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Painting Over Long-Standing Precedent: How the Rhode Island Supreme Court Misapplied Public Nuisance Law in State v. Lead Industries Association

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Articles

Painting Over Long-Standing Precedent: How the Rhode Island Supreme Court Misapplied Public Nuisance Law in *State v. Lead Industries Association*

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INTRODUCTION

In February 2006, the State of Rhode Island scored a decisive trial victory for all children who have, or will be, plagued by the scourge of lead poisoning in the State. A unanimous jury declared the presence of lead pigment in homes and buildings throughout the State of Rhode Island to be a public nuisance and further ordered that three former manufacturers of lead pigments abate

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the nuisance that they created.[1] The trial verdict was heralded as one of the most important public health victories for children in the last decade and signaled the beginning of the end of childhood lead poisoning in Rhode Island.[2]

The import of eradicating lead poisoning of children cannot be denied. There is virtual unanimity in the medical community about the adverse effects of lead paint on the cognitive development of children. Indeed, the Centers for Disease Control[3], the American Academy of Pediatrics[4], the United States Department of Housing and Urban Development[5], the United

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1. *See* Peter B. Lord, *3 Companies Found Liable in Lead-Paint Public Nuisance Suit*, PROVIDENCE J., Feb 23, 2006, at A1 [hereinafter "*3 Companies*"]; Raja Mishra, *Rhode Island Wins Lead Paint Suit*, BOSTON GLOBE, Feb 23, 2006, at B2; Peter Krouse, *Sherwin Williams Loses Lead Lawsuit; Stock Falls 18 Percent After Rhode Island Verdict*, CLEV. PLAIN-DEALER, Feb, 23, 2006, at C1.

2. *See* Lord, *3 Companies*, *supra* note 1 ("'This is a very important, milestone victory for those across the nation who work on childhood lead-poisoning prevention because it sets a historical precedent as the first time a state or local government has been able to hold lead-pigment manufacturers accountable for their actions in a judicial setting,' said the Alliance's Brian Gumm . . . 'We are absolutely thrilled,' said Roberta Hazen Aaronson, executive director of the Childhood Lead Action Project, an advocacy group for lead-poisoned children. 'Sometimes in this not so friendly world, the Goliaths are defeated and justice triumphs. This precedent-setting decision feels like a home run for the families devastated by lead poisoning and for a community that has borne the cost of this industry-made public health disaster.'").

3. CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN, 7 (1991), http://www.cdc.gov/nceh/lead/publications/books/plpyc/chapter2.htm ("Lead is a poison that affects virtually every system in the body. It is particularly harmful to the developing brain and nervous system of fetuses and young children . . . . The risks of lead exposure are not based on theoretical calculations. They are well known from studies of children themselves and are not extrapolated from data on laboratory animals or high-dose occupational exposures.").

4. American Academy of Pediatrics, *Lead Exposure in Children: Prevention, Detection and Management*, 116 PEDIATRICS 1036, 1037 (Oct. 2005) ("At the levels of lead exposure now seen in the United States, subclinical effects on the central nervous system (CNS) are the most common effects. The best-studied effect is cognitive impairment, measured by IQ tests. The strength of this association and its time course have been observed to be similar in multiple studies in several countries.").

5. PRESIDENT'S TASK FORCE ON ENVIRONMENTAL HEALTH RISKS AND SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS (Feb. 2000), *available at* http://www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf ("Levels as low as 10

States Environmental Protection Agency[6] and the United States Agency for Toxic Substances and Disease Registry[7] all concur that lead poisoning of children under the age of six can cause learning disabilities, behavioral issues, and decreased IQ. Furthermore, although there has been widespread attention given to the use of lead paint on children's toys in recent years[8], the primary source of childhood lead poisoning in the United States today is lead paint on the walls and woodwork of a child's own home.[9]

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micrograms of lead per deciliter of blood (μg/dL) in infants, children, and pregnant women are associated with impaired cognitive function, behavior difficulties, fetal organ development, and other problems. In addition, low levels of lead in children's blood can cause reduced intelligence, impaired hearing and reduced stature. Lead toxicity has been well-established, with evidence of harmful effects found in children whose blood lead levels exceed 10 μg/dL.").

6. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, BASIC INFORMATION: LEAD IN PAINT, DUST, AND SOIL, http://www.epa.gov/lead/pubs/leadinfo.htm (click on "Health Effects of Lead" hyperlink) ("[C]hildren with high levels of lead in their bodies can suffer from: [d]amage to the brain and nervous system; [b]ehavior and learning problems, such as hyperactivity; [s]lowed growth; [h]earing problems; [and] [h]eadaches."

7. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH STATEMENT FOR LEAD (Aug. 2007), http://www.atsdr.cdc.gov/toxprofiles/tp13-c1-b.pdf ("[C]hild who swallows large amounts of lead may develop anemia, kidney damage, colic (severe 'stomach ache'), muscle weakness, and brain damage, which ultimately can kill the child. In some cases, the amount of lead in the child's body can be lowered by giving the child certain drugs that help eliminate lead from the body. If a child swallows smaller amounts of lead, such as dust containing lead from paint, much less severe but still important effects on blood, development, and behavior may occur. In this case, recovery is likely once the child is removed from the source of lead exposure, but there is no guarantee that the child will completely avoid all long-term consequences of lead exposure. At still lower levels of exposure, lead can affect a child's mental and physical growth. Fetuses exposed to lead in the womb, because their mothers had a lot of lead in their bodies, may be born prematurely and have lower weights at birth. Exposure in the womb, in infancy, or in early childhood also may slow mental development and cause lower intelligence later in childhood. There is evidence that these effects may persist beyond childhood.").

8. Katie Charles, *Nothing to Toy With! Playthings Can Expose Kids to Lead and Other Harmful Substances; The Best Remedy is Parental Caution*, N.Y. DAILY NEWS, Dec. 17, 2008, at 34; Rummana Hussain, *Lead Fears Force Recall of American Girl Jewelry: Pieces Have Been Sold in Chicago for Past 7 Years*, CHICAGO SUN TIMES, Mar. 31, 2006, at 20.

9. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH STATEMENT FOR LEAD (Aug. 2007) ("People living in areas where there are old

The problem of lead poisoning is particularly acute in Rhode Island. The state has been dubbed the lead poisoning capitol of the United States.[10] According to reports, Providence children entering kindergarten in recent years with even relatively low levels of lead in their blood were far less likely to meet national standards for readiness to read.[11] In large part, Rhode Island's lead poisoning problem is caused by a perfect storm of factors: (1) the large percentage of the housing stock constructed prior to 1950; (2) the ubiquity of lead paint on these old homes; and (3) the socio-economic realities of certain older neighborhoods, particularly those with multi-family housing units.

The jury verdict was seen as a necessary step in eradicating lead poisoning by attacking it at the source. The remedy sought – primary prevention of lead poisoning by abatement of the lead paint – was intended to ensure that future generations of children are protected from a known health hazard. Work had begun on the plan for abatement in conformity with the jury's directive.

However, the Rhode Island Supreme Court reversed the jury verdict in 2008, thus substituting its judgment for that of the six-member jury who had sacrificed almost four months of their life to exercise their civic duty.[12] The 2008 decision essentially overruled the trial court's decision on the motion to dismiss. That motion, filed in 2000 and decided on April 2, 2001, found that the State could adequately state a claim in public nuisance against the former manufacturers of lead pigment.[13] There, the court

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houses that have been painted with lead paint may be exposed to higher levels of lead in dust and soil."); American Academy of Pediatrics, *supra* note 4, at 1037 ("The source of most lead poisoning in children now is dust and chips from deteriorating lead paint on interior surfaces."); UNITED STATES DEPARTMENT OF ENVIRONMENTAL PROTECTION, PROTECTING YOUR CHILD FROM LEAD POISONING, "WHERE LEAD IS LIKELY TO BE A PROBLEM", http://www.epa.gov/lead/pubs/leadinfo.htm#hazard.

10. Peter B. Lord, *Are Lead-paint Firms Liable for Damages?*, PROVIDENCE J., June 18, 1999, at 1A.

11. Peter B. Lord, *Study of Providence Children: Even Slightly High Lead Levels Hurt Abilities*, PROVIDENCE J., Oct. 30, 2009, at 6. This conclusion is consistent with the newest published studies on the effects of lead poisoning. *See* Chandramouli K. et al., *Effects of Early Childhood Lead Exposure on Academic Performance and Behavior of School Age Children*, 94 ARCHIVES OF DISEASE IN CHILDHOOD 844-48 (2009).

12. Lord, *3 Companies*, *supra* note 1.

13. State of Rhode Island v. Lead Indus. Ass'n, et al., No. 99-5226, 2001 R.I. Super. LEXIS 37, at *19-28 (R.I. Super. Apr. 2, 2001).

summarized the State's public nuisance claim as follows:

> Here, the Attorney General, as guardian of the public, asserts that the defendants, as manufacturers, promoters and suppliers, are responsible for the presence of lead, a substance alleged to be a health hazard to members of the public, in public and private buildings throughout the State. Further, the State also contends that the defendants' misconduct, by causing a public health crisis, has caused the State to incur substantial damages. In its expansive request for relief, the State, in part, seeks an order for the abatement of lead.[14]

Significantly, the trial court also stated that: "[a]ccording to the defendants herein, the State has not asserted a public nuisance claim because a public right has not been infringed and because the defendants' lead did not cause the alleged harm while within their control as product manufacturers or promoters."[15] These two issues – whether a public right was infringed and whether the defendants had adequate control over the nuisance – were at the heart of the Supreme Court decision over seven years later.[16]

This Article examines the Supreme Court's decision on each of these issues, ultimately concluding that the decision is at odds with decades-long, if not centuries-long, precedent in Rhode Island and across the country. Not only is the decision contrary to the

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14. *Id.* at *20.

15. *Id.* at *26.

16. The timing of the Supreme Court decision certainly raises questions concerning judicial economy. The initial decision on the motion to dismiss was April 2, 2001. Between April 2001 and the beginning of the trial in October 2005, the lead paint defendants filed four petitions for writ of certiorari to the Rhode Island Supreme Court that were denied. *See, e.g.*, State of Rhode Island v. Lead Indus. Ass'n, No. 2004-63-M.P., 2006 WL 1506312 (R.I. June 2, 2006) (writ of certiorari quashed regarding fee agreement). One petition was granted concerning the State's contingency fee agreement, although that issue was consolidated with the final post-trial appeal. *See* Notice, dated April 14, 2004; Order, dated May 21, 2007 (on file with author). Furthermore, on the eve of the first trial, the Defendants even requested an emergency stay of the trial from the United States Supreme Court that was summarily denied by Justice David Souter. If the Rhode Island Supreme Court had serious concerns about the trial court's decision on the motion to dismiss, judicial economy would have been served by reviewing the decision at the earliest stages.

basic foundations of public nuisance law and well-established precedent, it has dangerous implications in Rhode Island and elsewhere. The first section summarizes the law of public nuisance as it existed prior to the 2008 decision. The second section explores the Supreme Court's role in redefining the scope of public nuisance law in Rhode Island, examining the manner in which it defined public rights. The third section explores the new rules of liability for public nuisance in Rhode Island, contrasting that rule against the prevailing rule of law in Rhode Island prior to the decision. The final section discusses the implications of the decision for future public nuisance cases.

I. A BRIEF SUMMARY OF THE ANCIENT LAW OF PUBLIC NUISANCE

Public nuisance is an ancient legal doctrine dating back to the founding of this country. The United States Supreme Court summarized this history over a century ago in *Mugler v. Kansas*:

> [T]he jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.[17]

In *Thornton v. Grant*, the Rhode Island Supreme Court recognized that the law of public nuisance "as declared in the English cases has been recognized by the courts of this country, and has been applied in some cases with liberality towards the riparian proprietor."[18]

Rhode Island is not unique in its long and rich legal history

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17. 123 U.S. 623, 672-73 (1887) (citing 2 Story, Eq. Jur. §§ 921, 922). *See also* Respublica v. Caldwell, 1 U.S. 150 (1785) (recognizing a public nuisance); Cox v. City of Dallas, 256 F.3d 281, 289 (5th Cir. 2001) ("The nuisance action originated in the twelfth century. Courts first recognized 'private' nuisances, and by the sixteenth century, began to recognize 'public' nuisances."); Ellwest Stereo Theaters Inc. of Texas v. Byrd, 472 F. Supp. 702, 706 (D.C. Tex. 1979) ("It is ancient law that public nuisances may be enjoined."); People *ex rel.* Lemon v. Caparbo, 238 N.Y.S. 197, 201 (N.Y. Sup. Ct. 1929) ("That equity has jurisdiction in regard to public nuisances is not at all doubtful; in fact, it is an ancient legal truism.").

18. 10 R.I. 477, 1873 WL 3550, at *5 (R.I. 1873).

that recognizes both the existence of the common law public nuisance cause of action, as well as the power of the Attorney General to bring such an action. When former Attorney General Sheldon Whitehouse commenced the State's public nuisance suit against the lead pigment manufacturers in 1999 to protect the public from the health hazards associated with lead in the State, he did so in accord with his powers and duties as set forth in R.I. Gen. Laws § 42-9-2 and Rhode Island common law. Well-established precedent in Rhode Island recognizes that the Attorney General has the responsibility for prosecuting civil actions to protect the public health, safety and welfare. In the words of the Rhode Island Supreme Court:

> In this state it was long ago settled that 'Suits for the public should be placed in public and responsible hands.' . . . The public officer vested with that authority is the attorney general of the state. Only he may sue to redress a purely public wrong except in those instances where one of the public who is injured has a distinct personal legal interest different from that of the public at large, as where a public office is being withheld from the rightful incumbent thereof. [19]

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19. McCarthy v. McAloon, 83 A.2d 75, 78 (R.I. 1951) (internal citations omitted). *See also* Newport Realty, Inc. v. Lynch, 878 A.2d 1021, 1032 (R.I. 2005) ("This Court has recognized that the Attorney General is vested with the authority to maintain suits seeking redress of a public wrong . . ."). Requiring a responsible public official to act when the public health and welfare is involved protects courts from floods of litigation while simultaneously requiring public officials to exercise their "political responsibility" for the health and welfare of citizens. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 90, at 646 (5th ed. 1984) ("Redress of the wrong to the community must be left to its appointed representatives. The best reason that has been given for the rule is that it relieves the defendant of the multiplicity of actions which might follow if everyone were free to sue for the common harm."). As the United States Supreme Court has recognized:

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,'. . . differs in kind from the suit of an individual . . . . Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons . . . .

Alden v. Maine, 527 U.S. 706, 755-56 (1999).

This power includes the unique authority to prosecute public nuisances and other cases impacting the health and welfare of the residents of the State.[20]

Pursuant to this tradition, Rhode Island courts have long recognized that interferences with the public health, safety, peace, comfort and convenience can constitute an actionable public nuisance.[21] Indeed, prior to the Supreme Court's decision in *State of Rhode Island v. Lead Indus. Ass'n*, the Rhode Island Supreme Court had routinely and repeatedly defined public nuisance as:

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20. *See* State v. Keeran, 5 R.I. 497 (R.I. 1858) (early case recognizing public nuisance suit by the State); Pine v. Vinagro, No. PC-95-4928, 1996 R.I. Super. LEXIS 100, at *53 (R.I. Super. Nov. 4, 1996) ("Among the awesome responsibilities of the Attorney General [of Rhode Island] is that of prosecuting a public nuisance at common law . . . ."); Whitehouse v. New England Ecological Dev., Inc., No. 98-4525, 1999 R.I. Super. LEXIS 154, at *18 (R.I. Super. Oct. 28, 1999) ("This Court recognizes that one of the responsibilities of the Attorney General is prosecuting a public nuisance at common law . . . ."); Pine v. Shell Oil, No. 92-0346B, 1993 U.S. Dist. LEXIS 21043, at * 14 (D.R.I. Aug. 23, 1993) (finding that the Attorney General of Rhode Island has the authority to maintain a public nuisance suit to remedy harm to the public).

21. *See* cases discussed in note 19, *supra*. Many other jurisdictions have adopted a public nuisance cause of action. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 964 (W.D.N.Y. 1989) (defining public nuisance as "a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure."); Cincinnati R.R. Co. v. The Commonwealth, 80 Ky. 137, 1882 WL 8213, at *2 (Ky. Ct. App. Feb. 28, 1882) ("Public or common nuisances, as defined by Blackstone, 'are a species of offenses against public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good required...'"); Attorney General v. Chicago and NW Ry. Co., 25 Wis. 425, 1874 WL 3392, at *46 (Wis. 1874) (finding that a public nuisance is "anything unlawful, which works hurt, inconvenience or damage"); City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *14 (Mass. Super. July, 13 2000) ("A public nuisance differs from a private nuisance: 'It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property.' Thus, in its broadest statement, the concept of public nuisance 'seems unconnected to place or property.'"); JOSEPH H. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES 2 (Matthew Bender & Co. 1906) ("A nuisance may generally be defined as anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of legitimate and reasonable rights of person or property."); 2 HOWARD C. JOYCE, TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1042 (Matthew Bender & Co. 1909) (liability for public nuisance can arise from an omission or a positive act).

> [A]n unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the *health, safety, peace, comfort or convenience of the general community*.[22]

According to the Restatement (Second) of Torts, a condition can be unreasonable under public nuisance law when it poses either: (1) "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience;" or (2) if "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[23]

Thus, Rhode Island courts have long recognized the applicability of public nuisance claims in environmental contamination cases. For example, in one of the earliest reported cases, *Payne & Butler v. Providence Gas Co.*, the Rhode Island Supreme Court held that:

> [A]ny manufacturer who allows his deleterious waste product to contaminate the waters of the State, be they public or private, is liable to any person who is injured thereby in his private capacity and apart from being merely one of the public . . . .[24]

Since then, the doctrine has been consistently applied in situations where a company creates an environmental threat to the health and safety of Rhode Islanders.[25]

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22. Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980) (quoting Copart Indus., Inc. v. Consolidated Edison Co., 362 N.E.2d 968, 971 (N.Y. 1977)) (emphasis added). *See also* Arriaga v. New England Gas Co., 483 F. Supp. 2d 177 (D.R.I. 2007) ("A right 'common to the general public' has been described as a collective right that is shared by everyone in the community as opposed to a right that is possessed only by certain members of the public. . . . In general, it refers to the interference with 'the health, safety, peace, comfort or convenience of the general community.'") (internal citations omitted); Pine v. Shell Oil, No. 92-0346B, 1993 U.S. Dist. LEXIS 21043, at *5 (D.R.I. Aug. 23, 1993); Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 635 (D.R.I. 1990).

23. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) and (c) (1979) (emphasis added).

24. 77 A. 145, 151 (1910).

25. *See* Corvello v. New England Gas Co., Inc., 532 F. Supp. 2d 396, 398 (D.R.I. 2008) (wherein "[m]ore than 120 residents of Tiverton, Rhode Island

This use of public nuisance law to remediate environmental contamination cases is consistent with precedent from around the country. As two commentators have noted:

> Because of its flexibility, common law nuisance continues to play a vital role in complementing statutory environmental enforcement tools . . . [e]nvironmental harm is the quintessential public nuisance. In fact, modern environmental and energy statutes are codifications of the common law of public nuisance.[26]

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brought these actions against New England Gas Company ("NEG") alleg[ed] that their properties ha[d] been contaminated by hazardous substances contained in coal gasification wastes buried in the soil on or near their properties . . . ."); Reitsma v. Recchia, No. 00-4111, 2000 WL 1781960, at *6 (R.I. Super. Nov. 20, 2000) (wherein the State, through the Attorney General, brought a public nuisance action against the operator of a solid waste disposal facility; court concluded that "the odors emanating from the Recchia property constitute a public nuisance, which in the absence of relief, will continue to unreasonably interfere with neighbors' use and enjoyment of their premises."); Whitehouse v. New England Ecological Development, Inc., No. 98-4525, 1999 WL 1001188, at *6 (R.I. Super. Oct. 28, 1999) (wherein the State, through the Attorney General, brought suit against companies that disposed of out-of-state waste in Rhode Island); Pine v. Vinagro, No. PC-95-4928, 1996 WL 937004, at *21 (R.I. Super. Nov. 4, 1996) (wherein the Attorney General brought a public nuisance action and court concluded that "maintaining of open stockpiles of unprocessed construction and demolition debris, especially if it contains partially decomposed, or rotting, organic material is a public nuisance because of the plain risk of fire, smoke and odors."); Pine v. Shell Oil Co., No. 92-0346B, 1993 WL 389396 (D.R.I. Aug. 23, 1993) (Attorney General, "as 'parens patriae for Rhode Island's citizens, and as Rhode Island's environmental advocate'" brought public nuisance claim against lessee of a gasoline service station alleging that it released a quantity of hydrocarbon pollution into the ground surrounding the service station, thus polluting the ground and the water supply); Wood v. Picillo, 443 A.2d 1244 (R.I. 1982) (defendants liable for creating a public nuisance by maintaining a hazardous waste dump site that polluted the land and water surrounding the property); Braun v. Iannotti, 189 A. 25 (R.I. 1937) (public nuisance created by emitting smoke and soot from smokestack). *See also* Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L. J. 187, 215 (1996) (recognizing Rhode Island was one of the first states to uphold a public nuisance claim in a modern hazardous waste contamination case).

26. Matthew F. Pawa & Benjamin A. Krass, *Behind the Curve: The National Media's Reporting on Global Warming*, 33 B.C. ENVTL. AFF. L. REV. 485, 487-88 (2006). *See also* Cox v. City of Dallas, 256 F.3d 281, 291 (5th Cir. 2001) ("The theory of nuisance lends itself naturally to combating the harms created by environmental problems."); Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 101 F.3d 503, 505 (7th

In fact, not only does public nuisance provide for protection of the public health, it serves as the "backbone" of modern environmental law statutes, including the Resource Conservation and Recovery Act ("RCRA")[27] and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[28]

Public nuisance has thus long enjoyed an enviable, albeit limited, role in our jurisprudence. It has always been a powerful tool in a limited arsenal of legal theories available to our public officials that allows them to be proactive in protecting the public health, safety and welfare of the people.

II. THE RHODE ISLAND SUPREME COURT'S DEFINITION OF PUBLIC RIGHT IS AT ODDS WITH ESTABLISHED PRECEDENT AND SEVERELY LIMITS THE SCOPE OF PUBLIC NUISANCE CLAIMS

The Rhode Island Supreme Court has reached a deeply troubling conclusion when it found that "a *necessary* element of public nuisance is an interference with a public right – those indivisible resources shared by the public at large, such as air, water or public rights of way."[29] In so ruling, the Court concluded that "[t]he term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way."[30] Most surprisingly, the Court stated that:

> Although the state asserts that the public's right to be free from the hazards of unabated lead had been

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Cir. 1996) (The "interests [of environmental statutes] overlap to a great extent the interests that nuisance law protects."); State v. Schweda, 736 N.W.2d 49, 75 (Wis. 2007) ("Scholarly commentary recognizes the link between modern statutory environmental law and the common law of nuisance."); Richard A. Epstein, *Regulation-And Contract-In Environmental Law*, 93 W. VA. L. REV. 859, 862 (1990-91) ("When you go back to the early history of environmental law, the one substantive area that you would want to turn to more than any other would be the common law of nuisance."); WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1, at 100 (1977) ("The deepest doctrinal roots of modern environmental law are found in principles of nuisance.").

27. 42 U.S.C. § 9601 et seq. (2008).

28. 42 U.S.C. §§ 6901-6992k (2008).

29. State of Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428, 453 (R.I. 2008) (emphasis added).

30. *Id.*

> 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 state's allegation that defendants have interfered with the 'health, safety, peace, comfort or convenience of the residents of the [s]tate' standing alone does not constitute an allegation of interference with a public right. . . .[31]

This conclusion is legally flawed in several respects and has created contradictory case law in Rhode Island that may lead to a virtual evisceration of public nuisance law as it has historically been defined.[32]

A. The Legal Definition of Public Nuisance Under Rhode Island Law

It is axiomatic that a public nuisance claim must involve an interference with a public right. Indeed, courts have long noted this critical distinction between public nuisances and private nuisances:

> Historically, claims for private nuisance have been "narrowly restricted to the invasion of interests in the use or enjoyment of land" caused by a defendant's use of his own property. By contrast, claims of public nuisance "extend[ed] to virtually any form of annoyance or inconvenience interfering with common public rights." . . . Under Rhode Island law, "[a] cause of action for private nuisance 'arises from the unreasonable use of one's property that materially interferes with a neighbor's physical comfort or the neighbor's use of his real estate'" and "a public nuisance is an 'unreasonable interference

31. *Id.* at 455.

32. The Rhode Island Supreme Court's decision curiously relied heavily on a law review article published by the University of Cincinnati Law Review in 2003 by Donald Gifford, a professor of law at the University of Maryland School of Law. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (Spring 2003). Professor Gifford, however, is a paid consultant to the lead paint companies. *See* Eric Tucker, *Lead Paint Ruling Could Lead to More Lawsuits, Experts Say*, THE BOSTON GLOBE, Feb. 23, 2006. It is concerning that the Rhode Island Supreme Court would overlook its own precedent in favor of a position advocated by an advisor to the lead paint companies.

with a right common to the general public."'[33]

Thus, it is well settled that while private nuisance claims concern only a plaintiff's use and enjoyment of his or her own property, public nuisances required something broader and more far reaching to sustain an appropriate cause of action.[34] However, while courts have been able to articulate an appropriate and comprehensive legal standard for defining such public rights, the application of the standard has proved difficult.

There can be no question that the recognition of public rights in public nuisance law is an art rather than a science. For example, prior to the 2008 Rhode Island Supreme Court decision, Rhode Island courts were uniform in their definition of "public right" under public nuisance law. That definition – "behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community" – was articulated by the Rhode Island Supreme Court in 1980 and has been cited in virtually every public nuisance case considered in the State since then.[35] As explained in 2007, by the United States District Court for the District of Rhode Island:

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33. Gail v. New England Gas Co., 460 F. Supp. 2d 314, 323 (D.R.I. 2006). *See also* Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980) ("Actionable nuisances fall into two classifications, public and private. A private nuisance involves an interference with the use and enjoyment of land. It involves a material interference with the ordinary physical comfort or the reasonable use of one's property. A public nuisance is an unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.").

34. Rhode Island law recognizes a distinct legal claim for private nuisance. The Rhode Island Supreme Court has found that "a cause of action for a private nuisance 'arises from the unreasonable use of one's property that materially interferes with a neighbor's physical comfort or the neighbor's use of his real estate.'" Hydro-Manufacturing Inc. v. Kayser-Roth Corp., 640 A.2d 950, 959 (R.I. 1994). Furthermore, the Court stressed the distinction between private nuisance and public nuisance, stating that "[u]nlike a private nuisance where there is an invasion of another's interest in the private use and enjoyment of land, a public nuisance is an 'unreasonable interference with a right common to the general public.'" *Id.* Such distinction is consistent with the long recognized legal tenet that "public and private nuisance 'have almost nothing in common, except that each causes inconvenience to someone.'" Lewis v. Gen. Elec. Co., 37 F. Supp. 2d 55, 60 (D. Mass. 1999) (internal citations omitted).

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

> The requirement of interference with a right "common to the general public" provides a basis for distinguishing the almost absolute liability imposed by the doctrine of public nuisance from the fault based liability imposed by traditional tort law principles or even from the strict liability imposed for engaging in unreasonably dangerous activities. A right "common to the general public" has been described as a collective right that is shared by everyone in the community as opposed to a right that is possessed only by certain members of the public. In general, it refers to the interference with "the health, safety, peace, comfort or convenience of the general community."[36]

Much legal discourse has been devoted to the application of this seemingly simple definition to the realities of a complex world.[37] There are certain categories of "public" rights that are so well recognized that they necessarily give rise to public nuisance claims. For example, it has long been recognized that the three categories identified by the Rhode Island Supreme Court – air, water, and public rights of way – are indeed public rights, and an interference therewith can establish liability under the law of public nuisance.[38] Such widespread acceptance of these

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36. Arriaga v. New England Gas Co., 483 F. Supp. 2d 177, 186 (D.R.I. 2007) (quoting Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980)).

37. Bubalo v. Navegar, Inc., No. 96-C-3664, 1998 U.S. Dist. LEXIS 3598, at *2 (N.D. Ill. Mar. 16, 1998) (quoting WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS (5th ed. 1984): "To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual or several."); City of Virginia Beach v. Murphy, 389 S.E. 2d 462, 463 (Va. 1990) ("Public also is the nuisance committed 'in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience.'"); Attorney General v. Chicago and NW Ry. Co., 35 Wis. 425, 533-34 (Wis. 1874) ("[P]ublic wrong may be considered only as an aggregation of private wrongs."); WOOD ON NUISANCES, § 17, at 38 n.1 (3d ed. 1893) ("Whatever is injurious to a large class of the community, or annoys that portion of the public that necessarily comes in contact with it, is a public nuisance at common law.").

38. *See* Steere v. Tucker, 39 R.I. 531 (R.I. 1916); Engs v. Peckham, 11 R.I. 210, 1875 WL 4157, at *7 (R.I. 1875). *See also* Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591,

principles, which are grounded in the physical location of the nuisance, is in accord with the Restatement's definition.[39]

However, courts have also long recognized that there are numerous other types of public rights that sustain an appropriate public nuisance claim. As explained by the Wisconsin Supreme Court, "a public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place *or with the activities of an entire community*."[40] This later category of public right focuses not on the physical location of the nuisance, as the Rhode Island court did, but instead on the effect the condition has on the public at large. As the Restatement recognizes, conditions that affect community wide interests, and particularly those that impact the health, safety and morals of the community at large, may fall under the reach of the public nuisance doctrine despite the fact that they emanate from or are located on private property. As explained in more detail in comment g to section 821B of the Restatement (Second) of Torts:

> It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right *or it otherwise affects the interests of the community at large* . . . [T]he spread of smoke, dust or fumes over a considerable area filled with private residences may interfere also with the use of the public streets *or affect the health of so many persons as to involve the interests of the public at large.*[41]

Courts interpreting this provision have recognized that a public nuisance action can be maintained when conduct affects a significant number of people:

> Public also is the nuisance committed 'in such place and in such manner that the aggregation of private injuries

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600 (Feb 2008) ("Public nuisance must affect the public's common rights, as opposed to merely inflicting an injury to a large number of people's private rights. One such common right is the enjoyment of the environment. In the environmental context, public nuisance claims have been used to abate air pollution, water pollution, hazardous waste disposal, and excessive noise.").

39. See note 41, *infra*, and accompanying text.

40. Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co., 646 N.W.2d 777, 788 (2002).

41. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

> become so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may properly be the subject of a public prosecution. [42]

B. The Rhode Island Supreme Court's Lead Pigment Decision Has Re-Written Centuries of Public Nuisance Precedent

The Rhode Island Supreme Court's decision stands in stark contrast to this precedent. Instead of recognizing the critical distinctions between private nuisance and public nuisance law, the Court imposed a blanket requirement that public nuisances must exist in public locations, irrespective of the public nature of the harm caused. Relying on Professor Donald Gifford, the Court instead concluded that:

> The right of an individual child not to be poisoned by lead paint is strikingly similar to other examples of nonpublic rights cited by courts, the Restatement (Second), and several leading commentators . . . In the words of one commentator:
>
> > Despite the tragic nature of the child's illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes—obstruction of highways and waterways, or pollution of air or navigable streams.
>
> The enormous leap that the state urges us to take is wholly inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally. Were we to

42. *See* New York v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40, 43 (N.Y. Sup. Ct. 1978). *See also* Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985); City of Virginia Beach v. Murphy, 389 S.E.2d 462, 463 (Va. 1990); Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs., 712 P.2d 914, 917 (Ariz. 1985) ("[A] nuisance may be simultaneously public and private when a considerable number of people suffer an interference with their use and enjoyment of land. . . . The torts are not mutually exclusive.").

> hold otherwise, we would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.[43]

The Supreme Court's alarmist conclusions should be disregarded. The reality is that centuries of public nuisance precedent recognize that dangerous conditions in private locations constitute a public nuisance when they pose an unreasonable threat to members of the public. When examining the Rhode Island Supreme Court decision in context of established public nuisance law, its limitations, and therefore deficiencies, become obvious. For example, the following categories of conduct have long been considered public nuisances because of their widespread effect on the public health welfare and safety, irrespective of the physical location of the nuisance itself: "keeping diseased animals" on private property; interfering with public safety by "stor[ing] explosives in the midst of a city;" or interfering with the public morals by operating "houses of prostitution."[44] It does not require any great analysis or thought to see why each of these conditions is a public nuisance despite the fact that it does not affect the public air, water or rights of way. However, under this new precedent from the Rhode Island Supreme Court, defendants in each of these types could credibly argue that they are immunized from liability despite the wealth of historical precedent suggesting otherwise.

The reality is that the Rhode Island Supreme Court failed to consider or acknowledge the public harm standard when it overturned the prior legal rulings and jury verdict in *State of Rhode Island v. Lead Indus. Ass'n.* The Court fundamentally misconstrued the law of nuisance, which concerns itself with interference with public rights. It is the nature of the right at issue that determines whether a particular nuisance is public or not, not the location of the condition. The radical nature of this departure from prior public nuisance precedent is made manifest when the 2008 decision is contrasted with the Court's 1998

43. State of Rhode Island v. Lead Indus. Ass'n, 921 A.2d 428, 454 (R.I. 2008).

44. *See* RESTATEMENT (SECOND) OF TORTS § 821B, cmt b (1979).

decision in *Pine v. Kalian*.[45]

In *Pine v. Kalian*, the Rhode Island Attorney General filed a complaint sounding in public nuisance against a landlord seeking the abatement of lead-based paint from his rental property.[46] The trial court in that case found that "serious health risks to young children from exposure to lead have been clearly established by the record in [that] case" and that the home in question "contain[s] enough lead so as to constitute a continuing, persistent hazard of lead poisoning to members of the public who occupy such premises, especially to children of tender years."[47] Accordingly, the court concluded:

> *The premises are a public nuisance.* This Court has general equitable power, as well as statutory jurisdiction pursuant to G.L. 1956 (1997) § 10-1-1 et seq., to abate a public nuisance upon the application of the Attorney General.[48]

In affirming the trial court's issuance of a preliminary injunction, the Rhode Island Supreme Court concluded that "the persistence of the continuing hazard of lead paint presents immediate and irreparable harm to the public so long as that hazard remains unabated."[49] Clearly, the presence of lead paint in a single private dwelling in the State did not interfere with a public right to water, air or public rights of way, as the Supreme Court in *Lead Indus. Ass'n* required.[50] Despite this, the Rhode Island Supreme

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45. *Compare Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008) *with* Pine v. Kalian, No. PC 96-2673, 1998 WL 34090599 (R.I. Super. Feb. 2, 1998), *aff'd*, Pine v. Kalian, 723 A.2d 804 (R.I. 1998).

46. *Pine*, 1998 WL 34090599.

47. *Id.* at *1.

48. *Id.* at *2 (emphasis added).

49. *Pine*, 723 A.2d at 805 (R.I. Supreme Court opinion).

50. Indeed, the trial court in *Lead Indus. Ass'n* relied in part on the Supreme Court's decision in *Kalian* when deciding the initial motion to dismiss in 2001. In the words of the court:

> Our Supreme Court has recognized the Attorney General's prosecution of a public nuisance action seeking abatement of lead paint from a premises where 'significant amounts of lead had been found to constitute a hazard to the public and to children, in particular.' The matter involved an application for a preliminary injunction by the Attorney General and the Director of the Department of Health who asserted 'an overriding public interest in the protection of public health.' The trial justice, having found

Court understood in 2000 that lead paint could, and indeed did, constitute a public nuisance. The *Pine* decision – like the trial court's decision in the lead case – reflects the long standing tradition of our courts to utilize the law of public nuisance to rectify those conditions that cause injury to the public health, safety and welfare, regardless of whether the condition is located in a shared public space.[51]

The failure of the Rhode Island Supreme Court to acknowledge or consider the widespread public harm standard when deciding the *State v. Lead Indus. Ass'n* case is deeply troubling both in the context of that case, as well as future public nuisance cases in Rhode Island. For the lead paint case, the Rhode Island Supreme Court crafted a definition of public harm that necessarily excludes lead paint from the protective cloak of a

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> certain facts based on the evidence before him, had stated his belief that at a hearing on the merits, the Court 'would rule as a matter of law based on the evidence ... [that] the premises are a public nuisance.' Accordingly, the trial court, after including a reference to its general equitable power as well as jurisdiction pursuant to G.L. 1956 § 10-1-1 et seq. to abate a public nuisance upon application of the Attorney General, granted the application for a preliminary injunction and ordered, in part, that the defendants abate all lead hazards from the premises. In its affirmance order, the Supreme Court acknowledged the trial justice's finding that the 'persistence of the continuing hazard of lead paint presents immediate and irreparable harm to the public so long as that hazard remains unabated.'

State of Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2001 R.I. Super. LEXIS 37, at *23-24 (R.I. Super. Ct. 2001) (internal citations omitted).

51. Ironically, this Court attempted to offer comfort to the thousands of homeowners and lead poisoned children who were directly and adversely affected by this decision by suggesting that "an injunction requiring abatement may be sought against landlords who allow lead paint on their property to decay." State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 (R.I. 2008) (citing Pine v. Kalian, 723 A.2d 804, 804-05 (R.I. 1998)). The reality is, however, that the Court's rulings in this case affirmatively prohibit the Attorney General from seeking such an injunction. Specifically, a *Kalian*-like injunction action requires that a court first find that the presence of lead paint in a private home can interfere with a right common to the general public. However, under the *Lead Indus. Ass'n* decision, that public right is necessarily limited to interference with air, water and public rights of way. The presence of lead paint cannot, under the explicit holding of *Lead Indus. Ass'n*, interfere with an "indivisible resource shared by the public." *Lead Indus. Ass'n*, 723 A.2d at 448. Thus, the "comfort" offered the public is illusory – no injunction could issue because no public nuisance case could be maintained.

public nuisance claim. This definition not only ignored significant legal precedent concerning public rights but also disregarded compelling evidence concerning the widespread public health hazard caused by lead based paint. Indeed, the Rhode Island legislature all but concluded that lead paint was a public nuisance when it passed the Rhode Island Lead Poisoning Prevention Act, which reads in pertinent part: "[T]ens of thousands of Rhode Island's children are poisoned by lead at levels believed to be harmful, with most of these poisoned children going undiagnosed and untreated . . . *Childhood lead poisoning is dangerous to the public health, safety, and general welfare of the people.*"[52] This widespread harm to the health safety and general welfare of Rhode Islanders was then documented exhaustively through weeks of testimony and evidence before the jury. After hearing this evidence, the jury concluded that the presence of lead paint in Rhode Island's homes and buildings interfered with the public health, safety and welfare.[53] However, the Supreme Court did not

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52. R.I. GEN. LAWS § 23-24.6-3(4) and (5) (emphasis added).

53. A center piece of the lead paint Defendants' arguments to the jury in this case was that the public nuisance pled by the State was not a cause of any harm to the public. For example, in opening arguments, the Defendants said:

> The State says there are almost 250,000 properties, and that's homes and churches and schools and hospitals, that have some lead paint. That's what the state says. But the evidence shows that the vast majority have never harmed a child. But the state says there's a massive public nuisance. What does this mean? It means that the vast majority of homes and properties aren't the problem. What else will we learn? You'll learn that childhood lead poisoning has become a concern, not of all old homes with lead paint, not all properties with lead paint, but of a very small percentage of old homes with lead paint that's not properly maintained. One half of one percent of all homes last year. That's not a massive public nuisance. That's a focused, targeted problem. It's not a problem everywhere in the state where there is a – any lead paint. It's not lead wherever it is found. It's confined to certain areas and specific rental units. And as I said, there's a Web site that shows where the problem lies.

Opening Statement of Defendants, November 1, 2005, (64/136) Tr. at 113, App. 7291 (on file with author). Similarly, the Defendants also claimed that:

> That's evidence you're going hear and that evidence is not going to be seriously disputed, I suggest to you. And that evidence paints a picture of isolated, small, targeted issues that have to be dealt with and can be dealt with. That evidence you will see does not support the conclusion that there should be a declaration of a statewide public nuisance.

consider or even mention the mountain of evidence concerning lead paint's effects on the public health, safety and welfare, choosing instead to focus itself on its restrictive interpretation of a legal standard. Such a limitation has obvious implications for Rhode Island's homeowners, who must now bear the entire burden of lead paint themselves, and for Rhode Island's children, who continue to face the permanent effects of crumbling lead paint in their homes. But the limitation has more subtle implications for future generations as they attempt to redress harms caused by environmental toxins and obtain abatement of those toxins.

Opening Statement of Defendants, November 2, 2005, (65/136) Tr. at 254, App. 7295 (on file with author). Then, after a full opportunity to present evidence to the jury to support their position that the presence of lead in Rhode Island does not constitute a public nuisance, the Defendants argued strenuously to the jury that it should reject the State's definition of the public nuisance. In closing arguments, Defendants argued that:

> As you have heard already, there are specific known addresses in Rhode Island where there are children with elevated blood lead levels. But you aren't being asked to decide whether those houses, those individual properties or some subset of properties, is a public nuisance. You aren't being asked to decide that. You are being asked to decide that the cumulative presence of all pigment on an estimated 246,000 properties throughout the state, whether that's the single public nuisance. And the answer to that should be no, a resounding no. A no answer from you on that first question on the verdict form will end this case.

Closing Statement of Defendant, February 9, 2006, (118/136) Tr. at 7704-7705, App. 8263-8264 (on file with author). *See also* Closing Statement of Millennium Holdings LLC, February 8, 2006, (117/136) Tr. at 7677, App. 8233 (on file with author) ("Of approximately the 250,000 dwellings in Rhode Island that are believed to contain lead paint, there were 172 children who potentially were in those dwellings and had a lead level of such that it was potentially related to lead paint. This is clearly a problem. Every one of those 172 kids are a problem. But that statistic, in that content, does not create a statewide public nuisance.").

The jury flatly rejected the Defendants' factual proposition. Despite the cross-examination, despite the arguments presented by Defendants, the jury simply did not believe that the problems associated with lead pigments in Rhode Island are limited to a few homes or properties. Instead, they concluded that it was the presence of lead pigments throughout the state – the condition alleged by the State – that was the public nuisance in Rhode Island. The jury made that decision based on the mountains of evidence they had been presented during this lengthy trial. Appellate procedure simply should not have permitted the Defendants to utilize an appellate court to undo a jury verdict based on competent evidence.

III. THE SUPREME COURT'S LIMITATIONS ON LIABILITY FOR A PUBLIC NUISANCE FUNDAMENTALLY ALTERS THE LAW OF PUBLIC NUISANCE IN RHODE ISLAND

In addition to restricting the definition of public right, thereby effectively abolishing the well-recognized ability of public nuisance law to redress widespread harms to the public, the Rhode Island Supreme Court also radically redefined and limited the law concerning liability for a public nuisance. Specifically, the Court incorporated two new requirements of "control" into Rhode Island's public nuisance law: "a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs.*"[54]

While seemingly simple on its face, this ruling effectively re-wrote the law on liability for public nuisance in Rhode Island and abrogated the ability of public nuisance to shield citizens from the threat of future harm. The cumulative result of these changes is to effectively neuter the law of public nuisance in Rhode Island so that it can no longer protect the public from harms, even those that can meet the narrow definition of public right invented by the court.

A. Legal Precedent for Imposing Liability for a Public Nuisance

To understand fully the conundrum caused by the Supreme Court's decision, it is first necessary to understand the basic law of liability for a public nuisance. It is well established that liability for public nuisance can arise in two distinct circumstances: (1) those who create a public nuisance; and (2) those who maintain a public nuisance.

The State of Rhode Island alleged in its lawsuit that the lead pigment manufacturers were liable for creating a public nuisance. As the trial court summarized, the State alleged that:

[T]he defendants are responsible for the presence of lead,

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54. State v. Lead Indus. Ass'n., 951 A.2d 428, 449 (R.I. 2008). In support of that proposition, the Court relied primarily on three decisions from the United States District Court for the District of Rhode Island: Friends of the Sakonnet v. Dutra, 738 F. Supp. 623 (D.R.I. 1990) ("*Dutra I*"); Friends of the Sakonnet v. Dutra, 749 F. Supp. 381 (D.R.I. 1990) ("*Dutra II*") and City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646 (D.R.I. 1986). *See* discussion, *infra*, at III.B.1.

> a product recognized by our courts and the Legislature as constituting a potentially severehealth hazard to members of the public, in public and private properties throughout the State . . . [T]he defendants' misconduct, including a conspiracy calculated to mislead the public and the government regarding the danger to the public resulting from exposure to lead, has unreasonably interfered with the public health, including the public's right to be free from the hazards of unabated lead.[55]

Liability for creating, or contributing to the creation of a public nuisance, has long been recognized under public nuisance law. As the trial court concluded:

> '[O]ne is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.'[56]

This is consistent with a wealth of precedent from around the country that holds that a defendant is liable for a nuisance if it sets in motion the chain of events that ultimately creates or contributes to the creation of the nuisance.[57] As summarized by *American Jurisprudence*:

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55. State of Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2001 R.I. Super. LEXIS 37, at *26-7 (R.I. Super. Apr. 2, 2001).

56. *Id.* at *26 (citing 4 RESTATEMENT (SECOND) TORTS § 834 at 149 (1979)).

57. *See, e.g.*, City of New York v. A-1 Jewelry & Pawn, Inc., No. 06-CV-2233, 2007 WL 4462448, at *50 (E.D.N.Y. Dec. 18, 2007) ("Satisfaction of the causation requirement for liability in public nuisance actions requires proof that a defendant, alone or with others, created, contributed to, or maintained the alleged interference with the public right."); City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 892 (Wis. 2004) (finding in a public nuisance case against a lead pigment manufacturer that the appropriate factual inquiry was whether "the defendant's conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public, which injury is the subject of the action."); City of New York v. Beretta Corp., 315 F. Supp. 2d 256, 281 (E.D.N.Y. 2004) (in suit against gun industry for creating a public nuisance, court found that "[s]atisfaction of the causation requirement for liability in public nuisance actions requires proof that a defendant, alone or with others, created, contributed to, or maintained the alleged interference with the public right. Whether specific acts or omissions meet this standard involves a fact-intensive inquiry . . .") (internal citations omitted).

> Generally, one who creates a nuisance is liable for the resulting damages, and ordinarily such person's liability continues as long as the nuisance continues. *Liability for nuisance may be imposed upon one who sets in motion the forces which eventually cause the tortious act, and all who participate in the creation or maintenance of a nuisance are liable* for injuries suffered by others as a result of such nuisance.[58]

In addition to liability for creating a public nuisance, a separate category of liability exists for those who maintain a public nuisance. This category generally contemplates liability for those who did not create the nuisance originally, but instead continued to maintain the nuisance in such a manner in which harm is probable.[59] While there is little Rhode Island precedent discussing the distinction between liability for creating a public nuisance and liability for maintaining a public nuisance, other courts across the country have provided insights. For example, in *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, the Wisconsin Supreme Court considered a public nuisance case concerning tree branches that blocked a stop sign.[60] In resolving the issue, the

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58. *See* Anne E. Melley, *Nuisances*, 58 AM. JUR. 2D NUISANCES § 112 (2010) (emphasis added). *See also* City of New York v. Beretta Corp., 315 F. Supp. 2d 256, 282 (E.D.N.Y. 2004) ("Persons who join or participate in the creation or maintenance of a public nuisance are liable jointly and severally for the wrong and resulting injury."); New York v. Fermenta ACS Corp., 608 N.Y.S.2d 980, 985 (N.Y. Sup. Ct. 1994) ("While generally nuisance actions are brought against landowners . . . 'everyone who creates a nuisance or participates in the creation or maintenance . . . of a nuisance are liable . . . for the wrong and injury done thereby.'") (internal citations omitted); New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Mgmt. Servs., 821 F. Supp. 999, 1012-13 (D.N.J. 1993) ("It is enough for a nuisance claim to stand that the [defendants] . . . allegedly contributed to the creation of a situation which, it is alleged, unreasonably interfered with a right common to the general public."); Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc., 221 Cal. App. 3d 1601, 1619-20 (Cal. Ct. App. 1990) ("[A]ny person creating or assisting to create and maintain the nuisance was liable to be sued for its abatement and for damages") (internal citations omitted); Duncan v. Flagler, 132 P.2d 939, 940 (Okla. 1942) ("[T]he general rule is stated that all those who participate in the creation . . . of a nuisance are liable to third persons for injuries suffered therefrom"); Shurpin v. Elmhurst, 148 Cal. App. 3d 94, 101 (Cal. Ct. App. 1983) .

59. *See, e.g.*, Maio v. Ilg, 199 A.2d 727 (R.I. 1964) (recognizing liability in Rhode Island for maintaining a public nuisance).

60. 646 N.W.2d 777, 781 (Wis. 2002).

Court relied heavily on the case of *Brown v. Milwaukee Terminal Railway Co.*[61] The *Physicians Plus* court noted that the *Brown* court:

> [D]istinguishes liability for maintaining a public nuisance from liability for creating a public nuisance, by requiring actual or constructive notice in maintenance of public nuisance cases. Based on this distinction, we interpret *Brown* as essentially dividing public nuisance cases into two classes. The first class, maintenance of a public nuisance, bases liability on the defendant's failure to abate a public nuisance of which the defendant had actual or constructive notice. The defendant did not affirmatively create the nuisance, so liability is necessarily predicated on the defendant's notice of the hazardous condition . . . In contrast, the second class of cases focuses on the defendant's creation of the public nuisance and likewise does not require proof that the defendant had actual or constructive notice of the hazardous condition.[62]

The liability of a property owner for maintaining a public nuisance was also addressed by the United States District Court for the Western District of New York in *New York v. Solvent Chem. Co.*:

> [A] landowner is subject to liability for maintaining a public nuisance on his property 'irrespective of negligence or fault.' 'Liability [of a possessor of land] is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. Thus a vendee . . . of land upon which a harmful physical condition exists may be liable under the rule here stated for failing to abate it after he takes possession, even though it was created by his vendor, lessor or other person and even though he had no part in

61. *See* 224 N.W. 748 (Wis. 1929), *on reargument*, 227 N.W. 385 (Wis. 1929).

62. *Physicians Plus Ins. Corp.*, 646 N.W.2d. at 791 n.19.

> its creation.' However, an owner 'who passively continues a public nuisance created by a previous owner cannot be held absolutely liable for injuries sustained as a result of that nuisance unless it is established that he had actual or constructive notice of the existence of the nuisance.'[63]

Importantly for this discussion, creation and maintenance of a nuisance are not mutually exclusive liability concepts. In the same case, liability may be established against some defendants for originally creating the nuisance, and separately against other defendants for maintaining the nuisance.

Long standing public nuisance law recognizes liability for creating a public nuisance after immediate control over the nuisance ceases. As explained in the Restatement (Second) of Torts:

> Activities that create a physical condition differ from other activities in that they may cause an invasion of another's interest in the use and enjoyment of land after the activity itself ceases. . . if the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm. His active conduct has been a substantial factor in creating the harmful condition and so long as his condition continues the harm is traceable to him. This is true even though he is no longer in a position to abate the condition and to stop the harm.[64]

Furthermore, other courts considering this very same argument in

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63. 880 F. Supp. 139, 144 (W.D.N.Y. 1995).

64. RESTATEMENT (SECOND) OF TORTS § 834, cmt. (e). *See also* New York v. Solvent Chem. Co., 880 F. Supp. 139 (W.D.N.Y. 1995) ("[O]ne who creates a public nuisance cannot avoid liability by selling the property on which the nuisance was created."); United States v. Hooker Chemicals and Plastics Corp., 722 F. Supp. 960, 968-70 (W.D.N.Y. 1989); Adams v. NVR Homes, Inc., 193 F.R.D. 243, 251 (D. Md. 2000) ("Where the work or finished product of a third party is inherently dangerous and constitutes a public nuisance, such third party may be held liable for the creation of the public nuisance even though the third party no longer has control of the work or product creating the public nuisance.").

the context of public nuisance cases against lead pigment manufacturers have rejected such a holding. For example, in *County of Santa Clara v. Atlantic Richfield Co.*, the California appellate court expressly rejected the notion of control adopted by the Rhode Island Supreme Court: "'liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance.*'"[65] Similarly, the Wisconsin Appellate Court permitted a lead paint public nuisance case to proceed against a former manufacturer of lead pigment despite the fact that that defendant did not own the properties in which the lead paint was located.[66]

B. The Rhode Island Supreme Court Decision

Without any regard or acknowledgement of these distinctions in public nuisance liability, the Rhode Island Supreme Court decision imposed a blanket requirement of control. Under its newly articulated theory, a defendant can only be liable for a public nuisance if it is in *current* control of the nuisance *at the time that actual physical injury is sustained to the public interest or right.* This conclusion, however, is at odds with the Restatement and long standing precedent cited above in two respects: (1) it fails to distinguish between liability for creating a nuisance, as opposed to liability for maintaining a nuisance; and (2) the temporal requirement eviscerates long standing precedent that recognizes public nuisance's unique ability to remedy the threat of future harm.

1. The Rhode Island Supreme Court's Decision Improperly Blurs the Distinction Between Liability for Creating a Nuisance and Liability for Maintaining a Nuisance

The Rhode Island Supreme Court blurred the clear distinction between creating a nuisance and maintaining a nuisance when it imposed strict control requirements on the creators of public nuisance. What is most puzzling, perhaps, about the Rhode

65. 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006).
66. City of Milwaukee v. NL Indus, 691 N.W.2d 888 (Wis. 2004).

Island Supreme Court's conclusions regarding control is that it attempted to justify such conclusions by relying primarily on two cases from the District Court for the District of Rhode Island – *Friends of the Sakonnet v. Dutra*,[67] (*Dutra I*) and a later opinion in the same case, also captioned *Friends of the Sakonnet v. Dutra*,[68] (*Dutra II*). The Court explicitly relies on both the *Dutra I* and *Dutra II* decisions, but a reading of both cases indicates that the Supreme Court decision is in direct conflict with the conclusions of both *Dutra* opinions.

The *Dutra* cases were brought by the State of Rhode Island and others in an effort to remediate a public nuisance caused by a defective septic system. The defects in the system were causing raw sewage to run "directly from the leaching field, on the surface of the ground for approximately 250 feet, into the Sakonnet River and into the basement of a home located between the septic system and the River."[69] Suit was filed against the prior owners of the septic system, as well as the current homeowners.

In *Dutra I*, the court considered a motion to dismiss the public nuisance claim brought by the former owners of the septic system. In that decision, the Rhode Island federal court considered the liability of those who *create* a nuisance, as opposed to those who *maintain* a nuisance. In considering liability for the creation of a nuisance, the district court was unambiguous and unequivocal in its conclusion that:

> This Court has discovered no Rhode Island (or other) precedent that bars recovery of nuisance damages simply because the defendants no longer control the instrumentality alleged to have caused the nuisance. If Rhode Island courts allow suits for nuisance damages to go forward although the nuisance itself has already been abated, it follows that suits should be allowed, if within the statute of limitations, against one who is alleged to have caused damages by a nuisance even if that person no longer controls the alleged nuisance.[70]

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67. 738 F. Supp. 623 (D.R.I. 1990).
68. 749 F. Supp. 381 (D.R.I. 1990).
69. *Dutra I*, 738 F. Supp at 628.
70. *Id.* at 633 (internal citations omitted) (emphasis added). In so concluding, the *Dutra I* court did not rely on or endorse the opinion in *Nat'l*

Accordingly, the court denied the motion for summary judgment and allowed the claim to proceed.

In *Dutra II*, the same court considered a motion for a preliminary injunction based on the same set of facts by Q.L.C.R.I., the owner of the property upon which the faulty septic system was located. The court made explicit that Q.L.C.R.I.'s potential public nuisance liability was limited to maintenance of a public nuisance created by another.[71] The court then concluded that because Q.L.C.R.I. had direct control over the septic system, it too was liable for the public nuisance: "Q.L.C.R.I. and its predecessors-in-interest retained control of the failed sewerage system and had the correlative duty to maintain the system. Any nuisance that the failed system has created is the responsibility of Q.L.C.R.I. and its predecessors-in-interest."[72] Importantly, the *Dutra II* court was explicit that immediate control was *not* a requirement for all public nuisance liability. Specifically, after discussing the requirement on immediate control for one who maintains a nuisance, the Court was quick to point out that "'while at common law it is the general rule that the owner of land ceases to be liable in negligence for its condition when the premises pass out of his control before the injuries result, *this is not the general rule in the case of nuisance*.'"[73] Thus, both *Dutra* decisions are explicit in their conclusion that a party who *creates* a public nuisance is liable for that nuisance even though the party no longer controls the instrumentality creating the nuisance or the physical location where the nuisance is created.

In light of these findings, it is difficult to understand the

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Gypsum Co. (637 F. Supp. at 656) as Supreme Court stated; instead, the *Dutra I* court explicitly rejected *Nat'l Gypsum* as controlling precedent in Rhode Island: "[T]he decision in *National Gypsum*, although decided by this Court, was based on New Hampshire law and thus is not binding precedent for this case." *Dutra I*, 738 F. Supp. at 633 n.25.

71. *Dutra II*, 749 F. Supp. at 394 ("The liability of Q.L.C.R.I. under the law of nuisance depends primarily on the question of control and duty to maintain discussed above. One who controls a nuisance is liable for damages caused by that nuisance. It does not matter that the one in control did not create the nuisance, as a successor-in-interest who maintains a nuisance, that person is liable for damages caused by the nuisance. Successors-in-interest can be held responsible for abating the nuisance created by their predecessors.").

72. *Id.* at 395.

73. *Id.* at 395 n.21 (emphasis added).

Rhode Island Supreme Court's eagerness to incorporate the control element into the lead paint cases. As the District Court for the District of Rhode Island properly observed, there is simply no precedent in Rhode Island for barring a public nuisance claim because "the defendants no longer control the instrumentality alleged to have caused the nuisance."[74] Indeed, the reasons for this are only logical. Under current Rhode Island precedent, polluters are offered the option of dumping and running without fear of the consequences. Companies can bury toxic waste on private property and walk away, knowing that they cannot be held liable for creating a public nuisance, nor required to abate the public health catastrophe that they created. Infamous environmental situations, like the Love Canal cases from the mid-1970s, cannot be remedied in Rhode Island because the polluters have been granted immunity as they do not "control" the properties upon which the nuisance is located. In short, the Rhode Island Supreme Court created an incentive to do what the Pennsylvania Supreme Court warned against decades ago: "[t]o permit [a defendant] to avert responsibility for abating a nuisance which it created under the proposition that it may abandon its enterprise . . . ."[75]

2. The Rhode Island Supreme Court Decision Prevents Public Nuisance Claims from Preventing Future Harm to the Public

A more subtle, but no less troubling, aspect of the Rhode Island Supreme Court decision is the intrinsic assumption therein that public nuisance cases cannot, and do not, arise until after harm to the public has occurred. Specifically, in adopting the newly articulated "control" standard, the Rhode Island Supreme Court also imposed a temporal requirement: the control had to exist at the time the injury occurred. By stringently requiring control at the time that children are actually poisoned by lead pigment, the Supreme Court effectively eviscerated one of the most bedrock principles of common law public nuisance in Rhode Island – prevention of future harm to the public.

Prior to the 2008 decision, the Rhode Island Supreme Court

74. *Dutra I*, 738 F. Supp. at 633.

75. Commonwealth v. Barnes & Tucker Co., 353 A.2d 471, 479 (Pa. Commw. Ct. 1976), *aff'd*, 371 A.2d 461 (Pa. 1977).

on repeated occasions recognized "[t]he essential element of an actionable nuisance is that persons have suffered harm *or are threatened with injuries* that they ought not have to bear."[76] This conclusion is consistent with over a century of recognition that public nuisance is unique in its ability to remedy a condition *before* additional harms occur:

> The ground of this jurisdiction in cases of . . . public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community.[77]

This important element of nuisance was recognized recently by the Second Circuit, when it observed:

> Nor does public nuisance theory require that the harm caused must be immediate, as even threatened harm is actionable under the federal common law of nuisance . . . . Judge Oakes . . . recognized this attribute of nuisance law [in a prior case], writing that "'[o]ne distinguishing feature of equitable relief is that it may be granted upon the threat of harm which has not yet occurred.'"[78]

In finding that nuisance liability for lead poisoning cannot be established until children are actually poisoned, as opposed to when the community wide threat of harm was created,[79] the Court

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76. Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) (emphasis added).

77. Mugler v. Kansas, 123 U.S. 623, 673 (1887). *See also* New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1257 (D.N.M. 2004) ("Abatement of a public nuisance involving risks of public exposure to hazardous waste brings an end to the nuisance and to the risks, thus minimizing the externalized costs of the nuisance before many of those costs have been incurred.").

78. Conn. v. Am. Elec. Power Co., 582 F.3d 309, 357 (2d Cir. 2009).

79. State of Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428, 449 (R.I. 2008).

has abandoned its long and rich tradition of utilizing public nuisance law to shield its citizens from the certain harms that will result from environmental contaminants. Such a monumental shift neuters the ability of the State and the Attorney General to remedy harms and correct hazardous conditions prior to the actual injury to Rhode Islanders.

Instead, embracing the clear standard used by the Rhode Island Supreme Court in *Wood v. Picillo* compels a very different result.[80] Under the *Wood* mandate that liability arises when an actor creates a threat of future harm to the public health and welfare, the appropriate inquiry becomes when the threat of harm created, rather then when actual physical injury occurred. In the lead poisoning situation, the threat of harm arose when lead pigment was used in residential buildings in Rhode Island. As the evidence in this case showed, from that moment in time the poisonous paint was either an immediate harm because it was deteriorated and accessible to children or it was a threatened harm, because it could (and inevitably would) deteriorate and thus contaminate children's environments. Clearly, under the *Wood* analysis, there are major factual and legal flaws in assigning sole responsibility for the lead poisoning crisis to homeowners within the State. Homeowners were not in control of the public nuisance at the time the threat of harm to Rhode Islanders arose because lead paint was banned more than a quarter century ago. Current Rhode Island homeowners cannot be responsible for putting lead pigmented paint on the walls of their property and, accordingly, they cannot be responsible for the presence of lead pigment in the State of Rhode Island.

IV. THE IMPLICATIONS FOR PUBLIC NUISANCE LIABILITY FOLLOWING *STATE V. LEAD INDUS. ASS'N*

At this juncture, it is difficult to predict whether *State v. Lead Indus. Ass'n* will fundamentally alter the landscape of public nuisance liability or will become narrowly construed and relegated to deny the application of public nuisance in lead poisoning cases in Rhode Island. Current trends seem to suggest that this case will become a footnote in the decades long struggle against lead poisoning.

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80. *Wood*, 443 A.2d at 1244.

Specifically, in the eighteen months since the decision was handed down, the composition of the Rhode Island Supreme Court has changed. Chief Justice Frank Williams, the author of the opinion, has since resigned his position with the Court.[81] Until another public nuisance case comes before the court, it is difficult to predict how expansively the newly configured court will interpret the lead decision. However, the decision has created significant loopholes and immunity for corporate wrong doers and polluters, and there is no doubt that a future decision on public nuisance would require a detailed discussion of the lead decision.

Significantly, however, no court in Rhode Island or around the country has cited the lead paint decision as precedent in any public nuisance case. While the decision has received some attention in scholarly articles, it has not been adopted by any other court considering difficult public nuisance issues. Significantly, courts around the country have continued to issue more moderate public nuisance decisions, signaling that the new narrow interpretation in Rhode Island will not necessarily impact other public nuisance suits.[82] Of particular significance is a recent decision issued by the Second Circuit, *Conn. v. Am. Elec. Power Co.*[83] In that case, the court considered claims brought by "two groups of Plaintiffs, one consisting of eight States and New York City, and the other consisting of three land trusts . . ."[84] The court explained the crux of the plaintiffs' complaint:

> [The Plaintiffs] separately sued the same six electric power corporations that own and operate fossil-fuel-fired power plants in twenty states . . . seeking abatement of

81. Paul Edward Parker, *The Williams Court: Key decisions Included Lead Paint, Gambling*, PROVIDENCE J., Dec. 15, 2008, at A15.

82. Of particular interest is a recent editorial published in the National Journal and co-authored by Steven R. Williams, counsel for DuPont in the Rhode Island litigation. DuPont, which settled with the State prior to trial, was a former manufacturer of lead pigments used in residential paint. Mr. Williams analogized the Rhode Island Supreme Court decision to a "legal equivalent of a shot gun blast to the head," but ultimately concluded that "public nuisance did not die as a result of the Rhode Island decision." *See* Steven R. Williams et al., *Public Nuisance: The Tort That Refuses to Die*, THE NAT'L LAW J., April 6, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429614761&hbxlogin=1.

83. 582 F.3d 309 (2d Cir. 2009).

84. *Id.* at 314.

> Defendants' ongoing contributions to the public nuisance of global warming. Plaintiffs claim that global warming, to which Defendants contribute as the "five largest emitters of carbon dioxide in the United States and . . . among the largest in the world," by emitting 650 million tons per year of carbon dioxide, is causing and will continue to cause serious harms affecting human health and natural resources.[85]

In deciding that the plaintiffs had stated a cause of action for public nuisance, the Second Circuit articulated several legal principles that seem to contradict, or at least call into question, the conclusions of the Rhode Island court. For example, the Second Circuit concluded that:

> Threat of future harm can confer standing to asset a public nuisance claim: "Nor does public nuisance theory require that the harm caused must be immediate, as even threatened harm is actionable under the federal common law of nuisance."[86]

> Fact that others may contribute to creating or maintaining the same nuisance does not preclude liability upon defendants to the suit: "Plaintiffs have sufficiently alleged that their current and future injuries are 'fairly traceable' to Defendants' conduct. For purposes of Article III standing they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries."[87]

> Public nuisance are not localized, but are defined by widespread harm, including harm to public health: "Defendants' assertion that the federal common law of *nuisance* mandates that the harm be localized is similarly misplaced. The touchstone of a common law public

85. *Id.*
86. *Id.* at 357.
87. *Id.* at 347.

> nuisance action is that the harm is widespread, unreasonably interfering with a right common to the general public."[88]

As those of us interested in the academic debate about public nuisance watch for guidance from courts on the viability of the cause of action in the future, we must constantly be mindful of the profound impact that a court's decision on this legal issue has on people. The lead paint decision denied justice to children in Rhode Island and has allowed a legacy of poisoning to continue within the State. It also signaled a shift towards polluters and corporations being granted immunity from the consequences of their actions. Future public nuisance cases will deal with these realities and time will tell if this ancient doctrine, which has survived centuries of legal wrangling, will continue to protect the citizens of this country.

88. *Id.* at 357. Other relevant public nuisance decisions issued since the Rhode Island decision include: North Carolina ex. Rel. Cooper v. Tennessee Valley Auth., 593 F. Supp 2d 812 (W.D.N.C. 2009); Gates v. Rohm and Haas Co., No. 06-1743, 2008 WL 2977867 (E.D. Pa. July 31, 2008); Birke v. Oakwood Worldwide, 87 Cal. Rptr. 3d 602 (Cal. Ct. App. 2009).