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Maintaining Rational Boundaries
on a Rational Tort

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I. INTRODUCTION

In the movie "Zelig," Woody Allen's character was chameleon-like. His personality changed to fit his surroundings or needs at the moment. Throughout history, there have been various attempts to turn the tort of public nuisance into a Zelig-like legal theory as amorphous as the word "nuisance" itself.¹ Recently, some state attorneys general and personal injury lawyers have been trying to convert the tort of public nuisance into a cutting edge legal theory and are using it in the most important mass litigations of our time. They are attempting to move public nuisance theory far outside its traditional boundaries by using it to sue product manufacturers in an effort to circumvent the well-defined structure of products liability law. If history and sound public policies guide courts, these lawsuits will fail. Unlike the character Zelig, public nuisance theory has a rich history and distinct personality. This article offers a portrait of the tort's essential characteristics.

The tort of public nuisance has developed over nine centuries of English and American common law. Its essence is to allow governments to use the tort system to stop quasi-criminal conduct that, while not illegal, is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right. The traditional public nuisance involves blocking a public roadway or, in recent times, dumping sewage into a public river or blasting a stereo when people

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

The term frequently is used in several different senses. In popular speech it often has a very loose connotation of anything harmful, annoying, offensive or inconvenient, as when it is said that a man makes a nuisance of himself by bothering others. Occasionally this careless usage has crept into a court opinion. If the term is to have any definite legal significance, these cases must be completely disregarded.

Id.

are picnicking in a public park.² Under public nuisance theory, the government may seek an injunction to stop the activity causing the public nuisance or force the party to abate the public nuisance itself.

Also, public nuisance theory specifies the types of parties who may sue and which remedies each type of party may seek. Namely, the government may only seek injunction or abatement, not monetary damages. Individuals who have sustained a particular injury, such as harm to one's personal property from the public nuisance, can use the tort to seek compensatory damages. Unlike government plaintiffs, private individuals cannot seek injunction or abatement. Other members of the general public, even if inconvenienced by the public nuisance, cannot use the tort at all. Public nuisance theory was not developed to allow private citizens the power to stop or abate conduct, to allow government to grow its coffers, to spread the risk of an enterprise, or to punish defendants.³

Nonetheless, there have been numerous attempts to achieve these results by breaking the rational boundaries of the tort. Most attempts have involved re-defining public nuisance injury beyond an interference with a "public right." Individuals advocating this path would extend the tort to include any potential harm, inconvenience, or annoying activity that could qualify under the dictionary definition of "nuisance." After all, the principal hornbook on the law of torts in the 1980s observed, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people"⁴ Others have tried to redefine or shed the specific damages requirement for private lawsuits. Doing so would allow for broader recoveries and class actions. Occasionally, these strategies have worked, particularly with litigation targeting "unpopular" conduct or defendants; end-game oriented judges have disregarded history to achieve a desired result. Most American courts, however, have shown reasonable restraint and have adhered to the fundamental principles of public nuisance theory.

2. *See id.* Other types of public nuisance actions include interfering with public health and safety. *See Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1990). Examples include storing explosives within the city, interfering with reasonable noise levels at night, or interfering with breathable air, such as through emitting noxious odors into the public domain. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

3. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745-46 (2003) ("Historically, public nuisance most often was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct. Only in limited circumstances was a tort remedy available to an individual, and apparently never to the state or municipality.").

4. W. PAGE KEETON ET. AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984); *see also* F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949) (calling public nuisance a "mongrel" tort for being "intractable to definition" and stating that "[t]he prime cause of this difficulty is that the boundaries of the tort of nuisance are blurred").

The current effort to expand public nuisance theory to provide sanctions against manufacturers of lawful products is disconcerting because it would fundamentally change the entire character of public nuisance doctrine, as well as undermine products liability law.⁵ Not surprisingly, the targets involve “unpopular” products, such as asbestos, guns, tobacco, lead paint, the gasoline additive methyl tertiary butyl ether (MTBE), and others. Most courts have rejected these suits, stating that public nuisance theory has always targeted how properties or products are used, not manufactured. Nevertheless, a few courts have broken from traditional public nuisance theory and have allowed these cases to proceed. Whether those rulings remain an aberration, thereby following the pattern of previous divergences from traditional public nuisance theory, has yet to be determined.

This article reviews the development of public nuisance theory through English and American common law and its treatment under the Restatements of Torts. It then addresses the recent spate of cases in which public nuisance theory has been used against product manufacturers. Next, the article examines the core elements of public nuisance theory, explaining when a public nuisance remedy is appropriate, using MTBE litigation as a case study. Finally, the article details the key public policy reasons why products liability, and not public nuisance theory, should determine liability related to the manufacturing of products.

II. THE DEVELOPMENT OF PUBLIC NUISANCE LAW

A. *English Common Law*

Public nuisance theory has its foundation in twelfth-century English common law as a tort-based crime for infringing on the rights of the Crown.⁶ The King, through a sheriff and later an attorney general, could bring suit to stop an infringement and force the offending party to repair any damage to the King’s property.⁷ In the fourteenth century, English courts extended the principle of public nuisance beyond the rights of the Crown to include rights common to the public,⁸ such as “the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people

5. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1979) (stating that there is no liability to a manufacturer when the product is delivered in a safe condition); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998) (rejecting category liability).

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

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

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

and to be free from the spreading of infectious diseases.”⁹ The Crown prosecuted violators for committing a criminal offense.¹⁰

In assessing whether the conduct amounted to a criminal offense, courts weighed the value of the conduct against the harm it caused. For example, in a case involving the emission of offensive odors by a local candle factory, the court held that the odors did not constitute a public nuisance because the factory’s utility outweighed the townspeople’s discomfort.¹¹ The Parliament, viewed as an “instrument of royal government and the voice of the community,” also performed this utility balancing by passing legislation that labeled certain behaviors public nuisances.¹²

In 1535, an English court, for the first time, allowed individuals to sue and recover damages under the doctrine. The case involved the blocking of a highway and set the precedent that an individual who had suffered “particular damages”¹³ could file a public nuisance suit to recover those damages.¹⁴ The individual’s injury must have been different in kind, not simply more severe than the injury to the public as a whole, and the individual could not sue for injunction and abatement because those actions were reserved solely for the Crown.¹⁵

Justice Fitzherbert, one of the judges hearing the case, illustrated the difference between injury-in-kind and injury-in-degree through the example of a person riding on a public highway at night and coming across a man-made ditch.¹⁶ If the rider were delayed or inconven-

9. Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002). Although the Crown primarily used public nuisance against those who interfered with a public right of way or operated “noisome trades,” the apparent flexibility of public nuisance led to its use against numerous activities such as the following:

digging up a wall of a church, helping a “homicidal maniac” to escape, being a common scold, keeping a tiger in a pen next to a highway, leaving a mutilated corpse on a doorstep, selling rotten meat, embezzling public funds, keeping treasure trove, and subdividing houses which “become hurtful to the place by overpestering it with poor.”

Abrams & Washington, *supra* note 7.

10. Cleary, *supra* note 9.

11. *See id.* at 277-78.

12. *Id.* at 278 (“Parliament’s power emerged in the fifteenth century to create public nuisances not found in the common law and to authorize certain activities that were previously held to be public nuisances by the courts.”).

13. Although courts often use the phrase “special damages,” Prosser uses the phrase “particular damages” to avoid confusion with other areas of law. This article will use the phrase “particular damages.”

14. William A. McRae Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 36 (1948) (“Though this view eventually prevailed, it was not accepted without dissent, the dissent being that a public offence should not give rise to a private right.”).

15. Newark, *supra* note 4, at 483.

16. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1005 (1966). It has been suggested that Fitzherbert’s comments were dicta in a dissenting opinion and, in fact, did not represent the holding of the court. Nevertheless, as one commentator noted, it has been a well-defined part of public nuisance law for centuries. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 791 (2001) (arguing that people who “misconstrued” the ruling “arguably set[] legal doctrine on the wrong path for the past 450 years”).

nienced—no matter by how much or what the consequences—his injury would be the same as that sustained by anyone else. But, if his cart were harmed by falling into the ditch, he would have sustained damage that was different in kind from the general public.¹⁷

During the two centuries following this decision, the ruling was criticized as unnecessary because defendants could be held liable through negligence or some other cause of action. Many commentators argue that this ruling became a foundation for public nuisance theory because some defendants, in a twisted form of logic, argued that they should not be liable to individual plaintiffs in negligence actions if their conduct also amounted to a public nuisance, for which there would be no individual recovery.¹⁸ Lord Edward Coke's *Commentary upon Littleton* in 1628 and Sir William Blackstone's support of the particularized injury rule in 1768 solidified its acceptance.¹⁹

B. Public Nuisance in the United States

American courts adopted English common law. Historically, American public nuisance cases involved non-trespassory invasions of the public use and enjoyment of land. In the eighteenth and early nineteenth centuries, most public nuisance cases involved the obstruction of public highways and waterways, though some involved using property in ways that conflicted with public morals or social welfare.²⁰ These cases often involved gambling halls, taverns, or prostitution houses.²¹

The onset of the Industrial Revolution in the 1840s brought the first test of public nuisance theory boundaries in the United States. With urbanization and industrialization, the nature of land use changed and more conflicts arose regarding which land uses were ac-

17. Fitzherbert wrote the following:

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.

Gifford, *supra* note 3, at 800 (quoting Anon., Y.B. Mich. 27 Hen. 8, f.27, pl. 10 (1535)).

18. See Abrams & Washington, *supra* note 7, 362-63.

Previously, defendants in private tort actions often succeeded in having cases dismissed with the defense that, although a private individual may in fact be harmed, the defendant's activities also affected the rights of the public at large. Thus the common law court was without jurisdiction; any action against the offensive activities had to be brought, if at all, in the criminal courts as a public nuisance action.

Id.

19. See Antolini, *supra* note 16, at 794.

20. Gifford, *supra* note 3, at 800-01.

21. *Id.* at 801.

ceptable.²² In the absence of significant regulation, public nuisance became a substitute for governments that "could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public."²³

For example, water pollution suits against companies for industrial run-off often succeeded because polluting a river was akin to the obstruction of a public waterway.²⁴ By contrast, claims filed against railroads for noise and air pollution affecting the communities near the tracks often failed.²⁵ "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," there was no conflict with a public right.²⁶

Following the example set by Parliament, state legislatures and towns also began enacting public nuisance statutes and ordinances. Some legislation broadly defined public nuisance and gave the government clear authority to terminate conduct that fell within the definition; other legislation declared specific activities to be public nuisances.²⁷ Criminal prosecutions and injunctions were far more common than private actions seeking particular damages for public nuisances.²⁸

After the New Deal movement in the 1930s, with the expansion of "comprehensive statutory and regulatory schemes" determining acceptable societal behaviors, public nuisance theory was not necessary to define societal boundaries and largely faded from American jurisprudence.²⁹ In fact, when the first *Restatement of Torts* was published in 1939, it did not even include a reference to the tort of public nuisance.³⁰

22. See Antolini, *supra* note 16, at 771 (explaining that public nuisance was used when the conflict involved the violation of a public right and private nuisance was used when the conflict was between neighbors).

23. Gifford, *supra* note 3, at 804.

24. *Id.* at 802.

25. *Id.* at 803.

26. *Id.*

27. *Id.* at 804 (citing a 1915 Tennessee statute which provided "[t]hat 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 nuisances" (alteration in original)).

28. *Id.* at 805.

29. *Id.* at 805-06 ("A principal reason was that the development of comprehensive statutory and regulatory schemes that . . . substituted other means of regulation for many former targets of public nuisance prosecutions.").

30. *Id.* at 806. According to some accounts, nuisance law was assigned to the *Restatement of Property* during the first *Restatement* because of its grounding in property. The drafters of the *Restatement of Property* only focused on private nuisance, so that when nuisance was transferred to torts, public nuisance was not included. "In fact, the tort lawyers and tort professors at work on the *Restatement (First) of Torts* treated nuisance as though it were solely an issue of interference with private property rights, that is, an invasion of interests in the private use of land." Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 120-21 (1998).

1. *Restatement (Second) of Torts* and Attempts to Expand Public Nuisance Law

An attempt to create a modern era for public nuisance theory in the United States was engineered with the drafting of the *Restatement (Second) of Torts*. When Dean William Prosser, and later Dean John Wade, sought to codify the 900-year history of public nuisance theory, a debate occurred because the environmental community sought a relaxation of the strict binds of public nuisance theory.³¹ In her 2001 article in *Ecology Law Quarterly*, Denise E. Antolini, an Assistant Professor of Law at the University of Hawaii at Manoa and a former attorney for the Sierra Club, recounts in detail the specific developments in the 1960s and 1970s that could have led to “breaking the bounds of traditional public nuisance.”³²

The first issue involved the type of conduct required in public nuisance theory. As Dean Prosser wrote in 1966, “[a] public or ‘common’ nuisance is always a crime . . . a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure.”³³ The environmentalists fought this quasi-criminal standard because they wanted to use public nuisance theory to combat pollution that was not subject to criminal sanctions,³⁴ and in fact, was often permitted by federal, state, or local regulatory regimes or zoning regulations.³⁵ Such a revision would have broken the traditional public nuisance tenet that conduct “fully authorized by statute, ordinance or administrative regulation [would] not subject the actor to tort liability.”³⁶ As a compromise, the *Restatement* suggested that conduct need only be an “unreasonable

31. The *Restatement (Third) of Torts* has not addressed public nuisance, reflecting the fact that the principles set forth in *Restatement (Second) of Torts* still apply.

32. Antolini, *supra* note 16, at 838.

33. Prosser, *supra* note 16, at 997, 999. *But see* Gifford, *supra* note 3, at 781 (disagreeing with Prosser and suggesting that public nuisances were not always criminal actions); Halper, *supra* note 30, at 118 (paraphrasing Judge Benjamin Cardozo as stating that “where a use is not in itself unlawful or hazardous, negligence is the appropriate liability standard for the injuries attributable to that use”).

34. Antolini, *supra* note 16, at 838.

35. Local zoning ordinances made it unnecessary for courts to engage in “judicial zoning” by determining that certain land use was unreasonable for a specific locality. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (1979).

Now that most cities have complete sets of zoning regulations and agencies to plan and administer them, the courts have shown an inclination to leave the problem of the appropriate location of certain types of activities, as distinguished from the way in which they are carried on, to the administrative agencies. The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it, may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately.

Id.

36. *Id.*

interference" with a public right.³⁷ The *Restatement* clarified, however, that when a defendant's conduct at issue "does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard."³⁸

Second, the environmentalists sought to provide individuals and organizations with standing to bring private attorney general-type actions to enjoin or abate a public nuisance. To accommodate that concern, the *Restatement* suggested that individuals could have standing if they were suing "as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."³⁹ This provision could have appreciably expanded public nuisance claims, as state legislation enumerating specific acts began to significantly increase.⁴⁰ Finally, the environmentalists sought to expand standing in private compensatory suits to include anyone affected by the public nuisance, not just those who suffered an injury different-in-kind from the general public. This effort failed, and the *Restatement* maintained the well-reasoned difference-in-kind requirement.

2. The New Environmental Cases

In the early 1970s, some environmental advocates attempted to gain acceptance for these new theories by filing a purported public nuisance class action against scores of companies alleged to have contributed to air pollution in Los Angeles, California. In *Diamond v. General Motors Corp.*,⁴¹ the plaintiffs named product manufacturers, not just polluters, as defendants.⁴² They sought injunctive relief in addition to compensatory and punitive damages. The California court

37. *Id.* § 821B cmt. e. The *Restatement* provides the following factors to determine whether an activity unreasonably interferes with a common right:

(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.

Id. § 821B(2).

38. *Id.* § 821B cmt. e.

39. *Id.* § 821C(2)(c).

40. For example, statutes have labeled as a public nuisance the use of watercraft equipment that has a siren or flashing lights because it could interfere with the public right to limit those devices to emergency vehicles. Also, some statutes designate as public nuisance planting hedges on one's property that might block the sight of drivers or creating a hazard in properties adjacent to airports that might obstruct airspace. Public nuisance also has been used to break up protests or gang activities that block roads or sidewalks, as well as to end illegal labor strikes. *See, e.g., id.* § 821B cmt. b.

41. 97 Cal. Rptr. 639, 639 (Ct. App. 1971) (seeking an injunction against 293 named corporations and municipalities, as well as 1,000 unnamed defendants, for air pollution).

42. *Id.* at 641.

rejected the lawsuit, denying class certification and reasoning that public nuisance theory is ill-suited for this type of litigation.⁴³

First, the court appreciated that regulating activities that are not criminal in nature, such as manufacturing a lawful product, is the province of the legislature, not the judiciary. As the court noted, a “system of statutes and administrative rules” governed air pollution: “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.”⁴⁴

Second, the court recognized that the power of injunctive relief in public nuisance cases is only appropriate when wielded by the government, which is accountable to the public as a whole and can assess the societal value of the competing activities. In this case, as the court pointed out, “[t]he immediate effect of . . . an injunction would be to halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent.”⁴⁵

Third, the court found that massive class actions are not appropriate in public nuisance theory because the plaintiffs would have to claim that each member of the class sustained particular damages from the pollution in order to seek compensatory and punitive damages for the class. The court stated that “[r]equiring plaintiff to state separately the seven million causes of action, and to plead factually the damage as to each, would in and of itself constitute a practical bar to this action.”⁴⁶

Even in the well-publicized case of *Alaska Native Class v. Exxon Corp.*,⁴⁷ which stemmed from the environmental damage caused by Exxon’s oil spill off the coast of Alaska, the court showed the proper restraint on the public nuisance claim. The plaintiffs were private citizens whose lives were upended by the spill because they could no longer fish in the area waters. They filed a public nuisance claim to collect cultural damages associated with the loss of their “subsistence way of life.”⁴⁸ The court sympathized with the impact the spill had on the local community but stated that the plaintiffs failed to prove any particular injury, a core requirement in public nuisance theory for a private cause of action: “While the oil spill may have affected Alaskan Natives more severely than other members of the public, the right to [their culture and lifestyle] is shared by all Alaskans.”⁴⁹

43. *Id.* at 642-46.

44. *Id.* at 645.

45. *Id.* at 644.

46. *Id.* at 643.

47. 104 F.3d 1196 (9th Cir. 1997).

48. *Id.* at 1197.

49. *Id.* at 1198.

On a few occasions, courts have broken the bounds of public nuisance theory to meet a desired end. In the famous *Love Canal* cases in the mid-1980s, for example, the court allowed a public nuisance action to proceed against a company that had not engaged in the act of pollution and never owned or controlled the land where the pollution took place.⁵⁰ In the 1950s and 1960s, the defendant contracted with the polluter to dispose of waste.⁵¹ The local school board, which owned the land at the time of the litigation, knew of the pollution when it bought the property, but it did not have the resources to abate the nuisance. While the court acknowledged that deciding who should pay for the clean up "is essentially a political question to be decided in the legislative arena,"⁵² it "[n]onetheless" allowed the public nuisance claims to proceed, with the surprising and open-ended observation that "[s]omeone must pay to correct the problem."⁵³

In 1982, the Supreme Court of Hawaii in *Akau v. Olohana Corp.*⁵⁴ replaced the traditional "particular injury" rule with an "injury in fact" test for claims brought by private parties.⁵⁵ Under this ruling, anyone injured or inconvenienced by a public nuisance, regardless of the degree or kind of injury, could file a class action for injunctive relief and abatement. The rationale the court provided for creating such a "liberal standing" requirement was based "not in nuisance" theory, but in the increasing use of relaxed standing trends in other types of cases, such as taxpayer suits for improper expenditure of public funds, challenges to administrative decisions, and claims of harm to public trust property.⁵⁶ No other court has followed this decision; its conclusory nature and absence of reasoning may explain why.⁵⁷ For example, when presented with this question, the Florida Supreme Court stated that "[w]e adhere resolutely to our [prior holdings] relative to the concept of special injury in determining standing."⁵⁸

50. See *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (Sup. Ct. 1983) (adhering to the expansive definition of "nuisance" as "no more than harm, injury, inconvenience, or annoyance" (quoting *Copart Indus. v. Consol. Edison Co.*, 362 N.E.2d 968, 970 (N.Y. 1977)).

51. *Id.* at 974.

52. *Id.* at 977 (noting that the harmful nature of the pollution, which occurred in the 1950s and 1960s, was "[b]elatedly" discovered).

53. *Id.*

54. 652 P.2d 1130, 1130 (Haw. 1982) (allowing a class action against a private company for interfering with public trails).

55. See *id.* at 1134.

56. See *id.* at 1133-34.

57. See Antolini, *supra* note 16, at 786 (stating that the Hawaii ruling "still stands alone almost twenty years later as the only state court decision expressly to abandon the traditional special injury rule"). A similar ruling was issued in a British case in 1906. See Gifford, *supra* note 3, at 799.

58. *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974) (stating that a nonprofit citizens' group could not seek to enjoin a steel corporation from using portions of the soft sand beach area of Sand Key).

Most courts have followed the Supreme Court of Florida in rejecting the “end-justifies-the-means” approach to public nuisance displayed by the New York lower court in *Love Canal* and the Supreme Court of Hawaii in *Akau*.⁵⁹ Consider, for example, an oft-cited environmental products case that drew a hard line between those responsible for the polluting activity and those who made the products that were used to pollute. In *City of Bloomington v. Westinghouse Electrical Corp.*,⁶⁰ Westinghouse was charged with releasing waste containing polychlorinated biphenyls (PCBs) into Bloomington’s sewers and landfills. In addition to suing Westinghouse under public nuisance theory, the city named Monsanto Corporation, which manufactured the PCBs and sold them to Westinghouse.⁶¹ The court rejected the public nuisance claim against Monsanto, holding that a product manufacturer cannot be held liable under public nuisance theory. The essence of public nuisance theory, the court observed, is “using [one’s] property to the detriment of the use and enjoyment of others.”⁶² The court reasoned that once Monsanto sold the product to Westinghouse, it did not retain “the right to control the PCBs.”⁶³ Rather, “Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product.”⁶⁴

As Professor Antolini laments in her article, “[a]lthough public nuisance is a broad and flexible cause of action with great promise as a remedy for community injury . . . American courts have used the [traditional tenets of the tort] as an unduly rigid gatekeeper to control broad access to this powerful tort.”⁶⁵ Nevertheless, the changes achieved by environmentalists in the *Restatement (Second) of Torts* “invite[d] 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.”⁶⁶

59. See Antolini, *supra* note 16, at 776-86.

60. 891 F.2d 611 (7th Cir. 1990).

61. *Id.* at 613 (noting that “PCBs are chemical mixtures manufactured by Monsanto and others and sold for various industrial purposes, including insulation of high voltage electrical equipment such as capacitors and transformers”). Beginning in 1970, Monsanto used labels warning customers about the danger of PCBs entering the environment and signed an agreement with Westinghouse, instructing how to dispose of the PCBs. *Id.*

62. *Id.* at 614 (citations omitted).

63. *Id.*

64. *Id.*

65. Antolini, *supra* note 16, at 776.

66. Gifford, *supra* note 3, at 809.

III. PUBLIC NUISANCE LAWSUITS TARGETING PRODUCT MANUFACTURERS

Throughout the last twenty years, personal injury lawyers have increasingly sought to expand the boundaries of public nuisance theory to allow them to sue product manufacturers. They have argued that, even if lawfully manufactured, distributed, and sold, certain products by their nature interfere with the public's right to health or safety. The most prominent public nuisance claims have been against makers of products that could pose danger if used or stored incorrectly, such as asbestos, lead pigment and paint, firearms, and MTBE. State attorneys general also brought public nuisance claims against manufacturers of tobacco products. In many of these actions, the plaintiffs sought abatement, compensation, and punitive damages.

The reason personal injury lawyers have been lured by the elixir of public nuisance theory is because, if successful, it acts as a "super tort." As with products liability, public nuisance theory offers strict liability. But, products liability has well-defined boundaries, such as requiring the harm to be caused by a defective product.⁶⁷ By filing claims under public nuisance theory, personal injury lawyers hope to expand liability for harm caused by products by avoiding a number of time-tested products liability rules, such as defect, the statute of limitation, and the rule against recovery for purely economic loss.⁶⁸ "Thus, if a plaintiff could sustain a claim that her injuries were the consequence of a nuisance, her chances of recovery increased."⁶⁹ While most courts have rejected these new claims, others have been willing to accept them, leaving this chapter in public nuisance theory with an uncertain ending.

67. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998). The term "defect" is defined as containing a manufacturing defect, being defective in design or being defective because of inadequate instructions or warnings. *Id.*

68. Some commentators have noted that asserting public nuisance claims also allowed plaintiffs to avoid the pure economic loss rule, which prevents recovery under products liability theories for mere economic harm. See, e.g., Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 486 (2002). Nevertheless, several courts have declined to apply the pure economic loss rule in asbestos products liability claims, noting that "asbestos cases are unique in the law." *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 518 (Mich. Ct. App. 1992); see, e.g., *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 977 (4th Cir. 1987) (applying South Carolina law); *T.H.S. Northstar Assocs. v. W.R. Grace & Co.*, 767 F. Supp. 969, 972-74 (D. Minn. 1991) (applying Minnesota law); *Hebron Pub. Sch. Dist. v. U.S. Gypsum*, 690 F. Supp. 866, 870 (D.N.D. 1988) (applying North Dakota law); *Adams-Arapahoe Sch. Dist. v. Celotex Corp.*, 637 F. Supp. 1207, 1209 (D. Colo. 1986) (applying Colorado law); *Sch. Dist. of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442, 456-57 (Mo. Ct. App. 1988).

69. Halper, *supra* note 30, at 117. "Its land-use dispute resolution function lost to regulation, nuisance then came mostly within the tort ambit, where its strict liability birth and subsequent history made it a cuckoo in the nest." *Id.* at 128.

A. Asbestos Litigation

The first substantial test for the application of public nuisance theory to product manufacturers appeared in asbestos litigation. In the 1980s and 1990s, several municipalities and school districts asserted public nuisance claims against manufacturers of asbestos-containing products to recover the costs of removing asbestos from their buildings.⁷⁰ For the first time, plaintiffs alleged that the product itself constituted a public nuisance, not that the product was used to create a public nuisance. Also, instead of being filed by third parties, these suits were filed by the consumers themselves.

As the court stated in *Detroit Board of Education v. Celotex Corp.*,⁷¹ however, “manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by [a product] defect,” and “all courts that have considered the question have rejected nuisance as a theory of recovery for asbestos contamination.”⁷² The courts agreed that the creation of a product is not the same as the creation of a nuisance and that the facts in products liability cases do not fit the elements of public nuisance theory. For example, some courts observed that the element of “control” could not be satisfied because “a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality.”⁷³ In these cases, even if asbestos were considered a nuisance, “[t]he ‘nuisance’ creating property . . . was in possession and control of the plaintiff from the time it purchased the asbestos containing products.”⁷⁴

Courts also were troubled by the practical implications of the suits on products liability law, recognizing that the plaintiffs’ theory would “give rise to a cause of action . . . regardless of the defendant’s degree of culpability or of the availability of other traditional tort law theories of recovery.”⁷⁵ Further, the existence of asbestos cannot be considered a “continuing nuisance for which the statute of limitations [does] not bar recovery.”⁷⁶ Thus, even when a product caused serious harm to many people and there was widespread sympathy for school boards, courts adhered to the rule of law and maintained the common law boundaries of the public nuisance tort.

70. Gifford, *supra* note 3, at 751.

71. 493 N.W.2d 513 (Mich. Ct. App. 1992).

72. *Id.* at 521.

73. *Corp. of Mercer Univ. v. Nat’l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at *6 (M.D. Ga. Mar. 9, 1986); *see also* *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984); *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

74. *Mercer*, 1986 WL 12447, at *6.

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

76. *Detroit Bd. of Educ.*, 493 N.W.2d at 520.

B. Tobacco Litigation

The watershed event for product-based litigation in public nuisance theory came out of the lawsuits filed by state attorneys general against numerous manufacturers of tobacco products. These lawsuits, which "sought reimbursement of state expenditures for Medicaid and other medical programs" for smokers,⁷⁷ included several novel applications of recovery theories.⁷⁸ Not every lawsuit included public nuisance claims, however, some did, marking the first time that public nuisance was used in mass actions in products litigation.⁷⁹

The only court to rule on a public nuisance claim was a federal district court in *Texas v. American Tobacco Co.*⁸⁰ The allegation was that the defendants "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."⁸¹ The court dismissed this claim, stating that it was not within the traditional bounds of public nuisance theory: "The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the State's invitation to expand a claim for public nuisance."⁸²

In 1998, the state attorneys general settled all of their claims with the manufacturers of tobacco products in what was called the Master Settlement Agreement (MSA). The MSA resulted in the transfer of \$246 billion to the states and the plaintiffs firms hired to bring the litigation.⁸³ Nothing in the MSA indicated that the sale, distribution, and promotion of tobacco products constituted a public nuisance, but some of the lawsuits covered by the settlement contained public nuisance claims. Even though no court validated the use of public nuisance theory in the tobacco litigation, the use of public nuisance theory quickly became a misleading aspect of the state attorney gen-

77. Handler & Erway, *supra* note 68, at 487.

78. "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." Gifford, *supra* note 3, at 759.

79. The first such lawsuit was filed by Mississippi Attorney General Michael Moore in 1994 and included a claim for public nuisance. See Complaint, Moore *ex rel.* State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994); see, e.g., *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 974 (E.D. Tex. 1997) (barring recovery to the state under federal or state antitrust laws, public nuisance, restitution, unjust enrichment, or emergency assistance doctrine).

80. 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997).

81. *Id.* at 972.

82. *Id.* at 973.

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

eral tobacco litigation legend.⁸⁴ Given the sheer size of the award and resulting attorneys' fees, it is not surprising that, since the MSA, governments and plaintiffs' lawyers have attempted to apply public nuisance theory against many other industries of product manufacturers.⁸⁵

C. Firearms Litigation

The use of public nuisance theory in firearms litigation was a direct outgrowth of the MSA tobacco legend. Professor David Kairys, who taught at the Beasley School of Law at Temple University, worked with some cities to file public nuisance claims against gun manufacturers. Kairys stated that although the tobacco public nuisance claims had "legal problems" and "never [won] in court," he believed they were a "vehicle for settlement" and, therefore, a model for the gun suits.⁸⁶ This observation appears to be *ipse dixit*; no facts have been found to support it.

In his first cases, Professor Kairys made an important and clever change in how public nuisance theory would be applied. The alleged public nuisance would not be "in the manufacture of guns [or] in the existence or sale of guns," but in the marketing and distribution practices and policies of the manufacturers.⁸⁷ Specifically, the plaintiffs alleged that the manufacturers facilitated the illegal secondary market for firearms, thereby interfering with the public health of the community.⁸⁸ As in most attempts to stretch public nuisance theory, this new

84. Gifford notes that

[o]ne 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.

Gifford, *supra* note 3, at 764.

85. See, e.g., *Miller v. Home Depot, U.S.A., Inc.*, 199 F. Supp. 2d 502, 508 (W.D. La. 2001) (rejecting application of public nuisance law in treated lumber case); *E S Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1493-94 (N.D. Ala. 1995) (same in case involving plasticizing chemical); *First Nat'l Bank v. Nor-Am Agric. Prods., Inc.*, 537 P.2d 682, 686 (N.M. Ct. App. 1975) (same in seed disinfectant case); *DiCarlo v. Ford Motor Co.*, 409 N.Y.S.2d 417, 418-19 (App. Div. 1978) (same in case against automobile manufacturer).

86. See David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1163, 1172 (2000) (stating that he was named to a local task force to stop gun violence and that litigation against the industry became an outgrowth of those meetings).

87. *Id.* at 1173. As the Illinois Supreme Court noted, "[p]laintiffs concede that their public nuisance claim, based on the alleged effects of defendants' lawful manufacture and sale of firearms outside the city and the county, would extend public nuisance liability further than it has been applied in the past." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1118 (Ill. 2004).

88. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001) ("The plaintiffs alleged that the existence of the nuisance is a proximate cause of injuries and damages suffered by [the city], namely, that the presence of illegal guns in the city causes costs of enforcing the law, arming the police force, treating the victims of handgun crimes, implementing social service programs, and improving the social and economic climate of [the city]."); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231 (Ind. 2003) (stating that the city alleged that the

application was accepted by a few maverick courts but rejected by most.⁸⁹

In *City of Gary v. Smith & Wesson Corp.*,⁹⁰ the court allowed the suit to go forward but recognized that it was acting without precedent by allowing a public nuisance claim not involving land use or illegal activity.⁹¹ In doing so, the court defined an “interference with a public right” to include any “lawful activity conducted in such a manner that it imposes costs on others.”⁹² The court provided that “[i]f the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product.”⁹³ The court also allowed the city to sue for damages in addition to injunctive relief and abatement.⁹⁴

A pair of recent and carefully reasoned decisions by the Illinois Supreme Court, which has tended to be friendly to plaintiff arguments in the past few years, illustrate the majority view.⁹⁵ In the Illinois cases, one brought by the city of Chicago and the other by private plaintiffs, the court discussed the specific elements and standards of proof that public and private plaintiffs would have to satisfy to bring public nuisance actions against firearms manufacturers and retailers. In dismissing the suits, the court reinforced the requirement that a public right must be implicated, stating that the “right to be free from

“manufacturers, distributors, and dealers knowingly participate in a distribution system that unnecessarily and sometimes even intentionally provides guns to criminals, juveniles, and others who may not lawfully purchase them”); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141 (Ohio 2002) (stating the city alleged that the defendants “know, or reasonably should know, that their conduct will cause handguns to be used and possessed illegally and that such conduct produces an ongoing nuisance that has a detrimental effect upon the public health, safety, and welfare of the residents”).

89. See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (dismissing public nuisance claims under Pennsylvania law); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (dismissing public nuisance claims under New Jersey law); *Ganim*, 780 A.2d at 133 (dismissing public nuisance claims); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001); *Chicago*, 821 N.E.2d at 1099 (dismissing public nuisance claims); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. 2003) (dismissing public nuisance claims). But see *Gary*, 801 N.E.2d at 1232 (allowing a public nuisance claim to proceed); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. Ct. LEXIS 352, at *63-64 (July 13, 2000) (“To be sure, the legal theory is unique in the Commonwealth but . . . that is not reason to dismiss at this stage of the proceedings.”); *Cincinnati*, 768 N.E.2d at 1136 (allowing a public nuisance claim to proceed).

90. 801 N.E.2d 1222 (Ind. 2003).

91. *Id.* at 1231 (acknowledging that in all state and federal public nuisance claims under Indiana law, “courts have recognized public nuisance claims only in [these] two circumstances”).

92. *Id.* at 1233-34 (defending this position by stating that “there is no injustice in requiring the activity to tailor itself to accept the costs imposed on others or cease generating them”); see also *Cincinnati*, 768 N.E.2d at 1142 (stating that “a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public”).

93. *Gary*, 801 N.E.2d at 1234.

94. *Id.* at 1240.

95. See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1112 (Ill. 2004) (dismissing public nuisance claim by public plaintiff under the fact-pleading standard that the “court must disregard the conclusions that are pleaded and look only to well-pleaded facts to determine whether they are sufficient to state a cause of action against the defendant”); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004) (dismissing public nuisance claim by private plaintiffs).

the threat that members of the public may commit crimes against individuals” was a personal, not a public, right.⁹⁶ It also held that balancing the harm and utility of the sale and marketing of guns is a policy question better suited for the legislature, not the courts, particularly because these activities already are well regulated.⁹⁷ Further, the court was not willing to expand the traditional boundaries of public nuisance to include lawful conduct that does not involve the use of land or allow the city to collect economic damages.⁹⁸ Other courts have denied these claims because the defendants lacked the requisite control over the source of the alleged public nuisance.⁹⁹

D. Lead Pigment and Paint Litigation

Lead pigment and paint public nuisance suits grew out of failed attempts by personal injury lawyers to recover under products liability law. The cases arose out of the presence of lead paint in older homes, as lead-based paint was used widely in residential communities in the early twentieth century. In 1955, the industry voluntarily adopted standards to significantly reduce the amount of lead in paint because of potential health concerns.¹⁰⁰ Congress officially banned lead paint for residential use in 1978.¹⁰¹ Lead paint, when poorly maintained and allowed to chip or flake, could be a health hazard for small children because the ingestion of lead paint chips can cause lead poisoning.

Litigation against the product manufacturers began in the mid-1980s when Ralph Nader formed an alliance of contingency fee lawyers and filed strict products liability lawsuits.¹⁰² Those cases failed because plaintiffs could not satisfy the basic standards of products liability law: proving product defect, proximate cause, and product iden-

96. *Chicago*, 821 N.E.2d at 1114-16 (“We are also reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”); *see also* *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (stating that, under New Jersey law, “the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights”).

97. *Chicago*, 821 N.E.2d at 1121 (“We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so heavily regulated by both the state and federal governments.”).

98. *Id.* at 1117-18.

99. *See, e.g., Camden*, 273 F.3d at 539.

100. Andrew Ketterer, Editorial, *Public Attorneys and No-Win Lead Litigation*, *PUB. LAW.*, Winter 2002, at 7, 7.

101. *See In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528, at *3 (N.J. Super. Ct. Law Div. Nov. 4, 2002).

102. Until the 1980s, most litigation over lead poisoning from ill-maintained lead paint was aimed at individual landlords and property owners who allowed their properties to fall into disrepair. Michael B. Sena, *Sorting Out the Complexities of Lead-Paint Poisoning Cases*, 4 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 169, 177 (1995). The first lawsuit against a group of former lead paint manufacturers was filed in 1987 on behalf of five Massachusetts children. *See* Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 *STAN. ENVTL. L.J.* 46, 60 (1990).

tification.¹⁰³ In some cases, the statute of limitation had expired.¹⁰⁴ The lawyers then applied various industry-wide theories of liability, such as market-share liability,¹⁰⁵ enterprise liability,¹⁰⁶ and alternative

103. See, e.g., *Cofield v. Lead Indus. Ass'n*, No. MJG-99-3277, 2000 WL 34292681 (D. Md. Aug. 17, 2000); see also *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 547 (1st Cir. 1993) (noting that “[p]laintiff could not and cannot identify either which, if any, of the defendants are the source of the lead she ingested”); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 114, 121-22 (3d Cir. 1993) (stating that the city’s claims for negligence and strict liability were time barred because they accrued in 1976 when Congress enacted federal law regarding lead abatement in federally funded public housing, and the complaint was filed fourteen years later); *City of Philadelphia v. Lead Indus. Ass'n*, No. 90-7064, 1992 U.S. Dist. LEXIS 5849, at *9 (E.D. Pa. Apr. 23, 1992) (stating that the claim that lead pigment manufacturers could have produced a safer reasonable alternative of zinc or titanium pigments is “akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead”); *Wright v. Lead Indus. Ass'n*, Case Nos. 94363042/CL190487, 94363942/CL 190488, slip op. 8 (Cir. Ct. Balt. City July 6, 1995) (finding no design defect in lead pigment, as lead is intrinsic to its nature), *aff'd*, Case No. 1896, slip op. 13 (Md. Ct. Spec. App. Oct. 21, 1997) (“Lead is the very essence of lead pigment.”); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073 (N.Y. 1989) (explaining that “[i]n a products liability action, identification of the exact defendant whose product injured the plaintiff is, of course, generally required”); *Sabater v. Lead Indus. Ass'n*, 704 N.Y.S.2d 800, 805 (Sup. Ct. 2000) (“[T]here is no duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.”).

104. See, e.g., *Hous. Auth. of New Orleans v. Standard Paint & Varnish Co.*, 612 So. 2d 916, 919 (La. Ct. App. 1993) (holding that claims for fraud and conspiracy were time-barred).

105. Market-share liability developed in the 1980s as a way to hold defendants liable in litigation against manufacturers of diethylstilbesterol (DES), a drug that caused vaginal and cervical cancer in daughters of women who took it to prevent miscarriage. See, e.g., *Sindell v. Abbott Labs., Inc.*, 607 P.2d 924 (Cal. 1980). Under this doctrine, it is unnecessary for a plaintiff to identify the manufacturer of the product that caused the injury. Instead, defendants are held liable for their “market share,” but no more than that amount, even if other defendants are insolvent. *Id.* at 937. Market-share liability is limited to a narrow set of cases meeting particular characteristics: fungible products; a “signature injury” caused by the product; no other medical or environmental factors that could have caused or materially contributed to the harm; enough market-share data to support a reasonable apportionment of liability; a market that is limited in time; the inability of the plaintiff to identify the manufacturer through no fault of her own; and a long latency period between the time the product was used and the time the harm occurred. *Id.* at 936-37. Courts considering lead paint cases have all rejected market-share liability. See, e.g., *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 850 (App. Div. 1999) (explaining that while New York recognizes market-share liability in DES cases, lead litigation did not meet the standards that support dropping the proximate cause requirement in products liability law); *Skipworth v. Lead Indus. Ass'n*, 665 A.2d 1288, 1291-92 (Pa. Super. Ct. 1995) (stating that Pennsylvania does not recognize market-share liability); *Spring Branch Indep. Sch. Dist. v. NL Indus., Inc.*, No. 01-02-01006-CV, 2004 WL 1404036, at *4 (Tex. App. June 24, 2004) (rejecting market-share liability and stating that plaintiff school district’s position “disregards the bedrock principle of Texas law that a plaintiff must identify the manufacturer of the product that allegedly injured it”).

106. Under enterprise liability, there is an “industry-wide standard that is the cause of injury, and each defendant that participates in perpetuating and using the inadequate standard has contributed to and is liable for the plaintiff’s injury.” *Thomas v. Mallett*, 685 N.W.2d 791, 793 (Wis. Ct. App. 2004). Like market-share liability, this doctrine is used only in a very limited set of circumstances: a small number of manufacturers produced the injury-causing product; virtually all are named defendants; they had joint knowledge of the risks inherent in the product and joint capacity to reduce the risks; and each delegated the responsibility to establish safety standards to a trade association, which failed to reduce the risk. See *Philadelphia*, 994 F.2d at 126 (declining to adopt enterprise and market-share liability and to extend alternative liability into the field of toxic torts; “[m]arket share liability compromises fairness to defendants who must incur oftentimes staggering litigation costs as they are forced to defend all claims involving their product irrespective of their market share”).

liability,¹⁰⁷ but all of these lawsuits failed.¹⁰⁸

In 1999, personal injury lawyers from the law firm Motley Rice convinced the Attorney General of Rhode Island to partner with them in commencing a government public nuisance action against the former lead companies; the case would be brought on a contingency fee basis.¹⁰⁹ The alleged public nuisance was the mere presence of lead paint in homes and buildings.¹¹⁰ Armed with the power of the sovereign, Mr. Motley sought the costs of removing lead paint from every building in Rhode Island that contained it. He even boasted that he would “bring the entire lead paint industry to its knees.”¹¹¹ Since filing that case in 1999, the plaintiffs’ bar has partnered with public entities to bring public nuisance claims on behalf of several states, counties, and municipalities.¹¹²

In Rhode Island, the court allowed the case to go to a jury. In 2002, a jury deadlocked four to two against the state’s public nuisance claim; the second trial started in November 2005.¹¹³ The court framed the issues in the following way. First, it allowed the jury to define the public nuisance injury as “the *cumulative presence* of lead pigment in paints and coatings in [or] on buildings in the state of Rhode Island.”¹¹⁴ Second, the court stated that the jury should find “unreasonable interference” so long as the children “ought not to have to bear” the injury of lead poisoning; there was no requirement to find that the defendants engaged in any unreasonable conduct.¹¹⁵ Third, the court instructed the jury that it “need not find that lead pigment manufac-

107. Alternative liability shifts the burden to defendants to exculpate themselves or be held “jointly and severally liable for the plaintiff’s injury.” *Philadelphia*, 994 F.2d at 127-28.

108. See Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 DEF. COUNS. J. 119, 119 (2004) (stating that “lead paint and pigment defendants had never lost or settled a case” since 1987).

109. *State v. Lead Indus. Ass’n, Inc.*, No. 99-5226, Retainer Agreement, App. 4 to Pet. for Cert. ¶ 1 (R.I. filed Mar. 2, 2004).

110. See, 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). It is widely accepted that when the paint is allowed to crack or peel, young children that ingest the lead paint chips can contract lead poisoning. Lead poisoning can impair cognitive function, stunt growth, and lead to behavioral problems. See, e.g., *In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528, at *2 (N.J. Super. Ct. Law Div. Nov. 4, 2002).

111. Mark Curriden, *Tobacco Fees Give Plaintiffs’ Lawyers New Muscle for Other Litigation*, DALLAS MORNING NEWS, Oct. 31, 1999; Michael Freedman, *Turning Lead into Gold*, FORBES, May 14, 2001, at 122 (explaining that Mr. Motley targeted the former lead companies as his “next big-game hunt,” found victims, and “demonized” the industry because they were a “fat target”).

112. Public nuisance suits have been filed in Santa Clara County, California; Chicago, Illinois; St. Louis, Missouri; and Milwaukee, Wisconsin.

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

114. Peter B. Lord, *Lead-Paint Case Now in Jury’s Hands*, PROVIDENCE J., Feb. 14, 2006, at B2 (emphasis added) (quoting Judge Michael A. Silverstein).

115. Jury Instructions, *Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226, *12 (R.I. Super. Ct. Feb. 13, 2006) (“When you consider the unreasonableness of the interference, you may consider a number of factors including the nature of the harm, the numbers of community who may be affected by it, the extent of the harm, the permanence of the injuries and the potential for likely future injuries or harm.”).

tered by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable" under public nuisance theory.¹¹⁶ The court did not even require that any defendant "sold lead pigment in Rhode Island."¹¹⁷ The jury found against the defendants.¹¹⁸ Post-verdict interviews have indicated that the jury was initially deadlocked four to two *in favor* of the defense, but that the court's definitions in the jury instructions lead them to find for liability.¹¹⁹ At the time this article was published, the trial court was still contemplating how to determine and apportion abatement costs; the defendants will almost certainly appeal the final ruling.

Soon after the Rhode Island jury verdict, a California appellate court reinstated a purported public nuisance class action filed by several counties in the state against the lead paint and pigment defendants.¹²⁰ The mid-level appeals court broadly defined the public right as the "right to be free from detrimental affects [*sic*] of Lead in homes, buildings, and property in the State of California."¹²¹ Echoing concepts from the firearms litigation, the court defined as public nuisance conduct "defendants' *promotion of lead paint for interior use* with knowledge of the hazard that such use would create."¹²² In attempting to distinguish this litigation from products liability, the court suggested that "simply producing a defective product or failing to warn of a defective product" would not create nuisance liability.¹²³ A New Jersey appellate court also reinstated a public nuisance claim against lead paint and pigment defendants.¹²⁴ Both cases are still in the appeals process.

Other courts have adhered to the precedent set in asbestos and firearms cases and have not permitted plaintiffs' lawyers to expand the law of public nuisance. Several courts were bothered that the plaintiffs' lawyers "deliberately framed [their] case as a public nuisance action rather than a product liability suit," when the suit belonged in products liability.¹²⁵ In *City of Chicago v. American*

116. *Id.* at *14.

117. *Id.*

118. See Peter B. Lord, *Three Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006.

119. See Peter Krouse, *Verdict Raises Risk for Paint Companies*, PLAIN DEALER, Apr. 2, 2006 (including interviews with jurors stating that some members of the jury did not want to find for liability, but the jury instructions, according to one juror, "didn't give the paint companies much of a window to crawl through").

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

121. *Id.* at 324 (alteration in original).

122. *Id.* at 328.

123. *Id.*

124. *In re Lead Paint Litig.*, No. A-1946-02T3, 2005 WL 1994172, at *21 (N.J. Super. Ct. App. Div. Aug. 17, 2005).

125. See *City of Chicago v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567 (Ill. Cir. Ct. Oct. 7, 2003).

Cyanamid Co.,¹²⁶ the trial court stated that the suit was nothing more than another attempt to prevail under market-share liability without proof of proximate cause and that specific defendants caused the injuries to specific plaintiffs.¹²⁷ A Missouri trial court echoed that sentiment, stating that public nuisance theory cannot be used to avoid proving that each defendant actually produced, manufactured, or sold the particular product causing the harm.¹²⁸ In *Sabater v. Lead Industries Ass'n*,¹²⁹ a New York court provided that “[a] products liability action, where the damages are restricted to the user of the product and result from its allegedly negligent manufacture, does not give rise to a nuisance cause of action.”¹³⁰

In addition, courts found that lead pigment and paint manufacturers do not have control over products after they are sold and, therefore, should not be subject to liability under public nuisance theory for hazards caused by poorly maintained lead paint.¹³¹ Also, one court questioned whether there was a legitimate public nuisance injury because the plaintiffs failed to allege that the defendants’ products proximately caused any particular injury or harm-in-fact.¹³²

IV. DEFINING THE EDGES OF PUBLIC NUISANCE LAW

As evidenced by this history and the occasional divergences from traditional public nuisance theory, there appears to be a “bewilderment,” as a Michigan appellate court observed, among some legal scholars and jurists concerning the exact boundaries of public nuisance theory.¹³³ “[D]espite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts.”¹³⁴ Part of the problem is that public nuisance theory often is defined by what it is not, rather than what it is. This “I know it when I see it” test leaves a significant amount of wiggle room in the margins, as well as an opportunity for some courts, as in products liability cases, to move the tort far afield from the tort’s intended use.

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

127. See *City of Chicago*, 2003 WL 23315567, at *7.

128. See 5 Prod. Safety & Liab. (BNA) (Vol. 34), at 110-11 (Feb. 6, 2006).

129. 704 N.Y.S.2d 800 (Sup. Ct. 2000).

130. *Id.* at 806.

131. See, e.g., Smith, *supra* note 108, at 129.

132. See, e.g., *City of Chicago*, 2003 WL 23315567.

133. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 520 (Mich. Ct. App. 1992).

134. *Id.*

A. Elements of Public Nuisance Law

1. Type of Injury

The tort of public nuisance requires proof that the injury is to “a right *common* to the general public.”¹³⁵ This concept has become fairly well defined through case law. As the *Restatement (Second) of Torts* states, “[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.”¹³⁶ Donald Gifford, professor of law at the University of Maryland, clarified this definition by contrasting a “public right” with a “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.¹³⁷

In addition, “not all interferences with public rights are public nuisances. The nuisance must [also] . . . produce a common injury, or be dangerous or injurious to the general public”¹³⁸ The key inquiry is whether a person exercising a common right would be injured if she came into contact with the offending conduct. Consider the quintessential public nuisance claim against a party for blocking a public road. Blocking a public road interferes with the public right to drive on that road. Thus, a government could seek an injunction to stop the blockage even if no one actually encountered the blockage. Conversely, if the party blocked the entrance to someone’s home, a

135. *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 958 (R.I. 1994) (emphasis added) (citations omitted). This notion of a specific type of injury for a specific cause of action is not uncommon in American law. For example, to bring a suit in antitrust law, a plaintiff “must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

136. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979) (“[T]he pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.”); see also *Hydro-Mfg.*, 640 A.2d at 950 (rejecting a property owner’s public nuisance claim against a former landowner who contaminated property; the current property owner’s alleged damages due to federal enforcement action arose in the exercise of a private-property right, not a “public right”).

137. Gifford, *supra* note 3, at 815-16 (listing the following factors to determine if an injury meets this standard: “(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”).

138. 58 AM. JUR. 2D *Nuisances* § 39 (2002).

commercial shopping plaza, or a church, no public right would be violated, and the state would not have a public nuisance claim even if the blockage caused an injury.

As in this example, a public nuisance injury traditionally involved the misuse of real property.¹³⁹ While land use is still the foundation of public nuisance theory,¹⁴⁰ some courts have stretched public nuisance to include other types of conduct that conflict with a public right, such as a common right to “the health, safety, peace, comfort or convenience of the general community.”¹⁴¹ Either way, as most courts have held, this communal-based injury is wholly distinguishable from personal injuries that give rise to product-based suits. Personal injury lawyers who bring product claims under the guise of public nuisance have tried to blur this line in several ways.

First, they suggest that an injury to a significant number of individuals is the same as an injury to the community as a whole. For example, in the Rhode Island lead pigment and paint case, the lawyers bringing the suit allege that the cumulative presence of lead paint in people’s homes amounts to a public nuisance because hundreds of thousands of individuals have lead paint in their homes.¹⁴² This is faulty logic. It is clear from case law that “harm to individual members of the public”—no matter how many—is not the same as harm “to the public generally.”¹⁴³ As one court explained, “[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence.”¹⁴⁴

Second, some personal injury lawyers have tried to define the harm by its “potential” severity or magnitude, not its nature. For example, they suggest that it “is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun,

139. Though not expressed in the *Restatements of Torts*, public nuisance generally involves the defendant’s use of land.

[W]hen 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.

Gifford, *supra* note 3, at 831.

140. See, e.g., *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (“Traditionally, the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.”); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (stating that Texas case law requires public nuisance cases to be grounded in real property, such as disorderly taverns and brothels).

141. *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980).

142. See *Plaintiffs’ Second Am. Comp. ¶ 45, State v. Lead Indus. Ass’n*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (Apr. 2, 2001) (alleging interference with “the health, safety, peace, comfort or convenience of the residents of the State” (emphasis added)).

143. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1115-16 (Ill. 2005).

144. *Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943) (internal quotation marks omitted).

liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another."¹⁴⁵ Most courts have disagreed, concluding that there is no public right to be free from the threat that someone may use a legal product in a way that creates risk of harm to another.¹⁴⁶ In dismissing a public nuisance claim against gun manufacturers in New Jersey, the United States Court of Appeals for the Third Circuit wrote, "[i]f defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity."¹⁴⁷

Third, some personal injury lawyers have attempted to confuse public nuisance injury with an injury sufficient to bring a *private* nuisance claim, which is a wholly separate and distinct tort from *public* nuisance theory.¹⁴⁸ Unlike public nuisance cases, private nuisance claims are always between private parties and always center on conflicting uses of private land. The injury is the intentional invasion of a person's property that interferes with that person's use of the property. Courts, in reaching an equitable resolution, weigh the harm caused by the defendant's conduct against its social utility. There is no public right or collective harm involved. As Dean Prosser succinctly observed, the two "are quite unrelated except in the vague general way that each of them causes inconvenience to someone" and the two share a "common name."¹⁴⁹

2. Type of Conduct

a. *Common Law*

Public nuisance theory also calls for a specific type of conduct. The level of offense historically required in public nuisance claims has been comparable to quasi-criminal activity.¹⁵⁰ As part of the compromise reached during its drafting, the *Restatement (Second) of Torts* suggests lowering the standard to any "unreasonable interference" with a public right.¹⁵¹ The factors for determining unreasonableness would be whether the interference is significant; whether there is a

145. *Chicago*, 821 N.E.2d at 1116.

146. *Id.* at 1114-15.

147. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

148. *See, e.g.*, *Abrams & Washington*, *supra* note 7, at 390 ("[T]he shared name further confuses an already badly confused area of law.").

149. Prosser, *supra* note 16, at 999.

150. Public nuisance is "a species of catch-all criminal offense[s]." KEETON, *supra* note 4, at 618. When the manufacturer or seller is engaged in lawful activity, particularly a well-regulated activity, an injunction may violate the commerce clause of the U.S. Constitution.

151. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). As with most elements of public nuisance law, some cases have significantly strayed from these core elements. *See, e.g.*, *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (stating that public "nuisance [law] is predicated upon unreasonable injury, [not] unreasonable conduct").

statute proscribing or prohibiting the conduct; and whether the harm is of a continuing, long-lasting nature and the defendant knows its conduct has a "significant effect" on this ongoing harm.¹⁵²

Generally speaking, courts have encountered four categories of conduct in common law public nuisance claims: (i) unlawful, intentional acts; (ii) lawful conduct involving conflicting uses of property; (iii) lawful conduct, not involving the use of land that leads to unintended consequences; and (iv) otherwise tortious conduct. Assuming interference with a public right, the conduct in the first two scenarios would fall within the bounds of public nuisance theory. On the other hand, lawful conduct without the traditional nexus to land would not; such conduct would be considered *per se* reasonable.¹⁵³ For this reason, "the role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien."¹⁵⁴ Public nuisance theory would not support recovery simply because the "manufacture and sale of a product [was] later discovered to cause injury."¹⁵⁵

Regarding the fourth type of conduct, some have suggested that a public nuisance could be predicated on another tort, such as negligence, which causes a public nuisance injury. Thus far, this theory has been largely limited to negligence, though some have advocated allowing public nuisance claims for reckless conduct or abnormally dangerous activities.¹⁵⁶ The notion is that negligence, in particular, "embod[ies] in some degree the concept of unreasonableness" and unlawfulness.¹⁵⁷ Under this theory, each element of the underlying tort of negligence would need to be proven to sustain a public nuisance claim, i.e., the manufacturer owed the specific plaintiff a duty, breached that duty, and proximately caused damages that amounted to a public nuisance injury.¹⁵⁸

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

153. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1117 (Ill. 2005) ("To do so would be to expand the law of nuisance to encompass a third circumstance—the effect of lawful conduct that does not involve the use of land. We are reluctant to allow such an expansion."); *see also* Gifford, *supra* note 3, at 828 ("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 . . .").

154. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1993) (quoting 63 AM. JUR. 2D *Products Liability* § 593).

155. *Id.*

156. The Illinois Supreme Court limited this avenue to negligence only. *Chicago*, 821 N.E.2d at 1124 ("We conclude that it is possible to create a public nuisance by conducting a lawful enterprise in an unreasonable manner.").

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

158. *See Chicago*, 821 N.E.2d at 1125 ("[Regarding duty, t]he question turns largely on public policy considerations . . . of four traditional factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant.").

In dismissing the public nuisance claims against the gun manufacturers, the Supreme Court of Illinois stated that the negligence claim failed because the manufacturers did not owe a specific duty to the city "or its residents to prevent their firearms from 'ending up in the hands of persons who use and possess them illegally.'"¹⁵⁹ The court noted that "[t]he negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law of public nuisance."¹⁶⁰ When the underlying tort failed, the public nuisance claim failed as well.¹⁶¹

b. *Statutes and Regulations*

State and local governments may also define a specific activity as a public nuisance through legislation, regulation, or ordinance. Examples include laws barring the use of watercraft equipment with sirens or flashing lights; the planting of hedges on one's property that might block the sight of drivers; or the creation of hazards in properties adjacent to airports that might obstruct airspace.¹⁶² Violations of these laws are comparable to the quasi-criminal behavior generally associated with public nuisance theory because courts view these violations as "conclusive as to the existence of the crime and the unreasonableness of the interference."¹⁶³

Conversely, when the field of conduct is well regulated, conduct that might be categorized as unreasonable under common law may become non-tortious.¹⁶⁴ In these instances, courts accept that the legislative or regulatory body has determined that such conduct is acceptable to society and is therefore not unreasonable. For example, if an environmental statute provides for a maximum amount of pollu-

159. *Id.* at 1126 (quoting plaintiffs' complaint).

160. *Id.*

161. Regarding the retailers, the Illinois Supreme Court stated that "criminal acts of third parties [broke] the causal connection and the resulting nuisance," making injuries caused by criminals not foreseeable and too remote. *Id.* at 1134 (citations omitted). Another recent case reinforced this point, providing that "[m]erely engaging in what plaintiffs deem to be a risky practice, without a connecting causative link to a threatened harm, is not a public nuisance." *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 680 (Ct. App. 2005).

162. See *Chicago*, 821 N.E.2d at 1120 (citing 605 ILL. COMP. STAT. ANN. 5/9-108 (West 2002), which defines public nuisance as "planting of willow trees or hedges on the margin of a highway"; 620 ILL. COMP. STAT. ANN. 25/11 (West 2002), which defines public nuisance as creating "a hazard that obstructs the airspace required for the take-off or landing of aircraft"; and 625 ILL. COMP. STAT. ANN. 45/4-8 (West 2002), which defines public nuisance as using "watercraft equipped with siren or flashing lights").

163. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979). In codifying certain behaviors as public nuisances, some state legislatures concluded that the conduct proscribed in such statutes is unreasonable and interferes with a common right. The offending acts, therefore, were akin to common law crimes. *Id.*

164. The only means of pursuing a public nuisance claim for such lawful conduct would be to show that "the law regulating the defendant's enterprise is invalid." *Chicago*, 821 N.E.2d at 1124.

tion that a factory can emit, then a company would not be subject to liability under public nuisance theory for emissions that are within those limits.

3. Control

If public nuisance injury and conduct exist, the "paramount" issue becomes whether the element of control can be satisfied with respect to each defendant.¹⁶⁵ Control has long been a "basic element of the tort."¹⁶⁶ As a Rhode Island court observed, "[i]f the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."¹⁶⁷

Historically, when public nuisance cases involved property, the party who controlled the public nuisance was the party who owned or operated the property at the time of abatement. The court in *Detroit Board of Education v. Celotex Corp.* explained the following:

[L]iability of a possessor of land is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others.¹⁶⁸

As another court stated, the "inability to allege that the defendants ha[ve] a legal right to abate the nuisance is fatal to [a] nuisance claim."¹⁶⁹

Under this interpretation, a former landowner, even one who created the nuisance, would not be liable for abatement because she could no longer gain access to the land.¹⁷⁰ Thus, prospective buyers were encouraged to investigate the condition of a property and sellers had the incentive to cease and remediate any public nuisance on the property to maximize its sale price. Parties could also factor the existence of the public nuisance into the bargained-for price of the property. Either way, the seller would emerge from the transaction unencumbered by speculative, future liability. Some legislators found

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

166. *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986). *But see Chicago*, 821 N.E.2d at 1129 (suggesting that the element of control is "a 'consideration' and an 'issue,' but not . . . a prerequisite to the imposition of nuisance liability" (quoting *People v. Brockman*, 574 N.E.2d 626, 635 (Ill. 1991))).

167. *Manchester*, 637 F. Supp. at 656.

168. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W. 513, 521-22 n.8 (Mich. Ct. App. 1992).

169. *Corp. of Mercer Univ. v. Nat'l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at *7 (M.D. Ga. Mar. 9, 1986).

170. *See, e.g., Maisenbach v. Buckner*, 272 N.E.2d 851, 854 (Ill. App. Ct. 1971) ("Where a landowner clearly has no right to control the property after he sells it to another, he likewise can have no duty to third persons injured in connection with the property after the sale."); *RESTATEMENT (SECOND) OF TORTS* § 839 cmt. d (1979) ("[A] vendee or lessee 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 it was created by his vendor, lessor or other person and even though he had no part in its creation.").

this passing of liability unfair. "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."¹⁷¹

Nevertheless, a few courts have sought to create a public nuisance cause of action against the creators of the nuisance. For example, a federal district court in Rhode Island, in a case involving the alleged discharge of raw sewage into a river, allowed a public nuisance claim against previous owners. Diverting from tradition, the court stated that the issue "is whether the defendant was in control of the instrumentality alleged to have created the nuisance when the damage occurred."¹⁷² In the *City of Chicago* gun case, the Illinois Supreme Court in dictum went further, stating that "when the nuisance results from the use or misuse of an object apart from land, or from conduct unrelated to a defendant's use of land, lack of control of the instrumentality at the time of injury is not an absolute bar to liability."¹⁷³ While this statement represents the minority view, it is the direction that the environmental community sought in the *Restatement (Second) of Torts* and followed in the *Love Canal* cases.

Under any method of assessing control, there is no doubt that product manufacturers no longer have control over a product after it is sold.¹⁷⁴ Even in the *Love Canal* cases, while the defendant did not control the property, it had contracted with the property owner to dispose of the waste.¹⁷⁵ Because the defendant owned the waste, the court deemed it to have a connection to the nuisance.¹⁷⁶ A product manufacturer, on the other hand, furnishes lawful products to third parties. As numerous courts have concluded, furnishing a product or instrumentality—whether it be chemicals, asbestos, guns, lead paint, or other products—is not the same as having control over that instrumentality.¹⁷⁷ Thus, with regard to product manufacturers, "a basic el-

171. Gifford, *supra* note 3, at 824 (noting the reluctance of courts to allow governments that abate nuisances to seek reimbursement because the need for access to the nuisance is no longer necessary).

172. *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 634 (D.R.I. 1990).

173. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1129, 1132 (Ill. 2005) ("Plaintiffs acknowledge the general rule that when a defendant is blameless for the subsequent misuse of its product, it bears no legal responsibility for a nuisance subsequently created by those who have purchased the product.").

174. *See, e.g., City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) ("[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance."); *see also Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984); *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

175. *See State v. Schenectady Chems.*, 459 N.Y.S.2d 971, 974 (Sup. Ct. 1983).

176. *See id.*

177. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540-41 (3d Cir. 2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 910 (E.D. Pa. 2000).

ement of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief.”¹⁷⁸

4. Proximate Causation

Finally, the defendant’s conduct must have proximately caused the public nuisance.¹⁷⁹ The proximate cause analysis in public nuisance theory is the same as with claims for traditional negligence. A plaintiff must show that the conduct that created the public nuisance was foreseeable and satisfies the doctrine of remoteness.¹⁸⁰ Thus, the injury to the plaintiff must be the type of injury that a reasonable person would see as a likely result of her conduct.

In this analysis, acts of third parties are intervening events that may cut off proximate cause, depending on the nature of the event.¹⁸¹ Courts distinguish between tortious acts, such as creating a public nuisance, and benign acts, such as furnishing a condition upon which a tortfeasor acts. Generally, a party is not liable unless it “increase[s] an unreasonable risk of harm” caused by the intervening event.¹⁸² It is important to note that a party “may reasonably proceed upon the assumption that others will obey the criminal law.”¹⁸³ This is a key reason why public nuisance theory has failed in most gun and lead paint claims.

For example, in *City of Chicago v. Beretta*, the court stated that there is no proximate cause if the tortfeasor could have created the nuisance without the conduct of the manufacturer. Thus, if the creator of the nuisance could have purchased the product from another vendor, the retailer or manufacturer could not be deemed to have

178. *Manchester*, 637 F. Supp. at 656; see also *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (stating that once Monsanto sold its products to Westinghouse, then “Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product”).

179. See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1127-33 (Ill. 2005) (combining the proximate cause and control analyses into one element).

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

181. JOHN L. DIAMOND, *CASES AND MATERIALS ON TORTS* 256 (2001) (“An intervening force is one which joins with the defendant’s conduct to cause the injury. Such a force, whether it be human, animal, mechanical, or natural is considered intervening because it occurs after the defendant’s conduct. An intervening force will only act to cut off proximate cause if it is characterized as superseding. . . . [W]hile courts are quick to find negligence of a third party foreseeable and hence not superseding, criminal acts are often characterized as extraordinary unforeseeable and hence superseding.”).

182. KEETON, *supra* note 4, at 305.

183. *Id.*

proximately caused the nuisance.¹⁸⁴ This theory would defeat proximate cause in public nuisance actions against product manufacturers when there is competition in the marketplace.

Ironically, one of the key reasons personal injury lawyers tried to convert product suits into public nuisance claims was that they could not establish the proximate cause element under products liability law. Re-filing a claim in public nuisance, however, does not and should not eliminate the proximate cause requirement. It is inappropriate for courts, such as in the Rhode Island lead litigation or the municipal gun cases, to allow a plaintiff to generalize this burden by aggregating sales and filling gaps with statistical information.

B. *Government Actions Under Public Nuisance Law*

When the government serves as the plaintiff and is suing in its role as the sovereign, only injunction or abatement remedies are appropriate.¹⁸⁵ Litigation in which a government uses public nuisance theory against product manufacturers for the costs of police protection or other government programs raises two key problems. First, it violates well-established public nuisance remedies by seeking monetary compensation. "Even when it acts in the name of public health, the state is not the party who has suffered the special damages being sought."¹⁸⁶ Second, the public services doctrine prevents the costs associated with the performance of governmental functions from being recoverable in tort. The costs of police protection, government abatement programs, and other similar services are borne by the public as a whole and cannot be assessed against an individual tortfeasor.

C. *Private Actions Under Public Nuisance Law*

Since the sixteenth century, a private individual who sustained a particular injury from a public nuisance has had standing to bring a public nuisance action against the wrongdoer for compensation.¹⁸⁷ The prerequisite for such a cause of action is that the basic elements of public nuisance theory must be satisfied: public injury, unreasonable

184. *Chicago*, 821 N.E.2d at 1127 (defining proximate cause in a public nuisance case as "whether the injury is of a type that a reasonable person would see as a likely result of his conduct"). In addition, the defendant would have to foresee which individual sales or behaviors would lead to the creation of the particular nuisance at issue.

185. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979) (explaining that public nuisance law started solely as an action by the state—through the King's sheriff, the equivalent of the modern state attorney general—to stop a private party from invading a public right).

186. Gifford, *supra* note 3, at 784-85.

187. The *Restatement (Second) of Torts* explains that allowing such a private cause of action is legally justified because it would be unreasonable for a party to engage in the conduct without also paying for the harm done by that conduct. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (1979).

conduct, defendant control, and proximate cause. A private individual could not seek an injunction or abatement.

In a recent South Carolina case, *Overcash v. South Carolina Electric & Gas Co.*,¹⁸⁸ the court further stipulated that the particular injury requirement “is satisfied only by injury to the individual’s real or personal property.”¹⁸⁹ In this case, a boater was injured in a collision with a dock that was blocking a navigable waterway. In dismissing the claim, the court reviewed the history of private actions in public nuisance law. It reasoned that because there are “well developed tort-based doctrines which can redress wrongs resulting in personal injuries . . . [t]he addition of personal injury to public nuisance actions . . . would perpetuate the erosion of any semblance of doctrinal consistency in the common law of nuisance.”¹⁹⁰

Consider the following illustration: A landowner pollutes the ground and local river in a way that creates a public nuisance. The government will have a cause of action under public nuisance theory to stop the polluting activity and force the responsible party to abate the condition. A neighbor whose well water was polluted by the contamination, thereby sustaining a particular injury from the public nuisance, could seek compensation for her own damages. Conversely, a person who does not have a particular injury could not sue under public nuisance theory. Thus, under this example, members of the general public, who may no longer swim or fish in the river, would not have standing to sue.

The key issue in these suits is determining whether the alleged injury is different in kind or just different in degree—the same, but more severe—than that of the general public. As explained in *Alaska Native Class v. Exxon Corp.*, public nuisance actions are not available for those who sustain injuries that are only different in degree.¹⁹¹ Professor Antolini acknowledges this, with frustration, in stating that “two doctrines historically have limited the utility of public nuisance as a cause of action [for private parties] to redress community problems: the thoroughly entrenched ‘special injury rule’ and its constant companion, the strict ‘different-in-kind’ test.”¹⁹²

188. 614 S.E.2d 619 (S.C. 2005).

189. *Id.* at 622.

190. *Id.*

191. *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997). In a product case, allowing liability against a manufacturer in tort for solely economic losses occasioned by a malfunction of its product would, in effect, make a manufacturer a guarantor that all of its products would continue to perform satisfactorily throughout their reasonable existence. See, e.g., *Casa Clara Condo. Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1245-48 (Fla. 1993) (reinforcing the economic loss doctrine in Florida); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 (1998).

192. Antolini, *supra* note 16, at 759.

[T]he trend seems pretty clear here—if there’s a form of social improvement that you can’t accomplish by the normal legislative process, or is impeded by archaic constitu-

Some, including Professor Antolini, have suggested that members of the general public should have standing to sue for injunctive relief and abatement. Thus far, as discussed earlier in this article, only the Supreme Court of Hawaii has allowed such a cause of action. By maintaining the power of injunction and abatement with government entities, charged with balancing the social utility of the conduct against the public good, courts have minimized the potential for private parties, motivated by their own interests, to misuse public nuisance theory.

V. MTBE CASE STUDY: DEMONSTRATING THE BOUNDARIES OF PUBLIC NUISANCE LAW

A constructive case study for assessing the boundaries of public nuisance theory is the ongoing litigation involving the gasoline additive MTBE because it involves both land-based and product-based allegations. MTBE is a by-product of the process for refining gasoline that is used to increase gasoline oxygen content. Since the 1970s, MTBE has been added to high octane gasoline because it offered cleaner, more efficient burning fuel. In 1990, Congress enacted the Reformulated Gasoline Program as part of the Clean Air Act,¹⁹³ which required that gasoline contain higher oxygen levels in some urban centers to reduce air pollution.¹⁹⁴ In 1992, the Environmental Protection Agency (EPA) issued regulations for the program and certified MTBE as an acceptable oxygenate.¹⁹⁵ Gasoline with high levels of MTBE constitutes fifteen percent of all gasoline sold in the affected areas.¹⁹⁶ As a result, toxic air pollutants and harmful ozone levels have been reduced and smog has diminished.¹⁹⁷

In pursuing public nuisance claims against the manufacturers of MTBE, the plaintiffs allege that gasoline with MTBE is leaking into the ground, contaminating underground water sources, and making

tional provisions like the Bill of Rights, then engage some high-powered attorneys who know where to find deep pockets for their contingency fees, and go for it.

Ed Quillen, *Novel Litigation We Can Look Forward to*, DENVER POST, Mar. 7, 1999, available at <http://www.custerguide.com/quillen/eqcols/19993073.htm>.

193. 42 U.S.C. § 7545(k) (2000).

194. There are geographic areas with severe problems in attaining the National Ambient Air Quality Standard (NAAQS) for ozone use; these regions are called Nonattainment Areas. See 42 U.S.C. §§ 7501-90 (2000).

195. U.S. Environmental Protection Agency, Frequently Asked Questions (FAQs) About MTBE and USTs, <http://www.epa.gov/swrust1/mtbe/mtbefaqs.htm> (last visited Mar. 21, 2006) [hereinafter EPA FAQs].

196. "MTBE is added to approximately eighty-seven percent of the gasoline that is 'marketed, sold and used' in the United States." Trevor Graves, *Methyl Tertiary Butyl Ether (MTBE): A Certification Problem*, 17 J. NAT. RESOURCES & ENVTL. L. 187, 188 (2003).

197. James E. McCarthy & Mary Tiemann, *MTBE in Gasoline: Clean Air and Drinking Water Issues*, CONG. RESEARCH SERV. (Mar. 24, 1998), available at http://digital.library.unt.edu/govdocs/crs/data/1998/upl-meta-crs-6516/98-290_1998Mar24.pdf ("[MTBE] is credited with producing marked reductions in emissions of carbon monoxide and of the volatile organic compounds that react with other pollutants to produce smog.").

“water unusable and unfit for human consumption.”¹⁹⁸ It is widely accepted that the major source of the leakage is poorly maintained underground storage tanks at gasoline stations. Additional pollution comes from leaking above-ground tanks, pipes, farm run-off, and run-off from consumers who spill when filling the gas tanks in their automobiles.¹⁹⁹ Plaintiffs argue that manufacturers are liable because they knew that MTBE “is highly soluble and travels faster and farther in water than other gasoline components,” they conspired to misrepresent this threat, and they failed to disclose the information in gaining EPA approval for MTBE.²⁰⁰

MTBE litigation has been consolidated in a Multi-District Litigation (MDL) before the United States District Court for the Southern District of New York, which has allowed the public nuisance claim to proceed. In assessing whether public nuisance liability should arise from making, selling, or distributing MTBE, courts should consider traditional principles of nuisance theory and apply the elements that this article has shown are based on reason and long experience. Courts should neither stretch nor narrow those principles in reaching a result.

A. Common Injury

The threshold inquiry for a public nuisance action is whether there is an interference with a right common to the general public. In contamination cases, such as with MTBE, a public nuisance injury oc-

198. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 599 (S.D.N.Y. 2001) (stating plaintiffs allegations that MTBE’s “foul taste and odor” make it undrinkable).

199. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 330 n.5 (S.D.N.Y. 2002).

As a large industrialized nation, the United States produces, distributes, and consumes extensive quantities of gasoline, and much of that gasoline contains MTBE. After production, gasoline may travel through thousands of miles of pipelines, or be transported by truck, to any of roughly 10,000 terminals and bulk stations. From there it may be distributed to one of 180,000 retail outlets and fleet storage facilities, or to any of hundreds of thousands of above ground or underground tanks at farms, industrial facilities, businesses, and homes. Finally, gasoline is removed from bulk storage into individualized storage units associated with such products as cars, trucks, boats, planes, lawn mowers, brush cutters, and chain saws. Residual gasoline in transport conduits may contaminate different types of fuels (e.g., home heating oil) that is [sic] transported through the same conduits at different times. There are opportunities for leaks wherever gasoline (or a product containing gasoline) is stored and there are opportunities for spills whenever fuel is transported or transferred from one container to another. Gasoline is released to the environment every day. Although releases (through leaks, spills, and overfills) from underground storage tank systems is [sic] a major source of MTBE contamination there are many other potential sources. Other potential sources of MTBE releases include: farm and residential tanks of 1,100 gallons or less, home heating oil tanks, tanks in basements, tanks of 110 gallons or less, emergency spill and overfill tanks, above ground tanks, automobile accidents, tank truck spills, consumer disposal of “old” gasoline, spills during refueling operations, motorized water craft, and storm water runoff.

EPA FAQs, *supra* note 195.

200. *Id.*

curs when public grounds or public waterways are polluted. Conversely, MTBE contamination that only affects the well water of private landowners does not constitute a public nuisance injury.²⁰¹ As explained in the gun and lead litigation, the number of private landowners affected is not a factor in the creation of a public nuisance.

B. *Unreasonable Conduct*

The next step is to categorize the type of conduct that created the nuisance and determine whether such conduct can be deemed unreasonable. As indicated, most MTBE contamination comes from leaks in underground storage tanks, pipes, and other activities that violate state and federal codes associated with the transport, storage, and use of gasoline. The parties violating those codes—the owners or operators of the faulty tanks or leaky pipes—may be liable in public nuisance law for committing unreasonable, unlawful, or otherwise tortious conduct. On the other hand, manufacturers of MTBE or MTBE gasoline products did not contribute to the conduct creating the contamination. Rather, manufacturing such products would be categorized as lawful conduct, not involving the use of land, which led to unintended consequences. The purpose of adding MTBE to gasoline was to reduce pollution that would adversely affect the general public, not to harm the community or anyone in it. Moreover, literally thousands of products could cause harm if they are improperly stored. It is the party who fails to store a potentially harmful product, not the product manufacturer, who may be subject to liability for creating a public or private nuisance.

In addition, the authorizing statute for the Reformulated Gasoline Program, as well as the regulations issued by the EPA in implementing the program, provide a guide for identifying the types of MTBE conduct that have been approved by the government's regulatory scheme and, therefore, are *per se* reasonable.²⁰² Former U.S. Senator J. Bennett Johnston, the Chairman of the Senate Committee on Energy and Natural Resources during the 1990 Clean Air Act amendments on MTBE, recently confirmed that "Congress and the

201. In the motion to dismiss filed by the joint defense group, they state that "[p]laintiffs expressly acknowledge the lack of requisite 'public' harm in the Complaint. That concession alone—that public access to drinking water is not an issue in this case—is further reason to dismiss" the public nuisance action. Memorandum in Support of Defendants' Joint Motion to Dismiss "Master Complaint" as Adopted by Both the La Susa & England Plaintiffs in Their Amended Complaints, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001) (No. 00-1898) (citation omitted).

202. EPA formed the Oxygenates-Water Research Task Group to review research on MTBE and is monitoring water for MTBE contamination through the National Water-Quality Assessment Program. McCarthy & Tiemann, *supra* note 197. Defendants in MTBE litigation have asserted that federal statutes preempt state tort claims. This article takes no position on the preemption argument, as the relevance of federal regulation in a public nuisance action is not the same as with preemption.

EPA went into the MTBE process with eyes open.”²⁰³ Johnston further noted that

[w]e recognized that, among the fuel additives the government was mandating for use in cleaning smog-prone city air, MTBE was the only commercially viable alternative at the time. MTBE’s water solubility risks and ability to clean the air were trade-offs we faced. . . . [Energy producers] were operating under a federal mandate to use MTBE. The producers weren’t in a position to decide what oxygenate to use²⁰⁴

In implementing the program, the EPA set levels for when MTBE contamination is considered harmful and focused “on the need to minimize leaks from underground fuel storage tanks.”²⁰⁵ Thus, the plaintiff would have to establish that the defendant acted outside this regulatory framework in order to pursue a public nuisance action.²⁰⁶

In an effort to blur these boundary lines, plaintiffs have alleged that gasoline companies knew, but did not disclose, damaging information in gaining EPA approval for MTBE. There is significant evidence to the contrary, and after much study, the EPA has maintained its approval of MTBE for use in gasoline.²⁰⁷ Even if true, however, courts have held that this is not the type of conduct that gives rise to a public nuisance action. As with the firearms suits, in which plaintiffs alleged that the manufacturers sold a product that they knew would be used illegally and would cause harm, plaintiffs first would have to prevail on a negligence action as the basis for a public nuisance claim. Manufacturers, however, do not have the requisite duty to the public to provide information to the EPA. Plaintiffs also could not allege a theoretical claim for fraud on the EPA because only the EPA has standing to bring such a suit.²⁰⁸

203. J. Bennett Johnston, Letter to the Editor, *Energy Producers Operated Under an MTBE Mandate*, WALL ST. J., July 26, 2005, at A25.

204. *Id.*

205. McCarthy & Tiemann, *supra* note 197.

206. When contamination levels are below state and federal safety standards, the contamination would not be deemed unreasonable for the purposes of a public nuisance action. In the MDL action, many of the plaintiffs have not detected any MTBE in their well water while others have registered MTBE levels far below state and federal standards. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 331 (S.D.N.Y. 2002); *see also* J. Russell Jackson, Editorial, *Public Nuisance Theories*, NAT’L L.J., May 16, 2005, at 12 (“Particularly when the product is a regulated one, courts are increasingly reluctant to undertake judicial regulation of the product using nuisance theory.”).

207. “In EPA’s view, studies to date have not indicated that MTBE poses an[y] greater risk to health than other gasoline components, such as benzene.” McCarthy & Tiemann, *supra* note 197.

208. When a company fraudulently gained approval from a federal agency for its products or conduct, only the agency has an action for fraud, not a private citizen. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 344 (2001).

C. Control

Regardless of whether the court looks at control at the time of abatement or at the time the nuisance was created, the potentially culpable defendant must be an owner, occupier, or operator of the leaky storage tank or pipeline, not the manufacturer of the gasoline. In denying class certification in the MTBE MDL, the district court for the Southern District of New York acknowledged that MTBE and gasoline manufacturers did not have control of the areas that were contaminated. In addressing the request for an injunction, the court stated that, “[i]njunctive relief is also inappropriate in this case because . . . a third party-owned [underground storage tank] is the source.”²⁰⁹ Thus, “the third party’s cooperation—in allowing defendants to enter its property, in agreeing to upgrade tanks or in taking whatever steps are necessary to curtail future leaks—is essential to any remediation program.”²¹⁰ This rationale dictates why control in the public nuisance claim is not satisfied.

Some courts, including the federal court overseeing the MTBE MDL, have suggested that whether the manufacturer notified the gas station owners or operators of the special risks associated with MTBE, as well as the adequacy of any such warnings, could be factors in the element of control. As a practical matter this perspective is not correct and stems from a misinterpretation of *City of Bloomington v. Westinghouse Electric Corp.*²¹¹ In that case, the court stated that Monsanto, manufacturer of the PCBs involved in the suit, was not liable under public nuisance theory because “Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product.”²¹² In dicta, the court noted that, because Monsanto repeatedly warned Westinghouse of the dangers of PCBs, it would be particularly unfair for Monsanto to bear any liability. As the holding makes clear, the decision did not rest on the fact that warnings were given. Rather, the court stated that the reason Monsanto was deemed not to have control over the nuisance was because “[t]he allegations do not support the proposition that Monsanto *participated* in carrying on the nuisance. *Without such participation*, Monsanto cannot be liable within the definition” of public nuisance theory.²¹³

209. *In re MTBE*, 209 F.R.D. at 345-46.

210. *Id.* at 346.

211. *See In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 628 (S.D.N.Y. 2001) (dismissing the importance of *City of Bloomington* because Monsanto “made every effort to have [Westinghouse] dispose of the chemicals safely”).

212. *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989).

213. *Id.* (emphasis added).

D. Proximate Cause

Under a traditional proximate cause analysis, the party who illegally or negligently failed to maintain an underground storage tank or pipeline in accordance with federal or state codes could have proximately caused the resulting contamination. These illegal or negligent acts could also break the chain of causation for others, including makers of gasoline with MTBE.²¹⁴ Nevertheless, plaintiffs suggest that manufacturers could be deemed to have proximately caused the contamination because they sold a harmful product knowing that a certain percentage of tanks and pipelines will leak. But, as the Illinois Supreme Court explained in its gun liability suit, it would have to be foreseeable to the seller which specific tank or pipeline was going to leak in order to conclude that the seller proximately caused the specific contamination.²¹⁵

E. Private Plaintiffs

For a private individual, such as a well owner, to bring a public nuisance claim for MTBE contamination, she would have to satisfy all of the previous elements of a public nuisance claim *and* have sustained particular damages. In addition, plaintiffs could only seek specific compensation, not injunction or abatement, and, except perhaps in Hawaii, could not seek a citizen class action.

For the foregoing reasons, public nuisance actions against manufacturers of gasoline with MTBE fall outside of the traditional boundaries of public nuisance theory. The district court for the Southern District of New York, with a distinguished judge, broadened nuisance theory beyond its traditional and rational limits.²¹⁶

VI. PUBLIC POLICY

Keeping public nuisance theory within rational boundaries is the same type of rational line drawing that pervades all of tort law, such as in the torts of trespass, false imprisonment, and negligent infliction of emotional distress.²¹⁷ While the boundaries in public nuisance theory

214. See KEETON, *supra* note 4, at 311-19; VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS CASES AND MATERIALS 324-26 (10th ed. 2000).

215. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2005) ("We agree with the conclusion of the appellate division of the supreme court of New York in *Spitzer*: 'defendants' lawful commercial activity, having been followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm.'" (quoting *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201 (App. Div. 2003))).

216. See *In re MTBE*, 175 F. Supp. 2d at 627-30.

217. Victor E. Schwartz, Mark A. Behrens & Phil S. Goldberg, *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61 (2005).

may be more difficult to define than in other torts, it is clear that product-based suits fall outside of the line of the protections of the tort. As a learned judge explained, there are "practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another."²¹⁸ Law students sometimes like to stretch individual torts, such as battery, far beyond their well-defined perimeters. At that point in their careers, they may not realize that more appropriate tort vehicles exist by which to consider and evaluate certain conduct.

A. *Products Liability Is the Right Body of Law for Product-Based Claims*

The "paramount basis of liability" for manufacturers of products has been the mis-manufacturing of a product, the defective design of a product, or the failure by a manufacturer to reasonably warn the public of a risk associated with a product.²¹⁹ The new *Restatement (Third) of Torts: Products Liability*, spells out the rules for each category of liability.²²⁰

The underlying principles of products liability balance the interests of consumers, manufacturers and suppliers, and the public at large by facilitating plaintiffs' recovery and providing manufacturers with an incentive to exercise due care in making their products.²²¹ Manufacturing defects are easily understood and determined by juries. They exist if the product "departs from its intended design even though all possible care was exercised in the preparation and marketing of the product,"²²² such as a mouse in a soda bottle or a nail in a can of food. Because manufacturers are strictly liable for such defects, their liability can be actuarially projected for purposes of setting appropriate liability insurance rates and premiums.

Regarding design defect, the authors of the new *Restatement (Third) of Torts: Products Liability* understand that liability may be imposed only if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."²²³ The selection of this reasonable alternative design at a reasonable cost test was based on the principle of fairness: If something was wrong with a design, the plain-

218. *Sturm, Ruger & Co.*, 761 N.Y.S.2d at 196 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001)).

219. See SCHWARTZ ET AL., *supra* note 214, at 712.

220. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (1998).

221. See SCHWARTZ ET AL., *supra* note 214, at 712-13.

222. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (1998).

223. *Id.* § 2(b).

tiff should be required to demonstrate how it could be improved and corrected.

This same reasoning applies to warning defects, as a product "is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided" through reasonable instructions or warnings.²²⁴ There has been a firm public policy judgment that "super strict" liability is inappropriate with warning defect cases because hindsight does not equal foresight. In essence, "super strict" liability works well for manufacturing defects but not claims based on design or warnings. As this article demonstrates, the law of public nuisance should not be twisted in its perimeters to escape this fundamental public policy judgment.

B. *Public Nuisance Law Would "Devour" Products Liability Law*

While "defect is the conceptual linchpin that holds products liability law together,"²²⁵ public nuisance theory does not include the concept of "defect" at all. Thus, allowing a product-based case to be brought in public nuisance law would unwisely and irreparably distort the fundamental principles and public policy goals of products liability. As one court explained, public nuisance theory would "become a monster that would devour in one gulp the entire law of tort."²²⁶

The reason that public nuisance theory is so alluring to the personal injury bar is because it would negate the traditional products liability requirement of proving defect. Plaintiffs also may be able to circumvent defenses based on their own conduct and statutes of limitation. Advocates of tearing down the public nuisance boundaries have stated the following:

[P]ublic nuisance gives plaintiffs the opportunity to obtain damages and injunctive relief, lacks laches and other common tort defenses, is immune to administrative law defenses such as exhaustion, avoids the private nuisance requirement that the plaintiff be a landowner/occupier of affected land, eliminates a fault requirement, and circumvents any pre-suit notice requirement.²²⁷

However, as Dean John Wade noted in 1973, if

a plaintiff would need only to prove that the product was a factual cause in producing his injury. . . [the manufacturer] would be liable for all damages produced by the car, a gun maker would be liable to

224. *Id.* § 2(c).

225. James A. Henderson Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1267 (1991).

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

227. Antolini, *supra* note 16, at 774-75.

anyone shot by the gun, anyone cut by a knife could sue the maker.²²⁸

As wise jurists have observed, plaintiffs' lawyers would be able to "convert almost every products liability action into a [public] nuisance claim."²²⁹

All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.²³⁰

Under this scenario, product manufacturers would be thrust into the role of insurers of their products and be forced to police their consumers to ensure that products would not be used in ways that could create a public nuisance. For the following reasons, courts have repeatedly stated that public nuisance doctrine should not provide an end-run around the fundamental principles of product liability law.²³¹

- "A separate body of law (strict product liability and negligence) has been developed to cover the design and manufacture of products. To permit public nuisance law to be applied to the design and manufacture of lawful products would be to destroy the separate tort principles which govern those activities."²³²
- Courts should "enforce the boundary between the well-developed body of product liability law and public nuisance law."²³³
- To hold otherwise would "give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery."²³⁴
- The result would be "staggering": "The manufacturer's liability will turn not on whether the product was defective, but whether its legal marketing and distribution system somehow promoted the use of its product by 'criminals and underage end users.'"²³⁵

228. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 828 (1973).

229. *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

230. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).

231. In addition to asbestos, guns, and lead paint, federal and state courts around the country have rejected public nuisance suits for a slew of other products as well. *See, e.g.*, *Miller v. Home Depot, U.S.A., Inc.*, 199 F. Supp. 2d 502, 514 (W.D. La. 2001) (rejecting application of public nuisance law in case involving treated lumber); *E S Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1493-94 (N.D. Ala. 1995) (same in plasticizing chemical case); *First Nat'l Bank v. Nor-Am Agric. Prods., Inc.*, 537 P.2d 682, 686 (N.M. Ct. App. 1975) (same in seed disinfectant case); *DiCarlo v. Ford Motor Co.*, 409 N.Y.S.2d 417, 418 (App. Div. 1978) (same in case against automobile manufacturer).

232. *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838, at *2 (Ct. Com. Pl. Ohio Oct. 7, 1999).

233. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

234. *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993); *see also Camden*, 273 F.3d at 540.

235. *Ileto v. Glock, Inc.*, 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting).

C. Product Regulation Through Public Nuisance Law

Another potential danger in allowing public nuisance claims against product manufacturers is that courts would “use [their] injunctive powers to mandate the redesign of” products and regulate “business methods.”²³⁶ Consider, for example, reports that lawyers may bring public nuisance claims against food manufacturers for people’s consumption habits that have led to obesity.²³⁷ Professor John F. Banzhaf III of George Washington University, one of the architects of the tobacco litigation and lead organizer of the recent attempts to sue the food industry for obesity, explained that “if the legislatures won’t legislate, then the trial lawyers will litigate.”²³⁸ As the District Court of Appeals of Florida stated in *Penelas v. Arms Technology, Inc.*,²³⁹ however, “the judiciary is not empowered to ‘enact’ regulatory measures in the guise of injunctive relief.”²⁴⁰ Former Labor Secretary Robert Reich has called such regulation through litigation “faux legislation, which sacrifices democracy.”²⁴¹

This practice is being used against several industries. For example, a number of purported public nuisance class actions have been filed against manufacturers of alcoholic beverages by parents seeking the money that their children illegally spent on alcohol.²⁴² These parents allege that industry advertisements constitute a public nuisance, notwithstanding the conclusions of the U.S. Federal Trade Commission that the advertisements properly target adults of legal drinking age and that any regulation on advertising could violate the companies’ First Amendment right to free speech.²⁴³ A trial court in Los Angeles already dismissed such a claim, wisely sustaining the fundamentals of public nuisance theory. The court held that plaintiffs failed

236. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001).

237. See Charles H. Moellenberg Jr., *Heavyweight Litigation: Will Public Nuisance Theories Tackle the Food Industry?*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash. D.C.), Sept. 3, 2004, at 1; Victor E. Schwartz & Phil S. Goldberg, *Closing the Food Court: Why Legislative Action Is Needed to Curb Obesity Lawsuits*, BRIEFLY, (Nat’l Legal Center for the Pub. Int., Wash. D.C.), Aug. 2004, at 2.

238. *Fast Food on Trial* (Nat’l Pub. Radio broadcast Aug. 8, 2002), available at <http://banzhaf.net/docs/npr.html> (last visited Mar. 21, 2006).

239. 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001).

240. *Id.* at 1045.

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

242. See, e.g., *Goodwin v. Anheuser-Busch, Inc.*, No. BC310105, 2005 WL 280330, *8 (Cal. Sup. Ct. Jan. 28, 2005) (granting defendants’ Motion for Judgment on the Pleadings), *appeal filed*, Mar. 16, 2005; *Alston v. Advanced Brands & Importing Co.*, No. 05-72629, 2006 U.S. LEXIS 31324 (E.D. Mich. May 19, 2006); *Eisenberg v. Anheuser-Busch, Inc.*, No. 1:04 CV 1081, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006).

243. See Patrick Danner, *Alcohol Industry Accused of Marketing to Minors*, MIAMI HERALD, Apr. 14, 2005, at 1A (quoting Patricia Neal, a spokeswoman for Bacardi USA as saying, “[t]he federal government has looked into this issue of alcohol advertising three times within the past five years, and after each review, [the Federal Trade Commission] concluded that alcohol advertising is directed to adults”).

to show a particular injury²⁴⁴ and did not establish that defendants' advertisements were the legal cause of their injury: "Without alleging proximate cause, the nuisance claim fails."²⁴⁵ Courts in Colorado, Ohio, and Wisconsin have also dismissed these claims.

Another tactic used by personal injury lawyers in the name of industry reform is the underwriting of state public nuisance actions in exchange for a portion of the proceeds through contingency fee arrangements.²⁴⁶ The use of private, contingency fee lawyers in government public nuisance claims, however, improperly combines private monetary motivations with government police power.²⁴⁷ It also represents an attempt to circumvent the particular injury rule. As the California Supreme Court recognized in striking down such an arrangement, government public nuisance cases involve "a balancing of interests" and "a delicate weighing of values" that "demands the representative of the government to be absolutely neutral. . . . Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated."²⁴⁸

VII. CONCLUSION

Public nuisance theory "is a bizarre hybrid tort—it combines a collection of characteristics unique among torts, including substantiality, fault-free liability, balancing/unreasonableness, economic loss recovery, and injunctive relief."²⁴⁹ Nevertheless, it is not the tort version of Zelig's "human chameleon," designed to solve every problem or annoyance in a community. While some have suggested "that modern scholarship and jurisprudence should not simply accept the conservative formulation of the test as handed down by Coke, Black-

244. *Goodwin*, 2005 WL 280330, at *8.

245. *Id.* at *9.

246. In 1998, such industry-wide litigation resulted in a \$256 billion settlement with the tobacco industry with payouts to the states over twenty-five years. Some contingency fee personal injury lawyers earned astronomical fees as a result of their contracts with states—sometimes amounts equal to as much as \$105,022 an hour per lawyer. Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, *LEGAL TIMES*, Feb. 1, 1999, at 27.

247. Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, gun, lead, and MTBE litigation have followed. Reports suggested that the next targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries. See Michael Y. Park, *Lawyers See Fat Payoffs in Junk Food Lawsuits*, *FOX NEWS*, Jan. 23, 2002, http://www.foxnews.com/printer_friendly_story/0,3566,43749,00.html (last visited Mar. 21, 2006). The Rhode Island Attorney General has even suggested that "going after the latex rubber industry" could recoup "a couple of billion dollars." Letter from Sheldon Whitehouse, Rhode Island Attorney Gen., to Alan G. Lance, Idaho Attorney Gen. (Aug. 27, 1999) (on file with author). Eight states have filed a public nuisance claim alleging that certain electric utilities are public nuisances for emitting carbon dioxide, even though those emissions may be permissible under state and federal regulations. See Michael I. Krauss & S. Fred Singer, *Pseudo-Tort Alert!*, *WALL ST. J.*, Aug. 3, 2004, at A10.

248. *People ex. rel. Clancy v. Super. Ct. of Riverside County*, 705 P.2d 347, 352 (Cal. 1985).

249. Antolini, *supra* note 16, at 776.

stone, Holdsworth, or even Prosser,"²⁵⁰ when legitimate, proven reasons for rules exist, as they do in public nuisance law, the rules should prevail. Fortunately, in spite of tempting emotional arguments, most courts, such as the Supreme Court of Illinois, "got it right" and have resisted arrogating power to themselves by changing public nuisance theory into a "runaway" remedy.

250. *Id.* at 805.