Case Nos. 04-63-MP, 06-158-A, and 07-121-A

IN THE SUPREME COURT
FOR THE STATE OF RHODE ISLAND

STATE OF RHODE ISLAND,

Appellee,

v.

LEAD INDUSTRIES ASSOCIATION, INC., *et al*.,

Appellants.

On Appeal from the Superior Court
for the State of Rhode Island

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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January 31, 2008

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the nation's largest federation of businesses. It represents an underlying membership of more than three million businesses and professional organizations of every size and from every economic sector and geographic region in the country. One important function of the Chamber of Commerce is representing the interests of its members in court on issues of national concern to the business community. To that end, it has filed more than one thousand amicus briefs in state and federal courts.

This case is of particular interest to the Chamber of Commerce and its members. A series of legal errors by the trial court produced a jury verdict holding manufacturers of lead pigment liable for creating a "public nuisance" consisting of the presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island. The trial court's rulings represent a vast departure from the foundational requirements of public nuisance law and create a new form of absolute liability unknown to the law—in Rhode Island or elsewhere. The decision below opens the floodgates to claims of potentially limitless liability against *any* economic actor that plays a role in creating *any* society-wide problem, even when the actor's conduct conformed at the time to all societal norms of reasonableness. If the trial court's rulings are permitted to stand, the businesses represented by the Chamber of Commerce will be the target of future nuisance suits seeking to hold manufacturers of lawful, non-defective products liable for all manner of social ills, from global warming to obesity. The Chamber of Commerce thus has a strong interest in these proceedings, and it offers a unique, economy-wide perspective on the trial court's rulings that could be of assistance to this Court.

QUESTION PRESENTED

Is public nuisance law an appropriate mechanism for imposing liability on manufacturers of lawful, non-defective products that are not deemed to have negative societal consequences until long after they are made and sold?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS, AND STANDARD OF REVIEW

The Chamber of Commerce hereby incorporates by reference the Procedural History and Factual Background sections of the Appellants' Joint Brief, as well as the Standard of Review section of the Brief for Appellant Sherwin-Williams Company.

SUMMARY OF ARGUMENT

Even the most carefully designed product can cause injury when misused or improperly maintained. When such injuries occur, the most logical litigation target is usually the party responsible for the misuse or deterioration of the product. Nonetheless, some plaintiffs in search of deeper pockets turn instead to the product's manufacturer. Such plaintiffs often have found traditional tort theories, such as negligence and strict products liability, to be ineffective means of obtaining recovery from manufacturers of non-defective products. This is because those tort doctrines require either that the product in question be defective or that the potential for injury be foreseeable to the manufacturer at the time of the product's sale.

In an attempt to circumvent these sensible limitations on liability, some plaintiffs have sought to hold manufacturers liable under the doctrine of public nuisance. Most courts faced with these novel nuisance claims have rejected them. Those courts have recognized that, like theories of negligence and strict liability, nuisance law has unique limitations that make it an unsuitable mechanism for claims against non-negligent manufacturers of non-defective products.

Breaking with centuries of public nuisance jurisprudence in Rhode Island and elsewhere, the trial court in this case came to a different conclusion. It ignored longstanding restrictions on the scope of nuisance law and held defendants liable for creating a public nuisance through their manufacture and sale of lead pigment. If allowed to stand, this literally unprecedented decision would have dramatic and unwelcome effects on the judiciary, the political process, industry behavior, and the price and availability of socially beneficial products. Like any unprincipled theory of expansive liability, it would inflict major costs on the economy, and those costs ultimately would be borne by ordinary consumers. For the reasons discussed below, this Court should reverse the trial court's decision and restore public nuisance law to its traditional scope.

ARGUMENT

I. PUBLIC NUISANCE LIABILITY, LIKE OTHER FORMS OF TORT LIABILITY, IS SUBJECT TO PRUDENT LIMITATIONS THAT STRIKE AN EFFICIENT BALANCE BETWEEN COMPETING POLICY GOALS

The tort doctrines of negligence and strict products liability are of limited utility in lawsuits targeting manufacturers of lawfully made, non-defective products. Designed to strike an efficient balance between competing policy goals, these doctrines hold manufacturers accountable for injuries attributable to product defects and the manufacturers' own unreasonable conduct, but they do not compel manufacturers to serve as insurers against every social ill to which their products might conceivably contribute. Frustrated by the limitations of these traditional tort options, plaintiffs have settled on public nuisance law as an alternative mechanism for holding deep-pocketed manufacturers liable for injuries resulting from the use or misuse of non-defective products. Public nuisance theories are attractive because, according to plaintiffs, they do not require a demonstration that the product in question is defective *or* that a manufacturer acted negligently in placing the product in the stream of commerce.

What plaintiffs have failed to recognize is that nuisance law imposes three elements that usually cannot be met in lawsuits targeting manufacturers of lawfully-made, non-defective products. A defendant cannot be held liable for a public nuisance unless it has infringed on a *public right*. And where that infringement does not result from a defendant's unlawful or tortious conduct, it must arise from the defendant's unreasonable use of *real property*. Finally, a defendant is not responsible for a public nuisance unless it had *control over the instrumentality causing the nuisance* at the time that the nuisance was created or maintained. Unless a plaintiff satisfies each of these time-tested requirements, a claim for public nuisance must fail. This makes nuisance—like negligence and strict products liability—a poor option for plaintiffs targeting manufacturers of non-defective products.

A. Negligence And Strict Products Liability Are Poor Mechanisms For Recovery of Damages From Manufacturers Of Non-Defective Products

When a person is injured by the unreasonable conduct of another or by a defective product, the tort doctrines of negligence and products liability generally serve as effective mechanisms for recovery of damages from the person or company that caused the injury. But when a person is injured by a third party's use or misuse of a non-defective product, both negligence and products liability actions are likely to fail if the defendant is the product's manufacturer instead of the third party directly responsible for the injury. *See, e.g., City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993) (affirming dismissal of negligence and strict liability claims filed against manufacturers of lead pigment).

When a manufacturer sells a defective product, plaintiffs asserting products liability claims often need not prove that the manufacturer was negligent—*i.e.*, acted unreasonably—at the time that it put the product into the stream of commerce. *See* Victor E. Schwartz, et al.,

Prosser, Wade & Schwartz's Torts 825 (11th ed. 2005).[1] Where strict liability principles apply, they generally cannot be defeated by a showing that the defendant acted reasonably. *See Restatement (Third) of Torts: Products Liability* § 1, cmt. a (1998).

However, if a product is *not* defective at the time of its sale, courts have refused to hold the manufacturer liable for the misuse or deterioration of that product, even when such misuse or deterioration is foreseeable. *See, e.g., La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 735-36 (1st Cir. 1994) (holding Rhode Island law bars products liability claims where the consumer fails to adequately maintain the product); *Restatement (Second) of Torts* § 402A, cmt. g (1979) ("The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed."). Thus, when faced with products liability suits against manufacturers of lawful, non-defective products, courts have routinely held that manufacturers are not legally responsible for injuries caused by the use or misuse of those products. *See City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1118 (Ill. 2004) ("[A] products liability claim against one who lawfully manufactures and sells a nondefective product must fail.").

Different obstacles await plaintiffs alleging negligence claims against manufacturers of non-defective products. In order to be held liable for negligence, a manufacturer must have acted unreasonably *at the time that it made or sold the product* in question. *See, e.g., Raimbeault v. Takeuchi Mfg. (U.S.), Ltd.*, 772 A.2d 1056, 1063-64 (R.I. 2001) (to establish negligent design or negligent failure to warn, plaintiff must prove defendant knew or had reason to know of danger or design defect); *see also Restatement (Second) of Torts* §§ 283, 289 (setting out

[1] For purposes of strict products liability, there are carefully limited circumstances in which a product may be considered "defective." *See, e.g., Restatement (Third) of Torts: Products Liability* §§ 1, 2 (1998).

contours of reasonable person standard). That an injury was foreseeable is an important element of a claim for negligent manufacture. *See Crawford v. Cooper/T. Smith Stevedoring Co.*, 14 F. Supp. 2d 202, 210 (D.R.I. 1998) ("'[T]he predicate for the . . . negligent manufacturing claim is the general duty of every manufacturer to use due care to avoid foreseeable dangers in its products.'") (quoting *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 501 (1996) (alteration and omission in original)); *see also District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 641-45 (D.C. 2005) (refusing to hold a product manufacturer liable for negligence because the acts of the third parties who caused the harm were not foreseeable). As one court explained in dismissing a negligence claim premised on the manufacture and sale of lead pigment, "there is no duty upon a manufacturer to refrain from the lawful distribution of a non-defective product." *Sabater ex rel. Santana v. Lead Indus. Ass'n*, 704 N.Y.S.2d 800, 805 (Sup. Ct. 2000).

Such limitations on negligence and strict liability actions have made it difficult for plaintiffs to hold manufacturers liable for injuries caused by the plaintiff's or a third party's misuse of a non-defective product. When that is so, it *should* be so: these forms of tort liability have been carefully developed over time to strike the most efficient balance between competing policy goals. Strict liability principles relax some of the traditional requirements of negligence, facilitating plaintiffs' recovery and providing manufacturers with a strong incentive to exercise due care in creating their products. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 578 (2006). At the same time, unique limitations on strict liability actions—such as the requirement of a defect—preclude liability in circumstances where it would be inefficient to punish manufacturers for their non-negligent efforts to create consumer value.

Where both negligence law and strict liability law fail to provide a remedy, usually this is because efficiency demands such a result. Informed by centuries of experience, courts and legislatures have determined that manufacturers of products generally should not be held responsible for injuries caused by their products unless the manufacturer *either* engaged in unreasonable conduct *or* sold a defective product. As discussed in Part III below, allowing plaintiffs to circumvent this prudent and longstanding balance of policy considerations would undermine consumer welfare by inflicting wasteful new costs on the economy and overdeterring manufacturers from creating economic value.

B. Public Nuisance Liability Is Circumscribed By Three Limitations That Provide Important Checks On The Tort's Scope

Unable to rely on traditional negligence and products liability law, some plaintiffs have turned to public nuisance law as a way to pursue manufacturers of non-defective products that are either unpopular or that can be misused in ways that cause harm. *See* Schwartz & Goldberg, 45 Washburn L.J. at 543 (discussing the rise of nuisance law to target manufacturers of asbestos, firearms, tobacco, lead-based paint, and the gasoline additive MTBE). Such plaintiffs view public nuisance law as more plaintiff-friendly because, they contend, it does not require them to prove either a product defect or traditional tortious conduct on the part of the manufacturer. *Id.* at 552 ("The reason personal injury lawyers have been lured by the elixir of public nuisance theory is because, if successful, it acts as a 'super tort.' As with products liability, public nuisance theory offers strict liability.").

In evaluating these litigants' claims, it is important to distinguish between two analytically distinct concepts of "unreasonableness." The first is unreasonableness of the defendant's conduct *at the time of the conduct*. The second is whether, quite apart from whether the defendant acted unreasonably *then*, society now believes, with the benefit of hindsight, that

the eventual *results of that conduct* are "unreasonable" in that the social costs exceed the social benefits.

Negligence theories require the plaintiff to demonstrate the first type of unreasonableness, which is often—as here—more difficult to prove than the second type of unreasonableness. Public nuisance claims frequently require the same showing of unreasonable conduct.[2] *See, e.g., District of Columbia v. Beretta*, 872 A.2d at 646 (noting that public nuisance claims can be premised on "criminal violations, or independently tortious conduct, such as negligence"). But plaintiffs are attracted to nuisance law because it sometimes requires only the second type of unreasonableness. When certain prerequisites are met, nuisance plaintiffs need show only that the gravity of the harm caused by a defendant's conduct outweighs the utility of that conduct. *See, e.g., Restatement (Second) of Torts* § 821B cmt. e (defining unreasonable interference). As one Rhode Island court has explained this test, "[t]he essential element of an

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[2] Defendants contend that this showing is an essential element of *any* public nuisance claim and, in fact, that Appellee was required "to prove that Defendants acted negligently, with an intent to harm, or were engaged in an abnormally dangerous activity as a predicate to liability for the alleged public nuisance." Def. Sherwin-Williams Co.'s Mot. for J. as a Matter of Law & in the Alternative Defs.' Mot. for New Trial, *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, at 53 (R.I. Super. Ct. Apr. 19, 2006). This contention finds support in the Restatement. *See, e.g., Restatement (Second) of Torts* § 821B, cmt. e ("[T]he defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities. Liability was not normally imposed for a pure accident that did not fall into one of the three traditional categories of tort liability."). And a number of courts have suggested that public nuisance actions cannot be maintained unless the plaintiff can show that the defendant's conduct was unlawful or tortious under traditional theories of tort liability. *See, e.g., District of Columbia v. Beretta*, 872 A.2d at 646 ("As an independent tort, claims of nuisance have indeed not been viewed favorably by this court."); *Chicago v. Beretta*, 821 N.E.2d at 1124 (explaining that gun manufacturers and distributors were ''highly regulated by state or federal law," and that a claim for public nuisance could be brought against them only if, at a minimum, they had violated a law or negligently conducted their business operations). For purposes of this brief, however, the Chamber of Commerce does not need to challenge whether Appellee and the trial court are correct that unlawful or tortious conduct is not an essential element of a public nuisance claim.

actionable nuisance is that persons have suffered harm or are threatened with injuries that they ought not have to bear. Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct." *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (citation omitted).[3]

That is why Appellee here, and plaintiffs in other cases, have opted for a nuisance theory instead of traditional negligence or products liability: they hope to hold manufacturers liable for injuries caused by products that were objectively reasonable at the time of their manufacture but that have since been deemed undesirable because they have resulted in social costs that exceed their social benefits. The problem for such plaintiffs is that, even if Appellee were correct that nuisance law omits the requirement that a defendant's conduct be unreasonable *at the time of the conduct*, it adds other elements of liability that most plaintiffs in this category cannot meet.

First, where a plaintiff cannot show that the defendant has engaged in unlawful or tortious conduct, the nuisance must result from the defendant's use of *real property*. Although courts have been willing to find nuisances in a variety of circumstances when a defendant has violated the law or acted negligently, the focus of nuisance law has traditionally been on abating harm associated with a property owner's use of his property in a way that negatively affects others. *See City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (rejecting effort to hold product manufacturer liable under public nuisance theory and noting that "the essence of the tort of nuisance is one party . . . using his property to the detriment of the use

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[3] *See, e.g.*, *Rose v. Standard Oil Co. of N.Y.*, 185 A. 251, 254 (R.I. 1936) ("[I]f one man allows large volumes of smoke, produced by manufacturing operations which he carries on upon his own property, to escape therefrom continuously and to render residence on neighboring land so uncomfortable and unhealthful as to cause damage to its owner, the latter has a cause of action for that damage against the former, although the former may have used all reasonable care to prevent the nuisance. This is so because damage from such a nuisance is recoverable, irrespective of negligence or active misconduct by the man whose business operations have produced the smoke that has escaped into the air.").

and enjoyment of others" (internal quotation marks omitted); *Sabater*, 704 N.Y.S.2d at 805 (rejecting nuisance claim in lead paint action and explaining that "a nuisance is a wrong arising from an unreasonable or unlawful use of a house, premises, place, or property, to the discomfort, annoyance, inconvenience, or damage of another"); *see also* Schwartz & Goldberg, 45 Washburn L.J. at 563 n.139 ("[P]ublic nuisance generally involves the defendant's use of land.").

Thus, where a defendant has not acted in an unlawful or tortious manner, courts generally require the nuisance to arise from the defendant's use of real property. *See, e.g.*, *District of Columbia v. Beretta*, 872 A.2d at 646 ("[W]e have never recognized a public nuisance claim that did not involve either ownership (and control of) real property, criminal violations, or independently tortious conduct such as negligence."); *Chicago v. Beretta*, 821 N.E.2d at 1117 (explaining, in rejecting a public nuisance claim against firearm manufacturer, that in Illinois "a public nuisance has been found to exist only when one of two circumstances was present: either the defendant's conduct in creating the public nuisance involved *the defendant's* use of land, or the conduct at issue was in violation of a statute or ordinance" (emphasis added)).

Second, a defendant must exercise control over the instrumentality that is the cause of the public nuisance *at the time it gives rise to the nuisance* in order to be held liable for creating the nuisance.[4] Such temporal control is a "basic element of the tort," and "liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise." *City of Manchester v.*

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[4] A successor-in-interest in land can be held responsible for *maintaining* a nuisance on that land if it has control over the instrumentality of the nuisance and the power to abate the nuisance. *See, e.g.*, *Friends of the Sakonnet v. Dutra*, 749 F. Supp. 381, 395 (D.R.I. 1990) ("One who controls a nuisance is liable for damages caused by that nuisance. . . . It does not matter that the one in control did not create the nuisance, as a successor-in-interest who maintains a nuisance, that person is liable for damages caused by the nuisance."). But a party that has never had control over the nuisance cannot be held liable for the nuisance's creation or maintenance. *Id.* (citing *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986)).

Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 633-34 (D.R.I. 1990) ("The *paramount question* is whether the defendant was in control of the instrumentality alleged to have created the nuisance *when the damage occurred*." (emphasis added)); *Billings v. N. Kansas City Bridge & R.R. Co.*, 93 S.W.2d 944, 946 (Mo. 1936) ("[I]f it was not a nuisance at the time defendant parted with control over it, then it could not thereafter become a nuisance for which defendant would be liable.").

Third, a claim for public nuisance can be maintained only if the defendant's actions result in injury to a *public right*. The Restatement defines public nuisance as "an unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B(1). An essential element of the tort is that the right invaded be one "common to *all* members of the general public." *Id.* cmt. g (emphasis added); *see also Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980) ("A public nuisance is an unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the *general community*." (emphasis added)); *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 958 (R.I. 1994) (rejecting a nuisance claim because "harm was not suffered in the exercise of a right common to the general public"). Examples of invasions of a public right include obstruction of a public highway, pollution of a public river, and production of excessive noise or odors that interfere with enjoyment of a public place. *Restatement (Second) of Torts* § 821B, cmt. b; *see also, e.g.*, *Friends of the Sakonnet*, 738 F. Supp. at 633-34 (owners and operators of private septic system created public nuisance by discharging raw sewage into river).

This element of the public nuisance test means that injuries to private property, no matter how widespread, cannot trigger a cause of action for *public* nuisance. *See Restatement (Second)*

of Torts § 821B, cmt. g ("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."). For example, blocking a public highway could be a public nuisance, but blocking a private driveway or even thousands of private driveways could not. Similarly, injuries to individual persons, no matter how severe, generally cannot give rise to a claim for public nuisance. As the Restatement explains, a "public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." *Id.* Thus, courts routinely hold that "harm to individual members of the public," regardless of the number of people affected, is not the same as harm "to the public generally." *Chicago v. Beretta*, 821 N.E.2d at 1115; *see also Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943) ("The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights."). These precedents make clear that invasions of private property and individual rights usually must be remedied though other tort doctrines (including *private* nuisance, which is subject to additional limitations).

These three elements are critical limits on the scope of the public nuisance doctrine. In circumstances where the traditional requirement of unlawful or tortious conduct has been relaxed, a nuisance doctrine shorn of these limitations would be a "monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). As discussed in Part III below, eliminating these time-tested means of cabining the public nuisance doctrine would have dramatic (and unwelcome) effects on the judiciary, the political process, the behavior of industries, and the price and availability of

socially beneficial products. Unfortunately, this has not stopped some plaintiffs from urging courts to dramatically expand nuisance law so that it may be used as a means of circumventing longstanding and efficient limitations on other traditional tort actions. It is to this issue that we turn now.

II. PUBLIC NUISANCE LAW IS NOT COMPATIBLE WITH MOST SUITS AGAINST MANUFACTURERS OF LAWFUL, NON-DEFECTIVE PRODUCTS

Frustrated by their inability to prevail in litigation against product manufacturers under either negligence or products liability theories, some plaintiffs have turned to public nuisance theories as an alternative. They view nuisance law as a means of imposing liability without demonstrating that a manufacturer has sold a defective product or engaged in negligent conduct. What these plaintiffs fail to recognize, however, is that nuisance law contains additional restrictions that normally are even more fatal to their efforts to hold manufacturers liable for injuries caused by lawful, non-defective products.

Fortunately, most courts have *not* overlooked those restrictions. Instead, they have rejected efforts to impose nuisance liability on manufacturers of asbestos, firearms, lead-based paint, and other such products. These courts have explained that public nuisance theory targets how products are *used*, not manufactured. *See* Schwartz & Goldberg, 45 Washburn L.J. at 543; 1 *Am. Law of Prods. Liab.* § 1:18 (Timothy E. Travers, et al., eds., 3d ed. 2001) ("A product which has caused injury cannot be classified as a nuisance to hold liable the manufacturer or seller for the product's injurious effects[.]").

These cases demonstrate that the trial court's rulings below represent a vast departure from well-established nuisance law in Rhode Island and elsewhere. Simply said, the manufacture and sale of a lawful, non-defective product cannot give rise to liability under a theory of public nuisance. Instead, liability for injuries caused by such products properly rests

on those who use and misuse the products in ways that cause injury, especially when a product is an ingredient and not the end product.

A. Asbestos

Asbestos litigation was one of the earliest rejections of the theory that manufacturers of a potentially dangerous product can be held liable for creation of a public nuisance. Courts uniformly rejected this novel theory. As one court summed up this phase of public nuisance litigation, "manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by [a product] defect," and "all courts that have considered the question have rejected nuisance as a theory of recovery for asbestos contamination." *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992).

Many courts cited the unique elements of nuisance law as their justification for refusing to hold asbestos manufacturers liable for public nuisance. An excellent example is *City of Manchester v. National Gypsum Co.*, in which the City of Manchester brought suit against an asbestos manufacturer to recover the expenses of removing and disposing of asbestos-laden ceiling materials used in public buildings and schools during a thirty-year period, *see* 637 F. Supp. at 647-48. The court explained that the nuisance claim hinged on whether the manufacturer had control over the instrumentality that caused the nuisance. *See id.* at 656 ("[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 ownership or otherwise."). It held that, despite the defendant's manufacture of the asbestos, the City of Manchester had control over the instrumentality creating the nuisance for over thirty years. *See id.* Accordingly, it held, "a basic element of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief." *Id.*

Other courts have likewise rejected asbestos actions on the ground that plaintiffs could not establish the requisite level of control over the nuisance. A Georgia district court, for example, rejected an asbestos lawsuit on the ground that "a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality." *Corp. of Mercer Univ. v. Nat'l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at *6 (M.D. Ga. Mar. 9, 1986). Similarly, in dismissing an asbestos suit, the Eighth Circuit explained that "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance.'' *Tioga Pub. Sch. Dist.*, 984 F.2d at 920.

B. Polychlorinated Biphenyls (PCBs)

A similar fate awaited plaintiffs who argued that manufacturers of polychlorinated biphenyls (PCBs) should be held liable under a public nuisance theory for pollution and injuries caused by the release of their products into the environment. In *City of Bloomington v. Westinghouse Electric Corp.*, the court rejected a nuisance claim brought against Monsanto Corp., which had sold its PCBs to Westinghouse, which failed to dispose of them properly, resulting in pollution of Bloomington's sewers and landfills. *See* 891 F.2d at 613. The court expressed great reluctance to hold the manufacturer liable under a public nuisance theory, observing that "the essence of the tort of nuisance is one party—here Westinghouse—using his property to the detriment of the use and enjoyment of others." *Id.* at 614 (internal quotation marks omitted). In addition, the court held that the manufacturer was not liable for the nuisance because "Westinghouse was in control of the product and was solely responsible for the nuisance it created by not safely disposing of the product." *Id.* Thus, the court relied on both the control and real property limitations on the scope of public nuisance law.

C. Firearms

In recent years, a number of states and municipalities have sought to hold firearms manufacturers liable under public nuisance law for the social and economic costs of hand gun violence. But many courts have refused to apply public nuisance law in this context as well, citing all three unique limitations on the scope of that doctrine.

Some courts have held that the "right to be free from the threat that members of the public may commit crimes against individuals" is a personal right, not a public right. *Chicago v. Beretta*, 821 N.E.2d at 1114-15. As these courts have explained, "harm to individual members of the public," regardless of the number of people affected, is not the same as harm "to the public generally." *Id.* at 1115.

Courts have also been hesitant to apply nuisance law to the manufacture and sale of firearms because it would impose liability on lawful conduct that does not involve the defendant's use of real property. The Illinois Supreme Court, for example, noted that "a public nuisance has been found to exist only when one of two circumstances was present: either the defendant's conduct in creating the public nuisance involved *the defendant's* use of land, or the conduct at issue was in violation of a statute or ordinance." *Chicago v. Beretta*, 821 N.E.2d at 1117 (emphasis added). It explained that it was reluctant to "expand the law of nuisance to encompass a third circumstance—the effect of lawful conduct that does not involve the use of land." *Id.*

But the most common reason for rejecting nuisance claims against gun manufacturers is their lack of control over the uses to which firearms are put after they are sold. For example, in *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001), the Third Circuit held that the plaintiff "failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right," *id.* at 541. Similarly,

a federal court in Pennsylvania explained that a manufacturer's lack of control over firearms after they entered the stream of commerce was fatal to a public nuisance claim premised on their illegal misuse. *City of Phila. v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 910-11 (E.D. Pa. 2000).

D. Lead-Based Paint And Lead Pigment

It is no more appropriate to hold lead pigment manufacturers liable under a "nuisance" theory than it is to impose such nuisance liability on manufacturers of asbestos products, PCBs, or firearms. Lead pigment and lead-based paint are products that can have harmful consequences only when they are misused or poorly maintained.[5] Many private plaintiffs and various government entities have thus properly focused their attention on *landlords and property owners* who have allowed lead paint to deteriorate and threaten injury. Such suits are often successful. *See, e.g., Pine v. Kalian*, 723 A.2d 804, 805 (R.I. 1998); *Norwood v. Lazarus*, 634 S.W.2d 584 (Mo. Ct. App. 1982); *see also* Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 Def. Couns. J. 119, 124 (2004) (explaining that "damage awards in the hundreds of thousands or even millions of dollars against residential landlords in lead paint cases are not uncommon").

In recent years, however, some plaintiffs have turned their eyes to the manufacturers of lead paint and lead pigment, often relying on public nuisance as their cause of action.[6] By

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[5] A number of courts have held that lead pigment and lead-based paint were not defective products at the time of their manufacture and sale. *See, e.g., City of Phila. v. Lead Indus. Ass'n*, No. 90-7064, 1992 WL 98482, at *2-4 (E.D. Pa. Apr. 23, 1992) (refusing to hold lead pigment manufacturers liable under products liability theory because there is no design defect in lead pigment, as lead is intrinsic to its nature), *aff'd*, 994 F.2d 112 (3d Cir. 1993).

[6] Such cases have been brought in California, Illinois, Maryland, Missouri, New Jersey, New York, Ohio, Texas, and Wisconsin. *See, e.g.*, *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Ct. App. 2006); *City of Chi. v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *Sabater*, 704 N.Y.S.2d 800.

invoking nuisance law rather than strict liability or negligence principles, these plaintiffs hope to establish liability without showing *either* a product "defect" *or* unreasonable conduct by the defendant at the time of manufacture. But, as with other products liability actions masquerading as public nuisance suits, courts in a number of states have refused to dramatically expand the law of nuisance to accommodate lead-paint claims. *See, e.g.*, *City of Chi. v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *Sabater*, 704 N.Y.S.2d at 806 ("A products liability action, where the damages are restricted to the user of the product and result from its allegedly negligent manufacture, does not give rise to a nuisance cause of action.").

Rhode Island is not among those states, however. It made national headlines as the first state to find lead pigment manufacturers liable under public nuisance law for injuries caused by poorly maintained lead paint in privately owned buildings. *See* Richard O. Faulk & John S. Gray, *The Mouse that Roared?: Novel Public Nuisance Theory Runs Amok in Rhode Island*, Wash. Legal Found. Working Papers Series No. 146, at 1 (Mar. 2007). As a threshold matter, the trial court ruled that it was unnecessary for the jury to find that manufacturers of lead pigment acted negligently at the time of their manufacture and sale of the pigment. Decision on Post-Trial Mots., *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, at 11 n.15, 87 (R.I. Super. Ct. Feb. 26, 2007) ("Feb. 26, 2007, Order"). The court also instructed the jury that it could find an "unreasonable interference" with a public right and impose liability no matter how reasonable defendants' conduct might have been at the time of manufacture, *see id.* at 11 & n.15, 87, so long as the jury found that people today "ought not have to bear" the injury of lead poisoning, *see* Trial Tr. 8126 ("Interference is unreasonable when persons have suffered harm or are threatened with injuries that they ought not have to bear."). Then, contrary to the well-established

principles underlying nuisance law, the court proceeded to dispense with the safeguards that prevent nuisance law from making the limits on products liability law irrelevant.

But plaintiffs cannot have it both ways. If the "unreasonable conduct" element is omitted because plaintiffs do not wish to pursue a negligence case, plaintiffs nonetheless must satisfy the three other elements of nuisance liability discussed above. Because the court simply ignored those essential limitations on the scope of public nuisance law, its rulings must be reversed.

First, the trial court ignored the fact that the alleged nuisance did not result from *defendants'* use of real property. This represented a break with existing precedent in Rhode Island, which until that point had permitted a plaintiff to prevail in a public nuisance action only when *either* a defendant's use or misuse of real property invaded a public right *or* the defendant's conduct violated a statute or ordinance. *See, e.g.*, *Wood*, 443 A.2d at 1247 (concerning defendants' maintenance of a hazardous dump site on their property); *Town of W. Greenwich v. Stepping Stones Enters., Ltd.*, 416 A.2d 659, 660-63 (R.I. 1979) (provision of public entertainment violated statute and ordinance requiring license for such activity). This result conflicts with well-reasoned decision from other jurisdictions holding that lead paint nuisance actions are unsustainable because the injury does not result from the defendants' use or misuse of real property. *See, e.g., Sabater*, 704 N.Y.S.2d at 805 (rejecting a lead paint nuisance action in part because "a nuisance is a wrong arising from an unreasonable or unlawful use of a house, premises, place, or property, to the discomfort, annoyance, inconvenience, or damage of another").

Second, the trial court held that it was irrelevant that defendants were not in control of the instrumentality causing the nuisance at the time that the nuisance was created—*i.e.*, when landlords and property managers allowed the lead paint to deteriorate, thereby making it harmful.

Specifically, the court explained that such control was not necessary "so long as it can be shown that the Defendants substantially participated in the activities which caused the public nuisance, and that public nuisance causes continuing harm." Feb. 26, 2007, Order 91. This too represented a dramatic break with precedent from this state and elsewhere that "[t]he *paramount question* [in nuisance cases] is whether the defendant was in control of the instrumentality alleged to have created the nuisance *when the damage occurred*." *Friends of the Sakonnet*, 738 F. Supp. at 633-34 (emphasis added); *see also Manchester*, 637 F. Supp. at 656 (holding that control is a "basic element of the tort" under New Hampshire law and that "liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise").

Finally, the trial court required no showing that defendants interfered with a public right. Intrusion into private buildings, even on a grand scale, does not satisfy this element. *See, e.g.*, *Mo. ex rel. Att'y Gen. v. Canty*, 105 S.W. 1078, 1083 (Mo. 1907) (public nuisance requires invasion of "a place where the public have a right to go and congregate"); *Restatement (Second) of Torts* § 821B, cmt. g (public nuisance must interfere with a right "common to all members of the general public"). Similarly, the fact that individual members of the public have been injured does not mean that a public right has been infringed. Regardless of the number of people who claim to have been damaged by poorly maintained lead paint, their individual injuries are not automatically transformed into public injuries. *See Chicago v. Beretta*, 821 N.E.2d at 1115-16. As commenters have described the trial court's error, "[t]his wrongly suggests that an injury to a large number of individuals is the same as an injury to the community as a whole. 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.'" Faulk & Gray 4 (quoting *Chicago v. Beretta*, 821 N.E.2d at 1115 (footnote omitted)).

The trial court's rulings represent a vast departure from all prior applications of public nuisance law in Rhode Island. Prior to this case, no court in this state had based public nuisance liability on the non-negligent sale and manufacture of a lawful, non-defective product. For the reasons discussed below, this is not the proper case in which to diverge from that precedent. Sustaining the trial court's expansion of nuisance law would open a Pandora's box of lawsuits concerning all manner of social ills—a result that would yield far more mischief than good.

III. EXPANDING THE REACH OF PUBLIC NUISANCE LAW TO MANUFACTURERS OF NON-DEFECTIVE PRODUCTS WOULD CREATE SERIOUS POLICY PROBLEMS

Affirming the trial court's judgment would not only eviscerate the law of public nuisance in this state, but also give rise to a number of serious policy problems. Plaintiffs could bring public nuisance suits any time they wished to circumvent the efficient and prudent limitations that negligence and products liability law impose on litigants. Courts would be deluged with lawsuits seeking to hold product manufacturers responsible for everything from obesity to global warming. Were the judiciary to heed plaintiffs' calls to resolve such complicated and controversial policy issues, it would usurp the role of the political branches. Public participation, efficient policymaking, and the separation of powers would all be compromised. Entire industries would be threatened with the specter of bankrupting liability for non-negligent manufacture of products that, in a *post-hoc* analysis, are deemed to have yielded more social harm than good. This, in turn, would discourage efficient economic activity and exert upward pressure on the costs of most goods. For all these reasons, the Court should resist Appellee's call to expand the scope of nuisance liability to reach manufacturers of non-defective products.

A. Eliminating Traditional Limits On The Scope Of Public Nuisance Law Would Threaten Incalculable Liability For *Any* Manufacturer Whose Products Are Deemed To Have Negative Societal Consequences Long After They Are Made And Sold

If not corrected, the decision below will open the floodgates to claims of potentially limitless liability against *any* economic actor that plays a role in creating *any* society-wide problem, even when the actor's conduct conformed at the time to all societal norms of reasonableness. Because the logic of the trial court's decision cannot be confined to the context of lead-based paint, the courts of this state would be deluged with suits seeing to remedy a variety of social ills. "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).

Under the trial court's theory of nuisance, any company that makes an ingredient used in any product can be held responsible when a third party misuses the product or fails to maintain it in a safe condition. Other courts have cited this as a justification for refusing to use public nuisance law to impose liability on manufacturers for injuries caused by the use and misuse of lead paint, firearms, asbestos, PCBs, and other products. *See, e.g.*, *Tioga Pub. Sch. Dist.*, 984 F.2d at 921 (warning against transformation of nuisance law into a "monster that would devour in one gulp the entire law of tort"); *District of Columbia v. Beretta*, 872 A.2d at 651 (stating that use of public nuisance law against firearms manufacturers could result in "a proliferation of lawsuits not merely against these defendants[] but . . . against . . . other types of commercial enterprises—manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games—in

order to address a myriad of societal problems . . . regardless of the distance between the 'causes' of the 'problems' and their alleged consequences") (internal quotation marks omitted).

If the trial court's expansion of public nuisance law is affirmed, nearly any industry could become the target of such suits. Meat producers could be held responsible for heart disease caused by the consumption of their products. Manufacturers of high-calorie foods could be held liable for the nationwide epidemic of obesity. Cell phone manufacturers could be held responsible for car accidents caused by individuals who use their phones while driving. Producers of alcoholic beverages could be held responsible for injuries caused by (and incurred by) intoxicated consumers. The same is true of manufacturers of pharmaceuticals, such as painkillers, when those pharmaceuticals are misused or illegally consumed. Manufacturers of cars could be held responsible for injuries to pedestrians, property, and other motorists caused by those cars. And manufacturers of large automobiles could be held responsible for smog and global warming. The possibilities are endless.

Although such an expansion of public nuisance law may seem far-fetched, overzealous plaintiffs' lawyers and a few state-enforcement authorities appear to have concluded otherwise. California's Attorney General, for example, brought a public nuisance claim against automakers for manufacturing cars whose emissions contribute to global warming. *See California v. Gen. Motors Corp.*, No. 06-cv-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). Similarly, a number of states have sued electric power producers for their role in creating the "public nuisance" of global climate change. *See, e.g., Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005). Public nuisance class actions also have been filed against alcoholic beverage manufacturers by parents who seek to recoup amounts illegally spent by their children on alcohol. *See, e.g., Goodwin v. Anheuser-Busch Cos.*, No. BC310105, 2005 WL

280330 (Cal. Super. Ct. Jan. 28, 2005); *Eisenberg v. Anheuser-Busch, Inc.*, No. 1:04-cv-1081, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006). And a number of commenters have argued that the food industry will soon be a target of public nuisance suits seeking to hold those manufacturers responsible for obesity and other health problems. *See, e.g.*, Charles H. Moellenberg, Jr., *Heavyweight Litigation: Will Public Nuisance Theories Tackle the Food Industry?*, Wash. Legal Found., Legal Backgrounder 4 (Sept. 3, 2004) ("The vague public nuisance standards provide ample latitude for creative claims against food manufacturers, suppliers, retailers, and restaurants, which find themselves in the crosshairs of a public health controversy."). Other expansions of the public nuisance doctrine would not be far behind.

B. Allowing Plaintiffs To Circumvent Limitations On Negligence And Products Liability Law Would Be Economically Inefficient

Relaxing the traditional limitations on nuisance actions would give companies producing lawful, non-defective products almost no means of exculpating themselves from liability. And because such suits could be brought against any product manufacturer whose products contribute in some way to a widespread social problem, the government would have the power to impose bankrupting liability on nearly any industry it chose.

This regime would make manufacturers absolute insurers of their products, responsible for all social ills that could conceivably be caused by the products' use or misuse. Such a revolution in tort law would have numerous negative effects. As discussed in Part I above, negligence and products liability law currently strike a careful balance between protecting the public from injury and ensuring that excessive liability does not discourage efficient economic activity. As the Restatement explains, "[s]ociety does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the

right, or optimal, amount of product safety is achieved." *Restatement (Third) of Torts: Products Liability* § 2, cmt. a. Most commenters agree that products liability law in particular, with its relaxation of the concept of fault, provides an effective mechanism for compensating those who are injured by a defective product. *See* Schwartz & Goldberg, 45 Washburn L.J. at 578. It would be grossly inefficient to allow nuisance law to provide an end-run around that carefully crafted balance.

Many manufacturers would almost always err on the side of withholding products that could conceivably injure someone. Manufacturers would also be forced to police their customers to ensure that their use of the manufacturers' products did not create a public nuisance or other social ill. And the cost of goods would skyrocket because manufacturers would need to adjust their prices to account for their new role as insurers of all possible injuries resulting from the use and misuse of their products. In fact, courts have expressly acknowledged that this is likely to result from expansion of the scope of nuisance liability. *See, e.g., City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1234 (Ind. 2003) ("If the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product.").

C. Expanding The Scope Of Public Nuisance Law Would Result In Regulation Through Litigation

By loosing public nuisance actions from their traditional moorings, the trial court's decision encourages regulation through litigation. If this Court affirms, extremely complicated policy disputes that have traditionally been the responsibility of the legislature and the executive branch will instead be arbitrated by the courts. But this would subvert the democratic process and blur the separation of powers. "[T]he judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief." *Penelas v. Arms Tech. Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001). As the Michigan Attorney General has argued in a suit premised on

the "public nuisance" of global warming, "[t]hese kinds of determinations are fundamentally political questions that should be addressed by Congress and the executive branch, not the courts." Associated Press, *Michigan AG Urges Judge To Throw Out Calif. Global Warming Suit*, Jan. 20, 2007.

Legislating through litigation is particularly inappropriate where, as here, the political branches have taken steps to address the problem that forms the basis of the nuisance suit. Recognizing this, one California court faced with a suit against companies contributing to air pollution in Los Angeles remarked that the political branches already had enacted a "system of statutes and administrative rules" governing air pollution and that "Plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court." *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 645 (Ct. App. 1971). Similarly, a court rejecting a nuisance suit concerning firearms remarked that, particularly because the sale of firearms is so heavily regulated, the balancing of the harm and utility of such sales is a policy question better suited for the legislature, not the courts. *Chicago v. Beretta*, 821 N.E.2d at 1121.

The same analysis applies to public nuisance suits against manufacturers of lead pigment and lead-based paint. The Rhode Island legislature, like those of other states, has passed a number of statutes requiring property owners to maintain lead paint in a safe manner. *See, e.g.*, R.I. Gen. Laws § 23-24.6-23 (requiring property owners to maintain their properties in at least lead-safe condition and to abate any "lead hazards" that are identified). The executive branch has enacted regulations to the same effect. *See, e.g.*, R.I. Lead Hazard Mitigation Regs. §§ 5.1 & 9 (explaining the obligation of property owners to keep their properties in a safe

condition); *id.* § 5 (setting minimum conditions that property owners must meet to keep all painted surfaces in good condition). Through such mandates, the political branches have laid out clear responsibilities for property owners; had property owners followed those directives, children would face little danger from lead-based paint. Despite this history of legislative and executive action designed to hold property owners responsible, the trial court's decision in this case effectively absolves property owners of any responsibility for injuries resulting from the deterioration of lead paint brought on by poor maintenance.[7] As two observers have noted, "the Court's indifference to the responsibilities of property owners . . . not only ignore[s], but actually *change[s] the existing public policy declared by the State's legislature*. Such a declaration dangerously threatens the careful balance between governmental branches that is essential to our form of representative democracy." Faulk & Gray 17 (footnote omitted).

Separation of powers is not a quaint doctrine to be observed only when it is convenient for courts to do so. Instead, there are a number of powerful reasons why the creation of industry-wide exceptions to time-honored principles of negligence and products liability is best done by the political branches rather than the judiciary. Compared to legislatures and executives, courts have limited resources and jurisdiction, making it difficult for them to solve intractable problems that require the weighing of complex policy considerations. Legislative action allows all stakeholders to participate, permits widespread debate of the issues by policymakers, and is reviewed by the executive. By contrast, the amicus process is the only means for non-litigants to participate in judicial proceedings. That lone safety valve is a poor substitute for the hearings, public communications, and lobbying that facilitate public participation in legislative

[7] The trial court rejected defendants' request for joinder of landlords and property owners. Decision & Order, *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226 (R.I. Super. Ct. Mar. 22, 2004).

proceedings, or the public notice-and-comment procedures that facilitate participation in executive branch rulemaking.

Resolving policy problems through the courts also creates significant problems with enforcement. Manufacturer defendants are rarely in control of the instrumentality of the nuisance and thus have no means of abating it. As one commenter on the lead-paint litigation has noted, "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?" Faulk & Gray 15. Defendants cannot remedy the problem of decaying lead paint throughout the entire state without the voluntary cooperation of property owners. And such cooperation may not be forthcoming. Many property owners will fear a dramatic decline in property values if they admit that the walls of their properties are covered with lead paint. *See id.* Other owners may conclude remedial action, such as sanding walls and replacing windows, poses a greater risk than simply covering the lead paint with new, unleaded paint. *See id.* Similar enforcement problems are likely to occur in a number of other policy contexts if courts are permitted to usurp the role of the legislature in mediating intractable social issues.

Public nuisance is a well defined tort with a long and successful history. This court should not allow Appellee to warp public nuisance law into a tort of potentially limitless application that requires courts to engage in regulation through litigation.

CONCLUSION

The decision below should be reversed.

January 31, 2008

Respectfully submitted.

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