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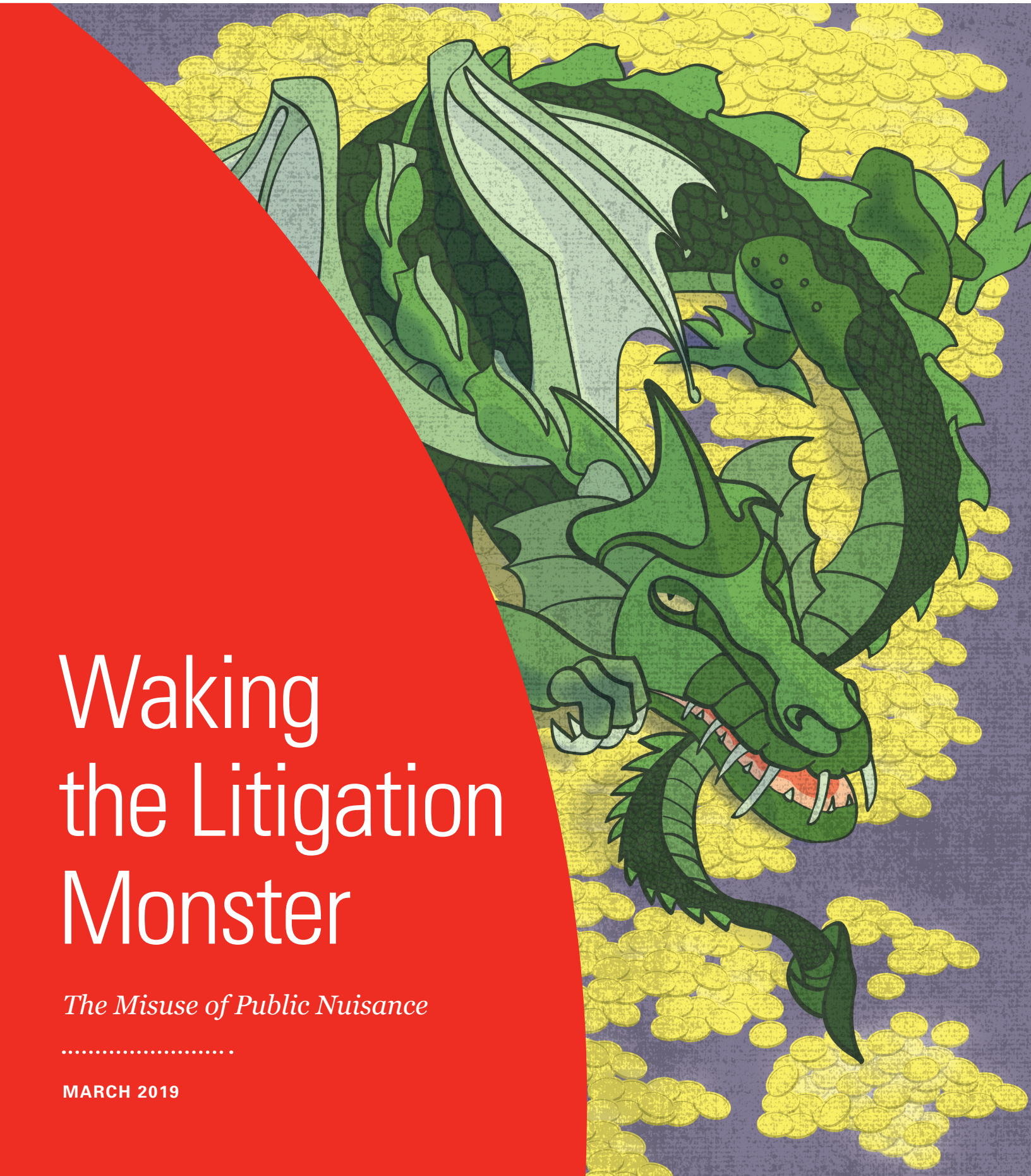

Waking the Litigation Monster

The Misuse of Public Nuisance

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Executive Summary

How should large-scale public policy challenges, such as opioids, climate change, and lead paint, be addressed, and who should pay the costs of remediation? These questions can be fully assessed and answered only by the political branches of government, not the judicial system.

Unlike courts, legislatures and expert agencies are uniquely capable of considering the problem holistically and balancing all of the competing interests with the complete picture in view.

But states and local governments have turned to the courts, using the tort of public nuisance in particular, to manage these public policy problems. As courts and commentators have recognized, these suits are inappropriate, not only because they usurp the proper role of the political branches, but also because they seek to side-step the limits courts traditionally have imposed on public nuisance actions.

Public nuisance is designed to vindicate a public right, such as the right to an unobstructed highway. It is aimed at addressing discrete, localized interferences with those rights, usually connected to the defendant's use of land. Traditionally, governmental plaintiffs have been able to sue only to enjoin or abate the nuisance. Private individuals have been able to recover damages, but only when their injury is different from the injury suffered by the public at large.

In cases where governmental plaintiffs have succeeded in bringing claims to address widespread public policy concerns on a public nuisance theory, the courts have not held the plaintiffs to the tort's historic standards. In effect, these plaintiffs have avoided having to state a claim for vindication of a recognized public right, have been able to seek large damages awards as a substitute for the traditional governmental remedies of injunction or abatement, and

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have avoided proving causation as normally required in a tort case.

This paper outlines the origins and development of public nuisance, including its role in filling gaps where legislatures had not acted. This paper shows how the plaintiffs' bar—including private attorneys representing governmental entities—has attempted to expand the tort beyond its traditional gap-filling role to one that would endow courts with increasingly broad power to determine public policy.

When it comes to sweeping matters of public policy, this paper concludes that courts should decline plaintiffs' invitation to substitute their judgments for those of the political branches of government, in order to stay true to the historic limits and purposes of the tort of public nuisance. Indeed, public nuisance is not needed to fill gaps where the legislative and executive branches have already balanced the relevant considerations and implemented comprehensive regulatory schemes.

Origins and Development of Public Nuisance

Public nuisance is an ancient tort, dating to 12th century England, originally created as a criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways. As originally conceived, the king alone had the authority to bring a public nuisance claim pursuant to his police power. Injunction or abatement were the only available remedies.

In the 16th century, English courts broadened the tort so that individuals who suffered "special" injuries—different in kind from injuries to the public—could bring a public nuisance claim to recover damages. They could not, however, seek to abate the nuisance as that power still belonged exclusively to the king. Even as the English courts adapted the tort of public nuisance as society changed and modernized, the basic elements of the tort and limitations on who could prosecute it and what remedy could be obtained remained unchanged, to the time of the founding of the United States.

American law recognized the tort of public nuisance from its earliest days. Consistent with English decisions, American courts limited its application to criminal or quasi-criminal situations that infringed upon a public right, limited the abatement remedy to governmental plaintiffs, and limited the damages remedy to individual plaintiffs who suffered "special" injuries. These long-standing limitations on the public nuisance tort, combined with blossoming national and state regulation of activities and industries that further displaced and precluded the tort's applicability, relegated it to such a minor role that it was not even included in the First Restatement of Torts published in 1939.

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English Origins

As the name suggests, public nuisance originated as an action to remedy conduct that interfered with a public right. "The earliest cases appear to have involved

purprestures, which were encroachments upon the royal domain or the public highway and could be redressed by a suit brought by the King."[1] Most often, it involved conduct affecting the use of land, such as blocking a highway or diverting a watercourse.[2] Over time, other public right interferences, such as noxious and offensive trades that interfered with the public's health, comfort and, in some cases, morals were considered public nuisances.[3]

Actions were brought in the name of the Crown to enjoin or abate the conduct that amounted to a nuisance.[4] These actions primarily took the form of criminal prosecutions, until the 18th century, when civil proceedings for injunctive relief—still brought by officers of the Crown—became more common.[5]

Private Action for Special Injury

Private individuals could not sue for damages resulting from a public nuisance, until a 16th century decision announced what has come to be known as the special injury rule.[6] Under the rule, a plaintiff may sue for damages resulting from a public nuisance that are different in kind from damages all other members of the public suffer.[7] In the case that gave rise to the rule, called *Anonymous*, a landowner sued another individual for obstructing the public highway, which prevented the plaintiff from accessing his fields.[8] The court declined to allow a private action, holding that to do so would open the defendant to suit multiple times for the same injury—blocking the public highway.[9]

A dissenting judge, Justice Fitzherbert, thought the plaintiff should be allowed to sue.[10] While Fitzherbert was not in the majority, his reasoning for why the plaintiff should be allowed to sue gave rise to the special injury rule.[11] Fitzherbert would have held that the plaintiff could sue as one suffering "special hurt" by the nuisance—special hurt being defined as "greater hurt or inconvenience than the generality have" suffered by the nuisance, such as a rider who falls into a ditch that is obstructing the highway.[12]

Early American Tort

As the United States adopted and built upon English common law, public nuisance developed as an American tort consistent with the features of the English tort.[13] The American tort: (1) addressed conduct interfering with a public right, often affecting the use of land;[14] (2) restricted injunctive and abatement remedies to governmental plaintiffs;[15] and (3) allowed individuals to sue for damages only if they satisfied the special injury rule.[16]

Within these long-recognized parameters, actions involving the obstruction of either public highways or navigable waterways continued to be the most common.[17] Less common were actions involving matters of public morals or welfare, such as lotteries and other forms of gambling, keeping a

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disorderly house or tavern, and enabling prostitution.[18]

By the beginning of the 20th century, states enacted statutes specifying offenses constituting public nuisances.[19] Statutorily-proscribed conduct included the sale of intoxicating liquors, operating "bawdy or assignation houses" or gambling houses, as well as erecting or using a place for trade that produces offensive smells or "otherwise is offensive or dangerous to the health of individuals or the public."[20]

Thus, before the entrenchment of the modern regulatory state, public nuisance actions served an important and necessary gap-filling role.[21] Through these actions, government officials could put a stop to conduct that interfered with public rights and thus harmed the public at large.[22] To be sure, consistent with the special injury rule developed in the 16th century, individuals could sue for unique damages resulting from the public nuisance.[23] However, the primary purpose of an action was for the government to stop the nuisance, and thus protect the public as a whole.[24]

Regulations proliferated across various sectors of the economy as a result of legislative and executive action in the 20th century and largely supplanted public nuisance actions.[25] Increasingly an unnecessary tool to stop conduct interfering with public rights, public nuisance was not even mentioned in the First Restatement of Torts in 1939.[26]

Public Nuisance Expands

While the First Restatement of Torts in 1939 omitted the public nuisance tort, the Second Restatement in 1979 included a section on the tort that purposefully broadened its application.

Dean William Prosser, who edited the Second Restatement, had previously written that the tort was limited to criminal activities.

At the behest of environmentalists, however, the Second Restatement expanded the tort to include an "unreasonable interference" with a public right. It also suggested that individual plaintiffs could seek to enjoin or abate a public nuisance if they sued "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."

Following the Second Restatement's expansion of the scope of the public nuisance action, enterprising plaintiffs sought to use the tort to address large-scale public policy issues in a way that had not been attempted before. Government plaintiffs in particular used the tort to seek large recoveries. For the most part, in response to these attempts, courts stayed true to the tort's historic limits and deferred to the policy judgments of the legislative and executive branches in these matters.

Some courts, however, eschewed those limits, and expanded public nuisance to address social problems better addressed by the political branches, such as environmental pollution and lead paint exposure. In tobacco litigation, public nuisance was not endorsed as a viable legal vehicle by the one court to consider it; however, the massive settlement of the litigation gave credence to the theory. As a consequence, that theory continues to be relied upon today in cases such as the ongoing opioid litigation.

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Second Restatement of Torts Rewritten to Broaden Public Nuisance

William Prosser, the famous torts expert and Dean of the Law School at the University of California, Berkeley, was the original reporter for the Second Restatement's sections on public nuisance: section 821B, defining public nuisance, and section 821C, providing who may sue for public nuisance.[27] In his original drafts, Prosser limited public nuisance to "a criminal interference with a right common to all members of the public."[28] And he limited damages recovery only to individuals that satisfied the special injury rule.[29]

The American Law Institute (ALI) initially approved these provisions as Prosser had drafted them, but subsequently reopened them before they were finalized.[30] The effort to reconsider Prosser's language was led by environmental lawyers seeking a more flexible definition of public nuisance that would allow for suits to stop pollution activities that may not involve criminal conduct.[31] These environmentalists also criticized the special injury rule as too restrictive.[32]

After the ALI voted to reopen the provisions, Vanderbilt Law School Dean John Wade replaced Prosser as the reporter for the Second Restatement's public nuisance sections.[33] While Wade and Prosser had collaborated over the years, and continued to do so after Wade became reporter, Wade oversaw fundamental changes to Prosser's original draft that broadened the scope of public nuisance as the environmentalists had requested.[34] Specifically, section 821B broadened the definition of public nuisance beyond criminal conduct to encompass any "unreasonable interference with a right common to the general public," and added a list of factors to help determine whether the interference was "unreasonable."[35]

Regarding the recovery of damages, section 821C preserved the special injury rule for individual plaintiffs.[36] With respect to proceedings to enjoin or abate a public nuisance, however, section 821C was broadened to provide that such proceedings could be brought not only by governmental officials, as had been the case historically, but also by individuals satisfying the special injury rule and by those that "have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."[37]

Thus, these sections of the Second Restatement constituted less of a restatement of the law than a purposeful departure from prior precedent.[38] Their adoption broadened public nuisance to encompass any interference with a public right so long as the interference could be said to be "unreasonable," and allowed private individuals to pursue injunction or

abatement so long as they had standing to sue in a representative capacity.[39] Ironically, while these changes were designed to help the environmental cause, it is questionable whether they were actually necessary to facilitate environmental claims.[40] Nevertheless, their breadth and flexibility meant that they were certainly "destined to invite mischief," as evidenced by the litigation pressing the boundaries of the ancient tort following the Second Restatement.[41]

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Public Nuisance Suits Over Time

After the adoption of the public nuisance sections of the Second Restatement, environmentalists filed numerous suits asserting public nuisance claims against parties they alleged caused or contributed to environmental pollution.

The results of these suits were mixed, although, as detailed further in this paper, even when courts allowed public nuisance claims to proceed, they sometimes openly acknowledged the problematic nature of their ruling in usurping the role of the legislature.

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One key innovation reflected in a number of these suits is the naming of product manufacturers as defendants in public nuisance suits. Suing product manufacturers marked a controversial shift in public nuisance litigation. The focus turned away from conduct that unreasonably interfered with a public right and toward the making of a non-defective, lawfully manufactured and distributed product. While such suits originally targeted manufacturers of chemicals, they were soon filed against manufacturers of other products, like asbestos, tobacco, and lead paint. Even though these suits have largely been unsuccessful, they continue to be filed and some courts have allowed them to move forward.

This chapter examines several major opinions construing public nuisance claims against certain product manufacturers and distributors after the Second Restatement's adoption.[42] The examination proceeds in roughly chronological order, from environmental pollution suits that began to be filed in the 1970s, through emerging present-day litigation targeting opioids as public nuisances. The chronological examination helps trace the law's development and demonstrates how most courts continued to apply traditional limiting principles to the tort of public nuisance after the Second Restatement's adoption, while also deferring to the unique competencies of the political branches of government in managing important public policy issues.

Environmental Pollution Suits

CALIFORNIA

One of the first public nuisance cases brought following the Second Restatement's changes was *Diamond v. General Motors Corp.*, a purported class action on behalf of 7,119,184 persons residing or owning property in Los Angeles County, California, against 293 named industrial corporations and municipalities alleged to have polluted the county's atmosphere, as well as 1,000 other defendants whose names were unknown.[43] The complaint sought billions of dollars in compensatory and punitive damages, and a permanent injunction restraining defendants from emitting and discharging pollution. For defendants who manufactured or distributed automobiles, the complaint sought an injunction restraining the sale and registration of automobiles in the county, and the appointment of a special master to oversee the retrofitting of automobiles, with the costs of the retrofitting to be paid by the defendants.[44]

The trial court dismissed the action, and the appellate court affirmed the dismissal based on traditional public nuisance limitations principles. In affirming the dismissal of the damages portion of the suit, the appellate court held that the case was not an appropriate class action since the special injury rule would require each plaintiff to individually plead and prove special injury caused by each defendant.[45]

As to the injunctive portion of the suit, the appellate court explained that federal and state statutory systems created administrative agencies to regulate pollution discharges, and the plaintiffs' claims were not based upon the violation of those standards.[46] Instead, they were based on a contention that "the present system of statutes and administrative rules is inadequate, and that the enforcement machinery is ineffective."[47] Thus, the plaintiffs were "asking the court to do what the elected representatives of the people ha[d] not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court," resulting in "judicial regulation of the processes, products and volume of business of the major industries of the county."[48] The appellate court concluded that the trial court had displayed "the greater wisdom" in dismissing the suit instead of engaging in the requested judicial regulation.[49]

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NEW YORK

Plaintiffs found more success in the Love Canal litigation arising out of a polluted area of New York, although the courts departed from traditional public nuisance limitations in the process. In *State v. Schenectady Chemicals, Inc.*, a state trial court acknowledged but ignored "the greater wisdom" from *Diamond* when it allowed the State of New York to pursue a public nuisance action against a chemical manufacturer based on dumping of chemical waste 15 to 30 years prior to the suit, which allegedly migrated into the surrounding air, surface and ground water.[50]

The court explained that the issue arising from chemical disposal was relatively new and acknowledged that "[s]omeone must pay to correct the problem, and the determination of who is essentially a political question to be decided in the legislative arena."[51] It then added that "resolution of the issues raised in society's attempt to ameliorate pollution are to a large extent beyond the ken of the judicial branch."[52]

Nevertheless, the court refused to dismiss the state's public nuisance claim, finding that the manufacturer created a nuisance through an inherently dangerous activity or use of an unreasonably dangerous product and therefore was absolutely liable for resulting damages, "irregardless of fault, and despite adhering to the highest standard of care."[53] The appellate court later affirmed, finding that "the seepage of chemical wastes into a public water supply constitutes a public nuisance" for which the manufacturer could be held responsible.[54]

A federal district court in New York drew upon the *Schenectady* decision in another action, *United States v. Hooker Chemicals & Plastics Corp.*, wherein the State of New York and the federal government asserted a public nuisance claim against a different chemical manufacturer related to the Love Canal site.[55] In *Hooker*, the court entered summary judgment against the manufacturer as to liability for harms occurring on lands adjacent to the Love Canal site resulting from chemical waste that migrated there years after the manufacturer disposed of it.[56]

In order to find the manufacturers liable, these courts had to depart from the traditional principle that only a person in control of the nuisance at the time of suit may be required to abate it.[57] At the time of suit, neither defendant controlled the waste or the land where they had disposed of it years earlier. They did, however, control the waste at the time they arranged for it to be disposed of at the site.

The same cannot be said of products manufactured and sold to third parties for their use. Accordingly, courts faced with pollution claims against product manufacturers after sale of a product would reach the opposite result by applying the traditional public nuisance limitations.[58] Nevertheless, enterprising plaintiffs would continue to seek to extend the tort to situations where defendants had no control over the product at issue.

Asbestos Suits

Following their limited success in asserting public nuisance claims against product manufacturers in environmental pollution litigation, plaintiffs, consisting largely of schools and municipalities, brought public nuisance claims against asbestos manufacturers, alleging that asbestos itself constituted a public nuisance. Courts overwhelmingly rejected these claims, leading the Eighth Circuit to summarize that "[o]ne issue on which the courts appear to agree ... is that nuisance law does not afford a remedy against the manufacturer

of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of that product in the building" because of the defendants' lack of control over the product following installation.[59]

EIGHTH CIRCUIT

The judicial agreement on the issue appears to have been driven by concerns that allowing public nuisance claims against asbestos manufacturers, who lacked control over the product once it was installed, would remove the tort's limits and hold defendants responsible for injuries they did not cause. In *Tioga Public School District*, the Eighth Circuit agreed with the judicial consensus that "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance" and that "a defendant who had sold an asbestos-containing material to a plaintiff lacked control of the product after the sale."[60]

The court rejected the argument that North Dakota's public nuisance statute might authorize the suit even if the common law would not, observing that "North Dakota cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor."[61] After affirming the applicability of these traditional limitations on public nuisance actions, the court explained that allowing the claim would "totally rewrite North Dakota tort law" so that "any injury suffered in North Dakota would give rise to a cause of action under [the public nuisance statute] regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery."[62] In that scenario, "[n]uisance … would become a monster that would devour in one gulp the entire law of tort …"[63]

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MICHIGAN

Other courts deciding asbestos suits expressed similar concerns about the consequences of expanding public nuisance to cover product liability situations. For example, in *Detroit Board of Education v. Celotex Corp.*, the Michigan Court of Appeals held "that manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect" because "[t]o hold otherwise would significantly

> *"'[M]anufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect' because '[t]o hold otherwise would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products.'"*

expand, with unpredictable consequences, the remedies already available to persons injured by products, and not merely asbestos products."[64]

To illustrate one of the consequences, the court noted that the plaintiffs' claim would have been barred by the statute of limitations if not for the trial court's determination that asbestos constituted a continuing nuisance.[65] The court criticized this result because "[s]tatutes of limitation are founded in public needs and public policy … and the public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim."[66] The *Celotex* court agreed that the defendants' lack of control over the alleged nuisance meant that they "lack the legal right to abate whatever hazards their products may pose," and held that the plaintiffs' "proper remedies, were they not barred by the running of the limitation period, [were] products liability actions for negligence or breach of warranty."[67]

Tobacco Litigation

While the asbestos litigation was essentially a rout against the assertion of public nuisance claims against asbestos manufacturers, the litigation governmental plaintiffs filed against tobacco companies in the 1990s proved to be an ironic impetus for the filing of public nuisance claims against product manufacturers. The great irony in the tobacco litigation was that the only court to actually review the viability of a public nuisance claim against the tobacco companies dismissed it because the court was "unwilling to accept the state's invitation to expand a claim for public nuisance beyond its ground in real property."[68]

While the tobacco litigation did not validate either the use of public nuisance claims against product manufacturers or the expansion of the tort beyond its traditional boundaries, the settlement of that litigation allowed the theory to continue to be used by plaintiffs. As one writer summarized, "[e]ven though public nuisance theory was not validated in [a] single tobacco case, the plaintiffs' victory in achieving a mass settlement in litigation that included this novel theory gave it the hint of legitimacy the trial bar needed."[69]

Two other aspects of the tobacco litigation similarly influenced more recent large-scale public nuisance litigation.

First, the tobacco litigation featured governmental entity plaintiffs represented by private counsel on a contingency fee basis. This combination resulted in "public attorneys provid[ing] the vehicle for the litigation," meaning a state or public entity as a plaintiff, and "private contingency-fee lawyers provid[ing] the fuel," meaning the resources and funding required to bring large, high-stakes litigation.[70] Thus, private personal injury lawyers became "public injury lawyers."[71]

Second, the size of the final tobacco settlement demonstrated the massive recovery potential of public nuisance suits. One scholar estimates the total payouts to the states by 2023 under the tobacco settlement would "be something on the order of a quarter of a trillion dollars," around $13.75 billion of which would be paid as fees to contingency fee counsel, representing "the largest transfer of wealth as a result of litigation in the history of the human race."[72]

Unsurprisingly, the massive recovery resulting from the tobacco litigation settlement has generated various controversies. For example, settlement funds received by the states have been

used for "a wide variety of purposes," not all of which relate to the "treatment and prevention of tobacco-related disease."[73] In one admittedly "extreme" instance, a local government spent $145,000 on its county executive's office suite and $600,000 on road salt, using funds it received from the settlement.[74] Additionally, some states balked at paying hundreds of millions of dollars in fees to contingency fee counsel.[75] Despite these controversies, "the extremely lucrative state settlements constitute a very tempting political precedent for ambitious public office holders."[76] As a result, the tobacco litigation and settlement provided the "momentum" for the filing of public nuisance claims against lead paint and gun manufacturers.[77]

Lead Paint Litigation

Following on the perceived success of the tobacco litigation, public nuisance claims against manufacturers of lead pigment in paint began in earnest in 1999 when Rhode Island's attorney general hired a private law firm to sue former lead paint manufacturers on a contingency fee basis.[78] The suit "sought the costs of removing lead paint from every building in Rhode Island that contained it," and one of the lead plaintiffs' lawyers declared he wanted to "bring the entire lead paint industry to its knees."[79] Following the filing of that first suit in 1999, "the plaintiffs' bar has partnered with public entities to bring public nuisance claims on behalf of several states, counties, and municipalities."[80]

The lead paint suits have generated numerous appellate opinions that have largely, but not uniformly, been decided in favor of the manufacturer defendants because the claims exceeded the traditional limits of public nuisance. The Supreme Courts of Missouri, New Jersey, and Rhode Island all rejected these claims. By contrast, majority opinions from intermediate appellate courts in Wisconsin and California, as well as dissenters from the Missouri and New Jersey opinions, either allowed or would have allowed such claims to go forward. The California appellate court decision is especially notable because it upheld a $1.15 billion judgment against lead paint manufacturers based on the presence of lead paint in houses in 10 cities and counties in California. These decisions warrant further examination, both for how they have shaped the development of public nuisance law, and what they portend for the future of public nuisance litigation.

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State Supreme Courts Reaffirm Historic Limitations

MISSOURI

In *City of St. Louis v. Benjamin Moore & Co.*, the Missouri Supreme Court upheld a trial court's dismissal of a public nuisance claim against manufacturers of lead paint and pigment seeking to recover the costs of a program of the City of St. Louis to assess, abate, and remediate lead paint.[81] The trial court dismissed the claim because, while the city was able to identify private residences where it had incurred costs

> *"The Missouri Supreme Court agreed and found that neither the Second Restatement nor Missouri case law 'abandon[ed] the requirement of proving actual causation in a public nuisance claim.'"*

related to the lead paint program, it was unable to identify the manufacturer of the paint at any of the properties at issue, meaning that it could not satisfy the causation element of its claim.[82]

The Missouri Supreme Court agreed and found that neither the Second Restatement nor Missouri case law "abandon[ed] the requirement of proving actual causation in a public nuisance claim."[83] The court further rejected the city's contention that it could satisfy the actual causation requirement "by showing that the defendant substantially contributed to the public health hazard created by lead paint via evidence of 'community wide marketing and sales of lead paint'" since that would show only that a particular manufacturer's paint "may have been present in the properties" and risked "exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability entirely."[84]

Finally, regarding the city's request for damages, the court refused to accord any special status to the city as a governmental entity and held that the special injury rule applied because the damages sought were "in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties."[85]

Three judges dissented because in their view the presence of lead paint in the properties at issue was "a poisonous hazard to which many may have contributed" with a widespread impact on public health, not an individualized injury.[86] As a result, the dissent viewed the case as having "nothing to do with identifying a particular paint and linking it to a particular injured victim," but instead having "everything to do with identifying the sources of a poison and making those sources pay their fair share of the cost of the cleanup of a direct hazard to the public health."[87] Based on this view of the case, the dissent would have held the city's proof of causation sufficient.[88]

NEW JERSEY

In 2007, the New Jersey Supreme Court also weighed in on the issue when it held that 26 municipalities and counties could not bring a public nuisance claim against lead paint manufacturers and distributors to recover the costs of finding and removing lead paint, reimbursing medical costs for treating lead paint poisoning, or developing education programs about the dangers of lead paint.[89] The New Jersey Supreme Court rejected the claims as inconsistent with the common law of nuisance and the New Jersey legislature's policy choices.

After "examining the historical antecedents of public nuisance and by tracing its development through the centuries," the court concluded "that plaintiffs' loosely-articulated assertions here cannot find

their basis in this tort. Rather, were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[90] The court found that the tort's history established two key parameters: "interference with the interests of the community at large" and a link "to the use of land by the one creating the nuisance."[91]

The court found the first parameter satisfied by the legislature's declaration that the presence of lead paint in buildings is a public nuisance.[92] It found the second parameter was not satisfied, however, because the premises owner, not the manufacturer, created the nuisance through improper maintenance of the lead paint after it was applied to the building.[93] The court also found that the special injury rule continued to apply following the adoption of the Second Restatement, and that the public entity plaintiffs in the case could not recover damages because they did not satisfy the rule.[94]

In conjunction with examining New Jersey public nuisance law, the court concluded that allowing the claim to go forward would "creat[e] a remedy entirely at odds with the pronouncements of [the New Jersey] Legislature" deciding, as a matter of public policy, how to deal with the problem of deteriorating lead paint inside buildings in the state.[95] The court noted that the New Jersey statute declaring lead paint to be a public nuisance focused on owners of premises containing lead paint, consistent with "the traditional public nuisance theory's link to the conduct of an actor, generally in a particular location," because the conduct creating the public nuisance would be the property owners' improper maintenance of the paint that allowed it to flake or peel.[96]

The court contrasted that improper maintenance with the conduct of the manufacturer and distributor defendants, finding the two situations to be "separate, and entirely different."[97] "[W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it[,] ... an interpretation [that] would far exceed any cognizable cause of action."[98] The court added that "the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers."[99] Instead, the court explained that a proper examination of plaintiffs' claims showed them to be products liability claims that fell within the New Jersey Products Liability Act.[100]

Two justices dissented because they believed that the court had a duty to address the problem.[101] Allowing the claim to proceed, according to the dissent, would be a "proper application of the public nuisance doctrine" because it "prevents the exploitation of the public and shifts the cost of abatement to those responsible for creating the nuisance. Compared to the communities suffering from the nuisance's harmful effects, the parties that created the problem are better suited to finance the abatement because they profited from the pollution of the community."[102]

While the dissent agreed with the majority that poor maintenance was the conduct causing lead paint to become a public nuisance, it disagreed with the legislature's policy choice that the individuals responsible for that conduct should pay the costs of remediation. The dissent explained that those with means had removed the paint from their homes years earlier and that the "lead paint that remains in our physical environment exists primarily in underprivileged, residential communities where home owners and municipalities cannot afford the exorbitant costs of decontamination."[103] Assuming these facts were proven as true, the dissent believed "defendants should bear the burden of remediation."[104]

RHODE ISLAND

One year after the New Jersey Supreme Court decision, the Rhode Island Supreme Court reversed a verdict won by the State of Rhode Island against three lead paint manufacturers. The trial court outcome marked "the first time in the United States that a trial resulted in a verdict that imposed liability on lead pigment manufacturers for creating a public nuisance."[105]

Consistent with the Missouri and New Jersey Supreme Court decisions, the Rhode Island Supreme Court reaffirmed the traditional elements of public nuisance—"(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred"—and held that the state's claim failed the second and third elements.[106] The court pretermitted consideration of reasonableness or causation due to its holding on the public right and control elements.[107] Regarding a public right, the court found the allegation that the public had a "right to be free from the hazards of unabated lead" fell "far short of alleging an interference with a public right as that term has traditionally been understood in the law of public nuisance."[108]

As to control, the court, drawing on the New Jersey Supreme Court's opinion, held that the state had failed to allege that the defendants controlled the lead paint at the time the alleged harm occurred.[109] The court also emphasized the historic connection between public nuisance and real property, explaining that "[a] common feature of public nuisance is the occurrence of a dangerous condition at a specific location," and, "to date, the actions for nuisance in this jurisdiction have been related to land."[110]

> *"The Rhode Island Supreme Court explained that allowing the state's public nuisance claim ... 'would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended.'"*

The Rhode Island Supreme Court explained that allowing the state's public nuisance claim "would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals."[111] That, in turn, "would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended."[112]

To drive home its point that a public right is not the same thing as widespread interference with private rights, the court quoted two passages from an Illinois Supreme Court opinion rejecting a public nuisance claim against a gun manufacturer:

> [I]f there is public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right ...[113]
>
> Similarly, cell phones, DVD players, and other lawful products may be misused by drivers, creating a risk of harm to others. In an increasing number of jurisdictions, state legislatures have acted to ban the use of these otherwise legal products while driving. A public right to be free from the threat that other drivers may defy these laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be, or are likely to be, used by drivers, distracting them and causing injury to others.[114]

The court concluded that, "[l]ike the *Beretta* court, we see no reason to depart from the long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way."[115]

Similarly, in upholding the control requirement, the court found the New Jersey Supreme Court's analysis persuasive and agreed that "to permit these complaints to proceed ... would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[116]

While the court held that the State of Rhode Island could not bring a public nuisance claim, it emphasized that other possible remedies were still available, consistent with the policy choices of the legislature. These remedies included seeking injunctive relief against landlords to require abatement or seeking statutory penalties and fines against property owners failing to comply with Rhode Island's lead paint statute.[117] The court then explained that "the proper means of commencing a lawsuit against a manufacturer of lead pigments for the sale of an unsafe product is a products liability action," adding that the "law of public nuisance never before has been applied to products, however harmful" and that "[c]ourts in other states consistently have rejected product-based public nuisance suits against lead pigment manufacturers, expressing a concern that allowing such a lawsuit would circumvent the basic requirements of products liability law."[118]

It also emphasized that public nuisance and products liability must remain "two separate and distinct causes of action," quoting a New York appellate court's warning about the consequences of collapsing them, namely, losing the limiting principles necessary for the orderly development of the common law:

> [G]iving a green light to a common-law public nuisance cause of action today will ... likely open

> the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.
>
> 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.[119]

The court closed its opinion by emphasizing, as the New Jersey Supreme Court had done, its deference to the state legislature regarding the proper approach to the lead paint problem and how the legislature's statutory scheme to deal with the issue was consistent with historic public nuisance law.[120]

Intermediate Appellate Courts Fail to Enforce Historic Limits

While the Missouri, New Jersey, and Rhode Island Supreme Courts all dismissed governmental entity public nuisance claims by applying the tort's historic limitations and deferring to the policy decisions of the legislature, other courts have refused to do so. Two notable decisions in this vein were issued by intermediate appellate courts in Wisconsin and California.

WISCONSIN

In *City of Milwaukee v. NL Industries*, the Wisconsin Court of Appeals reversed a trial court's dismissal of a city's public nuisance claim against two lead paint manufacturers.[121] In *NL Industries,* the court agreed with Milwaukee's argument that specific identification of the manufacturer of the lead paint in a particular house was "unnecessary" because the paint constituted "a community-wide health threat which is the alleged public nuisance, and the city can prove community-wide marketing and sales by defendants in the City of Milwaukee at times relevant to the creation of the nuisance."[122]

The court viewed the "essence" of the city's claim as being "that defendants sold and promoted a dangerous product to a community and that product caused a serious public health problem in that community," and described the injury as being to the city itself, not just to those physically injured by the paint.[123] Based on this view, the appeals court remanded the case for trial.[124] A jury ultimately rendered a verdict for the manufacturers, finding that, while lead paint was a public nuisance, the defendants did not intentionally, unreasonably, or negligently engage in conduct that caused the public nuisance.[125] Due to the jury's verdict for the manufacturers, the Wisconsin Supreme Court never weighed in on the propriety of the claim.

CALIFORNIA

The California Court of Appeal for the Sixth Appellate District similarly failed to enforce the historic limits on public nuisance when it substantially upheld a verdict against three lead paint manufacturers that required them to pay $1.15 billion into a fund to abate lead paint in the 10 California cities and counties that brought the suit.[126]

The 2017 decision was a follow-on to a prior decision in the same case in 2006.[127] In its prior opinion, the court had reversed a trial court's dismissal of the localities' public nuisance claim. The court found

the allegations that "lead causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property" were sufficient to state a public nuisance claim.[128] It noted that the plaintiffs had alleged that the "defendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though defendants had known for nearly a century that such a use of lead paint was hazardous to human beings."[129]

The court then used these allegations regarding the defendants' conduct to distinguish two prior California decisions dismissing public nuisance actions and explain why allowing the claims at issue to go forward would not create the "monster" envisioned by the Eighth Circuit in *Tioga Public School District*.[130] It summarized that "[a] representative public nuisance cause of action seeking abatement of a hazard created by affirmative and knowing promotion of a product for a hazardous use is not 'essentially' a products liability action 'in the guise of a nuisance action.'"[131] A products liability claim "may be brought only by one who has already suffered a physical injury to his or her person or property, ... is limited to recovering damages for such physical injuries[,] ... does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a public entity to act on behalf of a community that has been subjected to a widespread public health hazard."[132] The court found the fact that the pre-1978 manufacture and distribution of lead paint was in accordance with then-existing statutes did "not immunize it from subsequent abatement as a public nuisance."[133]

The Court of Appeal's 2017 opinion affirmed its 2006 public nuisance analysis. Based on that analysis, the court held that plaintiffs' burden was to show that the defendant manufacturers had actual, not just constructive, knowledge of the hazard that would be created—a burden the court found the plaintiffs had satisfied.[134]

> *"The California Court of Appeal for the Sixth Appellate District similarly failed to enforce the historic limits on public nuisance when it substantially upheld a verdict against three lead paint manufacturers ..."*

In terms of causation, the court explained that the standard for a public nuisance claim was whether defendants' conduct was a substantial factor in bringing about the injury, damage, or loss, which required "only that the contribution of the individual cause be more than negligible or theoretical."[135] The court found that this substantial factor test had been met and that whether the proximate cause standard was met was a fact question that was properly submitted to the jury.[136]

Further, the court explained that, because defendants' liability was premised

on their promotion of the use of lead paint for interior residential use, there was no requirement that any individual manufacturer's paint be shown to be present in any particular property to satisfy the causation requirement.[137] The court also relied on the fact that liability turned on the promotion of lead paint use to dismiss defendants' arguments that their due process rights were violated because they were not allowed to visit any of the residential properties at issue and the terms of the abatement order "grossly exceed[ed]" their individual responsibility.[138]

Turning next to examining whether a public right was implicated, the court explained that the "community has a collective social interest in the safety of children in residential housing" and "[i]nterior residential lead paint interferes with the community's 'public right' to housing that does not poison children."[139] Answering the defendants' argument that the public had no right to be present in a private home, the court explained that "[r]esidential housing, like water, electricity, natural gas, and sewer services, is an essential community resource."[140] "[W]ithout residential housing, it would be nearly impossible for the 'public' to obtain access to water, electricity, gas, and sewer services."[141] Based on these premises, the court concluded that "[p]ervasive lead exposure in residential housing threatens the public right to essential community resources."[142]

The court also found that actions taken and laws passed by the California legislature did not foreclose a public nuisance claim against lead paint manufacturers. The court found no statutory authority declaring that non-deteriorated lead paint was not a hazard, and also found that the fact that the use of lead paint was legal at the time it was applied to the properties at issue did not prevent it from being declared a nuisance now.[143] The court also gave its view that the trial court did not declare lead paint to be a nuisance per se, but instead had "crafted a very limited order requiring abatement of only deteriorated interior lead paint, lead paint on friction surfaces, and lead-contaminated soil at residences in the 10 jurisdictions."[144] The court was not persuaded by the defendants' argument that the trial court order would have "adverse policy implications" because "[i]t may well be that a multi-pronged approach to this problem will be necessary, with the court's abatement order serving as merely one of several methods necessary to resolve this problem."[145]

Climate Change Litigation

Climate change is one of the more recent targets of public nuisance litigation. As with public nuisance claims against asbestos manufacturers, "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming."[146] Further, a recent Supreme Court opinion rejecting a public nuisance claim against fossil fuel manufacturers and distributors will likely further curtail public nuisance claims aimed at addressing climate change. The fact that federal district courts in California and New York dismissed similar claims following the Supreme Court case seems to confirm this view. All three decisions are discussed below.

THE SUPREME COURT

In *American Electric Power Co. v. Connecticut* (AEPC), the Supreme Court rejected federal common law public nuisance claims brought by eight states, one city, and three land trusts against four private power companies and the Tennessee Valley Authority seeking abatement of activities allegedly

> *Further, a recent Supreme Court opinion rejecting a public nuisance claim against fossil fuel manufacturers and distributors will likely further curtail public nuisance claims aimed at addressing climate change.*

contributing to global warming. The Court found that the public nuisance claims were displaced by the Clean Air Act (CAA) and related Environmental Protection Agency (EPA) actions.[147] It is "primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," and federal legislation "excludes the declaration of federal common law ... [when] the statute 'speak[s] directly to [the] question' at issue."[148] Drawing on its decision in *Massachusetts v. EPA*,[149] the Court held that carbon dioxide emissions are subject to EPA regulation under the CAA, and the CAA "'speaks directly' to emissions of carbon dioxide from the defendants' plants."[150] Consequently, the EPA is the "first decider" regarding carbon dioxide emission regulations under the CAA, with its decision subject to judicial review.[151]

The *AEPC* Court considered it "altogether fitting that Congress designated an expert agency ... as best suited to serve as primary regulator of greenhouse gas emissions" because "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions."[152] "[J]udges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order," including "commission[ing] scientific studies or conven[ing] groups of experts for advice, or issu[ing] rules under notice-and-comment procedures inviting input by any interested person, or seek[ing] the counsel of regulators in the States where the defendants are located."[153] Instead, "judges are confined by a record comprising the evidence the parties present" and "lack authority to render precedential decisions binding other judges, even members of the same court."[154]

On the specific issue of carbon dioxide emissions, the Court added that regulations "cannot be prescribed in a vacuum" because, "as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental

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benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance."[155]

CALIFORNIA

One of the key cases to address the viability of a public nuisance claim related to climate change following *AEPC* is *City of Oakland v. BP P.L.C.*[156] The *City of Oakland* locality plaintiffs sued fossil fuel producers for anticipated harm they would suffer from rising sea levels due to the combustion of fossil fuels. They sought to avoid the impact of *AEPC* by emphasizing that the "conduct and emissions contributing to the nuisance arise outside the United States, although their ill effects reach within the United States."[157] The court held that this focus on the international nature of the conduct and emissions at issue allowed the claims to survive displacement by the CAA, but the claims nevertheless were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems."[158]

Indeed, the court described the theory underlying the plaintiffs' claims as "breathtaking" because it "would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming."[159] The court also recognized the historical dimensions when it weighed the social utility of fossil fuels versus the gravity of the harms they cause. The contribution to global warming had to be balanced against the fact that the "industrial revolution and the development of our modern world has literally been fueled by oil and coal," and "[w]ithout those fuels, virtually all of our monumental progress would have been impossible."[160] "[P]laintiffs' claims require a balancing of policy concerns—including the harmful effects of greenhouse gas emissions, [and] our industrialized society's dependence on fossil fuels, and national security"—and "undoubtedly implicate the interests of countless governments, both foreign and domestic."[161]

Invoking the "presumption against extraterritoriality," the court concluded that "there are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary."[162] The court therefore "stay[ed] its hand in favor of solutions by the legislative and executive branches" and dismissed the plaintiffs' claims.[163]

NEW YORK

Another key case that followed the same logic and reached the same result is *City of New York v. BP P.L.C.*[164] There, the city

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brought federal and state law nuisance claims against multinational oil and gas companies, seeking damages and injunctive relief for injuries allegedly caused by the emission of greenhouse gases from fuels produced and sold by those companies.[165] The city agreed that federal common law applied to suits against emitters of interstate pollution, but, in an attempt to save its state law claims, it contended that its claims were based on production and sale of fossil fuels, not emission.[166] The court rejected the city's contention, holding that federal common law displaced the city's state law claims because the city's claims were "ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims arise under federal common law and require a uniform standard of decision."[167] Following *AEPC*, the court then held that the CAA displaced the city's federal common law claims, and it observed that problems caused by climate change, which implicate federal foreign and domestic policy, "are not for the judiciary to ameliorate" but rather "must be addressed by the two other branches of government."[168]

> *"[T]he court … observed that problems caused by climate change … 'are not for the judiciary to ameliorate' but rather 'must be addressed by the two other branches of government.'"*

Emerging Public Nuisance Litigation

As the foregoing sections demonstrate, plaintiffs are on the search for public nuisance claims that will amount to the "next tobacco" case and give rise to a large monetary settlement.[169] Targets of this search include subprime mortgage lenders in relation to the 2009 financial crisis,[170] polychlorinated biphenyl (PCB) manufacturers in relation to water contamination,[171] and opioid manufacturers and distributors in relation to the opioid epidemic.[172]

The ultimate resolution of these cases, whether through court order, trial, or settlement, will likely impact the future viability and popularity of public nuisance claims by governmental entities.

Governmental Entity Plaintiffs Attempt to Avoid Long-Recognized Restrictions

Public nuisance represents a uniquely potent weapon in the hands of governmental entities and contingency fee private counsel representing them. As one scholar has summarized, public nuisance claims have a more direct focus on the merits, allow for damages and injunctive relief, and avoid substantive and procedural hurdles common to other torts:

> Public nuisance offers plaintiffs several important strategic advantages. Its primary advantage is a more direct focus on the merits—the existence of the nuisance, the injury, and the appropriate remedy—than is available in many statutory cases, where the focus is often on procedure or violations of permits or standards. Moreover, public 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.[173]

These strategic advantages illustrate both why plaintiffs continue to assert public nuisance claims and why the historic limits applicable to those claims developed in the first place.

Enterprising plaintiffs and their counsel would like to break the public nuisance "monster" out of its judicially constructed cage. Governmental entity plaintiffs, often represented by contingency fee

counsel, have argued that many of the historical restraints that courts apply to public nuisance suits should not apply to them due to their unique ability to bring representative claims on behalf of their constituents. The historical restraints they seek to avoid include the requirement that there be an injury to a right common to the public at large, limitations on the recovery of damages, and proving causation.

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AVOIDING THE REQUIREMENT OF A PUBLIC RIGHT

A foundational element of a public nuisance claim is interference with or violation of a public, as opposed to a private, right. Public rights are "collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured."[174] Classic examples of interferences with public rights include the "obstruction of highways and waterways, or pollution of air or navigable streams."[175] Consequently, "an individual's blockading or a public road may be a public nuisance," while "[b]locking a private driveway ... could never be a public nuisance because the act infringes only on the homeowner's private right to use his or her driveway."[176] Further, "the number of private driveways a person blocks is irrelevant, as an aggregation of infringements of private rights does not equal an infringement of a public right."[177]

The recent rise of suits by governmental entity plaintiffs acting in representative capacities represents an attempted end-run around the public right requirement. Public nuisance claims brought by public entities related to products like lead paint illustrate the problem. Because "[p]roducts tend to be purchased and used by individual consumers, … any harm a product causes is to individuals," even if "the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable."[178] But governmental plaintiffs have attempted to obscure the individual nature of such injuries by focusing on the widespread use of the product or its potential to cause harm. The City of St. Louis, for example, contended that lead paint was a "widespread health hazard" that was "uniquely public" because "the monumental task of cleaning up [d]efendants' toxic products falls upon the city and its taxpayers."[179] Similarly, the State of Rhode Island claimed that "the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island" could be considered a public nuisance.[180]

Many, if not most, courts have seen through this ruse, as the Missouri and Rhode Island Supreme Courts did in dismissing the St. Louis and Rhode Island claims.[181] Some courts and dissenting judges, however, have agreed with it. Notably, those courts and judges have expressed their opinions in broad brush

terms, such as calling lead paint a "deadly toxin that permeates the structural environment of this State,"[182] or re-characterizing the nature of a case.[183]

These broad approaches gloss over the fact that the actual injuries underlying the claims at issue are to individuals, likely occur inside their private homes or residences, and likely are redressable through personal injury, products liability, or other similar types of individual claims. These expansive approaches also may interfere with the public policy choices made by legislative or regulatory bodies regarding a particular type of claim, as discussed below. The fact that public nuisance can be used to displace individual actions and legislative or regulatory judgments illustrates why governmental entities should not be able to use their representative status to evade the centuries-old public right requirement.

AVOIDING DAMAGES LIMITATIONS BY USING ABATEMENT RECOVERY OR FORCED SETTLEMENTS AS SUBSTITUTES

Traditionally, governmental entities bringing public nuisance suits are limited to injunctive and abatement remedies. So, for example, a governmental entity could bring a public nuisance action against a person for blocking a public roadway that seeks to enjoin the blockage and force the person to pay for the cost of remedying it. In that circumstance, the costs of abatement would be clearly and definitely ascertainable.

The same cannot be said of the costs of abating large public policy or public health problems that governmental entities have more recently made the target of public nuisance claims. As illustrated by the California judgment requiring three manufacturers to pay $1.15 billion to pre-fund the estimated costs of abating lead paint in 10 cities and counties in California, the cost of addressing large-scale societal problems is unclear and indefinite, not to mention astronomical. Indeed, in the appellate decision upholding the billion-dollar verdict, the court called the "order ... requiring defendants to prefund remediation costs" "unusual," admitting that "the [trial] court's estimate of the amount that would be necessary for [remediation costs] was just that: an estimate."[184]

While the California court attempted to distinguish pre-paying remediation costs into a fund from a damages award, one commentator has noted that "[t]he difference between an order advancing costs and a judgment awarding damages is illusory, to say the least, especially to the person ordered to pay the money."[185]

This illusory distinction is demonstrated by the fact that governmental entities are able to use pre-remediation cost awards to offset the costs of providing public services that the entities have a duty to provide using tax dollars.[186] Consequently, these types of awards can subsidize the provision of services that the governmental entity would be required to provide even in the absence of the complained-of activity, allowing the government to redirect tax dollars to other uses. By using public nuisance awards in this way, the governmental entity avoids difficult decisions about tax increases or service levels that it otherwise would have to make.[187] Thus, even if the pre-remediation costs are paid into a special fund to which the public entity lacks access, the public entity has the ability to offset its expenditures against the value of that fund, with the end result being the same as if it had received a damages award.[188]

In addition to the illusory distinction between abatement or remediation cost recovery and a damages award in large-scale public nuisance litigation, the continued presence of contingency fee counsel representing governmental entities in this type of litigation raises the problem of the litigation being used as a vehicle for a forced settlement.[189] If the goal of these lawsuits truly was to cover the costs of abatement or remediation—especially when the money to cover those costs would be paid into a designated fund that may restrict counsel's ability to fully recover their fees—then private contingency fee counsel presumably would be disinterested in this type of litigation as unprofitable. But, at least since the tobacco litigation settlement in the 1990s, contingency fee counsel have been highly motivated to participate in these types of suits.[190]

> *"[T]he continued presence of contingency fee counsel representing governmental entities in this type of litigation raises the problem of the litigation being used as a vehicle for a forced settlement."*

Recent comments on the opioid litigation by former plaintiffs' lawyer Richard Scruggs, who was contingency fee counsel in the tobacco litigation, suggest this is because the real goal is forcing settlements.[191] Although Scruggs states he "has no special insight into the strategy and planning of the opioid initiatives," his judgment that settlement equals success would seem to align with the financial interests and incentives of the contingency fee counsel (many of whom were co-counsel with Scruggs in the tobacco litigation), who could structure the settlement terms to ensure that they were paid for their work. Relatedly (and consistent with the tobacco settlement), they could also structure the settlement to enable their public entity clients to use the funds more broadly than just for remediation or abatement.[192]

AVOIDING THE REQUIREMENT OF PROVING CAUSATION

Public entity plaintiffs also frequently argue that causation standards generally applicable to tort claims should not apply to their public nuisance claims. Courts' responses have been mixed.

The City of Chicago's position in its lawsuit against lead paint manufacturers exemplifies this argument.[193] As the Illinois Court of Appeals summarized, the argument avoids entirely the question of whether the defendant caused a particular injury and focuses instead on whether the defendant "substantially participated" in creating a perceived threat to public health and safety:

> [Chicago] asserts that because it is a governmental plaintiff it is not required to identify which defendant manufactured the paint found on each surface in Chicago where lead-based paint now constitutes a hazard. [Chicago] contends that the requisite causation is established where the defendant has substantially contributed to the public nuisance. [Chicago] notes that, in the present case, it is not seeking to recover for an injury to a particular

> person or property but, instead, it is asserting the right of the public as a whole to be free from threats to its health and safety. Moreover, [Chicago] notes that it has alleged that every defendant substantially participated in creating the threat.[194]

The appeals court rejected Chicago's argument because "there [was] no reported Illinois public nuisance case involving a viable lawsuit brought by any municipality in which identification and causation, including the specific location of the nuisance, were not known," and accepting Chicago's argument would "mak[e] each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many."[195] The Missouri Supreme Court rejected a similar argument by the City of St. Louis, as set forth above.[196]

While the Illinois and Missouri courts rightly rejected these cities' attempts to dodge their burden of proving causation, not every court has agreed. For example, in its recent *ConAgra* decision, the California Court of Appeal held that California law imposed a lower burden of proof of causation, whereby the public entity plaintiffs were required to prove only that the lead paint manufacturer defendants played more than an "infinitesimal" or "theoretical" part in creating the nuisance.[197] The sentiment behind allowing a lower burden of proof of causation was probably best captured by the dissent from the Missouri Supreme Court's decision dismissing the City of St. Louis' claims, which argued that the case had nothing to do with the cause of a particular injury and "everything to do with identifying the sources of a poison and making those sources pay their fair share of the cost of the cleanup of a direct hazard to the public health."[198]

One of the problems that results from lowering the causation requirement is that "[t]he battle in the public nuisance courtroom resembles a public policy debate, not the traditional role of courts to mete out individualized justice," with the end result resembling the creation of a social program more than the resolution of a particular dispute.[199] As one commentator described the lower court opinion that was overturned by the Rhode Island Supreme Court, the trial court "created a tort where liability is based upon unidentified ills allegedly suffered by unidentified people caused by unidentified products in unidentified locations."[200]

When liability is construed in this way, a trial tends to focus on "statistics

"Because such public policy decisions and debates properly belong in the legislative and executive branches of government, the harm caused by governmental entity attempts to avoid proving causation extends beyond the particular defendants in a given case to the very composition of government and the relationship between its coordinate branches."

and principles of general, not specific, causation," meaning that "[p]opulation data, population statistics, and epidemiology pervade the courtroom, but not actual individuals with injuries and direct causal connections to specific harm or expenditures."[201] This transformation of focus from a discrete injury to a more generalized societal problem potentially empowers "a single judge or jury to set public policy for an entire state or the nation."[202] Because such public policy decisions and debates properly belong in the legislative and executive branches of government, the harm caused by governmental entity attempts to avoid proving causation extends beyond the particular defendants in a given case to the very composition of government and the relationship between the coordinate branches.

Public Nuisance is an Ill-Suited Vehicle for Remedying Public Policy Problems

The problem of governmental plaintiffs seeking to circumvent the historic limits of public nuisance is compounded by the fact that public nuisance is an ill-suited vehicle for addressing widespread matters of public policy.

Indeed, public nuisance arose to address discrete, localized problems, not far-reaching policy matters. In contrast, large-scale societal challenges implicate needs and interests that can be fully addressed and balanced only by the political branches of government. To the extent the legislature has created a comprehensive regulatory scheme aimed at particular kinds of conduct, courts should be hesitant to interfere with that balance.

> *"[P]ublic nuisance arose to address discrete, localized problems, not far-reaching policy matters. In contrast, large-scale societal challenges implicate needs and interests that can be fully addressed and balanced only by the political branches of government."*

Public Nuisance Designed to Address Discrete, Localized Problems

Public nuisance arose as a means to address discrete problems that were local in nature.[203] This is evidenced by the fact that in the earliest days the public right most often being vindicated was the right to unobstructed public highways or navigable waterways.[204] Over time, other localized interferences with public rights were considered public nuisances, such as noxious and offensive trades that interfered with the health, comfort and, in some cases, morals of those in surrounding areas.[205] Indeed, public nuisance historically has been tied to the defendant's use of, or interference with, land.[206]

As the Rhode Island Supreme Court summarized, "A common feature of public nuisance is the occurrence of a dangerous condition at a specific location. This Court has recognized that the existence of a nuisance depends in large part on its location, and, to date, the actions for

nuisance in this jurisdiction have been related to land."[207] It went on to observe that "[T]he United States Supreme Court has remarked that 'the question [of] whether ... a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.'"[208]

Large-Scale Societal Challenges Implicate Needs and Interests Only Political Branches Can Balance

Unlike the discrete, localized interferences that public nuisance was designed to address, local government plaintiffs have sought to expand the tort's reach to include public policy matters that implicate much more widespread interests. In many cases, these interests reach the national, and even international, level. These large-scale societal challenges are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play.

As courts have repeatedly recognized, the question of who will pay to correct a widespread problem arising from a lawfully manufactured, and often highly regulated, product—whether it be the manufacturer, distributor, end-user, or someone else—is "essentially a political question to be decided in the legislative arena."[209] This is one of the primary reasons courts have declined to use the tort of public nuisance to impose judicial solutions to those broad-based public policy issues.

Addressing the issue of pollution, for instance, the court in *Diamond v. General Motors Corp.* declined to engage in "judicial regulation of the processes, products and volume of business of the major industries of the county" because "[t]hese issues are debated in the political arena and are being resolved by the action of those elected to serve in the legislative and executive branches of government."[210] Indeed, the Supreme Court in *AEPC* observed that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest."[211] Chief Justice Burger expounded on this principle in *Tennessee Valley Authority v. Hill*, stating that Congress's policy making role is just as important as the courts' role in recognizing that policy:

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is"... it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and

"These large-scale societal challenges are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play."

> mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.[212]

Thus, the legislature sets the overall policy, the executive carries it out, and the courts defer to that policy in their judgments.[213] This constitutional division of labor is upset when courts take on the legislative role and attempt to balance all of the interests at play in widespread societal problems.

> *"This constitutional division of labor is upset when courts take on the legislative role and attempt to balance all of the interests at play in widespread societal problems."*

This observation applies with even greater force to an international problem such as climate change, because courts traditionally defer to the political branches in matters of foreign affairs and the presumption against extraterritoriality applies.[214]

Comprehensive Regulatory Schemes Remove the Need for Judicial Recourse

While the tort of public nuisance is generally ill-suited to resolve large-scale public health or policy problems as shown throughout this paper, it is particularly ill-suited to address such problems when the legislative branch has created a regulatory framework for resolving or managing them.[215] As Chief Justice Burger explained, it is for the executive to carry out the legislature's policy choice, and for the courts to aid in enforcement when called upon to do so.[216] It is not for the courts to re-evaluate the legislature's policy choice.

As the Supreme Court explained in *AEPC* when it held that congressional and regulatory action displaced federal public nuisance claims targeting climate change, the principle that courts should defer to the political branches follows from the fact that courts are incapable of balancing all of the competing interests in the same way the political branches can.[217] Accordingly, courts should be hesitant to use the tort of public nuisance to interfere with a comprehensive regulatory scheme.

As referenced previously, the *Diamond v. General Motors Corp.* court held it was inappropriate for it to "do what the elected representatives of the people ha[d] not done: adopt stricter standards over the discharge of air contaminants in this county," and enforce them with the court's contempt power since state and federal statutes already regulated pollution.[218]

Similarly, the court in *State ex rel. Norvell v. Arizona Public Service Co.* declined to "interfere with the comprehensive programs" of the state and federal legislative and executive branches "designed to solve a complex social, economic and technological problem" like pollution.[219] Instead, the *Norvell* court stayed its hand in light of the fact that administrative agencies "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to regulate business uniformly and consistently.[220]

Likewise in the New Jersey and Rhode Island lead paint cases, the courts deferred to the clear pronouncements and policy decisions of their respective legislatures.[221] The New Jersey Supreme Court noted in particular the legislature's decision to declare lead paint a public nuisance but to focus liability on the conduct of the landowners, not manufacturers.[222] The court also observed that the plaintiffs' theory of recovery was in the nature of a product liability action, and that the claim therefore should have to meet the legislature's standards for such actions, not short-circuit them under the guise of a public nuisance claim.[223]

As the New Jersey Supreme Court recognized, when the legislature acts to address a widespread public crisis, it is able to balance all of the relevant interests in a "careful and comprehensive" way, unlike courts and the tort of public nuisance in particular:

> Our Legislature, in recognizing the scope and seriousness of the adverse health effects caused by exposure to and ingestion of deteriorated lead paint, acted swiftly to address that public health crisis. Its careful and comprehensive scheme did so in conformity with traditional concepts of common law public nuisance. Nothing in its pronouncements suggests it intended to vest the public entities with a general tort-based remedy or that it meant to create an ill-defined claim that would essentially take the place of its own enforcement, abatement, and public health funding scheme. Even less support exists for the notion that the Legislature intended to permit these plaintiffs to supplant an ordinary product liability claim with a separate cause of action as to which there are apparently no bounds. We cannot help but agree with the observation that, were we to find a cause of action here, "nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'"[224]

The Rhode Island Supreme Court similarly observed, and deferred to, its legislature's decision to address lead paint as a public health issue and focus liability on landlords, as those in control of the substance at the time it becomes hazardous.[225]

Conclusion

Public nuisance arose as a gap-filler tort. It addressed conduct that infringed a public right, and allowed the executive branch of government to use the judicial process to stop the nuisance. In the classic example, the defendant was required to remove the obstruction of the highway.

Over time, the tort allowed individuals to sue for damages if their injury was different from the injury to the public at large; that is, if there was some injury in addition to not being able to travel along the highway. As courts developed the tort of public nuisance to fill other gaps, and regulate noxious and offensive trades, the focus continued to be on vindicating public rights tied to a specific location.

By the early 20th century, legislatures acted to define public nuisances and, eventually, enacted comprehensive regulatory schemes governing the conduct. In furtherance of those legislative policy choices, executive agencies promulgated applicable standards as well. As a result, the gaps the public nuisance tort was designed and developed to address grew smaller.

In recognition of the limited role remaining for public nuisance claims, courts have deferred to the political branches on matters of public policy that impact society at large. Courts have recognized that the political branches can balance all of the interests and considerations at play in these matters in a way the judicial branch cannot. In order to stay true to this constitutional division of labor, and the historic limits and purpose of public nuisance in addressing discrete, localized problems, courts should continue to defer to the policy making role of the legislative and executive branches and not allow public nuisance to devour the law of tort.

> *"[C]ourts should continue to defer to the policy making role of the legislative and executive branches and not allow public nuisance to devour the law of tort."*

Endnotes

1 Restatement (Second) of Torts § 821B cmt. a (Am. Law Inst. 1979).

2 *Id.*; Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 793, 797 & n.287 (2003) (quoting D. Ibbetson, *A Historical Introduction to the Law of Obligations,* 104 (1999)).

3 Gifford, *supra* note 2, at 815.

4 Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 632 (2010).

5 Gifford, *supra* note 2, at 799.

6 *Id.* at 799-800.

7 *Id.*

8 *Id.* at 800 (citing Y.B. Mich. 27 Hen. 8, f.27, pl. 10 (1535)).

9 *Id.* at 796 ("if one person shall have an action for this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case") (quoting Y.B. Mich. 27 Hen. 8, f.27, pl. 10 (1535)).

10 *Id.* at 800.

11 *Id.*

12 *Id.* at 800 (quoting Y.B. Mich. 27 Hen. 8, f.27, pl. 10 (1535)).

13 *Id.* at 800.

14 *Id.* at 800-01.

15 *Id.* at 804-06.

16 *Id.*

17 *Id.* at 800.

18 *Id.* at 800-01. For a fuller explanation of common law public nuisances, including a lengthy list of examples, *see* Restatement (Second) of Torts § 821B cmt. b (Am. Law Inst. 1979).

19 Gifford, *supra* note 2, at 804-05.

20 *Id.* (citing Tennessee and Washington statutes).

21 *Id.* at 804.

22 *Id.* at 804-05.

23 *Id.*

24 *Id.*

25 *Id.* at 805-06.

26 *Id.*

27 *Id.* at 806.

28 *Id.* (quoting Restatement (Second) of Torts 6, 16-44 (Tentative Draft No. 15, 1969)).

29 *Id.*

30 *Id.* at 806-07.

31 *Id.*; *see also* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecology L.Q. 755, 835-48 (2001).

32 Antolini, *supra* note 31, at 836-39.

33 *Id.* at 842-48.

34 *Id.*

35 Restatement (Second) of Torts § 821B (Am. Law Inst. 1979); *see also* Gifford, *supra* note 2, at 807-09; Antolini, *supra* note 31, at 843-48.

36 *Id.*

37 *Id.*

38 *See* Gifford, *supra* note 2, at 807-09; Antolini, *supra* note 31, at 843-48.

39 *Id.*

40 Gifford, *supra* note 2, at 808-09.

41 *Id.* at 809.

42 While not covered in this paper, the firearm industry was targeted in public nuisance litigation by governmental entities in the early 2000s. Congress largely ended that litigation in 2005 when it passed the Protection of Lawful Commerce in Arms Act, which "effectively foreclosed nearly all municipal civil suits against the gun industry." Sarah L. Swan, *Plaintiff Cities*, 71 Vand. L. Rev. 1227, 1236 (2018).

43 20 Cal. App. 3d 374, 376 (1971).

44 *Id.*

45 *Id.* at 378-79.

46 *Id.* at 382.

47 *Id.*

48 *Id.* at 382-83.

49 *Id.*

50 459 N.Y.S.2d 971, 973-74 (Sup. Ct. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (App. Div. 1984).

51 *Id.* at 977.

52 *Id.* at 977 (citing *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970)).

53 *Id.* at 976 (citing *Spano v. Perine Corp.*, 250 N.E.2d 31 (N.Y. 1969)). Demonstrating the far-reaching effects of its refusal to dismiss the claim, the court proceeded to reject various defenses asserted by the defendant (statute of limitations, failure to join a necessary party, and compliance with industry standards) on the ground that they did not apply to a public nuisance claim. *Id.* at 977-79.

54 *State v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010, 1013 (App. Div. 1984).

55 *See generally United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989).

56 *Id.* at 962-63, 967.

57 *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on A Rational Tort*, 45 Washburn L.J. 541, 567–69 (2006).

58 *See City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (affirming dismissal of a public nuisance claim brought by the city against a chemical manufacturer arising out of water contamination caused by the purchaser of the product; the court noted that the city had been unable "to find any cases holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale"); *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995) (dismissing public and private nuisance claims against a chemical manufacturer in suit by buyer of chemicals where the manufacturer had no control over the products after it had tendered the product to the buyer).

59 *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (collecting cases).

60 *Id.*

61 *Id.* It should be noted that interference with the property rights of a neighbor more often may be cognizable as a private, rather than a public, nuisance.

62 *Id.* at 921.

63 *Id.*

64 493 N.W.2d 513, 521 (Mich. App. 1992).

65 *Id.*

66 *Id.*

67 *Id.* at 522. Courts expressed similar sentiments in the following cases: *Johnson Cty. v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("[A]llowing the plaintiff to bring this action under a nuisance theory would convert almost every products liability action into a nuisance claim. The undersigned can only conclude that as an elementary principle of tort law, a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality."), *set aside in part*, 664 F. Supp. 1127 (E.D. Tenn. 1985); *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876, 883 (Ct. App. 1994) ("City cites

no California decision, however, that allows recovery for a defective product under a nuisance cause of action. Indeed, under City's theory, nuisance 'would become a monster that would devour in one gulp the entire law of tort ...'") (quoting *Tioga Pub. Sch. Dist.*, 984 F.2d at 921).

68 *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997), *subsequent mandamus proceeding sub nom. In re Fraser*, 75 F. Supp. 2d 572 (E.D. Tex. 1999) (construing Texas law).

69 Schwartz, *supra* note 4, at 638–39. As a practical matter, that hint of legitimacy likely owes more to the discovery of memoranda authored by the tobacco companies showing they had "concealed the risk of cigarette use" and "designed their product to foster addiction" than it does to the settlement validating the plaintiffs' public nuisance claims. Gifford, *supra* note 2, at 757-58. Indeed, the change in focus from tobacco itself to the tobacco companies' knowledge of tobacco's dangers, as shown in the memoranda, appears to have influenced the lead paint litigation. Further, it appears that the only case where a court allowed a public nuisance claim to go forward against a tobacco manufacturer was *Evans v. Lorillard Tobacco Co.*, No. CIV. A. 04-2840A, 2007 WL 796175, at *19 (Mass. Super. Ct. Feb. 7, 2007) which involved the alleged distribution of cigarettes to minors. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 n.7 (N.D. Cal. 2018) (observing every court but *Evans* had rejected public nuisance claims against tobacco companies), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018).

70 Victor E. Schwartz et al., *Can Governments Impose A New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 931 (2009).

71 *Id.* The hiring of contingency fee counsel to represent governmental entities also raises a host of ethical issues because contingency fee counsel's motives and goals may differ from those of a governmental entity. *See id.* at 931–35.

72 Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563, 563–64 (2001).

73 Gifford, *supra* note 2, at 836–37.

74 *Id.* at 637.

75 *Id.* at 836.

76 DeBow, *supra* note 72, at 564.

77 Schwartz, *supra* note 4, at 639.

78 Schwartz & Goldberg, *supra* note 57, at 559.

79 *Id.*

80 *Id.*

81 226 S.W.3d 110, 112-13 (Mo. 2007) (en banc).

82 *Id.* at 113.

83 *Id.* at 114.

84 *Id.* at 115-16.

85 *Id.* at 116.

86 *Id.* at 117 (Wolff, C.J. dissenting).

87 *Id.* at 119.

88 *Id.*

89 *In re Lead Paint Litig.*, 924 A.2d 484, 486–87 (N.J. 2007).

90 *Id.* at 494.

91 *Id.* at 495-96.

92 *Id.* at 500-01.

93 *Id.* at 501-02.

94 *Id.* at 497-99, 502-03.

95 *Id.* at 494.

96 *Id.* at 501.

97 *Id.*

98 *Id.*

99 *Id.* at 502.

100 *Id.* at 503-05.

101 *Id.* at 506 (Zazzali, C.J. dissenting).

102 *Id.* at 511.

103 *Id.*

104 *Id.*

105 *State v. Lead Indus. Ass'n*, 951 A.2d 428, 434 (R.I. 2008).

106 *Id.* at 443-446.

107 *Id.* at 455.

108 *Id.* at 453.

109 *Id.* at 455.

110 *Id.* at 452.

111 *Id.* at 454.

112 *Id.* at 453.

113 *Id.* at 454 (quoting *City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099, 1116 (Ill. 2004).

114 *Id.* at 454-55 (quoting *Beretta*, 821 N.E.2d at 1116).

115 *Id.* at 455.

116 *Id.* (quoting *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007)).

117 *Id.* at 456.

118 *Id.*

119 *Id.* at 457 (quoting *People v. Sturm, Ruger & Co.,* 309 A.D.2d 91 (N.Y. App. Div. 2003).

120 *Id.* at 457-58.

121 691 N.W.2d 888, 890 (Wis. Ct. App. 2005).

122 *Id.* at 893.

123 *Id.*

124 *Id.* at 894.

125 *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 764 (Wis. Ct. App. 2008).

126 *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 514 (Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prods. v. California*, 139 S. Ct. 377 (2018), *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018).

127 *See Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Ct. App. 2006).

128 *Id.* at 325.

129 *Id.*

130 *Id.* at 326-28.

131 *Id.* at 328.

132 *Id.* at 328-29.

133 *Id.* at 329 (quoting *City of Bakersfield v. Miller*, 410 P.2d 393, 399 (Cal. 1966)).

134 *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 529-34 (Ct. App. 2017).

135 *Id.* at 543.

136 *Id.* at 543-46.

137 *Id.* at 548.

138 *Id.* at 557-59. In terms of apportionment of liability, the court found that the burden was on the defendant to prove the harm was capable of apportionment, a burden it assumed the trial court found unsatisfied. *Id.* at 548-49.

139 *Id.* at 552.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.* at 553-54.

144 *Id.* at 554.

145 *Id.* at 555. Perhaps due to their diametrically different outcomes on whether governmental plaintiffs could bring public nuisance claims against lead paint manufacturers or distributors, the California Court of Appeal specifically addressed four non-California opinions: *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *City of St. Louis v. Benjamin Moore & Co.,* 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); and *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008).

Unsurprisingly, the court found each of the decisions distinguishable on evidentiary and state law grounds. It noted that the other appellate courts either did not have or did not consider evidence presented to the trial court, while it was considering the full record presented at trial. *Id.* at 593-94. It also found that California law varied from the laws at issue in the other appeals in terms of control requirements, causation standards, assignment of abatement responsibility, public right standards, and the interplay between public nuisance and products liability causes of action. *Id.* at 593-94. Regarding the Rhode Island Supreme Court's "conclusion that lead paint does not interfere with 'shared resources,'" the California court simply "disagree[d]." *Id.* at 594.

146 *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018).

147 564 U.S. 410, 415 (2011).

148 *Id.* at 423-24 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

149 549 U.S. 497 (2007).

150 564 U.S. at 424.

151 *Id.* at 426-27.

152 *Id.* at 428.

153 *Id.*

154 *Id.*

155 *Id.* at 427. After deciding that the CAA displaced the federal common law claims at issue, the Supreme Court noted that the plaintiffs had also brought public nuisance claims under state law. *Id.* at 429. The issue of whether those claims were likewise displaced or preempted by the CAA had not been briefed, and the Court therefore left it for consideration on remand. *Id.* Following remand, the case was voluntarily dismissed so that issue was never decided.

156 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018).

157 *Id.* at 1024.

158 *Id.*

159 *Id.* at 1022.

160 *Id.* at 1023-24.

161 *Id.* at 1025-26.

162 *Id.* at 1025, 1029.

163 *Id.* at 1029.

164 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018).

165 *Id.* at 468-470.

166 *Id.* at 471.

167 *Id.* at 472 (quoting *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018)).

168 *Id.* at 474-76. While plaintiffs' public nuisance claims related to climate change have failed in court, plaintiffs may continue to pursue them for political purposes. In 2007, for example, a California federal district court dismissed a public nuisance claim brought by California against automobile manufacturers related to climate change as a non-justiciable political question. *See generally California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). One week before President Obama's climate change plan passed the House of Representatives, then-California Attorney General Jerry Brown voluntarily withdrew the State's appeal of the *GM* decision because, "[w]ith the new administration in Washington, the rules have radically changed ... The EPA and the federal government are now on the side of reducing greenhouse gasses and are taking strong measures to reduce emissions from vehicles." Schwartz, *supra* note 4, at 662. Attorneys general in Connecticut and Maine have made similar comments about bringing public nuisance claims related to climate change as a way to spur legislative or regulatory action. *See id.* at 664–65.

169 Schwartz, *supra* note 70, at 925–26.

170 *See* Swan, *supra* note 42, at 1239-41.

171 *See* Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 380-82 (2018).

172 *See id.* at 382-87.

173 Antolini, *supra* note 31, at 774-75.

174 Schwartz, *supra* note 4, at 634 (quoting Restatement (Second) of Torts § 821B cmt. g (1979)).

175 Gifford, *supra* note 2, at 818.

176 Schwartz, *supra* note 4, at 634.

177 *Id.*

178 Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation,* 2007 Mich. St. L. Rev. 941, 963 (2007) (emphasis added).

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

180 *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455 (R.I. 2008).

181 *City of St. Louis*, 226 S.W.3d at 116 ("Although the city characterizes its suit as one for an injury to the public health and suggests that it is for this injury that it is suing, this is not the case. The damages it seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties. In this way, the city's claims are like those of any plaintiff seeking particularized damages allegedly resulting from a public nuisance."); *Lead Indus. Ass'n*, 951 A.2d at 453 ("Although the state asserts that the public's right to be free from the hazards of unabated lead had been infringed, this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance."). The Delaware Superior Court recently dismissed the state's public nuisance claims against opioid manufacturers and distributors for similar reasons. *State ex rel. Jennings v. Purdue Pharma L.P.*, No. CVN18C01223MMJCCLD, 2019 WL 446382, at *11-13 (Del. Super. Ct. Feb. 4, 2019). The court observed that public nuisance claims had not been recognized for products under Delaware law, and held that the state failed to allege a public right with which defendants interfered and control by defendants over the instrumentality of the nuisance at the time it occurred. *Id.*

182 *In re Lead Paint Litig.*, 924 A.2d 484, 506 (N.J. 2007) (Zazzali, C.J. dissenting).

183 *City of St. Louis*, 226 S.W.3d at 119 (Wolff, C.J. dissenting) (describing the suit as having "nothing to do with identifying a particular paint and linking it to a particular injured victim" and "everything to do with identifying the sources of a poison").

184 *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 569-70 (Ct. App. 2017).

185 Faulk & Gray, *supra* note 178, at 950.

186 *See* Schwartz, *supra* note 70, at 953–54 ("Governments have also sought to change damages law by basing liability on the fact that the government spent money caring for injured individuals or cleaning a hazard associated with a product"; providing examples and illustrations of same); *cf. City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099, 1138–39 (Ill. 2004) (Chicago sought "$433 million in operating expenses attributable to the alleged public nuisance during the years 1994–98. This amount includes the expenses of emergency communications and emergency response, health care provided to victims of gun violence, police investigations, and the prosecution and defense of those accused of crimes involving illegal possession and use of firearms.").

187 By seeking to recover the costs of providing services that the entity is obligated to provide, these awards also at least arguably run afoul of the free public benefits doctrine, also called the public services doctrine, absent a legislative act or some other special circumstance authorizing their recovery. *See* Bruce R. Kelly & Ingo W. Sprie Jr., *Public Nuisance Cases as the Next Mass Tort: The Lead Paint Experience*, 21 Toxics L. Rep. (BNA) No. 29, at 697-98 (July 27, 2006). "[T]he 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." Schwartz & Goldberg, *supra* note 57, at 570; *see also* Schwartz, *supra* note 70, at 953–54 (arguing that allowing governments to sue to recover costs of expended services "could

convert every legislative spending decision into a liability-creating event" for product manufacturers).

188 The creation of special funds whose purpose is to remediate or abate public health or public policy crises like lead paint also raises issues about the institutional competency of the judiciary to properly and effectively oversee efforts to ameliorate or solve large societal problems that have traditionally been the subject of legislative or regulatory treatment. *See infra*; Gifford, *supra* note 2, at 835–36.

189 Relatedly, private contingency fee counsel representing public entity plaintiffs raise ethical issues since counsel's motivations may differ from their client's motivation. *See* Schwartz, *supra* note 70, at 931-35.

190 *See, e.g.,* Schwartz & Goldberg, *supra* note 57, at 559 (private lawyers "convinced the Attorney General of Rhode Island to partner with them in commencing a government public nuisance action against the former lead companies").

191 *See* Richard Scruggs, *Are Opioids the New Tobacco?*, Law360 (Sept. 15, 2017), https://www.law360.com/articles/962715 ("[T]he success of the opioid cases will depend upon whether the plaintiffs can muster sufficient legal, political and public relations pressure to force a settlement.").

192 *See* Gifford, *supra* note 2, at 836-37 ("Funds made available to the states as a result of the tobacco settlement have been used for a wide variety of purposes, sometimes relating—directly or indirectly—to the treatment and prevention of tobacco-related disease, but sometimes not.").

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

194 *Id.* at 135.

195 *Id.* at 135-36.

196 *See City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115-16 (Mo. 2007) ("Without product identification, the city can do no more than show that the defendants' lead paint may have been present in the properties where the city claims to have incurred abatement costs," which "risks exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability entirely.").

197 *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 543 (Ct. App. 2017).

198 *City of St. Louis*, 226 S.W.3d at 119 (Wolff, C.J. dissenting).

199 Charles H. Moellenberg, Jr. et al., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 Expert Evidence Report (BNA) No. 18, at 483 (Sept. 24, 2007).

200 Faulk & Gray, *supra* note 178, at 981-82.

201 Moellenberg, *supra* note 199, at 483.

202 *Id.*

203 *See id.* ("Historically, public nuisance was tied to a particular location. The defendant could visit, inspect and test the site; juries were taken to the site to view it.").

204 Gifford, *supra* note 2, at 815.

205 *Id.*

206 *Id.* at 830-33; *see also* Schwartz & Goldberg, *supra* note 57, at 541-42 ("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 are picnicking in a public park.").

207 *State v. Lead Indus. Ass'n*, 951 A.2d 428, 452 (R.I. 2008).

208 *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

209 *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983).

210 20 Cal. App. 3d 374, 383 (1971).

211 564 U.S. 410, 415, 423-24 (2011).

212 437 U.S. 153, 194 (1978) (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)).

213 *See also* Moellenberg, *supra* note 199, at 483 (requirement in tort of a causal connection between conduct and injury "demarks the proper role of courts to resolve particular

disputes among individuals, not to create social programs").

214 *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024-29 (N.D. Cal. 2018); *see also California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) ("In this case, by seeking to impose damages for the Defendant automakers' lawful worldwide sale of automobiles, Plaintiff's nuisance claims sufficiently implicate the political branches' powers over interstate commerce and foreign policy, thereby raising compelling concerns that warn against the exercise of subject matter jurisdiction on this record."); Schwartz, *supra* note 4, at 662 (noting the California attorney general's acknowledgment of the political nature of climate change claims and withdrawal of appeal after the Obama administration announced measures to reduce emissions from vehicles).

215 Of course, courts maintain a proper role in reviewing legislation for constitutionality and executive action for lawfulness. *See, e.g., AEPC*, 564 U.S. 410, 426-27 (2011) (under the Clean Air Act, the EPA is the "first decider" regarding carbon dioxide emission regulations, with its decision subject to judicial review).

216 *Hill*, 437 U.S. at 194.

217 564 U.S. at 427-28.

218 20 Cal. App. 3d 374, 382-83 (1971).

219 510 P.2d 98, 105 (N.M. 1973) (citing *City of Chicago v. Gen. Motors Corp.*, 332 F. Supp. 285, 291 (N.D. Ill. 1971)).

220 *Id.* at 103-04 (citing *Far East Conf. v. United States*, 342 U.S. 570, 574-75 (1952)).

221 *See In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007) (declining to create "a remedy entirely at odds with the pronouncements of our Legislature"); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456-58 (R.I. 2008) (declining to allow the State to bring a public nuisance claim against lead paint manufacturers, and emphasizing the legislature's "clear policy decisions about how to reduce lead hazards in Rhode Island homes, buildings, and other dwellings and who should be responsible").

222 *Lead Paint Litig.*, 924 A.2d at 499-501.

223 *Id.* at 503-05.

224 *Id.* at 505 (quoting *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (quoting in turn *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993))).

225 *Lead Indus. Ass'n,* 951 A.2d at 456-58.

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