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Venturing into the "Impenetrable Jungle": How California's Expansive Public Nuisance Doctrine May Result in an Unprecedented Judgment Against the Lead Paint Industry in the Case of County of Santa Clara v. Atlantic Richfield Company

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Venturing into the "Impenetrable Jungle": How California's Expansive Public Nuisance Doctrine May Result in an Unprecedented Judgment Against the Lead Paint Industry in the case of *County of Santa Clara v. Atlantic Richfield Company*

Matthew R. Watson*

> The Legislature hereby finds and declares that childhood lead exposure represents the most significant childhood environmental health problem in the state today; that too little is known about the prevalence, long-term health care costs, severity, and location of these problems in California; that it is well known that the environment is widely contaminated with lead . . . and that the cost to society of neglecting this problem may be enormous.[1]

INTRODUCTION

In their treatise on the law of torts, William Prosser and Werdner Page Keeton famously described the tort of public

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1. CAL. HEALTH & SAFETY CODE § 124125 (West 2006).

nuisance as an "impenetrable jungle."[2] While it is difficult to discern exactly what these famous legal scholars intended to convey with this observation, this phrase seemingly addresses the amorphous nature of the tort. Indeed, the tort of public nuisance is marked by a rather broad definition – "an unreasonable interference with a right common to the general public."[3] While many jurisdictions in the United States have added layers to the traditional tort of public nuisance by way of statute as well as common law interpretation,[4] the tort nevertheless retains a rather nebulous character. This ambiguity has proved particularly trying over the past several decades as jurisdictions across the nation have witnessed a wave of non-traditional product-based public nuisance claims.

One such product-based public nuisance action that has become prevalent in the past quarter-century has been brought against former lead paint manufacturers for the problems associated with lead poisoning.[5] These actions have been commenced by state and local officials, and generally allege that the presence of lead pigment in residential premises constitutes an unreasonable interference with the health and safety of the public, thus qualifying as a public nuisance.[6] While a prima facie examination of these claims suggests they comport with the common law definition of public nuisance, courts have, by and large, determined such claims to be inconsistent with the requirements and traditional application of the tort.[7] In fact, the

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (W. Page Keeton ed., West Publishing Co. 5th ed. 1984) (1941) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.").

3. VICTOR E. SCHWARTZ ET AL., TORTS: CASES AND MATERIALS 799 (Robert C. Clark ed., Foundation Press 11th ed. 2005) (1951) (quoting RESTATEMENT (SECOND) OF TORTS § 821B (1979)).

4. *Id.*

5. *See* Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 489 (2002).

6. Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 960-61 (2007).

7. *Id.* at 962.

tort of public nuisance has not yet been successfully litigated against a lead pigment manufacturer by any municipality or state throughout the nation.[8]

Despite this weight of authority, however, public nuisance claims against former lead pigment manufacturers are still actively pursued. Most notably, such litigation is ongoing in the California case of *County of Santa Clara v. Atlantic Richfield Co.*[9] There, a number of counties and related authorities filed suit on behalf of the People of the State of California against a collection of former lead pigment manufacturers for the problems associated with lead poisoning.[10] In the complaints before the court, the plaintiffs alleged a number of causes of action, including public nuisance.[11] While the trial judge initially sustained defendants' demurrer to this public nuisance claim, the Court of Appeal for the Sixth District of California overruled this preliminary finding and held that the plaintiffs were entitled to pursue a representative public nuisance action on behalf of the People of California.[12] Accordingly, the stage has been set for yet another prolonged legal battle on a claim of public nuisance against lead paint manufacturers.

This Comment provides an assessment of the likelihood of the *Santa Clara* plaintiffs' success on their aforementioned public nuisance claim. As such, this Comment contends that the plaintiffs may in fact prevail on their claim, despite the great weight of authority to the contrary, because California has adopted a more expansive interpretation of public nuisance than a number of jurisdictions that have addressed this issue to date. Part I provides a brief history of the tort of public nuisance and highlights its evolution in the United States. Part II examines the advent and subsequent development of public nuisance jurisprudence relative to product manufacturers, provides a detailed overview of several prior public nuisance actions against lead paint manufacturers, and identifies the reasons these claims

8. *See* Eric Tucker, *R.I. Lead Paint Loss Gives Industry Huge Win*, USA TODAY, July 6, 2008, http://www.usatoday.com/money/economy/2008-07-06-1044394103_x.htm?csp=34.

9. 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

10. *Id.* at 319.

11. *Id.*

12. *Id.* at 329-30.

have been unsuccessful to date. Part III outlines the requirements of public nuisance in California and highlights the ways California courts have provided a more expansive interpretation of the tort's boundaries than other jurisdictions that have addressed this issue. Part IV provides a general background of the plaintiffs' public nuisance claim in the case of *County of Santa Clara v. Atlantic Richfield Co.* and highlights the problems of lead poisoning in California. Lastly, Part V examines the preliminary facts of the case in order to provide an assessment of the probable result of the case.

I. GENERAL HISTORY OF THE TORT OF PUBLIC NUISANCE

A. The Birth of Public Nuisance

The law of public nuisance has roots dating back to twelfth century English common law and, in its earliest form, was used to remedy infringements of the rights of the Crown.[13] This application continued until the fourteenth century, when English courts expanded the reach of public nuisance to encompass infringements of rights common to the general public.[14] Examples of protected public rights during this early period included "the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases."[15]

B. The Evolution of Public Nuisance Jurisprudence in the United States

With the development of American common law, courts came to adopt the English common law concept of public nuisance.[16] The earliest public nuisance cases in America generally fell into one of two categories: obstructions of public highways or

13. Faulk & Gray, *supra* note 6, at 951.
14. *Id.*
15. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543-44 (2006) (quoting Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002)).
16. Faulk & Gray, *supra* note 6, at 953.

waterways and invasions of public morals and welfare.[17] With the onset of the Industrial Revolution, however, public nuisance took on a more substantive role in American jurisprudence.[18] In essence, public nuisance actions became a substitute for governments that "could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public."[19] In this era, public nuisance law provided a means to quell problems associated primarily with air and water pollution, and such actions were predominately criminal in nature and involved injunctive relief.[20]

Throughout the 1930s, public nuisance law took a backseat in American jurisprudence; the "comprehensive statutory and regulatory" reform of the New Deal era limited the need to utilize the tort of public nuisance to correct social ills.[21] Indeed, when the first *Restatement of Torts* was published in 1939, it failed to include a reference to the tort of public nuisance.[22]

In the 1960s, however, the tort of public nuisance experienced a resurgence in American jurisprudence.[23] Responding to such, Dean William Prosser, and later, Dean John Wade, attempted to codify the 900-year history of public nuisance law in the *Restatement (Second) of Torts*.[24] After extensive debate over the parameters of public nuisance, the *Restatement (Second) of Torts* came to define a public nuisance as "an unreasonable interference with a right common to the general public."[25] Further, it outlined circumstances that may sustain a holding that an interference with a public right is unreasonable: "(a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or

17. *Id.*
18. Schwartz & Goldberg, *supra* note 15, at 545-46.
19. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 804 (2003).
20. Faulk & Gray, *supra* note 6, at 954.
21. *Id.*
22. Schwartz & Goldberg, *supra* note 15, at 546.
23. Faulk & Gray, *supra* note 6, at 955.
24. Schwartz & Goldberg, *supra* note 15, at 547.
25. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[26]

Despite the efforts of the *Restatement (Second) of Torts* to add definition and clarity to the "impenetrable jungle" of public nuisance law, this area of law retained a vague character. Indeed, in order to further define the boundaries of this tort, a number of jurisdictions formulated statutes to outline the requirements of a public nuisance cause of action.[27] Moreover, in their analysis of public nuisance actions, state courts have attempted to clarify public nuisance law by interpreting the requirements of each respective element of the tort.[28]

With the efforts of legislatures and judges to define the requirements of public nuisance law, however, the tort has taken different shapes in various jurisdictions.[29] Consequently, an action, or perhaps inaction, of a defendant may constitute a public nuisance in one jurisdiction and not comply with the established public nuisance requirements of a separate jurisdiction. Ultimately, although American public nuisance law principally derives from a common source – English common law – it has evolved differently in each respective jurisdiction.

II. APPLICATION OF THE TORT OF PUBLIC NUISANCE TO PRODUCT-BASED CLAIMS

A. Asbestos

The confusion derived from the amorphous nature of the tort of public nuisance has been further compounded over the past thirty years as this tort has been utilized to pursue non-traditional product-based claims. The advent of this practice came in the early 1980s as several municipalities and school districts throughout the United States utilized public nuisance claims to recover the costs of removing asbestos from their facilities.[30] Commentators have argued that the impetus behind this methodological approach to asbestos litigation stemmed, in large

26. *Id.* § 821B(2).
27. *See* SCHWARTZ ET AL., *supra* note 3.
28. *See* Gifford, *supra* note 19, at 779-80.
29. *See id.*
30. *Id.* at 751.

part, from plaintiffs' inability to successfully pursue such claims under products liability doctrine due to complications with issues such as the expiration of the statute of limitations, the impropriety of suits for pure economic loss, and the inability to determine a particular asbestos manufacturer.[31] Despite the prevalence of these suits, plaintiffs rarely succeeded in pursuing a public nuisance claim against a manufacturer or distributor of asbestos.[32] Nevertheless, these suits paved the way for future product-based public nuisance litigation.

B. Tobacco

Following the trend set by asbestos-related litigation, between 1994 and 1998, a number of states and municipalities attempted to utilize the tort of public nuisance against the tobacco industry, seeking reimbursement of expenditures for medical programs related to cigarette smoking.[33] Specifically, the plaintiffs in these actions utilized the tort of public nuisance as a means to overcome a number of defenses to product liability claims and provided the plaintiffs a means to overcome a smoker's individual conduct.[34] These claims remain unresolved, however, because the litigation ended with a massive settlement by the tobacco industry.[35] Although the viability of the tort of public nuisance as applied to the tobacco industry was never truly tested, this settlement was deemed a great success, further providing confidence in the potential of the application of the tort of public nuisance to product manufacturers and distributors.[36]

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31. *See id.* at 751-53.

32. *Id.* at 752-53.

33. Handler & Erway, *supra* note 5, at 487. In addition to the application of public nuisance, the plaintiff states and municipalities in these actions sought to recover under theories of fraud, indemnification, unjust enrichment, common law misrepresentation, deceptive advertising, antitrust violations, and federal Racketeer Influenced Corrupt Organizations (RICO). Gifford, *supra* note 19, at 759-60.

34. Gifford, *supra* note 19, at 759.

35. *Id.* at 761-62. The tobacco industry reached the "Master Settlement Agreement" obligating the tobacco companies to make payments totaling $206 billion to the plaintiff states. *Id.* at 762. Additionally, the Master Settlement Agreement mandated that the tobacco industry refrain from advertising efforts directed towards youth audiences. *Id.*

36. Schwartz & Goldberg, *supra* note 15, at 554-55.

C. Lead Paint

The most recent application of the tort of public nuisance for a product-based claim has been against former lead paint manufacturers for the problems associated with childhood lead poisoning. These actions, like those brought against former asbestos manufacturers and the tobacco industry, have been brought by a number of states and municipalities throughout the nation. To date, the tort of public nuisance has not been successfully applied by any state or municipality against lead paint manufacturers in any jurisdiction that has addressed the issue.[37] Indeed, courts hearing these actions have, by and large, found such claims against lead paint manufacturers inconsistent with the application of public nuisance law within their respective jurisdictions.

To highlight the purported shortcomings of public nuisance law relative to its application against lead paint manufacturers, it is essential to provide a background of the problems associated with lead exposure and, in turn, to examine the holdings of the state courts that have heard public nuisance claims against lead paint manufacturers and distributors.

1. Lead Poisoning: An Overview

Lead is a toxic substance that, if ingested, can cause a wide array of health problems and adversely affect many bodily organs and metabolic functions.[38] In fact, there is no known safe level of lead the human body can withstand.[39] Low levels of lead in the human body (10-15 parts per million) can impair cognitive development, cause a loss of I.Q., slow the body's growth and development rate, and inhibit the formation of enzymes in blood.[40] At higher levels of lead exposure (40 parts per million and above) humans can experience brain and nerve damage, kidney

37. *See* Tucker, *supra* note 8.

38. *See* Agency for Toxic Substances & Disease Registry, *ToxFAQs for Lead*, Aug. 2007, http://www.atsdr.cdc.gov/tfacts13.html (last visited Apr. 20, 2010).

39. California Department of Public Health, *Frequently Asked Questions About Lead Poisoning*, http://www.cdph.ca.gov/programs/CLPPB/Pages/FAQ-CLPPB.aspx (last visited Apr. 20, 2010) [hereinafter CDPH Lead Poisoning].

40. CAL. EDUC. CODE § 32240 (West 2002).

impairment, and high blood pressure.[41] Further, in some instances, high levels of lead exposure can cause seizures, comas, and even result in death.[42] The buildup of lead in the body is referred to as lead poisoning.[43]

While there are a number of ways to be exposed to lead, the primary means is through lead pigment coated on the interior of older homes.[44] Until 1978, lead was an active ingredient in paint utilized to coat both the interior and exterior of homes throughout the United States.[45] The addition of lead to household paint served to increase the robust nature of the color, improve the ability to hide the surface it covers, and allow the coat of paint to last longer.[46] As lead paint deteriorates and decays, however, lead chips and dust coat the ground, which can, in turn, be ingested or inhaled.[47]

Children are particularly susceptible to lead exposure and subsequent poisoning.[48] First, children spend much of their time on the floor where lead dust is located and have a tendency to place their hands, as well as foreign objects, in their mouth.[49] Second, they are particularly sensitive to the harmful effects of lead; the bodies of children under the age of six have a tendency to absorb more lead, and because their brains and nervous systems are in critical stages of formation and development, they are considerably more vulnerable to associated harmful effects.[50]

Although it is difficult to discern exactly how many have been affected by lead poisoning, it is estimated that, throughout the United States, approximately 250,000 children between the ages of one and five have blood lead levels at a point that require

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41. *Id.*

42. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL., PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME 3 (2003) (on file with author).

43. CDPH Lead Poisoning, *supra* note 39.

44. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL., *supra* note 42, at 4-5.

45. *Id.* at 4.

46. New York State Department of Health, *Sources of Lead*, http://www.health.state.ny.us/environmental/lead/lead_sources.htm (last visited Apr. 20, 2010).

47. *See id.*

48. CAL. EDUC. CODE § 32240 (West 2002).

49. *Id.*

50. *Id.*

health actions to be initiated.[51] Further, of the approximately twenty-four million housing units throughout the United States with deteriorated lead paint and elevated levels of lead-contaminated house dust, more than four million are home to one or more young children.[52]

As a result of the health crisis posed by lead paint, particularly to young children, federal and state governments have enacted provisions aimed at reducing the presence of lead pigment in residences. Nevertheless, the problem of lead poisoning continues to plague the nation.

2. State Court Decisions Considering the Application of the Tort of Public Nuisance against Lead Paint Manufacturers and Distributors

i. *City of St. Louis v. Benjamin Moore & Co.*

In 2000, the City of St. Louis filed a public nuisance lawsuit against former lead paint manufacturers seeking to recover costs for a citywide program designed to abate lead paint.[53] In its complaint, the City argued that the "presence of lead paint in the City's housing built before February 27, 1978, areas accessible to the public, unreasonably interfere[d] with the public's health, safety, welfare, and comfort and, accordingly, constitute[d] a public nuisance."[54] During the course of discovery, the City identified locations where it had incurred costs abating the lead paint but was unable to identify the manufacturer of any of the lead paint at issue.[55] Nevertheless, the City maintained that product identification was not required for a public nuisance claim and that it was merely obligated to show that the defendants had substantially contributed to the creation of the nuisance.[56]

The trial judge, and later the Supreme Court of Missouri,

51. Centers for Disease Control and Prevention, *Prevention Tips*, http://www.cdc.gov/nceh/lead/ (last visited Apr. 20, 2010).

52. *Id.*

53. City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 112-13 (Mo. 2007).

54. *Id.* at 113.

55. *Id.*

56. *Id.*

disagreed with the City's contention.[57] Specifically, the Supreme Court determined that, in order to comply with the requisite element of causation in a public nuisance action, a plaintiff must identify the defendant who made or sold the product.[58] In its analysis, the Court emphasized that accepting the City's approach would implicitly adopt a market-share approach to liability, which the Court had rejected on a prior occasion.[59]

Ultimately, the Court determined the City's public nuisance claim did not adequately allege the required element of causation because it failed identify the producer or seller of the lead paint at issue.[60] Accordingly, the Court sustained the trial judge's award of summary judgment in favor of the defendants.[61]

ii. *City of Chicago v. American Cyanamid Co.*

In 2003, the City of Chicago filed a public nuisance action against a collection of entities that manufactured or sold lead pigments or lead-based paint at some point prior to 1978.[62] In its complaint, the City alleged that the presence of lead-based paint in Chicago constituted a public nuisance, which was created by the defendants' manufacturing, marketing, and promoting of lead-based paint for use in areas accessible to children long after defendants knew or should have known it was hazardous.[63] The trial judge determined that the City failed to state a claim and consequently dismissed the action.[64]

On appeal, the Illinois Appellate Court affirmed the trial court's ruling, citing a critical error in the City's claim: the failure to demonstrate that defendants were the proximate cause of the alleged public nuisance.[65] Specifically, the court held that the City failed to allege the requisite "cause in fact" because it did not identify any specific defendant as the source of lead paint at any

57. *See id.* at 113, 116-17.
58. *Id.* at 115.
59. *Id.*
60. *Id.* at 116-17.
61. *See id.*
62. City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 128 (Ill. App. Ct. 2005).
63. *Id.*
64. *Id.*
65. *Id.* at 140.

particular location.[66] The court noted that, to accept the City's argument that a governmental plaintiff is not required to identify which defendant manufactured the product in question would constitute an adoption of a market-share liability theory, which the Illinois Supreme Court had expressly rejected.[67] Further, the court held the defendants' conduct in the manufacturing and selling of lead-based paint was not a "legal cause" of the alleged public nuisance.[68] In arriving at this conclusion, the court emphasized that public policy concerns dictated that "legal cause" could not be established against the defendants in this case, given that defendants merely produced a legal product decades ago that was subsequently applied by third parties, and any hazard that persisted throughout the City of Chicago was a product of the landowners' failure to comply with existing laws that require them to remove deteriorated paint.[69]

Given the court's determination that the City's public nuisance complaint failed to adequately allege the two requirements of proximate cause – "cause in fact" and "legal cause" – the court held the trial judge properly dismissed the action.[70] On May 25, 2005, the Supreme Court of Illinois denied the City's appeal of the Appellate Court's decision.[71]

iii. *In re Lead Paint Litigation*

In 2001, the City of Newark filed a complaint against a number of companies that manufactured lead paint, or their corporate successors, alleging a number of causes of action, including public nuisance.[72] Shortly thereafter, twenty-five other plaintiffs filed similar complaints, which were subsequently consolidated by the court.[73] In this action, plaintiffs sought to recover the costs of detecting and removing lead paint from homes and buildings, the costs of medical care to residents affected by lead poisoning, and the costs of developing programs to educate

66. *Id.* at 134.
67. *Id.*
68. *Id.* at 136.
69. *Id.* at 139.
70. *Id.* at 140.
71. City of Chicago v. Am. Cyanamid Co., 833 N.E.2d 1 (Table) (Ill. 2005).
72. *In re* Lead Paint Litig., 924 A.2d 484, 487 (N.J. 2007).
73. *Id.*

residents about the dangers of lead paint.[74]

The trial judge granted the defendants' motion to dismiss the plaintiffs' complaint for failure to state a claim.[75] The New Jersey Court of Appeals overturned the trial judge's decision, however, ruling that the plaintiffs stated a viable claim for public nuisance.[76] Presented with these conflicting findings, the New Jersey Supreme Court granted defendants' petition for certification and accepted the issue for review.[77]

Upon review of the plaintiffs' public nuisance action, the New Jersey Supreme Court held that the plaintiffs failed to adequately allege a claim for public nuisance.[78] Specifically, the Court held that the conduct which caused interference with the public health was caused by the property owners' poor maintenance of premises where lead paint was found, rather than any conduct by defendants in their capacity as manufacturers.[79] As such, the Court emphasized that the requisite element that the defendant control the nuisance could not properly be alleged.[80] Further, the Court held that plaintiffs' public nuisance complaint impermissibly sought monetary damages rather than abatement of the nuisance.[81] The Court emphasized that, in order to seek monetary damages, the plaintiffs must specify a special injury, different in kind rather than degree.[82] According to the Court, the plaintiffs failed to assert any special injury.[83] Therefore, the Court concluded that the plaintiffs failed to adequately allege a

74. *Id.* at 486-87.
75. *Id.* at 487.
76. *See id.* at 488-89.
77. *See id.* at 489.
78. *Id.* at 487.
79. *Id.* at 501. The Court made three critical observations about the foundation and parameters of the tort of public nuisance. "First, a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right. Second, a private party who has suffered special injury may seek to recover damages to the extent of the special injury and, by extension, may also seek to abate. Third, a public entity which proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance." *Id.* at 499.
80. *See id.* at 501.
81. *See id.* at 502-03.
82. *Id.* at 503.
83. *Id.*

viable public nuisance claim as applied in New Jersey.[84]

iv. *State v. Lead Industries Association, Inc.*

In 1999, the Attorney General of Rhode Island filed a public nuisance action against a number of former lead pigment manufacturers for the problems associated with childhood lead poisoning throughout the State of Rhode Island.[85] The State's public nuisance complaint alleged that "[d]efendants created an environmental hazard that continues and will continue to unreasonably interfere with the health, safety, peace, comfort or convenience of the residents of the State, thereby constituting a public nuisance."[86] Following the longest civil trial in Rhode Island history, the jury returned a verdict in favor of the State on the public nuisance claim, and consequently, the defendants were ordered to abate the created nuisance.[87] With this verdict, Rhode Island became the first state in the nation where the tort of public nuisance was successfully applied against manufacturers of lead pigment.[88]

On appeal, however, the Rhode Island Supreme Court, in a unanimous decision, overturned the jury verdict.[89] The Court

84. *Id.* In dissent, Chief Justice James R. Zazzali contended that although prior application of the tort of public nuisance deviated from the case at bar, public nuisance doctrine nevertheless provides "an appropriate and efficient means for vindicating the public's right to be free from the harmful effects of lead paint." *Id.* at 506 (Zazzali, C.J., dissenting). Specifically, the Chief Justice emphasized that the tort of public nuisance has historically been applied to "prevent[] the exploitation of the public and shift[] the cost of abatement to those responsible for creating the nuisance." *Id.* at 511. Therefore, according to the Chief Justice, public nuisance doctrine should permit recovery "if the defendant is responsible for creating the nuisance and, by virtue of the unjust benefit derived from the nuisance, can fairly be required to fund abatement," even though the defendant may not control the nuisance at issue. *Id.*

85. State v. Lead Indus. Ass'n, 951 A.2d 428, 439 (R.I. 2008).

86. *Id.* at 453.

87. *Id.* at 442. The civil trial lasted for more than four months. *See* Abha Bhattarai, *Rhode Island Court Throws Out Jury Finding in Lead Case*, N.Y. TIMES, July 2, 2008, *available at* http://www.nytimes.com/2008/07/02/business/ 02paint.html.

88. *See* Corry E. Stephenson, *After Rhode Island's Public Nuisance Case, Lead Paint Industry on the Defensive*, LAWYERS USA, Apr. 23, 2007, *available at* http://www.lawyersweeklyusa.com/index.cfm/archive/view/id/404488.

89. *Lead Indus. Ass'n*, 951 A.2d at 435. The decision of the Rhode Island Supreme Court was announced by only four of the five Justices of the Court.

held that the requisite elements of public nuisance were not properly alleged, and the trial judge erred in failing to grant the defendants' motion to dismiss at the outset of the trial.[90] Specifically, the Court cited two errors in the State's complaint.[91] First, the Court held that the State failed to adequately allege an interference with a public right.[92] According to the Court, public rights are a limited set of indivisible resources shared by the public at large, such as air, water, or public rights of way, and ultimately, the State's complaint failed to allege the requisite interference with such.[93] Second, the Court held that the tort of public nuisance requires that the defendants control the instrumentality causing the alleged nuisance at the time the damage occurs.[94] Since the defendants did not have ownership or control over the properties at issue, the Court held that this required element of control was not met.[95] Accordingly, the Supreme Court held that the State failed to establish the requisite elements of the tort of public nuisance as applied in Rhode Island, and thus, the trial judge erred in failing to grant defendants' motion to dismiss.[96]

v. *City of Milwaukee v. NL Industries*

In 2001, the City of Milwaukee filed a suit against two former lead paint producers alleging a number of causes of action – including public nuisance – and sought compensatory and equitable relief for abatement of the toxic lead hazards in homes, restitution for the amounts expended by the City to abate lead pigment from homes, and punitive damages.[97] After the parties completed discovery, the defendants moved for summary judgment, which the trial judge granted.[98] Specifically, the trial judge concluded that the City failed to prove that the defendants'

Justice Goldberg did not participate in the decision. *Id.* at 481.

90. *Id.* at 452-53.
91. *See id.* at 453.
92. *Id.*
93. *See id.*
94. *Id.* at 455.
95. *Id.*
96. *Id.* at 453.
97. City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 890-91 (Wis. Ct. App. 2004).
98. *Id.* at 891.

paint was present on any property at issue, and thus, the City failed to establish the requisite element of causation for its public nuisance action.[99]

On appeal, however, the Wisconsin Court of Appeals reinstated the City's public nuisance action.[100] The court noted that causation, for the purpose of a public nuisance action in Wisconsin, merely requires a finding that the defendants were a substantial factor in creating the nuisance.[101] The court noted that this was an issue of material fact to be considered by the jury.[102] Accordingly, the court overturned the trial judge's award of summary judgment, and, following the Supreme Court of Wisconsin's denial of defendants' petition for review, the case proceeded to trial.[103]

After a prolonged trial, the jury determined that the presence of lead on properties throughout the City of Milwaukee constituted a public nuisance.[104] However, the jury found that the defendants' conduct did not cause the nuisance.[105] Consequently, judgment was entered for defendants.[106]

3. Setting the Stage in California

Despite the weight of authority of the jurisdictions previously mentioned, a number of counties throughout the State of California are nevertheless embarking down the public nuisance path in the case of *County of Santa Clara v. Atlantic Richfield Co.*[107] Although some may suggest the plaintiffs in this action are fighting an uphill battle, it is important to note that the plaintiffs have already surpassed a crucial point in the case – they have sufficiently stated a cognizable claim for public nuisance as applied in California.[108] The California Court of Appeal for the Sixth District overturned the trial judge's demurrer of plaintiffs'

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99. *Id.* at 890.
100. *Id.* at 897.
101. *Id.* at 893.
102. *Id.*
103. *See* City of Milwaukee v. NL Indus., Inc. 703 N.W.2d 380 (Table) (Wis. 2005).
104. *See* Faulk & Gray, *supra* note 6, at 979.
105. *See id.*
106. *See id.*
107. 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006).
108. *See id.* at 330.

public nuisance claim, and the California Supreme Court denied defendants' petition for review. Thus, the stage has been set in California for what will certainly be a prolonged jury trial on the issue of defendants' liability under the tort of public nuisance.

III. PUBLIC NUISANCE JURISPRUDENCE IN CALIFORNIA

In order to assess the plaintiffs' likelihood of success on their public nuisance claim, it is important to first outline the requirements of the tort of public nuisance in California, and, in turn, to consider how it has previously been applied within the state.

A. California's Statutory Scheme for Public Nuisance Law

In California, the basis of nuisance law derives from state statute. "Nuisance" is defined as follows:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.[109]

Moreover, this statutory scheme defines "public nuisance" as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[110] Further, the legislation dictates that "[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."[111] Under this statutory scheme, the remedies against a public nuisance are (1) indictment or information; (2) a civil action; or (3) abatement.[112]

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109. CAL. CIV. CODE § 3479 (West 1997).
110. *Id.* § 3480.
111. *Id.* § 3490.
112. *Id.* § 3491.

B. California Courts' Interpretation of the Requirements of the Tort of Public Nuisance

California courts have further defined the requirements of a public nuisance claim. Specifically, California courts have dictated that a cognizable claim must assert (1) an interference with a right common to the public, (2) which is both substantial and unreasonable, (3) that affects a considerable number of persons, (4) which the defendant created or assisted in creating.[113] In order to highlight the requirements of each of these respective elements, it is essential to consider each individually.

1. An Interference with a Right Common to the Public

For the purpose of a public nuisance action, California courts have consistently mandated that there be an interference with a "right common to the public."[114] The California Supreme Court, drawing from the *Restatement (Second) of Torts*, has "identified five general categories of public rights that, when unreasonably interfered with, can give rise to a claim for public nuisance: the public health, the public safety, the public peace, the public comfort or the public convenience."[115]

In consideration of what constitutes a public right, California courts have seemingly taken a rather expansive view. While some courts, such as Rhode Island and Illinois, have limited rights common to the public to "shared resources such as air, water, or public rights of way," [116] California courts have never provided such a limited construction. Rather, California courts have found a broad range of activities to interfere with rights common to the public for the purpose of a public nuisance action.[117] Such

113. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 604 (Cal. 1997); Birke v. Oakwood Worldwide, 87 Cal. Rptr. 3d 602, 609 (Cal. Ct. App. 2009); County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006); People v. McDonald, 40 Cal. Rptr. 3d 422, 433-34 (Cal. Ct. App. 2006).

114. *See Acuna*, 929 P.2d at 604.

115. Ileto v. Glock, Inc. 349 F.3d 1191, 1209 (9th Cir. 2003); RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979).

116. *See* State v. Lead Indus. Ass'n Inc., 951 A.2d 428, 453 (R.I. 2008); City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 131-133 (Ill. App. Ct. 2005).

117. *See* Opening Brief of Plaintiffs and Appellants County of Santa Clara

activities include:[118] gang activity,[119] distributing and marketing of firearms,[120] failure to warn about the dangers of chemicals,[121] illegal billboards,[122] obscene films,[123] public urination,[124] fire hazards,[125] and water pollution.[126] Indeed, consistent with this

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et al. at 16-17, *County of Santa Clara*, 40 Cal. Rptr. 3d 313 (No. CV 788657), 2004 WL 1513330.

118. *See id.*

119. *See Acuna*, 929 P.2d at 618 (holding that local gang activity which "routinely [obstructs]. . . residents' use of their own property-by such activities as dealing drugs from apartment houses, lawns, carports, and even residents' automobiles. . . [and] [obstructs] the 'free passage or use, in the customary manner,' of the public streets," qualifies as public nuisance under California law).

120. *See Ileto*, 349 F.3d at 1210-11, 1215 (holding that shooting victims and their families stated a cognizable public nuisance claim under California law against manufacturers and distributors of guns used in shootings based upon the defendants' firearm marketing and distribution schemes at issue).

121. *See* Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 607 (Cal. Ct. App. 1990) (holding that defendant's "design and installation of unsafe disposal systems" coupled with its failure to warn about potential problems such systems may pose to the underlying ground water was a sufficient factual basis to support a claim that the defendant "created or assisted in the creation of a public nuisance" under California law).

122. *See* People *ex rel.* Dept. Public Works v. The Golden Rule Church Ass'n, 122 Cal. Rptr. 596, 598 (Cal. Ct. App. 1975) (holding that the state has the requisite police power to declare billboards a public nuisance under California law for failing to conform to statutory requirements).

123. *See* People *ex rel.* Gow v. Mitchell Bros.' Santa Ana Theatre, 171 Cal. Rptr. 85, 91 (Cal. Ct. App. 1981) (holding that the exhibition of obscene films could properly be considered a public nuisance under California law for which abatement was an appropriate remedy). This case was overturned by the U.S. Supreme Court on different grounds. *See* California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90 (1981). However, on remand, the underlying holding in *Mitchell Brothers' Santa Ana Theatre* – that obscene films could constitute a public nuisance under California law – was upheld. *See* People *ex rel.* Gow v. Mitchell Bros.' Santa Ana Theatre, 180 Cal. Rptr. 728, 730 (Cal. Ct. App. 1982).

124. *See* People v. McDonald, 40 Cal. Rptr. 3d 422, 437 (Cal. Ct. App. 2006) (holding that defendant's urination in an empty public parking lot adjacent to a public street constituted a public nuisance under California law).

125. *See* County of San Diego v. Carlstrom, 16 Cal. Rptr. 667, 671 (Cal. Ct. App. 1961) (holding that defendant's dilapidated residential structures posed a significant fire hazard which, in turn, interfered with the comfort and enjoyment of neighboring properties, and thus, qualified as a public nuisance under California law).

126. *See* Newhall Land & Farming Co. v. Super. Ct., 23 Cal. Rptr. 2d 377, 381 (Cal. Ct. App. 1993) (holding that allegations that defendants discharged hazardous substances in violation of state law which, in turn, entered the soil

expansive list of activities that California courts have determined to interfere with a public right, the California Supreme Court, in *People ex. Rel. Gallo v. Acuna*, emphasized that the "principal office of the centuries-old doctrine of the 'public nuisance' has been the maintenance of public order – tranquility, security and protection – when the criminal law proves inadequate."[127]

Ultimately, a review of the conduct that California courts deem an interference with a right common to the public reveals California courts have adopted a broad interpretation, which, in due course, is considerably more expansive than the interpretations of a number of jurisdictions that have addressed the issue to date.

2. Substantial and Unreasonable Interference

For an interference with a right common to the public to be actionable under public nuisance doctrine, California courts have determined that the interference must be both "substantial and unreasonable."[128]

In making a determination whether an interference with a right common to the public is "substantial," California courts consider the significance of the harm and adjudge whether it constitutes a "real and appreciable invasion of the plaintiff's interests" which is "definitely offensive, seriously annoying or intolerable."[129] In such, the courts utilize an objective standard.[130] Specifically, California courts have stated that "[i]f normal persons in [a] locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one."[131] California courts have held that this is a question of fact, which turns on the circumstances of each respective case.[132]

In order to make a determination on the second prong of this element, whether an interference with a right common to the

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and polluted the groundwater stated a cognizable public nuisance claim under California law).

127. People *ex rel.* Gallo v. Acuna, 60 Cal. Rptr. 2d 277, 284 (Cal. 1997).

128. *Id.* at 285.

129. Monks v. City of Rancho Palos Verdes, 84 Cal. Rptr. 3d 75, 105 (Cal. Ct. App. 2008) (citing RESTATEMENT (SECOND) OF TORTS § 821F (1979)).

130. *Id.*

131. *Id.*

132. *See* San Diego Gas & Electric Co. v. Super. Ct., 920 P.2d 669, 696 (Cal. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 821F (1979)).

general public is "unreasonable," California courts weigh the social utility of the activity against the gravity of the harm it inflicts, taking into account a number of relevant factors.[133] Like the determination of substantiality, the standard for determining unreasonableness is objective; California courts inquire "whether [a] reasonable [person], generally, looking at the whole situation impartially and objectively, would consider [the activity] unreasonable."[134] This too, is a question of fact, which turns on the circumstances of each respective case.[135]

Given that the nature of inquiry into the substantiality and unreasonableness of an activity for the purpose of a public nuisance action is entirely fact-centered and case-specific, one cannot draw a distinct bright line between activities that cause substantial and unreasonable interferences and those that do not. Ultimately, the trier of fact must determine the substantiality of the interference and then, in turn, consider if it is unreasonable in light of mitigating social utility.

3. Interference that Affects a Considerable Number of Persons

As California Civil Code § 3480, discussed above, dictates, "a public nuisance is one which affects . . . an entire community or neighborhood, or any considerable number of persons . . . ."[136] Although California courts have never delineated a requisite portion of a populous that must be affected by an interference, they have undoubtedly adopted an expansive interpretation of this requirement. Indeed, California courts have held a public nuisance action can be maintained despite the fact that most community members are not actually privy to it.[137] For example, in the case of *People v. McDonald*, the California Court of Appeal for the First District upheld the trial court's holding that defendant's urination in an empty parking lot adjacent to a public roadway was sufficient to interfere with the comfortable enjoyment of life or property by a considerable number of persons,

133. *Id.* at 697.
134. *Id.*
135. *Id.*
136. CAL. CIV. CODE § 3480 (West 1997).
137. *See* People v. McDonald, 40 Cal. Rptr. 3d 422, 437 (Cal. Ct. App. 2006).

and thus, constituted a public nuisance.[138] Nevertheless, in the more common example of public nuisance actions in California, courts have found interference with a portion of a community or locality to sufficiently comply with this requisite element.[139] For example, in *People ex rel. Gallo v. Acuna*, the Supreme Court of California upheld the trial court's holding that local gang activity, which included threats of violence to residents, murder, drive-by shootings, assault and battery, vandalism, arson and other associated crimes, constituted interference with the enjoyment of life of a significant portion of the community, and consequently qualified as a public nuisance.[140]

4. Requisite Conduct by Defendant

In order to hold a defendant liable for a public nuisance, California courts require that the "defendant created or assisted in the creation of the nuisance."[141] Under this approach, California courts have consistently emphasized it is irrelevant "whether the defendant owns, possesses or controls the property [which is the site of the nuisance], nor [if] [the defendant] is in a position to abate the nuisance."[142] Rather, the critical question is whether the defendant's conduct caused the nuisance or assisted in its creation.[143]

Clearly, this approach to causation adopted by California courts is more expansive than a number of other jurisdictions that have addressed the issue to date. Unlike courts in Missouri and Illinois, which mandate that defendants were the "cause in fact" of the nuisance,[144] California courts merely require that defendants assisted in the nuisance's creation.[145] Further, unlike the

138. *Id.* at 437.
139. *See* People *ex rel.* Gallo v. Acuna, 969 P.2d 596, 615 (Cal. 1997).
140. *Id.*
141. *See* County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006); City of Modesto Redevelopment Agency v. Super. Ct., 13 Cal. Rptr. 3d 865, 872 (Cal. Ct. App. 2004).
142. *County of Santa Clara*, 40 Cal. Rptr. 3d at 325.
143. *Id.*
144. *See* City of St. Louis v. Benjamin Moore & Co., 226 S.W. 3d 110, 115 (Mo. 2007); City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 134 (Ill. App. Ct. 2005).
145. *See County of Santa Clara*, 40 Cal. Rptr. 3d at 341; *City of Modesto Redevelopment Agency*, 13 Cal. Rptr. 3d at 872.

Supreme Courts in Rhode Island and New Jersey, which require defendants to control the instrumentality causing the alleged nuisance at the time the damage occurs,[146] California courts have not adopted such a restriction. Rather, as mentioned, California courts have consistently emphasized that "liability for a public nuisance does not hinge on whether the defendant owns, possesses or controls the property" which is the site of the nuisance.[147]

Ultimately, a review of the requirements of the element of causation for the purpose of a public nuisance as construed by California courts reveals that they have taken a more relaxed interpretation of this requisite element, which, in turn, is considerably more expansive than a number of other jurisdictions that addressed the issue.

5. Remedies that May be Sought

California's public nuisance statute dictates that remedies available for a public nuisance action are: (1) indictment or information; (2) a civil action; or (3) abatement.[148] Nevertheless, California courts have carved out a special rule for representative public nuisance actions brought on behalf of the People.[149] Specifically, this rule dictates that "although California's general nuisance statute expressly permits the recovery of damages in a public nuisance action brought by a specifically injured party, it does not grant a damage remedy in actions brought on behalf of the People to abate a public nuisance."[150] In order to ensure this standard is upheld, California courts have held that "plaintiffs in a representative public nuisance action may not . . . [seek] damages in the form of 'costs of abatement.'"[151]

Despite this rule, California courts have expressly permitted a representative public nuisance action to seek an injunction to

146. *See* State v. Lead Indus. Ass'n Inc. 951 A.2d 428, 455 (R.I. 2008); *In re* Lead Paint Litig., 924 A.2d 484, 499 (N.J. 2007).

147. *County of Santa Clara*, 40 Cal. Rptr. 3d at 325 (quoting *City of Modesto Redevelopment Agency*, 13 Cal. Rptr. 3d at 865).

148. CAL. CIV. CODE § 3491 (West 1997).

149. *See* People *ex rel.* Van de Kamp v. Am. Art Enters. Inc., 656 P.2d 1170, 1173 (Cal. 1983).

150. *Id.* at 1173, n.11.

151. *County of Santa Clara*, 40 Cal. Rptr. 3d at 329 (citing County of San Luis Obispo v. Abalone Alliance, 178 Cal. App. 3d 848, 859-61 (Cal. Ct. App. 1986)).

abate the nuisance itself.[152] This is "accomplished in a court of equity by means of an injunction [which is] proper and suitable to the facts of each case."[153] The injunctive relief "should specifically point out the things which the defendant is required to do and refrain from doing in order to abate the nuisance," and is subject to modification over time to accommodate changing conditions.[154]

IV. COUNTY OF SANTA CLARA V. ATLANTIC RICHFIELD COMPANY: GENERAL BACKGROUND

A. Lead Poisoning in California

The problems of lead poisoning are particularly pronounced within the State of California. Indeed, the California State Legislature declared that "childhood lead exposure represents the most significant childhood environmental health problem in the state today."[155] Furthermore, as the Legislature noted, this problem is compounded by the fact that "too little is known about the prevalence, . . . severity, and location of these problems in California."[156] Although the extent of the prevalence of lead paint in homes throughout California remains to be seen, recent estimates suggest that more than eight million homes, apartments, and condominiums throughout the State contain lead paint, and more than 640,000 children face a high risk of lead poisoning due to exposure.[157] This estimate places the State of California third in the nation for the largest number of homes posing a health risk for young children and their families.[158]

B. The Facts of the Case Relative to Plaintiffs' Public Nuisance Claim

In March 2000, the County of Santa Clara filed a class action

152. *See, e.g., People ex rel. Van de Kamp*, 656 P.2d 1170.
153. Guttinger v. Calveras Cement Co., 105 Cal. App. 2d 382, 390 (Cal. Dist. Ct. App. 1951).
154. *Id.* at 390-91.
155. CAL. HEALTH & SAFETY CODE § 124125 (West 2006).
156. *Id.*
157. Press Release, National Health Law Program, California Assembly Passes Bill to Test Children for Toxic Lead Poisoning from Toys and Home Exposure (Aug. 14, 2008) (on file with author).
158. *See id.*

complaint against a number of companies, or their successors-in-interest, that manufactured, marketed, distributed, and/or sold lead pigment products, for the problems associated with lead poisoning.[159] In 2001, a number of cities, counties, and local municipalities throughout the State of California joined the suit.[160] Following a series of amendments, the plaintiffs' complaint alleged fraud and concealment, strict liability, negligence, negligent breach of special duty, unfair business practices and public nuisance.[161] Relative to the public nuisance claim, plaintiffs alleged that the "presence of [l]ead in paint in homes and buildings in California unreasonably interferes with the public health and safety of all residents of California who come in contact with it."[162] However, it is critical to note that plaintiffs' public nuisance action was not solely based on defendants' manufacture of a defective product. Specifically, plaintiffs' alleged that defendants created and/or contributed to the creation of the public nuisance through the following conduct:

> [1] Engaging in a promotional campaign to increase the use of [l]ead in paints and varnishes despite the fact that [defendants] knew that such use was injurious, and even potentially fatal, for children and other residents in the State;
>
> [2] Engaging in promotional activities that advocated the use of [l]ead on toys and furniture and in residential settings despite the fact that [defendants] knew that children would come into contact with the toxic substance;
>
> [3] Engaging in a sham public relations campaign to discredit medical and scientific literature that identified [l]ead in paints and coatings as a source (if not the

159. County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 320 (Cal Ct. App. 2006); Brief of Appellants at 3, n.1, *County of Santa Clara*, 40 Cal. Rptr. 3d 313 (No. H026651) (The defendants in this action are: "Atlantic Richfield Company, American Cyanamid Company, Conagra Grocery Products Company, I.E. DuPont Nemours and Company, Glidden Company, NL Industries, Inc., SCM Chemicals, and Sherwin-Williams Company.").

160. *County of Santa Clara*, 40 Cal. Rptr. 3d at 320.

161. *Id.* at 320-21.

162. Opening Brief of Plaintiffs and Appellants, *supra* note 117, at 17.

primary source) of lead poisoning; and

[4] Developing marketing ploys to ensure that lead was distributed as far and wide in California as possible.[163]

Clearly, the plaintiffs' complaint does not allege that defendants' liability under the tort of public nuisance hinges solely on their manufacture and distribution of the product.[164] Rather, the plaintiffs averred that the creation of a public nuisance derived from the defendants' conduct in the marketing and promotion of a hazardous product that the defendants knew posed health risks to the general population.[165] In order to remedy the alleged public nuisance, plaintiffs sought abatement of the lead paint in the homes and buildings throughout their respective localities.[166]

C. Procedural History of the Case Relative to Plaintiffs' Public Nuisance Claim

Following a series of amendments to the complaint by the plaintiffs, the defendants filed a demurrer to the plaintiffs' public nuisance cause of action.[167] In addressing this demurrer, the trial justice considered the issue "novel as to whether or not public nuisance is going to be extended to this kind of conduct . . . ."[168] After giving due consideration to the issue, the trial judge sustained the defendants' demurrer without leave to amend.[169]

On appeal, the California Court of Appeal for the Sixth District overturned the trial judge's grant of demurrer to the plaintiffs' representative public nuisance cause of action on behalf of the People of California.[170] In the first portion of its analysis,

163. *See* Brief of Appellants at 18, *supra* note 159.
164. *See County of Santa Clara*, 40 Cal. Rptr. 3d at 328.
165. *See id.*
166. *See id.* at 329.
167. *See id.* at 321.
168. *Id.*
169. *Id.*
170. *See id.* at 330. However the court determined that the plaintiff governmental entities were not entitled to pursue a public nuisance action on their own behalf seeking damages. *Id.* at 331. According to the court, unlike the plaintiffs' representative public nuisance claim, this "cause of action is much more like a products liability cause of action because it is, at its core, an action for *damages for injuries caused to plaintiffs' property by a product* . . ." and the court is "reluctant to extend liability for damages under a public nuisance theory to an arena that is otherwise fully encompassed by products

the court considered whether the plaintiffs properly alleged the existence of a public nuisance as applied in California.[171] The court pointed out that the plaintiffs sufficiently alleged that "lead causes grave harm, is injurious to health, and interferes with the comfort and enjoyment of life and property."[172] Accordingly, the trial judge held that the plaintiffs' complaint "clearly. . . was adequate to allege the existence of a public nuisance for which [the plaintiffs], acting as the People, could seek abatement."[173]

In the second portion of its analysis, the court considered whether the defendants could potentially be held responsible for the creation of the purported public nuisance.[174] As such, the court noted that the plaintiffs alleged that:

> [D]efendants assisted in the creation of the 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.[175]

Further, the court noted that the plaintiffs properly sought abatement of the lead paint as a remedy to the nuisance.[176] Given these factors, the court concluded that the plaintiffs' complaint sufficiently alleged a set of factors that could lead to a finding the defendants caused or substantially contributed to the nuisance.[177]

Based on the court's determination that the plaintiffs sufficiently pleaded the requisite elements for a representative public nuisance action as applied in California, the court held that the trial judge erred in sustaining defendants' demurrer.[178] In June 2006, the Supreme Court of California denied defendants' petition for review of this decision.[179] Thereupon, the case was remanded to the trial court for commencement of a trial on

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liability law." *Id.* (emphasis in original).

171. *See id.* at 324-25.

172. *Id.* at 325-26.

173. *Id.* at 326.

174. *See id.* at 325-30.

175. *Id.* at 325.

176. *Id.* at 329.

177. *See id.* at 328.

178. *See id.* at 330.

179. *See* County of Santa Clara v. Atl. Richfield Co., 2006 Cal. LEXIS 7622, at *1 (Cal. Jun. 21, 2006).

plaintiffs' representative public nuisance claim.

V. ASSESSMENT OF THE LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL ON THE PUBLIC NUISANCE CAUSE OF ACTION

The California Court of Appeal's determination that the *Santa Clara* plaintiffs sufficiently alleged a public nuisance cause of action stands as a significant victory for the plaintiffs in this action. Indeed, as the aforementioned overview of public nuisance litigation demonstrates, the majority of state courts that have addressed the issue to date have held that such complaints fail to allege the requisite elements of the tort as applied in the state's respective jurisdiction. With this initial, yet nonetheless significant, victory, the plaintiffs have been given the opportunity to present their case to a jury. Although this panel of California residents will ultimately serve as the fact finders in this case, an assessment of the preliminary facts of the case relative to the respective elements of the tort of public nuisance as applied in California will provide insight into the probable result.

A. Did Defendants Interfere with a Right Common to the General Public?

As the aforementioned analysis of public nuisance jurisprudence in California demonstrates, California has taken a considerably more expansive interpretation of what constitutes interference with a right common to the general public than a number of jurisdictions that have addressed the issue. Unlike some courts that have limited rights common to the public to "shared resources such as air, water, or public rights of way,"[180] California courts have never provided such a limited construction, but rather, have found a broad range of activities to interfere with rights common to the public for the purpose of a public nuisance action.[181] Specifically, the California Supreme Court has "identified five general categories of public rights that, when unreasonably interfered with, can give rise to a claim for public

180. *See* State v. Lead Indus. Ass'n Inc., 951 A.2d 428, 453 (R.I. 2008); City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 131-33 (Ill. App. Ct. 2005).

181. *See* An Interference with a Right Common to the Public, *supra* section III B (1); *see also* Brief of Appellants at 18, *supra* note 159.

nuisance: the public health, the public safety, the public peace, the public comfort, or the public convenience."[182]

Consideration of the facts of this case could lend support to the conclusion that the defendants' conduct resulted in an interference with a number of these respective categories of public rights. Plaintiffs allege that the defendants' manufacturing and subsequent marketing and promoting of lead paint, a product widely known to be hazardous, resulted in its mass utilization in and around households throughout the State of California.[183] Plaintiffs additionally allege, with ample evidentiary support, that lead paint exposure poses a significant health risk to the people, particularly the children, of the State of California.[184] Indeed, as mentioned, the severe health risks stemming from lead paint exposure have been well documented by the California State Legislature, finding that "childhood lead exposure represents the most significant childhood environmental health problem in the state today . . . ."[185] Accordingly, there seems to be a sufficient foundation for a jury to conclude that the presence of lead paint in residences throughout the state constitutes an interference with the public health and safety.

B. Is the Interference Substantial?

For a public nuisance action to lie in California, the interference with a right common to the general public must be substantial.[186] In order to determine whether an interference is substantial, California courts consider the significance of the harm and look to see if it constitutes a "real and appreciable invasion of the plaintiff's interests" which is "definitely offensive, seriously annoying or intolerable."[187] As such, the courts utilize an objective standard whereby a jury inquires "[i]f normal persons in [a] locality" would be "substantially annoyed or disturbed by the situation."[188]

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182. Ileto v. Glock, Inc. 349 F.3d 1191, 1209 (9th Cir. 2003).
183. *See* Brief of Appellants at 18, *supra* note 159.
184. *See id.*
185. CAL. HEALTH & SAFETY CODE § 124125 (West 2006).
186. *See* San Diego Gas & Electric Co. v. Super. Ct., 920 P.2d 669, 696 (Cal. 1996).
187. *Id.*
188. *Id.*

In this case, there appears to be significant evidence for a jury to objectively conclude that lead paint poses a substantial interference with the health and safety of California residents. As highlighted in Section II, the adverse effects caused by lead exposure are well-known and irrefutable. Lead is a toxic chemical that can cause an array of serious health problems persisting throughout the entirety of one's life.[189] Low levels of lead in the human body can impair cognitive development, cause a loss of I.Q., slow the body's growth and development rate, and inhibit the formation of enzymes in blood.[190] At higher levels of lead exposure, humans can experience brain and nerve damage, kidney impairment, and high blood pressure.[191] In fact, in some instances, high levels of lead exposure can cause seizures, comas, and even death.[192]

The truly substantial nature of the interference with the public health and safety, however, comes into perspective when one considers the prevalence of lead paint throughout homes in California. While the plaintiffs have not yet identified the purported number of homes that contain lead paint, recent estimates reveal this number is significant. In fact, with an estimated eight million homes that contain lead paint, California is ranked third throughout the nation for the largest number of homes posing a threat of lead poisoning.[193] Consequently, a jury will most certainly be presented with evidence that the amount of lead paint in homes throughout the plaintiffs' localities is considerable.

Given that the health effects associated with lead exposure are significant and the evidence at trial will, in all likelihood, indicate that lead paint is still widely present throughout the State of California, it seems probable that a jury will conclude that lead paint poses a substantial interference with the public health and safety.

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189. CAL. EDUC. CODE § 32240 (West 2002) (notes).
190. *Id.* at note (j).
191. *Id.*
192. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL., *supra* note 42, at 3.
193. *See* Press Release, National Health Law Program, *supra* note 157.

C. Is the Interference Unreasonable?

In addition to the requirement of substantiality, California courts also mandate that an interference with a right common to the general public is unreasonable.[194] In order to make a determination whether an interference with a right common to the general public is unreasonable, California courts weigh the social utility of the activity against the gravity of the harm it inflicts.[195] Like the determination of substantiality, the standard for determining unreasonableness is objective; California courts inquire "whether [a] reasonable [person], generally, looking at the whole situation impartially and objectively, would consider [the activity] unreasonable."[196]

In this case, there is ample evidence for a jury to conclude that the problems associated with lead paint constitute an unreasonable interference with the public health and safety. As the aforementioned review of the health problems associated with lead paint exposure indicates, lead paint poses a significant health risk to all those who come into contact with it. Conversely, the social utility that lead paint provides is minimal; the addition of lead to household paint merely serves to increase the robust nature of the color, improve the ability to hide the surface it covers, and allow the coat of paint to last longer.[197] Ultimately, any utility obtained by adding lead to pigment is merely aesthetic.

Accordingly, given that lead paint poses a number of significant health risks and provides minor, perhaps negligible, social utility, there is certainly ample evidence for a jury to conclude that lead paint constitutes an unreasonable interference with the health and safety of Californians.

D. Does the Interference Affect a Considerable Number of Persons?

When assessing the nature of an interference with a right common to the general public for the purpose of a public nuisance

194. *See* San Diego Gas & Electric Co. v. Super. Ct., 920 P.2d 669 (Cal. 1996).
195. *Id.* at 697.
196. *Id.*
197. *See* New York State Department of Health, *Sources of Lead*, *supra* note 46.

action, California courts require that the rights of a considerable number of persons are affected.[198]

Ultimately, a determination on this issue will hinge on the prevalence of the lead paint throughout the plaintiffs' respective localities. Nevertheless, as the discussion of the prevalence of lead paint throughout California suggests, a jury will, in all likelihood, be presented with evidence that lead paint is present in and around an overwhelming number of homes throughout the State of California. Thus, it seems likely that a jury will conclude that a considerable number of people are affected by the purported public nuisance.

E. Did the Defendants Create or Assist in the Creation of the Public Nuisance?

In order to hold a defendant liable under public nuisance jurisprudence, California courts mandate that the "defendant created or assisted in the creation of the nuisance."[199] Under this approach, California courts have consistently emphasized it is irrelevant "whether the defendant owns, possesses or controls the property [which is the site of the nuisance], nor [if] [the defendant] is in a position to abate the nuisance."[200] Rather, the critical question is whether the defendant's conduct caused the nuisance or assisted in its creation.[201]

While a jury's determination on this respective element is, by far, the most difficult to predict, there nevertheless seems to be sufficient evidence for a jury to conclude that the defendants in this case assisted in the creation of a public nuisance. Here, the plaintiffs aver that the defendants engaged in a rigorous marketing campaign in California to promote a hazardous product they manufactured, which they knew posed a significant health risk to the general population.[202] Further, plaintiffs allege that, in their promotional efforts, the defendants engaged in a sham public relations campaign to discredit medical and scientific

198. *See* CAL. CIV. CODE § 3480 (West 1997).

199. County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006); City of Modesto Redevelopment Agency v. Super. Ct., 13 Cal. Rptr. 3d 865, 872 (Cal. Ct. App. 2004).

200. *County of Santa Clara*, 40 Cal. Rptr. 3d at 327.

201. *Id.*

202. *See* Brief of Appellants at 18, *supra* note 159.

findings that lead paint was the primary source of lead poisoning.[203]

These allegations, if adequately supported, could undoubtedly lead one to conclude that the defendants assisted in the creation of a public nuisance posed by lead paint exposure. Specifically, these allegations demonstrate that the defendants engaged in a systematic effort to increase the prevalence of lead paint, despite the fact that they knew it posed a severe health risk for those who would come into contact with it. Indeed, one could surely find that that prevalence of lead paint throughout the State of California and its consequences are a result of the defendants' conduct. Accordingly, a jury could potentially find that the defendants' conduct in manufacturing, rigorously marketing, and distributing lead paint assisted in the creation of the public nuisance.

It should be noted, however, that it is by no means clear how a jury will find on this issue of causation. Indeed, there are a number of mitigating factors which the defendants will undoubtedly identify in order to suggest they did not cause or assist in the creation of the public nuisance. Principally, the defendants will surely posit that the purported public nuisance derives not from any conduct on their part, but rather, from the homeowners' conduct in permitting the lead paint on the interior of their homes to deteriorate and decay which, in turn, can be ingested or inhaled. It remains to be seen how a jury will receive this argument.

Nevertheless, because California merely requires that the defendants assisted in the creation of the nuisance, the plaintiffs will likely have a chance of success in establishing the requisite causation.[204] After all, plaintiffs need not demonstrate that the defendants' conduct was the sole cause of the public nuisance, but rather, that it was a factor in its creation.[205] Accordingly, given California's more expansive interpretation of the element of causation for a public nuisance action, a jury may indeed find that the defendants' conduct in manufacturing, marketing, and distributing a product which they knew to be hazardous, assisted in the creation of the public nuisance.

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203. *See id.*
204. *See City of Modesto Redevelopment Agency*, 13 Cal. Rptr. 3d at 872.
205. *See id.*

F. Are the Defendants Able to Abate the Public Nuisance?

If a jury were to find that the defendants' manufacture, promotion, and distribution of lead paint created or assisted in the creation of a substantial and unreasonable interference with a right common to the public, one question would remain: are the defendants able to abate the public nuisance? This question will not be posed to a jury, however.[206] Rather, a court of equity is assigned the task of considering the nature of the nuisance and consequently determining the nature of injunctive relief required.[207]

On appeal to the California Court of Appeal, the defendants argued that the trial judge properly granted a demurrer to the plaintiffs' public nuisance action, in part, because defendants lacked the ability to abate the nuisance.[208] The defendants contended that they were "in no position to abate," because they did not "own or control" the buildings where the lead paint was located.[209] Although the court held the plaintiffs need not establish the defendants' ability to abate the purported nuisance for the purpose of stating a cognizable claim for public nuisance, the issue is far from determined.[210] Surely the defendants will reattempt this argument before a court of equity if a jury finds they created or assisted in the creation of a public nuisance.

Nevertheless, in a brief to the court, the plaintiffs posited a number of potential means for abatement of the public nuisance, which, in their own right, are compelling.[211] Foremost of these is the argument that the defendants be ordered to enter the properties of those who consent and subsequently remove the lead paint contained therein.[212] Additionally, the plaintiffs argue that an injunctive order could require the defendants to "[distribute] to

206. *See* Guttinger v. Calveras Cement Co., 105 Cal. App. 2d 382, 390 (Cal. Dist. Ct. App. 1951).

207. *Id.*

208. *See* County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 329 (Cal. Ct. App. 2006).

209. *Id.* at 330.

210. *Id.*

211. *See* Brief of Amicus Curiae Office of the Los Angeles City Attorney on Behalf of Plaintiffs and Appellants at 13-17, *County of Santa Clara*, 40 Cal. Rptr. 3d 313 (No. CV 788657), 2004 WL 3256105.

212. *See id.* at 14-15.

the property owners a product designed to encapsulate the lead paint, [establish] service centers to test lead levels in blood or paint samples, or [institute] programs to educate the public about the hazards of lead paint and how to minimize the risk of lead poisoning."[213] Ultimately, the plaintiffs put forth a number of compelling means by which the defendants may abate the nuisance caused by lead paint without controlling the properties at issue.

Given that there are a number of ways for the defendants to abate the nuisance without having ownership or control of the properties in question, it seems likely that a court of equity could find a sufficient means for defendants to abate the nuisance posed by lead paint.

CONCLUSION

Although the tort of public nuisance has not yet been applied successfully against a former lead pigment manufacturer for the problems associated with lead poisoning by any municipality or state throughout the nation, the plaintiffs in the California case of *County of Santa Clara v. Atlantic Richfield Co.* have a number of defined advantages which make it probable that they may be the first to successfully bring such an action. Foremost of these advantages is California's adoption of a more expansive interpretation of the tort of public nuisance than a number of other jurisdictions that have addressed this issue: California courts broadly construe the qualification of a public right, merely require defendants' conduct assist in the creation of the nuisance, and do not require defendants to control the instrumentality causing the nuisance. Indeed, operating under this more expansive public nuisance framework, the *Santa Clara* plaintiffs have achieved a feat that the vast majority of similarly situated plaintiffs have failed to accomplish – they have stated a cognizable public nuisance claim and are able to present their case to a jury.

Going forward, it is impossible to state, with absolute certainty, how a jury will find in this case. Nevertheless, an overview of the requisite elements of the tort of public nuisance as applied in California relative to the preliminary facts of this case reveals that the plaintiffs have a high likelihood of success.

213. *Id.* at 15-16.

Provided that the plaintiffs' allegations are adequately supported, a jury could find that the defendants' conduct in manufacturing, promoting, and distributing a product which they knew to be hazardous has subsequently assisted in the creation of a substantial and unreasonable interference with a right common to the general public of California. As such, it seems likely that the *Santa Clara* plaintiffs may, in fact, succeed where so many other state and local officials throughout the nation have failed.

Only time will tell if the plaintiffs in this action will emerge from the "impenetrable jungle" of public nuisance law with a judgment that provides redress for the widespread lead contamination in residences throughout the State – the most significant environmental health problem that plagues California to this day. For now, with all eyes watching, the *Santa Clara* plaintiffs press on.