




PUBLIC NUISANCE: **Opening a Pandora's Box of Product Liability Claims**

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A photograph of a dense thicket of trees and bushes. In the foreground, there are several bright yellow flowers, possibly dandelions, growing among green foliage. The background is filled with bare, brown branches of trees and bushes, suggesting a late autumn or winter setting. The lighting is somewhat dim, with a soft glow from the sky visible through the branches.

Product manufacturers historically could expect that one claiming injury from exposure to their products would pursue a product liability claim under a negligence or strict liability theory. A troubling trend has emerged where governmental units, often with the assistance of private counsel, are attempting to circumvent the legal constraints of traditional product liability theories by asserting public nuisance claims.¹ This approach attempts to avoid product identification² and focuses on the gravity of the collective harm rather than the defendants' conduct.

Public nuisance claims essentially assert that product manufacturers created or maintained a public health crisis when they manufactured and sold a legal product that allegedly contributed to conditions such as elevated blood lead levels in children, tobacco-related health issues, or injuries from firearm usage.³ This latest iteration of public nuisance claims requires courts to assume a regulatory role in determining whether product manufacturers are responsible to the entire public community simply because they manufactured and sold a lawful product. That role is best left to the legislature

in enacting product liability statutes that delineate a product manufacturer's potential liability to the public for harm caused by its product.

Morphing public nuisance theory to fit product claims threatens manufacturers being held to a standard of absolute liability for public nuisance—if you made it and sold it, and the alleged public harm was caused by the mere existence of that category of product, you are responsible for the societal harm. Broadening the traditional scope of public nuisance to accommodate these claims for societal ills opens a Pandora's box for future claims. Under this paradigm, all types of industry, not just product manufacturers, could be swept in to defend public nuisance suits that, until now, never were contemplated as a risk of potential liability for conducting business. Illustrating the expansive reach of this theory are the recent public nuisance claims against electric utilities seeking redress for their alleged contributions to global warming and its alleged impact in intensifying the effects of Hurricane Katrina.⁴

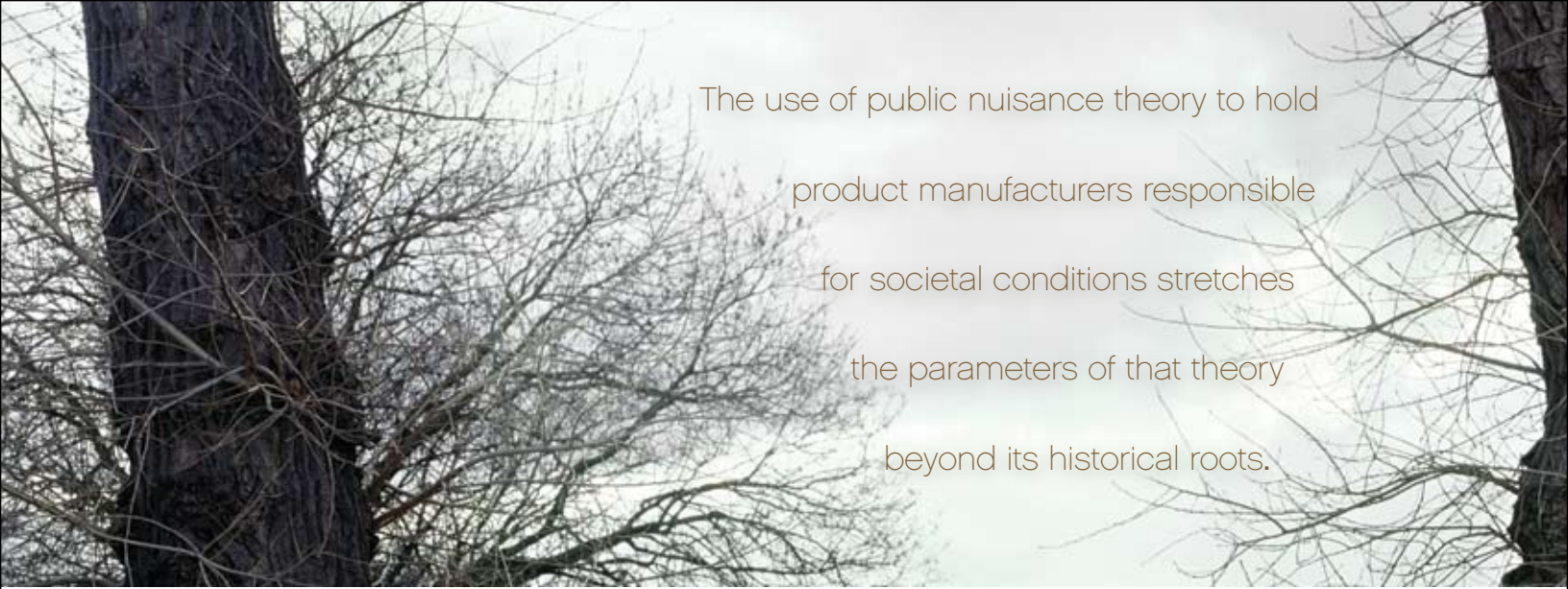
“Public nuisance” is defined as “an unreasonable interference with a right common to the general public,” which includes an interference with public health, public safety, and public peace. Restatement (Second) of Torts § 821B cmt. e (1979) (setting forth factors to determine whether an activity unreasonably interferes with a right common to the general public). Public nuisance historically provided an avenue for the government to enjoin activity that was causing an interference with the exercise of a public right. For instance, the typical public nuisance claim attempted to redress such wrongs as a factory emitting a foul odor or the blocking of a public roadway. See Restatement (Second) of Torts § 821A cmt. b (1979).

The use of public nuisance theory to hold product manufacturers responsible for societal conditions stretches the parameters of that theory beyond its historical roots. Given that it has long been recognized that “nuisance” is incapable of being defined exactly or comprehensively,⁵ today’s courts grapple with the newly constructed intersection of the theories of public nuisance and product liability. Uncertainty abounds, from how to define the nuisance at issue to whether traditional product liability or tort defenses apply, including product identification, state of the art, causation-in-fact and proximate cause, remoteness doctrine, product alteration, failure to maintain the product, assumption of the risk, and statute of limitations.⁶ Courts also struggle in fashioning a remedy, as governmental entities attempt to recoup economic losses sustained in remedying the health effects from the alleged product exposure even in the face of the limited equitable remedies available in a public nuisance claim.⁷ These claims also raise due process and other constitutional issues, particularly when retroactive liability to reimburse government expenditures is sought. Since no guiding principles exist, the net effect of this intersection of theories is inconsistent rulings.

Traditionally, product manufacturers raised a number of defenses to individual product liability claims alleging injury from exposure to products. Most courts considering those individual claims declined to permit the claims to proceed in the absence of proof that the manufacturer was at fault and caused the injury. See, e.g., *Jefferson v. Lead Indus. Ass’n, Inc.*, 106 F.3d 1245, 1253 (5th Cir. 1997); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 547 (1st Cir. 1993). Many courts considering product liability cases couched in public nuisance theory similarly followed the rule that the mere possibility of

causation is not enough to permit the imposition of liability.⁸ A number of courts dismissed public nuisance claims for an inability to meet causation and product identification requirements. For example, the Appellate Court of Illinois affirmed the dismissal of the City of Chicago’s public nuisance claim against manufacturers and sellers of lead-based paint for failure to state a claim. In so holding, that court aptly stated that “defendants cannot be liable under a theory of public nuisance of the manufacture, sale and promotion—decades ago—for products containing lead pigment because plaintiff has failed to allege facts adequate to show the proximate cause element of the cause of action.” *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 140 (Ill. App.), *appeal denied*, 833 N.E.2d 1 (2005). Likewise, both a Missouri trial and intermediate appellate court determined that the City of St. Louis’s public nuisance claim against lead-paint and lead-pigment companies should not proceed because, among other reasons, the city could not prove causation due to its inability to identify any of the defendant’s products at any location in the city.⁹

A few recent public nuisance cases, however, have not required proof that the alleged injury relate to a specific manufacturer’s product due to the collective nature of the harm alleged. A Rhode Island jury found three former manufacturers of lead pigments liable for creating a public nuisance by making, promoting, and selling lead pigments absent proof of negligence, fault, or that any specific manufacturer’s product caused any one case of an elevated blood lead level or property damage.¹⁰ That nuisance was defined as the cumulative presence of lead pigments in paints and coatings on buildings throughout Rhode Island. *State v. Lead Indus. Ass’n*, No. 99-5226, 2004 WL 2813747, at *1–2 (R.I. Super. Ct. Nov. 9, 2004). In ruling that this was not a product liability case, the trial court declined to require specific causation and product identification, and it precluded traditional defenses. *State v. Lead Indus. Ass’n*, No. Civ. A. 99-5226, 2005 WL 1331196, at *2 (R.I. Super. Ct. June 3, 2005). The Wisconsin Court of Appeals similarly ruled that a public nuisance claim against two former lead-paint and -pigment manufacturers should proceed to trial even though the city admitted that it could not connect any manufacturer of lead paint or pigment to a specific building sought to be abated. *City of Milwaukee v. NL Industries, Inc.*, 2005 WI App. 7, 278 Wis. 2d 313, 691 N.W.2d 888 (Ct. App. 2004).



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In the past, individual plaintiffs who attempted to overcome product identification inadequacies by advancing industry-wide or collective theories of liability met judicial resistance. These theories have included: (1) market share liability (plaintiff need not identify the manufacturer of the specific injury-causing product, but defendants' share of liability is based upon their market share), which the majority of courts have declined to adopt;¹¹ (2) enterprise liability (an industrywide standard is the cause of injury, and liability is distributed among defendants who participated in perpetuating and using that standard), which courts have universally rejected;¹² (3) alternative liability (all parties contributing to the risk of harm are collectively liable unless they can prove that their actions were not the cause of plaintiff's injury), which courts have rejected where more than a few defendants manufactured the product in question;¹³ and (4) concert-of-action and conspiracy theories (manufacturers are jointly and severally liable when it can be proved that they engaged in civil conspiracy or acted in concert in an effort to conceal or avoid disclosing the risks caused by exposure to their products), which the majority of courts have rejected if premised on mere parallel activity.¹⁴

Until recently, every court considering market share liability as an exception to proving causation in both individual and public nuisance cases declined to extend that theory beyond the miscarriage drug DES.¹⁵ Rarely will the product exposure alleged to have caused an injury be limited to a discrete period of time (such as DES exposure during a nine-month pregnancy) to permit determination of the relevant market share. Despite this, the Wisconsin Supreme Court

recently became the first court in the country to extend risk-contribution theory (a form of market share liability) to former white lead-pigment manufacturers, allowing the plaintiff's claim to survive a summary judgment motion despite his inability to show which manufacturer's product, if any, caused his alleged injury.¹⁶ This holding essentially eliminated the specific or actual causation requirement in an individual child lead-injury case in favor of collective liability based on mere historical participation in an industry. The *Thomas* court initially determined that the right to a remedy provision of the Wisconsin Constitution (Article I, Section 9) required the extension of the risk-contribution theory to former lead-pigment manufacturers. The court further determined that such an extension was warranted because the former lead-pigment manufacturers contributed to the risk of injury to the public and to individual plaintiffs and are supposedly better poised to absorb or distribute the cost of the injury.¹⁷

The effect of advancing public nuisance and market share theories to avoid causation issues varies, based on the facts, the existing law of public nuisance and product liability in each jurisdiction, and the rulings made by courts to address the unique claims pending, often in the absence of any controlling or even guiding precedent in that jurisdiction. Expanding public nuisance theory to address societal harms, however, is not limited to the private sector. These evolving principles may eventually permit claims against governmental units for their role in creating public nuisances through their operations, e.g., use of lead-containing paints, installation of lead water pipes, or operation of lead-emitting processes, such as incinerators.¹⁸

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Appellate courts and legislatures must determine the proper policy guiding such claims in order to bring certainty to the standards and process and to stem trial courts from assuming a regulatory role. Within a year of the 2005 passage of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03, a number of public nuisance claims against firearms manufacturers were dismissed. See, e.g., *Ileto v. Glock, Inc.*, 420 F. Supp. 2d (C.D. Cal. 2006) (granting motion to dismiss public nuisance and other claims based on Protection of Lawful Commerce in Arms Act). That Act provides immunity to firearms manufacturers and dealers from any lawsuit, pending or otherwise, fitting the Act's definition of "qualified civil liability action," which (subject to delineated exceptions) includes an action against a manufacturer for any type of damages or equitable relief resulting from the criminal misuse of a firearm. 15 U.S.C. §§ 7902–03. Even with the passage of this Act, however, some courts have permitted claims to proceed by finding that the public nuisance claim fits an exception to the Act or that the Act itself violates constitutional guarantees of due process and separation of powers. See, e.g., *City of Gary, Indiana v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (2003) and subsequent decisions therein.

Similarly, late in 2006, after five Ohio cities sued former lead-pigment manufacturers, the Ohio legislature passed amended Senate Bill 117, reaffirming that lead-paint plaintiffs suing in public nuisance must meet the elements of proof required under product liability law. That law was enacted during the final days of former governor Bob Taft's administration, only to be purportedly vetoed by the current governor, Ted Strickland, upon assuming office. The circumstances surrounding the enactment and subsequent veto of that law are the subject of litigation in the Supreme Court of Ohio. Public nuisance claims may arise, as in Ohio, even when a product liability act predates the filing of the public nuisance claim. In New Jersey, the intermediate appellate court determined that the New Jersey Products Liability Act ("PLA") did not apply to the public nuisance action brought by various public entities of New Jersey against former manufacturers of lead products. That court determined that the manufacturers' conduct fell within the environmental tort action exception to the PLA. *In re Lead Paint Litigation*, 2005 WL 1994172, at *10–11 (N.J. Super. Ct. App. Div.), cert. granted, 185 N.J. 391 (2005).

As the Ohio, New Jersey, and gun legislation illustrate, even when the legislature speaks, product manufacturers still have difficulty avoiding public nuisance suits, which are viewed as a means to fund publicly desirable projects. What is required is product liability legislation specifying and comprehensively encompassing the obligations of product manufacturers for all claims based on their manufacture, distribution, promotion, and sale of a product, including public nuisance actions. Until then, because all products have some risk of harm, especially if the product is misused or not maintained, the expansion of public nuisance to products may have a profound effect on the business landscape of any manufacturer of a mass-produced product. ■

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¹ See *County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct. April 4, 2007) (public attorneys cannot constitutionally delegate their prosecutorial function to contingency-fee attorneys who had filed public nuisance claims against lead-paint manufacturers on behalf of various California cities and counties).

² See, e.g., *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133 (5th Cir. 1986) (asbestos case dismissed for plaintiffs' failure to identify the specific products that caused their disease or any of the product manufacturers); *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 175 (Pa. 1997) (summary judgment for defendants because plaintiff was unable to identify the manufacturer of the lead pigment); *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 515 (D.N.J. 2002) (summary judgment for defendant tobacco company where plaintiff provided insufficient evidence of exposure to the company's product).

³ See, e.g., *State v. Lead Indus. Ass'n*, No. 99-5226, 2004 WL 2813747*1 (R.I. Super. Ct. Nov. 9, 2004) (lead-pigment manufacturers); *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1254–55 (11th Cir. 2001) (discussing tobacco settlement); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (firearms manufacturers).

⁴ See *Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), appeal pending, No. 05-5104-cv (2d Cir. argued June 7, 2006) and *Open Space Institute, Inc. v. American Electric Power Co., Inc.*, No. 05-5119-cv (2d Cir. argued June 7, 2006); *Comer v. Murphy Oil, U.S.A., No. 1:05-CV-00436-LTS-RHW* (S.D. Miss.) (motions to dismiss pending).

⁵ W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law

than that which surrounds the word 'nuisance.' "). See also *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 130 n.2 (Ill. App. Ct. 2005) (summarizing the historical confusion surrounding the law of nuisance).

⁶ See *Tioga Public School Dist. v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (holding that public nuisance theory does not apply to the sale of products and recognizing that such an application would "devour in one gulp the entire law of tort").

⁷ See, e.g., *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292 (2006) (permitting public nuisance claim to proceed to seek abatement of the alleged hazard but precluding claim for damages); *In re Lead Paint Litigation*, 2005 WL 1994172 (N.J. Super. Ct. App. Div.), cert. granted, 185 N.J. 391 (2005) (permitting city to pursue recovery of public funds allegedly spent to abate lead paint from building interiors and the costs of providing medical treatment to lead-poisoned population).

⁸ See, e.g., W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 269 (5th ed. 1984); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2005) ("we are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another"); *District of Columbia v. Beretta U.S.A., Corp.*, 872 A.2d 633, 650 (D.C. 2005) ("Deplorable though these facts may be, the ready availability of firearms in the nation at large, and the sheer number and variety of opportunities by which persons intent on acquiring them unlawfully can do so, counsel strong restraint on the part of a court asked to hold defendants—individual or corporate—answerable for a common-law nuisance.... In keeping with our own decisions and others we have found persuasive, we decline to relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance the District has alleged.").

⁹ *City of St. Louis v. Benjamin Moore & Co.*, No. E. D. 87702 (Mo. Ct. App. E. D. Dec. 26, 2006) (affirming dismissal of claim for failure to meet product identification requirements and transferring case to the Supreme Court of Missouri for consideration of the standards of proof for causation in a public nuisance case).

¹⁰ *State v. Lead Indus. Ass'n*, No. 99-5226, 2004 WL 2813747 (R.I. Super. Ct. Nov. 9, 2004) (declining to require the state to prove that the manufacturers were the proximate cause of the specific complained-of injuries); Creswell, Julie, "The Nuisance That May Cost Billions," *N.Y. Times*, April 2, 2006. An appeal to the Supreme Court of Rhode Island is pending from the trial court's February 2007 denial of post-trial motions.

¹¹ *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924 (1980) (market share liability recognized in cases involving the miscarriage drug DES). See also cases cited *infra* at n.15.

¹² Since its origination in the case of *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), enterprise or industrywide liability has been universally rejected. See, e.g., *Schwartzbauer v. Lead Indus. Ass'n*, 794 F. Supp. 142, 145-46 (E.D. Pa. 1992); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1017 (D.S.C. 1981) (theory is "repugnant to the most basic tenets of tort law"); *Zaft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245-46 (Mo. 1984).

¹³ See *Summers v. Tice*, 199 P.2d 1 (Cal. 1948); Restatement (Second) of Torts § 433(B)(3) (1965) (embodying alternative liability theory) and comment h. thereto.

¹⁴ See *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 224 (N.Y. 1992) (parallel activity without more is insufficient to establish the agreement necessary to maintain a concert-of-action claim); *Sindell*, 607 P.2d at 933 (rejecting concert-of-action claim where parallel conduct was reliance on each other's testing and promotion of DES). But see *In Re Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) (allowing plaintiffs to proceed on concert-of-action theory).

¹⁵ See, e.g., *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1247-48 (5th Cir. 1997); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 552 (1st Cir. 1993); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 126 (3d Cir. 1993); *Skipworth v. Lead Indus. Ass'n, Inc.*, 690 A.2d 169, 172 (Pa. 1997); *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 135-36 (Ill. App. Ct. 2005); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 702 (Ohio 1987). See also cases adopting market share liability in the DES context. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (N.Y.), cert. denied, 493 U.S. 944 (1989); *Martin v. Abbott Labs.*, 102 Wash. 2d 581, 689 P.2d 368 (Wash. 1984).

¹⁶ *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 (Wis. 2005). See also *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (Wis.) (adopted risk-contribution theory, which relaxed plaintiff's burden in proving causation in her negligence and strict liability claims against 12 drug companies that produced or marketed DES), cert. denied, 469 U.S. 826 (1984).

¹⁷ *Thomas*, 2005 WI 129, ¶¶ 135-36, 285 Wis. 2d 236, ¶¶ 135-36, 701 N.W.2d 523, ¶¶ 135-36.

¹⁸ See generally *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658 (Wis. 2005) (City of Milwaukee sued by sewerage district for negligence and nuisance seeking to recoup the costs of rebuilding areas that were allegedly destroyed when city water main collapsed).