

Spring 2006

Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children

Aileen Sprague
Motley Rice LLC

Fidelma Fitzpatrick
Motley Rice LLC

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Sprague, Aileen and Fitzpatrick, Fidelma (2006) "Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children," *Roger Williams University Law Review*: Vol. 11: Iss. 3, Article 1.
Available at: http://docs.rwu.edu/rwu_LR/vol11/iss3/1

This Article is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Articles

Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children

Aileen Sprague and Fidelma Fitzpatrick*

INTRODUCTION

On February 22, 2006, a jury of Rhode Islanders delivered a decisive verdict in a case that had been the source of significant political, social, and economic debate since it was filed in 1999. On that day, a jury of six, who had devoted more than four months of their lives hearing evidence in the longest civil jury trial in Rhode Island's history,¹ delivered a victory for the people of the

* Aileen Laurie Sprague - Associate Attorney, Motley Rice LLC, Providence, RI. B.A. 1994, Fairfield University; J.D. 2001, Northeastern University School of Law.

Fidelma L. Fitzpatrick - Member, Motley Rice LLC, Providence, RI. B.A. 1991, Canisius College; J.D. 1994, Washington College of Law, American University.

This article is the culmination of more than six years of hard and innovative work by the Rhode Island Lead Trial Team of which we are proud members. Many thanks to Jack McConnell, Bob McConnell, Laura Holcomb, Michael Rousseau, Jonathan Orent, Michaela McInnis, Michael Marran, Karl Smith, Neil F.X. Kelly, Genevieve Allaire-Johnson, Parisa Beers, Neil Leifer and Michael Lesser. Thanks also to former Attorney General Sheldon Whitehouse for courageously initiating this lawsuit on behalf of all Rhode Islanders, to Attorney General Patrick Lynch for confirming the importance of the case by supporting it when he assumed the office, and to Linn Freedman for her efforts in moving the case forward. Finally, we thank our families for their love and support.

State of Rhode Island by rendering a verdict determining that: (1) the presence of lead pigments in paints throughout Rhode Island was a public nuisance; (2) three former manufacturers, suppliers, and promoters of lead pigments - Sherwin Williams, Millennium Holdings, and NL Industries (hereinafter "Lead manufacturers" or "Defendants") – were liable for that public nuisance; and (3) the responsible defendants were required to abate the existing nuisance.²

The factual premise of the State's suit was simple. It recognized that lead poisoning poses a very serious risk to a large percentage of children under six years of age in Rhode Island.³ The primary reason that lead poisoning has such a widespread adverse impact on the health of Rhode Island children is that lead is still present in and on homes and buildings throughout our state despite the fact that it was banned for residential use in the United States in 1978.⁴ Furthermore, the action recognized that the manufacturers of lead products used in paint (hereinafter "Lead") and their trade association were responsible for this harm to Rhode Islanders because they manufactured and promoted Lead for use in and on homes and buildings throughout the State of Rhode Island despite their knowledge of its toxicity.⁵ In short, the Defendants knew Lead was dangerous but continued to sell it in Rhode Island.⁶ In addition, they also failed to warn parents,

1. See Peter B. Lord, *Jurors in Lead-Paint Trial Say They're Proud of Verdict*, THE PROVIDENCE J., Mar. 12, 2006, at B1 (noting that "court officials believe [the trial] was the longest civil trial in state history.")

2. *Rhode Island v. Atl. Richfield Co.*, C.A.No. 99-5226, Jury Verdict Form, Feb. 22, 2006 [hereinafter "Jury Verdict Form"].

3. See R.I. KIDS COUNT, R.I. KIDS COUNT FACT BOOK 66 (2005).

4. See 16 C.F.R. § 1303.1 (2005) ("the Consumer Product Safety Commission declares that paint and similar surface-coating materials for consumer use containing lead or lead compounds . . . are banned hazardous products . . ."). See also Official Morning Trial Transcript at 57, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 14, 2005).

5. Unofficial Afternoon Trial Transcript at 4-5, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 10, 2006) (wherein counsel for the State argued in closing arguments that "these four defendants knew that their lead products were hazardous to kids, they knew that their lead pigment could permanently hurt kids, they knew that it caused brain damage, they knew it killed kids, and they even knew how it happened. And they chose to sell it anyway.").

6. *Id.* at 35-36 (closing argument from State's counsel that "[t]hese defendants I just mentioned [NL, ARCO and Millennium Holdings] were told

homeowners, or the public about the dangers of lead based paint.⁷ For decades, many groups, including State government, homeowners and landlords, parents, and child health and housing advocates, worked to solve the lead poisoning problem in Rhode Island. Through the litigation, after years of bearing the burden of this public health scourge, the Attorney General and the State sought to have the Lead manufacturers share their responsibility for the lead poisoning crisis in Rhode Island.⁸

The legal premise was also simple. The State maintained that the Lead manufacturers had created an environmental

that kids were poisoned by lead in paint, and instead of embracing them, treating them, or offering to remove the toxic substance from their kids homes, they continued to promote their lead without even a whisper of the hazard. They poured more money into pro lead ads and more resources and did the [sic] into the promotion of lead to increase their sales. And all that add layers and layers of paints in our homes today that need to be abated.”) See also Unofficial Afternoon Trial Transcript at 46-48, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 12, 2005); Official Trial Transcript at 94-95, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 13, 2006).

7. Official Morning Trial Transcript at 32-33, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 1, 2005); see also Unofficial Afternoon Trial Transcript at 32, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 10, 2006) (closing arguments from State’s counsel arguing that “The defendants chose, they chose not to educate people about the dangers of their product. The defendants chose not to substitute safe alternatives. The defendants chose not to warn. The defendants chose to recklessly promote, and the defendants chose to downplay the hazards.”)

8. Unofficial Afternoon Trial Transcript at 58, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 10, 2006) (state’s closing argument stating “It’s right, it’s right, Ladies and Gentlemen, for the defendants to assume their responsibility after standing by and watching others carry it for so long.”); Unofficial Morning Trial Transcript at 62, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 9, 2006) (state’s counsel arguing in closing that “[the State, homeowners, parents] are the ones who are responsible for the public health success story. It’s taken care of 75 percent of the children who were still lead poisoned—who were lead poisoned. But 25 percent of children are left. 25 percent of children who were lead poisoned ten years ago are still getting lead poisoned today and that’s not okay. And so what we’re here saying is, it’s these defendants, these defendants should come and help share that responsibility.”); Official Morning Trial Transcript at 97, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 1, 2005) (opening statements from State’s counsel that “[t]he State has taken responsibility. Taxpayers and homeowners have taken responsibility. Parents have taken responsibility. We are that temporary Band-Aid, the cover up, the treatment. But there’s one group that has never contributed to the solution. This trial is about telling the defendants it’s time to help fix the lead paint problem they created once and for all.”)

hazard which they, like all who pollute the environment, should clean up. The case was brought under the common law claim of public nuisance, which imposes liability on those who “unreasonabl[y] interfere[] with a right common to the general public” such as the “the health, safety, peace, comfort or convenience of the general community.”⁹ Public nuisance law allowed the State to pursue the public health remedy of abatement, which “means the public nuisance is to be rendered harmless or suppressed.”¹⁰ Such a remedy would work toward a goal of primary prevention by protecting children before they are poisoned. Leading public health advocates have maintained that this strategy is essential to preventing lead poisoning in the future.¹¹ As the Centers for Disease Control recently concluded, the “answer to lead poisoning is prevention. The alternative of intervening only after a child has been harmed is unacceptable and serves neither the interests of the child nor the property

9. *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980) (quoting *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977)).

10. Official Morning Trial Transcript at 131, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 13, 2006).

11. See U.S. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children 4 (2005) (“Because lead-based paint is the most important source of lead exposure for young children, the first essential element of primary prevention is implementation of strategies to control lead paint-contaminated house dust and soil and poorly maintained lead paint in housing.”); U.S. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children (1991), <http://www.cdc.gov/nceh/lead/Publications/books/plpyc/contents.htm> (“Eradicating childhood lead poisoning requires a long-term active program of primary lead-poisoning prevention, including abatement of lead-based paint hazards in homes, day-care centers, and other places where young children play and live.”); President’s Task Force on Env’tl. Health Risks and Safety Risks to Children, U.S. Dep’t of Hous. and Urban Dev., Eliminating Childhood Lead Poisoning: A Fed. Strategy Targeting Lead Paint Hazards 35 (2000) (“The most important part of the treatment of childhood lead poisoning is the identification and elimination of the sources of lead exposure. In addition, case management services are needed to coordinate interventions related to environmental, housing, medical, and social factors.”); *id.* at 6 (“The benefit of permanently abating lead paint is considerably greater because more children would benefit over a considerable longer time span. The quantified monetary benefits may underestimate the actual benefits because of the many unquantifiable benefits associated with eliminating childhood lead paint poisoning.”)

owner nor future generations of children.”¹²

On February 13, 2006, after nearly ten weeks of receiving evidence, the trial court gave jury instructions which covered the law of public nuisance, among other things.¹³ After eight days of deliberation, the jury returned a unanimous verdict in favor of the State.¹⁴ Post-verdict interviews with the jurors revealed that the process was a perfect example of the way the jury system in the United States is supposed to work: the jurors recounted that they put aside their own philosophical and social beliefs and applied only the facts they heard during trial to the law as it was given to them.¹⁵

The verdict, which was the culmination of the jurors' scrupulous adherence to the law and facts presented in the case, should have put an end to the heated social and political debate that surrounded the suit since its inception in 1999.¹⁶ Instead, the

12. Lead-Based Paint Hazard Reduction and Financing Task Force, U.S. Dep't of Hous. and Urban Dev., *Putting the Pieces Together: Controlling Lead Hazards in the Nation's Hous.* 8 (1993).

13. Official Trial Transcript at 124-32, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 13, 2006).

14. Jury Verdict Form, *supra* note 2.

15. See Lord, *supra* note 1, at B4 (reporting that “the jurors said they carefully followed the judge’s instructions to focus only on the evidence.”). See also Peter Krouse, *Verdict Raises Risk for Paint Companies*, CLEVELAND PLAIN DEALER, Apr. 2, 2006, at A1.

16. Throughout the course of the litigation, the issue drew strong opinions from lead poisoning prevention groups and public health advocates on one hand and groups such as the Chamber of Commerce, local realtors associations, and newspaper editorial writers on the other. See Neil Gendel, Letter to the Editor, *Hit oil companies after paint makers*, THE PROVIDENCE J., Apr. 7, 2006, at B5 (“the people who represent us are catching up to the successors of the manufacturers and sellers of a product [leaded paint] known to be inherently dangerous to our health.”); See Edward Achorn, *Bizarre, Unfair Lead-Paint Ruling*, THE PROVIDENCE J., Apr. 4, 2006 (saying that the verdict “on its face seem unjust”); See Julie Creswell, *The Nuisance That May Cost Billions*, THE NEW YORK TIMES, Apr. 2, 2006, at Sec. 3 (noting that “the jury’s decision was particularly shocking”); See Jack McConnell, *Why judgment on lead paint was right*, THE PROVIDENCE J., Mar. 17, 2006 (“[c]learly, lead poisoning is a public nuisance in Rhode Island”); See Providence Journal Editorial Staff, *Blaming the wrong people*, THE PROVIDENCE J., Mar. 6, 2006 (noting that bad landlords were the real causes of lead poisoning in Rhode Island); See Editorials, *Lead paint decisions show clear reasoning*, PROVIDENCE BUSINESS NEWS, Mar. 6-12, 2006, at 28; See Editorial, *Motley Legal Crew*, WALL STREET J., Feb. 27, 2006, at A14 (“There are so many screwy aspects to this case that it’s hard to know where to

verdict fueled more heated debates, especially in light of the large decrease in the value of the publicly traded Defendants – Sherwin Williams and NL Industries – that accompanied the verdict.¹⁷ Corporate interests have flooded the media with criticism of the jurors’ work, questioning the decision that they reached, the manner in which the trial justice conducted the litigation, and even the wisdom of Rhode Island’s well-established public nuisance law.¹⁸

While this litigation has been described as “historic,”¹⁹ the progress the State of Rhode Island has made against corporations who have successfully immunized themselves from liability for more than twenty years through aggressive litigation strategy and scorched earth discovery²⁰ has also been historic.²¹ While this

begin.”); See Jane E. Brody, *Daily No Longer: Get the Lead Out*, THE NEW YORK TIMES, Jan. 17, 2006, at F6 (“no one at any level of society, not even those with seven-figure incomes, can afford to be complacent about the exposure of children to lead in home and play environments.”)

17. See Creswell, *supra* note 16 (“It was a surprising and devastating verdict for the industry, and the reaction was swift and severe. The stocks of the paint companies tumbled, wiping out billions of dollars in market value that afternoon.”); Peter B. Lord, *3 Companies Found Liable in Lead Paint Nuisance Suit*, THE PROVIDENCE JOURNAL-BULLETIN, Feb. 23, 2006, at A1 (“The value of Sherwin Williams stock began to plummet within moments of the verdict. By the end of the day, the value of the company’s shares dropped by nearly 18 percent—a loss totaling \$1.3 billion. The value of NL Industries stock dropped by 8 percent, for a total loss of \$642 million.”).

18. See Creswell, *supra* note 16 (“The defense lawyers . . . blame what they call Rhode Island’s quirky public nuisance laws. They also contend that the judge overseeing this case had severely limited their ability to gather evidence and present a defense, and say that he may have given erroneous instructions to the jury.”)

19. See Peter B. Lord, *In a Surprise Move, Defense Rests in Lead-Paint Trial*, THE PROVIDENCE J., Jan. 26, 2006, at B1.

20. Throughout the course of preparation for the November 2005 trial, the defendants deposed between 140 and 160 Rhode Island landlords, homeowners, and parents and hundreds of other fact and expert witnesses. In addition, they requested and received millions of pages of documents from Rhode Island departments, such as the Departments of Health, Environmental Management, Administration, Human Services, Office of the Governor, Office of the Attorney General, Business Regulation, and Corrections, and the General Assembly.

21. In 1987, the first case filed against the lead industry was a personal injury suit brought under the theory of market share liability. In *Santiago v. Sherwin-Williams Co.*, the First Circuit declined to overturn the lower court’s ruling that market share liability does not apply in Massachusetts. *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993). Several other

verdict represents a break from the past, the legal and factual premise of the State's case has deep roots in Rhode Island's legal tradition. The Attorney General's responsibility to bring this type of action, as well as the controlling law of public nuisance, is well-grounded in over a century of Rhode Island jurisprudence. The concept of public nuisance is not a landmark or novel cause of action; it is firmly rooted in the common law, with cases in Rhode Island dating back to 1800s.²² Furthermore, the law of Rhode Island in this regard is not idiosyncratic or different from public nuisance law around the country. Not only is there significant historical precedent nationwide for Rhode Island's suit, but other courts around the country that have also considered the applicability of public nuisance law to the lead poisoning crisis and the conduct of these defendants have issued decisions mirroring those of the Rhode Island Superior Court.²³

Part I of this Article provides an extensive overview of the public nuisance claim, explores that claim's deep roots in Rhode Island law and refutes arguments typically made against applying public nuisance to remedy communal harms, such as lead poisoning. Part II discusses the significance of the Rhode Island verdict and discusses the remedies that the State will make on behalf of the Rhode Islanders. Part III provides an overview of successful cases brought in other states by government entities against the Lead defendants. The Article concludes that these companies will no longer be able to use carefully crafted legal defenses to shield themselves from responsibility for the lead poisoning crisis that plagues the country and its children.

similar personal injury suits filed in Massachusetts, Maryland, and Pennsylvania were either voluntarily or involuntarily dismissed in the mid 1990s after the negative ruling in *Santiago*. These rulings, based on principles of product liability law, paved the way for the public nuisance cause of action filed by the State of Rhode Island in October 1999. Other governmental entities have filed similar public nuisance suits against the lead industry since 1999.

22. See *Simmons v. Cornell*, 1 R.I. 519 (1851); *Hughes v. Providence & W.R. Co.*, 2 R.I. 493 (Sept. term. 1853); *State v. Johnson*, 3 R.I. 94 (1855); *State v. Keeran*, 5 R.I. 497 (1858); *Clark v. Peckham*, 10 R.I. 35 (1871); *Thornton v. Grant*, 10 R.I. 477 (1873); *Engs v. Peckham*, 11 R.I. 210 (1875).

23. See *In Re Lead Paint Litigation*, No. A-1946-02T3, 2005 WL 1994172, at *14 (N.J. Super. A.D. Aug. 17, 2005); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W. 2d 888, 893 (Wisc. App. 2004); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 348 (Cal. App. 6 Dist. 2006).

I. RHODE ISLAND'S PUBLIC NUISANCE CLAIM

A. *The State's Claim Is Consistent with Almost a Century of Rhode Island Precedent*

The filing of this litigation in 1999 against the Lead manufacturers was not based on a long shot theory of public nuisance that has never been previously applied to environmental torts affecting the public at large. Public nuisance has long been utilized by the Attorney General to bring suits on behalf of the public to remedy public harms.²⁴

Rhode Island courts have recognized the exhaustive common law authority of the Attorney General to commence suit to redress public harms:

In this state it was long ago settled that '[s]uits 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.²⁵

24. The Rhode Island Attorney General's responsibility to prosecute public nuisances injurious to the health and welfare of residents of the State is consistent with authority from the majority of jurisdictions across the country. See *Lawton v. Steele*, 152 U.S. 133, 136 (1893) (state's police power includes "everything essential to the public safety, health, and morals, and [] justifi[es] the destruction or abatement . . . of whatever may be regarded as a public nuisance"); *People v. Nebbia*, 186 N.E. 694, 699 (N.Y. 1933); *Minnesota ex rel. Humphrey v. Standard Oil Co.*, 568 F. Supp. 556, 563 (D. Minn. 1983) ("the *parens patriae* doctrine allows a state to maintain a legal action where state citizens have been harmed, where the state maintains a quasi-sovereign interest. A state maintains a quasi-sovereign interest [] where the health and well-being of its residents is affected. . .") (internal citations omitted); *State ex rel. Patterson v. Warren*, 180 So.2d 293, 299 (Miss. 1965) (at common law, the attorney general had inherent authority "to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state, and to intervene in all actions which were of concern to the general public"); *Wilsonville v. SCA Services, Inc.*, 426 N.E.2d 824, 837 (Ill. 1981); *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 885 (Pa. 1974) ("The power of the Attorney General to abate public nuisances is an adjunct of the inherent police power of the Commonwealth.").

25. *McCarthy v. McAloon*, 83 A.2d 75, 78 (R.I. 1951) (internal citations omitted). See also *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at *3 (R.I. Super. Apr. 2, 2001) ("the Attorney General's authority in bringing this action is comprised of that which existed at common law, as

Further, the Attorney General's authority to maintain such actions is also derived from the Rhode Island Constitution and the Rhode Island General Laws. The Constitution reserves for the Attorney General all of the duties and powers of the office as they existed at the time the Constitution was adopted.²⁶ Since the power and responsibility to prosecute public nuisance actions existed in the Office of Attorney General prior to the adoption of the Constitution, it remains one of the office's constitutionally proscribed duties.²⁷ Similarly, R.I.G.L. § 42-9-5 provides that the "attorney general shall commence and prosecute to final judgment and execution those other legal or equitable processes, and shall perform those other duties which are or may be required of him or her by law; except insofar as he or she may have been required to act as the legal officer of the department of health, those functions are hereby transferred to the chief counsel of the division of legal services of the department of health."²⁸ Historically, the Attorney General of Rhode Island has prosecuted companies for conduct that has put the health and welfare of the citizens of Rhode Island at risk.²⁹

well as that allowed by statute."); *Pine v. Vinagro*, No. PC 95-4928, 1996 WL 937004, at *20 (R.I. Super. Nov. 4, 1996) ("Among the awesome responsibilities of the Attorney General is that of prosecuting a public nuisance. . .").

26. See *Motolla v. Cirello*, 789 A.2d 421, 424 (R.I. 2002) ("Pursuant to article 9, section 12, of the Rhode Island Constitution, the duties and powers of the Attorney General remained the same under the Constitution as existed at the time the Constitution was adopted, 'or as from time to time may be prescribed by law.'"); *Suitor v. Nugent*, 199 A.2d 722, 723 (R.I. 1964) ("The constitution did not purport to create such an office [of Attorney General], but recognized it as existing and provided for continuance of the powers and duties exercised by its occupant prior to the adoption of the constitution.").

27. See *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2003 WL 1880120, at *3 (R.I. Super. Mar. 20, 2003) (the "common law equity power as to public nuisances [was] vested in the Attorney General even prior to the adoption of our State Constitution."); *Greenough v. Indus. Trust Co.*, 82 A. 266, 266 (R.I. 1912) (recognizing an "information in equity brought in the superior court by the Attorney General, in behalf of the state, to abate a public nuisance. . ."); *Engs v. Peckham*, 11 R.I. 210, 212 (1875).

28. R.I. GEN. LAWS § 42-9-5 (1993). See also R.I. GEN. LAWS § 42-9-6 (1993).

29. See *Pine v. Shell Oil Co.*, No. 92-0346B, 1993 U.S. Dist. LEXIS 21043, at *14 (D.R.I. Aug. 23, 1993) (wherein the Attorney General sued Shell Oil company under public nuisance claim after a service station released hydrocarbons into the environment, polluting ground water); *Wood v. Picillo*,

Under Rhode Island law, public nuisance is defined expansively as “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.”³⁰ An interference can be considered “unreasonable” if:

the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or [] the conduct is proscribed by a statute, ordinance or administrative regulation, or [] 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.³¹

In considering the elements a plaintiff would have to prove to establish that some instrumentality was an unreasonable interference with a right common to the general public, the Rhode Island Supreme Court noted that “liability in nuisance is predicated upon unreasonable injury rather than unreasonable conduct.”³² Therefore, pursuant to Rhode Island precedent, the plaintiff bringing the nuisance claim must “demonstrate the existence of the nuisance, and that injury has been caused by the nuisance complained of.”³³

443 A.2d 1244, 1245 (R.I. 1982) (wherein the Attorney General sued property owners under public nuisance as a result of chemical disposal operations at their property and sought to have them finance cleanup and removal of toxic wastes); *Whitehouse v. New England Ecological Dev., Inc.*, No. 98-4525, 1999 WL 1001188, at *6 (R.I. Super. Oct. 28, 1999) (wherein the Attorney General sued solid waste disposal company under public nuisance alleging that their excessive disposal of out-of-state waste in Rhode Island constitutes a public nuisance).

30. *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980) (citing *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977)).

31. Restatement (Second) of Torts § 821B (1979).

32. *Wood*, 443 A.2d at 1247. See also *Braun v. Iannotti*, 175 A. 656, 657 (R.I. 1934) (“[i]n cases of damages by nuisance it is considered that the injurious consequences resulting from the nuisance, rather than the act which produces the nuisance, is the cause of action. . .”) (internal citations omitted).

33. *Citizens for Pres. of Waterman Lake*, 420 A.2d at 59. (internal citations omitted).

Public nuisance law also addresses the issue of liability. The social impact and the benefits of living in an ordered society require those who do harm that rises to the level of a public nuisance to remediate that harm to the public, even if it that harm was done innocently. To prove liability, the State had to show that the Defendants participated in creating or maintaining the public nuisance, not that lead pigment was a defective product or that Defendants' participation was tortious. Here, the trial court adopted the Restatement (Second) of Torts: "One 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."³⁴

Significantly, liability for a public nuisance is not premised on tort-based notions of fault or negligence. Instead, public nuisance is more akin to a strict or absolute liability claim because it is not fault-based. As the Rhode Island Supreme Court has found:

Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct. Thus, plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury. Generally, this court has not required plaintiffs to establish negligence in nuisance actions.³⁵

34. Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2005 WL 1331196, at *2 (R.I. Super. June 3, 2005); Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2001 WL 345830, at *7 (R.I. Super. Apr. 2, 2001) (quoting RESTATEMENT (SECOND) OF TORTS § 834 (1979)). In addition, the court adopted comment (d) to § 834, which states "when a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is true because to be a legal cause of harm a person's conduct must be a substantial factor in bringing it about." RESTATEMENT (SECOND) OF TORTS § 834 cmt. d (1979). The court further found that "[a]lso of significance is the provision of comment (e) to the effect that if the activity engaged in lead to the creation rather than to the maintenance of the nuisance, the actor who carried on the activity '... or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm.' This is so even after he has withdrawn from the activity and even if he is not in a position to stop the harm, or to abate the condition." *Lead Indus. Ass'n*, 2005 WL 1331196, at *2. See also RESTATEMENT (SECOND) OF TORTS, § 834 cmt. e (1979).

35. *Wood*, 443 A.2d at 1247-48 (internal citations omitted). See also New

This important distinction between nuisance and negligence liability underscores the inapplicability of product liability concepts – both affirmative requirements and defenses thereto – to public nuisance suits.

The Rhode Island Supreme Court has recognized for almost a century that public nuisance provides a cause of action in environmental contamination and pollution cases. For example, in *Payne & Butler v. Providence Gas Co.*, our highest court considered whether a manufacturer that polluted public and/or private waters could be found liable for creating a public nuisance.³⁶ In concluding the manufacturer could be found liable, the court stated:

[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, provided he can trace to its origin the noxious substance whereby he is damaged.³⁷

Furthermore, in 1982, the Rhode Island Supreme Court issued a seminal opinion considering the applicability of public nuisance to a modern environmental contamination and pollution case.³⁸ *Wood v. Picillo* set the tone for the application of public

York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985) (finding that liability for public nuisance exists “irrespective of negligence or fault”); *United States v. Hooker Chemicals & Plastics Corp.*, 722 F. Supp. 960, 968 (West. Dist. N.Y. 1989) (“fault is not an issue, the inquiry being limited to whether the condition created, not the conduct creating it, is causing damage to the public”) (quoting *State v. Schenectady Chemicals, Inc.*, 459 N.Y.S.2d 971, 979 (N.Y. Sup. Ct. 1983)); *Concerned Citizens of Bridesburg v. City of Philadelphia*, 643 F. Supp. 713, 726 (E.D. Pa. 1986) (“At common law, neither individuals nor municipalities have the right to maintain for any period of time activities that constitute a public nuisance, irrespective of lack of fault or due care.”); *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) (public nuisance “is not centrally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded.”).

36. 77 A. 145, 151 (R.I. 1910).

37. *Id.* See also *Braun v. Iannotti*, 189 A. 25 (1937) (public nuisance created by emitting smoke and soot from a smokestack).

38. See Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 214-15 (1996) (recognizing Rhode Island was one of the first states to uphold a public nuisance claim in a modern hazardous waste contamination case).

nuisance law to environmental hazard cases.³⁹ In *Wood*, the Attorney General commenced a private and public nuisance suit against certain defendants who owned and maintained a hazardous waste dump on their property.⁴⁰ The Rhode Island Supreme Court held that the “essential element of an actionable nuisance is that persons have suffered harm or are threatened with injuries that they ought not have to bear.”⁴¹ In applying this public nuisance law to the facts of the case, the Court upheld the trial court’s determination that the defendants’ conduct constituted a public nuisance because their storage of the hazardous and toxic waste on the defendant’s private property posed a threat to the health of both aquatic wildlife and humans.⁴²

Public nuisance law in Rhode Island, with its rich, well-reasoned decisions and clear holdings with respect to environmental torts, was clearly applicable to the factual scenario of the serious environmental and health problem facing all Rhode Islanders, especially the state’s children, from lead poisoning. Moreover, the unique and powerful authority entrusted to the Attorney General to bring nuisance suits to prosecute threats and injuries against the public health, safety and welfare predated the adoption of the Rhode Island Constitution. The Attorney General can therefore draw from this authority to support the state’s public nuisance claim against the Lead manufacturers.

B. Legal Challenges to a Modern Application of Public Nuisance To Lead Pigment

Despite the seemingly simple and straightforward pronouncement of public nuisance law in Rhode Island, Defendants raised a series of seemingly endless questions concerning the bounds of the public nuisance law. First, the Lead manufacturers raised a host of questions at the outset of the litigation on motions to dismiss, urging the trial court to dismiss the complaint for following reasons: (1) these Defendants cannot be liable for a public nuisance because they are not in current control of the property upon which the nuisance is found; (2)

39. 443 A.2d 1244, 1245 (R.I. 1982).

40. *Id.*

41. *Id.* at 1247-49.

42. *Id.* at 1248.

manufacturers of products cannot be held liable for a public nuisance; and (3) lead poisoning is a private, not a public, issue.⁴³ The trial court rejected each of these arguments, permitting the State's claims to go forward.⁴⁴

Following failed attempts to dismiss the case at the pleading stage, the Defendants also engaged in significant motion practice throughout the litigation aimed at aborting the Attorney General's suit. Though the legal arguments were ultimately unsuccessful, they provide an interesting framework for considering the boundaries of public nuisance law and its interplay with products liability law. In addition to those identified above at the pleading stage, Defendants presented the following issues to the trial court during the course of the trial: (1) whether the Rhode Island Lead Poisoning Prevention Act pre-empts the Attorney General's constitutional, statutory and common law authority to bring a public nuisance action; (2) whether the State is required to identify the presence of particular lead pigment on particular walls to succeed in its public nuisance claim; and (3) whether a manufacturer of a legal product can be held liable for a public nuisance.

1. *The Defendants' Motion to Dismiss*

In lengthy written and oral arguments, the Defendants raised a host of issues seeking to dismiss the complaint in its entirety, including the public nuisance claim. When considered in light of prevailing public nuisance law, the trial court's rejection of the defendants' arguments against the State's public nuisance claim is easily understood. First, public nuisance law in Rhode Island and throughout the country squarely holds that those who either created or contributed to the creation of a public nuisance may be liable for that nuisance despite the fact that they are not in physical control of the real property in question. In *Friends of Sakonnet v. Dutra*, the United States Federal District Court for the State of Rhode Island found that Rhode Island law does not bar a public nuisance claim against a defendant that no longer controls the property in question:

This Court has discovered no Rhode Island (or other)

43. *State v. Lead Ind. Ass'n*, 2001 WL 345830 (R.I. Super. Apr. 2, 2001).

44. *Id.*

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 . . . against one who is alleged to have caused damages by a nuisance even if that person no longer controls the alleged nuisance.⁴⁵

The Rhode Island Supreme Court and Rhode Island's federal district court have applied this principle to numerous public nuisance cases over the last century, properly concluding that a defendant's creation of a public nuisance renders him liable for the resulting damages regardless of current control of the nuisance.⁴⁶ For example, as early as 1910, the Rhode Island Supreme Court recognized that a manufacturer of chemicals could be held liable under public nuisance when their chemicals contaminated either private or public waters in Rhode Island.⁴⁷ Although the chemical manufacturer was not in control of the private or public waters it contaminated, the court found the manufacturer liable for creating a public nuisance.⁴⁸ Rhode Island's application of public

45. *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990) (internal citations omitted).

46. Similarly, other courts have established public nuisance liability in cases where a defendant created a nuisance on either public or private property not controlled by the defendant. *See, e.g., Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 1222 (D. Mass. 1986) (groundwater contamination); *Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 775 (9th Cir. 1998), *cert. denied*, 525 U.S. 822 (groundwater contamination); *Branch v. W. Petroleum, Inc.*, 657 P.2d 267 (Utah 1982); *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55, 57 (D. Mass. 1999); *B&D Molded Products v. Vitek Research Corp.*, No. 970060362S, 1998 Conn. Super. LEXIS 2363, at *1 (Conn. Super. Aug., 17 1998); *N.J. Dep't of Env'tl. Protection and Energy v. Gloucester Env'tl. Mgmt. Services*, 821 F. Supp. 999, 1012-13 (D.N.J. 1993); *North Carolina ex rel. Howes v. W.R. Peele*, 876 F. Supp. 733, 737 (E.D.N.C. 1995).

47. *Payne & Butler v. Providence Gas. Co.*, 77 A. 145, 170 (R.I. 1910).

48. *Id.* *See also Friends of the Sakonnet*, 738 F. Supp. at 633-34 (finding defendants who contaminated the waters of Rhode Island liable under public nuisance despite the fact that the defendants exercised no control over the polluted waters); *Pine v. Shell Oil Co.*, 1993 U.S. Dist. LEXIS 21043, at *14-15 (finding Shell Oil created a nuisance by releasing hydrocarbons into the ground despite the fact that Shell Oil did not control the land it had polluted);

nuisance liability to those who do not currently control the real property upon which the nuisance is located is consistent with the law across the country.⁴⁹

Second, public nuisance law simply does not grant blanket immunity to product manufacturers. Rather, under Rhode Island law, a public nuisance includes “*behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.*”⁵⁰ Further, public nuisance “[l]iability is

Wood v. Picillo, 443 A.2d 1244, 1248 (R.I. 1982) (holding defendants created a public nuisance by allowing chemical wastes to contaminate surrounding property despite the fact that defendants did not control the property that had become contaminated).

49. According to 58 Am. Jur. 2d *Nuisances* § 116 (1999):

[a]s a general rule, one who creates a nuisance is liable for the resulting damages, and ordinarily his liability continues as long as the nuisance continues. Furthermore, *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 (emphasis added).*

See, e.g., *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1997 U.S. Dist. LEXIS 8551, at *13 (N.D. Ill. June 13, 1997) (“under Illinois law, liability [for a public nuisance] may be established by demonstrating that the defendant was the creator of the nuisance”); *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 741 (E.D.N.C. 1995) (“The person who creates the nuisance is liable and that liability continues as long as the nuisance exists.”); *N.J. Dep’t of Env’tl. Prot. & Energy v. Gloucester Env’tl. Mgmt. Services*, 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.”); *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)); *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.*, 221 Cal. App. 3d 1601, 1619-20 (Cal. Ct. App. 1990) (quoting *Hardin v. Sin Claire*, 115 Cal. 460, 463 (1896) (“any person creating or assisting to create and maintain the nuisance was liable to be sued for its abatement and for damages”)); *Phila. Elec. Co. v. Hercules, Inc.*, 587 F. Supp. 144, 147-48 (E.D. Pa. 1984), *rev’d on other grounds*, 762 F.2d 303 (3d Cir. 1985); *Duncan v. Flagler*, 132 P.2d 939, 940 (Okla. 1942) (“the 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) (“the party or parties who create or assist in [the creation of a nuisance] . . . [are] responsible for the ensuing damages”); *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.*, 712 P.2d 914, 920 (Ariz. 1985).

50. *Citizens for the Pres. of Waterman Lake*, 420 A.2d at 59 (emphasis

imposed . . . in those cases in which the harm or *risk to one is greater than he ought to be required to bear* under the circumstances.”⁵¹ No mention is made anywhere in Rhode Island law that product manufacturers are immune from public nuisance liability.⁵² As such, Defendants’ arguments for immunity do not

added).

51. *Id.* (emphasis added).

52. Case law from around the country reveals numerous instances in which courts have found that manufacturers of hazardous products are liable under nuisance law for injury caused by their products when the manufacturers’ conduct created that public nuisance. *See* Chase Manhattan Bank, N.A. v. T&N PLC, 905 F. Supp. 107, 126 (S.D.N.Y. 1995) (finding that the plaintiff could maintain an action for public nuisance against the manufacturer of an asbestos fire-proofing spray); Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171, 177 (Iowa 1984) (finding the manufacturer of a computer system that emitted radiation materially participated in the creation of the nuisance and could be held liable); New York v. Fermenta ASC Corp., 616 N.Y.S.2d 701 (Sup. Ct. 1994) (finding the manufacturer of a pesticide could be liable under public nuisance for contamination of groundwater caused by the product) *See Alaska v. Philip Morris*, Case No. 1JU-97-915CI, Transcript of Oral Argument at 5 (1st Jud. Dist. Juneau Apr. 29, 1998) (Oct. 9, 1998) (the court deciding the State of Alaska had stated a claim for public nuisance by alleging “defendants targeted and addicted minors, denied that nicotine is addictive while manipulating nicotine levels to promote addiction, and lied about the ill-effects of tobacco while suppressing safer products.”); *Wisconsin v. Philip Morris*, Case No. 97-CV-328, Decision & Order at 22 (Branch 11 Mar. 17, 1998) (finding the tobacco defendants “interfered with the public’s right to be free of unwarranted injury and illness, and have directly caused the State to incur substantial costs in order to lessen the negative effects of tobacco-related health problems. . . . Accordingly, this [public nuisance] claim is necessary . . . to provide compensation for economic injuries.”); *Oklahoma v. R.J. Reynolds*, No. CJ-96-1499, Transcript at 171 (Cleveland Co. July 7, 1998) (“to the extent that the jury finds wrongful acts such as targeting and addicting minors, denying that nicotine is addictive, secretly manipulating nicotine levels to promote addiction, misdirecting public opinion, misdirecting advertising, lying about ill effects of tobacco, and suppressing the promotion of safer products, to the extent the state can establish that and a jury finds that those wrongful acts did occur, that can rise to the level of public nuisance in Oklahoma.”); *Montana ex rel. Mazurek v. Philip Morris, Inc.*, No. CDV97-306, Memorandum & Order (1st Jud. Dist. Ct. Sept. 22, 1998); *Iowa v. Philip Morris, Inc.*, Co. CL 71048, Ruling (Dist. Ct. Aug. 26, 1997); *Puerto Rico ex rel. Rossello v. Brown & Williamson*, No. 97-1910JAF, Opinion and Order (D.P.R. June 3, 1998); *Oregon v. Philip Morris*, No. 9706 04457, Amended Order (Cir. Ct. July 6, 1998); *Massachusetts v. Philip Morris*, No. 96-148, Transcript (Super. Ct. Oct. 22, 1997); *New Mexico v. The Am. Tobacco Co.*, No. SF 97-1235 (C), Decision (1st Jud. Cir. Ct. Feb. 3, 1998); *Mississippi ex rel. Moore v. Am. Tobacco Co.*, No. 94-1429, Judgment (Ch. Ct. Feb. 21,

apply in the public nuisance realm.

Finally, the Defendants' attempts to have the public nuisance count dismissed by claiming the State is seeking damages for interference with private rights, as opposed to public rights, are vanquished by prior precedent from Rhode Island courts. That prior precedent established that the presence of Lead in homes in the State interferes with public rights and, therefore, is actionable as a public nuisance. In *Pine v. Kalian*,⁵³ both the trial court and the Rhode Island Supreme Court found that the presence of lead paint in a rental property was a public nuisance "constitut[ing] a continuing, persistent hazard of lead poisoning to members of the public who occupy such premises, especially to children of tender years."⁵⁴ Implicit in this decision is the determination that lead poisoning and its hazards are issues of concern to the public health, safety and welfare, and therefore, are actionable under a public nuisance claim.⁵⁵

1995).

53. In *Pine v. Kalian*, the Attorney General filed a complaint sounding in public nuisance against a landlord seeking the abatement of lead-based paint from his rental property. 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." No. 96-2673, 1998 WL 34090599, at *1 (R.I. Super. Feb 2, 1998). Accordingly, the court concluded that "[t]he 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." *Id.* at *2 (emphasis added). 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." *Pine*, 723 A.2d at 805. This conclusion is consistent with almost a century of Rhode Island precedent concerning the definition and scope of public nuisance law and is dispositive of the public nuisance count in this action.

54. *Kalian*, 723 A.2d at 805.

55. In addition, courts from around the country have determined that a nuisance can be both private and public and, when the aggregate of private injuries becomes so large, the issue becomes one of public concern actionable under public nuisance. See *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." (citation omitted)); *Cline v. Franklin Pork, Inc.*, 361

2. The State's Lead Pigment Suit and the Rhode Island Lead Poisoning Prevention Act

The Rhode Island General Assembly enacted the Lead Poisoning Prevention Act (hereinafter LPPA) in 1991 in response to the staggering rates of childhood lead poisoning in our state. The Legislature found that:

(1) Environmental exposures to even low levels of lead increase a child's risks of developing permanent learning disabilities, reduced concentration and attentiveness and behavior problems, problems which may persist and adversely affect the child's chances for success in school and life.

(2) Childhood lead poisoning is caused by environmental exposure to lead. The most significant sources of environmental lead are lead based paint in older housing and house dust and soil contaminated by this paint.

(3) Childhood lead poisoning is completely preventable.

(4) Rhode Island does not currently have a comprehensive strategy in place for preventing childhood lead poisoning. As a result, tens 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.

(5) Childhood lead poisoning is dangerous to the public health, safety, and general welfare of the people and necessitates excessive and disproportionate expenditure of public funds for health care and special education, causing a drain upon public revenue.

(6) The enactment and enforcement of this chapter is

N.W.2d 566 (Neb. 1985); *New York v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40, 43 (Sup. Ct. 1978) ("Public also is the nuisance committed in such a place and in such manner that the aggregation of private injuries become so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution."); *City of Va. Beach v. Murphy*, 389 S.E.2d 462, 463 (Va. 1990).

essential to the public interest. It is intended that the provisions of this chapter be liberally construed to effectuate its purposes.

(7) The magnitude of the childhood lead poisoning in Rhode Island's older homes and urban areas is a result of approved use of lead based materials over an extended period in public buildings and systems and private housing that a comprehensive approach is necessary to alleviate the cause, identify and treat the children, rehabilitate the affected housing where young children reside, and dispose of the hazardous material. Rhode Island presently does not have the public or the private resources to handle the total problem, requiring prioritizing on a need basis.⁵⁶

Furthermore, "the express purpose of the LPPA is 'to protect the public health and the public interest by establishing a comprehensive program to reduce exposure to environmental lead and thereby prevent childhood lead poisoning, the most severe environmental health problem in Rhode Island.'"⁵⁷ Finally, the LPPA provides that "[t]he provisions of this chapter shall be liberally construed and shall be held to be in addition to, and not in substitution for or a limitation of, the provisions of any other law."⁵⁸

In another effort to shield themselves from liability for the public nuisance, the Defendants argued at numerous times during the litigation that the existence of the LPPA and its governance of lead poisoning prevention and abatement interferes with or supersedes the Attorney General's common law public nuisance claim. The trial court rejected this argument for several reasons.⁵⁹ Specifically, the trial court found:

[L]anguage [of the LPPA] mandated the law be liberally interpreted so as to permit the LPPA to co-exist (consistent with its terms) with common law equity power

56. R.I. GEN. LAWS § 23-24.6-2 (1986).

57. *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at *5 (R.I. Super. Apr. 2, 2001) (quoting R.I. GEN. LAWS § 23-24.6-3).

58. R.I. GEN. LAWS § 23-24.6-25 (1986).

59. *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2003 WL 1880120, at *2 (R.I. Super. Mar. 20, 2003).

as to public nuisances vested in the Attorney General even prior to the adoption of our State Constitution. The Court further notes that the provisions of LPPA clearly in the first instance were intended by the General Assembly to protect the health of children and that its provisions almost exclusively deal with owners of dwellings, dwelling units or premises and not in any way with manufacturers of lead pigment used in paint and coatings or, indeed, with manufacturers or vendors of paint or paint products. It, of course, is the alleged manufacturers of such pigment who, here, are the Defendants.⁶⁰

This holding is in concert with the great weight of authority in Rhode Island, where courts have frequently determined that a condition can be regulated by statute and also declared to be a common law public nuisance.⁶¹

3. Product Identification Is Not Required to Bring a Public Nuisance Claim

Defendants also sought to have the public nuisance claim dismissed wholesale, arguing that the public nuisance law requires that, as a matter of law, the State prove the existence of each Defendant's lead pigment in particular homes and buildings throughout the State of Rhode Island. Stated differently, the question was whether the conduct of these Defendants in manufacturing, marketing and promoting Lead, both individually and collectively, was sufficient to establish liability for creating a

60. *Id.* at *3. See also *Lead Indus. Ass'n*, 2001 WL 345830, at *5 ("the express purpose of the LPPA is 'to protect the public health and the public interest by establishing a comprehensive program to reduce exposure to environmental lead and thereby prevent childhood lead poisoning, the most severe environmental health problem in Rhode Island.' G.L. 1956 § 23-24.6.3. Accordingly, the absence of express authorization in the statute does not constitute a separation of powers bar which absolutely precludes the Attorney General from bringing this type of action.").

61. See *State v. Carpiolato*, 605 A.2d 498, 498 (R.I. 1992) (sign maintenance statute); *Bierman v. Shookster*, 590 A.2d 402, 403 (R.I. 1991) (traffic control signal maintenance statute); *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 56 (R.I. 1980) (Fresh Water Wetlands Act); *Berberian v. Avery*, 205 A.2d 579 (R.I. 1964) (Mosquito Abatement Act); *Pine v. Kalian*, No. 96-2673, 1998 WL 34090599, at *3 (R.I. Super. Feb. 2, 1998), *aff'd*, 723 A.2d 804 (R.I. 1998).

public nuisance in the State of Rhode Island or whether lack of product identification was fatal to the case.

Defendants urged the trial court to incorporate the requirements and holding of *Gorman v. Abbott Laboratories*.⁶² In that case, the Supreme Court considered personal injury cases against multiple drug manufacturers.⁶³ The plaintiff was unable to identify the manufacturer of the particular drug she ingested, and therefore relied on the market-share theory of liability to escape traditional product identification requirements in product liability suits.⁶⁴ The *Gorman* court rejected the market-share doctrine⁶⁵ and instead required the identification of a specific defendant in order to establish liability.⁶⁶ The lead manufacturers argued that the *Gorman* court's product manufacturer identification requirement should be applied to Rhode Island's public nuisance claim, requiring the State to identify with particularity the manufacturer of the lead pigment in each house in Rhode Island.⁶⁷

62. 599 A.2d 1364 (R.I. 1991).

63. *Id.*

64. *Id.*

65. *Id.* The market share doctrine was recognized by California in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), in response to the causation problems that women injured by their mothers' ingestion of the drug DES during pregnancy were having in seeking a remedy against the manufacturers of that drug. These women could not identify the specific manufacturer of the DES that their mothers had taken because the DES pills from one manufacturer were identical to those of another manufacturer. *Id.* at 936. Through the market share doctrine, the California court relaxed the requirement that an injured party must prove which manufacturer produced the actual DES pill their mother took by allowing her to bring into the litigation the manufacturers who represented the market for DES at the time her mother may have ingested DES. *Id.* at 937. Once those manufacturers were in suit, the burden shifted to them to prove that they did not manufacture the product that caused the harm. *Id.* If liability were found, then damages against that manufacturer would be apportioned in accordance with its share of the market. *Id.*

66. *Gorman*, 599 A.2d at 1364.

67. The market share defense has been effective in personal injury suits against the lead industry. Because it is impossible for a lead poisoned child to identify the particular manufacturer of the lead pigment he or she ingested, numerous courts have rejected their personal injury claims and left lead poisoned children with no redress against the lead manufacturers. *See supra*, note 66. However, in July 2005, the Wisconsin Supreme Court reversed the tide of dismissals, adopted a modified market share theory of liability called risk-contribution, which allows individual lead poisoned

The trial court ultimately rejected the Defendants' argument, focusing its analysis on the distinctions between products liability law and public nuisance law. First, the court had long recognized that the condition alleged to be a public nuisance is the *collective* presence of lead pigment in paints throughout Rhode Island. As the court stated:

[t]he issue... was not as to if such pigment in any particular building or group of buildings (however numerous) constituted a public nuisance, but rather whether the cumulative effect of all such pigment in such properties constitutes a single public nuisance.⁶⁸

Indeed, it ruled that "property specific evidence is irrelevant in connection with the issues of whether the cumulative effect of such pigment in all such buildings, (that is to say buildings containing lead pigment in paint or coating), was a public nuisance . . ."⁶⁹

Relying on two of its previous decisions in this litigation,⁷⁰ the trial court then concluded that the product identification requirements enunciated in *Gorman* were inapplicable to the State's public nuisance claim. As the court stated, "[f]irst, and of some significance the present case is *not* a products liability case . . ."⁷¹ It then explained:

During the course of argument, defendants seemed to read into *Gorman* and the other cases they cited, a requirement for product identification in this public nuisance case, a requirement that this Court does not find. This is not a case where it is alleged that one defendant out of a number of defendants (but plaintiff cannot tell which) made a product causing injury to a single individual but rather it is a case where it is

children to sue the Lead defendants absent proof of the particular manufacturer of lead pigment that he ingested. See *Thomas ex. rel. Gramling v. Mallett*, 701 N.W.2d 523 (2005).

68. *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2004 WL 2813747, at *1 (R.I. Super. Nov. 9, 2004).

69. *Id.* at *2.

70. See *Rhode Island v. Lead Indus. Ass'n*, 2001 WL 345830, at *7 (R.I. Super. Apr. 2, 2001); *Lead Industries Ass'n*, 2004 WL 2813747, at *1.

71. *Rhode Island v. Lead Indus. Ass'n*, 2005 WL 1331196 at *2 (June 3, 2005).

claimed that each of the defendants through their own separate actions or conduct was a substantial cause of the massive public nuisance and harms and/or injuries resulting therefrom. What the Court does find is that if what plaintiff contends for, that is to say that each defendant's conduct or activities were a proximate cause of the public nuisance alleged, the cumulative effect of lead pigment in buildings throughout the state (sometimes stated as the collective presence of lead pigment in buildings throughout the state of Rhode Island), and of injury resulting therefrom then indeed liability of the defendants may be found. In order to prove that causation, defendants must establish that each defendant's conduct was a substantial cause of the public nuisance and that the public nuisance was a substantial factor in causing injury to the public which injury is subject of this action.⁷²

Having rejected Defendants' arguments, the court recognized the clear distinction between products liability law and public nuisance law. It is noteworthy that concepts from each are not easily interchangeable, and that strict adherence to the law of public nuisance requires an analysis distinct from product liability concepts.⁷³

4. *Legality of Product and Actions of Others*

In addition, the Defendants urged both the trial court and the jury to reject the public nuisance claim for two reasons: (1) Lead pigment was a legal product at the time it was applied to the walls of Rhode Island homes and buildings; and (2) the subsequent actions of homeowners and landlords served to immunize the Defendants from public nuisance liability. These arguments failed at the motion to dismiss stage, summary judgment stage and failed to convince the jury at trial.

First, established law holds that it is irrelevant to a nuisance cause of action that the conduct complained of may be legal or

72. *Id.*

73. Hearing Transcript at 23, *Rhode Island v. Lead Indus. Ass'n*, D.A. No. 99-5226 (Oct. 5, 2005) (granting plaintiff's motion to strike Defendants' product liability affirmative defenses to the State's complaint)

even appropriate and necessary in a certain circumstance. In the words of the United States Supreme Court, “[n]uisance may be merely a right thing in a wrong place,—like a pig in the parlor instead of the barnyard.”⁷⁴ Other courts have subsequently agreed, holding that the fact that a defendant’s conduct is otherwise lawful does not preclude liability for public nuisance.⁷⁵

Similarly, the subsequent actions of anyone – even homeowners and landlords – do not immunize Lead manufacturers from liability. Instead, a jury must consider whether those actions are superseding, intervening causes of the harm caused by the presence of Lead. Legally, superseding/intervening cause is often utilized by negligent parties to insulate them from liability for those negligent acts. The burden of proving the defense is on the defendant, who must demonstrate that the “intervening” actor: (1) was negligent, (2) his negligence was the proximate cause of the plaintiff’s harm and (3) his negligence was *not* a reasonably foreseeable consequence of defendant’s original negligence.⁷⁶

The third element of foreseeability is the lynchpin of the superseding/intervening cause defense. Where, as here, a party seeks to sever the proximate cause chain between its conduct and the resulting injury, that party must demonstrate that the intervening act was not foreseeable and has rendered its original acts totally inoperable:

[A]n intervening act will not insulate a defendant from liability if his negligence was a concurring proximate cause which had not been rendered remote by reason of the secondary cause which intervened. The test for remoteness is whether the intervening act could reasonably have been foreseen as a natural and probable

74. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

75. *See City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004); *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003); *United States v. Reserve Mining Co.*, 394 F. Supp. 233 (D. Minn. 1974); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Dist. Ct. App. 2006).

76. *See Pantalone v. Advanced Energy Delivery Sys., Inc.*, 694 A.2d 1213, 1215 (R.I. 1997).

result of the original act of negligence of the defendant. If it could have been so foreseen, the intervening negligence is not so remote as to prevent the original act from being considered at law as merely a concurring cause of the injury.⁷⁷

Furthermore, “[i]t is well settled that for an independent intervening cause to replace a defendant’s original negligence as the proximate cause of an accident, the original negligent conduct must have become *totally inoperative* as a cause of the injury.”⁷⁸ On the other hand, an *unforeseeable* intervening cause will break the causal chain and allows the original wrongdoer to escape liability. In such cases, “the intervening. . . act becomes the sole proximate cause of the plaintiff’s injuries.”⁷⁹

Courts considering the affirmative defense of superseding/intervening cause in the context of a public nuisance claim have concluded:

Intervening actions between a defendant and the harm suffered by the public, even multiple or criminal actions taken by third parties or occurring naturally, do not break the chain of causation if a defendant could have expected their nature and effect. . . . [T]he causal chain is not broken even where it is the third party that is the most immediate causal event of the injury to the public.⁸⁰

77. *Roberts v. Kettle*, 356 A.2d 207, 215 (R.I. 1976). See also *Aldcroft v. Fid. & Cas. Co.*, 259 A.2d 408 (1969); *Almeida v. Town of N. Providence*, 468 A.2d 915, 917 (R.I. 1983) (stating that if the intervening cause was foreseeable to the original wrongdoer, then the “causal connection remains unbroken” and liability remains with the original wrongdoer); *Mahogany v. Ward*, 17 A. 860, 861 (R.I. 1889) (“[I]f the intervening act is such as might reasonably have been anticipated as the natural or probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable.”); *Walsh v. Israel Couture Post*, No. 2274 V.F.W. of the U.S., 542 A.2d 1094, 1097 (R.I. 1988) (“[A]n intervening act . . . will not insulate an original tortfeasor if it appears that such intervening act is a natural and probable consequence of the initial tortfeasor’s act.”).

78. *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827, 830 (R.I. 1986) (citing *Roberts*, 356 A.2d 207) (emphasis added).

79. *Almeida*, 468 A.2d at 917.

80. *N.A.A.C.P.*, 271 F. Supp. 2d at 494.

Instead, liability for nuisance will lie when the acts or omissions of the Defendants “remain[] the dominant and relevant fact[s] without which the public nuisance would not have resulted where and under the circumstances it did,” irrespective of intervening actions by third parties.⁸¹

In conformity with this law, the trial court instructed the jury:

[i]n determining whether the acts of others constitute an intervening superseding cause, you must consider whether the conduct of the defendants, or any of them, created or increased a foreseeable risk of harm through the intervention of such others' acts. If defendants' conduct created or increased the foreseeable harm, risk of harm, through the intervention of the subsequent actor, then the intervening acts cannot be said to be an intervening superseding cause and defendants will not have proved their assertion.⁸²

The court also instructed the jury:

The act or failure to act by a defendant need not be intentional or negligent to impose liability for creating a public nuisance. Rather, the fact that the conduct which caused the public nuisance otherwise is lawful or has not been made unlawful does not preclude liability where that conduct nevertheless results in the public nuisance.⁸³

Jurors reported that these two issues – legality of the product and the conduct of others – were factors in their decision. In fact, for some, Defendants' arguments that the product was legal and that the faults lie with landlords and homeowners had social and

81. *Commonwealth v. Barnes & Tucker*, 353 A.2d 471, 479 (Pa. Commw. Ct. 1976), *aff'd* 371 A.2d 461 (Pa. 1977). *See also* *United States v. Hooker Chemicals and Plastics Corp.*, 722 F. Supp. 960, 968 (W.D.N.Y. 1989) (rejected argument that causal connection between defendant's conduct and the nuisance “was broken by independent acts of other parties which constituted superseding causes” when defendant's conduct “remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did.”).

82. Official Trial Transcript at 130-31, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Feb. 13, 2006).

83. *Id.* at 129.

philosophical appeal.⁸⁴ But the justice system prevailed, and jurors reported that they were able to put aside their philosophical or political biases and apply the law to the facts.⁸⁵ When applying the law regarding superseding/intervening cause, the jurors ultimately “agreed that regardless of what the landlords did, the harm began with the companies distributing toxic paints.”⁸⁶ On the issue of the legality of the product, jurors also reported that they strictly adhered to the law as enunciated by the trial court. One juror who was affected by the argument reported:

after rereading the judge’s instructions, it became clear to him that the paint – even if applied decades ago – had caused harm and that it had interfered with the rights of children to be safe in their own homes. The fact that the pigment makers had not broken any laws did not preclude a finding of liability, according to the judge, nor did the contributions of lousy landlords to the problem.⁸⁷

Despite all of these challenges to the modern application of public nuisance law to the situation created and maintained by the Defendants in Rhode Island because of their manufacture, sale, promotion and marketing of lead, the State successfully presented its case to the jury.

II. THE SIGNIFICANCE OF THE JURY’S VERDICT FOR THE STATE’S CLAIM

84. See Krouse, *supra* note 15, at A1 (noting that one of the jurors originally “wanted to let the paint-company defendants off the hook. He wanted to blame slumlords for the dangers of lead paint in Rhode Island homes, not the firms that prosecutors claim made the pigment decades ago.”); Lord, *supra* note 1, at B1 (reporting that one juror said that “[s]ome of us thought a big part of the problem was poor maintenance” and another said that “[m]ost of use wanted to blame the landlords.”).

85. One law professor who commented on the trial to the *Cleveland Plain-Dealer* questioned “how lead paint can be ruled a public nuisance without taking into account the lack of home maintenance that contributes to the problem.” Krouse, *supra* note 15, at A1. However, the record reveals that in this case, the lack of maintenance defense was presented to the jury, covered in the jury instructions and ultimately rejected by the jury because it did not satisfy the legal requirements of a superseding, intervening cause affirmative defense. Thus, any such criticism of the verdict is without foundation in facts of this case and is best attributed to the spin generated by the defendants after the verdict.

86. Lord, *supra* note 1, at B4.

87. Peter Krouse, *Verdict Raises Risk for Paint Companies*, THE CLEVELAND PLAIN-DEALER, Apr. 2, 2006 at A1.

AGAINST THE LEAD PAINT MANUFACTURERS

Armed with this public nuisance law, the jury sifted through the testimony of twelve witnesses and numerous documents admitted into evidence over eight days. Included among the witnesses were four medical/scientific experts,⁸⁸ three State public health experts or officials,⁸⁹ three historians,⁹⁰ and two experts in

88. The four medical/scientific experts were Dr. Philip Landrigan, Ms. June Tourangeau, Dr. Michael Shannon, and Dr. James Girard.

Dr. Philip Landrigan received his M.D. from Harvard University in 1967. Dr. Landrigan has been at the forefront of childhood lead poisoning research and prevention efforts for over thirty years. During this time he has worked at or consulted with the United States Public Health Service, the Centers for Disease Control and the Environmental Protection Agency on issues related to childhood lead poisoning. Dr. Landrigan is board certified in Pediatrics, Preventative and Occupational & Environmental Medicine and is a member of the American Academy of Pediatrics, the American Medical Association and the American Public Health Association. Dr. Landrigan has conducted extensive research and written numerous peer reviewed articles on the subject of childhood lead poisoning.

Ms. June Tourangeau is a Licensed Practical Nurse who has served lead poisoned children in Rhode Island since 1978. Tourangeau is also a Licensed Lead Inspector and Certified Lead Technician. Tourangeau developed the model childhood lead poisoning case management system for the State of Rhode Island and has investigated hundreds of homes and hundreds of lead poisoning cases over the past decade.

Dr. Michael Shannon holds an M.D. from Duke University, an M.P.H. from the University of North Carolina and is board certified in pediatrics, emergency medicine, and medical toxicology. Dr. Shannon currently serves as Chief of Emergency Medicine at Boston Children's Hospital and as Chair of the American Academy of Pediatrics Committee on Environmental Health. During his illustrious career, Dr. Shannon has conducted extensive research and authored many articles on childhood lead poisoning, and has personally treated over 5,500 lead poisoned children.

Dr. James Girard received his Ph.D. in Chemistry from Penn State University in 1971. Dr. Girard is a Professor of Chemistry and the Chairman of the Chemistry Department at American University in Washington, D.C., where he instructs students on government approved methods for analyzing materials in the environment including lead in paint.

89. The three public health officials were Dr. Patricia Nolan, Mr. Dean Albro, and the Honorable David Cicilline.

Dr. Patricia Nolan holds an M.S. in Public Health, an M.D. from Magill University and is board certified in Public Health. A public health servant for over thirty years, Dr. Nolan served as the Director of the Department of Health for the State of Rhode Island from 1995-2005. During her time as Director, the Department of Health spearheaded a statewide cooperative effort that resulted in a significant reduction in both the incidence and prevalence of childhood lead poisoning in Rhode Island.

Mr. Dean Albro received a B.S. in Resource Development from the University of Rhode Island in 1977. Since 1996, Mr. Albro has served as Chief of the Office of Compliance and Inspection for the Rhode Island Department of Environmental Management where among his primary responsibilities, Mr. Albro is responsible for enforcing DEM Air Regulation 24, the rules and regulations related to exterior lead-based paint removal in Rhode Island.

Mayor David Cicilline holds a B.S. in Political Science and a J.D. from Georgetown University Law Center. Since 2002, Mayor Cicilline has served as Mayor of the City of Providence and has made lead poisoning prevention a priority of his administration. In so doing, Mayor Cicilline directed the preparation of the Consolidated Plan for the City of Providence 2005-2010 which addresses elimination of childhood lead poisoning within the City of Providence.

90. The three historians were Dr. Gerald Markowitz, Dr. David Rosner, and Dr. Michael Kosnett.

Dr. Gerald Markowitz received his Doctorate in History from the University of Wisconsin in 1971. He currently serves as an Adjunct Professor of Sociomedical Sciences at Columbia University and as a Distinguished Professor of History at John Jay College of Criminal Justice. Dr. Markowitz, in conjunction with Dr. David Rosner, has dedicated himself to the study of the history of the conduct of the members of the lead pigment industry, involving the systematic review of hundreds of thousands of pages of historical, scientific and corporate documents from numerous sources. As a result, Dr. Markowitz has published numerous articles and books on lead poisoning, including the award winning book "Deceit & Denial - The Deadly Politics of Industrial Pollution." Dr. Markowitz has given numerous presentations on the conduct of the members of the lead pigment industry before such esteemed organizations as the American Public Health Association and the Wisconsin State Department of Health.

Dr. David Rosner holds a Ph.D. in the History of Science from Harvard University and an M.S. in Public Health from the University of Massachusetts. Dr. Rosner currently serves as a Professor of History and Public Health of Sociomedical Sciences at Columbia University, and as an Adjunct Professor of Community Medicine and as the Director for the Center for the History of Ethics in Public Health at Mt. Sinai School of Medicine. Together with Dr. Gerald Markowitz, Dr. Rosner has dedicated himself to the study of the conduct of the members of the lead pigment industry, the results of which he has presented before numerous organizations including Yale University, Columbia University, NYU, Johns Hopkins, Centers for Disease Control and the National Institute of Public Health. Dr. Rosner has authored dozens of articles and books, including his work as co-author of the award-winning book "Deceit & Denial - The Deadly Politics of Industrial Pollution."

Dr. Michael Kosnett holds an M.D. from the University of California, San Francisco, an M.S. in Public Health and Toxicology from Berkeley and a B.S. from Yale University. Dr. Kosnett is board certified in Medical Toxicology, Preventative and Occupational & Environmental Medicine and is a Professor at the University of Colorado, School of Medicine. Dr. Kosnett has over twenty years experience treating hundreds of lead poisoned children.

identifying and remediating lead paint and lead paint hazards.⁹¹ Each of these witnesses was called by the State; the Defendants surprisingly did not call a single witness to counter the testimony of the State's experts.⁹² These witnesses presented the following statistical evidence from 2004: (1) 172 children were significantly lead poisoned,⁹³ (2) 1,167 children had elevated blood lead levels⁹⁴ and (3) every city and town in Rhode Island, with the exception of Gloucester, had a lead poisoned child that year.⁹⁵ The witnesses pointed out that, because of the larger number of older houses throughout the state, the risk of lead poisoning occurring statewide is significant.⁹⁶

91. The two lead paint experts were Mr. Frank King and Ms. Bonnie Cassani.

Frank King has been a Registered Rhode Island General Contractor specializing in lead hazard abatement for over twenty years. In 1993, Mr. King was among the first contractors in the State of Rhode Island to become a Licensed Lead Hazard Reduction Contractor. Since 1993, as President and Owner of KRA, Inc., Mr. King has performed lead hazard reduction services on over 1,500 properties within the State of Rhode Island.

Ms. Cassani is the sole proprietor of Northeast Lead Management, a company organized to conduct lead-based paint inspections and based in Rhode Island. In 1993, Ms. Cassani became the first Master Environmental Lead Inspector in Rhode Island, and today, is one of only two Master Environmental Lead Inspectors in Rhode Island. During her career, Ms. Cassani has inspected thousands of homes, schools, daycare centers and other buildings in Rhode Island for lead hazards.

92. The jurors' response to the defendants' decision to present no witnesses at trial was reported in newspapers, many of which considered the surprising litigation tactic to be a factor in the Lead industry's defeat. According to the *New York Times*, one factor in the loss may have been "the courtroom-strategy battles among the defense lawyers, and their hubris from never having lost a lawsuit before." Julie Creswell, *The Nuisance That May Cost Billions*, THE NEW YORK TIMES, Apr. 2, 2006 at Sec. 3. Furthermore, "[t]hree of the six jurors interviewed for this article . . . said they had been surprised and disappointed that the defense did not offer any witnesses to rebut the State's central allegation: That simply by having been in the business of making lead-based paint, companies contributed to what is now a pervasive public nuisance. 'They could have brought their own witnesses up there,' the jury's foreman, Gerald Lenau, said. 'The fact is, the person you hear last does leave a lasting impression, but maybe they couldn't dispute anything.'" *Id.*

93. Official Morning Trial Transcript at 67-70, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 14, 2005).

94. *Id.*

95. *Id.* at 70-72.

96. *Id.* at 72.

The statistics also have an economic impact, not only because of the numbers of kids poisoned and the irreversible damage suffered by those children,⁹⁷ but also because of the reduction in earning capacity such poisoning causes.⁹⁸ In addition, childhood lead poisoning causes burdens on society because taxpayer dollars are used to defray medical costs, relocation costs, and special education costs for lead poisoned children.⁹⁹ This economic impact is especially acute because even very low levels of lead can negatively influence a child's nervous system development and educational and intellectual outcomes.¹⁰⁰

On the issue of liability, the State presented evidence to the jury on each defendant's acts and omissions that substantially contributed to the public nuisance in Rhode Island. It was based on these facts that the jury applied the law on liability for a public nuisance, finding that Defendants NL Industries, Inc., Millennium Holdings, LLC and The Sherwin-Williams Company were liable for the nuisance.¹⁰¹ Key evidence and allegations against NL Industries, Inc. included:

- Manufactured Lead from 1891 until 1975;¹⁰²
- Promoted Lead in paint as safe even though it knew that pure white lead paint in fact was not safe;¹⁰³
- Failed to recommend that homeowners be educated about the toxicity of Lead in paint;¹⁰⁴
- Fought regulations to include warnings or labels on its products that contained Lead;¹⁰⁵
- Sold and promoted Lead in Rhode Island.¹⁰⁶

97. *Id.* at 8.

98. *Id.* at 20.

99. *Id.* at 21-22.

100. *Id.* at 49.

101. The jury did not find that Defendant Atlantic Richfield Company was liable for the nuisance because of their ten year involvement in the industry. See Lord, *supra* note 1, at B1.

102. Official Afternoon Trial Transcript at 45, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 16, 2005).

103. Unofficial Trial Transcript at 29-30, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 13, 2006).

104. *Id.* at 30

105. Unofficial Afternoon Trial Transcript at 8-11, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 15, 2005).

106. Official Trial Transcript at 77, *Rhode Island v. Atl. Richfield Co.*, No.

Key evidence against The Sherwin-Williams Company was:

- Manufactured Lead from 1904 until 1971;¹⁰⁷
- Made no effort to keep Lead pigment from being used on buildings in Rhode Island;¹⁰⁸
- Sold and promoted in Rhode Island when it had actual knowledge concerning childhood lead poisoning;¹⁰⁹
- Continued to sell Lead for use in paint knowing it could poison kids.¹¹⁰

Key evidence against Millennium Holdings, LLC (predecessor Glidden) included:

- Manufactured Lead from 1924 to 1958;¹¹¹
- Promoted Lead in paint as safe despite knowledge of the hazards;¹¹²
- Consistently marketed its non-lead paints as safe alternatives to Lead paints;¹¹³
- Used advertisements that did not contain warnings of Lead paint hazards;¹¹⁴
- Sold and promoted Lead products in Rhode Island.;¹¹⁵
- Had actual knowledge of childhood lead poisoning from Lead pigment at the time it manufactured such pigment.¹¹⁶

99-5226 (Jan. 13, 2006).

107. Unofficial Afternoon Trial Transcript at 45-46, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 16, 2005).

108. Official Morning Trial Transcript at 65, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 20, 2006).

109. Official Trial Transcript at 77-78, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 13, 2006).

110. Unofficial Morning Trial Transcript at 46, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 12, 2005).

111. Unofficial Afternoon Trial Transcript at 140-141, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 20, 2006).

112. Official Trial Transcript at 31, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 13, 2006).

113. Unofficial Afternoon Trial Transcript at 134-36, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 20, 2006).

114. Official Trial Transcript at 22, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 13, 2006).

115. Official Trial Transcript at 77, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 13, 2006).

116. Unofficial Afternoon Trial Transcript at 47, *Rhode Island v. Atl.*

Key evidence against Atlantic Richfield (predecessor International Smelting and Refining Company) included:

- Manufactured Lead from 1936 until 1946;¹¹⁷
- Never warned parents of the source of the poison for childhood lead poisoning in the 1920s, 30s, 40s, 50s, 60s and beyond;¹¹⁸
- Fought regulations to include warning labels on its harmful products.¹¹⁹

The witnesses also provided evidence against all the defendants that implicated the industry as a whole for contributing to this public nuisance. First, adequate alternatives to lead pigments existed prior to 1978.¹²⁰ Second, each defendant was responsible for supplying Lead to thousands of paint makers.¹²¹ Third, these Defendants' total market share was significant: ranging from 50 to 75% for dry white lead and 70 to 80% for white lead-in-oil.¹²² Finally, the Defendants' trade association, the Lead Industries Association (hereinafter "LIA"), regularly sent medical articles on childhood lead poisoning to its members while all defendants were members.¹²³ The LIA acted as the Defendants' pseudo-lobbyist by monitoring legislation on behalf of all its members and aggressively taking steps to void any legislation that would restrict lead pigment use.¹²⁴

The reasons reported in the press for the jury's verdict were

Richfield Co., No. 99-5226 (Dec. 12, 2005).

117. Unofficial Afternoon Trial Transcript at 44, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 16, 2005).

118. Official Morning Trial Transcript at 60-61, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 15, 2005).

119. Unofficial Afternoon Trial Transcript at 27-30, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 12, 2005).

120. Official Morning Trial Transcript at 31, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Nov. 7, 2005).

121. Official Morning Trial Transcript at 25-26, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Jan. 12, 2006).

122. *Id.* at 25.

123. Unofficial Afternoon Trial Transcript at 34-35, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 12, 2005).

124. Unofficial Morning Trial Transcript at 13-17, *Rhode Island v. Atl. Richfield Co.*, No. 99-5226 (Dec. 12, 2005).

consistent with the law as laid out in the trial court's jury instructions. First, the jury determined that the presence of Lead pigment in paints throughout Rhode Island was a public nuisance. One juror likened the effects of lead to a "ripple effect' of harm . . . [i]t wasn't just the poisoned children who suffered but also their parents and the agencies that had to spend money on the problem."¹²⁵ Another reported that "it became clear to him that the paint – even if applied decades ago – had caused harm and that it had interfered with the right of children to be safe in their own homes."¹²⁶

The jury next decided that three of the four defendants named in the lawsuit were liable for the public nuisance. As one juror stated, "The paint on the walls in Rhode Island didn't magically appear. If they didn't do it, who did?"¹²⁷ That same juror also commented, "[t]he state said the companies manufactured and sold 80 percent of the paint sold in the country. It was up to the paint companies to say no, but they didn't furnish us with that. All they had to say was no, but they did not because I don't think they could."¹²⁸

The final question the jury had to consider was whether the liable defendants were required to abate the nuisance.¹²⁹ That decision, reported the jury foreman, was made quickly after the findings of public nuisance and liability.¹³⁰ But although that determination was made quickly, the ramifications of the

125. Krouse, *supra* note 15, at A1.

126. *Id.*

127. Creswell, *supra* note 16.

128. *Id.*

129. Since the outset of this case, the State has been clear that it was seeking as part of its remedy for the public nuisance, the equitable remedy of abatement. In its Complaint, the State sought relief in the form of an order and judgment against Defendants, jointly and severally for "funding of a public education campaign relating to the continuing dangers posed by Lead, and for funding of lead-poisoning detection and preventative screening programs in the State; [] [j]udgment ordering the Defendants to detect and abate Lead in all residences, schools, hospitals, and public and private buildings within the State accessible to children; [] [a]n order awarding the State such other extraordinary, declaratory and/or injunctive relief as permitted by law or equity as necessary to assure that the State has an effective remedy; and [] [f]or such other and further relief as the Court deems equitable, just, and proper." Complaint at 24, Oct. 29, 1999; Second Amended Complaint at 25-26, Mar. 7, 2002.

130. Lord, *supra* note 1, at B4.

abatement decision are far-reaching.

First, in order to implement the jury's order of abatement, the trial judge has to determine the manner in which abatement should take place. Prior to the trial, the court determined that:

[T]he question of whether defendants or any of them shall be required to abate or to otherwise provide non-monetary relief as prayed by plaintiff shall be determined by the jury. In the event that such relief is ordered by the jury, this Court will conduct appropriate hearings, if necessary, from time to time and fashion such orders as under the circumstances might be appropriate in order to implement any judgment of abatement rendered by the jury.¹³¹

The singular question still pending before the trial court is the manner in which the defendants must be required to abate the public nuisance found by the jury. At this time, the State has requested that the trial court appoint a Special Master pursuant to Rule 53 of the Rhode Island Rules of Civil Procedure¹³² who is charged with designing an abatement plan that is consistent with the evidence in this case and the public health needs. Specifically, the State requests that the court: (1) appoint a Special Master with specialized knowledge in the public health issues of lead abatement and lead poisoning prevention, (2) ask that the Special

131. Hearing Transcript at 7-10, *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226 (Oct. 17, 2005). In reaching this decision, the trial court relied on *Hudson v. Caryl*, a matter heard "in the days of yore," for the principle that "[t]he action when brought for the double object of removing the nuisance and recovering the damages occasioned by it was always tried by jury. The ancient remedy was by a size of nuisance demanding the sheriff to summon a jury and view the premises. And if the jury found for the plaintiff, he was entitled to judgment of two things. First, to have the nuisance abated; and second, to recover damages." *Id.*, citing *Hudson v. Caryl*, 44 N.Y. 553, 555 (N.Y. Ct. App. 1871). This Court further found that, "[t]he plaintiff here, in view of the Court, has pleaded a case, and the discovery that the Court has had an opportunity to review, indicates that if an alleged nuisance is found, such nuisance in fact and in law would be abatable." *Id.*

132. Under Rule 53(a), "[t]he court may appoint a special master in any appropriate action which is pending therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner and any other individual or entity possessing such special expertise sufficient to serve the purpose or purposes for which a master may be appointed under this rule." R.I. R. CIV. P. 53(a).

Master consider and answer specific questions that would be relevant to assist the Court in determining the manner in which the abatement will be carried out, (3) authorize the Special Master to solicit factual information and professional opinions on the manner, method, timing, cost and sequencing of the abatement of this nuisance, and (4) authorize the parties to review and comment on the Special Master's answers to the questions framed by the Court.¹³³

Significant legal precedent exists for the appointment of a special master to devise and oversee a remedial program.¹³⁴ For example, special masters have been appointed in similar cases to supervise the affirmative abatement of a nuisance.¹³⁵ This use of a special master to assist in the abatement of a public nuisance is also in accord with well-established precedent. For example,

133. See Plaintiff's Position Paper Concerning Hiring of a Special Master To Assist in the Implementation of the Jury Verdict Ordering Abatement at 2 (Mar. 31, 2006).

134. See Margaret G. Farrell, *Special Masters, in Reference Manual on Scientific Evidence*, FED. JUDICIAL CTR. 590 (1994) ("Expert masters appointed after a finding of liability in environmental and institutional reform litigation often advise the court by making recommendations for detailed remedial orders or amendments to such orders in periodic reports based on their own expertise.")

135. See *State v. Patrick*, 1990 WL 83402, at *4 (Tenn. Crim. App. June 20, 1990) (recognizing the power of a court sitting in equity to "be creative in solving this problem [of abatement]" and that "a special master could be appointed to monitor the [abatement]."); *Gwinnett County v. Vaccaro*, 376 S.E.2d 680, 682 (Ga. 1989) (finding, in a public nuisance action, "no error in either the trial judge's appointment at county expense of a monitor to supervise the necessary cleanup efforts at the Yellow River plant or in the order of other measures which require expenditures."); *Custred v. Jefferson County*, 360 So.2d 285, 288 (Ala. 1978) (wherein trial court interrupted trial to appoint an independent special master to study and research the condition of water in stream and lake alleged to be a public nuisance and to render a report thereon).

In addition, there are numerous examples of public nuisance cases in which special masters were employed for other purposes. See, e.g., *New Jersey v. City of New York*, 283 U.S. 473, 473 (1931) (recognizing a court's authority to appoint a special master to receive evidence and render a report in public nuisance case); *N.A.A.C.P. v. Acusport Corp.*, 216 F. Supp. 2d 59, 59 (E.D.N.Y. 2002) (appointing special master in public nuisance suit to resolve discovery dispute); *Charleston Comm. for Safe Water v. Commissioners of Pub. Works*, 331 S.E.2d 371, 371 (S.C. Ct. App. 1985) (using special master to receive evidence in a public nuisance case); *Mercer v. Keynton*, 163 So. 411, 413 (Fla. 1935) (same).

special masters have been employed in school desegregation cases to help fashion an appropriate remedy and to oversee the implementation of that remedy:

[I]t is a fact that public law litigation often places a trial judge in a position where his role is necessarily somewhat different from that performed in more traditional cases. This is especially true in the remedial phase of a school desegregation or institutional reform case. School and institutional financing and administration are subjects with which few judges have more than a passing familiarity. Yet, when litigation exposes constitutional violations in public institutions a court of equity must take steps to eliminate them. In accomplishing this result trial courts frequently issue orders which require fundamental changes in the administrative and financial structures of the institutions involved. In order to accomplish these ends with fairness to all concerned a judge in equity has inherent power to appoint persons from outside the court system for assistance.¹³⁶

Finally, in addition to the clear authority imparted to the trial court by Rule 53, a court also has the ability to appoint a Special Master pursuant to its inherent equitable powers. Specifically, abatement of a public nuisance requires the Court to utilize its inherently flexible powers to fashion an appropriate remedy. The "essence of equity jurisdiction has been the power . . . to mould each decree to the necessities of the particular case."¹³⁷

136. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 743 (6th Cir. 1979). See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1291, 1313 (W.D.N.C. 1969), *vac. on other grounds*, 431 F.2d 138 (4th Cir.), *on remand*, 318 F. Supp. 786 (1970), *aff'd*, 402 U.S. 1 (1971) (the district court appointing a special master who was an expert 'consultant' in educational administration "to prepare immediately plans and recommendations to the court for desegregation of the schools."); *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 765 (E.D.N.Y. 1974) (court noting that "[m]asters to determine remedies after liability has been determined by the court . . . have been particularly useful.").

137. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). See also *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 874 (1st Cir. 1995) ("This emphasis on the particulars of each individual case is consistent with the central feature of equity jurisdiction: 'the ability to assess all relevant facts and circumstances and tailor appropriate relief on a case by case basis.'" (quoting *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 321 (1st Cir.

Furthermore, the Court's equitable powers are even broader and more flexible when considering equitable issues implicating the public interest. In *Porter v. Warner Holding Co.*,¹³⁸ the United States Supreme Court recognized that "since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."¹³⁹ Pursuant to these equitable powers, the Court may appoint a person to assist in administering an equitable remedy.¹⁴⁰

If the special master is appointed, the State has set forth the parameters of the abatement it will seek. Contrary to the erroneous statement and reports that the State is seeking full scale removal of all lead paint from all buildings in the State of Rhode Island,¹⁴¹ the State instead seeks an order requiring Defendants to administer and operate programs for the citizens of Rhode Island that would "assist in the remediation and abatement

1989)); *Lussier v. Runyon*, 50 F.3d 1103, 1110 (1st Cir. 1995) (stating that "the hallmarks of equity have long been flexibility and particularity").

138. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (citing *Virginian R. Co. v. System Fed'n*, 300 U.S. 515, 552 (1937)).

139. *See also* *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

140. *See* *Warwick Sch. Comm. v. Warwick Teachers' Union Local 915*, 613 A.2d 1273, 1276 (R.I. 1992) (Court "may appoint one or more special masters or mediators to assist in the implementation and facilitation of such negotiations."); *Ruiz v. Estelle*, 679 F.3d 1115, 1161 (5th Cir. 1982), *rev'd on other grounds*, ("[R]ule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established. Such court-appointed agents have been identified by a confusing plethora of titles: 'receiver,' 'Master,' 'Special Master,' 'master hearing officer,' 'monitor,' 'human rights committee,' 'Ombudsman,' and others. The function is clear, whatever the title."); *United States v. Connecticut*, 931 F. Supp. 974, 984 (D. Conn. 1996) ("[b]eyond the provisions of [Rule 53] for appointing and making references to Masters, a federal district court has the inherent power to supply itself with [a special master] for the administration of justice when deemed by it essential." (quoting *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982))).

141. *See* Peter B. Lord, *R.I. Sets Costs of Lead Clean-Up*, THE PROVIDENCE J., Apr. 5, 2006 at A2 (wherein it was reported that "[t]he paint companies insist the state is going beyond state and federal policies that call for making homes lead-safe, rather than lead-free.").

of lead-based paint and/or lead-based paint hazards in properties in which they own or reside.”¹⁴²

If successful in implementing this statewide abatement of lead pigments in paints, the result of the prolonged Rhode Island litigation will be to ensure the future for successive generations. Children will no longer have to be lead detectors; no child will face an uncertain future as a result of childhood lead poisoning; parents and homeowners will be provided with the tools necessary to inactivate a known toxin in their homes and protect not only their own children, but every child that comes to live in that home. In the words of a long-term lead poisoning prevention advocate in Rhode Island:

“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.”¹⁴³

III. NATIONAL TREND APPLYING PUBLIC NUISANCE LAW TO LEAD PIGMENT CASES

The Rhode Island verdict could presage a national trend toward greater protection of lead poisoned victims. While the Defendants and those critical of the Rhode Island suit have claimed that the suit is “bizarre” and “quirky,”¹⁴⁴ the reality is that the law and the facts of this case are equally applicable in other jurisdictions. In the last year alone, courts in New Jersey, Wisconsin and California have all affirmed a governmental entity’s right and obligation to bring a suit on behalf of the public

142. Plaintiff’s Answers to Defendants’ Interrogatories (Nov. 30, 2004).

143. Peter B. Lord, *3 Companies Found Liable in Lead-Paint Nuisance Suit*, THE PROVIDENCE J., Feb. 23, 2006, at A1.

144. Creswell, *supra* note 16 (“Three defense lawyers interviewed for this article said that this was one of the most bizarre lawsuits and trials of their careers. They blame what they call Rhode Island’s quirky public nuisance laws.”)

to remedy the public nuisance caused by the presence of lead pigment in paint on buildings in those states. In addition, the Supreme Court of Wisconsin has also affirmed the right of an individual lead poisoned child to sue the lead pigment industry notwithstanding his inability to identify the manufacturer of the particular lead pigment he ingested. Each of these decisions signals a change in the landscape of lead pigment litigation, and sends a clear message to these and other possible defendants that they will be held accountable for their actions.

A. *New Jersey*

In 2000, twenty-six cities and towns in New Jersey brought suit against manufacturers, sellers, and promoters of lead pigment seeking to recover costs for detecting and removing lead paint, providing medical care to lead-poisoned residents and for developing educational programs. Plaintiffs sought to recover these expenses through claims based on public nuisance and several other claims. On November 4, 2002, the motion judge granted defendants' omnibus motion to dismiss.¹⁴⁵ On August 17, 2005, the New Jersey court reversed the motion judge's dismissal of the public nuisance cause of action, finding that a municipal body has a common law right to abate a nuisance by summary proceedings.¹⁴⁶ In addition, the court concluded, as the Rhode Island Superior Court did, that a common law public nuisance claim:

[W]ould not subvert the goals of the [New Jersey] Lead Paint Statute, and, in fact, such action would foster those goals. Each remedial tool looks to different responsible parties. The Lead Paint Statute imposes a duty of abatement on property owners, while this civil action demands that the named paint-industry defendants compensate the cities for their expenditures caused by defendants' creation of a public nuisance. This civil suit can proceed on a parallel track that need not ever intersect with the mechanism set forth in the Lead Paint

145. *In Re Lead Paint*, 2002 WL 31474528 (N.J. Super. Law. Div. Nov. 4, 2002).

146. *In Re Lead Paint*, 2005 WL 1994172 (N.J. Super. Aug. 17, 2005).

Statute. The relief demanded in the complaint—funding future programs and compensating the municipalities for their abatement and health-care expenses— would not interfere with the municipalities’ ongoing enforcement efforts under the Lead Paint Statute; their boards of health remain free to sue property owners for the costs of removal. And, the State Department of Health may prosecute disorderly persons complaints against violating owners. None of the statute’s enforcement tools may be used against manufacturers or distributors. Hence, the two classes of remedies are complementary, not conflicting or duplicative.¹⁴⁷

Importantly, as to the applicability of public nuisance law to lead pigment and lead poisoning claims, the Appellate Division found that “public health problems such as lead-paint contamination and illnesses casually linked thereto require the expenditure of public funds to provide medical diagnostic and treatment services, particularly to members of the public who have no access to health coverage or have insufficient resources to attend to their healthcare needs.”¹⁴⁸ Affirming the relevancy of an abatement remedy, the court also found that “[t]he very presence of lead paint – even lead paint that is never ingested – has purportedly caused plaintiffs to incur costs of removing lead paint and of funding detection and education programs. Thus the complaint’s key proximate cause averment is...Plaintiffs also allege damages to themselves...the costs of discovering and abating Lead. . .”¹⁴⁹

The New Jersey case affirmed by the Appellate Division is pending on appeal to the New Jersey Supreme Court.¹⁵⁰

B. *City of Milwaukee*

The City of Milwaukee brought suit against NL and Mautz Paint to recover costs associated with the city’s abatement of lead-

147. *Id.* at *5.

148. *Id.* at *13.

149. *Id.*

150. In reversing the trial court’s decision, the appellate court relied in part on the Rhode Island trial court’s decision, signaling that the court’s decisions therein are not quite as “bizarre” as defense counsel have contended. *See id.* at *15.

based paint hazards. The city asserted claims for public nuisance, conspiracy and restitution, alleging that the defendants were “a substantial factor in contributing to the community-wide, lead-based public nuisance in Milwaukee.”¹⁵¹ The defendants moved for summary judgment, claiming that the City was required to prove ‘at a minimum, that [defendants’] pigment or lead paint. . is present on windows in . properties and that their conduct somehow caused the paint to become a hazard to children.”¹⁵² The court held “that to establish a claim of creating a public nuisance, a plaintiff must prove that the defendants’ 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. Finally, public policy considerations must also be considered because, similar to liability for negligence, liability for creating a public nuisance can be limited on public policy grounds.”¹⁵³ The court rejected the defendants’ position, finding instead that product identification and property specific evidence were not required to prove that a community-wide public nuisance existed or that the defendants were liable for that nuisance.¹⁵⁴ The court agreed, recognizing the communal harms associated with lead poisoning:

Public nuisance is focused primarily on harm to the community or the general public. . . .[T]he allegation at its essence is that defendants sold and promoted a dangerous product to a community and that product caused a serious public health problem in that community. The City, rather than only the sick children, has suffered and sustained an injury. This injury, unlike injury suffered by individuals, is community-wide and affects even those whose health is not compromised by lead-paint poisoning. The City is also the entity most reasonably able to remedy this community-wide injury to public health.¹⁵⁵

151. *City of Milwaukee v. NL Indus., Inc.*, 691 N.W. 2d 888, 893 (Wisc. App. 2004).

152. *Id.*

153. *Id.* at 892.

154. *Id.* at 894.

155. *Id.* at 893.

The Wisconsin Court of Appeals determined that allegations of marketing, promoting, and manufacturing Lead for use in paints and coatings were sufficient to establish liability for creating a public nuisance in the absence of product and/or manufacturer identification. The case is scheduled for trial in early 2007.

C. *California*

Just days after the Rhode Island jury reached its verdict, the California Appeals Court, Sixth District permitted government entities to pursue a public nuisance cause of action against the former manufacturers of lead pigments.¹⁵⁶ In that case, “a group of governmental entities acting for themselves, as class representatives, and on behalf of the People of the State of California, filed a class action against a group of lead manufacturers.¹⁵⁷ This class action suit alleged that the manufacturers were liable under strict product liability, negligence and fraud “for damages caused by lead paint.”¹⁵⁸ The suit asks for abatement, injunctive relief, restitution and disgorgement of profits.¹⁵⁹

Like the Rhode Island case, the plaintiffs in the California case alleged that the presence of lead pigment was a public nuisance because it “is injurious to the health of the public.”¹⁶⁰ Further, as in the Rhode Island case, the complaint alleged that defendants had created and/or contributed to the creation of the public nuisance by “[e]ngaging in a massive campaign to promote the use of Lead on the interiors and exteriors of private residences and public and private buildings and for use on furniture and toys; failing to warn the public about the dangers of lead; selling, promoting and distributing lead; trying to discredit evidence linking lead poisoning to lead; trying to stop regulation and

156. See *County of Santa Clara v. Atl. Richfield Co.*, 137 40 Cal. Rptr. 3d 313 (Cal. App. 6 Dist. 2006). In addition to reversing the trial court and reinstating the public nuisance cause of action, the court also reinstated the plaintiffs’ strict liability, negligence and fraud causes of action.

157. *Id.* at 319.

158. *Id.*

159. *Id.* at 319.

160. *Id.* at 324.

restrictions on lead; and trying to increase the market for lead.”¹⁶¹ Finally, like Rhode Island, the “remedy sought was abatement ‘from all public and private homes and property so affected throughout the State of California.’”¹⁶²

The court first concluded that the complaints identified a condition that could be considered a public nuisance and that abatement was an appropriate remedy: “Clearly their complaint was adequate to allege the existence of a public nuisance for which these entities, acting as the People, could seek abatement.”¹⁶³ In considering whether the defendants could be liable for that nuisance, the court expressly rejected the contention that product manufacturers could not be held liable for creating a public nuisance. Instead, the court found:

[A] “*representative public nuisance cause of action seeking abatement of a hazard created by affirmative and knowing promotion of a product for a hazardous use is not ‘essentially’ a products liability action ‘in the guise of a nuisance action’ and does not threaten to permit public nuisance to ‘become a monster that would devour in one gulp the entire law of tort. . . .’* Because this type of nuisance action does not seek damages but rather abatement, a plaintiff may obtain relief *before* the hazard causes any physical injury or physical damage to property. A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition. Here, the alleged basis for defendants’ liability for the public nuisance created by lead paint is their affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards.”¹⁶⁴

The court then went on to find that public nuisance liability and products liability were not interchangeable claims: “A products liability action does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a

161. *Id.*

162. *Id.*

163. *Id.* at 325.

164. *Id.* at 328.

public entity to act on behalf of a community that has been subjected to a widespread public health hazard. For these reasons, we are convinced that the public nuisance cause of action in the third amended complaint is not a disguised version of plaintiffs' products liability causes of action"¹⁶⁵

The appellate division remanded the case back to the trial court. As of the time this article was written, the parties were still awaiting the return of the case to the trial level so that a trial date could be set.

D. *Thomas v. Mallett*

The *Thomas* case is a single plaintiff case brought against the plaintiff's landlords and against the same lead industry defendants as the State of Rhode Island sued in its public nuisance case.¹⁶⁶ The case proceeded against the industry defendants based on a possible application of the risk contribution theory of *Collins v. Eli Lilly*¹⁶⁷ which permitted those injured by DES to recover against the DES manufacturers, despite the inability of the plaintiff to identify the specific manufacturer of the DES that caused the injury.

While the case involved different legal theories of liability than public nuisance, the Wisconsin Supreme Court drew a number of conclusions that apply in the public nuisance context. First, the court expressed "serious concerns" with pigment manufacturers' attempts to displace blame for lead poisoning from themselves to landlords.¹⁶⁸ Second, the court found that, while landlords could *share* in that blame, "landlords are not to blame for the fact that the lead pigment in the paint is poisonous in the first instance."¹⁶⁹ Third, the court recognized that the pigment manufacturers "did more than simply contribute to a risk," but knowingly produced and promoted the harmful product that created that risk.¹⁷⁰ Finally, and perhaps most importantly, the court recognized the communal harm associated with lead

165. *Id.* at 329.

166. *See Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

167. 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

168. *Id.* at 552.

169. *Id.* at 554.

170. *Id.* at 558.

poisoning: “the problem of lead poisoning...is real[,]it is widespread and represents “a public health catastrophe that is poised to linger for quite some time.”¹⁷¹ This recognition of the communal harm associated with lead poisoning represented the crux of Rhode Island’s public nuisance claim against the lead paint manufacturers.

III. CONCLUSION

While the case of *State of Rhode Island v. Atlantic Richfield Company, NL Industries, Inc., Millennium Holdings LLC, and The Sherwin-Williams Company* saw the first successful application of public nuisance law against the lead pigment industry for its role in creating a state-wide public health crisis, this unique tort is solidly rooted in the history of Rhode Island jurisprudence. The abatement remedy ordered by the jury will ably supplement the decades of work done by children’s health and housing advocates to battle childhood lead poisoning and raise awareness about the importance of healthy and safe housing. Precisely what that remedy will consist of is in the hands of the trial court and is the subject of more briefing and argument by the parties. This additional debate over the parties’ abatement proposals, which are worlds apart, is a small delay in what will be the ultimately triumphant outcome for the people of the State of Rhode Island: a housing stock that is free of lead and lead hazards. Additionally, Rhode Island’s victory in its public health lawsuit may be a precursor of things to come in other jurisdictions. With appellate courts in other states endorsing the applicability of public nuisance law to lead pigment suits, this ancient cause of action has found new life in modern environmental torts. Furthermore, over and above any legal impact, the fact that, under public nuisance law, other states may have the opportunity to benefit their citizens by seeking abatement of lead and lead hazards from their housing is an important public health victory.

171. *Id.*

