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THE MOUSE THAT ROARED?:
NOVEL PUBLIC NUISANCE THEORY RUNS AMOK IN RHODE ISLAND

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PREFACE

On a cold gray February day in 2006, a jury in Rhode Island found three companies liable for creating a "public nuisance."[1] In that case, styled as *Rhode Island v. Atlantic Richfield Co*, the State of Rhode Island sued four former manufacturers of lead pigment. The State claimed that the manufacturers were responsible for creating a "public nuisance" in Rhode Island during the century before residential sale of lead paint was banned in 1978.[2] The case made national headlines because, for the first time, lead pigment manufacturers were found liable for problems allegedly caused by poorly maintained lead-based paint in privately-owed homes.

One year later, on another cold gray February day, the Rhode Island trial court (the "Court") issued a long awaited decision regarding the Defendants' post-verdict motions. In a 198 page decision, the Court found that a multitude of alleged legal errors by the Court and alleged misconduct by the State's trial team either did not occur or were not sufficiently serious to require a new trial. In the same decision, the Court ruled that the State's "non-delegable" duty to perform lead

[1] *See* Peter B. Lord, *Three Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J. (Feb. 23, 2006).

[2] 42 FED. REG. 44192 (Sept. 1, 1977); *CPSC Announces Final Ban On Lead-Containing Paint*, Release No. 77-096 (Sept. 2, 1977), *available at* http://www.cpsc.gov/cpscpub/prerel/prhtml77/77096.html (last visited Aug. 3, 2006); *see also* Richard Faulk and John Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel,* 21 TOXICS L. RPTR. (BNA) 1,124, 1,145 (2006) (three-part series *covering pages* 1,071-98, 1,124-52, 1,172-96 providing a thorough overview of the use of lead historically, its toxicity, its use in paint, federal regulations aimed at controlling and eliminating the risk of lead paint poisoning and a summary of lead paint litigation).

abatements was in fact *partially* delegable – so long as the State remained ultimately responsible.

But the Court's ruling was much more than a lengthy disposition of procedural and substantive issues regarding the trial and the verdict. In a decision that dispensed with the most fundamental requirements of American tort law, this Rhode Island trial court held that merely *manufacturing and marketin*g a product is sufficient to impose liability on a defendant—even in the absence of any evidence that a defendant's product produced harm to any person where the nuisance allegedly exists. With this broad stroke, the Court ruled that neither product identification nor evidence of specific injuries attributable to a particular defendant is necessary before a defendant is ordered to abate a nuisance.

As a result of this ruling—which is preliminary and may not be subject to appeal presently —this Rhode Island Court has created an extraordinarily dangerous vehicle for lawsuit abuse—a tort where liability is based upon *unidentified* ills allegedly suffered by *unidentified* people caused by *unidentified* products in *unidentified* locations. At least in Rhode Island, product liability law has been swallowed up by the amorphous concept of "public nuisance"—a development that should alert every industry to the dangerous alliance of public authorities and private counsel, and their opportunistic distortions of traditional legal principles.

I. BACKGROUND OF THE RHODE ISLAND LITIGATION

The extensive trial held in 2006 was not the first trial in this case. In 2002, a jury deadlocked 4-2 against the State's original public nuisance claim.[3] The jury deadlocked because they were not able to agree as to whether the State had established the existence of a public nuisance.

In response, the State persuaded the Court to lower the threshold for finding a public nuisance. Additionally, in the second "all-in" trial, the Court allowed the State to try the manufacturers not on their own conduct, but on the conduct of their trade associations—conduct that did not occur in Rhode Island, but rather happened in

[3]Peter B. Lord, *Trailblazing Lead-Paint Trial Ends in Deadlock*, PROVIDENCE J., Oct. 30, 2002.

other states. And then, in the second trial, the State refused to disclose new evidence that, by the State's own standards, the childhood lead poisoning "problem" in Rhode Island was *eliminated* before the trial ended. In spite of this evidence, known only to the State, the State argued to the jury that the level of childhood lead poisoning in the State had reached a "plateau," and was no longer declining. Thus, the jury was deprived of critical evidence—unknown to Defendants until after the verdict was returned—that flatly undermined the presence of the "nuisance" the State wrongly claimed to exist.

As a result of the Court's jury instructions, and the State's trial tactics, the jury's decision against the Defendants, in hindsight, now seems predictable and, indeed, inevitable. Although the second jury was also initially deadlocked 4-2 in favor of the defense, post-verdict interviews indicated that the Court's jury instructions essentially directed a finding liability.[4] According to one juror, the jury instructions "didn't give the paint companies much of a window to crawl through"[5]

Some, such as the private contingent fee lawyers that Rhode Island hired to prosecute its case, claim that what happened in Rhode Island constitutes "justice."[6] Others, including these authors, take a different view. The Judge's rulings and the State's conduct resulted in a monstrous mosaic of serious errors, many of which, standing alone, constitute reversible error.[7] When viewed as a whole, the Rhode Island Court's decision abdicates the judiciary's fundamental role to ensure procedural and substantive fairness to *all* parties—a role that is enshrined in our most honored jurisprudential traditions. It is not the role of the judiciary—and

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[4] *See* Lord, *supra* note 1.

[5] *See* Peter Krouse, *Verdict Raises Risk for Paint Companies*, PLAIN DEALER, Apr. 2, 2006.

[6] *See* A. Sprague and F. Fitzpatrick, *Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children*, 11 ROGER WILLIAMS U. L. REV. 603 (2006).

[7] According to the Court, "based on the evidence that a public nuisance exists ... and on common sense, the jury properly could have concluded that whoever sold and promoted lead pigment in Rhode Island proximately caused the public nuisance. In effect, the sale and promotion would complete the chain of causation that begins at manufacture, and ends with the existence of the public nuisance." Court's Decision, *Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226, *17-18 (R.I. Super. Ct. Feb. 26, 2007) [hereinafter "Court's Decision"], *available at* http://www.courts.state.ri.us/superior/pdf/99-5226-2-26-07.pdf (last visited Feb. 26, 2007). The authors wonder if "common sense" also dictated that the Court ignore all of the landlords and property owners who improperly maintained the lead-based paint or allowed it to deteriorate to where it became a health hazard.

certainly not the role of a *trial* judge—to blithely "change the law" when precedents raise barriers to a plaintiffs' recovery, especially when, in order to do so, the court must sweep centuries of common law tradition under the rug. Such an analogy is particularly apt in this case because, like soil under the carpet, the injustice of the Court's ruling persists—even when covered by almost 200 pages of creative justifications.

II. THE JURY CHARGE

A. The Court Improperly Defined a Public Nuisance as "the Cumulative Presence" of Lead

The trial court defined a public nuisance injury simply as "the *cumulative presence* of lead pigment in paints and coatings in [or] on buildings in the state of Rhode Island.[8] This wrongly suggests that an injury to a large number of individuals is the same as an injury to the community as a whole.[9] Case law clearly states that "harm to individual members of the public" (no matter how many) is not the same as harm "to the public generally."[10] As one court explained, "[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the

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[8]Peter B. Lord, *Lead-Paint Case Now in Jury's Hands*, PROVIDENCE J., Feb. 14, 2006, at B2 (emphasis added) (quoting Judge Michael A. Silverstein).

[9]In its jury instructions, the Court altered the language in comment g of §821B of the Restatement ("A public right is one common to all members of the general public"). Instead of following the Restatement, the Court instructed the jury that:

> A right common to the general public is a right or an interest that belongs to the community-at-large. It is a right that is collective in nature. A public right is a right collective in nature and not like an individual right that everyone has not to be assaulted, defamed, or defrauded, or negligently injured.

Jury Instructions, *Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226, *11 (R.I. Super. Ct. Feb. 13, 2006) [hereinafter "Jury Instructions"]. This language ignores the Restatement sentence which states that a public right is common "to all members of the general public." The Court refused the defendant's requested instruction that conduct "does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons." RESTATEMENT (SECOND) TORTS §821B, cmt. g. In fact, the Court instructed the jury contrary to comment g that: "When you consider the reasonableness of the interference, you may consider a number of factors including . . . the numbers of the community who may be affected by it. . . ." Jury Instructions, *supra* note 9, at *12.

[10]*City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1115-16 (Ill. 2005).

invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence."[11]

As will be discussed elsewhere in this article, the State provided no proof that the "nuisance" existed anywhere except in *private residences*. Accordingly, the alleged problems did not threaten the exercise of any rights held by the public at large, such as the use of public buildings or resources, but rather related to the exercise of *private* rights by *private* individuals in their *private* abodes. Since no "collective" right was impacted that applied to the general public, the trial court's instructions overstepped the bounds of public nuisance as defined by the common law, and dissolved the distinction between public and private nuisance as separate causes of action.

Thus, for the first time in common law jurisprudence, the Rhode Island Court held that the characterization of a nuisance as "public" or "private" depends not upon its impact on rights held by the community at large, but rather upon the number of persons allegedly affected by the problem. The State's intrusion into areas governed previously by personal claims is an alarming expansion of governmental power. Using the "common law" to justify such a usurpation of private interests is not only unprecedented, but also sets a dangerous precedent that may be used to justify even greater expansions of governmental authority into private spheres.

B. The Court Improperly Tied its Definition of "Unreasonable Interference" to Presence of Harm and Not to a Defendant's Conduct

The Court instructed the jury that "either a present harm or the potential for a likely future harm" was enough to support a finding of a public nuisance. The jury was told that it could find an "unreasonable interference" so long as it finds that children "ought not to have to bear" the injury of lead poisoning; there was no

[11] *Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943) (internal quotation marks omitted).

requirement to find that the defendants engaged in any unreasonable conduct.[12] This instruction erroneously suggests that it "is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another."[13]

According to the Court's jury instructions, a public nuisance concerns more than the community's right to be free from harm caused by existing conditions. Specifically, the Court instructed the jury that a public nuisance can exist if it finds that the public ought not have to bear the *possibility* that someone might be harmed in the future "as a result of a condition that exists today."[14] Accordingly, in Rhode Island, "the standard for finding a public nuisance speaks only of 'likelihood' of future harm and not of absolute certainty."[15] Thus, to be liable, *a nuisance does not have to presently exist*. Under these instructions, "intact" paint, which presents no present risk, can also qualify as a public nuisance.[16]

With this ruling, despite its professed allegiance to "common law" principles of public nuisance, the Rhode Island Court leaped to accept a concept that virtually every other common law court has rejected. Most courts have concluded that there is no public right to be free from the threat that someone may use a legal product in

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[12]Jury Instructions, *supra* note 9, at *11 ("Interference is unreasonable when persons have suffered harm or are threatened with injuries that they ought not have to bear."). *See also id.* at *12 ("When you consider the unreasonableness of the interference, you may consider a number of factors including the nature of the harm, the numbers of community who may be affected by it, the extent of the harm, the permanence of the injuries and the potential for likely future injuries or harm.").

[13]*See* Victor E. Schwartz and Phil Goldberg, *The Law Of Public Nuisance: Maintaining Rational Boundaries On A Rational Tort*, 45 WASHBURN L. J. 541, 564 (2006). A public nuisance requires interference with a public right. *See*, *e.g., Hydro-Manufacturing Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 957-58 (R.I. 1994); *Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980). "Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public." RESTATEMENT (SECOND) OF TORTS §821B comment g.

[14]Jury Instructions, *supra* note 9, at *11-12.

[15]*See also* Court's Decision, *supra* note 7, at *37 (stating that "while it may be true that some paint which contains lead pigment has lasted 300 or 400 years, the jury was entitled to conclude that even intact paint is likely to cause harm.").

[16]*Id.*

a way that creates risk of harm to another.[17] In dismissing a public nuisance claim against gun manufacturers in New Jersey, the United States Court of Appeals for the Third Circuit wrote, "[i]f defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity."[18]

Of course, there was no evidence before the Rhode Island Court that lead paint products were anything other than legal at the time they were manufactured and sold and there was no finding that such products were "defective." Indeed, one of the State's principal purposes for using the "public nuisance" cause of action was to *avoid* the proof problems that frustrated them in traditional product liability cases,[19]—a result the Rhode Island Court achieved by focusing entirely on the rights of *unidentified* private individuals to be "free" from the "likelihood" that they, or some other *unidentified* private person, might be harmed by some *unidentified* manufacturer's product in some *unidentified* private residence. There are no rational restraints on the jury's discretion, and the court's power, to impose undefined and unlimited liability if neither the scope nor the extent of the alleged nuisance is relevant. Such an amorphous rule unfairly forces defendants to defend claims without the most basic information necessary to evaluate them.

C. Lack of Proof of In-state Sales is no Bar to Liability According to the Rhode Island Trial Court

In one of the most incredible developments of the trial, the Court instructed the jury that it could find the Defendants liable *even if the state was unable to show that they sold lead pigment in Rhode Island*. It instructed the jury that it "need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of

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[17]*Chicago*, 821 N.E.2d at 1114-15.

[18]*Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

[19]*See* Sprague, *supra* note 6.

them, are liable."[20] In fact, the Court did not even require that any Defendant "sold lead pigment in Rhode Island."[21] "Common sense" assumptions and speculation by experts that sales *must have occurred* was enough to support submission of the case to the jury[22]—even when the only evidence allegedly regarding sales by one of the Defendants was (i) the existence of an agreement with a Massachusetts company allowing the company to sell its product in Rhode Island, and (ii) the presence of branch stores that were opened *after* the Defendant stopped manufacturing lead pigment.[23]

Thus, according to the Rhode Island trial court, the jury can find a Defendant liable for a public nuisance even if there is no proof that the Defendant sold a lead paint product in Rhode Island. Although the Court characterized the evidence as

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[20]Jury Instructions, *supra* note 9, at *14. *See also* Court's Decision, at *13 ("the Court found that the State did not have to 'identify a particular paint containing a lead pigment manufactured by any particular defendant at any particular location within the State." [citing *State v. Lead Indus. Ass'n*, 2005 R.I. Super. LEXIS 95, *8 (Jun. 3, 2005) at *2]) ("The Court finds that this type of argument is merely a restatement of an argument that the Court has rejected in the past.").

[21]Jury Instructions, *supra* note 9, at *14 ("nor do you have to find that the Defendants, or any of them, sold lead pigment in Rhode Island to conclude that the conduct of such Defendants, or of any of them, is a proximate cause of a public nuisance").

[22]Although no evidence of any particular product sales was adduced, the Court relied upon the following testimony of one of the State's expert witnesses, Dr. Rosner, who asked if his testimony was just assumptions, testifies:

> Well, it's more than an assumption. I know that you had stores here. You had one over on Traverse street, you had a warehouse, you had salesmen here. You had outlets for ACME paint and other paints here. You had a representative in Pawtucket who was here selling something, *and I would assume that it's various products of Sherwin Williams*, or I know it was various products of Sherwin Williams. And *I must assume that you were selling what you usually advertised in throughout the nation, you were selling the same products here. So, therefore, I would assume that they're here.*

Court's Decision, *supra* note 7, at *29 (emphasis added). The entirety of the States' causation evidence is based on this expert's legally inadwquate conclusory opinion. Mere assumption of what occurred is not evidence. *See Montuori v. Narragansett Elec. Co.*, 418 A.2d 5, 11 (R.I. 1980) (directed verdict was appropriate where expert acknowledged he was speculating).

[23]The Court found sufficient evidence for sales of lead pigment by one defendant based on Dr. Rosner's testimony that the defendant had branch stores and an independent dealer selling lead pigment in Rhode Island. *Id.* at *22-23. However, the Court ignored Dr. Rosner's testimony that he did not know when those Rhode Island stores opened or that they in fact opened in 1958 - the year Dr. Rosner testified that this same defendant stopped manufacturing lead pigment. *See* Trial Transcript, January 20, 2006, at *147-48. Thus, the only evidence of Rhode Island sales of lead pigment for this particular defendant was a contract giving a Massachusetts company the right to sell in Rhode Island. Nevertheless, according to the Court, the expert and jury was "entitled to infer" Rhode Island sales from this showing. Court's Decision, *supra* note 7, at *29, n.28.

"circumstantial," the testimony was, on its face, based upon assumptions by an expert witness, not sales records or even anecdotal evidence of sales by customers. Indeed, the Court even allowed the jury to infer "circumstantially" that agreements with third parties from a different state that permitted sales in Rhode Island necessarily resulted in such transactions—an inference that, in a jurisdictional or commercial litigation context, would never be indulged. Moreover, instead of limiting testimony to Defendants' conduct in Rhode Island, the Court allowed the State to present evidence of conduct of Defendants' and their trade association's activities in other states,[24] and then instructed the jury to consider that evidence in determining whether any of the Defendants may have sold their product in Rhode Island.[25] While the Court referred to this piecemeal collection of assumptions and speculations as a "mosaic of circumstantial evidence,"[26] seeing a cohesive design in such speculations requires considerable artistic liberty.

III. THE JURY INSTRUCTIONS AND THE ELEMENTS OF A PUBLIC NUISANCE

A. Proximate Cause and the Creation of a Nuisance

According to the Court, in order to prove "proximate cause," the State had to prove that each Defendant was a "substantial cause" of the public nuisance and that

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[24] *Id.* at *28, *29-30. The Court's conflicting positions on the use of trade association evidence are difficult to reconcile:

> Although the court ruled that the acts of the [trade association] are not attributable to the Defendants, this is still relevant circumstantial evidence to show the extent that the lead-pigment products of [trade association] members were marketed nationally and in Rhode Island. ... Such evidence permitted the jury to infer that the [trade association] was marketing the products of its members—the Defendants—who admittedly were in the business of manufacturing and selling lead pigment. ... *So while the [trade association's] activities are not attributable to any Defendant, the evidence is still competent to demonstrate that the Defendant's products reached Rhode Island.*

Id. at *28 (record citations omitted, emphasis added). How evidence "not attributable to any Defendant" can be used to support a claim against those same Defendants seems inexplicable, to say the least.

[25] Jury Instructions, *supra* note 9, at *14 (Instead, you must consider the totality of each Defendant's conduct ....); *see also* Court's decision, at *12.

[26] Court's Decision, *supra* note 7, at *30 ("Therefore, the Court finds that a sufficient mosaic of circumstantial evidence exists on this record to support a Rhode Island nexus, and will not order a new trial on this basis.").

the public nuisance was a substantial factor in harming the public.[27] Specifically, the Court instructed the jury that a Defendant was liable if it substantially contributed to the "creation" of the public nuisance.[28] As a standard for evaluating liability, "the role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien."[29] Traditionally, public nuisance law has not supported recovery simply because the "manufacture and sale of a product [was] later discovered to cause injury."[30]

Unfortunately, the Rhode Island Court never instructed the jury about what constitutes "creation." Instead, it permitted the State to argue that the Defendants broadly "created" the nuisance by manufacturing lead pigment and placing it into the stream of commerce. In order to understand a concept, however, it is not sufficient to merely cite self-serving examples. For a principle to work justly, its limits must be circumscribed so that a person can guide their affairs in a predictable and coherent manner. Surely, merely manufacturing and selling a product cannot be sufficient to impose liability. If that were so, then *any* product could be transformed into a "public nuisance" decades after it is sold—even when, like virtually all products, it produces harm only as a result of use by others and its own physical decay. So when does "creation" of a nuisance begin? How far back in the chain should the law go to impose liability?

Consider the classic "public nuisance" example of a tree that falls and blocks a public road. Everyone will agree that the fallen tree is a public nuisance—but who is responsible for "creating" the nuisance? Did the tree's *current owner* create the nuisance merely because it was on his property, or because he failed to maintain the tree and allowed it to become diseased, or because it died and he failed to cut it down before it fell? Was the nuisance created by a *prior owner* of the property who initially bought the tree from a store and decided to plant the tree along the road?

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[27] Jury Instructions, *supra* note 9, at *12.

[28] *Id.* at *13-14.

[29] *Detroit Bd. of Educ. v. Celotex Corp.,* 493 N.W.2d 513, 521 (Mich. Ct. App. 1993) (quoting 63 AM. JUR. 2D Products Liability §593).

[30] *Id.*

Was it created by the *store* that sold the tree to the customer who decided to plant the tree along the road? Or was the nuisance created by the *nursery* who planted the seed, grew the tree and sold to it a lawn and garden shop? Using the Rhode Island trial court's reasoning, the nursery is liable for "creating" a public nuisance merely because it placed the tree into the "stream of commerce." It is immaterial that the nursery did not know where the tree would be planted or that some future property owner would not maintain the tree. In fact, under the Court's ruling, it is not even necessary to prove that a particular nursery sold the offending tree. It is sufficient if the nursery merely *promoted* its trees nationally because, in Rhode Island, jurors and experts are free to assume, speculate and infer that actual sales took place within the State.

The absurdity of this result is apparent. Because all products, whether cultivated or manufactured, decay and deteriorate, and because their use and decay typically occurs in a third party's possession, the law justly requires some inherent "defect" in a product attributable to the manufacturing process or, alternatively, some unreasonable misconduct by the manufacturer before liability is imposed. Otherwise, the decision becomes a mere exercise in economics and social policy, rather than justice. Naming such a socialistic transfer of wealth after a traditional common law remedy, such as "public nuisance," changes nothing. In fact, *the Rhode Island trial court did not employ the common law "public nuisance" cause of action at all*. Instead, it created an entirely *new* cause of action that imposed *absolute liability* under a jurisprudential alias.

The true character of this pseudonymous remedy is plainly revealed in the Court's opinion. The Court plainly holds that the only evidence needed to find a defendant liable for "creating" a public nuisance is evidence that defendants manufactured and marketed lead pigment or paints containing lead pigments. So long as the defendant promoted its product nationally and had agreements that permitted others to market its products in Rhode Island, jurors are free to speculate and, indeed, *assume* that the defendant's products were actually sold in Rhode

Island.[31] Even the bare existence of a sales agreement with a Massachusetts-based company granting the right to sell products in Rhode Island is apparently sufficient.[32] Such a ruling allows "expert witnesses" to opine, assume and speculate that actual sales occurred, and further permits jurors to base their decisions on proof which is wholly unreliable.[33] Even disinterested courtroom observers noted the lack of transactional evidence and questioned the reasoning of the Court's decision, stating "I was present in the court room during direct and cross and no, [the State's expert] did not provide any concrete evidence of direct business transactions in RI by the defendants."[34]

By adopting the State's "cumulative presence" definition of what constitutes a public nuisance, the Court did something utterly foreign to most "common sense" observers—*it relieved the State of its burden to prove that the defendants did anything wrong*. The State was not required to prove that any particular child actually had been injured by lead-containing pigment, or that any particular home in

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[31]*See* Court's Decision, *supra* note 7, at *27, where the Court piles inference upon inference to build a questionable evidentiary edifice:

> The jury could properly have concluded from this testimony that the Defendants' substantially participated in the sale and promotion of lead pigment nationally. Then, in combination with [the State's expert] testimony on each Defendant's individual promotion efforts in Rhode Island, and his opinion that each Defendant sold and promoted lead pigment in Rhode Island, the jury could have inferred (though it was not required to so infer) that each Defendant's participation in Rhode Island was similarly substantial. ...the jury could still have concluded that the Defendants' lead pigment is still on Rhode Island buildings in substantial amounts. On the basis of the foregoing, the Court concludes that the evidence was sufficient to make a prima facie case that the Defendants substantially participated in activities which proximately caused the public nuisance.

Id.

[32]*Id.* at *29 n.28 (Noting that the defendant's re-cross-examination was designed to show that the sales agency agreement ... only provided the Massachusetts company with a right to sell goods in Rhode Island—but did not directly prove that such sales took place.... However, [the State's expert] was entitled to infer, as was the jury, that a sales agreement to sell goods in Rhode Island actually resulted in sales in Rhode Island.").

[33]*Id. See also, Waldman v. Shipping Marina, Inc.*, 230 A.2d 841, 844-45 (R.I. 1967) (precluding a jury from drawing a "pyramid[ing] of inferences" and recognizing that, although a jury may be permitted to infer a fact, if the inference is reasonable, from an established fact, it may not draw a further inference from the initial inference it choose to draw); *Carnevale v. Smith*, 404 A.2d 836 (R.I. 1979) (finding that motion for directed verdict should have been granted where non-moving party relied on a "pyramid of inferences" to establish the defendant's negligence).

[34]Peter B. Lord, *Providence Journal's Lord Reviews RI Lead Paint Ruling*, PROVIDENCE J. (Feb. 27, 2007).

Rhode Island actually contained lead pigment manufactured by any of the Defendants. Instead, the Court allowed the State to introduce general evidence that many children had elevated blood lead levels, that lead-containing paint probably contributed to those blood lead levels, and that the Defendants historically made lead paint. No individual child's condition, history or circumstances were evaluated to determine whether, in fact, lead paint actually caused any child's injuries. No individual residences of those children were evaluated to determine whether they actually contained lead paint or whether alternative sources of lead might have caused the alleged problems. Instead, once the jury found that a defendant historically made lead paint and promoted its product, it was *assumed* that the defendant contributed to the nuisance and *deemed* that the defendants were responsible for causing the alleged harm to *all* children who suffered from lead poisoning in the State. Nothing in this unjust scenario remotely resembles the cause of action traditionally known as "public nuisance." Despite the familiar "common law" moniker, the Court has, by eliminating the essential element of causation, unmistakably crafted a new and dangerous program of social insurance that merely masquerades as a tort.[35]

B. Defendants' Inability to Control the Nuisance Precludes Liability

Historically, Rhode Island courts have required plaintiffs to prove that a defendant controlled the instrumentality causing the nuisance when the damage occurred.[36] Furthermore, Rhode Island law has held consistently that once a

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[35]Proof of causation is a fundamental requirement of not only public nuisance, but of all tort law. *See, e.g., Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004); *Citizens for Preservation of Waterman Lake v. Davis,* 420 A.2d 53, 59-60 (R.I. 1980); *see also,* W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS 269 (5th ed. 1984) ("A mere possibility of ... causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant" (footnotes omitted)). "Proof of negligence in the air, so to speak, will not do." *See* Sir Frederick Pollock, The Law of Torts 455 (11th ed. 1920) (famously cited by Justice Cardozo in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) for the proposition that negligence in the air is not a basis for imposing liability).

[36]*See, e.g., City of Manchester v. National Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (applying New Hampshire law) ("[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through

product enters the stream of commerce, the manufacturer loses control over the use (or misuse) of the product and cannot be held liable for any nuisance flowing from the product.[37] By not insisting on proof that Defendants controlled the circumstances that produced the nuisance, the Court removed all notions of personal (*i.e.* landowner) responsibility by making the defendants insurers of how purchasers used and maintained their products.[38] Moreover, because the Defendants do not presently have the ability to abate the alleged problem except through the voluntary cooperation of landowners—they lack the ability to implement any overt remediation orders.

If the State now argues that Defendants should be required to abate the "cumulative presence" of lead paint in Rhode Island, it is unclear how such an order could be enforced. Since feasibility and consideration of the privacy interests of the public are essential elements of any remedial action, rushing to judgment before determining how such a plan can be implemented is patently premature. Unless such matters are addressed before ordering a remedy, the problem could persist indefinitely—not because the Defendants are recalcitrant, but rather because the affected property owners prove uncooperative or resist the plan's implementation.

Such a development is not improbable. Many property owners may understandably resist the *de facto* condemnation of property values that results from

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ownership or otherwise."); *see also, Friends of Sakonnet v. Dutra,* 738 F. Supp. 623, 633-34 (D.R.I. 1990) (applying Rhode Island law) ("[T]he paramount question is whether the defendant was in control of the instrumentality alleged to have created the nuisance when *the damage occurred*.") (emphasis added); *Friends of Sakonnet v. Dutra,* 749 F. Supp. 381, 395 (D.R.I. 1990) (court emphasized that liability for public nuisance "depends primarily on the question of control and duty to maintain" and thus, "[o]ne who controls a nuisance is liable for damages caused by that nuisance.").

[37]*See City of Manchester*, 637 F. Supp. at 646 (holding manufacturers of asbestos cannot be held liable on nuisance because the manufacturers did not have control over product after sale); RESTATEMENT (SECOND) OF TORTS §834 cmt. d.

[38]In Rhode Island and in many other states, manufacturers of products are not the insurer of all possible subsequent uses and misuses of its product. *Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 716 (R.I. 1999) ("[A] component part supplier should not be required to act as an insurer for any and all accidents that may arise after that component part leaves the supplier's hands."); *LaBelle v. Phillip Morris, Inc.*, 243 F. Supp. 2d 508, 526 n.5 (D.S.C. 2001) ("A manufacturer is not the insurer against all injuries caused by its product."); *Accord Starling v. Seaboard Coast Line R. Co.*, 533 F. Supp. 183, 190 (S.D. Ga. 1982); *Zimmerman v. Volkswagen of Am., Inc.*, 920 P.2d 67, 73 (Idaho 1997); *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 190 (Ohio 1998); *Webb v. Navistar Int'l Transp. Corp.*, 692 A.2d 343, 350 (Vt. 1996); *Elliott v. Lachance*, 256 A.2d 153, 156 (N.H. 1969).

a finding that their walls are coated with lead paint. Moreover, many owners may also decide that the risks created by remedial action, such as sanding walls and replacing windows, are greater than the problems associated with covering the lead with fresh and unleaded coatings. The Defendants do not have the power to compel property owners to even allow *inspections*, much less remediation, and one doubts that the State has the political will to challenge property owners who flatly refuse to cooperate. Such problems illustrate the issues which arise when courts, with their limited resources and jurisdiction, presume to solve problems that require comprehensive reconciliations of competing considerations. Such solutions are uniquely *legislative* in nature because they require truly democratic solutions generated by the representatives of the *public at large*, as opposed to the narrow perspectives generated by litigants.

To be blunt, one wonders what will happen when property owners who are not parties to the case refuse to open their doors to inspection, evaluation and remediation. What enforceable orders, if any, can the court issue to compel their obedience when, throughout these proceedings, they have been absent? The question is critical because, unless the court's remedial order is designed to do nothing more than coerce the payment of substantial sums of money—something the Court expressly denies[39]—it is entirely possible that the remedial orders will be inhibited by property owners who resist *de facto* condemnation, increased health risks caused by remediation of otherwise encapsulated lead, and the substantial inconvenience that results from abatement.

C. The Court Improperly Ignored the Role of Property Owners

One of the Defendants' principal arguments asserts that they cannot be liable for poorly maintained paint because Rhode Island law provides manufacturers immunity from lawsuits arising out of injuries caused by alterations of their

[39]Court's Decision, *supra* note 7, at *177.

products.[40] Relying on established Rhode Island precedent, the Defendants also argue that the property owners' failure to correct a known, dangerous condition (the deteriorated paint) supersedes and eliminates their liability as a matter of law:

> [W]hen a second actor has become aware of the existence of a potential danger caused by the negligence of a first actor and the second actor acts negligently with regard to the dangerous condition, thereby bringing about an accident with injurious consequences to others, the first actor is relieved of liability. *This is so because the condition created by the first actor is merely a circumstance and not the proximate cause of the accident.*[41]

Hence, if the owners failed to perform their statutory duties, that failure should be a superseding cause of the nuisance. In its decision, the Court acknowledged that under Rhode Island law, property owners have a duty to maintain lead-based paint in a safe manner,[42] but the Court dismissed this duty as irrelevant because it did not exist when the lead-based paint was sold.[43] According to the Court, although post-sale laws were enacted that required property owners to safely maintain areas covered with lead-based paint, the laws were not "intended to 'authorize' the presence of lead paint or otherwise insulate actors such as the Defendants from public nuisance liability."[44]

Traditionally, if defendants' conduct created the condition (the presence of lead pigments), but subsequent acts of third parties (property owners allowing the paint to deteriorate) caused the State's injuries (elevated blood lead levels in children under six), the defendants would not be liable. Although the Court correctly noted

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[40]*See* R.I. GEN. LAWS §9-1-32; *see also, La Plante v. Am. Honda Co.*, 27 F.3d 731, 736 (1st Cir. 1994) (Section 9-1-32 prohibits liability where consumer failed to maintain product).

[41]*Pantalone v. Advanced Energy Delivery Sys., Inc.*, 694 A.2d 1213, 1215 (R.I. 1997) (emphasis added) (citing *Walsh v. Israel Couture Post No. 2274 V.F.W.*, 542 A.2d 1094 (R.I. 1988)); *see also*, *Drazen v. Otis Elevator Co.*, 189 A.2d 693, 695 (R.I. 1963) ("Accordingly, where the second actor, after having become aware of the existence of a potential danger created by the negligence of the first actor, acts negligently in respect of the dangerous situation and thereby brings about an accident with injurious consequences to others, the first actor is relieved of liability, because the condition created by him was merely a circumstance and not the proximate cause of the accident.").

[42]Court's Decision, *supra* note 7, at *32 (identifying the 2002 Lead Hazard Mitigation Act and the 1991 Lead Poisoning Prevention Act).

[43]*Id.*

[44]*Id.*

that the laws were not designed to "authorize" the presence of lead-based paint, it ignored the fact that *these statutes were passed to prevent the creation of the very "nuisance" that allegedly exists*.[45] Indeed, the Court's opinion disregards a critical point, namely, that the factual foundation of the lawsuit exists only because property owners did not do what Rhode Island law requires them to do. If landowners had simply obeyed the law and maintained their properties in, at the very least, a "lead-safe" condition, no health concerns would exist presently. Of equal importance, no health concerns will arise in the future if these statutory mandates are followed. Given the comprehensive and clear mandates laid down by the Rhode Island legislature, the Court's indifference to the responsibilities of property owners is perhaps the best illustration of its intent to not only ignore, but actually *change the existing public policy declared by the State's legislature*.[46] Such a declaration dangerously threatens the careful balance between governmental branches that is essential to our form of representative democracy.

D. The Court Improperly Instructed the Jury to Ignore the Role of Alternative Sources of Lead in Creating the Nuisance

The Defendants also complained that the judge improperly narrowed the scope of the trial to lead pigment contained in paints and coatings, instead of allowing the jury to consider the role of alternative sources of lead in creating the alleged nuisance. Although the "harm" threatened by the situation is "lead poisoning," lead poisoning can be caused by exposure to *any* source of lead. Thus, the Court implicitly instructed the jury to ignore critical facts, namely, that lead poisoning can result from common sources such as (i) lead in the water systems of

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[45]*See* Rhode Island Lead Hazard Mitigation Regulations §§ 5.1 & 9 (legislative determination that it is the owners responsibility and burden to keep their properties in a safe condition) and § 5 (setting minimum conditions that property owners must meet to keep all painted surfaces in a good condition, free from chalking, chipping and or peeling); see also R.I. GEN LAWS §§ 23-24.6-2.5(a)(1) & 2.5(b)(1) (requiring property owners to maintain their properties in at least lead-safe condition); § 23-24.6-11.1(a) (requiring property owners to abate any "lead hazards" that are identified).

[46]Court's Decision, *supra* note 7, at *33 (not finding "as a matter of law that the failure of property owners to prevent harm, arising from an alleged duty which did not exist when the Defendants acted, is an intervening, superseding cause").

children's homes or schools, (ii) lead in the soil outside of their homes (associated with decades of leaded gasoline use) that is also tracked into their homes, or which contaminates the food they eat, and (iii) children placing toys containing lead in their mouths or in the case of sidewalk chalk, their chalk-dusted fingers in their mouths.[47] According to the Defendants, the Court essentially directed a verdict on these disputed issues. Although the Court acknowledged that the jury could have read the instructions in the manner that Defendants complain[48] it nonetheless held that when considered as a whole, the instruction merely advised the jury not to blame Defendants for other sources of lead. Thus, this objection to its jury charge was "without merit." [49]

By precluding consideration of the myriad alternative sources of lead, and by failing to require the State to identify and quantify the extent to which those sources contributed to cause childhood lead poisoning within Rhode Island, the jury was forced to presume that lead paints were the *sole* cause of those health concerns—a presumption that flies in the face of decades of extensive action by regulatory bodies, a host of scientific evidence, and a growing body of current developments.[50] To call the inevitable conclusion of such a truncated inquiry a *de facto* "directed verdict" is an understatement. Without the ability to determine the true nature and scope and causes of childhood lead poisoning in Rhode Island—something a legislative body would surely develop before passing a comprehensive statute—the jury necessarily concluded that the Defendants were responsible for causing the entire situation. Without the benefit of the "rest of the story," [51] the jury inevitably concluded that

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[47]*See* Faulk and Gray, *supra* note 2, at 1080-84, 1093-96, and 1145-50 (discussing many alternative sources of lead exposure).

[48]Court's Decision, *supra* note 7, at *97 ("It is arguably possible that the jury could have discerned from that instruction the meaning suggested here by the Defendants.").

[49]*Id.* at *98. ("The juxtaposition of these two sentences should have made abundantly clear to the jury that a finding of public nuisance could be based only upon lead pigment found in paints and coatings on buildings, and that evidence of other sources of lead could be used to rebut the existence of a public nuisance.").

[50]*See* Faulk and Gray, *supra* note 2, at 1080-84, 1093-96, and 1145-50 (discussing many alternative sources of lead exposure).

[51]The phrase is used with all deference to and respect for noted commentator Paul Harvey.

Defendants should be required to abate all properties containing lead paint—even though the beneficial impact of such abatements on the rate of childhood lead poisoning cannot be determined without evaluating the role of alternative sources.

Simply stated, pervasive problems with multiple potential causes cannot be solved by arbitrarily focusing on an isolated factor. Here, the Court not only ignored the role of other responsible parties who needed to participate in order to effectuate a solution, it also ignored the role of other causes of lead poisoning, thereby depriving the Defendants, the jury, and ultimately the Court itself of the facts and resources necessary to determine the existence, scope and causes of the problem. Without those tools, the efficacy of any remedial orders cannot be projected reliably, and there is no assurance that the vast resources consumed in litigating the controversy will produce any meaningful results. Indeed, this entire conundrum was created by an improper judicial intrusion into the legislative sphere—a sphere which, as we will see below, has already acted in a salutary manner to eliminate childhood lead poisoning in Rhode Island.[52]

IV. SIGNIFICANT TRIAL ERRORS

A. Guilt by Association

The State promised the Court that it would prove the existence of an "agency" between the Defendants and the Lead Industries Association ("LIA")—the lead trade association. The State claimed that it would prove that the LIA was the Defendants' agent. Although the State presented evidence about the LIA's legislative lobbying activities in other states, it presented no further evidence of agency. The State finally conceded the lack of evidence supporting an agency, but did so only *after* the Court conditionally admitted all of the evidence about LIA's lobbying. Although the Court ruled that there was no agency, it still allowed the jury to consider the lobbying

[52]Childhood Lead Poisoning in Rhode Island: The Numbers 2006 Edition, Rhode Island Dept. of Health 17-18 (July 2006).

evidence—and expressly instructed the jury that the evidence could not be considered as acts of the Defendants, but could be considered for other purposes.[53]

The Court believes its instruction adequately remedied the problem. Nevertheless, the Defendants complain that the Court improperly allowed the "genie out of the bottle" by refusing to instruct the jury to disregard the evidence completely. Interestingly, the Court notes that much of the LIA evidence was "admissible not to demonstrate acts of the LIA that were attributable to the Defendants, but to show that some or all of the Defendants had knowledge of a particular matter."[54] This remark is inexplicable, however, if, as the Court also ruled, *knowledge is not relevant to liability for public nuisance*.[55] By doing nothing to control the impact of alleged "collective" activities on the jury's deliberations, the Court tacitly condoned a "guilt by association" inference, thereby allowing the jury to view Defendants adversely for engaging in activities that they have a constitutional right to pursue.

Lobbying and petitioning the government is a form of speech expressly protected by both the Federal and Rhode Island Constitutions.[56] Under a line of cases known as the *Noerr-Pennington* doctrine, the U.S. Supreme Court recognized that "opposing legislation is a way of participating in the legislative process just as proposing legislation is" and is equally protected by the First Amendment.[57] Hence, the State's introduction of LIA's lobbying efforts against lead-related legislation in other states was constitutionally prohibited. Opposition to regulations and

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[53]*See* Court's Decision, *supra* note 7, at *63.

[54]*Id.*

[55]*Id.* at *15-16 (stating that "the underlying cause of the nuisance is the manufacturing activity, and not the knowledge, because without the manufacturing there could be no public nuisance" and that "knowledge evidence is not helpful in establishing a nexus between Defendants' activities and the public nuisance in Rhode Island, and the Court must look to other evidence of 'nexus'").

[56]*See* U.S. CONST. amend. I; R.I. CONST. art. I, §21.

[57]*In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999); *see also, Eastern R.R. Presidents Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961). The Rhode Island Supreme Court similarly "has adopted the *Noerr-Pennington* premise and has applied its protection to common-law tort claims." *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996); *see Cove Rd. Dev. v. W. Cranston Indus. Park Assocs.*, 674 A.2d 1234, 1237 (R.I. 1996) ("[T]he constitutional protection of the right to petition is no less compelling in the context of common-law tort claims than in the framework of federal anti-trust legislation.").

legislation is exactly the kind of petitioning activity that the Constitution protects.[58] The introduction of lobbying efforts is prohibited even if the legislative activities were part of the alleged nuisance harm itself.[59] Thus, there is no reason the Court should have allowed the State to introduce and use LIA's constitutionally protected lobbying efforts as a basis for convincing the jury to impose liability, and given the honored and sensitive character of this right, the Court should have strictly protected against its infringement by instructing the jury to disregard the evidence it previously admitted.

Similarly, the Defendants complained that the Court allowed the State to introduce evidence of their membership in LIA. It is well established that the free association right guaranteed by the First Amendment prohibits the imposition of liability for a defendant's membership in, or association with, a trade organization.[60] "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection."[61] Courts should preserve and protect this associational right, not penalize parties by imputing "guilt by association."[62] Traditionally, courts

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[58]*See, e.g., Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 300 (9th Cir. 1994) (prohibiting plaintiff from arguing that defendant's legislative and petitioning activities were the cause of a harm: "Proof of causation would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue. This inquiry runs afoul of the principles guiding the *Parker* [*v. Brown*, 317 U.S. 341 (1942)] and *Noerr* decision.").

[59]*See, e.g., Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984) ("In short, plaintiffs assail defendants for taking a particular view in a scientific debate and for trying to retain a regulatory standard which defendants preferred. Not only do these actions not constitute torts, they are protected by the first amendment."). "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[60]*See Thomas v. Collins,* 323 U.S. 516, 530-31 (1945) (freedom of association applies to organizations engaged in economic activity, as it does to individuals and political organizations).

[61]*In re Asbestos School Litig.,* 46 F.3d at 1294; *see also, Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977) (holding the First Amendment protects "the freedom of an individual to associate for the purpose of advancing beliefs and ideas").

[62]Contrary to well-established First Amendment jurisprudence, the Court allowed the State to cast guilt on all defendants for merely belonging to and associating with the LIA. For example, it argued that:

> What the State is saying is that if you don't agree with your industry organization, get out or speak out or do something different. Don't continue paying your dues. Don't keep funding the programs, don't keep going to the meetings, don't keep serving on the board

have zealously protected parties from inferences that "chill" the exercise of constitutionally protected rights—yet this Rhode Island court remained silent on this critical subject.

B. The "Plateau" that Never Was

During the trial, the State and its experts relied on 2004 data to argue that Rhode Island's lead-poisoning prevention programs had reached the limits of their effectiveness, that too many children still had elevated blood lead levels, and that elevated blood lead levels had "plateaued."[63]

After the verdict was returned, the Defendants complained about this argument for a fundamental reason—it was simply untrue. The *truth* is that there were 621 new elevated blood lead levels in Rhode Island for *all* of 2005 (compared to 1,167 new elevated blood lead levels in 2004), a *drop* of 47% from the previous year.[64] The State knew these facts by not later than January 31, 2006 (during the trial) when Rhode Island's Department of Health prepared a draft report documenting the 2005 numbers.[65] Yet, after learning that the new 2005 data directly contradicted its theme of the "plateauing" of declining lead levels, the State

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> of directors, don't keep serving on committees. . . . Not one, not a single one of these defendants said stop it. Not a single one of them—not a single one of them quit the LIA to protest their conduct.

See Trial Transcript, February 10, 2006, at *49; *see also,* Trial Transcript, Nov. 11, 2005, at *36; Trial Transcript, Dec. 8, 2005, at *56-*71.

[63]Morning Trial Transcript, Nov. 1, 2005, *23-*24, *65-*68 ("Ladies and Gentlemen, we've reached a *plateau*. We've gone as far as the secondary measures of enforcement and the screening program can take us."); *see also,* Trial Transcript, Feb. 29, 2006, at 80. ("[W]e also know that in 2004 more than 1,100 Rhode Island children – there's actually 1,167 children, real children with real families, who tested positive for lead poisoning.... We know that Rhode Island has made great strides but that today too many children still have lead poisoning." "But if you'll remember what Dr. Shannon told you, he was asked if lead poisoning and the treatment of lead poisoning was a public health success story, and he said yes because the numbers have come down. But he said there's been a *plateau* recently and that it is still a public health menace.").

[64]CHILDHOOD LEAD POISONING IN RHODE ISLAND: THE NUMBERS 2006 EDITION, Rhode Island Dept. of Health 5 (July 2006), *available at* http://www.health.ri.gov/lead/databook/2006_Databook.pdf (last visited Sept. 1, 2006).

[65]ELIMINATING LEAD POISONING IN RHODE ISLAND, Draft Report (Jan. 31, 2006) (noting that there were only 621 new cases of lead poisoning at the end of 2005). This draft report was provided as part of the Report Of The Interagency Council On Environmental Lead that was submitted to Rhode Island's governor on March 17, 2006.

still allowed its "special assistants" to continue claiming that a "plateau" existed.[66] According to the Defendants, this misrepresentation of facts is sufficient grounds for granting a new trial.

To compound the problem, neither the State nor its "special assistants"[67] disclosed this relevant and critical information regarding the effectiveness of Rhode Island's existing lead poisoning prevention program to the Defendants after it became aware of the new data.[68] The choice was made even though there was a discovery request seeking that very information.[69] Defendants argued that the State breached its duty of candor to the Court and its Rule 26(e) duty to supplement its discovery responses. They claimed that this undisclosed information was relevant to the heart of the issue in this trial—whether a public nuisance exists in Rhode Island—and was crucial to Defendants' case.

To rebut this claim, the State's "special assistants" claimed that they were not obliged to supplement discovery because the Court ended discovery on May 30, 2005. Therefore, the State argued that the Defendants were obliged to seek an order requiring the State to supplement its discovery,[70] and that the Defendants waived their right to complain because they did not seek a court order mandating

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[66]*See* Feb. 29, 2006 Trial Excerpt, *supra* note 63; *see also* Trial Transcript, February 9, 2006, at *172 ("Ladies and gentlemen, we've reached a plateau. We've gone as far as the secondary measures of enforcement and the screening program can take us. And the only ones who should do more, I submit - that would be the first time for the defendants…"); Trial Transcript, Feb. 9, 2006, at 81 ("Just because it's a public health success story doesn't mean that we leave the rest of the kids who have been unaffected behind. It's not getting worse, but it's not getting better.").

[67]The State's "special assistants" were attorneys with the Motley Rice law firm, which holds a contingent fee interest in any recovery awarded to the State.

[68]Rule 26(e)(2)(b) states: "A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which … (b) The party knows that the response, though correct when made, is no longer true or complete, and the circumstances are such that a failure to amend the response is in substance a knowing concealment."

[69]During the trial, on January 10, 2006, defendants asked counsel for the State to: "Please provide us with the most current version of the [LESS] database [Rhode Island's Lead Poisoning database]. We understand that this version will include blood lead data through the end of 2005. As the State is scheduled to conclude its case shortly, please forward this…." Hearing Transcript, August 31, 2006, at *171. The State's response was "… not only is this an overly burdensome request to comply with while in the midst of trial but discovery has been closed for over eight months." *Id* at 171-72.

[70]According to the State, if defendants wanted "additional discovery," beyond May 30, 2005, they were to work it out by agreement if possible, or show the court good cause for the discovery and ask it to order the discovery. Hearing Transcript, August 31, 2006, at *189.

supplementation.[71] Thus, according to the State, its duty to supplement ended once the trial began,[72] and it would be unfair to inject the 2005 numbers into the case because it "totally changes the playing field of numbers."[73] Allegedly, the State's arguments throughout trial were consistent with the facts as they existed before the trial started and the 2005 numbers were finalized.[74]

The State also argued that its decision to deny providing the final 2005 numbers was not relevant because: (1) the defense rested its case-in-chief without putting on any evidence, thus the Defendants decided the jury did not need any additional information,[75] and (2) the Court previously ruled that because the State's Attorney General brought a common law claim, it did not have to adopt the statutory definition of lead poisoning or what constitutes an elevated blood lead level that the State's legislative assembly enacted as the law of the Rhode Island.[76] But, by refusing to supplement discovery and provide the Defendants with the year-end 2005 data, the State denied the Defendants an opportunity to show the jury, with the State's own numbers, that there was no "plateau," and it denied the jury the opportunity to weigh the credibility of the State's claims using the best and most current information available.

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[71] *Id.* at *245.

[72] Now, in that time period as well, going chronologically, the defendants asked the State what—we were going to rely on data post 2004. Any of the 2005 data for trial. And we told them no. And that's what we did, Your Honor. We closed it at 2004 because that was the last full year of data that was available before the trial started. And in October, couple of months—couple of weeks before the trial started, we produced them—to the defendants the LESS database with the first three quarters of the 2005 data. We're still a couple of weeks pre-trial. We are post the May 30 cutoff. But by agreement we provided it. And we provided it, Your Honor, because we were pre-trial. Trial hadn't started yet, so they could have the information.

Id. at *201.

[73] *Id.* at *246 ("On January 10 we sent an e-mail saying, 'Time out, we're in the middle of trial, not supplementing discovery anymore. We have been limited to the 2004 numbers. If we go and give the additional 2005 numbers, it totally changes the playing field of numbers. We don't agree. We are not going to give it to you.'").

[74] *Id.* at *247.

[75] *Id.* at *207-08.

[76] *Id.* at *189 ("But what you said is the Department of Health can define lead poisoning any way they want in their rules and regulations, but that's got no bearing on how it's defined here.").

In considering this problem, the Court aptly noted that "[i]t has been said that there are three types of lies: lies, damn lies, and statistics."[77] The Court acknowledged that both the State's method of determining the number of childhood lead poisoning cases changed (from what the State was telling the jury),[78] that the actual number on which the State was basing its plateau argument were wrong and that the State probably should have provided the accurate numbers.[79] Still, the Court sidestepped this impropriety by simply finding that "the Defendants did not exercise due diligence to obtain the last three months of data" and that "the data is merely cumulative of issues that the Defendants could have and should have raised at trial."[80]

Incredibly, the Court stated that "it is difficult to see how that [disclosing the complete 2005 data to the Defendants when it was requested] constitutes a concealment—knowing or otherwise."[81] The Court went so far as to say "even if the court assumes the worst case scenario: that the State knew the content of the 2005 LESS data; believed that it would destroy their case; and consciously took a frivolous position to ignore a properly interposed discovery request, the Court still could not find that a new trial was warranted" because the Defendants chose not to present any evidence in their case in chief.[82] Apparently, the Court believes that the State's wrongful conduct was vitiated because the Defendants' did not present a case-in-chief. Of course, this reasoning begs the question. Short of clairvoyance, *it is impossible to know whether the Defendants would have presented a case-in-chief if the State fully disclosed all the relevant facts.*

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[77]Court's Decision, *supra* note 7, at *150.

[78]*Id.* at *155 (stating that even though the Defendants "were not given notice of the changed counting methodology, they still are not entitled to a new trial" because in the Court's opinion the changed methodology was merely additional evidence that the old method being used was flawed [even thought it was an admission] and thus, it was "merely cumulative or impeaching" of evidence already presented).

[79]*Id.* at *159 (noting that "the testimony of [the State's expert] regarding annual data would have weighed in favor of an order compelling production of the 2005 data in January, 2006).

[80]*Id.* at *157.

[81]*Id.* at *168.

[82]*Id.* at *168-69.

Although the Court correctly notes its requirement to seek a court order for additional discovery once the State refused Defendants' requests, nothing in the rules "freezes" the truth.[83] The 2005 data contradicted the 2004 data on which the State was relying to make its case. Defendants the truth. Even if the State is "technically" correct, this issue vividly illustrates the problem with states hiring private counsel as "special assistants" to prosecute these types of cases pursuant to contingent fee agreements.[84] Indeed, it exposes the conflict between public service and private interests that undercuts the fundamental duties owed by those representing the sovereign, and leads to the inevitable inquiry of whether such alliances should *ever* be permitted.

Moreover, mere "technical compliance" does not excuse the State's continued knowing reliance on *incorrect data* in their closing arguments when they still claimed the existence of a plateau. According to the Court, in Rhode Island, such actions are allowed to stand unless the Defendant's can "show 'by clear and convincing evidence that the alleged fraud' prevented them from fully presenting their case."[85] Thus, because the State provided a partial year's worth of data in discovery, the Court found that the "Defendants were not prevented from presenting

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[83]According to the United States Supreme Court, a government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery in a particular case; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963). A government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and therefore the government attorney is required to use the power of the sovereign to promote justice for all citizens. *Berger v. United States*, 295 U.S. 78, 88 (1935).

[84]Unlike "special assistants," attorneys general and assistant attorneys general take an oath to "faithfully and impartially discharge the duties of the office of the Attorney General" and to "support the Constitution and laws of this state, and the Constitution of the United States, so help me God." *See, e.g.,* R.I. GEN. LAWS §§36-1-2, 42-9-9. They are paid in full through the annual appropriation adopted by the general assembly to ensure that their loyalty is to the people of the State. *See, e.g.,* R.I. GEN. LAWS §§42-9-1, 42-9-10. State employees are forbidden from using their positions for financial gain or advantage. This means that they are not allowed to have a financial interest, direct or indirect, in the areas they are administrating because it creates a conflict of interest "which is in substantial conflict with the proper discharge of his or her duties or employment in the public." *See, e.g.,* R.I. GEN. LAWS §§36-14-1, 36-14-5(a). A substantial conflict of interest exists when the Attorney General "has reason to believe or expect that he or she . . . will derive a direct monetary gain . . . by reason of his or her official activity." R.I. GEN. LAWS §36-14-7(a).

[85]Court's Decision, *supra* note 7, at *160-61.

data of a decline in the 2005 incidence rate."[86] It also found that the State was not relying solely on its "plateau" argument.[87] Accordingly, it refused to grant a new trial—thereby perpetuating a recurrent theme of this unjust proceeding, namely, *depriving the jury of all of the facts relevant to their deliberations*.[88] This time, however, the jury was not simply denied the right to weigh disputed evidence, and it was not merely denied the right to determine the credibility of controversial proof. Instead, it was denied the right to consider evidence that flatly undermined the existence of the very harm the alleged nuisance was alleged to create—an unexpectedly high number of children with lead poisoning in Rhode Island.

It seems inconceivable that such an important decision on the facts of the case should hinge upon an incomplete record—much less a technical "waiver"—especially when the complaining party is a State charged with "doing justice" through its designated counsel. Did the "profit motive" underlying the aggressive efforts of the "special assistants" cause the State's counsel to forget the admonition of the United States Supreme Court that a government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery, in a particular case; rather, "the Government wins its point when justice is done in its courts?"[89] Did the rush to claim the contingent fee bounty blur the truth that a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and therefore blur the requirement that public counsel must use the power of the sovereign to promote justice for all citizens?[90] Even if the participating counsel deny

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[86]*Id.* at *165.

[87]"However, the State based its theory upon more than merely the LESS data when it argued that primary prevention techniques are required to completely eliminate lead poisoning. The Court finds ample evidence in the record to support the State's use of that [plateau] argument. …" *Id.*

[88]Recall that a similar result obtained when the jury was not allowed to consider alternative causes for lead poisoning. As will be developed later, the jury was also deprived of the opportunity to consider the responsibilities of property owners and landlords.

[89]*Brady v. Maryland*, 373 U.S. 83, 88, fn. 2 (1963).

[90]*Berger v. United States*, 295 U.S. 78, 88 (1935); *see also, State v. Powers*, 526 A.2d 489, 494 (R.I. 1987) ("the primary duty of a prosecutor is to achieve justice, not to convict"). It is beyond dispute that this solemn duty applies "with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (Mikva, C.J.). Thus, it

these inquiries, does the situation nevertheless present an unacceptable "appearance of impropriety," especially when representation of the public interest is concerned? These questions are undeniably worth asking—and if they are worth asking, they surely deserve better answers than procedural gamesmanship.

V. PREDICTING THE FUTURE: WHAT HAPPENS NEXT IN RHODE ISLAND?

A. Will the Court Adjudicate the Liability of the Third Party Plaintiffs?

Missing from the courtroom table during the first two Rhode Island trials were some—but by no means all—landlords and property owners who were joined by the Defendants. Clearly, these persons have control over the alleged nuisance, and they are unquestionably required by Rhode Island law to keep their properties in a lead-safe manner.[91] They are also the persons that Rhode Island law requires to abate lead hazards on their properties.[92] Most importantly, they are the ones who are responsible for allowing the lead-based paint in their properties to deteriorate to the point that a health hazard is created—and they are the persons in the best position to prevent and abate any resulting "public nuisance." These critical parties were missing from the table because, at the State's request, they were severed from the trial.[93]

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has long been recognized that a government lawyer in a civil proceeding should be held to a higher standard than a private lawyer, and that in civil proceeding "government lawyers have 'the responsibility to seek justice,' and 'should refrain from instituting or continuing litigation that is obviously unfair.'" (citation omitted).

[91] *See* R.I. GEN LAW §§23-24.6-11.1(a), 23-24.6-21.3(b) & (c). (2005); *see also* R.I. Lead Hazard Mitigation Regulations §§5.1 & 9 (2003).

[92] *Id.* at § 23-24.6-11.1(a).

[93] The State of Rhode Island actually opposed the joinder of landlords and property owners in the trial against the pigment manufacturers—despite Rhode Island's clear regulatory mandate that recognizes that such persons are primarily responsible for preventing lead exposures in their properties. Incredibly, the trial Court agreed with this argument and severed the manufacturers' claims against the landlords and property owners from the proceedings. Decision and Order, *Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226 (R.I. Super. Ct. issued Mar. 22, 2004).

Now that the liability of the lead pigment manufacturers has been decided, will the Court adjudicate the liability of the severed landlords and property owners? After all, *these parties are already before the Court* and "common sense" dictates that their liability should be determined before any fair, informed and just remedy can be crafted. Nevertheless, "common sense" aside, it remains to be seen whether the State or the Court will take any early action regarding persons whose poorly maintained properties comprise the "public nuisance" the State seeks to remedy.

In its recent decision, the Court "telegraphed" its intentions. With respect to these parties, the Court stated: "[t]o the extent participation in an abatement remedy occurs without the participation of these unidentified liable parties, the Defendants should seek future actions for contribution, *toties quoties*, against those parties."[94] The Court also stated that "[i]f the Defendants feel that it is an appropriate time to prosecute their third party complaint, they may take appropriate steps leading to a trial."[95]

Clearly, it is the Court's intention to proceed "full speed ahead" with the remedy phase of this trial without first adjudicating the liability of all potentially responsible parties. According to the Court, it "sees no reason to delay the formation of a remedial plan *merely* because there may exist other liable parties somewhere."[96] The import of such a statement is unmistakable—it is not the Court's "goal" to adjudicate the liability of all parties who contributed to the creation of this public nuisance, even those who, like the property owners, are "primarily responsible" under Rhode Island law. Apparently, the Court believes that if it attempted to adjudicate the liability of "every possible party who contributed to the public nuisance found by the jury . . . then abatement would never occur.[97]

To these authors, the Court's statements are a frank admission that "fixing the problem" is more important than deciding the responsibilities of those who must do

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[94]Court's Decision, *supra* note 7, at *176.

[95]*Id.* at *177.

[96]*Id.*

[97]*Id.*

the fixing. By seeking a remedy prematurely, the Court not only unfairly places the burden on those who are conveniently sued first—persons unilaterally chosen by the State—but also denies the landowners a meaningful voice in the remedy selection. The entire scenario eerily resembles a "common law" CERCLA[98] replete with all of CERCLA's ambiguities and problems but lacking its safeguards. Surely, at least insofar as the currently joined landowners are concerned, it is not too much to ask that their liabilities be determined so they may participate in fashioning remedies for which they may be responsible. Although it remains unjust to exclude the entire range of owners from the debate, denying involvement by *some* owners who are *already parties to the suit* disregards all the statutory priorities Rhode Island's legislature so carefully crafted. If such a ruling prevails, there will be little doubt that, similarly to CERCLA, Rhode Island's pseudonymous "public nuisance" claim is not a tort—but rather a means to impose liabilities on "deep pockets" arbitrarily selected to ensure that a *result* is achieved, irrespective of whether it is just.

B. What Relief Is Available?

In its complaint, the State sought the funding of various specific programs, including (i) a public education campaign regarding the continuing dangers posed by lead, (ii) lead poisoning detection and preventative screening programs, (iii) treatment of lead-related health issues, and (iv) detection and remediation of lead containing paint from all pre-1978 homes in the state.[99] The Defendants argued that this type of relief is monetary in nature and not available in public nuisance actions.

Public nuisance theory was not developed to allow private citizens the power to stop or abate conduct, to allow government to grow its coffers, to spread the risk of an enterprise, or to punish defendants.[100] Traditionally, under public nuisance theory, governmental entities (such as the State of Rhode Island) may only seek an injunction to stop the activity causing the public nuisance or force the party to abate

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[98]Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 95-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675) (2007).

[99]*See* Hearing Transcript of May 22, 2006, at *19-20.

[100]*See* Faulk and Gray, *supra* note 2, at 1176 (discussing public nuisance law).

the public nuisance itself, but they may not seek monetary damages.[101] In its decision, the Court acknowledged that it cannot order an injunction for the payment of money damages,[102] but it rejected the conclusion that the relief requested by the State was merely a "veiled request" for a monetary-based injunction.[103]

The Court observed that an injunction could be issued that, in addition to requiring defendants to abate the public nuisance in the private homes, required the defendants to conduct a testing and monitoring program and/or to conduct a public education campaign.[104] Although such programs do not address or redress the nuisance directly, the Court apparently believes that it has discretion to require the Defendants to create and pay for such programs "as a 'structural' injunction akin to those used in school desegregation cases."[105] The Court apparently perceives that its equitable discretion enables it to address issues beyond investigation, evaluation and, if necessary, cleanup of residences.

Unfortunately, the problem of the "unwilling homeowners" who resist the Court's altruistic intrusions remains unsolved, and no injunction issued against any Defendant can, consistently with due process, coerce such persons to open their doors or tolerate "abatement" involuntarily. However grand the design of the Court's ultimate remedy may appear, the lack of such power remains the "Achilles heel" that is fatal to the entire program. After all, social engineering is best accomplished by society itself through its elected legislatures, and no court, no matter how knowledgeable or powerful it may appear, can yet transform a non-participant's private home into anything other than their personal and sovereign castle.

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[101]Schwartz, *supra* note 13 at 542. Unlike government plaintiffs, private individuals cannot seek injunction or abatement. Other members of the general public, even if inconvenienced by the public nuisance, cannot use the tort at all.

[102]Court's Decision, *supra* note 7, at *177 (citing *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979)).

[103]*Id.* The State has urged the Court to appoint a Special Master to design an abatement plan and requested that the abatement plan could "include, *inter alia*, 'education, prevention, identification, hazard reduction, and monitoring.'" *Id.* at *171.

[104]*Id.* at *178.

[105]*Id.*

C. Overcoming the State's Non-delegable Duty to Run Its Lead Abatement Program

According to Rhode Island's Attorney General, the State "owes a non-delegable, legally imposed duty to the residents of the State to make lead-related expenditures."[106] As a result of this non-delegable duty, the Defendants have repeatedly insisted that the State, rather than the Defendants, must run any abatement program, and that the State must then seek reimbursement.[107] This argument presented a major problem for the Court. On the one hand, the law precluded the Court from awarding the State any monetary damages, and the only permissible remedy is an injunction ordering the Defendants to abate the nuisance. On the other hand, if the State has a non-delegable duty to run the lead abatement program and make lead-related expenditures, the Court cannot enjoin any other party to perform that role. Unless the Court could overcome the preclusive effect of the State's non-delegable duty, it was powerless to award any relief.

To get around this problem, the Court creatively used the jury's verdict to "bifurcate" the State's non-delegable duty. First, the Court ruled that "[a] necessary implication from the jury verdict is that the cumulative presence of lead pigment in paint imposes a burden on the State that it ought not have to bear. Therefore, to the extent that an abatement remedy relieves the State of some of its burden, the Court does not see how that relief would be improper."[108] Second, it held that only the "the ultimate responsibility for performance—is non-delegable."[109] Finally, the Court

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[106] *Id.* at *180 n.130 (citing *State v. Lead Indus. Ass'n*, 2001 R.I. Super. LEXIS 37, *52–*53 (R.I. Super. Ct. April 2, 2001)).

[107] The defendants claim that under the doctrine of *toties quoties,* the State cannot be awarded future damages in this lawsuit because the State can bring future actions seeking to recover those monies it spends. *Id.* at 174. *Toties quoties* is Latin for "as often as occasion shall arise." BLACK'S LAW DICTIONARY 1490 (West 6th ed. 1990). Accordingly to the defendants, once the State actually performs abatement in a particular area, those costs will no longer be unrecoverable future damages, but will be recoverable as past damages. The amount of those costs will also be readily ascertainable because the State will have already spent the money, and presumably will keep accurate records of those expenditures. Therefore, a future action is required to recover future damages. Court's Decision, *supra* note 7, at *174 n.128.

[108] *Id.* at *180.

[109] *Id.* at *180 n.130.

ruled that the performance of the non-delegable duties was delegable "to third parties, such as Defendants."[110]

Additionally, the Court held that it would be inequitable to require the State to spend money to perform the abatement itself and bring future actions to recover monies it spent.[111] Surprisingly, the Court opined that if it required the State to perform the abatements and seek cost recovery, "it is doubtful that such abatement would ever be performed."[112] The Court further opined that although it is "theoretically possible" that the State could bring cost recovery actions, the Court did not think the State had adequate resources to bring such actions even though the State would be benefited by the preclusive effect of this litigation.[113] Thus, the Court ruled that because the State is incapable of effectively abating the lead problems on its own, and because the State would not have the resources to bring future cost recovery actions, requiring the State to fully perform its non-delegable duties was inequitable and an inadequate remedy. As the Court so poignantly put it: "Defendants … cannot seriously comprehend that after a finding of liability by the jury, the 'form' of abatement ordered by this Court would be no abatement at all."[114]

One wonders how the Court—which was obviously aware that, by Rhode Island's own standards, the childhood lead poisoning danger had been *eliminated by the State's existing program* while the case was pending—could ignore that development and insist that abatement was still necessary. Incredibly, the Court does not even *refer* to the precipitous drop in elevated blood lead levels in Rhode

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[110]*Id.*

[111]*Id.* at *175 ("this Court does not find it 'adequate' after over six years of litigation for the non-liable party [*i.e.*, the State] to have to take primary responsibility for abating the nuisance, for which other parties have been found liable, and then be required to engage in more litigation to recover its costs"). Of course, as discussed earlier, the court found no problems forcing defendants to do so, even though the parties they would pursue—the landowners—are, by statute, primarily responsible for lead paint concerns. Even here, the Court's exercise in "liability relativity" is obviously illogical.

[112]*Id.* at *176.

[113]*Id.*

[114]*Id.* at *181.

Island for 2005 – a drop of 47% from the previous year[115] – in any part of its remedial discussion. Of course, *this decline occurred solely as a result of the State's existing programs*, which were developed by the legislature and implemented by the State's executive branch.

It is one thing for the Court to rule erroneously that the *jury* did not need to consider this evidence in determining whether a nuisance existed, but it is quite another for the *Court* to ignore those facts in determining whether additional programs are needed to maintain the elimination that the State has already achieved so admirably.[116] Although the Court may be justifiably frustrated that its docket has been unnecessarily consumed by two lengthy trials to resolve liability for a nuisance that no longer exists, that frustration will only be compounded it if plunges ahead to order a remedy for a non-existent risk. To paraphrase the Court's opinion, perhaps, it is the *statistics* that show us, after all, what the "lies and damn lies" actually are.

CONCLUSION

The tortured history of the Rhode Island proceedings illustrates the pitfalls of blurring the distinctions between the legislative and judicial functions of government. To be sure, the "common law" has its role in modern society, but it is not designed to supplant or replace public policies already declared by other branches of government. The roots of the common law are based in experience, not experiments. This experience is developed through centuries of jurisprudence based upon the collective experience of individual cases—experience that yields not only the wisdom to make difficult decisions, but also the wisdom to know when such decisions should be made by others.

Indeed, one wonders at the extraordinary effort and zeal of a single tribunal to decide gargantuan questions of public policy as matters of *first impression* in the

[115]Childhood Lead Poisoning In Rhode Island: The Numbers 2006 Edition, Rhode Island Dept. of Health 5 (July 2006).

[116]Although the Court did not consider the 2005 data before concluding that Rhode Island's public nuisance is huge, "the Court finds that the priority of any abatement remedy should not be to duplicate programs run by the State, but rather to focus on areas in which the State's programs are inadequate and need supplementation." Court's Decision, *supra* note 7, at *180.

face of legions of procedural, substantive and constitutional barriers rationally constructed by centuries of reasoned precedent. Although these departures are depicted as consistent with prior applications of the tort of "public nuisance," the record reveals something very different. In fact, the new "claim" is not a tort at all, but rather a massive "program" designed to coerce those who simply manufacture and market products to bear responsibility for those products whenever and wherever and to whomever a State may arbitrarily choose.

Such a sweeping declaration by a legislature would be immediately challenged as unconstitutional for a variety of reasons beyond the scope of this article, but at least such a declaration would be passed after a broad inquiry in chambers equipped to conduct broad investigations, as opposed to a courtroom restricted by the record generated by advocates. At least such a declaration would be made by a body of many persons with diverse points of view after all interested persons were allowed to participate, and after the issues were subjected to debate, executive review, and if necessary, a governor's veto. If the measure survived, the law would then be entrusted to the judiciary to interpret and apply—but not to improvise upon, amend, or expand.

As the situation now stands, the Rhode Island trial court has unleashed a phenomenon bounded only by its own ingenuity—a phenomenon that contains seeds of abuse that, unless constrained, threaten the fundamental structures of representative democracy by imposing liability without wrongdoing and remedies without injury. At its essence, the new "claim" imposes liability solely upon the basis of a person's *status* as a product manufacturer, making them responsible not for what they have done, but rather for who they are. In a real sense, Rhode Island's new "claim" is more akin to a *tax* imposed by the legislature than a judgment issuing from a court. As such, it sets the most dangerous precedent of all, for as Justice Marshall so eloquently recognized in *McCulloch v. Maryland*, "the power to tax is the power to destroy."[117]

[117] *McCulloch v. Maryland*, 17 U.S. 316, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

Unfortunately for the Rhode Island Defendants, they did not prevail on their post-verdict motions. Fortunately, however, opportunities still remain to reverse the course of the proceedings, either in the remedial phase or, ultimately, on appeal. As the case proceeds, and as the abusive seeds of this cause of action are sown in other jurisdictions, courts across the nation will be confronted with opportunities to act consistently with their common law forbears, relying on experience to inform their wisdom—or to pursue their own experiments in social engineering. Although such an ill-advised pursuit may produce results, those results are unlikely to resemble justice. Our diverse and democratic society, which wisely entrusted the development of public policy to its legislatures, is entitled to more representative solutions than those devised through the "tunnel vision" of courts and opportunistic litigants.

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