, 2001). The state of Rhode Island subsequently announced its intention to seek another trial. Peter Lord, *Lead Paint Rulings Clear Way for Retrial*, PROVIDENCE J., Mar. 22, 2003. The author, former Chair of the Maryland Lead Paint Poisoning Commission, has served as a consultant or advisor on issues including both state legislative responses to childhood lead poisoning and various issues in the Rhode Island litigation, see *supra*, to Dickstein Shapiro Morin & Oshinsky LLP of Washington, D.C., which represents E.I. du Pont de Nemours & Co.

The recent emergence of public nuisance as a player in the arena of products liability is abrupt and unexpected. By the close of the twentieth century, well-developed bodies of law covering strict products liability, negligence, and warranty theories governed products liability, and courts also entertained claims based upon other theories when additional facts warranted such consideration.

Though liability for injuries or sickness caused by products traces its roots back to the thirteenth century,⁷ it was the dramatic development of the mass-marketing of consumer goods in the twentieth century that spawned modern products liability law.⁸ In addition to the continuing viability of claims based on negligence and warranty theories, "strict" products liability emerged in the 1960s and quickly lead to the adoption of Restatement (Second) of Torts section 402A.⁹ Strict products liability literally swept the country. By the mid-1980s, virtually every state had adopted some form of it.¹⁰ This development was called "the most radical and spectacular" in American tort law during the twentieth century.¹¹ In 1998, the American Law Institute, drawing upon the substantial judicial experience with strict products liability during the previous generation, adopted the Restatement (Third) of Torts: Products Liability (1998).¹²

The law governing actions against product manufacturers based upon negligence¹³ and warranty¹⁴ claims obviously pre-dates the adoption of strict products liability. Despite an attempt by the Restatement (Third) of Torts: Products Liability to make the law outlined in that Restate-

7. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998) ("As early as 1266, criminal statutes imposed liability upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied contaminated food and drink.").

8. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) for the classic exposition of the justification for strict products liability in a mass consumer economy; see also *infra* notes 410-413 and accompanying text.

9. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

10. See *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 341 n.8 (Wyo. 1986) (identifying Delaware, Utah, Virginia, North Carolina, and the District of Columbia as the only American jurisdictions that had not adopted strict tort liability). In fact, three of these jurisdictions had previously adopted strict liability for product claims. See *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976); *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (Utah 1979); *Berman v. Watergate W., Inc.* 391 A.2d 1351, 1357 (D.C. Cir. 1978). A Virginia statute accomplished similar results by providing that lack of privity is no defense to a claim against a product manufacturer based on implied warranty. VA. CODE § 8.2-318 (2001). Only North Carolina has continued to reject a claim in product liability cases based on strict liability or its equivalent. See *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504, 510 (N.C. 1980).

11. Miller, *Significant New Concepts of Tort Liability—Strict Liability*, 17 SYRACUSE L. REV. 25, 29 (1965) (quoting Am. Law Institute Meeting, 32 U.S.L.W. 2623, 2627 (1964)).

12. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

13. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

14. See, e.g., *Klein v. Duchess Sandwich Co., Ltd.*, 93 P.2d 799 (Cal. 1939) (implied warranty); *Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932) (express warranty).

ment the exclusive claim in most actions against products manufacturers and distributors, many courts already have rejected this claim of exclusivity and continue to hold defendants liable on negligence and warranty claims.¹⁵ In addition, courts entertain claims where additional facts in a products case satisfy the requirements of another theory of recovery, such as misrepresentation in actions against tobacco manufacturers for affirmatively misrepresenting the safety of their products or concealing the risks of such products.¹⁶

In any event, courts today considering liability for injuries caused by products are guided by comprehensive and well-developed bodies of law covering traditional products liability claims including strict products liability, warranty theories, negligence, and, where appropriate, misrepresentation. To be sure, significant issues remain controversial.¹⁷ Nevertheless, courts share a basic understanding of the parameters of the torts and a consensus about the framework and language used to analyze issues and evaluate the arguments of opposing counsel.

The use of the public nuisance claims against product manufacturers and distributors, on the other hand, is new and novel. Public nuisance traces its origins back more than 900 years,¹⁸ but the first attempts to use public nuisance against product manufacturers did not occur until the 1970s.¹⁹ Even more striking, the first cases upholding the use of public nuisance against product manufacturers—with a single exception—were decided within the past three years.²⁰

Historically, public nuisance most often was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions

15. *E.g.*, *Fleck v. Titan Tire Corp.*, 177 F.Supp. 2d 605 (E.D. Mich. 2001) (explicitly rejecting Restatement (Third) view of exclusivity of remedy; plaintiff permitted to proceed on implied warranty under Michigan law after dismissal of strict product liability and negligence claims); *see also* *Denney v. Ford Motor Co.*, 639 N.Y.S.2d 250, 662 N.E.2d 730 (N.Y. 1995) (approving a jury verdict finding defendant liable under a theory of breach of implied warranty but not liable under a strict products liability cause of action). *Contra*, *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W. 2d 827 (Neb. 2000) (adopting Restatement (Third) view on this issue).

16. *E.g.*, *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000) (Weinstein, J.) (denying defendant-manufacturers' motion to dismiss common law misrepresentation claims).

17. For example, must the plaintiff in a strict products liability design defect case prove the existence of an alternative feasible design? *Compare* RESTATEMENT (THIRD) OF TORTS § 2(b) (1998) (requiring alternative reasonable design) *with, e.g.*, *Delaney v. Deere & Co.*, 791, 999 P.2d 930, 945 (Kan. 2000); *Green v. Smith & Nephew AHP, Inc.*, 824, 629 N.W. 2d 727, 752 (Wis. 2001) (both explicitly rejecting this provision of the Restatement). Similarly, is recovery for purely economic loss allowed in the absence of personal injury and property damage? *Compare* *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) (allowing recovery) *with* *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981) (rejecting recovery of economic loss under strict products liability and negligence theories).

18. *See infra* notes 249-74 and accompanying text.

19. *See infra* notes 39-54 and accompanying text.

20. *See infra* note 441.

or seek injunctive relief to abate harmful conduct.²¹ Only in limited circumstances was a tort remedy available to an individual,²² and apparently never to the state or municipality.²³

The court evaluating whether public nuisance applies to a case against a product manufacturer or distributor must work without the benefit of either clear understandings of the parameters of public nuisance or past judicial consensus regarding the basic contours of the tort. For example, in 1982, the Illinois Supreme Court prophetically acknowledged, "The concept of public nuisance does elude precise definition."²⁴ Twenty years later, the same court vaguely defined public nuisance as "the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public."²⁵

This article traces the recent dramatic resurgence of the public nuisance tort. Should this reinvigoration be viewed as a creative development of the common law that appropriately and adaptively responds to rigid limitations set by more fully developed products liability theories on the means of seeking redress for serious injuries to public health and welfare? Or is it better seen as an opportunistic attempt to distort and circumvent the principled development of the law governing products liability?

The analysis here does not focus on the respective virtues or vices of public officials and personal injury plaintiffs' attorneys seeking funds to deal with major social issues such as tobacco-related diseases, firearm violence, or childhood lead poisoning, nor on those of manufacturers of products that may at some time cause or have caused injury or disease. My goal is different: to assess whether the "new" public nuisance tort has resulted from a sufficiently principled and intellectually rigorous common law development of torts theory.

American tort law changed dramatically during the twentieth century, usually in the direction of creating greater liability for defendants whose conduct injured others. The most significant expansions of liability, however, resulted from the principled growth of the common law of torts. Consider, for example, one of the changes in tort law

21. See *infra* notes 207-14, 295-98, 327-29, & 334, and accompanying texts.

22. See *infra* notes 215-20 and accompanying text.

23. See *infra* notes 213-14 and accompanying text.

24. *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 164 (Ill. 1982).

25. *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 767 N.E.2d 314, 337 (Ill. 2002) (quoting *Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (Ill. 1981), quoting Prosser, *Torts* § 88, at 583 n.29 (1971)); see also *McKee v. Mt. Pleasant*, 328 S.W.2d 224, 229 (Tex. Ct. Civ. App. 1959) (According to the common law . . . 'anything that worketh hurt, inconvenience, or damage to the subjects of the Crown.'" (quoting *King v. Columbian Carbon Co.*, 152 F. 2d 636, 638 (5th Cir. 1946))).

during the twentieth century often regarded as most important: the replacement of the traditional doctrine of contributory negligence precluding the victim from recovering from a negligent defendant whenever her own fault contributed to the accident, with the new principle of comparative fault.²⁶ Under comparative fault, the victim can recover even if she has failed to exercise reasonable care for her own protection, but her recovery is reduced in accordance with her relative degree of fault compared with that of the defendant. This seemingly dramatic change in the law, however, flowed naturally from the traditional general principle of tort law that a party at fault should bear the consequences of a tortious injury.

Is the use of public nuisance as a mass products liability tort a similarly principled development? The boundaries of an ancient tort certainly can and should expand with changing circumstances. The appropriate question, however, is whether the expansion of the parameters necessary for public nuisance to encompass claims against product manufacturers would fundamentally alter the nature of the tort and its objectives. Is there any principle at all derived from the common law of public nuisance, regardless of how abstract or general in scope, suggesting that liability for the tort should be extended to product manufacturers? Conversely, are the historical purposes of public nuisance law and the basic core principles governing the tort inconsistent with such an expansion of liability?

The tort of public nuisance first burst upon the mass products torts scene as a part of the litigation filed by American states against tobacco companies during the late 1990s.²⁷ By asserting public nuisance claims, plaintiff states sought to avoid many of the defenses available to tobacco companies against more traditional product tort claims filed by individual victims of tobacco-related illness, such as defenses based on the smoker's own conduct and statutes of limitations.²⁸ The states' lawsuits against the tobacco companies were settled before courts could address the viability of public nuisance claims in the context of mass products, but the tobacco settlement has inspired states and municipalities and their attorneys to file similar claims against the manufacturers of handguns and lead-pigment.²⁹

26. *E.g.*, *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); see Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 25 n.66 (1993).

27. Copies of the complaints filed by the states are available at the website of the State Tobacco Information Center at the University of California San Francisco, <http://www.library.ucsf.edu/tobacco/litigation/states.html>.

28. See *infra* notes 74-85, 91 & 102-05 and accompanying texts.

29. See *infra* notes 114-62 and accompanying text.

Since 2000, courts have reached strikingly inconsistent conclusions regarding the viability of public nuisance claims against manufacturers of mass products.³⁰ Section II of this article describes the recent emergence of the public nuisance tort as a claim in lawsuits seeking to hold product manufacturers liable for large-scale social ills.³¹

Well-developed bodies of law guide courts in evaluating claims for damages caused by products grounded in strict products liability, negligence, or even misrepresentation, but courts evaluating public nuisance actions against product manufacturers have lacked the benefit of such extensive precedent. Courts reach differing judgments about the legitimacy of a public nuisance theory of recovery against product manufacturers because of both the vague and variable manner in which the tort often has been defined and inconsistent judicial understandings of the core elements of the tort. These issues are presented in Section III below.³²

More importantly, no judicial consensus has emerged on some of the core issues that should establish the parameters of the tort of public nuisance.³³ For example, what exactly is the public nuisance for which defendant may be held liable? Is it defendant's conduct³⁴ or the harm itself?³⁵ This question is not merely one of abstract linguistics, for its answer may well determine whether claims against manufacturers who manufactured and sold products decades ago that continue to cause harm today are able to satisfy the requirements of the statute of limitations. Similarly, courts disagree as to whether the plaintiff in a public nuisance action must prove underlying tortious conduct by the defendant—an intentional tort, negligence, or a strict liability tort—or

30. Compare *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. Ill. 2002) (refusing to dismiss claims against distributor of genetically modified seed corn that allegedly "contaminated the entire corn supply of the United States"); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002) (motion to dismiss public nuisance claims against gun manufacturer denied); *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. 2001) (same) *with, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (affirming trial court's dismissal); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (same); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001) (same).

31. See *infra* notes 39-162 and accompanying text.

32. See *infra* notes 163-247 and accompanying text.

33. See *infra* notes 188-231 and accompanying text.

34. See, e.g., *Young*, 765 N.E. 2d at 11 (marketing and distribution practices of manufacturers of handguns).

35. See, e.g., *Whitehouse v. Lead Indus. Ass'n*, No. 99-5226, 2002 R.I. Super LEXIS 90 at *6 (R.I. Super. Ct. July 3, 2002) (the question to be decided at trial is "does the presence of lead pigment in paint and in coating, in homes, schools, hospitals, and other public and private buildings throughout the State of Rhode Island constitute a public nuisance?").

whether the existence of an objectionable condition³⁶ itself establishes the tortious liability.

Despite the lack of precedents covering the use of public nuisance as a products liability tort, the 920-year history of public nuisance, summarized in Section IV,³⁷ reveals the goals and purposes of the public nuisance tort. This history provides considerable guidance to a court seeking an understanding of the parameters of the public nuisance tort and whether they are broad enough to encompass actions against product manufacturers.

Section V³⁸ outlines the five critical boundaries of the tort of public nuisance derived from its long history and more recent case law and applies these criteria to reach the conclusion that public nuisance is not a theory that should be used to enable a plaintiff, whether a government plaintiff or a private one, to recover damages in an action against a product manufacturer.

II. THE EMERGENCE OF THE "NEW TORT" REGIME: PUBLIC NUISANCE CLAIMS IN GOVERNMENT RECOUPMENT ACTIONS AGAINST MASS PRODUCTS MANUFACTURERS

A. "Early" Public Nuisance Products Cases

The earliest, but unsuccessful, attempts to use public nuisance as the legal basis for recovery in a products liability action occurred in the 1970s, first as an extension of the then-recent expansion of the use of public nuisance in environmental cases.³⁹ The motive behind joining a public nuisance claim with more typical claims against product manufacturers and distributors—negligence, strict liability in tort, and implied warranty theories—is not difficult to ascertain. In a few circumstances, public nuisance afforded the possibility of remedies, notably injunctive relief, not available with other legal theories. More commonly, however, the lack of a mature and well-developed body of law delineating the nature of the tort suggested to plaintiffs' lawyers the possibility of circumventing the normal doctrinal parameters of strict products liability law and negligence that restrict the expansion of liability for harm caused by products, particularly statutes of limitation and the economic loss doctrine.

36. See Tr. Aug. 14, 2002, *State v. Lead Indus. Ass'n.* (No. 99-3226) (bench ruling denying defendants' motion for summary judgment; "a condition rather than conduct constitutes public nuisance").

37. See *infra* notes 248-367 and accompanying text.

38. See *infra* notes 368-442 and accompanying text.

39. See *infra* notes 340-41 & 351-67 and accompanying texts.

Probably the earliest written opinion evincing the use of a public nuisance claim against product manufacturers is *Diamond v. General Motors Corp.*,⁴⁰ a 1971 opinion from the California Court of Appeal. The litigation was a class action filed on behalf of 7,119,184 property owners and residents of Los Angeles County against 293 named defendants and additional scores of unnamed defendants who allegedly caused air pollution in the county, among them, manufacturers and distributors of automobiles. The complaint sought both billions of dollars in compensation and injunctive relief—including an injunction prohibiting the sale and distribution of automobiles.

The *Diamond* litigation obviously was not the prototypical traditional tort case where an individual injured plaintiff seeks compensation. It was a virtual caricature of the “public law model” of litigation advocated by public interest lawyers and supportive law professors.⁴¹ The plaintiff represented a class, consisting of millions, against hundreds of defendants in a field of social and economic policy occupied by federal and state administrative regulation. As the Court of Appeals noted:

Plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court

The objective, which plaintiff envisions to justify his class action, is judicial regulation of the processes, products and volume of business of the major industries of the county⁴²

The *Diamond* complaint was filed during a time of increasing use of the public nuisance theory in environmental protection cases⁴³—but it broke new ground by including manufacturers of products among hundreds of defendants facing liability under a public nuisance theory for allegedly causing air pollution in Los Angeles County. It also afforded the plaintiffs the possibility of using injunctive relief—a tort remedy generally available only with public or private nuisance claims—to implement their broad plan of social and economic change. Not surprisingly, the trial court and the California intermediate appellate court dismissed the case on the grounds that class action certification was not proper because, among other things, it would lead

40. 97 Cal. Rptr. 639 (Cal. Ct. App. 1971).

41. E.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

42. *Diamond*, 97 Cal. Rptr. at 645-46.

43. See *supra* note 39 and accompanying text.

to judicial encroachment on an area of legislative responsibility and discretion.⁴⁴

Diamond was an early and anomalous attempt to use public nuisance in product liability cases. During the 1980s, however, attempts to use public nuisance in the products context became more common as a means of circumventing the by then well-developed doctrinal parameters of negligence and strict products liability. These early attempts to seek recovery under the public nuisance tort often were filed by municipalities and school districts seeking to recover from manufacturers of asbestos products the costs of removing asbestos from public buildings.⁴⁵

Consider, for example, the attempt of the plaintiff school board in *Detroit Board of Education v. Celotex Corp.*⁴⁶ to overcome statute of limitations problems that would have precluded liability on more traditional products liability theories. Plaintiff, representing a class of seven hundred public and private schools, sought recovery of the costs of asbestos removal from manufacturers, distributors, and installers of asbestos products. The evidence suggested that the school board knew of the health risks caused by asbestos-containing building products no later than November 1979 when it submitted to the Environmental Protection Agency (EPA) cost estimates for asbestos removal and continued monitoring. The court followed the common rule that the three-year statute of limitations began to run at the time that either the plaintiff discovered, or through the exercise of reasonable diligence should have discovered, the injury and the likely cause of the injury. Accordingly, it dismissed the claims based upon negligence, strict products liability, implied warranties, and misrepresentation. The plaintiff argued, however, that the presence of asbestos products constituted a "continuing nuisance" and, as such, its claim for public nuisance was not barred by the statute of limitations.⁴⁷ The Court of Appeals rejected the argument on the grounds that "the public would not be served by . . . labeling a products liability claim as a nuisance claim,"⁴⁸ emphasizing further that

44. *Diamond*, 97 Cal. Rptr. at 645-46.

45. *E.g.*, *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993); *City of San Diego v. U.S. Gypsum Co.*, Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W. 2d 513 (Mich. App. 1992).

46. 493 N.W. 2d 513 (Mich. App. 1992).

47. *Id.* at 522. The trial court agreed with plaintiff's argument that the statute of limitations had not yet run against the "continuing nuisance," but the appellate court disagreed, stating that "the public would not be served by neutralizing the limitation period by labeling a product liability claim as a nuisance claim." *Id.*

48. *Id.* For another opinion rejecting the plaintiff's attempt to use public nuisance as a claim to

[T]his case concerns commercial transactions. Defendants gave up ownership and control of their products when the products were sold to plaintiffs. Defendants now lack the legal right to abate whatever hazards their products may pose; ownership and possession lie exclusively with plaintiffs. "If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use." Plaintiffs' proper remedies . . . are products liability actions for negligence or breach of warranty.⁴⁹

Similarly, during the 1980s and 1990s, plaintiffs who faced being precluded from recovery under a negligence or strict products liability cause of action because of the "pure economic loss" rule sometimes pursued claims under public nuisance. The economic loss doctrine generally prevents plaintiffs from recovering under either negligence or strict product liability theories when their losses are purely economic or commercial ones, rather than those resulting from personal injury or damages to plaintiff's property other than the allegedly defective product itself.⁵⁰ In *Detroit Board of Education v. Celotex Corp.*,⁵¹ for example, the trial court dismissed claims against the asbestos manufacturers sounding in negligence and strict products liability on the basis of the economic loss rule, but rejected dismissal of the public nuisance claim on these grounds.⁵² In cases other than those resulting from injuries caused by products, courts also have dismissed claims based upon negligence that sought only economic damages, but allowed public nuisance claims to proceed.⁵³

Despite the effort of plaintiffs' attorneys to interject the public nuisance cause of action into the products liability arena, there was very little evidence through the mid-1990s that a claim of public nuisance would ever pose a significant threat to a product manufacturer or distributor. Until then, published opinions reveal no cases in which public nuisance claims survived dismissal motions,⁵⁴ and there is nothing

circumvent the statute of limitations of more traditional products liability claims, see *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994).

49. *Celotex*, 493 N.W. 2d at 522 (citation omitted).

50. See, e.g., *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845 (6th Cir. 2002); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965); *Neibarger v. Universal Coops., Inc.*, 486 N.W. 2d 612 (Mich. 1992).

51. *Supra* note 45.

52. 493 N.W. 2d at 522.

53. E.g., *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1480 (E.D. Pa. 1993) ("economic loss doctrine is not applicable to public nuisance claims"); *Stop & Shop Cos. v. Fisher*, 444 N.E.2d 368 (Mass. 1983) (allowing recovery for economic loss resulting from public nuisance).

54. In addition to the opinions cited *supra* note 30, other cases in which the public nuisance claim against a product manufacturer or distributor were dismissed include *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646

to suggest that the threat of public nuisance litigation was a factor in inducing any large settlements. Then came tobacco.

B. Tobacco Litigation and the Emergence of Public Nuisance as a Mass Products Tort

By the late 1990s, a dramatic shift was occurring in the way the tort system operated in seeking damages from defendants in mass products tort cases. As one component of that shift, the humble tort of public nuisance was being reinvigorated as an open-ended and expansive cause of action in many of the largest tort actions of all time—lawsuits filed against the manufacturers of tobacco products,⁵⁵ firearms,⁵⁶ and lead pigment.⁵⁷

Mass product tort actions frequently are now brought not by individual plaintiffs, but by states and municipalities seeking to recoup or be reimbursed for the expenses that have been borne by state or local governments, but that allegedly arose from problems associated with products manufactured by defendants. Such expenses include medical assistance payments to—or on behalf of victims of—tobacco-caused cancer or other illnesses, childhood lead poisoning, or gunshot wounds,⁵⁸ as well as other public health, public safety, and public education expenditures incurred by the government as a result of such diseases or injuries.

These government plaintiffs typically seek to replace the requirement of tracing a particular victim's cancer to the use of a particular tobacco product (instead of to a variety of other cancer-producing agents or genetic causes) with the use of statistical sampling models of disease populations showing the aggregate increases in cancer among the population caused by tobacco.⁵⁹ They argue that the need to demonstrate that a particular manufacturer's product caused the injured victim's injury or disease should be eliminated, and that plaintiffs instead

(D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984); *Mercer Univ. v. Nat'l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at 5-6 (M.D. Ga. Mar. 9, 1986).

55. *E.g.*, Complaint, *Moore ex rel. State v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994), <http://www.library.ucsf.edu/tobacco/litigation/MS/moore.html> (last visited Mar. 21, 2003); *see infra* notes 88-112 and accompanying text.

56. *E.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3rd Cir. 2002) (Pennsylvania law); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (New Jersey law); *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 768 N.E.2d 1136 (Ohio 2002).

57. *E.g.*, *State v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct. Apr. 2, 2001).

58. *See infra* notes 89-90 and accompanying text.

59. *See infra* notes 104 & 240 and accompanying text.

should be able to hold defendants liable through either joint and several liability or market-share liability.⁶⁰ Finally, with the state or its political subdivisions as plaintiffs in these lawsuits—i.e., as players in the litigation contest—the state nevertheless sometimes reasserts its role as umpire or referee and makes industry-specific changes in the statutory law designed to facilitate a successful outcome for the government plaintiff.⁶¹ Coupled with these other changes in the new tort regime, the use of the poorly-defined public nuisance tort dramatically expands the ability of the government to pursue those defendants who—sometimes decades ago—manufactured products that otherwise would be effectively beyond the reach of the law.

It is difficult to assess the significance of the role that the public nuisance theory of recovery played in the tobacco litigation of the late 1990s and the subsequent \$246 billion tobacco settlement. On the one hand, there are no reported cases in which a plaintiff sued tobacco manufacturers or distributors on a public nuisance theory and recovered. On the other hand, public nuisance was one of several theories of recovery in the litigation resulting in the huge tobacco settlement, and it continues to be asserted as a cause of action in subsequent lawsuits.⁶²

1. Tobacco Litigation Before Government Recoupment Actions

The use of the public nuisance claim by plaintiffs' attorneys followed scores of unsuccessful lawsuits filed against manufacturers of tobacco products from the 1950s through the 1980s by individuals with cancer or other tobacco-related illnesses. Those lawsuits were based on more traditional products liability theories of recovery, including negligent failure to warn,⁶³ breach of warranties,⁶⁴ strict products liability,⁶⁵ and misrepresentation.⁶⁶ During the "first wave"⁶⁷ of tobacco litigation filed

60. See *infra* notes 104 & 241 and accompanying text.

61. See *infra* notes 102-05 and accompanying text.

62. *E.g.*, *Hughes v. Tobacco Inst.*, 278 F.3d 417 (5th Cir. 2001); *Ass'n of Washington Pub. Hosp. Dists. v. Phillip Morris, Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999); *State v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997).

63. *E.g.*, *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F.2d 95, 95 (3d Cir. 1966); *Ross v. Phillip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964).

64. *E.g.*, *Pritchard*, 370 F.2d at 95 (express warranty); *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970) (implied warranty); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963) (implied warranty).

65. *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 (1988 D.N.H. 1988).

66. *E.g.*, *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

67. See Robert L. Rabin, *Essay: A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 854 (1992).

in the 1950s and the 1960s, courts rejected attempts by plaintiffs to assert liability on both negligence and implied warranty theories, often on the grounds that tobacco companies could not have foreseen the harmful effects of smoking at the time that plaintiffs began smoking and that “the manufacturer is not the insurer against the unknowable.”⁶⁸ In addition, plaintiffs’ attorneys representing individual victims of cancer and other tobacco-related diseases encountered an industry committed to fight every claim. They were buried with pre-trial motions and discovery requests, and confronted with an absolute unwillingness on the part of the tobacco industry to consider settlement, which contrasted sharply with the manner in which most personal injury claims were, and still are, handled.⁶⁹

The “second wave” of tobacco litigation surfaced in the 1980s⁷⁰ as a result of both greater understanding of the risks of tobacco and substantial changes in the law governing both the specific obligation of manufacturers to warn cigarette smokers of health hazards and products liability generally. In 1964, the Surgeon General’s report confirmed the link between smoking and cancer and other smoking-related health risks.⁷¹ Soon thereafter, Congress passed regulations that required cigarette manufacturers to place health warnings on each package of cigarettes and also banned many forms of cigarette advertising, including television and radio advertisements.⁷² During this same period of time, strict products liability emerged as an important theory of recovery in most products liability cases.⁷³

Despite these changes, plaintiffs continued to be unsuccessful in their lawsuits against cigarette manufacturers during the 1980s and the early 1990s. Most plaintiffs continued to “fold” when confronted with the aggressive litigation tactics and “no settlement” stance of the tobacco companies.⁷⁴ In addition, defendants successfully employed a three-

68. *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 40 (5th Cir. 1963).

69. See Rabin, *supra* note 67, at 858.

70. See generally *id.* at 864-76.

71. PUBLIC HEALTH SERVICE, U.S. DEPT’ OF HEALTH, EDUCATION & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 26 (1964).

72. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1340 (2000)); Federal Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-1340 (2000)).

73. In 1965, reflecting recent court decisions accepting strict liability principles in several key jurisdictions, the American Law Institute adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965) providing in pertinent parts that “One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property although the seller has exercised all possible care in the preparation and sale of his product”

74. Rabin, *supra* note 67, at 869.

pronged strategy. First, tobacco manufacturers claimed that either common knowledge about the dangers of smoking or an individual plaintiff's own knowledge prevented recovery. Comment i to Restatement (Second) of Torts section 402A provides that in order for a product to be unreasonably dangerous, it "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."⁷⁵ It goes on to say, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful"⁷⁶ Defendants argued, usually successfully, that the cancer-causing properties of cigarettes were common knowledge⁷⁷ and, therefore, that cigarettes were not unreasonably dangerous. Also, several states passed statutes providing that tobacco and other products known to have harmful effects were not unreasonably dangerous.⁷⁸

Plaintiffs' knowledge of the risks of smoking also frequently constituted an affirmative defense preventing recovery. For example, in *Horton v. American Tobacco Co.*,⁷⁹ the jury found the defendant to be at fault, but refused to allow plaintiff to recover any damages even though Mississippi was a "pure" comparative fault jurisdiction.⁸⁰ Similarly, following the United States Supreme Court's decision and remand in *Cipollone v. Liggett Group, Inc.*,⁸¹ the jury found the plaintiff in that case to be eighty percent at fault and the defendant only twenty percent at fault.⁸² Professor Rabin observes that plaintiffs' lawyers during this time "simply failed to grasp how intensely most jurors would react to damage claims by individuals who were aware of the risks associated with smoking and nonetheless chose to continue the activity over a long time period."⁸³ He concludes that the tobacco litigation of this era was "a last

75. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

76. *Id.*

77. *E.g.*, *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263 (D.R.I. 2000) (Rhode Island law) ("[i]nvocation of this principle has resulted in the development of a doctrine used to defeat product liability based on the 'common knowledge' of the product risks by the reasonable consumer"); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 424 (Tex. 1977) (finding general health effects of smoking cigarettes to be "commonly known" and not unreasonably dangerous, but also finding that the danger of nicotine addiction was not a matter of common knowledge at the time plaintiff started smoking).

78. *E.g.*, MICH. COMP. LAWS. § 600.2945-2948 (2) (2002); TEX. CODE ANN. § 82.004 (2001).

79. 667 So. 2d 1289, 1292-93 (Miss. 1995).

80. Jurisdictions adopting "pure" comparative fault apportion liability for damages between the plaintiff and defendant according to the relative degrees of fault of the parties, even if the plaintiff is found to be more at fault than the defendants. *See, e.g.*, *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 436 (Fla. 1973); *see generally* FOWLER V. HARPER ET AL., THE LAW OF TORTS § 22.15 (2d ed. 1986) & 2001 Cumulative Supplement § 22.15.

81. 505 U.S. 504 (1992).

82. *Horton v. Am. Tobacco Co.*, 667 So. 2d 1289 (Miss. 1995).

83. Rabin, *supra* note 67, at 871.

vestige of a perhaps idealized vision of nineteenth century tort law as an interpersonal morality play.”⁸⁴

Defendants’ second defense during this phase of the tobacco wars was to claim that plaintiffs had not proved that their cancers were caused by cigarettes manufactured by named defendants. Instead, in case after case, each defendant argued that a particular plaintiff’s cancer was caused by other manufacturers’ products, exposure to different carcinogens, and lifestyle factors.⁸⁵

Third, defendants argued that federal statutes requiring health warnings on all cigarette packages pre-empted any common law liability at the state level for failure to warn. In *Cipollone*,⁸⁶ the United States Supreme Court held that the 1969 act⁸⁷ preempted state tort damage claims for breach of duty to warn based upon statements or omissions in defendant’s advertising. The statute, however, did not pre-empt claims grounded in other theories, such as those based upon misrepresentation or express warranty.

By the mid-1990s, at the end of the “second wave” of tobacco litigation, defendant manufacturers again were undefeated in court. Plaintiffs seeking to sue tobacco companies faced several seemingly insurmountable obstacles. First, individual plaintiffs lacked the resources to litigate effectively against the shifting consortia of tobacco companies. Second, plaintiffs were often precluded from recovering by their own conduct when they continued to use tobacco products after the health risks of smoking were commonly known. Third, proving that the plaintiff’s cancer or other tobacco-related illness resulted from smoking often was difficult. Finally, claims based upon a duty to warn theory, in the absence of misrepresentation by the tobacco companies, were precluded by federal legislation. Each of those obstacles, however, was soon to be overcome.

2. Government Recoupment Actions Against Tobacco Manufacturers and Emergence of Public Nuisance Claims

The dramatic disclosure in the 1990s that, for decades, tobacco companies systematically and deliberately had not only concealed the

84. *Id.*

85. *Id.* at 868; see *Sackman v. Liggett Group*, 173 F.R.D. 358, 363 (E.D. N.Y. 1997) (causal nexus between tobacco and disease disputed; defendants introduced studies linking “environmental factors and other non-smoking factors, such as air pollution, geographic location, type of employment and place of birth with the incidence of disease commonly associated with smoking”).

86. 505 U.S. 504 (1992).

87. Federal Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-1340 (2000)).

risk of cigarette use⁸⁸ but also had purposefully designed their product to foster addiction provided sufficiently substantial evidence of misrepresentation to overcome the federal preclusion barrier imposed by *Cipollone*. These new disclosures also shifted public opinion against tobacco manufacturers.

The need to match the tobacco companies' litigation resources was met by a new form of tort litigation—state and municipal governments themselves taking on the role of plaintiff and filing litigation seeking reimbursement, or “recoupment,” of expenditures by the states or municipalities caused by tobacco related illness. Primarily, governments sought recoupment for expenditures for the tobacco-related illnesses of those eligible for medical assistance programs. Moreover, in an attempt to overcome the barriers caused by injured parties' own knowledge of the risks of products, the inability to prove causation in an individual case, and other common law defenses including, in some cases, the contributions of third parties to the injuries or disease,⁸⁹ states also turned to several novel legal theories, including public nuisance and unjust enrichment.⁹⁰

88. The third wave of tobacco litigation was spurred in part by “continuing new revelations of industry efforts to conceal and misrepresent tobacco-related health concerns.” ROBERT L. RABIN & STEPHEN D. SUGARMAN, *REGULATING TOBACCO* 179, 183-84 (Oxford 2001).

89. The use of the tort of public nuisance to circumvent defenses available to the defendant under more well established torts is not of recent origin. In *McFarlane v. City of Niagara Falls*, 160 N.E. 391 (N.Y. 1928), the plaintiff had stumbled on an imperfection in the cement of a public sidewalk. Because she had noticed the irregularities in the sidewalk on earlier occasions, any action brought on a negligence theory would have failed because of her own contributory negligence. Instead, she sued on a nuisance theory. Chief Judge Cardozo held that the trial court erred in failing to give a jury instruction covering contributory negligence, because the defendant's liability for nuisance in the particular case was “dependent upon negligence.” *Id.* at 392.

90. “A party may recover under the theory of unjust enrichment when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.” *State of Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997) (quoting *Heldenfels Bros. Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). In *Heldenfels*, the Texas Supreme Court opined, “unjust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss.” *Id.* at 42. In various lawsuits against tobacco manufacturers, plaintiffs have claimed that defendant-manufacturers, through their wrongful conduct, have received “substantial and unconscionable profits from the sale of cigarettes.” *Chamberlain v. Am. Tobacco Co.*, No. 1-96 CV 2005, 1999 U.S. Dist. LEXIS 22636 at *53-54 (N.D. Ohio 1999). As a result of this conduct, plaintiffs have been required to pay additional medical and other costs while tobacco manufacturers reap the profit of their sales. According to plaintiffs, it is unfair for tobacco manufacturers to enrich themselves at the expense of plaintiffs. *Id.* at *54; see also *Conye ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 491 (6th Cir. 1999) (plaintiffs claimed tobacco manufacturers had been “unjustly enriched at the expense of the State of Ohio [and had] unlawfully shifted the financial responsibility for their conduct to the state”); *Philip Morris, Inc. v. Glendening*, 349 Md. 660, 669 (Md. 1998) (complaint alleged unjust enrichment of defendants and recited State's payment of three billion dollars in medical assistance for tobacco-related healthcare costs).

The first innovative state recoupment action was filed by Mississippi Attorney General Mike Moore in 1994 and alleged three substantive theories of liability that were novel in the context of tobacco litigation: unjust enrichment, indemnity, and public nuisance.⁹¹ Unlike individual victims of tobacco-related disease, the state was not a direct victim, and the traditional theories of recovery used by individual smokers were therefore inappropriate. Instead, the basic principle of the complaint was that the defendants had caused a harm to the state and had profited from that harm. By using public nuisance and other equitable theories of recovery, the state attempted both to avoid the need to prove specific causation of any individual's illness and to eliminate defenses based upon a smoker's own conduct, such as contributory negligence and assumption of risk. Within three years of the filing of the Mississippi complaint, at least forty states had filed suits against the tobacco manufacturers.⁹² Municipalities,⁹³ health care insurers,⁹⁴ and labor union insurers⁹⁵ filed similar complaints seeking reimbursement for the costs they claimed to have sustained as a result of tobacco-related illnesses.

In their recoupment actions, different states pursued a wide variety of substantive claims, including claims based upon common law misrepresentation,⁹⁶ deceptive advertising,⁹⁷ antitrust violations,⁹⁸ and federal

91. Complaint, *Moore ex rel. State v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994), <http://www.library.ucsf.edu/tobacco/litigation/ms/2moore.html>. Copies of other complaints subsequently filed by states are available at the website of the State Tobacco Information Center, <http://www.library.ucsf.edu/tobacco/litigation/states.html>.

92. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 338 (2001).

93. *E.g.*, Complaint, *State v. Philip Morris, Inc.*, No. C-96-2090 (N.D. Cal., filed June 6, 1996), <http://www.library.ucsf.edu/tobacco/litigation/other/sfcomplaint>; Complaint, *County of Los Angeles v. R.J. Reynolds Tobacco Co.*, No. 07651 (Super. Ct., County of Los Angeles, filed Aug. 5, 1996), <http://www.library.ucsf.edu/tobacco/litigation/other/lacomplaint.html> (last visited Apr. 18, 2003).

94. *E.g.*, *Blue Cross & Blue Shield, Inc. v. Phillip Morris, Inc.*, 113 F. Supp. 2d 345 (E.D. N.Y. 2000); *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240 (N.Y. 2000).

95. *E.g.*, *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 23 F. Supp. 2d 771 (N.D. Ohio 1998).

96. *E.g.*, Complaint, *State ex rel. Woods v. Am. Tobacco Co., Inc.*, No. CV-96-14769 (Super. Ct. of Arizona in and for Maricopa County, filed Aug. 20, 1996), <http://www.library.ucsf.edu/tobacco/litigation/az/azcomplaint.html>; Complaint, *Connecticut v. Philip Morris, Inc.* No. CV-960072414 (Super. Ct., Judicial District of Stamford/Norwalk at Stamford, filed July 18, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ct/5concomp.html>; Complaint, *State of Iowa v. R.J. Reynolds Tobacco Co.*, No. CL71048 (Iowa District Court for Polk County, filed Nov. 27, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ia/iacomplaint.html>; Complaint, *State v. R.J. Reynolds Tobacco Co.*, No. 96-CV-919 (District Court of Shawnee County, Kansas Division, filed Aug. 20, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ks/kscomplaint.html>; Complaint, *Massachusetts v. Philip Morris, Inc.*, No. 95-7378 (Middlesex Super. Ct., filed Dec. 12, 1995), <http://www.library.ucsf.edu/tobacco/litigation/ma/8macomplaint.html>; Complaint, *Kelley ex rel. State v. Philip Morris, Inc.*, No. 96-84284-CZ (State of

Racketeer Influenced Corrupt Organizations (RICO)⁹⁹ theories. Some of the state recoupment complaints filed after the Mississippi complaint included claims for public nuisance,¹⁰⁰ but others did not.¹⁰¹

Michigan Circuit Court for the 30th Judicial Cir., Ingham County, filed Aug. 21, 1996), <http://www.library.ucsf.edu/tobacco/litigation/mi/micomplaint.html>; Complaint, State v. R.J. Reynolds Tobacco Co., (Super. Ct. of N.J., filed Sept. 9, 1996), <http://www.library.ucsf.edu/tobacco/litigation/nj/njcomplaint.html>; Complaint, State v. R.J. Reynolds Tobacco Co., No. CJ96-1499 (Dist. Ct. for Cleveland County, Okla., filed Aug. 22, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ok/okcomplaint.html>; Complaint, Texas v. Am. Tobacco Co., No. 5-96CV91 (E.D. Tex., Texarkana Division, filed Mar. 28, 1996), <http://www.library.ucsf.edu/tobacco/litigation/tx/3txcomp.html>; State v. R.J. Reynolds Tobacco Co., No. 96 CV 0829W (U.S. District Court for the District of Utah, Central Division, filed Sept. 30, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ut/utcomplaint.html>; Complaint, Washington v. Am. Tobacco Co., No. 96-2-15056-8SEA (Super. Ct. of Washington, King County, filed June 5, 1996), <http://www.library.ucsf.edu/tobacco/litigation/wa/4wacomp.html>; Complaint, McGraw v. Am. Tobacco Co., No. 94-1707 (Kanawha County Circuit Court, filed Sept. 20, 1994), <http://www.library.ucsf.edu/tobacco/litigation/wv/4wvcomp.html>.

97. *E.g.*, Complaint, State v. R.J. Reynolds Tobacco Co., No. 96-CV-919 (Dist. Ct. of Shawnee County, filed Aug. 20, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ks/kscomplaint.html>; Complaint, Kelley *ex rel.* State v. Philip Morris, Inc., No. 96-84284-CZ (Mich. Cir. Ct., Ingham County, filed Aug. 21, 1996), <http://www.library.ucsf.edu/tobacco/litigation/mi/micomplaint.html>; Complaint, v. R.J. Reynolds Tobacco Co. (N.J. Super. Ct., Middlesex County, filed Sept. 9, 1996), <http://www.library.ucsf.edu/tobacco/litigation/nj/njcomplaint.html>; Complaint, State v. R.J. Reynolds Tobacco Co., No. CJ96-1499 (Dist. Ct. for Cleveland County, Okla., filed Aug. 22, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ok/okcomplaint.html>; Complaint, State v. R.J. Reynolds Tobacco Co., No. 96 CV 0829W (D.C. Utah, filed Sept. 30, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ut/utcomplaint.html>; Complaint, McGraw v. Am. Tobacco Co., No. 94-1707 (Kanawha County Cir. Ct., filed Sept. 20, 1994), <http://www.library.ucsf.edu/tobacco/litigation/wv/4wvcomp.html>.

98. *E.g.*, Complaint, State v. R.J. Reynolds Tobacco Co., No. 96-CV-919 (District Court of Shawnee County, Kansas Division, filed Aug. 20, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ks/kscomplaint.html>; Complaint, Kelley *ex rel.* State v. Philip Morris, Inc., No. 96-84284-CZ (Cir. Ct. Mich., filed Aug. 21, 1996), <http://www.library.ucsf.edu/tobacco/litigation/mi/micomplaint.html>; Complaint, Minnesota v. Philip Morris, Inc., No. C1-94-8565 (D.C. Minn., filed Aug. 17, 1994), <http://www.library.ucsf.edu/tobacco/litigation/mn/3bcbs.html>; Complaint, Texas v. Am. Tobacco Co., No. 5-96CV91 (E.D. Tex., filed Mar. 28, 1996), <http://www.library.ucsf.edu/tobacco/litigation/tx/3txcomp.html>; Complaint, Washington v. Am. Tobacco Co., No. 96-2-15056-8SEA (Super. Ct. Wash., filed June 5, 1996), <http://www.library.ucsf.edu/tobacco/litigation/wa/4wacomp.html>; Complaint, McGraw v. Am. Tobacco Co., No. 94-1707 (Cir. Ct. Kanawha County, filed Sept. 20, 1994), <http://www.library.ucsf.edu/tobacco/litigation/wv/4wvcomp.html>.

99. *E.g.*, Complaint, State v. R.J. Reynolds Tobacco Co. (Super. Ct. of New Jersey Chancery Division—Middlesex County, filed Sept. 9, 1996), <http://www.library.ucsf.edu/tobacco/litigation/nj/njcomplaint.html>; Complaint, Texas v. Am. Tobacco Co., No. 5-96CV91 (E.D. Tex., filed Mar. 28, 1996), <http://www.library.ucsf.edu/tobacco/litigation/tx/3txcomp.html>; Complaint, State v. R.J. Reynolds Tobacco Co., No. 96 CV 0829W (D.C. Utah, filed Sept. 30, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ut/utcomplaint.html>.

100. *E.g.*, Complaint, State *ex rel.* Woods v. Am. Tobacco Co., Inc., No. CV-96-14769 (Super. Ct. Ariz., filed Aug. 20, 1996), <http://www.library.ucsf.edu/tobacco/litigation/az/azcomplaint.html>; Complaint, State v. Philip Morris, No. 96-L13146 (Cir. Ct. Ill., filed Nov. 12, 1996), <http://www.library.ucsf.edu/tobacco/litigation/il/ilcomplaint.html>; Complaint, State v. R.J. Reynolds Tobacco Co., No. CL71048 (Dist. Ct. Iowa, filed Nov. 27, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ia/iacomplaint.html>; Complaint, State v. R.J. Reynolds Tobacco Co., No. CJ96-1499 (Dist. Ct. Okla., filed Aug. 22, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ok/okcomplaint.html>; Complaint, Texas v. Am. Tobacco Co., No. 5-96CV91 (E.D. Tex., filed Mar. 28, 1996), <http://www.library.ucsf.edu/>

Florida, for example, did not pursue a public nuisance theory of recovery. Instead, its lawyers sought to avoid the problems of causation and smoker-conduct defenses by having the legislature enact a statute providing the state with a direct cause of action against tobacco manufacturers and statutorily eliminating defenses such as assumption of risk.¹⁰² The statute also addressed the causation issues that use of the public nuisance claim sought to avoid in other jurisdictions. For example, it allowed the state to pursue its actions without identifying the specific individuals who received medical assistance benefits as a result of smoking-related illness,¹⁰³ but the Florida Supreme Court subsequently ruled that this provision violated the state's due process clause.¹⁰⁴ The statute also permitted the use of market-share liability against the tobacco manufacturers.¹⁰⁵ If the constitutionality of the section eliminating the need to identify the injured victim had been upheld, its combination with the market-share liability provision that was held constitutional would have enabled Florida to hold manufacturers liable without proving that specific defendants had caused injuries to particular plaintiffs. Other states, such as Mississippi, pursued the same objective through use of public nuisance and other equitable claims.

Courts were never forced to rule on the possible validity of the states' public nuisance, unjust enrichment, or indemnification claims against

tobacco/litigation/tx/3txcomp.html; Complaint, *State v. R.J. Reynolds Tobacco Co.*, No. 96 CV 0829W (D.C. Utah, filed Sept. 30, 1996), <http://www.library.ucsf.edu/tobacco/litigation/ut/utcomplaint.html>.

101. *E.g.*, Complaint, *Florida v. Am. Tobacco Co.*, No. CL 95-1466 (15th Judicial Circuit for the County of Palm Beach, filed Feb. 21, 1995), <http://www.library.ucsf.edu/tobacco/litigation/fl/1florida.html>.

102. FLA. STAT. § 409.910 (1995); *see also* 33 VT. STAT. ANN. 1911 (2001). Upon review, Fla. Stat. ch. § 409.910 (1995) was approved in part and found unconstitutional in part by the Supreme Court of Florida. *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996). The court found constitutional the "legislative enactment aimed at the recoupment of Medicaid expenditures necessitated by the tortious conduct of others." *Id.* at 1243. However, the court found "(1) the authority to pursue an action without identifying individual Medicaid recipients must be stricken; (2) the abolition of a statute-of-repose defense is ineffective to revive time-barred claims; and (3) the provision for combining the theories of market share liability and joint and several liability must be stricken even though either theory may be used separately," because they interfered with the due process guarantees of the Florida Constitution. *Id.* at 1243; *see also* 33 VT. STAT. ANN. 1911 (2001); *see generally* Christ Sarafa, *Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act*, 2 DEPAUL J. HEALTH CARE L. 123 (1997); Elizabeth A. Frohlich, *Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?*, 21 AM. J. L. & MED. 445 (1995).

103. FLA. STAT. § 409.910(9)(a) (1995).

104. *Agency for Health Care Admin.*, 678 So. 2d at 1253-55 (due process clause of state constitution is violated when state is allowed to seek recovery of Medicaid payments made on behalf of entire class of recipients without revealing identity of recipients to defendants). For further discussion of the use of statistical analysis in proving causation in cases against tobacco manufacturers and other mass product tort defendants, *see* Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329 (1999).

105. FLA. STAT. § 409.910(9)(b) (1995); *see also supra* note 102 regarding constitutionality of this provision.

tobacco manufacturers, because in June 1997 the parties agreed to the so-called "global settlement" that called for the tobacco companies to make payments totaling \$368.5 billion over a twenty-five year period.¹⁰⁶ The settlement, however, required Congressional approval and legislation to implement its provisions. Instead, Congress took a more aggressive approach and responded with the McCain bill that would have required much larger payments from tobacco manufacturers, totaling \$516 billion, as well as public health provisions similar to those contained in the proposed settlement.¹⁰⁷ Most notably, however, the McCain bill did not approve those provisions of the global settlement agreement granting defendants immunity from class action suits and limiting suits filed by individual victims of tobacco-related illnesses.

As the battle raged in Congress over the approval of the proposed June settlement, the tobacco industry settled with four individual states, in most cases states where trial dates were quickly approaching—Mississippi, Florida, Texas, and Minnesota. Shortly thereafter, the tobacco industry reached the "Master Settlement Agreement" with the remaining forty-six states.¹⁰⁸ The Master Settlement Agreement settled the state recoupment actions by obligating the tobacco companies to make payments totaling \$206 billion,¹⁰⁹ but it did not grant the companies immunity from private individual or class action claims. The Master Settlement Agreement also obligated the defendants to refrain from youth-oriented advertising, but did not include any provisions acknowledging the Food and Drug Administration's regulatory powers.

Most settlements of individual tort cases reflect the defendant's assessment of the probabilities of being forced to pay a judgment resulting from the court's adjudication of the claims presented in the complaint. If this were the case with the Master Settlement Agreement, one might conclude that the public nuisance and other equitable claims in the complaints filed by Mississippi and many of the other states

106. Rabin, *supra* note 92, at 338 & n.34. The defendants also agreed to a variety of public health measures, including bans on advertising designed to reduce the incidence of smoking among youth and acquiescence in the jurisdiction of the federal Food and Drug Administration (FDA) over regulation of nicotine content in cigarettes. The agreement would not only have settled the state recoupment suits, but also have granted the tobacco industry immunity from class action lawsuits and suits by "third-party" plaintiffs such as health insurers and union health plans. The total liability to individual claimants in all suits would have been capped at \$5 billion and claims for punitive damages also would have been restricted. *Id.* at 339.

107. Universal Tobacco Settlement Act, S. 1415 105th Cong. (1997).

108. *See McClendon v. Ga. Dep't. of Cmty Health*, 261 F.3d 1252 (11th Cir. 2001) (outlining terms of the Master Settlement Agreement).

109. Four states earlier had reached settlement agreements with the tobacco manufacturers that obligated them to pay more than \$40 billion, bringing the tobacco companies' total settlement payments to a figure in excess of \$246 billion. *See Rabin, supra* note 92, at 340.

appeared to pose significant liability risks for the tobacco companies when they assessed their exposure. This explanation is overly simplistic and may be misleading, however. For one thing, in sufficiently large and complex cases, the anticipated cost of continuing to defend mass tort products litigation on multiple fronts can itself be determinative, regardless of the scientific merits of the case.¹¹⁰ For another, in this particular matter, the most important benefit of the Master Settlement Agreement to the tobacco companies was to eliminate the threat of Congress responding to the sudden public fury directed at tobacco companies with even more draconian conditions that probably would have included granting the FDA regulatory control over cigarettes.¹¹¹ Finally, it is difficult to assess whether tobacco companies feared that public nuisance and other equitable claims contained in the complaints filed by Mississippi and several other states might result in legal liability, or whether they perceived a greater threat from different theories of recovery in lawsuits filed by other states.¹¹²

In short, the first significant use of the public nuisance theory in mass products tort litigation tells us little about the legal viability of this cause of action.¹¹³ On one hand, the use of public nuisance claims in the

110. See, e.g., Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 9 No. 11 Andrews Breast Implant Litig. Rep. 11, Aug. 7, 2000 (describing multidistrict breast implant litigation, including the filing for Chapter 11 bankruptcy protection by Dow Corning Corporation, and the later determinations by both the National Science Panel appointed by Judge Pointer and the Institute of Medicine of the National Academy of Sciences that, as Dow Corning had asserted in individual cases until the magnitude of litigation became too great to bear, scientific evidence was not sufficient to link silicon implants to either connective tissue diseases or immune system dysfunctions); see also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1301 (7th Cir. 1995) (describing the pressure to settle that would come to bear on the defendant if suits that individually had little chance of success were nonetheless consolidated in class action).

111. Rabin, *supra* note 92, at 340-41.

112. See *supra* notes 96-101 and accompanying text.

113. The Master Settlement Agreement did not prohibit individual claims, class actions, or actions by health insurers or union health funds against tobacco manufacturers. A number of these actions have included a public nuisance claim. See, e.g., *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001) (public nuisance claim dismissed under Texas statute); *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 491 (5th Cir. 1999); *Texas v. Am. Tobacco Co.*, 14 F.Supp. 2d 956, 972 (E.D. Tex. 1997) (alleging that defendants have "intentionally interfered with the public's right to be free from unwarranted injury, disease, and sickness and have caused damage to the public health, the public safety, and the general welfare of the citizens of the State"); *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 188 Misc. 2d 638, 641-42 (N.Y. 2000). Most of these actions have been dismissed because of a lack of standing, e.g., *Ass'n of Wash. Pub. Hosp. Dists. v. Phillip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2001) (plaintiffs-hospitals lacked standing to sue for damages resulting from injuries to their patients); *State v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (dismissed because complaint did not allege that State itself had been injured); or a finding that the harm to the plaintiff was too indirect or remote to be considered proximately caused by the actions of defendant tobacco manufacturers. E.g., *Allegheny Gen. Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429 (3rd Cir. 2000); *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, No. W1999-01061-COA-R9-CV, 2000 Tenn. App. LEXIS 644, at *4 (Tenn. Ct. App. Sept. 26, 2000).

tobacco cases was a novel application with little support in prior case law. In that light, threats of further legislation against tobacco companies and possible liability based upon more traditional legal theories probably played more of a role in convincing tobacco manufacturers to settle these lawsuits than did the risks of claims based upon public nuisance, unjust enrichment, and indemnification. On the other hand, assertion in the tobacco context of the relatively untried public nuisance theory could well have contributed to bringing the largest tort settlement of all time. One possible lesson from the tobacco settlement is that the lack of a clear doctrine governing the public nuisance tort and its viability in mass products torts results in a potentially huge liability exposure for defendants facing such actions—sometimes a risk that is unacceptable to manufacturers who, though desirous of building a body of case law more clearly delineating the theory, cannot afford the risk of losing in the meantime.

The ultimate resolution of subsequent and ongoing mass products claims against manufacturers of other products, most notably firearms and lead pigment or lead paint, may help answer the question of whether public nuisance is a viable claim in the products liability context.

C. Public Nuisance Claims in Government Actions Against Gun Manufacturers

To date, litigation against gun manufacturers has yielded the vast majority of legal opinions addressing the legal viability of the public nuisance theory of recovery in the context of mass products liability. In most cases, courts dismiss these public nuisance claims,¹¹⁴ but there have been exceptions.¹¹⁵

The link between the use of public nuisance claims by states and municipalities against tobacco companies and the subsequent assertion of similar claims against gun manufacturers is not difficult to trace. Professor David Kairys, a key figure in at least two major legal actions brought by municipalities against gun manufacturers, reveals that in

No written opinions have ruled one way or the other on the validity of public nuisance claims themselves against tobacco manufacturers in the context of such suits.

114. *E.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3rd Cir. 2002) (Pennsylvania law); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3rd Cir. 2001) (New Jersey law); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (Conn. 2001).

115. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (Ohio law); *Young v. Bryco Arms* 765 N.E.2d 1 (Ill. App. Ct. 2001); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super LEXIS 352 (Mass. Super. Ct. July 13, 2000) (“[t]o be sure, the legal theory is unique in the Commonwealth but . . . that is not reason to dismiss at this stage of the proceedings”).

“the formative period of [those] municipal lawsuits, the Fall of 1996, I also noticed the early state attorney general lawsuits [against tobacco manufacturers] . . . [W]hat emerged was the public nuisance claim.”¹¹⁶ In the state and municipal gun cases, the plaintiffs appear to be trying to force the gun manufacturers to the settlement table in order to reform how guns are manufactured and distributed—results that legislatures have not been willing to mandate. Kairys acknowledges that in viewing the tobacco litigation as a model, he recognized that “those suits were not treated as overly serious and were seen as having legal problems; they never did win in court, but they [nevertheless] became the vehicle for settlement.”¹¹⁷

The complaint in *Camden County Board of Chosen Freeholders v. Beretta, U.S.A.*,¹¹⁸ succinctly states the factual allegations behind the public nuisance claim against gun manufacturers:

Defendants market, distribute and promote handguns, a lethal product, with reckless disregard for human life and for the peace, tranquility and economic well-being of Camden County. They have knowingly created, facilitated and maintained an oversaturated handgun market that makes handguns easily available to anyone intent on crime, including legally prohibited purchasers. This constitutes a public nuisance by unreasonably interfering with public safety and health¹¹⁹

116. David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172-73 (2000). Professor Kairys served as counsel for the appellant in *Camden County Bd. of Chosen Freeholders*, 273 F.3d 536, and as a member of the City of Philadelphia's Handgun Violence Reduction Taskforce that promoted the litigation in *City of Philadelphia*, 277 F.3d at 415.

117. Kairys, *supra* note 116, at 1172.

118. 273 F.3d 536.

119. Second Am. Compl. and Jury Demand P15, in *Camden County Bd. v. Beretta U.S.A. Corp.*, No. 99CV2518 (D.N.J. filed Jan. 6, 2000), *quoted in* D. Kairys, *supra* note 116, at 1179. The complaint alleges:

a. Defendants produce, market and distribute substantially more handguns than they reasonably expect to sell to law-abiding purchasers, knowingly participating in and facilitating the criminal handgun market.

b. Defendants continually use distribution channels that they know regularly yield criminal and underage end users in Camden County and throughout the nation. . . . [D]efendants knowingly supply a range of disreputable distributors, gun shops, pawnshops, gun shows, and telemarketers.

c. Defendants do not limit, or require their distributors and dealers to limit, the number, purpose or frequency of handgun purchases, nor do they monitor or supervise their distributors or dealers for practices or policies that facilitate access to handguns for criminal purposes

d. Defendants' contracts with their distributors and dealers do not provide any procedure or sanction for practices that fail to limit or minimize purchase of their handguns by persons prohibited to purchase or possess handguns under state, local or federal law. . . .

e. Defendants' design, production and advertising practices further facilitate sales to and use by criminals. . . .

Courts that reject the viability of a public nuisance claim against gun manufacturers typically base their decisions on four lines of reasoning. First, courts denying the liability of gun manufacturers and distributors hold that the lawful sale of products does not meet the requirement that the alleged nuisance interfere “with a right common to the general public.”¹²⁰ However, if the manufacture or distribution of a product could ever constitute an interference with a public right or a common right, one would imagine that it would be in the case of handguns allegedly distributed in a manner designed to provide access of such products to criminals. For example, in *Young v. Bryco Arms*,¹²¹ the Illinois Appellate Court convincingly concluded that the defendants’ distribution of handguns did interfere with such a collective right.¹²² That court noted that the Restatement identifies public peace and public safety as rights of the general public entitled to protection and specifically describes “interference with public safety” as a public nuisance.¹²³

The second reason for denying the applicability of a public nuisance theory in an action against gun manufacturers was articulated by the Court of Appeals for the Third Circuit in *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*:¹²⁴

[T]he County has failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right. . . . A public-nuisance defendant can bring its own conduct or activities at a particular physical site under control. But the limited ability of a defendant to exercise control beyond its sphere of immediate activity may explain why public nuisance law has traditionally been confined to real property and violations of public rights.¹²⁵

g. Defendants fail to adopt even minimal policies and practices completely within their control that would eliminate or ameliorate the crime market and the harm to Camden County.

Second Am. Compl. and Jury Demand, p. 14, *quoted in id.* at n.14.

120. RESTATEMENT (SECOND) OF TORTS § 821B (1998); *see, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F.Supp. 2d 882 (E.D. Pa. 2000), *aff’d* 277 F.3d 415 (3rd Cir. 2002); *see also Camden County Bd. of Chosen Freeholders*, 273 F.3d at 539 (New Jersey law) (“the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights”).

121. 765 N.E.2d 1 (Ill. App. Ct. 2001).

122. *Id.* at 10-11.

123. *Id.*; *see also* *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1997 WL 337218 at *4 (N.D. Ill. June 13, 1997) (there exists a public right “to be free from disturbance and reasonable apprehension of danger to person and property”) (quoting *Village of Desplaines v. Poyer*, 14 N.E. 677 (Ill. 1888); *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-243, 2001 WL 333111 (Ind. Super. Ct. Jan. 11, 2001) (“public nuisance claims must arise from an unreasonable use of property . . . or a violation of a specific statute”).

124. 273 F.3d 536 (3d Cir. 2001).

125. *Id.* at 541; *see also, City of Gary*, No. 45D05-005-CT-243, 2001 WL 333111.

As the court noted in a later case, once manufacturers ship the handguns to licensed distributors and dealers, they have “a diminished ability” to control to whom they are sold and how the ultimate purchasers use or misuse the weapons.¹²⁶

Analysis of these first two criteria has led many of the courts deciding cases against gun manufacturers to declare a third: that product manufacturers and distributors simply cannot be held liable on a public nuisance theory.¹²⁷ This third ground is often stated as a separate and distinct rule or justification for denying liability, but for the most part this conclusion emerges from the application of traditional principles of public nuisance to the new context of mass products torts.¹²⁸ However, articulation of the principle that public nuisance claims cannot be brought against product manufacturers also can be found in a number of previous opinions involving asbestos and other products.¹²⁹

The fourth basic reason courts have dismissed public nuisance claims asserted against gun manufacturers by states and municipalities is that any injuries allegedly suffered by the government plaintiff are too indirect or remote from the conduct complained of to allow recovery.¹³⁰ The requirement of directness can be analyzed as one of duty,¹³¹ proximate cause,¹³² or the standing of the governmental unit to sue,¹³³ but essentially is “based on policy considerations, of setting some reasonable limits on the legal consequences of wrongful conduct.”¹³⁴ In *Ganim v. Smith and Wesson Corp.*,¹³⁵ the Connecticut Supreme Court described the attenuated chain of causation between the gun-manufacturer’s actions and the injuries for which states and municipalities claim compensation:

126. *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 886 (E.D. Pa. 2000).

127. *E.g.*, *City of Philadelphia v. Beretta USA*, 277 F.3d 415, 421-22 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders*, 273 F.3d at 540.

128. *See infra* notes 362-436 and accompanying text.

129. *E.g.*, *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp 646 (D.R.I. 1986); *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 876, 882-83 (Cal. Ct. App. 1994); *Detroit Bd. of Educ. v. Celotex.*, 493 N.W.2d 513 (Mich. Ct. App. 1992).

130. *E.g.*, *Camden County Bd. of Chosen Freeholders*, 273 F.3d at 541 (New Jersey law) (“causal chain is simply too attenuated . . . to make out a public nuisance claim”); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 118-28 (Conn. 2001).

131. *Cf. Ganim*, 780 A.2d at 120 (the issue of standing “is akin to, if not precisely the same as, the judicial task of determining whether a tortfeasor owes a duty to one who has been injured . . .”); *see generally* *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (Cardozo, C.J.) (“Negligence is not actionable unless it involves the invasion of a legally protected interest . . . The law of causation . . . is thus foreign to the case before us”).

132. *E.g.*, *Camden County Bd. of Chosen Freeholders*, 273 F.3d at 541.

133. *Ganim*, 780 A.2d at 118-28.

134. *Id.* at 120.

135. *Id.*

Necessarily implicit in this factual scenario are the following links in the chain connecting the defendants' conduct to the plaintiffs. The manufacturers sell the handguns to distributors or wholesalers and, . . . those sales are lawful because federal law requires that they be by licensed sellers to licensed buyers. The distributors then sell the handguns to the retailers, sales that, again, are required by federal law to be by licensed sellers to licensed buyers. The next set of links is that the retailer then sells the guns either to authorized buyers, namely, legitimate consumers, or, through the "straw man" method or other illegitimate means, to unauthorized buyers, sales that likely would be criminal under federal law. Next, the illegally acquired guns enter an "illegal market." From that market, those guns end up in the hands of unauthorized users. Next, either the authorized buyers misuse the guns by not taking proper storage precautions or other unwarned or uninstructed precautions, or the unauthorized buyers misuse the guns to commit crimes or other harmful acts. Depending on the nature of the conduct of the users of the guns, the plaintiffs then incur expenses for such municipal necessities as investigation of crime, emergency and medical services for the injured, or similar expenses. Finally, as a result of this chain of events, the plaintiffs ultimately suffer the harms delineated¹³⁶

Note the close connection between the previously discussed requirement that the defendant control the instrumentality causing the injury¹³⁷ to the plaintiff and the requirement of a direct causal link.

136. 780 A.2d at 123. Consider, however, the conflicting analysis of the court in *Young v. Bryco Arms*, 765 N.E. 2d 1, 18-19 (Ill. App. 2001) (citations omitted):

According to the Restatement, liability for either public or private nuisance arises because one person's acts set in motion a force or chain of events resulting in the invasion or interference. The acts may be a direct and immediate cause or an indirect cause of the interference. RESTATEMENT (SECOND) OF TORTS § 824, cmt. b (1979). Legal causation is essentially a question of foreseeability. In the special case where plaintiff's injuries result not from defendant's direct actions, but from the subsequent, independent act of a third person, the issue of legal causation becomes the following: whether the intervening cause is of the type that a reasonable person would see as a likely result of his conduct.

The defendants . . . [argue] that criminal misuse of a handgun is not a foreseeable consequence of gun manufacturing. According to the defendants, this unforeseeable, intervening cause similarly breaks the causal connection between the defendants' actions and the subsequent injuries, relieving them of liability. We disagree.

[T]he complaints in the instant case contain much more than allegations of mere gun manufacturing. The defendants here allegedly intentionally created and maintained an underground market of firearms and deliberately designed, marketed, and sold guns that were targeted to appeal to criminals. In our view, a reasonable trier of fact could find that the criminal misuse of guns killing persons were occurrences that defendants knew would result or were substantially certain to result from the defendants' alleged conduct in the instant case.

137. See *supra* notes 124-26 and accompanying text.

In addition to these four primary grounds for denying the liability of gun manufacturers for public nuisance, a few courts have set forth additional reasons. A comment to the Restatement (Second) of Torts¹³⁸ articulates one such justification: that a defendant is normally not liable for public nuisance unless its conduct is either intentional and unreasonable or otherwise actionable as negligent or reckless conduct or as an abnormally dangerous activity that warrants the imposition of strict liability. Accordingly, several courts have held that in the absence of an independent tortious ground, there is no liability for public nuisance in the context of product torts.¹³⁹ The Ohio Supreme Court's opinion in *City of Cincinnati v. Beretta U.S.A. Corp.*, however, found that the requirement of intentional invasion of a public right would be satisfied if plaintiff proved its allegations that defendants "intentionally and recklessly market, distribute and sell handguns that defendants know, or reasonably should know, will be obtained by persons with criminal purposes"¹⁴⁰

In 2000, a single gun manufacturer, Smith & Wesson, agreed to abide by specified safety regulations governing how it manufactures and distributes handguns as part of a settlement of a number of lawsuits against the manufacturer.¹⁴¹ Otherwise, however, despite occasional defeats in trial and appellate courts, gun manufacturers fighting public nuisance claims asserted by states and municipalities have made no dramatic moves toward a consolidated settlement like that reached in the tobacco litigation.

D. Public Nuisance Claims in Government Actions Against Former Manufacturers of Lead Pigment

As with public nuisance claims against gun manufacturers, the recent filing of complaints containing public nuisance claims against former

138. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979).

139. *E.g.*, *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist. LEXIS 33598, at *7 (N.D. Ill. Mar. 16, 1998); *City of Gary v. Smith & Wesson Corp.*, 2001 WL 333111, at *4 (Ind. Super. Ct. 2001).

140. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002); *see also Young*, 765 N.E.2d at 11.

141. *See* James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES, Mar. 18, 2000, at 1. Smith & Wesson agreed to sell each new handgun with a trigger-lock and to develop "smart-gun technology" by 2003 that would allow its guns only to be used by authorized users. It also agreed to a variety of restrictions on the manner in which it distributes guns.

Other manufacturers, however, failed to follow Smith & Wesson's lead. In Mar. 2002, the city of Boston, one of the few plaintiffs whose public nuisance cause-of-action had survived a motion to dismiss at the trial court, voluntarily dismissed its lawsuit against the gun manufacturers, citing litigation costs that were exceeding \$30,000 per month. *See* Raja Mishra, *Boston Drops Lawsuit on Guns; Growing Cost Cited in Case vs. 31 Firms*, BOSTON GLOBE, Mar. 28, 2002, at A1.

manufacturers of lead pigment and lead-based paint traces its origins to the tobacco litigation:

Armed with new legal theories, trial lawyers and politicians locally and across the nation are gearing up to mount a major assault on the former makers of lead paint The potential battle borrows much of its inspiration from the recent legal assault on big tobacco—a confrontation that wrung a \$240 billion settlement from cigarette makers after states took on the industry in a series of lawsuits. Just as the tobacco suits sought to recover Medicaid funds used to treat sick smokers, lead paint lawsuits would likely seek recovery of government funds spent on medical care or to remove lead from housing. Many of the same lawyers who made millions in the tobacco litigation are jumping into the fray, wooing potential clients. . . .¹⁴²

One state—Rhode Island¹⁴³—and a number of counties, municipalities, and school districts¹⁴⁴ have filed lawsuits against former manufacturers of lead pigment alleging either that the presence of lead in

142. Saundra Torrey, *Lead Paint Could Be Next Big Legal Target*, WASH. POST, June 10, 1999, at A1. Specifically, Ronald Motley, of Ness, Motley, Loadholt, Richardson & Poole, who now represents the State of Rhode Island in its suit against former manufacturers of lead pigment “represented the consortium of states, including Rhode Island, that won an agreement with major tobacco companies to pay more than \$250 billion to reimburse states for the costs of smoking-related deaths.” Russell Garland, *He’s Got Game*, PROVIDENCE J.-BULL., Oct. 29, 2000, at 1F. Motley, whose firm is expected to “receive as much as \$2 billion for its work on behalf of the plaintiffs [in the tobacco litigation],” *Attorney’s Fight for Legal Fees Survives Dismissal Motion*, 17 TOBACCO INDUS. LITIG. REP. 5, Mar. 22, 2002, at 5, said in 1999, “If I don’t bring the entire lead paint industry to its knees within three years, I will give them my boat [a 120-foot motor yacht].” Mark Curriden, *Tobacco Fees Give Plaintiffs’ Lawyers new Muscle*, DALLAS MORNING NEWS, Oct. 31, 1999, at H1.

143. See *State v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct. Apr. 2, 2001).

144. In addition to the State of Rhode Island, the governmental entities that have pursued cases in which they asserted public nuisance claims against former manufacturers of lead pigment and/or lead-based paint included some twenty-six New Jersey counties and municipalities, whose cases have been consolidated in *In re Lead Paint Litig.*, Case Code 702-MT-Civil Action, N.J. Super. Ct. Law Div.: Middlesex County, and then were dismissed. See *New Jersey Mass Tort Cases Dismissed; Nuisance Theory Conflicts with Case Law*, 12 MEALEY’S LITIG. REP.: LEAD 4-5 (issue 3). There are a half-dozen California counties and cities in the Bay area that have joined in the putative class action. *Santa Clara v. Lead Indus. Ass’n, Inc.*, No. CV788657, Super. Ct., Santa Clara, Calif.; see also Scott Winokur, *Lead-Paint Charges Don’t Stick, Judge Says; Area Cities Told to Amend Their Case*, SAN FRAN. CHRON., June 5, 2001, at C1. There are about eight school districts in Texas and Mississippi; see, e.g., *Harris County v. Lead Indus. Ass’n, Inc.*, No. 2001-21413, Dist. Ct. of Harris Co., Texas (215th Judic. Dist.). There have also been a number of cities including Milwaukee, Greg Borowski, *City to File Lead Lawsuit Today; 2 Paint Companies Targeted in New Strategy*, MILWAUKEE J. SENTINEL, Apr. 9, 2001, at 01B, and Saint Louis, Geri L. Dreiling, *These Lawyers Could Cash in Big, but Who Hired Them?*, (ST. LOUIS) RIVERFRONT TIMES, July 3, 2002.

In earlier litigation brought by private individuals (not governmental entities), a New York trial court dismissed “nuisance” claims against manufacturers of lead pigment and their trade association. *Sabaterv. Lead Indus. Ass’n, Inc.*, 704 N.Y.S.2d 800 (N.Y. Sup. Ct. 2000). The court stated that “[p]ublic nuisance . . . at common law was always a crime and punishable as such.” *Id.* at 806. Because the court did not believe defendants’ conduct fit within the definition of the state’s public nuisance criminal offense, it dismissed the charges.

paint in residences itself constitutes a public nuisance or that the marketing and distribution practices of manufacturers constitutes a public nuisance so long as the lead remains in residences. In a July 3, 2002 decision, a Rhode Island trial court defined the issue as:

"Is the cumulative effect of lead pigment in paint and in coatings found in homes, schools, hospitals, and other public and private buildings throughout the State of Rhode Island the creation of a public nuisance?" Here the jury is not being asked if each such property is a separate public nuisance, but rather, as to whether the cumulative effect of all such properties constitutes a public nuisance.¹⁴⁵

Because the harm allegedly caused by defendants in these public nuisance cases may be less familiar than tobacco- or gun-related harms previously considered, a brief explanation may be in order. Exposure to poorly maintained and deteriorated lead-based paint can cause a variety of deleterious effects on young children who are exposed to it, including impaired cognitive function, behavior difficulties, impaired hearing, reduced stature, and, in extreme but now rare cases, even death.¹⁴⁶ Lead-based paint for use in the interior of residences, however, has not been sold since 1978, when it was banned by federal law.¹⁴⁷ Further, largely due to a voluntary industry reduction in 1955 of the lead content in paint to no more than one percent total weight,¹⁴⁸ more than eighty percent of the lead still remaining in residential housing was applied before 1940 and less than four percent was applied after 1960.¹⁴⁹ Preventing childhood lead poisoning is a matter of maintaining housing units properly so as not to allow lead-based paint to deteriorate into chips and dust accessible to children.¹⁵⁰ Most cases of childhood lead

145. *Whitehouse v. Lead Indus. Ass'n.*, No. 99-5226, 2002 R.I. Super. LEXIS 90 at *6 (R.I. July 3, 2002).

146. PRESIDENT'S TASK FORCE ON ENVIRONMENTAL HEALTH RISKS AND SAFETY RISKS TO CHILDREN, *ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PINT HAZARDS*, 1 (2000) [hereinafter *PRESIDENT'S TASK FORCE*].

147. See *Lead-Based Paint Poisoning Prevention Act*, Pub. L. No. 91-695, 84 Stat. 2078 (1971) (§ 401 (*codified as amended* at 42 U.S.C. §§ 4801 (2000))).

148. American Standards Ass'n, Standard No. Z661 (1955); *c.f.* U.S. DEPT. OF COMMERCE, CIRCULAR OF THE BUR. OF STANDARDS NO. 89, UNITED STATES GOVERNMENT MASTER SPECIFICATION FOR PAINT, WHITE, AND TINTED PAINTS MADE ON A WHITE BASE, SEMIPASTE AND READY MIXED, FED. SPEC. BOARD, STAND. SPEC. NO. 10B, at 2 (3rd ed., Apr. 25, 1927) (pigment in white base semi-paste paint to be purchased by the federal government shall be composed of: White lead [basic carbonate, basic sulphate, or a mixture thereof] Maximum 70%, Minimum 45%); 42 Fed. Reg. 170 (Sept. 1, 1977) (defining lead-based paint as paint containing in excess of 0.5% by weight).

149. PRESIDENT'S TASK FORCE, *supra* note 146, at 22, tbl. 4.

150. REPORT OF THE LEAD PAINT POISONING COMMISSION (State of Maryland, May 5, 1994) ("The single most important source of childhood lead poisoning in Maryland is lead-contaminated dust resulting from, among other sources, deteriorated lead-based paint in the older housing stock."). The author served as chair of the commission; see also, *e.g.*, PRESIDENT'S TASK FORCE, *supra* note 146, at 3 & 5.

poisoning arise in a small percentage of poorly maintained rental properties.¹⁵¹

In *State of Rhode Island v. Lead Industries Ass'n., Inc.*,¹⁵² the trial court judge denied the defendants' motion to dismiss the public nuisance claim. Noting that both the Rhode Island legislature and the Rhode Island Supreme Court had spoken to the issue of lead paint being "a hazard to the public and to children, in particular,"¹⁵³ the court found that the Attorney General, acting in his *parens patriae* (quasi-sovereign) capacity, had adequately asserted an action for public nuisance, by "sufficiently averr[ing] that the defendants have unreasonably interfered with a right common to the general public: more specifically, [that] their conduct has unreasonably interfered with the health, safety, peace, comfort or convenience of the general community."¹⁵⁴

Significantly, however, despite the trial court's focus in that initial order on the issue of whether defendants' conduct was an unreasonable interference, it appears that, for purposes of trial, the issue has shifted to whether the harm or injury itself, and not any conduct on the part of defendants, constitutes the public nuisance for which defendants may be held liable.¹⁵⁵ Subsequent to its decision on the motions to dismiss, the court divided the trial into phases.¹⁵⁶ Phase I will address

the central issue to be determined by the fact finder . . . "does the presence of lead pigment in paint and coatings in homes, schools, hospitals and other public and private buildings throughout the State

151. See, e.g., Christy Plumer, *Setting Priorities for Prevention of Childhood Lead Poisoning in Providence*, available at http://cnvstudies.brown.edu/Dept/thesis/master9900/christy_plumer.htm (last visited Apr. 18, 2003) ("Two percent (2%) of the residential addresses in the city housed 51% of the children with elevated blood-lead levels . . . and 32% of the addresses where a child resided in 1998 were addresses with a history of multiple poisonings in 1993-1997. This means that if the City had remediated all the houses where multiple poisonings had occurred, 930 addresses in total, a third of the 1998 poisonings would have been prevented.").

152. No. 99-5226, 2001 R.I. Super. LEXIS at *37.

153. *Id.* at *23 (quoting *Pine v. Kallian*, 723 A.2d 804, 805 (R.I. 1998)).

154. *Id.* at *27. "[A] state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. . . . Sufficient quasi-sovereign interests include a state's interests in its citizens' health, safety, and welfare, as well as in a healthful environment. . . . Further, if the Attorney General could not bring such actions, it appears that wrongs to the public interest would not be able to be vindicated by the State." (internal citation omitted). *Id.* at *11; see *infra* notes 223-26 and accompanying text.

155. In supporting its conclusion that the presence of lead constituted a public nuisance, the court noted that both a Rhode Island statute, R.I. Gen. Laws § 23-24.6-2, and an opinion of the Rhode Island Supreme Court, *Pine v. Kallian*, 723 A.2d 804, 805 (R.I. 1998), considered poorly-maintained rental properties with lead hazards to be public nuisances. *Id.* at 23-24. The court failed to note, however, that the statute and the opinion sought to hold property-owners, not pigment manufacturers, legally responsible for these public nuisances.

156. *Whitehouse v. Lead Indus. Ass'n*, No. 99-5226, 2002 R.I. Super. LEXIS 43 (R.I. Mar. 15, 2002).

of Rhode Island constitute a public nuisance.” Put differently, but asking the same question, “is the cumulative effect of lead pigment in paint and in coatings, found in . . . public and private buildings throughout the State . . . the creation of a public nuisance?”¹⁵⁷

Only then in Phase II will the issue of the liability of the defendants for the public nuisance be addressed. If the state prevails in Phases I and II, Phase III will address the fashioning of remedies in the form of equitable relief or damages.¹⁵⁸ The judge may even “quadrificate” the case to accommodate the manufacturer-defendants’ third-party contribution and indemnification claims against the Rhode Island landlords they believe directly responsible for allowing children to be exposed to lead hazards in their homes.¹⁵⁹

In the context of cases against former manufacturers of lead paint, as in those against tobacco manufacturers, the assertion of public nuisance claims by government entities seems calculated to circumvent the application of well-established products liability doctrines and defenses that would prevent recovery under more traditional causes of action. The focus on the scope of gravity of an existing harm itself, instead of on a defendant’s conduct, whether past or continuing, avoids the question of whether the harm arose from the type of conduct by the defendant that both tort law generally and the history of public nuisance require in order to impose liability. Following Phase I of the Rhode Island trial, the court might find in this proceeding against defendant-manufacturers that a public nuisance exists, without ever considering whether defendant’s conduct was intentional and unreasonable, negligent, or actionable under a strict liability theory as an abnormally dangerous activity.¹⁶⁰ With respect to lead pigment manufacturers’ liability for conduct that occurred prior to 1978, and in many cases even eighty or

157. *Whitehouse v. Lead Indus. Ass’n*, No. 99-5226, 2002 R.I. Super LEXIS 90, at *6 (R.I. July 3, 2002).

158. *Id.*

159. Tr. at 17-18, *Whitehouse v. Lead Indus. Ass’n*, No. 99-5226, Feb. 5, 2002. Finding that “neither property rights nor possessory rights are implicated in the case at bar,” the court denied defendants’ motion for an order requiring individual notice to each of the owners of the estimated 330,000 Rhode Island properties containing lead paint that would be affected by a finding for the state in Phase I. *Whitehouse*, No. 99-5226, 2002 R.I. Super LEXIS 90 at *8. In response, citing the “immediate and deleterious impact” a public nuisance determination would have on property owners and mortgage banks who could be held responsible for abatement, property values that would fall upon news that the properties were contaminated, and the economy that could be shaken by widespread foreclosures, the Rhode Island Bankers Association filed a motion before the Rhode Island Supreme Court for leave to appear as amici curiae in support of defendants’ petition for writ of certiorari and application for stay of Phase I. *Rhode Island Bankers Ass’n Mot. for Leave to Appear as Amicus Curiae and in Support of Petition for Writ of Certiorari and Application for Stay*, *State v. Lead Indus. Ass’n*, No. 02-422 R.I. Sup. Ct., filed July 18, 2002.

160. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979); see also *infra* notes 418-26 and accompanying text.

one hundred years ago, treating the harm as the nuisance may also circumvent the effect of any applicable statute of limitations or statutes of repose. For example, the Rhode Island trial court dismissed claims filed against the pigment manufacturers for negligence, strict products liability, negligent misrepresentation, and fraudulent misrepresentations because the statutes of limitations had run, but allowed the public nuisance claims to proceed.¹⁶¹ Other courts have allowed public nuisance actions to proceed as long as the harm is a continuing one.¹⁶²

III. PUBLIC NUISANCE: THE ILL-DEFINED TORT

A. *Vague and Variable Common Law and Statutory Definitions*

In torts, a field of law where vague definitions, rules, and doctrines abound, no other tort is as vaguely defined or poorly understood as public nuisance. The Florida Supreme Court recently proclaimed, for example, that “a public nuisance may be classified as something that causes any annoyance to the community or harm to public health.”¹⁶³ The Rhode Island Supreme Court’s attempt to define the requirements for liability in nuisance is perhaps even less helpful:

The essential element of an actionable nuisance is that persons have suffered harm or are threatened with injuries they ought not have to bear. Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than unreasonable conduct. Thus, plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury.¹⁶⁴

161. *Whitehouse v. Lead Indus. Ass’n*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Apr. 2, 2001). The court rejected the application of the *nullum tempus* doctrine—providing that the statute of limitations does not run against the state when it seeks to assert a public right—to the claims of negligence, strict liability, negligent misrepresentation, and fraudulent misrepresentation brought by the state because similar claims “could have been filed by any private litigant against the defendants.” *Id.*

162. *E.g.*, *Wade v. Campbell*, 19 Cal. Rptr. 173, 177 (Cal. Ct. App. 1962) (“[n]either prescriptive rights, laches nor the statute of limitations is a defense against the maintenance of a public nuisance”) (quoting *City of Turlock v. Bristow*, 284 P. 962, 965); *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E. 2d 901, 925 (W. Va. 1997) (“until [the] harm is abated . . . public nuisance is continuing and the statute of limitations does not accrue”); *cf.* *Jamail v. Stoneledge Condo. Owners Ass’n*, 970 S.W.2d 673, 676 (Tex. App. 1998) (“[l]imitations is not a defense to an action to abate a continuing nuisance”) (quoting *Stein v. Highland Park I.S.D.*, 540 S.W.2d 551, 554 (Tex. Civ. App. 1976)).

163. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001) (quoting *Kirk v. U.S. Sugar Corp.*, 726 So. 2d 822, 826 (Fla. App. 1999)).

164. *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (citations omitted). The court upheld findings of both public nuisance and private nuisance against defendant landowners whose property included a toxic waste site.

Lest anyone think that the court really means “non-negligent” instead of “nontortious,” it goes on to state that “the finding of both private and public nuisance [in this case] makes it unnecessary to consider the doctrine of strict liability.”¹⁶⁵

A number of states now define public nuisance by statute, but often the statutory definitions fail to improve on the judicial ones. A California statute, for example, defines nuisance as follows:

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.¹⁶⁶

A public nuisance, according to the statutory scheme, is “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”¹⁶⁷

As previously mentioned, vague definitions are endemic to tort law.¹⁶⁸ Usually common law case development gradually yields meaningful parameters: torts are defined and understood inductively.¹⁶⁹ The

165. *Id.* at 1249.

166. CAL. CIV. CODE § 3479 (1997); *see also* IOWA CODE § 657.1 (1998) providing:

Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

167. *Id.* § 3480.

168. The quintessential example of a vague definition in tort law is the basic principle that “[a] person acts with negligence if the person does not exercise reasonable care under all the circumstances.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 3 (Tentative Draft No. 1, Mar. 28, 2001). Courts have developed vast bodies of law, however, clarifying the meaning of reasonable care by reference to cost-benefit analysis, *see, e.g.*, *Adams v. Bullock*, 125 N.E. 93 (N.Y. 1919), standards contained in criminal or regulatory statutes, *e.g.*, *Martin v. Herzog*, 126 N.E. 814 (1920); *Combs v. Los Angeles Ry. Corp.*, 177 P.2d 293 (Cal. 1947), and custom, *e.g.*, *Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968).

169. Consider strict liability for abnormally dangerous activities. Today it is possible to express the parameters of liability for this tort in a form that resembles a definition, principle, or rule:

An activity is abnormally dangerous if:

- (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
- (2) the activity is not a matter of common usage.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 20 (Tentative Draft No. 1, Mar. 28, 2001).

The origins of this tort lie, however, in a series of disparate factual contexts that courts originally often

extraordinary variety of fact patterns resulting in recent judicial findings of public nuisance, however, suggest little coherence in courts' understanding of the tort's boundaries. Courts have found liability under public nuisance for environmental harms including the discharge of untreated sewage,¹⁷⁰ the maintenance of an automobile junkyard,¹⁷¹ the operation of a hog farm and sewage lagoon,¹⁷² and the storage of coal dust.¹⁷³ At the same time, courts frequently find activities constituting violations of public morals to be public nuisances.¹⁷⁴ Still other bothersome activities that fit within neither of these two initial categories are nonetheless also deemed public nuisances. They include such widely disparate activities as a street gang,¹⁷⁵ a flea market with an "unsightly appearance,"¹⁷⁶ loud music,¹⁷⁷ and anti-abortion protests that blocked access to an abortion clinic.¹⁷⁸ And, of course, at least in theory, the manufacture and distribution of certain products.

As previously discussed, the Restatement (Second) of Torts' explication of the law of public nuisance is more helpful than the reasoning in many cases, but it still disappoints the judge or lawyer expecting to find meaningful boundaries for tortious liability. Section 821B of the Restatement begins with the defining statement that "[a] public nuisance is an unreasonable interference with a right common to the general public."¹⁷⁹ This provision is potentially helpful in two ways. First, it limits liability to interference with rights "common to the general public." In other words, injuries occurring to individuals or even to numerous individuals who are not exercising a public right are excluded.¹⁸⁰ Second, the defendant is potentially liable only for "unreasonable" interference with such rights. Section 821B, however, then goes

did not associate with each other. *E.g.*, *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510 (2nd Cir. 1931) (storage of explosives); *Niagra Oil Co. v. Jackson*, 91 N.E. 825 (Ind. Ct. App. 1910) (operation of gas or oil well causing damage to neighbor's land); *Spano v. Perini Corp.*, 250 N.E. 2d 31 (1969) (blasting); *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (collection of large amounts of water in unsuitable place).

170. *Miotke v. City of Spokane*, 678 P.2d 803 (Wash. 1984).

171. *Mountrail County v. Hoffman*, 607 N.W. 2d 901 (N.D. 2000).

172. *State v. Sprecher*, 606 N.W. 2d 138 (S.D. 2000).

173. *Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So. 2d 857 (Miss. 1988).

174. *E.g.*, *Masterson v. State*, 949 S.W. 2d 63 (1997) (bingo halls where bingo is played for money); *Wagner v. Regency Inn Corp.*, 186 Mich. App. 158 (Mich. Ct. App. 1990) (hotel frequented by prostitutes, drug-traffickers, and thieves); *Village of Winslow v. Sheets*, 622 N.W. 2d 595 (Neb. 2001) (nude exotic dancing); *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 588 N.E. 2d 116 (Ohio 1992) (adult bookstore).

175. *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

176. *Boyles v. City of Topeka*, 21 P.3d 974 (Kan. 2001).

177. *City of Va. Beach v. Murphy*, 389 S.E. 2d 462 (Va. 1990).

178. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762, 764-65 (1994).

179. *RESTATEMENT (SECOND) OF TORTS* § 821 B (1977).

180. *See infra* notes 366-84 and accompanying text.

on to describe three *factors* to be used by courts to determine whether the interference is unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(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.¹⁸¹

These “factors”—while marginally helpful in establishing the parameters of the tort—provide the courts with more discretion than the definition, rules, and principles found in most other sections of the Second Restatement of Torts. Further, two of the three factors—(a) and (c)—are articulated in very amorphous, open-ended language.

This article focuses on the use of the public nuisance tort against product manufacturers. The open-ended and amorphous nature of public nuisance, however, historically also has facilitated its use as a weapon of public officials against the exercise of civil liberties and other conduct found to be distasteful. For example, in 1894, the United States government used public nuisance as the legal grounds for the injunction against Eugene Debs and other labor leaders that broke the back of the Pullman Strike.¹⁸² During the 1980s and 1990s, anti-abortion protests that blocked access to abortion clinics were enjoined as public nuisances.¹⁸³ The decision of the California Supreme Court in *People ex rel. Gallo v. Acuna*,¹⁸⁴ upholding the state’s employment of public nuisance as the substantive basis to enjoin the operation of street gangs despite freedom of assembly concerns, has provoked substantial criticism.¹⁸⁵ Finally, other commentators have attacked the use of public nuisance statutes as a means of holding landlords accountable—through

181. RESTATEMENT (SECOND) OF TORTS § 821B (2) (1977).

182. *In re Debs*, 158 U.S. 564 (1895).

183. *E.g., Madsen*, 512 U.S. at 762, 764-65; *N.Y. State Nat’l Org. for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989).

184. 929 P.2d 596 (Cal. 1997).

185. *See, e.g.,* Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717 (2000); Kim Strosnider, *Anti-Gang Ordinances after City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002); Christopher S. Yoo, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U.L. REV. 213 (1994); Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2250 (1998).

forfeiture of the use of the leased property—for the criminal activities of tenants, usually drug-related activities.¹⁸⁶ According to Professor B.A. Glesner, this use of public nuisance encourages landlords to resort to “vigilantism.”¹⁸⁷ In short, the ill-defined nature of public nuisance presents risks not only to product manufacturers but also to those engaged in a wide variety of activities that result in what some may consider socially undesirable consequences.

B. Contemporary Confusion About What Actually Constitutes the Tort of Public Nuisance

The vagueness of the articulated definitions of public nuisance is only one aspect of the judicial confusion evident in recent case law regarding the parameters of the tort. Many courts are confused by one or more critical aspects of what is required for a finding of liability. This section describes contemporary courts’ uncertainties and misunderstandings.

1. The Distinction Between the Separate Torts of Public Nuisance and Private Nuisance

Courts are generally aware, as Prosser admonished his contemporaries, that “[t]here are . . . two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law.”¹⁸⁸ As a more careful examination of the common historical roots of private nuisance and public nuisance suggests in Section IV below,¹⁸⁹ Prosser’s conclusion may well be wrong. Nevertheless, it clearly is useful to distinguish private nuisance and public nuisance as two separate torts, of which only one—private nuisance—has developed a generally-accepted ascertainable meaning. For purposes of this article, it is sufficient to recite that private nuisance is an “invasion of another’s interest in the private use and enjoyment of his land”¹⁹⁰ and that such invasion must be either “intentional and unreasonable” or otherwise

186. B. A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. 679, 716 (1992); Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547 (2000).

187. Glesner, *supra* note 186, at 791.

188. Prosser, *supra* note 1, at 999.

189. See *infra* notes 249-74 and accompanying text.

190. RESTATEMENT (SECOND) OF TORTS § 822 (1979); see also FOWLER V. HARPER ET AL., THE LAW OF TORTS §1.23 (3d ed. 1996).

independently tortious under the rules governing negligence or strict liability for abnormally hazardous conditions.¹⁹¹ In short, private nuisance is a tort involving interference with the ownership, occupation, or use of real property. Public nuisance, in contrast, involves interference with rights "general to the common public."¹⁹²

Despite this clear distinction between interferences with the use of real property and interferences with the enjoyment of public rights, however, courts sometimes fail to distinguish between public nuisance and private nuisance and discuss the two torts together as if they constituted a single theory of recovery.¹⁹³

2. What Is the Public Nuisance: the Harm, the Property, or the Conduct?

Different courts have very different understandings of what it is that actually constitutes the entity of "public nuisance."¹⁹⁴ Many courts consider the public to be *defendant's conduct* creating an unreasonable interference with a public right.¹⁹⁵ Other courts, however, take different approaches.¹⁹⁶ For example, some courts err in holding that it is the real property itself where defendant conducts his activities that comprises the public nuisance.¹⁹⁷ Occasionally, courts treat the personal property instrumental in interfering with others' rights as the public nuisance.¹⁹⁸

191. *Id.*

192. See *infra* notes 372-90 for an analysis of the meaning of a "public right" as that term is used in the definition of public nuisance.

193. *E.g.*, *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 632 N.W.2d 59 (Wis. Ct. App. 2001).

194. See RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979).

195. *E.g.*, *People v. Lim*, 118 P.2d 472 (Cal. 1941) (operation of gambling house; "the common law recognized various types of wrongful activity as indictable public nuisances"); *City of Cincinnati v. Beretta U.S.A. Corp.*, 968 N.E.2d 1136, 1143 (Ohio 2002) ("ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market"); see also *Masterson v. State*, 949 S.W.2d 63 (Ark. 1997) (operation of bingo halls for money); *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2001) (marketing and distribution practices of manufacturers of handguns); *City of Va. Beach v. Murphy*, 389 S.E.2d 462 (Va. 1990) (playing of loud music); *Hillmer v. McConnell Bros.*, 414 P.2d 972 (Wyo. 1966) (operation of rabbit-processing plant).

196. See HARPER ET AL., *supra* note 190, at § 1.23.

197. *E.g.*, *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 588 N.E.2d 116 (Ohio 1992) (an adult bookstore itself, instead of defendant's activities conducted therein, held to constitute public nuisance); *Pine v. Kallian*, 723 A.2d 804, 805 (R.I. 1998) (deteriorated residential rental properties containing lead-paint hazards).

198. See *Boyles v. City of Topeka*, 21 P.3d 974 (Kan. 2001) (specific items of trash at flea market found to constitute a public nuisance); see also *Bennis v. Michigan*, 516 U.S. 442 (1996) (automobile in which defendant's husband engaged in illegal sexual activity with prostitute found to be public nuisance under criminal forfeiture statute).

More importantly for our purposes, however, courts often consider the harm or damages that the plaintiff complains of to be the public nuisance.¹⁹⁹ As the New York Court of Appeals stated in *Copart Industries v. Consolidated Edison Co.*,²⁰⁰ “nuisance . . . describes the consequences of conduct, the inconvenience to others, rather than the type of conduct involved.” The Restatement (Second) of Torts also uses the term in this manner.²⁰¹

Courts using the term “public nuisance” to describe the harm sometimes overlook the additional requirement that such harm “is tortious only if it falls into the usual categories of tort liability”²⁰² and that the defendant should be “held liable for a public nuisance [only] if his interference . . . was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities.”²⁰³ Also, referring to the harm instead of defendant’s conduct as “public nuisance” is inconsistent with the way language is used to describe most other torts. For example, “negligence”²⁰⁴ and “strict products liability”²⁰⁵ refer to defendant’s conduct or the legal consequences of such conduct, not the resulting harm.

In most cases, the linguistic distinction between “public nuisance” as conduct and “public nuisance” as the harm caused by the conduct is unimportant, so long as courts remember that defendant’s conduct must be otherwise tortious. In the context of mass products and other toxic torts, however, the issue of what actually constitutes the “public nuisance” may have important consequences. Consider the situation in which the defendant long ago stopped manufacturing or selling a product that now is understood to pose significant risks. Individuals exposed to the product were harmed by the product a number of years ago and may no longer be able to recover for claims based upon negligence, strict products liability, or even misrepresentation. Yet the risk posed by the product that long ago left the manufacturer’s control

199. *E.g.*, *Wagner v. Regency Inn Corp.*, 463 N.W.2d 450, 453 (Mich. Ct. App. 1990) (defendants “created or allowed the existence of certain dangerous physical conditions and protracted criminal activities which combined to constitute a public nuisance”); *Copart Indus. v. Consol. Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977).

200. 362 N.E.2d at 971.

201. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979).

202. *Id.* at cmt. c; *see e.g.*, *Pine v. Kallian*, 723 A.2d 804, 805 (R.I. 1998) (deteriorated residential rental properties containing lead-paint hazards); *Whitehouse v. Lead Indus. Ass’n*, No. 99-5226, 2002 R.I. Super LEXIS 90, at *2 (R.I. July 3, 2002) (the question to be decided at trial is “does the presence of lead pigment in paint and in coatings, in homes, schools, hospitals, and other public and private buildings throughout the State of Rhode Island constitute a public nuisance?”).

203. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979).

204. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Basic Principles) § 3, cmt. a. (Tentative Draft No. 1, Mar. 28, 2001).

205. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

continues unabated by those in possession of the product or by state and municipal governments.

In this case, the application of ordinary principles applicable to torts dictate that the cause of action accrued at the time of the injury and, if a period of time greater than the period of limitations has expired, the injured party should not be able to recovery from the defendant. If the court regards the continuing, unabated harm or risk as the "public nuisance" itself, however, the statute of limitations never runs. This is not an absurd hypothetical, but instead the logical consequence of the court's ruling in the Rhode Island paint litigation.²⁰⁶

3. The Overlap of Crime, Public Abatement, and Tort

Public nuisance is clearly more than a tort. Indeed, Prosser claimed that "public nuisance . . . is always a crime"²⁰⁷ and that "[f]or a few centuries after its origin . . . public nuisance remained only a crime."²⁰⁸ Though Prosser's historical claim probably is not correct,²⁰⁹ and courts clearly do not today accept his analysis that public nuisance is always a crime, civil liability traditionally has been an incidental aspect of public nuisance. The primary purpose of public nuisance has been as a vehicle to enable public authorities to terminate conduct found to be harmful to the public health or welfare.²¹⁰ Criminal prosecutions against those maintaining public nuisances and injunctions brought by public authorities historically have been²¹¹ and remain²¹² the principal means of addressing public nuisances.

206. *Whitehouse v. Lead Indus. Ass'n*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Apr. 2, 2001); see also *supra* notes 160-62 and accompanying text and opinions discussed in note 162.

207. Prosser, *supra* note 1, at 997.

208. *Id.* at 1004.

209. See *infra* notes 271-74, 295-98 and accompanying text.

210. See *infra* notes 324-25 and accompanying text.

211. See *infra* notes 328-30 and accompanying text.

212. For criminal prosecutions, see, e.g., *Ind. Alcoholic Beverage Comm'n v. River Rd. Lounge, Inc.*, 590 N.E.2d 656 (Ind. Ct. App. 1992) (illegal drug sales on premises); *City of Billings v. Panasuk*, 833 P.2d 1050 (Mont. 1992) (sale of liquor to minors); and *State v. Hafner*, 587 N.W.2d 177 (N.D. 1998) (allowing livestock to run free).

For injunctions by public authorities, see, e.g., *Alt.-Coushatta Tribes of Tex. v. Texas*, 208 F.Supp.2d 670 (E.D. Tex. 2002) (injunction against operation on tribal lands of illegal casino); *Masterson v. State ex rel Bryant*, 949 S.W.2d 63 (Ark. 1997) (injunction restraining operation of bingo halls); *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600 (Cal. 1976) (injunction restraining exhibition of obscene books and films); *People v. Englebrecht*, 106 Cal. Rptr.2d 738 (Md. 2001) (injunction prohibiting participation in a gang); *Becker v. State*, 767 A.2d 816 (Md. 2001) (premises used for sale of illegal drugs); *Bosarge v. State ex rel. Price*, 666 So. 2d 485 (Miss. 1995) (club illegally serving alcohol to minors); and *City of New York v. 924 Columbus Assocs., L.P.*, 640 N.Y.S.2d 497 (N.Y. 1996) (premises used for sale of illegal drugs).

There is no historical evidence, however, that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance. The state's remedies were restricted to prosecution or abatement, or both.²¹³ Damages were reserved only for those individuals suffering special injuries. Support for this conclusion is found in Restatement (Second) of Torts section 821C, which specifically recognizes the right of public officials to seek injunctive relief to end a public nuisance, but says nothing about the state's rights to recover damages for a public nuisance.²¹⁴

In contrast, a private plaintiff may recover damages for the tort of public nuisance when she has "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 the interference."²¹⁵ In *In re Exxon Valdez*,²¹⁶ for example, Alaskan Natives sought damages resulting from an oil spill including both the economic loss of fishing resources and the harm to their communal life which they claimed was "dependent upon the preservation of uncontaminated natural resources, marine life and wildlife, and reflect[ed] a personal, economic, psychological, social cultural, communal and religious form of daily living."²¹⁷ The district court upheld the claims for damages resulting from the economic loss of fishing resources, but denied damages for the loss of the subsistence way of life. The Ninth Circuit Court of Appeals affirmed, stating:

Admittedly, the oil spill affected the communal life of Alaska Natives, but whatever injury they suffered (other than the harvest loss), though potentially different in degree than that suffered by other Alaskans, was not different in kind. . . . [T]he right to lead subsistence lifestyles is not limited to Alaska Natives. While the oil spill may have affected Alaska Natives more severely than other members of the public, "the

213. See e.g., *People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater*, 171 Cal. Rptr. 85 (Cal. Ct. App. 1981), *rev'd on other grounds*, *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90 (1981) (remedies of municipality limited to abatement under California statute; private individual's remedies include both abatement and damages).

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

215. *Id.*; see also Prosser, *supra* note 1, at 1005-23. The same provision of the Restatement also allows an abatement action to be brought by one entitled to recover damages, by a public official or public agency having authority to represent the state, or by someone having standing to sue as a representative of the public or as a member of a class in a class action. See, e.g., *Blair v. Anderson*, 570 N.E.2d 1337 (Ind. App. 1991) (adjoining landowner had special injury entitling him to seek injunction against landfill operation when defendant blocked a creek flowing on his property); *Hartford v. Women's Servs., P.C.*, 477 N.W.2d 161 (Neb. 1991) (abortion clinic protestor not entitled to seek injunctive relief against clinic for running lawn sprinklers that soaked protestors; plaintiff had no special injury different in kind from other members of general public using sidewalks).

216. 104 F.3d 1196 (9th Cir. 1997).

217. *Id.* at 1197 (quoting Complaint).

right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings" is shared by all Alaskans.²¹⁸

If there has in fact been a violation of the "right common to the general public" as required by public nuisance law,²¹⁹ the individual victim of tobacco-related illness, handgun violence, or childhood lead poisoning most likely would qualify as having sustained a special injury.²²⁰ The state or city itself also may incur other costs, such as those necessary to conduct public health programs to prevent tobacco-related illness or campaigns to end firearm violence. These costs would likely qualify as special injuries sustained by the state itself assuming they are within the scope of the risk created by the defendant-manufacturer's conduct.²²¹ When states and municipalities file actions against manufacturers of tobacco products, handguns, and lead pigment, however, the damages sought generally include "recoupment" or reimbursement of medical assistance payments made to those who have sustained damages resulting from illness caused by the products.²²²

218. *Id.* at 1197-98 (citations omitted); *see also* 532 Madison Ave. Gourmet Foods, Inc., v. Finlandia Ctr., Inc., 750 N.E.2d 1097 (N.Y. 2001). In that case, a section of a skyscraper wall on Madison Ave. had collapsed, resulting in the closing of fifteen heavily trafficked blocks of Madison Ave., as well as adjoining cross streets. The plaintiff's delicatessen, located one-half block away, was closed for five weeks. The New York Court of Appeals concluded that the plaintiff had not suffered "a special injury beyond that of the community so as to support [his] claim for public nuisance." *Id.* at 1105. The court reasoned:

[E]very person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue was exposed to similar economic loss during the closure periods. Thus, in that the economic loss was "common to an entire community and the plaintiff[s] suffer[ed] it only in a greater degree than others, it is not a different kind of harm and the plaintiff[s] cannot recover for the invasion of the public right."

Id. at 1105 (quoting RESTATEMENT (SECOND) OF TORTS § 821C, cmt. h).

219. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1979); *see also infra* notes 370-90 and accompanying text.

220. A serious issue remains, however, as to whether the Medicaid recipient's injuries are within the scope of the risk created by the manufacture or sale of the product, or whether the injury is too indirect and remote from the defendant's conduct. *See infra* notes 407-17 and accompanying text.

221. In *Whitehouse v. Lead Indus. Ass'n*, No. 99-5226 2001 R.I. Super. LEXIS 37 (R.I. Apr. 2, 2001), for example, the State claimed as damages

the costs of discovering and abating Lead, the expenditure of State funds to detect lead poisoning and provide medical and/or other care of lead poisoned residents of the State, the costs of education programs for children suffering injuries as a result of Lead exposure and the costs of education programs for residents of the State due to the dangers present as a result of Lead in the State.

Id. at *3. Similarly, in *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419 (3d Cir. 2002), the City alleged as damages "costs associated with preventing and responding to handgun violence and crime ... [including] those associated with criminal justice and administration, police services, emergency medical services and educational programs."

222. *See, e.g.*, *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000) (in making medical assistance payments to those injured by tobacco products, state becomes subrogated to smoker-recipient's claims against tobacco manufacturers).

A relatively small number of state and federal courts have provided plaintiffs with a potentially potent weapon by allowing the state to pursue these more expansive damages on the grounds that the state is acting as a "quasi-sovereign" in a *parens patriae* action.²²³ In litigation brought by the State of Texas against tobacco manufacturers, the court explained the state's status as a quasi-sovereign litigant as follows:

Quasi-sovereign interests are to be distinguished from a state's general sovereign or proprietary interests. "They consist of a set of interests that the State has in the well-being of its populace."²²⁴ These interests can relate to either the physical or economic well-being of the citizenry. . . . The only hard and fast rule set forth by the [United States Supreme] Court is that a State may not invoke this doctrine when it is only a nominal party asserting the interests of another.

In the instant case, the Court finds that the State has set forth a sufficient interest to maintain an action in its quasi-sovereign capacity. First, it is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the State and the welfare of its people have suffered at the hands of the Defendants.²²⁵

The state's ability to sue for damages as a quasi-sovereign in mass products cases, however, rests on faulty logic. Almost all of the cases where courts have allowed the state to proceed in a quasi-sovereign capacity pursuing claims other than those for personal injuries have involved suits for injunctive relief.²²⁶ In these circumstances, the state is acting to assure its legitimate interests in the enforcement of its law or federal law. In fact, such suits parallel those brought by states to abate public nuisances or criminally prosecute those responsible, where the goal is to terminate defendant's harmful or illegal conduct.

The issue of the state suing in its quasi-sovereign capacity to recover damages for personal injuries to its citizens based upon a public nuisance theory, however, is more problematic. This aggressive coupling of the state's unique ability to sue in a quasi-sovereign capacity with the assertion of public nuisance claims in mass products cases

223. *E.g.*, *State v. Am. Tobacco Co.*, 14 F. Supp.2d 936 (E.D. Tex. 1997); *Rhode Island* No. 99-5226, 2001 R.I. Super. LEXIS 37.

224. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

225. *Am. Tobacco Co.*, 14 F. Supp.2d at 973.

226. *E.g.*, *Snapp & Son*, 458 U.S. 592; *Pennsylvania v. Baumann*, 659 F.2d 306 (3d Cir. 1981).

effectively reverses the 900-year old assumption that the state's remedies for public nuisance are limited to criminal prosecution and injunctive relief. Even when it acts in the name of public health, the state is not the party who has suffered the special damages being sought.

4. The Nature of Defendant's Conduct Necessary for Liability

The Restatement (Second) of Torts²²⁷ and most jurisdictions²²⁸ recognize that for plaintiff to recover for the tort of public nuisance, normally the defendant's conduct must be either intentional and unreasonable, independently tortious as negligence or strict liability for abnormally dangerous activity, or a violation of a statute declaring specific conduct to constitute a public nuisance. Comment e to Restatement (Second) of Torts section 821B states:

[T]he defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities. Liability was not normally imposed for a pure accident that did not fall into one of the three traditional categories of tort liability. . . .

If the common law crimes for public nuisance have been supplanted or supplemented by a broad general statute, the situation has not been changed in any material respect, and the common law rules are generally still applicable to both criminal and civil liability. . . .

If, however, particular conduct is declared to be a public nuisance by a specific statute, an ordinance, or an administrative regulation, the act may provide, or be construed to mean, that the defendant is guilty of the crime even though his interference with the public right was purely accidental and unintentional. . . . This strict criminal responsibility is carried over to the tort action.²²⁹

Not all courts agree, however. In *Wood v. Picillo*,²³⁰ for example, the Rhode Island Supreme Court held that the plaintiffs could recover for public nuisance even though defendant's activities were not otherwise tortious and did not violate a specific state statute. The court stated that the "essential element of an actionable nuisance is that persons have suffered harm or are threatened with injuries that they ought not bear

227. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

228. *E.g.*, *Keeney v. Town of Old Saybrook*, 676 A.2d 795, 810 (Conn. 1996); *Copart Indus., Inc., v. Consol. Edison Co.*, 362 N.E.2d 968 (N.Y. 1977).

229. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979).

230. 443 A.2d 1244, 1247 (R.I. 1982).

. . . liability . . . is predicated upon unreasonable injury than upon unreasonable conduct.”²³¹

C. The Virtues of Boundaries in Tort Law

So the tort of public nuisance is vaguely described. So the courts also reach fundamentally inconsistent conclusions about the previously described core issues illuminating the limits of the tort. So what? Is there a downside to giving courts maximum flexibility in deciding when the product manufacturer or other tort defendant should be held liable to an injured or sick plaintiff? This section identifies some of the reasons why a clearer delineation of the parameters of public nuisance liability and an end to confusion about the core elements of the tort are desirable.

1. Meaningful Standards or Rules Governing Tort Liability

Addressing the issue of whether judges “create” law or “discover” law, Judge Benjamin Cardozo once acknowledged that judges create law, but went on to say that the judge is “not wholly free . . . to innovate at pleasure. . . . He is to draw his inspiration from consecrated principles.”²³² Hart and Sacks emphasized the importance of both “fair warning”²³³ and a process of “reasoned elaboration” that in part “is an expression of an underlying and pervasive principle of law that like cases should be treated alike.”²³⁴

These core foundations of the common law system demonstrate the importance of having a meaningful standard for liability in public nuisance, particularly when the state is the plaintiff in a recoupment case. The vagueness of many “definitions” of public nuisance and the fundamental confusion among courts as to what constitutes the tort means that defendants do not have fair warning as to when their conduct may be tortious. In addition, this tort, without meaningful boundaries, creates opportunities for inconsistent and arbitrary treatment at the hands of courts and, increasingly, state attorneys general who file recoupment actions against mass product manufacturers.

The desirability of principled parameters in tort law parallels the policies that underpin the doctrine of “void for vagueness” in the

231. *Id.* at 1247.

232. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

233. HENRY M. HART & ALBER M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 568-69 (William N. Eskridge & Philip P. Frickley eds., 1994).

234. *Id.* at 147.

criminal law. In 1972, the United States Supreme Court considered the constitutionality of an anti-noise ordinance targeted at those who had planned to demonstrate outside schools in *Grayned v. City of Rockford*.²³⁵ The court observed:

Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.²³⁶

In *Rubin v. City of Santa Monica*,²³⁷ plaintiffs sought to enjoin the enforcement of an ordinance that required a permit for the use of any city park by a group of thirty-five or more persons. The statute listed as a ground for denial that the activities of the group constitute a public nuisance. The court found that the ordinance was void for vagueness because it failed on all three of the grounds elaborated in *Grayned v. City of Rockford*.

Ordinarily, the void for vagueness doctrine applies only to criminal enforcement and not to civil liability. When, however, a state's attorney general, a state official, selects an industry and files a massive legal action seeking recoupment for hundreds of millions of dollars against a defendant alleging liability under a particularly vague tort, the principles behind the void for vagueness doctrine are implicated. The discretionary use of the public nuisance tort by state and municipal officials in recoupment actions delegates basic policy-making decisions to state attorneys general and other state and local officials even when legislative and regulatory agencies have decided not to regulate or prohibit the manufacture or sale of the products in question. Defendant manufacturers are not given fair warning. It is one thing to be held liable for "unreasonable conduct"; it is a different matter to be held liable when, decades after manufacture, one's products are deemed to have caused an unreasonable harm, even when misused by others in the interim. In *State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals*,²³⁸ a public

235. 408 U.S. 104 (1972).

236. *Id.* at 108-09.

237. 823 F. Supp. 709 (C.D. Cal. 1993).

238. 588 N.E. 2d 116 (Ohio 1992).

nuisance case, the court noted that the test of providing “sufficiently definite warning” as “measured by common understanding and practices . . . is particularly applicable in a civil case where the state is granted wider latitude than may be applicable in a criminal case”²³⁹

2. The Impact of Vague Substantive Standards Coupled with Other Tort Doctrines Forfeiting Traditional Requirements of Particularity

The lack of coherent standards for establishing civil liability for public nuisance is but one aspect of the potentially boundless liability facing defendant manufacturers in mass tort state recoupment actions. The use of the ill-defined cause of action often is coupled with corresponding changes in other doctrines that traditionally required particularity in tort litigation. Rather than proving the identity of each injured victim, states use statistical methods of proof to show that a widely distributed product increased the aggregate number of state residents who contracted a disease, such as lung cancer.²⁴⁰ Market-share liability and its cousins obviate the need to prove that the product that injured a specific plaintiff was produced by a specific manufacturer.²⁴¹ Statutes enacted in anticipation of the legal action in which the state itself is the plaintiff eliminate the use of certain affirmative defenses in the pending action, such as those based upon assumption of risk.²⁴² Ordinarily, claims against manufacturers for actions taken decades ago that result in injuries that manifested themselves years ago would be prohibited by either the statute of limitations or a statute of repose. State recoupment actions including a public nuisance claim, however, arguably allow the state to pursue such an action—either because the statute of limitations does not run against the state²⁴³ or because the harm complained of is

239. *Id.* at 121.

240. See, e.g., VT. STAT. ANN. tit. 33 § 1911 (2001) (statistical evidence admissible to prove claims against manufacturers of tobacco products); see also generally, Laurens Walker & John Monohan, *Essay: Sampling Liability*, 85 VA. L. REV. 329 (1999).

241. See, e.g., VT. STAT. ANN. tit. 33 § 1911 (2001) (providing for both market-share liability and joint and several liability against tobacco manufacturers); *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1247 (Fla. 1996) (holding that under state statute, use of either market-share liability or joint and several liability was permissible, but not both).

242. See, e.g., VT. STAT. ANN. tit. 33 § 1911 (2001) (abrogating for purposes of state recoupment action any affirmative defenses that might be applicable if action were brought by individual user of tobacco products); *Agency for Health Care Admin.* 678 So. 2d at 1245-46 (quoting Florida statute abrogating affirmative defenses for purposes of state recoupment action).

243. See *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112 (3rd Cir. 1993) (state housing authority exempt from statute of limitations under doctrine of *nullum tempus*); *State v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37, at *42 (R.I. Apr. 2, 2001) (“doctrine *nullum tempus* . . . allows

a continuing harm despite the lack of ongoing involvement by the defendant²⁴⁴ and the argument goes, therefore the statute has not yet run. In the context of these other newly emerged doctrines expanding liability of defendants in state recoupment actions, the lack of boundaries for public nuisance seems even more ominous.

3. A Principled Response to Precedents

The legitimacy of common law development ultimately depends upon judicial acknowledgement of basic principles of law established by precedents and a principled response to such principles. Professor Philip Soper, a leading legal theorist, expresses this fundamental notion succinctly: "To judge in general means to decide by reference to pre-existing standards rather than personal whim."²⁴⁵ Professor Gregory C. Keating echoes this principle when he states, "As far as legal decision is concerned, the minimum implication of the ideal of the rule of law is that courts should decide cases in accordance with general, public pre-existing laws—and that they should do so impartially and fairly—'without zeal or bias.'"²⁴⁶ The importance of acknowledging precedents and dealing with them in a principled way is recognized throughout most, but not all, ideological perspectives on contemporary American law.²⁴⁷

The next part of this article reviews the history of public nuisance law, its core goals and objectives, and traditional limitations on its use: Liability under a tort theory of recovery can expand in a principled manner in response to changes in the economy, social and political norms, and judicial experience with past precedents. Liability under public nuisance should not be extended to product manufacturers, however, if such an expansion of liability is not only an extension of past public nuisance precedents and their application to new circumstances, but also is fundamentally inconsistent with the basic historical objectives

the attorney general to avoid any relevant statute of limitations"); *see generally* Guaranty Trust Co. v. United States, 304 U.S. 126, 132-33 (1938).

244. *E.g.*, O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404 (C.D. Cal. 2000) (statute of limitations defense did not affect continuing public nuisance claims).

245. PHILIP SOPER, A THEORY OF LAW 111 (1984). The general topic of the importance of fidelity to precedent and the reasons supporting such an adherence is beyond the scope of this article. *See generally* Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 2 (1993).

246. Keating, *supra* note 245, at 4.

247. *Compare* JOHN RAWLS, A THEORY OF JUSTICE 235 (1971); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.CHI. L. REV. 1175, 1187 (1989); *with* Mark V. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (the proper judicial role "is to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism").

of public nuisance law and core doctrines that define the boundaries of the tort.

IV. A RETROSPECTIVE SEARCH FOR THE MEANING OF PUBLIC NUISANCE

The state and city officials, as well as the plaintiffs' attorneys, who have filed public nuisance claims against the manufacturers of tobacco products, handguns, and lead pigment seek both very large damage awards and social change. In this light, defining the boundaries of the public nuisance tort emerges as a particularly important responsibility of the courts. In the common law system, past precedents—albeit interpreted in light of changing current social and economic conditions—should guide courts as they undertake to bring clarity to this rapidly developing area of the law.²⁴⁸ As shown in this section, careful historical analysis of the nearly one-thousand year history of public nuisance in Anglo-American law helps to define the parameters of the tort—even when applied in the most contemporary contexts—and leads to the conclusion that public nuisance is not an appropriate legal basis for mass products tort actions.

A. The Shared Origins of Public Nuisance and Private Nuisance

The standard introduction to the entangled doctrinal jungle of the two separate concepts of public nuisance and private nuisance begins with the admonition that “[t]hey have little or nothing else in common, and are quite unrelated”²⁴⁹ It is the case, of course, that in the modern context, public nuisance and private nuisance constitute separate and distinguishable violations of rights with often different remedies brought by generally distinct parties. To suggest, however, that public nuisance and private nuisance have little in common and are unrelated is to ignore more than eight hundred years of intertwined

248. In their classic text, Professors Hart and Sacks suggest “[a] tentative formulation of the Bases of the Doctrine of Stare Decisis”:

1. “enabling people to plan their affairs [so as to know] they will not become entangled in litigation”,
2. “[t]he desirability, from the point of view of fairness to the litigants, of securing a reasonable uniformity of decisions”, and
3. “maximizing the acceptability of decisions [by basing them on a] reasoned foundation.”

HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 568-69 (William N. Eskridge, Jr. & Phillip P. Frickey eds., Foundation Press 1994).

249. *RESTATEMENT (SECOND) OF TORTS*, ch. 40, Introductory Note (1979); *see also* Prosser, *supra* note 1, at 998.

history.²⁵⁰ The confusion between the two results not from occasional recent misunderstandings by courts or law students, but from a shared heritage—an understanding of which can assist us in the current task of elucidating the appropriate parameters of public nuisance in the contemporary context.

The precursors of modern nuisance law can be traced back to eleventh- and twelfth-century England.²⁵¹ In 1082, William the Conqueror issued a writ to Archbishop Lanfranc that ordered that “the mill built by Picot at Cambridge shall be destroyed if it injures the other.”²⁵² The writ issued by William is properly viewed as an executive writ or royal order, not a judicial writ. Notably, it anticipates a fact-finding or determination at the local level as to whether the mill in fact injures another.²⁵³ A royal writ issued by Henry II sometime between 1156 and 1159 more clearly suggests the presence of a quasi-judicial process.²⁵⁴ That writ, issued to municipal authorities in Canterbury, ordered that all mills within the city be reduced in height to the height they were during the last year of the reign of Henry I so that nearby mills could grind effectively.²⁵⁵

As is the case with so many other areas of English law, particularly those related to land, the law of nuisance in a form that is identifiable today first began to appear during the reign of Henry II in the last half of the twelfth century. Henry II established a permanent court of professional judges who traveled from one area of England to another,²⁵⁶

250. A leading English legal history, speaking from the perspective of 1600, acknowledges that the “question, still not fully resolved today, is whether nuisance constituted a single tort.” D. IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 106 (1999).

251. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY*, 352 (2d ed. 1979); Janet Loengard, *The Assize of Nuisance: Origins of An Action at Common Law*, 37 *CAMBRIDGE L.J.* 144, 145-49 (1978).

252. *REGESTA REGUM ANGLO-NORMANNORUM*, No. 151 (H.W.C. Davis ed., 1913), *quoted in* Loengard, *supra* note 251, at 149.

253. Royal writs issued a generation later during the reign of Henry I, see Loengard, *supra* note 251, at 150-51, also sounded in nuisance—including a writ concerning a hedge wrongfully made or cut down, see 2 *REGESTA REGUM ANGLO-NORMANNORUM*, No. 736 (Charles Johnson and H.A. Cronne eds., 1956), *quoted in* Loengard, *supra* note 251, at 150-51, and one ordering that the sheepfolds of the manor of Hilgay, Norfolk, be restored to where they had been in the past. 1 *REGESTA REGUM ANGLO-NORMANNORUM*, No. 1860 (H.W.C. Davis ed., 1913).

254. See Loengard, *supra* note 251, at 150-51.

255. The writ refers to the “oath of twenty-four lawful men who have already sworn that these mills were so adjusted in the time of King Henry my grandfather.” *RECUEIL DES ACTES DE HENRI II, ROI D’ANGLETERRE ET DUC DE NORMANDIE, CONCERNANT LES PROVINCES FRANÇAISES ET LES AFFAIRES DE FRANCE*, posthumous work of Leopold Delisle publ. Ellic Berger (3 vols. in 2; Paris, 1916-27), Vol. I, No. CIII, *quoted in* Loengard, *supra* note 251, at 150-51. The “twenty-four lawful men” appeared to have constituted a quasi-judicial body, a precursor of the jury, in an earlier action.

256. 1 *HOLDSWORTH, HISTORY OF ENGLISH LAW* 327 (5th ed. 1931); 1 *FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW* 138 (2d ed. 1911). His motives were very pragmatic: to enforce the rights of those who had unjustly been dispossessed of their land during the

and he promulgated a substantive law of land possession and the procedures for enforcing land rights.²⁵⁷ When “anyone has unjustly and without a judgment disseised another” of the freehold,²⁵⁸ a royal writ was issued to the sheriff commanding him to prosecute the claim and cause the complainant to be restored to his land if his claim was just.²⁵⁹ The sheriff summoned twelve men, or recognitors, to appear before the king’s representatives to recognize who last possessed the land.

Nuisance first arose in this context. What happened if the landowner’s possession of his land was interfered with—not by someone claiming possession or through trespass—but by activities conducted on the property of an adjoining landowner? During the latter portion of the twelfth century, the assize of nuisance emerged in the royal courts as a remedy for the plaintiff who complained that he had been disseised of a right of way or other easement or that the defendant had otherwise done some act of nuisance to his detriment.²⁶⁰ Again, it was the twelve recognitors who determined whether the alleged nuisance existed.²⁶¹ These recognitors functioned much like a jury, except that they performed their own fact-gathering and did not rely upon witnesses. The typical remedy for the plaintiff was abatement of the nuisance, but as early as 1167 and 1168, damages were levied for conditions found to constitute nuisances—a ditch unjustly made, a hedge, the destruction of a boundary marker, and a ditch wrongfully broken down.²⁶²

Even at the time of Henry II, the law recognized conduct that today might be classified either as a public nuisance or as a private nuisance as a violation of rights. In either case, however, the nuisances handled by royal courts were, broadly speaking, those affecting land, either directly or indirectly.²⁶³ Antisocial conduct that might later be found to constitute public nuisance was not addressed by the early royal courts unless it involved land.

anarchy of the reign of King Stephen. See generally Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433, 466-84 (1988).

257. POLLACK & MAITLAND, *supra* note 256, at 137, 145. According to Maitland, at the Council of Clarendon Henry II issued a document that probably covered both substantive rights regarding land and procedures for enforcing those rights, but no text exists. In any event, one of the results was a new procedure for royal courts. Most often property claims were made by tenants whose lords had unjustly seized their land, but these also were “downward” claims by lords that tenants had unjustly “disseised” their lords. See Biancalana, *supra* note 256, at 479-80.

258. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL ch. XIII sec. 32. (G.D.G. Hall ed., 1965).

259. POLLACK & MAITLAND, *supra* note 256, at 145-46.

260. BAKER, *supra* note 251, at 352.

261. See S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 137-43 (1969).

262. See Loengard, *supra* note 251, 162-63.

263. See D.J. IBBETSON, *supra* note 250, at 13.

During the thirteenth and fourteenth centuries, the assize of nuisance gradually began to expand beyond those interferences with land—either publicly or privately held—that closely resemble today's definition of private nuisance. The more common complaints during the fourteenth century that often would be treated as public nuisances in later centuries continued to be those involving what might still be regarded as an interference with the king's real property rights, such as the obstruction of highways²⁶⁴ or diversion of watercourses.²⁶⁵ Even in these cases, however, the assize of nuisance was sometimes extended to protect the interests of those other than land occupiers.²⁶⁶

Courts began to find other conduct that did not impair plaintiff's interest in real property nonetheless actionable under the assize of nuisance, such as disturbances of a market franchise. Further, a statute enacted in 1285 extended the reach of the assize of nuisance to interferences with profits a prendre, tolls, and offices in fee.²⁶⁷ Bracton, writing in the late thirteenth century, identified these kinds of actions under the assize of nuisance as a distinguishable category—“*nocumentum iniuriosum propter communem et publicam utilitatem*”²⁶⁸—a nuisance by reason of the common and public welfare.

In his Treatise,²⁶⁹ Bracton for the first time attempted to define the parameters of the assize of nuisance. Perhaps borrowing from Roman law, he stated that the defendant, in order to be held liable under the assize of nuisance, must be an owner or occupier of land.²⁷⁰ He also provided that the actions constituting nuisance must be both *inuria* and *damnum*, that is, both injurious and wrongful.²⁷¹

264. H. CHEW & W. KELLAWAY (EDS.), LONDON ASSIZE OF NUISANCE, 1301-1431, xii and *e.g.*, cases 142, 449, 454, 456, 457 (1973).

265. *E.g.*, *id.* at cases 140, 453, 459.

266. Consider, for example, the following judgment from the London Assize of Nuisance, dated Apr. 18, 1309:

The mayor and the men swoon to the assize order that within 40 days etc. John de Waledene lower the pavement which he has built too high opposite his house, to the nuisance of private persons and strangers walking and riding there.

Id., case 142 (second set of emphasis added).

Recognition of the rights of “strangers walking and riding” on a thoroughfare would not be protected under any modern understanding of private nuisance, because such “strangers” did not possess or occupy land.

267. STATUTE OF WESTMINSTER II 1285, c.25., *quoted in* J.H. BAKER, *supra* note 251, at 352.

268. HENRY DE BRACON, 3 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 191, f. 232b (Samuel E. Thorne ed., 1977) (footnote omitted).

269. *Id.* at 189-201.

270. *Id.* (emphasis added); *see infra* notes 427-39 and accompanying text.

271. *See* IBBETSON, *supra* note 250, at 100. As an example of when a defendant could not be held liable for a nuisance because it is not wrongful, Bracton gives as an example that heirs and successors of the party creating the nuisance cannot be held liable, except to the extent of abating the nuisance. BRACON, *supra* note 268, at f. 235, 195.

This brief historical summary demonstrates that public nuisance and private nuisance began as a common writ, not two separate and distinct actions. The purposes of the Assize of Novel Disseisin, from which the nuisance action flowed, were both (1) to restore public order and vindicate a public wrong, and (2) to assist the disseised. The first of these objectives reflects the more typical use of public nuisance throughout the centuries,²⁷² while the second is analogous to the goals for private nuisance.

The earliest nuisance cases, dating from 1168, were cases in which both the injured party sought abatement—and sometimes compensation—and, at the same time, officers of the crown actively initiated actions to punish nuisances as criminal acts.²⁷³ The underlying fact patterns found to constitute nuisance included both ones that would be regarded as private nuisances today and others that would be regarded as public nuisances.

This lack of a clear distinction between private nuisance and public nuisance is only part of the larger pattern of English and European law at the time, according to a leading legal historian of the times, Professor D.J. Ibbetson. Ibbetson writes, “This early idea of wrongdoing does not allow a clear division between crime and tort, between public and private wrongs: legal redress for wrongs would invariably be activated by the victim or the victim’s family, but the penalty might go either to the victim or to some personification of the state.”²⁷⁴ In short, any assertion that public nuisance and private nuisance share only a word in common and that confusion between the two is a recent development ignores their common origin.

B. The Emergence of Jurisdictional Distinctions

During the thirteenth and fourteenth centuries, nuisances—including those that today would be regarded as either private or public nuisances—were handled in one of three ways under English law. As previously described, royal courts exercised jurisdiction over the assize of nuisance. In addition, however, royal courts sometimes directed a writ of nuisance to the county or other local courts. According to Ibbetson, “Like the assize of nuisance proper, the primary (perhaps exclusive) aim of such complaints was to get the nuisance removed.”²⁷⁵ Finally, criminal prosecutions were conducted in local courts with the

272. See *infra* notes 276-82, 286-94, and 304-67 and accompanying text.

273. See DONALD W. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 13-14 (1973).

274. IBBETSON, *supra* note 250, at 1-2 (1999).

275. *Id.* at 101.

clear goal of terminating conduct that today would be regarded as a public nuisance.

From the time of Henry II through the sixteenth century, many of the wrongs that in modern times would be classified as public nuisances, including particularly those that did not involve real property in any manner, were handled by local criminal courts instead of through the assize of nuisance in the royal courts.²⁷⁶ The principal business of these local courts—variously known as the hundred courts, court *leet*, or “sheriff’s tourn”—was minor public welfare offenses, including blocking public highways or fouling them through the dumping of garbage, pollution from noxious trades, and public morals offenses such as operating “bawdy-houses” or disorderly ale houses. When the King’s courts at Westminster began to supervise the jurisdiction of the local criminal courts in the seventeenth century, they held that the presentment (indictment) of any person prosecuted in these courts had to state that the alleged conduct of the defendant was “*ad commune nocumentum*,”²⁷⁷ that is, a harm to the community at large.

William Sheppard, a seventeenth century treatise writer, included in his description of the jurisdiction of the courts *leet* a heading of “common nuisances” including “matters affecting public highways and waterways; polluting the air ‘with houses of office, laying of garbage, carrion or the like, if it be near the common high way,’ victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell products unfit for human consumption; running ‘lewd ale-houses’; and subdividing houses in good neighbourhoods ‘that become hurtful to the place by overpestring it with poor.’”²⁷⁸ By the late sixteenth century, the courts *leet* were in decline and their jurisdiction over “common nuisances” was absorbed by the justices of the peace. In short, the scope of the local courts’ jurisdiction over public welfare offenses bears remarkable resemblance to the interferences classified as “public nuisances” in nineteenth and twentieth century American law. Again, the remedies available in these courts were limited to abatement and criminal prosecution. In addition to these “public nuisances” handled by the local criminal courts, the King’s Bench had residual power to criminally prosecute any misconduct that threatened the public good.²⁷⁹

276. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 59-61 (1989).

277. Anon (1669) 1 Ventris 27, 86 E.R. 19.

278. Spencer, *supra* note 276, at 60, (quoting WILLIAM SHEPPARD, THE COURT-KEEPER’S GUIDE, OR A PLAIN AND FAMILIAR TREATISE NEEDFUL AND USEFUL FOR THE HELP OF MANY THAT ARE EMPLOYED IN THE KEEPING OF LAW-DAYS, OR COURTS BARON, 5th ed., 1662 from ROILE’S ABRIDGMENT 139 (1668)).

279. Spencer, *supra* note 276, at 61-63.

The inchoate distinction between what would become the separate legal concepts of public nuisance and private nuisance began to emerge during this period. If the defendant's actions harmed only a single plaintiff, the proper remedy was an action for damages, the precursor of private nuisance. If the nuisance affected the entire community, it most often was addressed by the local courts as a criminal or abatement matter. Actions for damages were not available in such cases.²⁸⁰ The reason for this rule was explained in 1535 by Chief Justice Baldwin in a case in which the court rejected a plaintiff's claim for damages resulting from the obstruction of a public highway.²⁸¹ Baldwin stated that "if one person shall have an action for this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case."²⁸²

The distinction between public nuisance and private nuisance emerges more clearly between the mid-fourteenth and the seventeenth centuries. First, let us consider the development of nuisance as a civil remedy, and then we will turn our attention to criminal prosecutions for public nuisance.

Though the assize of nuisance was the older and more common remedy for nuisance in the royal courts, by the thirteenth and fourteenth century some nuisances were found to be actionable as trespasses.²⁸³ These included those "private" nuisances that included a physical invasion of the plaintiff's property as well as those cases in which the defendant crossed onto plaintiff's property in order to block a waterway. Generally the royal courts were more willing to allow an action for trespass in a case where there was a "breach of the king's peace," such as what would today be regarded as a public nuisance, than in the case of a private nuisance where the assize of nuisance generally was considered the appropriate remedy.

The emergence of the new tort of trespass on the case, which lacked the requirement of "force" or "directness" required for trespass, posed the possibility of much greater overlap with the assize of nuisance than previously had existed between nuisance and trespass.²⁸⁴ Actions "on the case" during this period include numerous examples of "private nuisance," including those seeking compensation for the flooding of plaintiff's land because the defendant had failed to repair his sea walls, and actions for failure to repair roads, bridges, and fences.

280. *Id.* at 59, 73.

281. Y.B. Mich, 27 Hen. 8, f. 27 pl. 10.

282. *Id.*

283. IBBETSON, *supra* note 250, at 101.

284. *Id.* at 103.

One critical issue was whether the royal courts would take jurisdiction through a writ of trespass on the case if another adequate remedy existed—such as abatement of the nuisance through the assize of nuisance or criminal prosecution by local courts. During the fifteenth and sixteenth centuries, the yearbooks suggest that royal courts heard a number of nuisance actions without regard to whether this requirement was satisfied. In 1566, however, the Common Pleas held that trespass on the case was not available for a “local or real disturbance,” such as where a right of way was obstructed.²⁸⁵ The King’s Bench disagreed, however, and heard such cases until the 1590s when the Exchequer Chamber reversed these holdings on the grounds that the proper action for nuisance was the assize. Finally the matter was settled for the English courts in 1601 in *Slade’s Case*,²⁸⁶ which held that plaintiff had the right to choose between available actions, that is—in the instance of public nuisance—between an action on the case and an assize action.

Ibbetson argues that this history of jurisdictional boundaries is important in understanding today’s torts of private nuisance and public nuisance:

There is a serious point to this formalism. The concentration on the boundary between the action on the case and the assize of nuisance meant that, as the tort of nuisance was consolidated, it did not wholly escape the shackles of the old thinking and remained firmly the tort of nuisance. So far as private nuisance was concerned it was still primarily concerned with damage to the plaintiff’s land and interference with the enjoyment of it, and so far as public nuisance was concerned it was still centred [sic] around the blocking of roads and the diversion of watercourses.²⁸⁷

During this same period of time, it became clear that criminal prosecutions were not available against conduct that today would be classified as a private nuisance. Rolle’s *Abridgment*, published in 1668, provides that “all misdemeanors whatsoever of a publickly evil example against the public law, may be indicted; but no injuries of a private nature, unless they in some way concern the KING.”²⁸⁸

285. *Yevance v. Holcombe* (1566) 2 Dyer 250, 3 Leon 13, 4 Leon 167, 224, Coke’s *Entires*, f.11b.

286. *Cantrel v. Church*, 2 Croke 854 (K.B. 1601) Cro Eliz 845, Noy 37.

287. IBBETSON, *supra* note 250, at 104.

288. *Quoted in Spencer*, *supra* note 276, at 63 n.32.

C. Legislatively Created Public Nuisances and an Early Attempt to Define the Parameters of "Public Nuisance"

At least by the seventeenth century, Parliament also was adding to the varieties of conduct found by the courts to constitute the crime of public nuisance, thus beginning a pattern of legislative bodies declaring certain activities to be public nuisances that continues to this day. Parliament's incentive to declare a crime to be a public nuisance was its struggle for power with a succession of English kings. The king had a dispensing power to "pardon in advance" a subject's criminal conduct if the crime was *malum prohibitum*, but not if it was *malum in se*.²⁸⁹ As early as 1495, the law provided that a public nuisance was *malum in se* and, therefore, could not be pardoned in advance by the king.²⁹⁰ Perhaps the most notorious example of Parliament's use of the device of declaring a crime to be a public nuisance in order to avoid royal dispensation occurred when Parliament made it a crime to import Irish beef and declared it to be a public nuisance.²⁹¹ The King opposed the legislation because his realm at that time also included Ireland.

The disparate origins of public nuisance were brought together—as so often is the case—by a treatise writer.²⁹² In 1716, William Hawkins published *Pleas of the Crown*, the first comprehensive treatment of English criminal law that sought to provide definitions of each offense and categorize the crimes. As described by Professor J.R. Spencer, Hawkins's impact on the law of public nuisance has been profound:

As might be expected, Hawkins had problems fitting everything into a tidy scheme, and ended up with an annoying pile of bits and pieces left over. These he seems to have dealt with by taking the vague heading "common nuisance," using it as a residual category, and stuffing into it all the things that he could fit in nowhere else. Having done so, he fashioned a definition of the concept broad enough to cover everything he had grouped within it: . . . The definition of common nuisance which he fabricated to cover all this is "an offence against the publick, either doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires."²⁹³

This definition is so wide that it can scarcely be called a definition at all, and it is amazing that anyone should assume that Hawkins was

289. The Crown's dispensing power was prohibited by the Bill of Rights Act of 1689. See Spencer, *supra* note 276, at 64.

290. (1495) Y.B. Mich. 11 Hen. VII ff. 11-12, pl. 35.

291. 18 Car. II cap. 2.

292. See Spencer, *supra* note 276, at 65-66.

293. *Id.*

describing a single offence, rather than making a residual category of offences which did not fit anywhere else in his scheme. Nevertheless, Hawkins's words have been so interpreted, and his "definition" is the basis of the definition for a single offence of public nuisance which appears in almost every book on tort or criminal law today.²⁹⁴

D. Public and Private Remedies for Public Nuisance

By the second half of the eighteenth century, injunctive relief in the civil courts of England began to replace criminal prosecutions as the principal means of dealing with public nuisances.²⁹⁵ Initially, injunctive relief was seen as a supplement to the criminal prosecution, generally because the criminal prosecution took so long. By 1752, however, private parties began to seek injunctive relief to abate public nuisances. In the case of *Baines v. Baker*,²⁹⁶ the defendant had established an "inoculation hospital" where persons concerned that they would catch smallpox could go and be infected under promising conditions so that they could inoculate themselves. A neighbor understandably thought the hospital was a public nuisance, and sought an injunction in his own name. Lord Hardwicke denied his request on the grounds that the hospital was a public nuisance and it was the Attorney General's decision as to whether to file an information in the King's Bench. Although it appears that Hardwicke in 1752 was referring to criminal charges, in the case of *A.G. v. Johnson* in 1819,²⁹⁷ the Attorney General filed an information seeking injunctive relief in the King's Bench to abate an illegal wharf in the Thames. The King's Bench, citing Lord Hardwicke's language, granted the injunction. Thus, the way was cleared for the Attorney General to initiate civil proceedings, often at the behest of a private party, to abate a public nuisance. Eventually, under English common law, a private party as well was able to obtain injunctive relief in his own name to abate a nuisance.²⁹⁸

In medieval times, no private tort action was allowed for a public—or common—nuisance.²⁹⁹ As previously described, the argument was that if a private claim for damages were allowed, the defendant would be faced with hundreds of such actions for the same offense. In 1535,

294. *Id.*

295. See Spencer, *supra* note 276, at 66-71.

296. 27 E.R. 105 (Ch. 1752) *sub nom. anon.* 3 Atk. 751, 26 E.R. 1230. It is suggested as early as 1411 that an individual may sue. Y.B. 12 Hy. IV. p. 43 (1411); see William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FL. L. REV. 27 (1948).

297. (1819) 2 Wils. Ch. 87, 37 E.R. 297.

298. See *Crowder v. Tinkler* 34 E.R. 645; *Boyce v. Paddington Open* [1903] 1 Ch. 110, [1906] A.C. 1.

299. BAKER, *supra* note 251, at 362.

however, a person who suffered much greater damage than other members of the public became entitled, for the first time, to sue for damages.³⁰⁰ The plaintiff complained that he was unable to reach his property because the defendant had obstructed the highway with offal (butcher's waste). A majority of the court thought that an action would lie. Justice Fitzherbert reasoned as follows:

I agree well that each nuisance done in the King's highway is punishable in the Leet and not by action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt. So if one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered more damage than any other person.³⁰¹

Since that time, Fitzherbert's requirement of what has become known as "special damage"³⁰² has governed when a private party can bring an action for damages based upon a public nuisance.³⁰³

E. The History of Public Nuisance in American Law

As was the case with many aspects of the common law, the English law of public nuisance, or common nuisance, was adopted without significant change in colonial America and subsequently in the new republic during its early years. The early American cases of what would now be regarded as public nuisance fell into two categories. Most public nuisance actions involved the obstruction of either public highways³⁰⁴ or navigable waterways.³⁰⁵ Less common were a loose amalgamation of

300. Anon., Y.B. Mich. 27 Hen. 8, f.27, pl. 10 (1535).

301. *Id.*

302. *E.g.*, Blair v. Anderson, 570 N.E. 2d 1337 (Ind. App. 1991); RESTATEMENT (SECOND) OF TORTS § 821C (1979). Professor Antolini argues that subsequent cases and treatises have misinterpreted Fitzherbert's famous opinion. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 790-805 (2001). Fitzherbert argued, according to Antolini, that the plaintiff should have a private cause of action whenever he suffered a harm that was "greater" or "more" than other members of the public, not merely when the harm was "different in kind."

303. *See supra* notes 215-18 and accompanying text.

304. *E.g.*, Barr v. Stevens, 4 Ky. 292 (Ky. 1808); Thayer v. Dudley, 3 Mass. 296 (Mass 1807); 4 Mc. 93 (1826); Olcott v. Banfill, 4 N.H. 537 (N.H. 1829); Hendrick v. Andrick, 3 Va. 267 (Va. 1812).

305. *E.g.*, Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. 91, 9 L. Ed. 1012 (1838); Burrows v. Pixley, 1 Root 362 (Conn. 1792); Lansing v. Smith, 8 Cow. 146 (N.Y. Sup. Ct. 1828); Lansing v. Smith, 4 Wend. 9 (N.Y. 1829); Hughes v. Heiser, 1 Binn. 463 (Pa. 1808); Dimmett v. Eskridge, 20 Va. 308 (1819).

minor offenses involving public morals or the public welfare that were classified as either public nuisances or common nuisances, including lotteries,³⁰⁶ other forms of gambling and wagering,³⁰⁷ keeping a disorderly house or tavern,³⁰⁸ enabling prostitution,³⁰⁹ and using profane language.³¹⁰ Both criminal prosecutions and actions by private individuals seeking compensation for “special damages” from public nuisances or common nuisance continued throughout the nineteenth century.

As was the case in England, the distinction between public or common nuisance, on one hand, and private nuisance on the other, was anything but clear. Judge Allen, dissenting in *Lansing v. Smith*,³¹¹ gave voice to the frequently articulated—but seldom carefully considered—American judicial view, that “[t]he distinction, then, between public and private nuisances is plain and palpable; the first being an injury done which affects the whole community, . . . the second, an injury to the property, privileges or health of individuals of that community”³¹² *Lansing v. Smith* itself, however, is a good example of the blurring of public nuisance and private nuisance. The plaintiff owned a wharf in the Hudson River, and he filed an action for damages against defendants, agents of a company who had built a temporary bridge obstructing the waterway. The majority opinion held that defendants might be indicted for a common nuisance and that the plaintiff may maintain a private suit for his own injury if he suffered actual damages different from that which the law presumes every citizen to sustain.³¹³ This principle was borrowed from the English and was widely accepted among the American courts.³¹⁴

The dissenting judges in *Lansing v. Smith*, however, viewed the case not as one in which the plaintiff might pursue a suit for public nuisance because he had sustained special damages, but instead as one of private nuisance. Indeed in this factual context, a common one, in which the

306. *E.g.*, *Seidenbender v. Charles's Adm'r*, 4 Serg. & Rawle 151 (Pa. 1818) (lottery declared a public nuisance by statute); *State v. Smith*, 10 Tenn. 272 (Tenn. 1829).

307. *E.g.*, *United States v. Holly*, 26 F. Cas. 346 (D.C. Cir. 1829) (operating gambling house); *Van Valkenburgh v. Torrey*, 7 Cow. 252 (N.Y. Sup. Ct. 1827) (wagering on horses).

308. *E.g.*, *United States v. Benner*, 24 F. Cas. 1089 (D.C. Cir. 1837) (disorderly tavern); *Commonwealth v. Stewart*, 1 Serg. & Rawle 342 (Pa. 1815) (keeping of disorderly house).

309. *E.g.*, *Commonwealth v. Harrington*, 20 Mass. 26, 3 Pick. 26 (Mass. 1825).

310. *E.g.*, *State v. Kirby*, 5 N.C. 254 (N.C. 1809) (swearing in the court-yard during the sitting of the jury held to constitute a public nuisance); *State v. Ellar*, 12 N.C. 267 (N.C. 1827) (profane swearing).

311. *Lansing v. Smith*, 4 Wend. 9, 25 (N.Y. 1829) (S. Allen, dissenting).

312. *Id.* at 30.

313. *Id.* at 24-25.

314. *E.g.*, *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97 (1838) (dicta); *Burrow v. Pixley*, 1 Root 362 (Conn. 1792); *Thayer v. Dudley*, 3 Mass. 296 (Mass. 1807).

special damages plaintiff suffers arise from his ownership of property, it is difficult to understand how private nuisance and public nuisance operate as separate and distinct concepts.

Beginning as early as the 1840s, industrialization also brought public nuisance claims alleging new types of injuries: water pollution³¹⁵ and air pollution³¹⁶ resulting from industrial enterprises. Generally, the rationale for extending a common nuisance cause of action to these new fact patterns was not discussed. In *People v. Gold Run Ditch & Mining Co.*,³¹⁷ however, the California Supreme Court traced the lineage of these claims to earlier cases involving obstructions to public waterways:

Great water highways belong to the same class of public rights, and are governed by the same general rules applicable to highways upon land. Any contracting or narrowing of a public highway on land is a nuisance; and all unauthorized intrusions upon a water highway, for purposes unconnected with the right of navigation or passage, are nuisances. To make use of the banks of a river for dumping places, from which to cast into the river annually six hundred thousand cubic yards of mining debris, consisting of bowlders [sic], sand, earth, and waste materials, to be carried by the velocity of the stream down its course and into and along a navigable river, is an encroachment upon the soil of the latter, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood, or any considerable number of persons, to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance.

The precedents supporting claims against those engaged in polluting the air are more difficult to trace. Presumably, the justification for extending public nuisance to these fact patterns lay either in the long tradition of finding noxious trades to be public or common nuisances³¹⁸ or in the fact that often the “unpleasant and unwholesome vapors”³¹⁹ resulted from the spoiling of water.³²⁰

315. *E.g.*, *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) (dumping debris and waste into river); *Chenoweth v. Hicks*, 5 Ind. 224 (Ind. 1854) (slaughterhouse wastes dumped into waterway); *Luning v. State*, 2 Wis. 215 (Wis. 1849) (erection of dam creating mill-pond with stagnant waters).

316. *E.g.*, *Commonwealth v. Brown*, 54 Mass 365 (Mass. 1847) (Shaw, C.J.) (unwholesome smokes and vapors from manufacture of neat's foot oil; indictment held invalid); *Smiths v. McConathy*, 11 Mo. 517 (Mo. 1848) (vapors from distillery and hog waste); *Price v. Grantz*, 11 A. 794 (Pa. 1888) (dust from manufacture of lead pipe and shot).

317. 4 P. 1152, 1155-56 (Cal. 1884) (citations omitted).

318. *E.g.*, *Brown v. E. & Midlands Ry. Co.* 22 Q.B.D.391 (Eng. C.A. 1889); *Wesson v. Washburn Iron Co.*, 95 Mass. 95 (Mass. 1866); *Francis v. Schoellkop*, 53 N.Y. 152 (N.Y. 1873).

319. *Luning v. State*, 2 Wis. 215, 219 (1849).

320. *Id.*; see also *Chenoweth*, 5 Ind. 224.

Perhaps more important than these early industrial era public nuisances cases filed against businesses that polluted air or water were those against railroads which were rarely found to constitute public nuisances. Where the operation of the railroad was pursuant to a legislative charter or license and the operation of the railroad was in accordance with the expectations of the legislature, courts generally held that the railroad constituted neither a public nuisance nor a private nuisance.³²¹

Professor Morton Horwitz claims that courts during the nineteenth century expanded the use of the public nuisance theory and concomitantly reduced the scope of the private nuisance claim as a way of preventing private parties from successfully suing for compensation. Horwitz's argument is probably overstated. It appears premised upon the assumption that in the early nineteenth century, there already existed a clear distinction between a private cause of action for a public nuisance in a case in which there were special damages and an action for private nuisance. As previously mentioned, this distinction is probably a twentieth century perspective on a distinction that was still blurred during the mid-nineteenth century. In these early nuisance cases against railroads, courts considered both public nuisance and private nuisance claims, and a court's decision that a public nuisance was not viable did not preclude consideration of a private nuisance claim.³²² The rejection of both public nuisance claims and private nuisance claims more often is premised upon the sanctioning of the railroad's operations by legislative authority and the absence of negligence.³²³ It would appear that Horwitz is correct, however, in his core conclusion that the perceived need to protect railroads and emerging industries from ruinous damage judgments discouraged at least some courts from awarding private plaintiffs damages on either a public nuisance or a private nuisance theory.³²⁴

321. *E.g.*, *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. (8 Dana) 289 (Ky. 1839); *Bordentown & S. Amboy Tpk., Rd. v. Camden A.R. & Transp. Co.*, 17 N.J.L. 314 (N.J. 1839).

322. *E.g.*, *Atkinson St. Ry. Co. v. Nave*, 17 P. 587 (Kan. 1888); *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. (8 Dana) 289 (Ky. 1839).

323. As early as 1806, in *People v. C. & L. Sands*, 1 Johns 78 (N.Y. 1806), a majority of the judges of the Supreme Court of Judicature of New York required negligence to sustain an indictment for public nuisance for the storing of gunpowder. This requirement in the context of an indictment for public nuisance appears to pre-date the articulation of a negligence standard in tort claims generally.

324. In *Lexington & Ohio R.R. Co.*, 38 Ky. (8 Dana) 289, for example, the court denied both the plaintiff's public nuisance and private nuisance claims and explained:

The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here, as elsewhere, to the improved and improving condition of our country and our countrymen. And therefore, rail roads and

Even though public nuisance law did not provide a vehicle for many who sought to recover damages resulting from the injuries that accompanied the onset of railroads and industrial enterprises, it continued to play an important role in the United States during the late nineteenth and early twentieth centuries. State legislatures, particularly during times of economic and industrial transformation, could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public. American traditions of both private ownership of enterprises and the assertion of individual rights inevitably meant that from time to time businesses and individuals, operating without any need for prior sanction from their government or other community norm-mediating groups, such as the church, undertook activities that injured or annoyed the public.

In a legal regime in which regulation was the exception and not the rule, public nuisance was a principal "stopgap" measure. While it enabled public authorities to find conduct injurious to the public welfare to be illegal, the principal purpose of public nuisance law does not appear to have been punishment. Instead, public nuisance statutes gave the state the opportunity to terminate such conduct, either through criminal prosecutions or, more directly, through abatement actions.

Two different types of public nuisance statutes emerged during this period. The first kind of statute gave the state the power to prosecute or abate conduct described in broad terms as constituting a public nuisance.³²⁵ The second statutory approach, often employed in tandem with the first, was for a state to declare a set of specific offenses to constitute public nuisances through a series of specific statutes. For example, a statute enacted in Tennessee in 1915 declared:

That the conducting, maintaining, carrying on, or engaging in the sale of intoxicating liquors, the keeping, maintaining, or conducting bawdy or assignation houses, and the conducting, operating, keeping, running, or maintaining gambling houses . . . are hereby declared to be public nuisances³²⁶

locomotive steam cars—the offspring, as they will also be the parents, of progressive improvement—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and therefore more mischievous.

Id. at 310.

325. See, e.g., CAL. CIV. CODE § 3479 (1997); *supra* text accompanying note 166, first enacted in 1872.

326. 1915 Tenn. Pub. Acts, Chapter 11, *quoted in* State *ex rel.* Mynatt v. King, 191 S.W. 352, 352-53 (Tenn. 1916).

Similarly, a Washington statute in effect in 1904 declared the following to be a nuisance:

To erect, continue, or use any building, or other place, for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, offensive smells or otherwise is offensive or dangerous to the health of individuals or the public.³²⁷

The limited evidence available suggests that criminal prosecutions or suits for injunctive relief brought by the state were far more common as remedies for public nuisance during this period than were actions for damages brought by private plaintiffs who had sustained “special” or “extraordinary” damages. Though admittedly an imprecise measure, an electronic word search request for the period from 1890 through 1929 produces more than 750 written opinions concerning criminal prosecutions for public nuisance³²⁸ and more than 125 opinions involving suits for injunctive relief brought by public officials against a public nuisance,³²⁹ as compared with an estimate of less than one hundred opinions³³⁰ involving actions for damages based upon public nuisance brought by individuals.

The onset of the Progressive Era and the New Deal saw a substantial reduction in both governmental actions for public nuisance, whether criminal prosecutions³³¹ or suits seeking injunctive relief against public nuisances, and actions brought by individuals seeking special damages or extraordinary damages.³³² A principal reason was that the development of comprehensive statutory and regulatory schemes that

327. *Wilcox v. Henry*, 77 P. 1055 (1904) (quoting BAL. ANN. CODE § 3084 (7)).

328. A Lexis search for the period Jan. 1, 1890 through Dec. 31, 1929 for “Combined Federal and State Case Law—U.S.” using the search request “public nuisance or common nuisance w/8 prosecution or crim! or indictment or information or misdemeanor” resulted in 754 cases (last visited Aug. 28, 2002).

329. A Lexis search for the period Jan. 1, 1890 through Dec. 31, 1929 for “Combined Federal and State Case Law—U.S.” using the search request “public nuisance or common nuisance w/8 injunction or enjoin w/5 attorney general or state or city or municipality or county or board or secretary resulted in 126 cases (last visited Aug. 28, 2002).

330. A Lexis search for the period Jan. 1, 1890 through Dec. 31, 1929 for “Combined Federal and State Case Law—U.S.” using the search request “public nuisance or common nuisance w/8 special damages or extraordinary damages w/5 action or claim w/3 damages” resulted in 4 cases. A Lexis search for the period Jan. 1, 1890 through Dec. 31, 1929 for “All Federal and State Cases” using the search request “public nuisance or common nuisance w/8 special damages or extraordinary damages” resulted in 214 cases (last visited Aug. 28, 2002). A perusal of the first half of these cases showed that less than half were ones in which plaintiffs sought damages.

331. A Lexis search for written opinions involving criminal prosecutions for public nuisance from Jan. 1, 1930 to Dec. 31, 1969, suggests that the number of criminal prosecutions for public nuisance was reduced by at least fifty percent compared with the previous thirty year period (last visited Aug. 28, 2002).

332. A Lexis search for the period Jan. 1, 1930 through Dec. 31, 1969 for “All Federal and State Cases” using the search request “public nuisance or common nuisance w/8 special damages or extraordinary damages” resulted in ninety opinions (last visited Aug. 28, 2002).

substituted other means of regulation for many former targets of public nuisance prosecutions. When the first Restatement of Torts was approved in 1939, it did not even mention public nuisance.³³³

*F. Prosser, the Restatement (Second) of Torts, and the
Environmental Law Movement*

In 1966, Professor William Prosser, the Reporter for the Restatement (Second) of Torts tackled the law of public nuisance and sought to impose a rule-like structure on the tort. He declared that “[a] public or ‘common’ nuisance is always a crime.”³³⁴ He identified two ways in which defendant’s conduct could result in liability for damages if the other requirements of the tort were satisfied.³³⁵ In Prosser’s view, a defendant would be liable for conduct that was either a violation of a criminal statute or else “[l]iability may rest upon any of the three familiar tort bases: intent, negligence, or strict liability.”³³⁶

When Prosser first submitted the proposed draft of the public nuisance provisions of the Restatement (Second) of Torts, he sought to limit recovery to those situations in which there had been a violation of a criminal statute. The available appellate decisions during the preceding decades supported this proposition.³³⁷ Section 821B of his proposed draft provided: “A public nuisance is a criminal interference with a right common to all members of the public.”³³⁸ Under section 821C, liability in tort was limited “only to those who have suffered harm of a kind different from that suffered by other members of the public exercising the public right.” When first brought before the American Law Institute, these provisions—after some discussion—were easily approved.³³⁹

At the very next meeting of the American Law Institute, however, members of the Institute who saw Prosser’s proffered language as a way to restrict the use of public nuisance in the environmental cases then emerging sought to have it reconsidered. John P. Frank, a practitioner from Arizona, led the charge for reconsideration:

333. RESTATEMENT OF TORTS (1939).

334. Prosser, *supra* note 1, at 997.

335. *Id.* at 1003.

336. *Id.*

337. See John W. Wade, *Environmental Protection, The Common Law of Nuisance and The Restatement of Torts*, 8 FORUM 165, 168 (1972).

338. RESTATEMENT (SECOND) OF TORTS 6, 16-44 (Tentative Draft No. 15, 1969).

339. See ALI Proceedings 277-287 (1969); see generally Antolini, *supra* note 301, at 819-51; Wade, *supra* note 336.

What is happening at the moment all over America is that the people are asking to deal with pollution of air and of water and of land, that in this connection a developing body of law is beginning to formulate which is breaking the bounds of traditional public nuisance. What is happening in our portions of this Restatement is that we are clamping a ceiling down, and by this restatement of public nuisance we are making it impossible to use the courts for the most important single social function which at this moment law in its civil reach ought to have

Pollution may be a crime against God and nature, but it is not usually a crime against the laws of the state, so that by putting in that definition we make it impossible to reach the problem of the black cloud of filth which hangs over my community and, I suspect, yours.³⁴⁰

Two staff attorneys for the Natural Resources Defense Council argued in an article published after the debate that it was important to have public nuisance available as grounds for a remedy, even if there were no criminal violation, in order to protect “public” interests other than the “private” interests protected by the tort of private nuisance:

[M]odern courts should not permit the right to challenge pollution to depend on property ownership, nor should they, in dealing with substantial pollution questions, focus only on the effect on a plaintiff’s enjoyment of his land. . . . If any injured party may bring a nuisance action, public or private, then private nuisance actions may be reserved for situations in which the principal problem is invasion of property interests, and environmental threats to the health, comfort, and beauty of the community will be treated—as they logically should—as public nuisances.³⁴¹

The two public nuisance sections were sent back to the reporter for further study and reconsideration.³⁴² In May 1971, the American Law Institute adopted a version of section 821B of the Restatement (Second) of Torts that unmoored the tort of public nuisance from decades of law that generally had required a violation of criminal law:

§ 821B Public Nuisance

(1) A public nuisance is an unreasonable interference with a right common to the general public.

340. Presentation of Restatement of Law, Second, Torts, Tentative Draft No. 16, A.L.I. Proc. 287, 291 (remarks of John P. Frank).

341. John E. Bryson & Agnus Macbeth, *Public Nuisance, The Restatement (Second) of Torts, and Environmental Law*, 2 *ECOLOGY L.Q.* 241, 276 (1972).

342. See ALI Proceedings 287-305 (1970). Professor Antolini reports that the ALI proceedings deeply discouraged and affected Prosser. Antolini, *supra* note 301, at 840-51.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(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.³⁴³

A subsequent section of the Restatement (Second), section 821C, accurately reflected past law by establishing that in order for a private individual to seek damages from a public nuisance, that individual "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 the interference."³⁴⁴ The section further provided, however, that injunctive relief to abate the nuisance could also be sought by a public official or someone having "standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."³⁴⁵

The language of section 821B of the Restatement goes substantially beyond the previous law in allowing a finding of the tort of public nuisance. As previously described, many judicial findings of a tortious public nuisance during the nineteenth and twentieth centuries resulted from a violation of a state statute establishing that certain specified conduct constituted a public nuisance.³⁴⁶ In other cases, tort recovery was allowed for a public nuisance when a state statute defined the parameters of a broadly stated criminal violation entitled "public nuisance" and the private plaintiff had sustained an injury of special damages beyond those suffered by other members of the general public.³⁴⁷ In still other cases, particularly during the nineteenth century, plaintiffs recovered damages because the conduct alleged to constitute a public nuisance fell within the parameters of the most ancient understanding of what constituted a public nuisance—the obstruction of a public highway or navigable stream or the operation of a noisome or noxious trade.³⁴⁸ In addition, many cases from the beginning of industrialization allowed recovery for pollution of these same streams or

343. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

344. *Id.* § 821C.

345. *Id.*

346. *Supra* notes 325-27 and accompanying text.

347. *Supra* notes 313-14 & 325 and accompanying text.

348. *Supra* notes 311-17 and accompanying text.

pollution of the air caused by a trade or business. In either of these latter two situations, the cases' lineage is directly traceable to more traditional forms of public nuisance.

The language of section 821B, however, arguably goes far beyond the types of conduct previously recognized by the courts as tortious public nuisance. It basically defines public nuisance as "an unreasonable interference with a right common to the general public."³⁴⁹ If a court adopts the rationale of this open-ended provision, the only terms of limitations contained within the Restatement section itself are that (1) defendant's conduct must interfere with a right "common to the general public" and (2) such interference must be "unreasonable." Section 821B then goes on to define three factors—dissimilar from the definitions, rules, and principles more typically found in the ALI's restatements—to be used in guiding courts as to the meaning of "unreasonable."³⁵⁰ Further, two of the three factors—(a) and (c)—are articulated in very amorphous, open-ended language.

The rejection of Dean William Prosser's substantially more restrictive language, following the revolt by environmentalists and their supporters, was intended to make the tort available against various forms of environmental pollution. Most of the cases the environmentalists intended to cover fell within the historical understanding of the tort. The language of the Restatement and its reliance on a multi-factorial approach to determine when a court should impose liability for a public nuisance, however, went beyond what was necessary for the environmental movement and was destined to invite mischief in other areas—such as products liability—where the historical core purposes of public nuisance do not apply and where alternative theories of recoveries are available.

In short, section 821B does not untangle the jungle of 900 years of confusion surrounding recovery for damages under public nuisance law. It serves instead as an invitation for judges and jurors to provide their own definitions of what constitutes "unreasonable interference" and "a right common to the general public" without the guidance generally provided by precedents.

Section V of this article analyzes the appropriate parameters of the tort of public nuisance and whether this tort is sufficiently broad to provide a remedy for mass products torts. Before that analysis, however, the impact of the environmental law movement on the expansion of the scope of the public nuisance tort is considered.

349. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

350. *Id.*

*G. The Impact of the "Love Canal" Litigation and other
Toxic Torts on the Law of Public Nuisance*

As previously noted, the origins of public nuisance and its growth during the nineteenth century were in response to the need for a legal means to stop a defendant's conduct that was injurious to the public health or welfare. Beginning in the 1970s and 1980s, however, some states successfully pursued public nuisance actions against defendants who had created or contributed to the creation of an injurious condition at some point in the past, even if they were no longer conducting such activity.³⁵¹ These cases broke the heretofore prerequisite link between the defendant's ability to abate the injurious condition and the court's finding the defendant liable for public nuisance.

This expansion of liability for public nuisance perhaps can best be explained by examining *United States v. Hooker Chemicals & Plastics Corporation (Hooker II)*,³⁵² one of the many opinions in the "Love Canal" litigation of the 1980s. The State of New York sought to hold defendant Occidental Chemical Corporation (Occidental) liable under public nuisance law for the costs caused by toxic wastes stored in the Love Canal more than thirty-five years earlier by Occidental's corporate predecessor, the Hooker Electrochemical Company. In 1953, Hooker had sold the property to the local board of education, disclosing the previous use of the canal as a toxic waste dumpsite.³⁵³

In an earlier opinion (*Hooker I*),³⁵⁴ the court had found Occidental liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),³⁵⁵ for the costs incurred by the federal and state governments in cleaning up the Love Canal site. Section 107(a) of CERCLA outlines four groups of potentially liable parties including "past owners and operators of hazardous waste facilities."³⁵⁶ The court rejected Occidental's argument that it could not be held liable under the statute for past acts and explicitly found that "CERCLA's legislative history suggests that the statute was enacted as a means of compelling the waste disposal industry to correct its past

351. *E.g.*, *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960, 963-70 (W.D.N.Y. 1989).

352. *Id.*

353. *Id.* at 961-62.

354. *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988).

355. 42 U.S.C. § 9607(a) (2000).

356. *Id.* § 9607 (a) (2) (2000).

mistakes and to provide a solution for the dangers posed by inactive abandoned waste sites.”³⁵⁷

In *Hooker II*, despite the absence of any similar statutory command with respect to the effect of the legislation on existing common law, the court borrowed the CERCLA-based analysis from *Hooker I* and applied it to the public nuisance claims, finding that Occidental was liable for “creation of the ‘public health nuisance’”³⁵⁸ even though Occidental was not in control of the toxic waste site at the time of the litigation. The court quotes the reasoning of an earlier New York state trial court opinion, *State v. Schenectady Chemicals, Inc.*:³⁵⁹

While ordinarily nuisance is an action pursued against the owner of land for some wrongful activity conducted thereon, “everyone who creates a nuisance or participates in the creation or maintenance . . . of a nuisance [is] liable jointly and severally for the wrong and injury done thereby.”³⁶⁰ Even a non-landowner can be liable for taking part in the creation of a nuisance upon the property of another.

The New York trial court had been quite explicit in identifying both the sympathetic fact patterns and the policy analysis that drove its conclusion, and in doing so revealed its strongly activist bias:

The common law is not static. Society has repeatedly been confronted with new inventions and products that, through foreseen and unforeseen events, have imposed dangers upon society (explosives are an example). The courts have reacted by expanding the common law to meet the challenge The modern chemical industry, and the problems engendered through the disposal of its by-products, is, to a large extent, a creature of the twentieth century. Since the Second World War hundreds of previously unknown chemicals have been created. The wastes produced have been dumped, sometimes openly and sometimes surreptitiously, at thousands of sites across the country. Belatedly it has been discovered that the waste products are polluting the air and water and pose a consequent threat to all life forms. Someone must pay to correct the problem³⁶¹

The court in *Hooker II* also acknowledged that the boundaries of “nuisance” were very open-ended: “the term nuisance . . . means no more than harm, injury, inconvenience, or annoyance.”³⁶²

357. *Hooker I*, 680 F. Supp. at 556.

358. *Hooker II*, 722 F. Supp. at 967.

359. 459 N.Y.S.2d 971 (N.Y. 1983).

360. *Id.* at 976 (quoting 17 Carmody-Wait 2d, NY Prac, § 107:59, p. 334).

361. *Id.* at 977.

362. 722 F. Supp. at 964 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 571).

Hooker II and *Schenectady Chemicals* are good examples of cases that blur the distinction between public nuisance and private nuisance. Both courts borrow from private nuisance the liability-expanding principle that a defendant can be held liable for creating a nuisance even if the defendant does not continue to own or possess the land or otherwise carry on or maintain the nuisance at the time of the litigation.³⁶³ Other courts have approached public nuisance cases in the same way, also following private nuisance precedents that do not require the defendant to own or occupy the property where the injurious condition exists, or otherwise to continue to maintain or carry on the activities constituting such condition.³⁶⁴ By doing so, courts abandon the limits appropriate to public nuisance actions that arose from the historical core purposes of the tort.

Hooker II and *Schenectady Chemicals*, however, also incorporate from private nuisance law the liability-containing requirement that to be actionable as a public nuisance, defendant's conduct must provide an underlying basis of tortious liability. The defendant's conduct must be either intentional and unreasonable, negligent, or actionable as strict liability because it results from "an inherently dangerous [sic]³⁶⁵ activity or use of an unreasonably dangerous product"³⁶⁶

Nevertheless, courts sometimes conclude, erroneously, that unlike the situation with private nuisances, a finding of public nuisance does not require that the defendant have at any time engaged in conduct that falls within any of these three categories.³⁶⁷ In short, these courts abandon not only the traditional restriction of public nuisance to those

363. RESTATEMENT (SECOND) OF TORTS § 834 (1979) provides "One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." Comment b gives as examples "physical conditions that are harmful to neighboring land after the activity that created them has ceased—such as structures, excavations, cesspools, piles of refuse, bodies of water, oil and other substances." Comment c is extremely explicit:

His active conduct has been a substantial factor in creating the harmful condition and so long as his condition continues the harm is traceable to him. *This is true even though he is no longer in a position to abate the condition and to stop the harm.*

Id. (emphasis added).

364. *E.g., In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp.2d 828 (N.D. Ill. 2002) (refusing to dismiss claims against distributor of genetically modified seed corn that allegedly "contaminated the entire corn supply of the United States"); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *State v. Lead Indus. Ass'n* No. 99-5226, 2001 R. I. Super LEXIS 37 (R.I. Apr. 2, 2001).

365. The appropriate term here would be "abnormally dangerous" activity that provides the grounds for a strict liability standard. *See, e.g.,* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 20 (Tentative Draft No. 1, Mar. 28, 2001) ("defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity"); RESTATEMENT (SECOND) OF TORTS § 520 (1965).

366. *Hooker II*, 722 F. Supp. 960, 965 (quoting *State of New York v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (N.Y. 1983)).

367. *E.g., Wood v. Picillo*, 443 A.2d 1244, 1249 (R.I. 1982).

who control the instrumentality causing the nuisance, but also the traditional limits on private nuisance actions to conduct that is intentional and unreasonable or independently tortious.

In these toxic tort cases, public nuisance theory thus becomes unbound from two of the very few constraints on the scope of what may constitute a public nuisance. Motivated by compelling fact patterns, and analogizing both to the explicit statutory intent of CERCLA to establish liability for previous owners of property and to cases of private nuisance, where distinct boundaries of liability were well-established, the courts in *Hooker II* and *Schenectady Chemicals* expanded the possible range of defendants in public nuisance actions far beyond the extent contemplated during the previous 900 years—which had been limited to those whose continuing conduct caused the harm. Thus, the focus of public nuisance law shifted dramatically from its origins as a means of forcing the termination of conduct found harmful to public health or public welfare toward becoming a new source of compensatory damages for a wide variety of arguably injurious conditions that fall within the amorphous definition of the tort.

V. PRODUCTS LIABILITY: BEYOND THE PARAMETERS OF PUBLIC NUISANCE

As the previous sections suggest, the assertion of the public nuisance tort as a theory of recovery in mass products liability claims has resulted from courts using sometimes amorphous definitions of the tort and ignoring its appropriate purposes and long history. There exists no public nuisance opinion that comprehensively analyzes the fundamental principles of the tort and deliberately decides that it applies to products liability cases. There is no analogous opinion to *MacPherson v. Buick Motor Co.*³⁶⁸ regarding the role of negligence in products liability or to *Greenman v. Yuba Power Products, Inc.*³⁶⁹ in the case of strict liability. Instead, the application of public nuisance to the liability of the manufacturers of products appears to be a result of judicial ignorance—calculated or otherwise—of the fundamental principles governing the tort. This section outlines these fundamental principles. It also considers how each principle applies to any attempt to use a public nuisance claim against a products manufacturer.

368. 111 N.E. 1050 (N.Y. 1916).

369. 377 P.2d 897 (Cal. 1963).

A. Interference with a Public Right

As illustrated by the previous section, the origins of the tort of public nuisance are different than those of any other tort. Historically, the recovery of damages has been an ancillary and unusual remedy when a public nuisance was found to exist.³⁷⁰ The core concept behind public nuisance is the right of public authorities to end defendant's conduct that harms the public, through remedies of either injunctive relief³⁷¹ or criminal prosecution.³⁷² For a public nuisance to exist in the first place, there must be interference with a "public right." Only then does the question arise of whether, in an unusual circumstance, a private party has sustained a "special injury."³⁷³

What then is a "public right"? Can the manufacturer or distributor ever interfere with a public right? If so, under what circumstances?

Comment g to the Restatement (Second) of Torts section 821B³⁷⁴ provides in part:

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

In *Ganim v. Smith and Wesson Corp.*,³⁷⁵ the Connecticut Supreme Court stated:

Nuisances are public where they violate public rights, and produce a common injury, and where they constitute an obstruction to public

370. See *supra* notes 207-08, 272, 324-30 and accompanying texts.

371. See *supra* notes 210-12, 295-97, 328-30 and accompanying texts.

372. See *supra* notes 207-12, 328-30 and accompanying texts.

373. See *supra* notes 215-20, 299-303, 313-14 and accompanying text.

374. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979); see also, e.g., *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) ("an unreasonable interference with a right common to the general public") (quoting *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985)); *City of Philadelphia v. Beretta U.S.A.*, 126 F. Supp. 2d 882, 907 (E.D. Pa. 2000), *aff'd* *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002) ("an act 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects'" (quoting W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS §90 (1984)); *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist LEXIS 3598 (N.D. Ill. Mar. 16, 1998); *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980) ("an unreasonable interference with a right common to the general public; it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community") (emphasis added); HARPER ET AL., *supra* note 190, at § 1.23 ("public nuisance, which is the interference with a right common to all members of the public") (emphasis added).

375. 780 A.2d 98 (2001).

rights, that is, the rights enjoyed by citizens as part of the public. . . . If the annoyance is one that is common to the public generally, then it is a public nuisance. . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.³⁷⁶

The term “public right” has a well-defined meaning in the history of public nuisance law, one that courts should not ignore when considering actions against product manufacturers and distributors. Recall that the earliest understanding of the fact patterns constituting public nuisances encompassed obstructions of public highways or navigable waterways, and little else.³⁷⁷ At least by the sixteenth century, noxious and offensive trades that interfered with the health and comfort of those in surrounding areas sometimes were regarded as public nuisances.³⁷⁸ By the mid-nineteenth century, those who polluted navigable waterways³⁷⁹ and those who polluted the surrounding air by conducting noxious trades or businesses were viewed as potentially liable defendants under the tort of public nuisance. During this same time, states sometimes sought to close down disorderly taverns and similar enterprises as public nuisance on the grounds that they endangered public health, comfort, and morals. Consistent with this historical analysis, the Wisconsin Supreme Court recently clarified the meaning of a public right by “defining public nuisance as a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.”³⁸⁰

The essential nature of a “public right,” may be illuminated by contrasting it with the “public interest.” That which might benefit (or harm) “the public interest” is a far broader category than that which actually violates “a public right.” For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing. It follows, then, that “a public right” is to “the public interest” much as “an entitlement” is to “a

376. *Id.* at 131-32.

377. *See supra* notes 264-65 and accompanying text.

378. *See supra* notes 277-78 and accompanying text.

379. *See supra* notes 315-20 and accompanying text.

380. *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 728 (Wis. 2002) (upholding public nuisance claims against adjoining landowner, municipality, and county for failure to prevent overgrown tree branches from obscuring stop sign).

benefit.³⁸¹ If that is the case, then a government recoupment action that may well be initiated to promote or protect the public interest, is not *necessarily* a legitimate vindication of the violation of a public right.

Nor does the mere existence of a statute or regulation designed to protect a class of persons including the plaintiff necessarily create a "public right" entitling an injured party to sue for public nuisance if the statute or regulation is violated. Comment c to Restatement (Second) of Torts section 821B provides that a legislature may explicitly declare "certain conduct or conditions to be public nuisances because they interfere with the rights of the general public."³⁸² In the absence of such a declaration, however, a statute does not define a public right and the violation of such statute does not necessarily constitute a public nuisance. No court has ever so held. There is no concept of public nuisance *per se* corresponding to the doctrine of negligence *per se*.³⁸³

Distinguishing between the violation of a public right and an interference with the public interest in this manner also promotes adherence to the Restatement's requirement that to be actionable an interference with a right common to the general public must be "unreasonable."³⁸⁴ For even if a product is determined to interfere with a public right, guidelines are needed to determine whether that interference is an *unreasonable* one. The variables to consider seem to be: (i) the number of people susceptible, (ii) the degree of risk of harm occurring, (iii) the duration of the risk of harm occurring, and (iv) the severity of the harm that may occur. In the context of any mass products tort, this analysis of whether the interference with a public right is unreasonable would be complex.

The inherently indeterminate nature of this calculation makes it all the more important for courts to make clear, determinative legal distinctions about what constitutes the other necessary core elements of the tort so that such an analysis is avoided in inappropriate cases. A court's desire to promote the public interest in an ideal state of health and well-being should not be sufficient to state a public nuisance claim against a manufacturer whose products, though harmful, do not violate a public right and do not otherwise satisfy the criteria for liability under a public nuisance theory.

381. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999) ("something that promotes well-being: ADVANTAGE").

382. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979).

383. *See generally*, Osborne v. McMasters, 41 N.W. 543 (Minn. 1889); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 14 (Tent. Draft No. 1, Mar. 28, 2001); HARPER ET AL., *supra* note 80.

384. RESTATEMENT (SECOND) OF TORTS § 821B(1) & cmt. c (1979).

The manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right. Even if the owners of a fast-food chain were to sell millions of defectively produced hamburgers causing harm to millions of people who ate them, the violation of rights is a series of separate violations of private rights—typical tort or contract rights that the consumers might have—not a violation of the rights of the general public, or of *the public as the public*. The sheer number of violations does not transform the harm from individual injury to communal injury.

What does a proper understanding of what constitutes a public right suggest about the viability of the triad of most common uses of public nuisance law in mass torts? Regardless of the vast numbers of residents of the United States and other nations of the world who smoke cigarettes or use other tobacco products, any tobacco-related illnesses from which they suffer do not result from a violation of their “public rights,” unless that term is given a much different and more expansive reading than it has during the previous centuries of public nuisance law. The decision to smoke—even one caused by youthful addiction at a time that the tobacco industry concealed or failed to disclose the dangers of cigarette smoking—is a private choice and results from a smoker's consumption of a product individually. While the user of tobacco products now suffering from cancer or other smoking-related disease may have potentially viable causes of action based upon misrepresentation or tort claims traditionally used in products cases, she does not have a viable claim based upon public nuisance. Conceivably, however, a victim of tobacco related-illness who could prove that her disease resulted from “second-hand” smoke, particularly in public places such as public parks or while walking on public thoroughfares, could satisfy this first requirement of public nuisance.

In much the same way, the claims of those injured by criminals using handguns may satisfy this first requirement of public nuisance, interference with a public right. Public authorities traditionally have criminally prosecuted or used injunctive relief to abate public nuisances threatening public safety and public health.³⁸⁵ Protecting citizens from crime and violence traditionally has been viewed as one of the core

385. See *supra* notes 207-12, 295-97, and 328-30 and accompanying text.

functions of public authorities.³⁸⁶ Hence, injury resulting in this context appropriately and logically should be viewed as a violation of a public right. In *Young v. Bryco Arms*,³⁸⁷ the court reasoned:

The first element that a plaintiff must allege in order to state a claim for public nuisance is the existence of "a right common to the general public." . . . Rights of the general public entitled to protection include the right to "the public health, the public safety, the public peace, the public comfort or the public convenience." Restatement (Second) of Torts § 821B(2)(a) (1979) (common law public nuisances include interference with public safety, like shooting off fireworks in the public streets, or interference with public convenience, as by obstruction of a public highway).

Here, plaintiffs allege "the rights of plaintiffs and others to use the streets and public ways without fear, apprehension and injury." . . . In our view, plaintiffs' allegations sufficiently plead the right of the people to be free from disturbance and reasonable apprehension of danger to person and property.³⁸⁸

Whether public nuisance claims against gun manufacturers can meet the other requirements for public nuisance is more problematic, however.³⁸⁹

The concept of public right as that term has been understood in the law of public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned as a result of exposure to deteriorated lead-based paint in private residences or child-care facilities operated by private owners. Despite the tragic nature of the child's illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes—obstruction of highways and waterways, or pollution of air or navigable streams. Even though the law regulates rental housing, in contemporary American law—for better or for worse—the provision of safe and

386. See, e.g., *Union Pac. R.R. v. Cal. Pub. Utils. Comm'n*, 109 F. Supp.2d 1186, 1215 (N.D. Cal. 2000) (dictum) ("maintaining public safety falls within the core of state police powers"); *State v. Ludlow Supermarkets*, 448 A. 2d 791, 798 (Vt. 1982) (Daley, J., concurring) ("the proper role of the police power . . . [is] protecting the public safety, health and welfare").

387. 765 N.E.2d 1 (Ill. App. 2001); accord, *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001). Other courts have held, however, that the concept of unreasonable interference with public rights does not include the sale and distribution of handguns that pose a threat to public safety. E.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421-22 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541-42 (3d Cir. 2001).

388. *Young v. Bryco Arms*, 765 N.E. 2d 1, 10 (Ill. App. Ct. 2001).

389. See *infra* notes 391-442 and accompanying text.

adequate housing is not understood as an enforceable public right.³⁹⁰ Any rights granted tenants and their families under legal regulation applicable to rental housing are private rights, enjoyed by many renters in the community in their capacity as renters, not as members of the public.

In summary, it is an unusual situation in which the conduct of a product manufacturer or distributor can be said to violate a public right as that term has been understood in public nuisance law. Injuries and harm caused by products typically result from private consumption. However widespread the use of the product and the harm it causes, such harm rarely violates a private right.

B. Defendant's Control of the Instrumentality Causing the Harm

History demonstrates that the core purpose underlying public nuisance has been to assure that public authorities have a legal remedy available to terminate conduct of a defendant that is violating a public right and injuring the public safety, health or welfare.³⁹¹ The recovery of damages by a private party sustaining a special injury resulting from defendant's conduct is ancillary to the state's remedy to abate the nuisance.

390. Perhaps a child exposed to lead-bearing paint in a public facility, such as a school or publicly operated childcare facility, could claim a violation of a public right.

Lead poisoning is an affliction more common among young children, because the bodies of older children and adults are not vulnerable to lead poisoning except when exposed to extremely high doses of lead, such as those that may arise during industrial or occupational exposure. Further, the crawling and frequent hand-to-mouth activity of very young children cause them to come into contact with ingestible lead dust.

Section 821B of the Restatement, however, limits public nuisance to an unreasonable interference with a right "common to the general public," and at least one questionable precedent suggests that younger children cannot be construed to be the "general public." In *Maio v. Ig*, 199 A.2d 727 (R.I. 1964), the Rhode Island Supreme Court found no violation of a public right even in a case with underlying facts similar to these. The plaintiff, a minor, through her father and next friend, sued the city of Cranston for injuries suffered while using a swimming pool maintained by the city in a public high school. She alleged that the defendant negligently constructed, installed and maintained a fence which it knew constituted an extremely hazardous condition to those using the pool, and that this constituted a public nuisance. Because she sustained a special injury, she asserted that the city was liable. The court dismissed the public nuisance claim, stating:

If plaintiff had here alleged a nuisance which was "to the common annoyance of the public," we might be warranted in . . . allowing an action for nuisance. . . . The plaintiff has not done this because her averment that the pool was "regularly used by school children of tender years" cannot reasonably be construed as an allegation that the general public, as distinguished from an unspecified number of school children, was exposed to the dangerous condition complained of or that the claimed nuisance affected many as distinguished from a few.

Id. at 729-30.

391. See *supra* notes 207-12, 295-97, 328-30, and 370-72 and accompanying text.

Public nuisance claims against product manufacturers or distributors fail because the defendants no longer have the ability to end the conduct alleged to constitute the nuisance. They may be held liable for damages, of course, under any other theory of recovery that governs harm caused by products. The essence of public nuisance law, however, is ending the harmful conduct. This is impossible for the manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product.

Consider, for example, *Manchester v. National Gypsum Co.*,³⁹² where the court held under New Hampshire law that product manufacturers cannot be held liable for either private or public nuisances because they do not control the instrumentalities alleged to constitute a nuisance. In that case, the city of Manchester had sued manufacturers of asbestos products. The plaintiff had purchased plaster products containing high levels of asbestos for construction and renovation of school buildings. In dismissing the nuisance claims, the court stated:

[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. If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use.

The instrumentality which created the nuisance, in this case, has been in the possession and control of the plaintiff, the City of Manchester, since the time it purchased the products containing asbestos materials. The defendants, after the time of manufacture and sale, no longer had the power to abate the nuisance. Therefore, a basic element of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief.³⁹³

Other judicial opinions make clear that liability for nuisance—both public and private—is premised not on the creation of a nuisance but rather on the defendant's current control of the instrumentality causing the nuisance.³⁹⁴

392. 637 F. Supp. 646 (D.R.I. 1986).

393. *Id.* at 656 (citations omitted).

394. In *Roseville Plaza Ltd. P'ship v. U.S. Gypsum Co.*, 811 F. Supp. 1200 (E.D. Mich. 1992), the court dismissed a public nuisance claim against the manufacturer of asbestos products incorporated into the plaintiff's shopping center: "This case involves a commercial transaction where defendant gave up ownership and control of its product to plaintiff at the time of the sale. In so doing, plaintiff became the exclusive owner and possessor of the product, and defendant thereafter lacked any legal right to abate whatever hazard its product may have posed." *Id.* at 1210; *see also, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 888, 911 (E.D. Pa. 2000), *aff'd* 277 F.3d 415 (3rd Cir. 2001); *Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 266 (D.N.J. 2000), *aff'd* 273 F.3d 536 (3rd Cir. 2001); *Stevens v. Drckich*, 178 Mich. App. 273, 278, 443 N.W. 2d 401, 403 (Mich. Ct. App. 1989) (for liability under public nuisance, defendant must have possession or control of land). Other courts hold defendant

The Restatement (Second) of Torts provisions covering public nuisance are strangely silent on this traditional requirement of public nuisance law that the defendant must be in control of the instrumentality causing the nuisance, but it is possible to speculate about the reasons for this silence. As described in a previous section,³⁹⁵ the public nuisance provisions of the Restatement were adopted after environmentalists and their supporters objected strongly to Dean Prosser's earlier draft that would have limited liability for public nuisances. These environmentalists no doubt wanted the Restatement provisions to enable them to pursue public nuisance actions against both those who maintained toxic waste sites and those who originally contributed to their creation, but no longer owned or controlled them. The Restatement in section 834, comment e, a provision applicable to both private and public nuisances—without acknowledging the very different histories or purposes of the two torts—enables plaintiffs to hold liable defendants “who carried on the activity that created the condition or who participated to a substantial extent in the activity. . . for the continuing harm.”³⁹⁶ In a separate provision, section 839, comment d, the Restatement provides liability on the part of the person in current control of the public nuisance, the more traditional defendant in public nuisance actions:

Liability . . . is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. Thus a vendee of land upon which a harmful physical condition exists may be liable under the rule here stated for failing to abate it after he takes possession, even though

liable for a public nuisance when it creates or participates in carrying on a nuisance, even if it is not in control of the instrumentality causing the nuisance at the time of the injury. *E.g., In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 175 F. Supp.2d 593, 628-29 (S.D.N.Y. 2001); *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (defendant gun manufacturers control the creation and supply of illegal, secondary market for firearms); *Illinois v. Brockman*, 574 N.E.2d 626 (Ill. 1991) (contribution claim in case of public abatement against operator of dump allowed against those who generated and transported waste to dump); *Malezi v. S.W. Rogers Co., Inc.*, 24 Va. Cir. 122 (Va. Cir. Ct. 1991).

395. See *supra* notes 334-50 and accompanying text.

396. RESTATEMENT (SECOND) OF TORTS § 834 cmt. e (1979).

it was created by his vendor, lessor or other person and even though he had no part in its creation.³⁹⁷

Liability under this second prong of the Restatement is more consistent with the history of public nuisance as a means of forcing an end to defendant's harmful conduct. There is less support in earlier case law for a provision creating liability in damages for "creating" the nuisance.

The use of public nuisance claims against manufacturers of handguns and lead-pigment or lead-bearing paint is particularly problematic. The harm or injurious condition allegedly created by the public nuisance clearly is not within the control of the defendants. Further, the injury does not even result from the proper use of the product. Instead it arises from a third-party's actions—the criminal use of handguns or the failure of property owners to properly maintain surfaces covered decades ago with lead-based paint.

A firearm manufacturer is not in control of the instrumentality causing the harm asserted to be the public nuisance at that time the harm occurs and is in no position to avoid the harm:

The plaintiffs urge the court not to follow those cases requiring control over the nuisance at the time the injury occurs. They insist that the nuisance is the distribution practice itself. However, doing so would run contrary to notions of fair play. The defendants have a diminished ability to dictate precisely to whom their products will be sold once they ship them to legally licensed distributors and dealers. More importantly, they lack direct control over how end-purchasers use (or misuse) weapons.³⁹⁸

Similarly, the federal district court for New Jersey dismissed a public nuisance action against gun manufacturers because they did not control or substantially participate in the public nuisance:

[T]he County's public nuisance claim suffers from the fatal defect of failing to allege the required element that the defendants exercised control over the nuisance to be abated. . . . The physical location of this conduct is on the premises of the manufacturer defendants, which operate in several states and at least two foreign nations. No manufacturer is even located in New Jersey. Under the County's public nuisance theory, then, the defendants' wrongful conduct sought

397. *Id.* § 839 cmt. d. In *State v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1984), the Court of Appeals relied on the Restatement comment when it held under New York law that the subsequent purchaser of land liable for the public and private nuisance created by hazardous waste deposited before defendant's purchase of the property. Liability for the nuisance was premised, according to the court, on defendant "learning of the nuisance and having a reasonable opportunity to abate it." *Id.* at 1050.

398. *City of Philadelphia*, 126 F. Supp. 2d at 911.

to be abated transpires in locations far from the streets of Camden, where an alleged criminal market for handguns is the end result. . . .³⁹⁹

The ability of the defendant-manufacturers to terminate the public nuisance is also lacking in cases brought against manufacturers of lead paint or lead pigment seeking damages caused by childhood lead poisoning. More than eighty percent of the lead present in the interiors of residences in the United States in the year 2000 was applied prior to 1940, and lead-based paint has not been used on interiors at all since 1978,⁴⁰⁰ or even earlier in some states and cities.⁴⁰¹ Childhood lead poisoning can be substantially reduced by proper maintenance of the painted surfaces and through proper education. Under these circumstances, former manufacturers of lead pigment and lead paint are not in control of the instrumentality causing the public nuisance and have no ability to abate the nuisance.

If the historical and proper focus of public nuisance law focuses on the need to terminate defendant's conduct found to be harmful, a state or municipality might still argue that it is entitled to seek reimbursement from the defendant of the costs of abating the public nuisance. To those familiar with modern environmental law, this concept is a familiar one. A variety of federal statutes, including the Comprehensive Environmental Responses, Compensation and Liability Act of 1980 (CERCLA)⁴⁰² and similar federal⁴⁰³ and state⁴⁰⁴ acts, allow the government to recover the costs of clean-up and other remediation from those who have contributed to the problem, even if they are no longer in control of the toxic waste site or other property that continues to cause the risk of harm. The need for CERCLA and its cousins, however, arose in the 1970s and 1980s precisely because of the lack of

399. *Bd. of Chosen Freeholders*, 123 F. Supp. 2d at 266.

400. PRESIDENT'S TASK FORCE ON ENVIRONMENTAL HEALTH RISKS AND SAFETY RISKS TO CHILDREN, *ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS*, 2 & 22 (2000).

401. See, e.g., N.J. STAT. ANN. § 24:14A-1 (1971); Baltimore, Md., Ordinance No. 1504 (1958), codified at BALTIMORE, MD., HEALTH CODE §§ 5-401-5-408 (2000); *Sabater v. Lead Indus. Ass'n*, 704 N.Y.S.2d 800 (N.Y. Sup. Ct. 2000) ([T]he sale of interior residential lead paint was prohibited in New York City after Dec. 31, 1959.").

402. 42 U.S.C. § 9607 (a) (4) (A) (2000).

403. RESOURCE CONSERVATION AND RECOVERY ACT OF 1976 (RCRA), as amended, 42 U.S.C. § 6973 (a) (2000).

404. See, e.g., *Genesco, Inc. v. Mich. Dep't of Envtl. Quality*, 645 N.W. 2d 319 (Mich. Ct. App. 2002) (state statute modeled on CERCLA provided liability for clean-up costs); *Mason v. Buchman*, 211 N.W. 2d 552 (Mich. Ct. App. 1973) (city ordinance authorized recovery of costs of abatement of public nuisance); *State v. Employers Ins.*, 644 N.W.2d 820 (Minn. Ct. App. 2002) (statute authorized recovery of abatement costs); *State v. Ketter*, 569 N.W. 2d 589 (Wis. 1997) (state statute authorized recover for clean-up costs of nuisance).

ability of the federal, state, or municipal governments to recover clean-up costs through common law public nuisance actions.

Courts generally have not allowed governments that have abated public nuisances to recover the costs of abatement on a public nuisance theory, either when the defendant remains in control of the instrumentality or when such control has been relinquished.⁴⁰⁵ One can construct a hypothetical in which the result flowing from this principle appears unsound. Suppose that a large truck dumped a load of gravel on a public highway, either negligently or intentionally. The obstruction of the public highway falls clearly within the core boundary of the violation of a public right.⁴⁰⁶ The instrumentality causing the nuisance, the gravel heap, is not, however, within the control of the defendant. Surely a modern court would allow the government to recover from the owner or operator of the truck for costs of remediation.

Regardless of how a court willing to overlook traditional doctrinal barriers might decide this hypothetical, the contemporary mass products tort cases against the manufacturers of tobacco products, firearms, and lead pigment, pose very different issues. When a load of gravel is dumped on the highway, the cause and nature of the problem are clear. The means necessary to abate the harm are unlikely to be in dispute. The possible ability of the government to recover abatement costs in the dumped gravel hypothetical does not give the government a *carte blanche* to cure complex and widespread public health or public safety problems resulting from multiple causes and with a variety of debatable possible solutions. Nor does it require courts awarding damages for the costs of abatement to function as a legislature devising solutions to multi-faced social issues. That is why, in the environmental arena, statutes, not judicial opinions, have established the right of governments to recover clean-up costs and other expenses of remediation.

C. Scope of Liability Under Public Nuisance Law

The chain of causation between the acts of defendant-manufacturers in public nuisance cases and the harms sustained by plaintiffs, particularly state or municipal governments suing to recoup medical assistance payments and other governmental costs, is highly attenuated. The Third Circuit described the causal link that the municipalities must show between the costs they have sustained as a result of firearm violence and the acts of the defendant-manufacturers as follows:

405. *E.g.*, *County of San Luis Obispo v. Abalone Albacore*, 233 Cal. Rptr. 846 (Cal. Ct. App. 1986) (California general public nuisance statute does not authorize recovery of abatement costs).

406. *See supra* notes 166, 264-65 and accompanying text.

This causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps, the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use.⁴⁰⁷

Courts sometimes dismiss public nuisance claims against product manufacturers on the grounds that plaintiff has failed to show that the alleged public nuisance was the proximate cause of plaintiff's injury.⁴⁰⁸ This fundamental tort question is more accurately viewed as the question of whether the scope of liability for defendant's acts extends to the plaintiff's injuries. As the Connecticut Supreme Court stated in *Ganim*:

The question of whether a set of harms suffered by the plaintiff is the direct, or the indirect, remote or derivative, consequence of the defendant's conduct, is not determined, however, simply by the court applying one set of labels or the other to the facts of the case. It is, instead, part of the judicial task, based on policy considerations, of setting some reasonable limits on the legal consequences of wrongful conduct. . . . [W]e have stated: "We recognize that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. W. Prosser & W. Keeton, [Torts (5th Ed. 1984)] § 53, p. 358. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results. W. Prosser & W. Keeton, *supra*, § 43, p. 281."⁴⁰⁹

407. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001).

408. *E.g., id.* at 541; *see also* *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 266 (D.N.J. 2000); *cf.* *City of St. Louis v. Varachi, Inc.*, 39 S.W.3d 531, 537 (Mo. Ct. App. 2001) (rejecting public nuisance action against hotel, court held that "hotel's three-hour rental policy, and the reputation of the hotel as a place frequented by prostitutes" was not the proximate cause of prostitutes soliciting on the streets of the neighborhood). *Id.* at 538.

409. *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 120-21 (Conn. 2001) (citations omitted); *see generally* Restatement (Third) of Torts: Liability for Physical Harm, Special Note on Proximate Cause (Tentative Draft No. 3, Apr. 7, 2003) ("Although the term 'proximate cause' has been in widespread use . . . it is an especially poor one to describe the idea to which it is connected. . . . 'Scope of Liability' more

A fundamental policy distinction should be recognized between scope of liability issues in the context of public nuisance and similar issues in the case of claims premised upon strict products liability. The fundamental principle driving the development of strict products liability theory is that product manufacturers are the most appropriate parties to bear the costs of injuries resulting from the use of their products.⁴¹⁰ Under contemporary products liability law, if a product contributed to the plaintiff's harm, then the existence of other necessary causes of the plaintiff's harm, including some types of misuse of the product, will not prevent the manufacturer from being held liable.⁴¹¹ Neither proximity in time⁴¹² nor space⁴¹³ is required to find the product manufacturer liable. The manufacturer generally desires that its products be distributed in as widespread a geographic area as possible, and manufacturers will be held liable for injuries sustained from the use of their defective products decades after the products were manufactured and distributed.

Remembering that an injured party can still seek recovery, of course, under strict products liability, negligence, or other applicable theories more typically applied to actions against product manufacturers, the scope of liability analysis under public nuisance law should be viewed by

accurately describes the . . . [idea that] [t]ort law does not impose liability on an actor for all harm factually caused by the actor's tortious conduct.").

410. In his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944), Justice Traynor explained the justifications for strict products liability:

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . [T]he manufacturer is best situated to afford such protection.

Id. at 440-41; see also *HARPER ET AL.*, *supra* note 80, at § 28.1 (products liability is "responsive to ever-growing pressure for protection of the consumer, coupled with a realization that liability [will] not unduly inhibit the enterprise of manufacturers and that they [are] well placed both to profit from its lessons and to distribute its burdens").

411. See generally *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 17 cmt. a (1998).

412. See, e.g., *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973) (defendant can be found liable for plaintiff's intestate's death as a result of exposure to products manufactured by defendant as early as 1936).

413. See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 63, 69-70 (2nd Cir. 2001) (plaintiff's intestate who fell to death in elevator shaft in Bogotá, Columbia, sued elevator manufacturer on products liability theory in Connecticut, defendant's principal place of business); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2nd Cir. 1980) (plaintiffs, veterans of Vietnam War, sued manufacturers of herbicide Agent Orange on products liability theories for injuries sustained as a result of exposure to Agent Orange while serving in Vietnam).

the courts as fundamentally different. Because the principal purpose and focus of public nuisance law is to abate or terminate harmful conduct, once the defendant's conduct constituting the public nuisance has been stopped, the scope of liability for damages should be limited. A plaintiff who received special injuries while the public nuisance was ongoing should be able to recover damages if his claim meets the other legal requirements of the tort. On the other hand, the fact that plaintiff was not injured until decades after the manufacture of a product has stopped strongly suggests that his injuries are too indirect and remote to recover under a public nuisance theory.

Further, plaintiffs themselves or third parties sometimes create a harmful or dangerous condition through the misuse of products manufactured or distributed by the defendant. Liberalized product liability rules in recent decades often allow the plaintiff to recover despite the misuse of the product by third parties or the plaintiff himself.⁴¹⁴ These decisions can be traced to the basic premise that the costs of injuries caused by products should be borne by product manufacturers and distributors rather than by injured consumers.⁴¹⁵ The same conclusion appears to have no applicability when the manufacturer's contribution to the alleged public nuisance, at least in some cases, ended years before the misuse of its products created harm.⁴¹⁶ Again, if the focus of public nuisance law is to abate or terminate the nuisance and the defendant's contribution to the alleged nuisance has ended, it is inequitable to hold the defendant manufacturer liable for harm resulting from the misuse of its product.

This analysis is best illustrated by the ongoing litigation against manufacturers of lead pigment contained in paint applied to residential interiors. The manufacture of all such lead-based paint had effectively ceased by 1978, when the product was banned by the federal government. Proper maintenance by landlords and other property-owners keeps lead hazards from developing and children from being exposed to lead in ingestible form, thus preventing childhood lead

414. See *Perlmutter v. U.S. Gypsum Co.*, 4 F.3d 864, 873 (10th Cir. 1993) (whether product misuse is reasonably foreseeable and therefore not a defense is a jury question); *Dodson v. GMC*, No. 96-CA-00051 COA, 1997 Miss. App. LEXIS 969 (Miss. Ct. App. Aug. 12, 1997) (manufacturer liable where misuse of product by third party, including criminal misuse, is foreseeable); see generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a (1998).

415. See *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 120-21 (Conn. 2001).

416. See *infra* note 412 and accompanying text. *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2001) fails to make these distinctions between causal link under strict products liability and nuisance law. As a result, it concludes that the criminal misuse of handguns does not preclude liability under public nuisance law. *Id.* at 12-13. It also finds that the intervening acts of various parties, including the criminals who used the handguns, were foreseeable. *Id.* at 18-19.

poisoning, and landlords have known or should have known this since at least the mid-1960s.⁴¹⁷ The passage of many decades between the defendants' manufacture of lead pigment, its distribution to paint manufacturers, its purchase and application to walls and windows by consumers, and current property owners' failures to repaint and maintain their premises properly, strongly attenuate the link between defendant's acts and plaintiff's injuries. As a policy matter, the causal chain linking defendant's manufacture of products and plaintiffs' injuries decades later are too indirect and remote when considered through the lens of the purpose of public nuisance law. The recovery of damages by those sustaining special injuries has always been an ancillary remedy to abating the nuisance, not the principal purpose behind public nuisance law. Therefore, the scope of liability for damages is more restricted than it is for other torts such as strict products liability or negligence where compensation is a principal goal.

The previously discussed requirement that a public nuisance be caused by an instrumentality within the control of the defendant is closely related to this discussion of the scope of liability. At least in the context of products liability, this requirement operates to assure that in most cases plaintiff's injuries resulting from a public nuisance are not so indirect and remote as to be beyond the scope of liability. Both requirements echo the history that public nuisance traditionally has been a means of ending harmful conduct and granting ancillary compensation to those injured in the past, not as a typical means of awarding compensation resulting from defendant's past conduct that occurs in the future.

D. Requirement of a Specific Statutory Violation, Intentional and Unreasonable Conduct, or Independently Tortious Grounds

Public nuisance law reaches its limitless extreme when an occasional court suggests that the liability of the defendant requires neither independently tortious conduct, violation of a statute, nor conduct that is intentional and unreasonable: "[F]ault is not an issue, the inquiry being limited to whether the condition created, not the conduct creating it, is causing damage to the public."⁴¹⁸ Reaction to an argument

417. See *Brown v. Dermer*, 744 A.2d 47, 61-62 (Md. 2000) (jury could find that reasonably prudent landlord by late 1960s would have understood health risks caused by chipping, peeling or flaking paint to young children).

418. *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960, 968 (W.D.N.Y. 1989) (quoting *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 979 (N.Y. 1983); see also *New York v. Fermenta*, 608 N.Y.S.2d 980, 985 (N.Y. 1994) ("a plaintiff in an action to abate a public nuisance is not

premised upon this assumption lead the Eighth Circuit Court of Appeals to comment that to allow recovery for public nuisance “regardless of the defendant’s degree of culpability or the availability of other traditional tort law theories of recovery” would allow nuisance to become “a monster that would devour in one gulp the entire law of tort.”⁴¹⁹

As previously reported, as early as the thirteenth century, Bracton concluded that for there to be a public nuisance, defendant’s conduct must be both “injurious and wrongful.”⁴²⁰ Prosser, reviewing the existing case law in 1966, concluded that public nuisance “is always a crime.”⁴²¹ The Second Restatement of Torts is less restrictive, but still establishes important and appropriate limitations on liability:

[T]he defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities. . . . If the interference with the public right is intentional, it must also be unreasonable. If the interference was unintentional, the principles governing negligent or reckless conduct, or abnormally dangerous activities all embody in some degree the concept of unreasonableness.

If the common law crimes for public nuisance have been supplanted or supplemented by a broad general statute, the situation has not been changed in any material respect, and the common law rules are generally still applicable to both criminal and civil liability. . . . If, however, particular conduct is declared to be a public nuisance by a specific statute, an ordinance, or an administrative regulation, the act may provide, or be construed to mean, that the defendant is guilty of the crime even though his interference with the public right was purely accidental and unintentional. . . . This strict criminal responsibility is carried over to the tort action.⁴²²

The critical question remains, however, as to the meaning of “intentional” as used in the Restatement. In the context of public nuisances allegedly caused by products, “intentional” means more than

required to demonstrate negligence or willful conduct on behalf of the defendant”).

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

420. *See supra* note 271 and accompanying text.

421. Prosser, *supra* note 1, at 997.

422. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979); *see also, e.g.*, *Kecney v. Town of Old Saybrook*, 676 A.2d 795, 810 (Conn. 1996) (“public nuisance can be created intentionally or negligently”); *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 792 (Wis. 2002) (liability must be based on either negligent or intentional conduct). Some courts have held that to constitute a public nuisance, defendant’s activities must violate a statute or municipal ordinance. *See, e.g.*, *People v. Lim*, 118 P.2d 472 (Cal. 1941). *Contra* *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.*, 712 P.2d 914, 921-22 (Ariz. 1985) (finding of public nuisance does not require violation of statute, ordinance, or regulation).

that the manufacturer or distributor intends to distribute products. According to the Connecticut Supreme Court, "A nuisance is created intentionally if 'the creator of the condition intends the act that brings about the condition' . . . 'an interference with the public right, is intentional if the [defendant] . . . knows that it is resulting or is substantially certain to result from [its] conduct.'"⁴²³ It is possible, in some circumstances, that the requirement of intentional or negligent conduct arguably may be met in the distribution of products. In *City of Cincinnati v. Beretta U.S.A. Corp.*,⁴²⁴ for example, the court found the allegations of the city's complaint that defendants "intentionally and recklessly market, distribute, and sell handguns that defendants know, or reasonably should know, will be obtained by persons with criminal purposes"⁴²⁵ sufficient to withstand a motion to dismiss.

So long as plaintiff has met the other requirements of the tort, recovery for public nuisance when the defendant has violated a specific statute declaring its conduct to be a public nuisance is consistent with the historical background of the tort. Liability under a public nuisance theory when the defendant's conduct is independently tortious as a negligent or strict liability tort (including strict products liability) simply allows recovery for one type of tortiously-caused damages, those resulting from a violation of a public right.⁴²⁶ To allow a public nuisance claim without either a violation of law, conduct found to be intentional or unreasonable, or conduct otherwise found to be tortious invites the court and jury to find a public nuisance without guidance and standards.

E. The Link Between the Tort of Public Nuisance and Real Property

Clearly articulated rules for recovery under the tort of private nuisance require that defendant's activity interfere with the plaintiff's use and enjoyment of property.⁴²⁷ Often not expressly articulated, however,

423. *Keeney*, 676 A.2d at 810-11; see also RESTATEMENT (SECOND) OF TORTS § 825 (1979).

424. 768 N.E.2d 1136 (Ohio 2002).

425. *Id.* at 1143 (quoting plaintiff's complaint).

426. See *supra* notes 370-90 and accompanying text. Important issues arise, however, as to whether doctrine and principles limiting recovery under one of the other torts apply when the defendant is found liable under a public nuisance theory. For example, would the economic loss doctrine that generally prevents the plaintiff from recovering for pure commercial or economic loss in the absence of personal injury or property damage under a negligence theory prevent a state or municipality from recoupment of medical assistance payments and other financial losses resulting from defendant's conduct such as the manufacture and sale of tobacco-related products, handguns, or lead-bearing paint?

427. See RESTATEMENT (SECOND) OF TORTS § 821D (1979) ("[a] private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land"); see also *id.* § 821E (parties who can recover for private nuisance are those with an ownership or possessory interest in the land).

is any required connection between *public* nuisance and the use of land by either the plaintiff or the defendant. Yet when one reads hundreds of nuisance cases from medieval times to the present, one is struck by the reality that public nuisance almost always involves land, not injuries that occur in a variety of other factual contexts such as collisions between vehicles, business or professional settings, or other personal injuries.

Most often, public nuisance cases arise in the context of defendant's, not plaintiff's, use of land. Almost all examples of common law public nuisances provided in the Restatement arise from the defendant's use of land.⁴²⁸ Many courts explicitly have stated that defendant's conduct, in order to constitute either a public nuisance or a private nuisance, must arise from the use of land.⁴²⁹ As early as the late thirteenth century, Bracton noted in factual contexts that now would be regarded as public nuisance that one of the few requirements for the assize of nuisance is that the defendant must be an owner of land.⁴³⁰ More recently, in the state's recoupment action against manufacturers of tobacco products, the Texas Supreme Court restricted the tort of public nuisance to harm caused by the use of land by the defendant:

The Court agrees with Defendants that the State . . . has failed to plead essential allegations under Texas public nuisance law. Specifically, the State failed to plead that Defendants improperly used their own property, or that the State itself has been injured in its use or employment of its property. The overly broad definition of the elements of public nuisance urged by the State is simply not found in

428. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b. (1979). Comment b describes public nuisance as covering "a large, miscellaneous and diversified group of minor criminal offenses," but almost all the examples that follow flow from the defendant's use of land: (1) "keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes," (2) "storage of explosives in the midst of a city," (3) maintaining houses of prostitution, (4) loud and disturbing noises," most of which presumably are continuing and result from the use of land, and (5) "widely disseminated bad odors, dust and smoke," again generally resulting from the defendant's use of land.

429. See, e.g., *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *Texas v. Am. Tobacco Co.*, 14 F.Supp.2d 956, 973 (E.D. Tex. 1997), *partially rev'd and vac'd on other issues*, 1997 U.S. Dist. LEXIS 23289 (E.D. Tex. 1997); *Detroit Bd. of Educ. v. Celotex*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992); Louise Halper, *Public Nuisance and Public Plaintiffs: Ownership, Use, and Causation (Part II)*, 17 ELR 10044, 10044 (1987) ("use of land . . . is the basis of liability for public nuisance").

The Ohio Supreme Court apparently confused these two issues in *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E. 2d 1136, 1142 (Ohio 2002). Defendants there argued that public nuisance "does not encompass injuries caused by product design and construction, but instead is limited to actions involving *real property* or to statutory or regulatory violations involving public health or safety." *Id.* The court disagreed, but cited to Comment h of RESTATEMENT (SECOND) OF TORTS § 821B (1970) providing that "unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land," but not addressing whether there is a requirement that defendant's activities involve the ownership, possession, or use of land. *Id.*

430. BRAC'TON, *supra* note 268, at 189-201, *quoted in* J. R. Spencer, *supra* note 276, at 56.

Texas case law and the Court is unwilling to accept the State's invitation to expand a claim for public nuisance beyond its grounding in real property.⁴³¹

The careless manner in which the language of public nuisance is employed demonstrates the nevertheless valid observation that defendant's conduct usually arises from the use of land. Courts routinely—and incorrectly—refer to the use of the land itself, rather than to defendant's conduct, as the public nuisance. Disorderly taverns,⁴³² residences where illegal drugs are used or distributed,⁴³³ and gambling establishments⁴³⁴ themselves, are typically designated as the "public nuisances" that must be abated.

There are situations in which courts properly will hold a defendant liable even when the public nuisance does not arise from defendant's use of land. The defining characteristic of these exceptions, however, is that the defendant has interfered with the plaintiff's use and enjoyment of public land. For example, the Restatement's list of examples of common law nuisance includes "the shooting of fireworks in the public streets" and "the obstruction of a public highway or a navigable stream."⁴³⁵ The dump-truck hypothetical previously discussed also falls into this category.⁴³⁶

In summary, a finding of public nuisance historically involved the use of land. In most cases, the harm resulting from the public nuisance arose from the defendant's ownership, possession, or use of land and flows directly from the history of public nuisance law,⁴³⁷ and specifically the requirement that the defendant be in control of the instrumentality causing the harm. Again, the principal focus of public nuisance law generally has been to provide a means of abating or ending defendant's continuing conduct that is harming the public safety or welfare. As early as 1942, Dean Prosser noted that except when public nuisances result from a violation of statute, or defendant's negligence or conducting abnormally dangerous activities,⁴³⁸ "the question is not really the nature of the defendant's original conduct but whether he shall be permitted to continue it."⁴³⁹ When the defendant owns, possesses, or

431. *State v. Am. Tobacco Co.*, 41 F. Supp.2d 956, 973 (E.D. Tex. 1997).

432. *E.g.*, *Taylor v. State*, 155 So. 2d 595 (Ala. 1963); *Brown v. State*, 173 S.W.2d 1016 (Ark. 1943).

433. *E.g.*, *Blinken v. State*, 420 A.2d 997 (Md. Ct. Spec. App. 1980).

434. *E.g.*, *Monogna v. O'Dwyer*, 16 So. 2d 829 (La. 1943); *New York v. Castro*, 542 N.Y.S. 2d 101 (N.Y. Sup. Ct. 1989).

435. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b. (1979).

436. *See supra* note 406 and accompanying text.

437. *See supra* note 273 and accompanying text.

438. *See supra* notes 418-26 and accompanying text.

439. William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 418 (1942).

even is continuing to use land, he or she has the ability to terminate the conduct causing the harm. In a handful of factual contexts, public nuisance is found even though defendant's conduct does not involve the use of land. In these instances, however, liability is premised upon the most ancient examples of public nuisance: interference with the public's use of what essentially is public property—roads and highways and navigable streams.

Confining public nuisance to the world of property is supported by logic, as well as history. During the past two hundred years, vast bodies of law have developed to govern torts such as negligence, strict liability for abnormally dangerous activities, and strict products liability that apply more appropriately to personal injuries resulting from defendant's conduct other than the use of land. The handful of principles governing the tort of public nuisance were never intended to govern any unreasonable harm that might result from human interaction, nor are they adequate for such a daunting task.

F. The Manufacture or Distribution of Lawful Products Does Not Meet the Requirements for Public Nuisance

Application of these traditional principles leads to the conclusion that product manufacturers and distributors should not be liable under the tort of public nuisance for harm caused by the manufacture or sale of lawful products. Most courts agree that the manufacture or distribution of a lawful product does not meet the requirements for liability under public nuisance law,⁴⁴⁰ but some have reached a contrary conclusion.⁴⁴¹

Many of the courts denying the liability of product manufacturers for public nuisance now appropriately state as an independent, rule-like

440. *E.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist LEXIS 3598 (N.D. Ill. Mar. 16, 1998); *Manchester v. Nat'l Gypsum Co.*, 637 F. Supp 646 (D.R.I., 1986); *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 876, 882-83 (Cal. Ct. App. 1994); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Detroit Bd. of Educ. v. Celotex*, 493 N.W.2d 513 (Mich. Ct. App. 1992); *Sabater v. Lead Indus. Ass'n, Inc.*, 704 N.Y.S.2d 800 (N.Y. Sup. Ct. 2000).

441. *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (Ohio law; "[p]laintiffs' nuisance claims will likely rise or fall with their negligence claims"); *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. Ill. 2002) (refusing to dismiss claims against distributor of genetically modified seed corn that allegedly "contaminated the entire corn supply of the United States"); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2001); *City of Boston v. Smith & Wesson*, No. 1999-02590 (Mass. Super Ct. filed July 13, 2000) (slip op.) (refusing to dismiss public nuisance claims at pleading stage); *Archer v. Arms Tech.*, No. 99-912662-NZ (Mich. Cir. Ct. filed May 16, 2000) (slip op.) (same); *New York v. Fermenta ASC Corp.*, 608 N.Y.S.2d 980 (N.Y. Sup. Ct. 1994).

justification for denying liability that “manufacturers, sellers, or installers of defective products may not be held liable on a [public] nuisance theory for injuries.”⁴⁴²

VI. CONCLUSION

To allow states and municipalities to hold manufacturers of mass products liable under a public nuisance theory would be to fundamentally alter the nature of the tort. The core historical policies underlying the tort are inconsistent with its use to impose liability for the manufacture or distribution of lawful products. While some instances of harm caused by product manufacturers might satisfy one or more of the requirements of public nuisance, it appears improbable that an action against a product manufacturer or distributor would satisfy all the fundamentally necessary criteria that legitimately establish the parameters of public nuisance:

1. *Harm to a person who uses, consumes, or is otherwise injured by a product rarely involves the violation of a public right.* In a few instances, harm to those other than the consumer or user of the product—such as injuries caused by firearm violence or “second-hand” smoke in a public place—arguably involves a public right, but these are unusual circumstances.

2. *Manufacturers and distributors of products are not in control of the instrumentality causing the harm once the product has been sold or otherwise distributed.*

3. *Injuries resulting from products often are not within the scope of liability (sometimes analyzed under the concept of “proximate causation”) of the manufacturer’s conduct.* Because traditionally the primary focus of public nuisance law was termination of defendant’s harmful conduct—through injunctive relief or public prosecution—not recovery of damages that might occur at some point after the termination of the conduct, the scope of liability for public nuisance should be less than for other product liability torts. Often the intervening, contributing acts of third parties—the criminal use of the handgun or the landlord’s failure to reasonably maintain the property painted with lead-bearing paint decades ago—mean that the harm is not within the original scope of liability. The passage of a considerable length of time since the defendant’s conduct has ended also is a factor in finding that plaintiff’s injuries are not within the scope of defendant’s liability.

442. *Detroit Bd. of Educ.*, 493 N.W.2d at 521; see also, e.g., *City of Philadelphia*, 277 F.3d at 421; *Camden County Bd. of Chosen Freeholders*, 273 F.3d at 536; *Tioga*, 984 F.2d at 915.

4. *Product manufacturers should not be held liable under public nuisance in the absence of either a violation of a specific statute, ordinance or regulation, conduct that is intentional and unreasonable, or an independently tortious ground.*

5. *Injuries from products do not arise from the use of land by the defendant nor, except in isolated instances, do they result from defendant's conduct that interferes with the public's use of roads and highways or navigable streams.*

These most basic principles defining the tort of public nuisance are inconsistent with the handful of existing judicial opinions suggesting that states, municipalities, or other plaintiffs may be able to hold product manufacturers and distributors liable on a public nuisance theory. Tort theories of recovery sometimes do change when confronted with new harms and changing judicial, social and political norms. The use of public nuisance as a mass products tort would go far beyond this, however. For more than 900 years, the law of public nuisance did not sanction actions against product manufacturers. More importantly, the basic principles of the public nuisance tort are inconsistent with any judicial expansion of liability to encompass such liability.

To achieve both legal consistency and wise policy, problems that arise from the manufacture, distribution, or sale of products are better solved through either traditional products liability litigation or through legislative solutions such as no-fault compensation systems.

Addressing the consequences of the use of the three products explored in this article—tobacco, guns, and lead-based paint—involves not only the more typical, albeit frequently challenging, tort issues of causation, damages, and reasonableness—but also broader and more intricate questions about government responsibility, decaying social structures (particularly in many inner cities), and other economic and social aspects of public health and public safety policies. All three products at issue in the public nuisance government recoupment actions had been the subject of extensive regulation by state and federal legislatures for years before executive branch officials asserted public nuisance claims in court. With respect to each product, the conduct giving rise to the risk of harm involves multiple actors operating over long periods of time, but plaintiff governments bring only one group of actors, manufacturers, before the court for a determination of liability. Moreover, such government recoupment actions are likely to stretch the institutional competence of the courts beyond the breaking point. For example, an Illinois trial court recently dismissed a complaint seeking class certification for purposes of enjoining former manufacturers of lead pigment to establish a medical monitoring fund, finding that it would be a tremendous and utterly inappropriate burden for a court to be saddled with the ongoing administration of a monitoring and remediation

program that would likely take decades and involve tens of thousands of parties.⁴⁴³

The social problems created by tobacco-related illness, firearm violence, and childhood lead poisoning result in huge social costs—and economic costs for the government. Yet the history of the tobacco litigation and the subsequent settlement—a presumably “successful” outcome from the perspective of the government plaintiffs—provides little encouragement that mass products litigation is a cost-effective means of providing funds to be used for reducing smoking and the use of tobacco products or for ameliorating or treating the harmful consequences of such use. The costs of tort litigation generally exceed thirty percent of the total compensation paid to plaintiffs.⁴⁴⁴ Following the tobacco settlement, many states balked at the payment of attorneys’ fees in the hundreds of million-dollars range.⁴⁴⁵ The expensive nature of the litigation process, as well as other factors, argue in favor of administrative approaches, no-fault compensation systems, or similar remedies to compensate victims of mass torts.⁴⁴⁶

In addition, lump sum payments to the government may not be the best way to assure solutions for social problems. Funds made available to the states as a result of the tobacco settlement have been used for a wide variety of purposes, sometimes relating—directly or indirectly—to the treatment and prevention of tobacco-related disease, but sometimes

443. Tr. Aug. 22, 2001, *Lewis v. Lead Indus. Ass’n, et al.*, No. 00 CH 9800, Ill. Cir. Ct., Cook County, J. Robert v. Boharic (striking complaint seeking medical monitoring of children who may have been exposed to lead hazards) (“The Court is being asked to set up a court-supervised medical evaluation program. And once that kind of sweeping relief is asked for, gargantuan-type of relief, the Court has to ask itself some questions. Who will work at this program? Who will administer all of this? Who is going to be responsible for receiving these funds, paying them out, and making the decisions as to whether or not someone needs particular medical monitoring in the future or not.” *Id.* at 88-89) (“[T]he way that this Complaint is presently set up it would amount to a usurpation of the legislative function . . . [T]he plaintiffs are asking this court to sit as a type of super legislature . . . The Court is not in a position to run for decades some program.” *Id.* at 92); see also *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 646 (Cal. Ct. App. 1971). (“[T]he objective, which plaintiff envisions to justify his class action, is judicial regulation of the processes, products and volume of business of major industries of the country. It was entirely reasonable for the trial court to conclude from the face of the pleading that such an undertaking was beyond its effective capability. The plaintiff has paid the court an extravagant compliment in asking it to supersede the legislative and administrative regulation in this critical areas, but the trial judge showed the greater wisdom in declining the tender.”).

444. See J. KAKALIK & N. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* vi-viii (1986).

445. See, e.g., MINN. HIGH COURT ASKED TO RULE ON TOBACCO FEE, MEALEY’S LITIGATION REPORT: TOBACCO, Vol. 13, No. 19 (Feb. 3, 2000) (litigation over \$440.8 million fee for attorneys representing State of Minnesota).

446. See, e.g., Robert Rabin, *Book Review*, 98 YALE L.J. 813, 829 (1989) (reviewing P. SHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURT* (enlarged ed. 1987)); see also MD. CODE, ENVIRONMENT § 6-826 (2001) (“neo-no fault” system compensating lead poisoned children funded by landlords and the state).

not. In one extreme case, a local government used a portion of its tobacco settlement funds to purchase new furniture costing \$145,000 for the county executive's office suite and \$600,000 for road salt.⁴⁴⁷

To the extent that battles over the deleterious effects of products *qua* products continue to be fought in the courtroom, they should be structured by—and decided on the basis of—the well-developed bodies of law covering torts such as negligence, strict products liability, fraud, misrepresentation, and the like. The recent attempts to use public nuisance law in novel ways are patently intended to circumvent “the boundary between the well-developed body of product liability law and public nuisance law.”⁴⁴⁸ If plaintiffs cannot prevail in their lawsuits against manufacturer-defendants under well-established theories of recovery, courts should not permit them to move their crusades into the utterly uncharted territory of public nuisance.

The often vaguely articulated, but long-standing and sound principles of public nuisance law not only fail to encompass such liability, but also are inherently inconsistent with such an expansion. Courts should not replace the substantial bodies of mature doctrinal and policy analysis available to guide them in products liability actions with a vaguely defined tort that is being used in ways utterly foreign to its historical context. To do so would indeed allow public nuisance to become “a monster that would devour in one gulp the entire law of tort.”⁴⁴⁹

447. See Patrick LaKamp, *\$2 Million Wrongly Charged to Tobacco Fund*, BUFF. NEWS, Apr. 19, 2002, at C1.

448. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). This conclusion does not implicate the emerging debate under Section 2 cmt. n of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) as to whether courts should apply a single, unified set of principles to govern products liability actions instead of analyzing the case under the separate, but well-developed theories of strict products liability, negligence, and implied warranty theories. Many courts have rejected the Restatement's call for a unitary theory of liability governing injuries resulting from the use of products. See *supra* note 15; see also, e.g., *Mercer v. Pittway Corp.*, 616 N.W.2d 602 (Iowa 2000); *Lovick v. Wil-Rich*, 588 N.W.2d 688 (Iowa 1999).

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

