

**REGULATION BY LITIGATION AND  
THE LIMITS OF GOVERNMENT POWER**

by

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The views expressed in this article are the author's alone, and they do not necessarily reflect the views of his law firm or its clients.

# REGULATION BY LITIGATION AND THE LIMITS OF GOVERNMENT POWER

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## INTRODUCTION

Picture a world in which individual government officials could prohibit virtually anything, not by enacting legislation subject to the checks and balances of the democratic process, but by bringing lawsuits. In this world, the government could not only prohibit lawful conduct through lawsuits. It could also force private parties to pay the cost of governmental services provided to others, in order to selectively “tax” these parties or effectively ban the products they have produced. And it could do all this despite a series of centuries-old rules designed to preclude this kind of abuse of government power.

This is neither a fictional world nor the figment of an overactive imagination. It is the real world of regulation-through-litigation that a recent series of unprecedented “public nuisance” lawsuits has attempted to create.

These lawsuits are a species of criminal prosecution,<sup>1</sup> but without any of

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<sup>1</sup>See RESTATEMENT (SECOND) OF TORTS, § 821B, cmts. a and b (1979); Prosser and Keeton on Law of Torts § 90 (W. Page Keeton et al. eds., 5th ed. 1984). In arguing in support of the State of Rhode Island's public nuisance claim against former lead pigment

the traditional protections afforded criminal defendants. Ordinary criminal prosecutions are virtually always about past conduct. The defendant is accused of committing an act that constituted a well-defined crime, and it is a question of fact whether he committed the act in question. In one field, however, the law looks not at past, but at present and future conduct, and is continually defining, often without any prior notice, what constitutes a legal wrong.<sup>2</sup> This is the law of public nuisance — a body of law that the government plaintiffs, in what we will call the “new public nuisance” suits, have attempted to distort.

State and local governments have long had the authority to seek the abatement of a public nuisance.<sup>3</sup> A “public nuisance” has been vaguely defined as any substantial and unreasonable interference with a right common to the

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manufacturers, the Attorney General told the court: “A public nuisance is always a crime, always always always always a crime....It’s part crime, part tort, part equitable remedy.” *State of Rhode Island v. Lead Indus. Ass’n*, C.A. No. 99-5226 (R.I. Super. Ct., Transcript of Hearing of Oct. 12, 2000, at 134).

<sup>2</sup>Almost eight decades ago, the Supreme Court stated that “[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (citing *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914); *Collins v. Kentucky*, 234 U.S. 634, 638 (1914)). This seems particularly apt when the lawful sale of products becomes subject later to a public nuisance claim by a public official. Fair notice allows a person to avoid unlawful conduct and also is a safeguard against arbitrary and discriminatory enforcement. See *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966); *S & H Riggers & Erectors, Inc. v. Occupation Safety & Health Review Commission*, 659 F.2d 1273, 1281 (5<sup>th</sup> Cir. 1981).

<sup>3</sup>See e.g., *Division of Health, Dept. of Health & Welfare v. Rogers*, 432 A.2d 135, 139 (R.I. 1981).

general public, such as public health, safety, or peace.<sup>4</sup> Public officials can obtain a court abatement order directing that an activity posing a threat to the health or welfare of the public-at-large be stopped. This nuisance authority is both broad and vague, far too broad and far too vague to prevent the abuse of governmental power once the historical boundaries are crossed.

Over the centuries the common law has developed a series of limits on the scope of liability for public nuisance. These limits balance the community's interest in protecting public health and welfare against the risk of governmental excess and abuse of power. Applied by the courts in legal actions seeking to abate public nuisances, these limits effectively define what counts as an actionable public nuisance and what does not. One of these historical limits has been that public nuisance law is not used to regulate the sale of products.<sup>5</sup>

In recent years, however, a number of state and local governments apparently have felt too restricted by the well-established rules governing products liability and negligence. These rules require particularized proof of

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<sup>4</sup>RESTATEMENT (SECOND) OF TORTS, § 821B (1979).

<sup>5</sup>American Law of Products Liability § 27:3 (Timothy E. Travers, et al. eds. 3d ed. 1987) (footnotes omitted). *See, e.g., Camden County Board of Chosen Freeholders v. Beretta USA Corp.*, 273 F.3d 536, 540 (3d Cir. 2001); *Tioga Public School District v. United States Gypsum Co.*, 984 F.2d 915, 920 (8<sup>th</sup> Cir. 1993); *City of Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 614 (7<sup>th</sup> Cir. 1989); *Town of Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D. N.H. 1984); *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992).

product identification and injury causation that do not lend themselves to wide-scale regulatory schemes or cost recoveries by government officials. Seeking to circumvent these statutory and common law rules and defenses, government officials have attempted to expand public nuisance theories in order to pursue actions against product manufacturers, such as tobacco companies, handgun manufacturers, and the makers of lead pigments long ago used in house paint.<sup>6</sup> Fortunately, most of the new public nuisance suits have failed, and those that have not been dismissed outright may be reversed on appeal. But the specter of unlimited public nuisance actions remains.

A single factor links these new public nuisance actions: each claims that a lawful, non-defective product is nonetheless a public nuisance because of harm or government expense it causes. This is an unprecedented effort to extend the scope of public nuisance from risky or harmful activities to lawful products. It is an end-run around the rules that have long defined the liability of the makers of lawful, non-defective products, as well as the legislative or administrative rules and processes that must be followed before there can be legislative or administrative action.

If this kind of suit were permitted, then it would only be a matter of time

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<sup>6</sup>See, e.g., *City of St. Louis v. American Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999) (tobacco companies); *City of Philadelphia v. Beretta U.S.A. Corp.*, 227 F.3d 415 (3<sup>rd</sup> Cir. 2002) (handgun manufacturers); *State of Rhode Island v. Lead Industries Ass'n*, C.A. No. 99-5226 (R.I. Super. Ct., filed October 12, 1999) (former makers of lead pigment).

before public nuisance suits were brought against the makers of other lawful, non-defective products that a government official believed were not good for the public. The makers of alcoholic beverages could be sued for committing a public nuisance by causing drunk driving. The manufacturers of SUV's could be sued for committing a public nuisance by causing injuries to passengers in cars struck by SUV's. Even the makers of fatty foods might be sued for committing a public nuisance that resulted in increased health care costs. This is not an exaggerated "parade of horrors." Both the logic and motive behind the new public nuisance suits is that lawful products can constitute public nuisances even if they violate no product liability rule whatsoever.

But this is not all. The new public nuisance actions propose the elimination of a series of other traditional limits on the scope of liability for public nuisance as well. In assessing the validity of these lawsuits, both state and local governments and the courts would do well to keep in mind the wisdom that is reflected in the centuries-old common law rules governing public nuisance actions. Taken individually, each rule is only a brick in the common law edifice. But taken together, these rules erect a wall that protects against abuse of government authority, by requiring proof of each element of a public nuisance before a government official may selectively invoke the power of the criminal law against a private party. Each common law requirement will

be discussed separately, followed by some concluding thoughts about the significance of the requirements as a whole.

## **I. THERE MUST BE INFRINGEMENT OF A “PUBLIC” RIGHT**

To constitute a “public” nuisance, an activity must infringe on a right that is held by the entire community in common. Public nuisance is sometimes referred to as “common” nuisance. The obstruction of a highway or the pollution of the air are classic examples. All members of the public have the same undifferentiated right to use the public highways and to breath clean air.<sup>7</sup>

To constitute a public nuisance, it is not enough that a large number of private parties’ rights are infringed.<sup>8</sup> If the obstruction of a highway diverts business from an area, each business owner has a loss. Each might consider bringing a tort action to recover individual damages. But these are not “public” rights and the government has no standing to sue for them; the public nuisance for which the government has a right to sue is to remove the obstruction of the highway itself.

The governmental plaintiffs in some of the new public nuisance actions

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<sup>7</sup>*City of Sturgeon v. The Wabash Railway Co.*, 17 S.W.2d 616, 619 (Mo. Ct. App. 1929) (stating that a nuisance is public when it affects the rights enjoyed by citizens as part of the public such as the right of navigating a river, or traveling on a public highway).

<sup>8</sup>See RESTATEMENT (SECOND) OF TORTS, §821B cmt. g (1979).

have attempted to circumvent this rule. Although cast generally as an effort to protect public health or to recover government expenditures for public health or safety, such as keeping the streets safe from handgun violence, there can be no plausible argument that the injury to health that may result to persons smoking cigarettes, or the damage to a residence from the presence of flaking lead paint, or a person being shot by a criminal, injures a public right. These are private, individual interests that are subject to the rules of tort law, not public nuisance. When governments attempt to bring public nuisance suits by aggregating the private harm of individuals, they have stepped over the boundary that divides public nuisance law from private tort law.

## **II. THERE MUST BE SPECIFIC PROOF OF INDIVIDUAL RESPONSIBILITY**

In the traditional public nuisance action, both the identity of each person alleged to be responsible for the nuisance and the scope of each person's contribution to the nuisance must be proved.<sup>9</sup> Often this is straightforward, in light of what a public nuisance suit is designed to achieve. A fallen tree blocks a highway. The tree fell from someone's property. The property owner is responsible. The whole point is to abate an existing nuisance, and ordinarily the party committing the nuisance is readily identifiable.

However, when generic risks posed by lawful products made by different

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<sup>9</sup>See *Voyer v New England Chemical Co.*, 634 A.2d 1175, 1176 (R.I. 1993); *Hood v Slefkin*, 143 A.2d 683, 688 (R.I. 1958).

companies are alleged to constitute a public nuisance, then this proof is likely to be missing. This is a fatal flaw in a number of the new public nuisance actions. Whose handguns caused what injury, if any? Whose lead pigment is in which residences, if any? The government plaintiffs have no way to answer these questions, no way to introduce the required evidence.

In a tort suit this would be described as proof of causation, and proof on that issue is, of course, an indispensable element of a valid tort claim. There are few, rare exceptions to the causation requirement in tort suits. But these exceptions have never been applied in a private tort action for injuries allegedly caused by tobacco, handguns, or lead pigment, and there is no reason to apply them in a public nuisance action either.<sup>10</sup>

In fact, there are even stronger reasons to require proof of causation in public nuisance suits. First, since public nuisance suits are quasi-criminal, the government's burden of proof should be strictly complied with. It would be paradoxical if the government had a less onerous burden of proof in a public nuisance action than a private party has in a civil tort action. Second, the requirement that the government specifically identify the causal contribution of each defendant in a public nuisance action is an important means of

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<sup>10</sup>See *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2001) (injuries caused by handguns); *Brenner v. American Cyanamid Co.*, 699 N.Y.S.2d 848, 853 (N.Y. App. Div. 4<sup>th</sup> Dept., 1999) (injuries caused by lead pigment).

protecting private parties against abuse of government power. If there were no such requirement, then government officials could single out unpopular persons or “deep pocket” companies by bringing public nuisance actions against them, without having to prove the scope of their contribution to the nuisance.

This would be an enormously powerful weapon to place at the disposal of government. The criminal law has protections against abuse of prosecutorial discretion — most notably in the due process and equal protection provisions of the U.S. Constitution and the individual state constitutions.<sup>11</sup> The causation requirement, among others, helps to protect against abuse of discretion by government in the public nuisance arena where, for largely historical reasons, the constitutional protections have not been needed.

A suit by the (now former) Attorney General of Rhode Island against a few of the dozens of companies that once made lead pigment illustrates the problem.<sup>12</sup> He sought a judicial declaration, against the few companies he had sued, that the mere presence of lead pigment in paint in Rhode Island residences constituted a public nuisance. He sought this declaration without proving that any pigment in the paint in any residence was made by any

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<sup>11</sup>See *U.S. v. Batchelder*, 442 U.S. 114 (1979).

<sup>12</sup>*State of Rhode Island v Lead Industry Ass'n*, C.A. No. 99-5226 (R.I. Super. Ct., filed October 12, 1999).

defendant or their predecessors. In fact, the Attorney General anticipated forcing these few defendants to prove which residences *did not* contain paint with lead pigment for which they were responsible — in other words, the defendants would have the burden of proving their innocence.<sup>13</sup> This is discriminatory prosecution. In fact, one of the outside, contingency fee lawyers responsible for the case had publicly stated that the purpose of the suit was to “bring the entire lead paint industry to its knees” and that if he did not do that “within three years [he would] give them [his] boat.”<sup>14</sup> In a probable reflection of the jury’s recognition that the State was overreaching, the first trial resulted in a mistrial with most jurors in favor of a defense verdict.<sup>15</sup>

### **III. THERE MUST BE A PRESENT ACTIVITY, NOT MERELY AN OLD PRODUCT**

Public nuisances are present activities that unduly risk or harm the public health or welfare. The new public nuisance suits allege that products which are not defective, and which therefore do not pose a risk of causing tortious injury, nonetheless are a public nuisance. The public harm often results from misuse of the product, such as a criminal shooting, or failure to

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<sup>13</sup>*Id.* (Transcript of Hearing of July 20, 2001, at 80).

<sup>14</sup>Mark Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, DALLAS MORNING NEWS, Oct. 31, 1999, at 4, available at LEXIS, News Library.

<sup>15</sup>*Deadlocked Jury Ends Paint Suit in Mistrial*, PLAIN DEALER, (Cleveland, OH) Oct. 30, 2002, available at LEXIS, News Library.

maintain old lead paint. These suits would set aside the limits of modern products liability law. After a manufacturer had done everything necessary to comply with government regulations and the rules of tort law, the government plaintiffs would have public nuisance law supersede this lawful conduct. This amounts to the imposition of liability retroactively.<sup>16</sup>

For example, the lead pigment suits allege that products made many decades ago constitute a present nuisance. Most of the companies that once made lead pigment no longer exist. The few who remain were those who developed the alternatives to lead pigments. It is one thing to ask a defendant to cease a present activity that constitutes a public nuisance; it is quite another to allege that a product made many decades ago now constitutes a nuisance, and that any surviving company is liable for what all past companies did.

Nor is this only a question of fairness, although it is certainly that. It is also a question of control and of remedial effectiveness. Among other things, a product made in the past is always in the hands of someone else by the time it is alleged to constitute a public nuisance. The party who controls the alleged nuisance is in the best position to prevent or remedy it.<sup>17</sup> There is a practical

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<sup>16</sup>See *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-533 (1998) (stating that retroactive liability is unfair and generally disfavored because it can deprive citizens of legitimate expectations and upset settled transactions).

<sup>17</sup>*Friends of the Sakonnet v. Dutra*, 749 F. Supp. 381, 395 (D.R.I. 1990); *Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980).

connection between the traditional rule that lawful products themselves are not nuisances and the fact that there is virtually always a party better situated to prevent or control a nuisance arising out of product use (or misuse) than the maker of the product. In the case of lead pigment, for example, the owners of properties containing lead-based paint are in the best position to prevent or abate the dangers posed by poorly maintained lead-based paint. In fact, all federal, state, and local statutes and regulations addressing dangers posed by lead-based paint hold the property owners responsible for eliminating these dangers. To seek to impose public nuisance liability on the historical makers of lead pigment is to ignore the logic of control and the practical requirement of remedial effectiveness.

#### **IV. THERE MUST BE A DIRECT CONNECTION BETWEEN THE DEFENDANT'S CONDUCT AND THE PLAINTIFF'S HARM**

The risk or harm associated with a public nuisance must be direct in two ways. There must be a direct connection between the alleged nuisance and the plaintiff's harm, and there must be a direct connection between the defendant's conduct and the occurrence of the alleged nuisance.<sup>18</sup> In the traditional public nuisance case, both requirements are easily satisfied. For example, if the defendant obstructs a public highway and the municipality sues, the

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<sup>18</sup>See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

municipality represents those whose public rights of access are directly infringed, and the harm to the public is the direct result of the defendant's conduct.

A rule known as the "remoteness" doctrine precludes liability when these connections are not direct, but remote.<sup>19</sup> In each of the new public nuisance cases, either or both of these forms of directness are missing, and the remoteness doctrine is violated. First, in these cases the government typically is not merely seeking abatement, but some form of monetary damages. In the tobacco cases, governments have sought repayment of health care costs they have incurred when their citizens became ill; in the handgun cases, governments seek to recover the costs of preventing and responding to handgun violence, including the increased costs of criminal justice administration and emergency medical services; and in the lead pigment cases governments seek reimbursement for the cost of making residences lead-safe or lead-free, health care and special education.

A longstanding application of the remoteness doctrine, however, is that a person who incurs costs because of personal injury or property damage to

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<sup>19</sup>*Id.* The policy rationale for the "remoteness" doctrine is explained in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269-70 (1992). The policy was also well put by the New Jersey Superior Court as "a limiting principle formulated in each case to guard against a mass of litigation and liability grossly disproportionate to defendant's fault flowing from remote and speculative injuries which defendant could not foresee in any practical sense of the term." *Peoples Express Airlines, Inc. v. Consolidated Rail Corp.*, 476 A.2d 1256, 1258 (N.J. Super. Ct. 1984).

someone else does not have a right to sue the party who caused the injury or damage. This is often expressed by the principle that no duty is owed to a party who only has an economic loss as a result of personal injury or property damage to another person.<sup>20</sup> Insurance companies do not have a claim in their own right when a tortfeasor injures a policyholder, nor do labor unions have their own claims against tortfeasors when union members are paid benefits because of their illness.<sup>21</sup> The public nuisance suits involve the same kind of claim. The governments in these cases have in effect sued for costs they have incurred because of other individuals' losses. If anyone's rights have been violated (and they may not have been), it is the rights of these individuals and not the rights of the public-at-large.

The second prong of the remoteness rule requires a direct connection between the defendant's conduct and the harm to the public. But this connection is anything but direct in the new public nuisance cases. For example, in the tobacco cases the connection is indirect: defendants marketed

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<sup>20</sup>See, e.g., *Barber Lines v. M/V Donau Maru*, 764 F.2d 50, 51 (1<sup>st</sup> Cir. 1985) (no tort action could be maintained to recover costs incurred when a fuel spill prevented plaintiff from docking at a nearby berth and caused it to discharge cargo at another pier at significant expense); *Dundee Cement Co. v. Chemical Labs., Inc.*, 712 F.2d 1166, 1169 (7<sup>th</sup> Cir. 1983) (affirming dismissal of action by cement plant owner seeking lost revenues from owner and driver of truck that spilled flammable liquid on highway, causing road to be closed and preventing cement company's customers from gaining access to its property).

<sup>21</sup>*State ex rel. Manchester Ins. and Indem. Co. v. Moss*, 522 S.W.2d 772 (Mo. 1975) (en banc) [insurance companies]; *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229 (2<sup>nd</sup> Cir. 1999), cert. denied, 528 U.S. 1080 (2000) [labor unions].

cigarettes, others smoked them, and the government incurred health care costs to treat diseases of these third parties. And in the gun and lead pigment cases, the connection is very attenuated and thoroughly indirect. The links in the chain in the handgun cases, for example, are many. The defendant manufacturers make perfectly legal sales to distributors or wholesalers; distributors or wholesalers then make perfectly legal sales to retailers; retailers then sell the guns to authorized buyers, to “straw men,” or, through other illegitimate means, to unauthorized buyers. The guns then enter an illegal market, and the unauthorized buyers misuse the guns to commit crimes or other harmful acts. The plaintiff governments then incur expenses for crime investigation or emergency services. As a result, it is alleged, the public has a higher tax burden, reduced property values, and the “destruction of communities,” for which losses the plaintiff governments seek to hold the handgun manufacturers liable.

In the lead paint cases a similarly indirect chain of events occurs, involving a sequence of actions, first by lead pigment manufacturers, and then by the makers of paint, followed by architects, general contractors, painters, and finally misuse by failure to maintain the paint by owners of buildings before children ingest the paint and, ultimately, the plaintiff governments claim some expense. This is hardly what the common law courts have in mind when they

require “direct” harm.

In short, what we are seeing today is not your father’s direct public nuisance. It is an effort by state and local government officials to reach far back in the chain of causation, to single out a deep-pocket scapegoat to blame for a social problem, and then to charge the scapegoat for all costs these governments expend in dealing with the problem. It is precisely this kind of abuse that the directness requirement is designed to prevent.

## **V. THE REMEDY MUST BE ABATEMENT, NOT REIMBURSEMENT FOR SERVICES PROVIDED**

The traditional remedy for committing a public nuisance is abatement — *i.e.*, ceasing the conduct in question and removing any offensive condition that constitutes the nuisance.<sup>22</sup> Since a public nuisance is an infringement of a public right — a quasi-criminal offense — abatement almost always is sufficient to remove the nuisance and restore the *status quo ante*. Abatement eliminates the quasi-criminal conduct. Any personal injury or property damage that has resulted from the nuisance is a harm to private rights that falls outside the scope of the government’s cause of action and is reserved for private resolution in a civil tort action. For that reason, the cost of government services or benefits provided to those who sustain personal injury or property damage is

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<sup>22</sup>See RESTATEMENT (SECOND) OF TORTS, § 821B, cmt. I (1979).

not properly included in the remedy for public nuisance.<sup>23</sup>

Yet these costs are the core of what the government plaintiffs in the new public nuisance actions seek to recover. In the handgun suits, the government claims it is entitled to damages measured in part by the cost of emergency medical services it has provided to handgun victims; in the lead pigment cases, governments demand reimbursement for the past and future cost of making conditions at private residences lead-safe. Instead of abatement, the governments seek reimbursement for expenditures they have made for state or municipal services and benefits. But they are not entitled to reimbursement for public services. In fact, in many states a “free public services” doctrine has evolved to reflect the idea that governments cannot finance their expenditures through lawsuits against private parties. This doctrine holds that those whose actions cause government to provide services are not liable for the cost of those services (absent specific legislative authorization).<sup>24</sup> Making these types of expenditures is what government is all about, and the method by which the services are properly financed is taxation, not the imposition of monetary liability on a few selected, private parties.

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<sup>23</sup>A municipality must show “special damages over and above that suffered by the general public” to obtain public nuisance damages. *Township of Howell v. Waste Disposal, Inc.*, 504 A.2d 19, 30 (N.J. Super. Ct. 1986).

<sup>24</sup>*District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *City of Flagstaff v. Atchinson, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9<sup>th</sup> Cir. 1983); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Commw. Ct. 1986).

## **VI. THERE MUST BE COMPLIANCE WITH THE SEPARATION OF POWERS DOCTRINE**

The last relevant principle is not unique to public nuisance law, but is nevertheless critically important to understanding the legitimate scope of this body of law. Often the legislative branch of government has already addressed the problem that is the subject of a public nuisance suit. That alone is not necessarily enough to preclude the suit. But depending on what the legislature has done specifically about the problem, a government official in the executive branch may well be precluded from bringing the particular kind of suit that has been brought.

The separation of powers principle applies to public nuisance in three separate situations. First, the legislature may have decided to occupy a field entirely.<sup>25</sup> For example, in some states the legislature has enacted a comprehensive program for regulating the hazards posed by flaking lead-based paint. The enactment of this kind of program may signal the legislature's intention to use that program as the exclusive means of regulating these hazards. It has set the standards, assigned responsibilities, provided remedies, and provided funding. This is a matter of statutory interpretation, but depending on the interpretation of the statute or statutes at issue, the

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<sup>25</sup>See *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947); *City of Camden v. Byrne*, 411 A.2d 462 (N.J. 1980); *Rhode Island Federation of Teachers v. Sundlun*, 595 A.2d 799 (R.I. 1991).

separation of powers principle may preclude a simultaneous public nuisance action that goes beyond the remedies and funding provided in the statute.<sup>26</sup>

Second, a standard set by the legislature may conflict with the remedy sought by the government in the public nuisance action. For example, in Rhode Island, the legislature has implemented a program to make residential premises “lead-safe,” by ensuring that lead-based paint is safely maintained, rather than removing all of it.<sup>27</sup> Public health studies have shown that hazards may be introduced by removing well-maintained lead based paint from residences. The Attorney General’s public nuisance suit, however, sought removal of all lead-based paint from all residences and buildings. The legislature’s “lead-safe” approach thus squarely conflicted with the Attorney General’s “lead-free” approach. Arguably, therefore, the Attorney General’s public nuisance action violated the separation of powers principle. If the suit is retried as a result of the first mistrial, the Rhode Island Supreme Court may have the opportunity to address this issue.

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<sup>26</sup>As stated in the Restatement (Second) of Torts, § 821B, cmt. f, “if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations.” The legislature, of course, reigns supreme. *See supra* note 25. As the New Jersey Supreme Court has put it, courts do not sit as a “superlegislature,” *Burton v. Silas*, 248 A.2d 521, 525 (N.J. 1968), and have the duty to “declare the law to be as the Legislature has written it.” *Port of New York Authority v. Weehawken Tp.*, 103 A.2d 603, 608 (N.J. 1954).

<sup>27</sup>*See* R.I. GEN. LAWS § 23-24.6-4(15) (2002) [effective until July 1, 2007]; R.I. CODE R. 14 000 013-6.1(a) (setting lead-safe standards for lead in paint) and R.I. Code R. 14 000 013-4.2(d)(3) (intact paint that is not on a friction surface is lead-safe).

The third situation in which separation of powers may preclude a public nuisance suit occurs when the legislature has allocated authority to bring public nuisance actions to a different entity from the one that has brought the suit. In that situation, the suing entity lacks the necessary authority to do what it has attempted. In a lead pigment action in New Jersey, for example, the trial court ruled that legislation delegated the authority to bring public nuisance actions to local boards of health and not to the municipalities that had brought the suits. Because permitting the municipalities to maintain their suits in the face of this legislation would have violated the constitutional separation of powers between the branches of government, the suit was dismissed.<sup>28</sup>

## CONCLUSION

This brief review of the limits of public nuisance law yields two important conclusions. First, the rules that impose these limits are related. They serve the same purpose of protecting private persons from government overreaching. The rules restrict liability for public nuisance in order to constrain governmental authority. Thus, the government may bring a public nuisance suit only to vindicate public, not private, rights; the government must specifically prove the defendant's contribution to the nuisance or its suit fails;

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<sup>28</sup>*In re Lead Paint Litigation*, C.A. No. 702-MT (N.J. Super. Ct., Nov. 4, 2002) (order granting defendants' motion to dismiss public nuisance claim by cities and counties).

there is no liability for hazards posed by an old, lawful product, but only for present activities; the government's suit may not succeed when its harm only indirectly results from the alleged nuisance; the government is entitled to a directive that a private party controlling the nuisance abate it, but not to be paid for providing public services; and a government official may not bring a public nuisance action that conflicts with legislative rules or programs. Each rule is designed to ensure that the government cannot single out a private party and hold that party responsible for the costs of remedying a social problem.

The second conclusion is equally important: as is so often true, the significance of all these rules together is greater than the sum of their parts. It is no surprise that each of the new public nuisance suits would violate most of the rules setting limits on liability for public nuisance. A modest change is not what the new public nuisance suits contemplate. They claim that the boundaries of each and every one of the traditional rules must be expanded substantially and simultaneously in order to validate their claims. Without this kind of wholesale expansion — indeed, eradication — of the fundamental rules of tort law, the suits cannot succeed.

It is one thing for a court to make a modest, incremental change in the law that results in a slight expansion of liability. It is quite a different thing to remake the law entirely in the face of a series of rules that have been developed

over a long period of time, precisely in order to prevent the short-term wishes of individual government officials from overriding well-established individual rights and protections. The new public nuisance suits violate not only the letter of the law, but its overall spirit as well. Taken together, the rules that limit public nuisance liability are telling us that the new public nuisance suits are way out of line.