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The New York Environmental Lawyer

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of the New York State Bar Association

Message from the Chair

Joan Leary Matthews

Greetings to all. I write this as spring approaches, usually so full of promise and change, but more somber and tentative this year given the world's economic climate. Nonetheless, this is an exciting time for environmental lawyers, as we watch the developing environmental agenda at the federal level. Whatever the decisions made, environmental lawyers will be busy!

Annual Meeting Recap

We have just concluded a very successful Annual Meeting, thanks to **Alan Knauf**, the Section's First Vice-Chair, and the Co-Chairs of the Global Climate Change Committee: **Kevin Healy**, **Eleanor Stein**, **Ginny Robbins**, and **Vince Altieri**. The keynote was presented by Dr. James Hansen of the NASA Goddard Institute of Space Studies. Dr. Hansen is quite provocative and disagrees that cap-and-trade is the way to go with CO2 emissions. Rather, he advocates for a phaseout of coal and the imposition of a carbon tax with a 100% return to citizens. (The slides that Dr. Hansen and the other speakers presented are posted on the Section's Web site at www.nysba.org/environental.)

Indeed, many different approaches are now a part of our national dialogue on how to address this pressing issue. Michael Northrop of the Rockefeller Brothers Fund was our luncheon speaker and he made the case that not only is tackling greenhouse gas emissions good for the environment and good for the economy, but as demonstrated in the states of California, Arizona, Florida, and Missouri, it represents good politics, too, to bring climate change to the forefront of state government policy. For more details, please see the reprint of Mr. Northrop's remarks in this issue of the *Journal*.

The Global Climate Change Committee is building on the momentum of the Annual Meeting to organize a workshop for localities, which will showcase the measures that localities can adopt to mitigate and adapt for climate change.

At the NYSBA Presidential Summit during the Annual Meeting week at the end of January, the NYSBA Global Warming Task Force rolled out its report on the measures that New York can adopt to address climate change. The report is available on the NYSBA Web site. The Task Force was chaired by **Michael Gerrard**, co-sponsored by the Section, and it included many Section members. The report recommended that New York adopt a comprehensive statewide climate change policy that would also include economic incentives to reduce the emission of greenhouse gases. The Task Force will formally present its report to the NYSBA House of Delegates in April.

Inside

NYSBA

The Section has long played a part in educating government leaders and the public on the impacts of climate change, and we are pleased to continue this important role.

Legislative Forum

The Section's annual Legislative Forum was held at the State Bar Center on May 6. Invited to speak were Environmental Conservation Commissioner Pete Grannis and the chairs of the Senate and Assembly Environmental Committees, Senator Antoine Thompson and Assemblyman Robert Sweeney. The Forum explored how the recent changes in the legislature will affect environmental legislation this session. That afternoon, the Section's Executive Committee also met.

New Officer and Executive Committee Update

Congratulations to **Kevin Reilly**, the longtime Editor-in-Chief of the *Journal*, for being elected the new Section officer! It's a well-deserved reward for all the years he has spent editing this *Journal*.

Congratulations, too, to the new Member-at Large—**J. Cullen Howe**, Arnold & Porter. Among his many accomplishments, Cullen is a graduate of Vermont Law School, a LEED Accredited Professional, and a member of the board of the New York City Environmental Law Leadership Institute. At Arnold & Porter, Cullen edits many publications, including the monthly newsletter *Environmental Law in New York*. Cullen is also the administrator of the Section's new blog (see below).

Another addition to the Executive Committee as Co-chair of the Pollution Prevention Committee is **Jacalyn Fleming**, Munley, Meade, Nielsen & Re of Huntington, N.Y., and a former winner of the Section's Essay Contest. Jacalyn is a graduate of Albany Law School where she was a member of the *Albany Law Review.*

Changes for the Section's *Journal*

Kevin Reilly's election as Section Secretary means that he will have to relinquish his role as editor of the *Journal*. It's a bittersweet moment for us, given Kevin's significant contribution over so many years at the helm of this *Journal*.

However, it does provide us with an opportunity to make some changes, including the adoption of some pollution-prevention measures. We have restructured the *Journal* to be managed overall by an Editor-in-Chief, with each issue organized by an Issue Editor. Fulfilling the role of Editor-in-Chief is former Section Chair **Miriam Villani**. The Issue Editors are:

1. **Justin Birzon**, employed by Legal Support Personnel, working on complex securities litigation at Skadden, Arps, Slate, Meagher & Flom LLP;
2. **Gregory Hoffnagle**, Associate, Mound Cotton Wollan & Greengrass;
3. **Prof. Keith Hirokawa**, Texas Wesleyan School of Law, but joining the faculty at Albany Law School in July 2009; and

We thank them all and wish them well as they assume these new duties.

In our own effort to promote sustainability, the Cabinet has also decided that the *Journal* will be delivered to Section members electronically. Section members may elect to continue to receive a hard copy. This means that the electronic copy will be the default. We will let you know when you can make the election to receive a hard copy.

New! The Section Blog and the Classroom Project

We have two new developments that propel the Section into the 21st Century. The Section's blog, ***Envirosphere***, debuted in February. The blog administrator is **Cullen Howe**, the newest Member-at-Large. Cullen has been doing a fine job to keep Section members apprised of some key happenings in environmental law. You can get to the blog from the Section's home page at www.nysba.org. We are anticipating that the blog will become one of your bookmarked sites.

The Section's **Classroom Project** is also live. Many thanks to **Peter Casper**, **Aliza Cinamon**, **Bridget Lee**, **Joseph Mouallem**, and **Brody Smith** for organizing this project. They have compiled teaching materials on a variety of environmental issues and have organized them by topic and grade level. You can access these materials by going to the Section's home page at www.nysba.org/envrionmental. The Classroom Project site will continue to be updated. We hope that you will visit the site, review the terrific materials in it, select the materials that will suit your purposes, and contact your local school to arrange to go into the classroom. I would love to hear of your experiences in the classroom and how we can improve or expand this program.

Member Recruitment

The Section has been very successful this year in recruiting new members. I think you are getting the idea that in this Section, we eagerly welcome good ideas. As I mentioned before, we also go by the rule that "many hands make light work." Our numbers increase when we continue to make the Section relevant and current: by offering CLE programs for newer attorneys, by developing good ideas into workable projects, and by modernizing our methods of communication. Membership Committee Co-Chairs **Howard Tollin** and **Janice Dean** have worked very hard this year, offering novel suggestions and following up those good ideas with action.

Fall Meeting 2009—Save the Date

Mark your calendars: the next Fall Meeting of the Section will be held at the Canandaigua Inn on the Lake on October 23-25. We are once again partnering with the Municipal Law Section. Details will follow in the coming months.

Thank you all for the continued success of the Section.

Joan Leary Matthews

From the Editor

Kevin Anthony Reilly

After what felt like an interminable period of time when national environmental policy seemed as stale as last week's bread—and about as digestible—it seems that the country is turning a new corner with substantial public support for tackling our many environmental problems. Even global warming, which, to the public, seemed to be the stuff of obscure scientific journals and alarmist environmental activists not too long ago, is now the subject of significant investments in research and development by industry, under the prodding of a more thoughtful federal government, and is no longer derided as the fantasy of fear mongers. Each day, my various avenues of keeping current with developments in environmental law and policy are churning out environmental decisions, policies, articles, and studies. While the feeling of crisis has not abated with respect to global warming, toxic environments or impoverished ecologies, it is refreshing that these and other issues are on the public's radar screen again. It also is striking how many fewer naysayers are dominating the public discussion. In any event, as with the economic crisis, we may not know all the right answers, and we don't really know how things will turn out, but it does inspire some measure of confidence that competent people, including governmental actors, are pragmatically identifying and trying to address a web of inter-connected issues.

The Chair's Message provides an update on the diverse activities of several Section members. Mike Gerrard, in particular, has been especially busy, adding his Chairmanship of the New York State Bar Association's Task Force on Global Warming to his itinerary along with his exciting new responsibilities at Columbia University. Joan notes that I will be leaving my position as editor of the *Journal*. After seventeen years (I can't believe that even as I say it—it seems like yesterday that Phil Weinberg asked me if I wanted to undertake a little task), it's time for a change. The next issue will be my last. I feel like I'm making it just in time for electronic delivery, so that my final column may remain in the database of the New York State Bar Association for all eternity, or until purged as being obsolete. Something to ponder . . . along with the photo taken so many eons ago which presently bears so little similarity to its subject. Joan outlines the proposed new structure in her Chair's Message. Joan also notes that the Section's Legislative Forum was held on May 6, with anticipated participation by not only the DEC Commissioner but also by the Chairs of the Senate and Assembly Environmental Committees. The value of this session to practicing lawyers, as well as to anyone interested in environmental policy, enforcement and legislation in New York, was manifest.

In this issue, Lou Alexander repeats his performance as our reporter-at-large by submitting an article on the Section's current events, in this case, mention of the recipients of awards at the Section's Annual Meeting in January. The recipients of the Section's Minority Fellowships are separately noted. Lou, along with Peter Casper, Jean McCarroll and Luis Martinez, comprise that Committee. Michael Northrop, the Program director of Sustainable Development at the Rockefeller Brothers Fund, was the keynote speaker during the luncheon at the Annual Meeting. His remarks are also included herein.

In my environmental law class for the Pace Environmental Science Master's Degree, I teach non-lawyers. I typically introduce them to environmental law with common law theories of liability, such as public nuisance and negligence. Lawyers understand the tactical value of seeking redress for some pollution-related injuries, such as those resulting from the ingestion of lead or the inhalation of asbestos fibers, with common law tools. Sometimes, though, it seems easier explaining the Clean Water Act, RCRA and other federal statutes (but certainly not the hazardous waste regulations)—if you did it, you are liable—than it is to explain nuisance, how it differs from negligence, and how to prove it. Steven Sarno submits an article addressing the evidentiary difficulties of proving toxic torts, such as those involving lead paint and asbestos, by private plaintiffs, the judicial misapplication of evidentiary rules that sometimes occurs, and he proposes that government is better suited to pursue such actions. The article was the 2008 first place finalist in the Section's William R. Ginsberg Memorial Environmental Law Essay Competition.

Yvonne Marciano has summarized the new ethics rules for New York attorneys, which became effective April 1. Case summaries have been provided by students in the Environmental Law Society at St. John's Law School, a service that they have consistently provided under the tutelage of Phil Weinberg. The new student editor is Nadya Kramerova.

Kevin Anthony Reilly

Award Recipients

Each year, the Chair of the Environmental Law Section establishes an awards committee to consider eligible candidates for the Section and the Section Council Awards that are presented at the Section's annual meeting. The Section Award is given to individuals or organizations with a record of significant achievement, meaningful contribution, and distinguished service to the environment. The Section Council Award is given to a member of the Environmental Law Section who has made a significant contribution to the Section and its activities.

Awards Committee member Gail Suchman, Committee member Philip Weinberg and Shauna McMillen DeSantis (The Nature Conservancy)

At this year's Annual Meeting, the Environmental Law Section was pleased to give Section Awards to The Nature Conservancy and New Yorkers for Parks, two organizations that have made noteworthy and long-term contributions to New York's environment. The inscription on the award to The Nature Conservancy read as follows:

> In recognition of its extraordinary conservation work, including innovative public-private community partnerships that promote sustainable economic development while protecting our natural resources and ecosystems.

Accepting the award on behalf of The Nature Conservancy was Shauna McMillen DeSantis, Senior Attorney with that organization.

Accepting the award on behalf of New Yorkers for Parks was Christian DiPalermo, its executive director. The inscription on the award to New Yorkers for Parks read as follows:

> In recognition of its leadership as New York City's sole city-wide parks advocacy group, raising awareness of the need to protect parks, promoting greener and safer parks for futuregenerations and working to ensure environmental review of attempts to remove or reduce park land.

Catherine Morrison Golden, Board Chair of New Yorkers for Parks, also attended the awards presentation.

The 2009 Section Council Award was presented to Luis Martinez, in recognition of his distinguished service as Co-chair of the Section's Environmental Justice Committee and in particular for his work in support of the Section's minority fellowship program to encourage a diverse Section membership.

Christian DiPalermo (New Yorkers for Parks); Awards Committee member Philip Weinberg

Comprising this year's Awards Committee were Philip Weinberg, Kathleen Martens, Gail Suchman, and Louis Alexander. This year's Awards Committee also prepared a set of written procedures and guidelines that the Section Cabinet has adopted for use by future awards committees.

Louis A. Alexander

Recipients of Environmental Law Minority Fellowships Named

Three law students were awarded Minority Fellowships in Environmental Law at the January 30, 2009 NYSBA Environmental Law Section meeting. The fellowship recipients include:

Luis Martinez and Jean McCarroll presenting fellowship award to Dan Feng Mei

- Dan Feng Mei, who is a first-year law student at St. John's University School of Law. Ms. Mei is a graduate of Barnard College, where she majored in neuroscience and behavior;
- Kelly Whiten, who is a first-year law student at Pace University Law School. Ms. Whiten is a graduate of Boston University, where she majored in environmental analysis and policy; and
- Vanessa M. Young, who is a second-year law student at Syracuse University College of Law. Ms. Young is a graduate of the University of California at Berkeley, where she majored in sociology. She is also presently enrolled in the master's program at the State University of New York College of Environmental Science and Forestry.

The Minority Fellowship Program was established in 1992 as a joint project of the environmental law committees of the New York State Bar Association and the Association of the Bar of the City of New York. The Program seeks to provide opportunities to minority law students in the environmental legal field. Past fellowship recipients have worked at the Region II Office of the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation, the New York State Department of Law, and such environmental organizations as Environmental Defense and the Natural Resources Defense Council.

This year's applications were reviewed by a panel of judges that included the chairs of the NYSBA Environmental Law Section's Environmental Justice Committee (Peter M. Casper, Jean M. McCarroll, and Luis G. Martinez), and Victor J. Gallo and Kathy Robb (from the City Bar's environmental committee). The three fellowship winners will receive stipends to spend the summer of 2009 working in environmental positions with governmental agencies. Ms. Whiten and Ms. Young will be working at the Region II Office of the U.S. Environmental Protection Agency and Ms. Mei will be working at the Environmental Protection Bureau of the New York State Department of Law.

Luis Martinez and Jean McCarroll presenting fellowship award to Kelly Whiten

Luis Martinez and Jean McCarroll presenting fellowship award to Vanessa M. Young

The Fellowship recipients will also participate in meetings of the New York State Bar Association and the Association of the City Bar of New York's environmental law committees during the year. Each has been assigned mentors from the environmental Bar for the summer. Serving as mentors this year are Victor J. Gallo, Jeffrey B. Gracer, Jean M. McCarroll, Desiree Giler Mann, Luis G. Martinez, Kathy Robb, and Gail Suchman.

DEC Commissioner Pete Grannis, Luis Martinez, Dan Feng Mei, Vanessa Young, Kelly Whiten, Louis Alexander, Jean McCarroll, Joan Leary Matthews

A list of present and past fellowship recipients may be accessed from the Environmental Law Section's home page on the New York State Bar Association's Web site at www.nysba.org/environmental.

Louis A. Alexander
Peter M. Casper
Jean M. McCarroll
Luis G. Martinez

NEW YORK STATE BAR ASSOCIATION

Save the Dates

Environmental Law Section

FALL MEETING

October 23-25, 2009

Inn on the Lake • Canandaigua, NY

(Joint Meeting with the Municipal Law Section)

Will New York Grab the Climate and Energy Opportunity?

By Michael Northrop

Adapted from remarks of Michael Northrop, Program Director of Sustainable Development at the Rockefeller Brothers Fund, delivered at a Luncheon of the NYS Bar Association, Environmental Law Section, January 30, 2009, New York City

About five years ago we made the decision at the Rockefeller Brothers Fund to devote 100 percent of our attention inside the sustainable development program to climate and energy issues. The decision was a difficult one, but was driven by the realization that everything else we were working on in the environment and sustainable development arena was being so heavily impacted by climate change that we ought to focus our attention there. In many cases, we realized that climate was the number one thing impacting the issues we cared about and that if we didn't focus our attention on climate we were fooling ourselves and wasting our time and money.

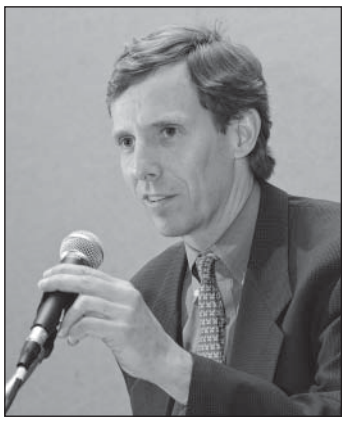
"The good news is that there are proven, concrete win-win steps the state can take that will not only allow us to do our fair share to stabilize the climate and protect the planet for our kids and grandkids, but that will also strengthen our prosperity."

This decision has taken our support into a variety of arenas. In New York City, for example, we helped with PlaNYC; in more than twenty states, we have supported governors to develop comprehensive climate action plans; and we have worked to advance international negotiations as well as federal policy, recognizing that if we don't get a meaningful U.S. response to the climate issue, we won't get an international response either.

Given what James Hansen said this morning about the rapidly escalating impacts of global warming, it is imperative that we take action as a country in 2009, and New York State has an important role to play, given that the state spends $80 billion a year on energy alone. There are, however, obstacles in the way of New York taking a leadership role on the national stage, and there are many other states poised to take advantage of the clean energy revolution ahead of New York.

The good news is that there are proven, concrete win-win steps the state can take that will not only allow us to do our fair share to stabilize the climate and protect the planet for our kids and grandkids, but that will also strengthen our prosperity.

An Approach for New York



Let's start with the most glaring opportunity at hand: most of that $80 billion spent on energy last year went out of state. We can keep more and more of that money right at home over time by adopting a strong climate/clean energy plan that begins with signing on to science-based goals: at least an 80 percent reduction in emissions below 1990 levels by 2050. Right now in New York State we're still working with an outdated 10 percent reduction goal set by Governor Pataki in 2002. The state cannot do the necessary planning to seize hold of this economic opportunity without updated goals and benchmarks.

The state has already done some very good work on climate. We are currently at 1990 emissions levels, while most states are 20 percent or more above 1990 levels. That's due in part to policies put in place by Governors Pataki and Spitzer, and the large carbon-free benefit we enjoy from hydroelectric power generation. We should build on our statistical head start and set a target to bring emissions 30 percent below 1990 levels by 2020. It would put New York on par with where other leadership states and Europe are headed and it would quickly make us a national leader.

Governor Paterson has said and done many good things on climate since being in office, but he should take a page from governors leading the nation on the climate issue—for example, Schwarzenegger and Crist and Corzine and others—and take a comprehensive and bold approach that opens the door to economic opportunity. It is an approach that would unify many disparate efforts already under way in the state.

A few simple steps could get us going right away. First, set the target. Governor Paterson could issue an executive order—as many other governors have done—that sets a long-term reduction goal of 80 percent below 1990

levels by 2050, and an interim goal of 30 percent below 1990 levels by 2020.

Second, he could issue another executive order to assemble a climate action team composed of stakeholders to develop a plan for the state. Many other states, with the expert help of the Center for Climate Strategies, have done this, and New York stands to quickly benefit from their prior experience and best practices. The state, through a project under way at NYSERDA, has most of the funding and the first steps in place to embark on this kind of a facilitated stakeholder planning process. All it would take is a bit of rethinking and reworking, and tapping into existing institutional strengths at DEC, NYSERDA, and RGGI.

And let's not forget that we also have the world's leading finance sector right here to help us, a core of the world's major companies with their headquarters here, and New York City as a partner, with a committed mayor already deeply engaged.

Safely Navigating the Politics

From the perspective of a funder, it seems as if the state is well-equipped to act boldly and decisively. Let me provide the evidence for the strong economic rationale for action that will be needed to generate political momentum and counter the prevailing fear that taking action on climate change is going to be a big drag on the economy.

The fear has been blown completely out of proportion by those who would prefer the status quo, and it tends to hang over the discussion like a dark cloud as a result. Exxon, other oil majors, the coal industry, Southern Company and other utilities, several large right wing donors, a group of right wing think tanks, and even foreign governments have all had a hand in orchestrating a drumbeat of messages intended to encourage this point of view and to slow U.S. action.

Unfortunately, it's been very effective. If you are an elected official or a CEO and you thought something was going to harm your jurisdiction's economy or your bottom line, and you had heard this drumbeat, you wouldn't touch the climate change issue. Harming your jurisdiction's economy or your bottom line would mean losing your job. Where the fear campaign has been most effective is with elected representatives and senators in Washington, D.C., where the stakes are greatest.

The good news is that leaders all across the U.S. have proven that the fear of damaging the economy is unfounded if you take a smart, practical approach. At the state, local, and company level, we have hundreds of examples of elected leaders and CEOs taking a comprehensive, practical, portfolio approach toward reducing emissions that has been positive economically and politically a winner.

Every city and state and company that has taken serious action on global warming has found ways to reduce emissions, save money, generate jobs and incite economic development. It's the reason why so many mayors and governors are getting into the game and taking steps to reduce emissions in smart ways, and why New York needs to play on the same field, too.

At last count, we have almost 30 states with comprehensive climate plans done or under way and more than 900 mayors who have signed onto Seattle Mayor Nickels's climate pledge to reduce GHG emissions by an amount equal to Kyoto, and scores and scores of CEOs taking action.

As a start at each of these levels, leaders are learning that energy efficiency pays and that it's possible to lay the groundwork for enhanced competitiveness and for new economic development opportunities. It is worth repeating that there is not a single company, city, or state that has taken steps to reduce GHG emissions that hasn't saved money and/or generated economic opportunity. Further, what's even more significant, it seems like the greater the ambition and action, the greater the benefit.

Evidence from Other States

California has halved energy use per capita and saved $65 billion from the mid-70s to 2008. This money stayed in people's pocketbooks instead of being shipped overseas to Saudi Arabia or out of state. These monies spurred a higher quality of life, created more jobs and enterprises, and built a better economy for Californians. As a result of California's support for energy efficiency and renewable energy, the state is also home to many of the clean energy companies of the future.

California is no longer alone. There are now more than 30 states that have created or are creating comprehensive climate action plans. The way they go about it is worth understanding.

First, they examine the source of emissions. Then, they examine each source and try to decide which ones can be tackled most cost effectively with the greatest emissions reductions. They score each of the potential options they have—often a list of several hundred. Then they pick the ones that make the most sense, economically, politically, and for the climate. It usually takes about a year to come up with a plan like this. A group called the Center for Climate Strategies has facilitated the development of nearly all these plans, tailored to meet the needs of each state uniquely.

In 2006, Arizona embarked on this path. Keep in mind that Arizona is the fastest growing state in the union and a hard red state with a strong history of anti-environmental politics. After a year of work, the state adopted a plan with 50 measures that promises to cut emissions in half by 2020, saves $5.5 billion, and creates 250,000 new jobs.

Since Arizona acted, many others have followed, including New Mexico, Colorado, Washington, Oregon, Kansas, Iowa, Minnesota, Michigan, Wisconsin, New Jersey, Vermont, Massachusetts, Maryland, Florida, South Carolina, and Arkansas.

One of the most recent plans is Florida's. In 2008, Governor Crist announced his plan, which cuts emissions by a third by 2025, and saves $28 billion by 2025. Governor Crist has positioned it as an economic stimulus plan for the state—and keep in mind he did this before the Obama Administration took the same approach to economic recovery. The Florida panel that made these recommendations to the Governor included a former aide to Jeb Bush, a former aide to Vice President Dick Cheney, and a cross section of utility, company, and civic groups—evidence that this approach has clear bipartisan value.

It is also possible to look at all this state activity in aggregate and draw some startling and encouraging lessons. In late 2008, the Center for Climate Strategies unveiled a study using data from 20 states developing these comprehensive climate plans. They scaled up estimated impacts to a national level and concluded that the country could reduce emissions to 1990 levels and realize a cumulative savings between 2009 and 2020 of $535 billion.

And from Cities and Corporations

The same is true at the city level. For example, Portland, Oregon, estimates $2.6 billion in annual savings in transportation costs alone from mass transit improvements the city has created, $300 million in electricity savings, and the creation of hundreds of sustainable enterprises. One Portland commissioner called climate action the best economic development strategy ever devised.

Every time Mayor Bloomberg talks about climate action, he talks about strengthening New York City's economy. Every other mayor with experience in this arena says the very same thing.

In the corporate world, there are now scores of similar stories, too. Since 1990, DuPont has achieved a 75 percent GHG reduction and more than $3 billion in savings. The company has an $8 billion revenue goal for new renewable resource-based manufacturing businesses.

GE's "ecomagination" program has a $25 billion revenue goal from new business creation. GE had already reached $10 billion in 2005, with orders for $20 billion more in house now. The company's greenhouse gas emissions are down nearly 10 percent across the company already, generating hundreds of millions of dollars in energy savings.

Wal-Mart has pioneered massive energy savings across its supply chain and has saved hundreds of millions of dollars for its consumers in recent years. Dow has reduced emissions 20 percent and saved $3 billion doing it. IBM has saved nearly $800 million by becoming more efficient, and it is not even an energy intensive company.

All of these companies can talk about large GHG reductions and large energy savings and new opportunities. In each case, they took a smart, practical approach. In well-managed companies, energy efficiency now equals increased competitiveness. In many companies, it is also becoming a clear spur for innovation and new product development.

While these are all great important stories, we have just scratched the surface of opportunity. We could extract even greater economic benefit by reducing emissions and changing the energy paradigm, if we would only commit to the direction. Bill Clinton now says regularly that "creating the low carbon/clean energy economy is the greatest economic opportunity for America since we mobilized for World War II." Seen from that perspective, it seems so foolish to be merely tinkering around the edges. It means going further into debt, hindering our economy, paying more money to foreign oil producers, dirtying our air, fouling our water, and making people and the planet sick.

Climate action is not only an economic gold mine. It is also a political gold mine. Energy and dollar savings, new jobs, new businesses, and economic development opportunities translate into support for a clean energy politics, as well. Every politician who has embraced climate action and clean energy has benefited from it politically—just look at Governors Schwarzenegger, Crist, Corzine, Rell and many others, or Mayors Bloomberg, Hickenlooper, Daley, Nickels, Wynn, and many others.

Surveying the success stories and the economic modeling and planning, the biggest opportunities lie in three areas: buildings, transit, and renewable energy. Let's examine each.

Buildings

Buildings account for half of U.S. GHG emissions. In New York City, buildings produce an astonishing 80 percent of emissions. If we refurbished buildings on a systematic basis, the potential economic benefits are staggering. Let's use New York City as an example: tens of billions of dollars of energy savings each year; tens of thousands of new jobs; new business opportunities for firms that manufacture, wholesale, retail, transport, install, and finance the millions of lights, insulation, windows, doors, roofs, appliances, boilers, furnaces, air conditioning and heating, ground source heat pumps, solar hot water systems, photovoltaic systems, and rooftop wind turbines that will be retrofitted into these buildings by contractors, electricians, plumbers, and their helpers. Retrofitting buildings is the best climate and economic stimulus policy I can think of.

It's applicable in any size town all across America. In large towns and cities, it is decades of work, and when we get done with the first round we will need to go back in and do it again. It's a whole new economy. Why aren't we grabbing it? It will keep dollars in our communities; it will make our communities more competitive. What's kept it from happening is that we need new institutions, new financing mechanisms, new ways to get labor in place, new ways to manage at scale, but these are all challenges susceptible to practical solutions.

Transit

Sure, roads and highways are important, but what if we took all that federal money (now about 80 percent of our transportation bill) and put most of it into public transit? The short answer is that the jobs we'd create, the manufacturing we'd need, the dollars we would allow people to keep in their pockets would be extraordinary.

The average American household spends 19 percent of household income on transportation. Americans in transit-accessible communities spend 9 percent. Suburban and exurban Americans not served by public transit spend 25 percent and above, often more than their housing costs. Imagine the benefit if we put 10-15 percent of household income back into people's pocket books instead of sucking it out for higher energy costs. Remember, Portland is saving $2.6 billion annually from its transit investments. That's all money that stays in the community, and supports economic expansion.

It was particularly poignant last summer when low-income workers couldn't afford the higher prices they were paying for gasoline to use the roads. They were desperate to find alternatives and get a cheaper way to get to work. They will be in the same boat when gas prices go back up, which they will.

Transit systems are big job creators, too. A group called Transportation America estimates that building transit in 78 American metro centers would generate 6.7 million jobs. It also turns out that rail corridors are magnets for investment. One good example comes from Dallas, where its new transit corridor attracted $4.26 billion in investment between 1997-2007.

Renewable Energy

Sir Nicholas Stern, the British economist, estimates that the renewable energy markets will be worth $500 billion a year if the world acts at an appropriate scale to tackle climate change. This is another gigantic market opportunity for the U.S. and New York State to grab onto. With the right enabling policies, we could be growing our capacity to be major players in this market. We have seen California, Florida, New Jersey, Michigan, and Iowa all seize hold of this as a means for creating jobs and creating enterprises in recent years. New York could be doing much more here as well by enacting a larger renewable portfolio standard for the state or by imposing a feed-in-tariff to support renewable energy generators.

Conclusion

As we sit here in New York, we are witnessing a significant commitment to a clean energy economy coming from Washington, D.C. President Obama is looking for partners in the states to help develop an efficient and renewable energy future. At the moment, New York is in the odd position for such a great state of being significantly back in the pack, with many other states positioned ahead of us.

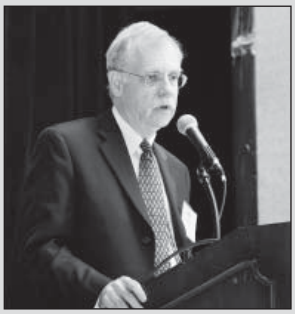
When New York set its 10 percent greenhouse gas reduction target back in 2002, it was in the forefront of U.S. states. Today, though, as I've mentioned, we are not well positioned. By updating our reduction targets, creating a climate action team, and developing a comprehensive plan for climate action in the state over the coming year, New York could reclaim its leadership position nationally and in the world and position itself for a greener, more prosperous economic future.

The question I leave with you today is whether we are going to go ahead and seize the opportunity or sit on the sidelines? Thank you.

2009 Environmental Law Section Annual Meeting

Section Chair
Joan Leary Matthews

Luncheon Speaker
Michael Northrop



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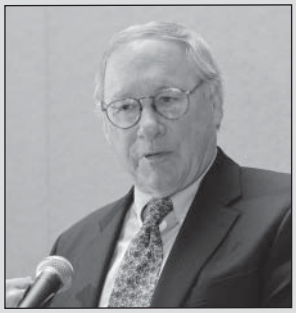

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In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance

By Steven Sarno

On February 22, 2006, a Rhode Island jury found defendant lead paint manufacturers[1] liable for the costs of abating the lead health hazard that their products had created in the state's housing stock.[2] This marked the first time that an American jury found lead paint manufacturers liable under a public nuisance theory. This group of defendants previously had been sued in several states by both private plaintiffs and governmental entities. Virtually all of these claims failed.[3] Against the backdrop of the *Rhode Island v. Lead Indus. Ass'n* case, this article examines the recent decisions from other state courts wrestling with the application of public nuisance doctrine to the lingering lead paint contamination in our national housing.

This article works from the premise, as articulated in the Restatement (Second) of Torts, that public nuisance is a viable and flexible tool available to state entities in the exercise of their duties to protect the public health, safety, welfare, and comfort.[4] In many of the lead paint lawsuits brought by private plaintiffs, as well as by governments not alleging public nuisance, plaintiffs sought damages and restitution for the costs of treating lead-poisoned individuals. Lead paint manufacturers successfully defended against these claims by making a two-part argument: (1) plaintiffs failed to show product identification[5] (and thus could not prove a causal link to the defendants), and (2) alternative liability theories, such as market share liability, do not apply to lead paint (and thus could not relieve a plaintiff from the burden of causation). On the whole, courts accepted this argument.[6] Capitalizing on the success of these arguments, defendant manufacturers reasserted them in subsequent lawsuits brought by state entities alleging public nuisance. The court in *Rhode Island* found these arguments inapposite and the jury subsequently found the defendants liable for abatement. Other courts, however, have not been as careful in their review of public nuisance law and have prematurely or erroneously rejected the theory as it applies to lead paint.

Recent decisions dealing with claims brought by state entities against lead paint manufacturers suggest a certain amount of judicial confusion. This confusion is understandable, but cannot be acceptable. Several factors combine to create this confusion, chief among them, and the focus of this article, is: the misapplication of a *negligence* causation standard to states' public nuisance claims. Unlike negligence actions, which focus on the causation of injury to an individual and a defendant's liability for it, public nuisance actions are concerned only with the causation of the nuisance itself.[7] In order to see clearly why some courts have mistakenly blended these issues, and why public nuisance is a viable theory for state entities pursuing lead paint abatement, we must briefly examine the legal journey that lead paint has taken through the American judiciary.

Part I lays out the factual foundation of lead paint hazard lawsuits and identifies the attributes particular to lead and lead-based paint that become dispositive issues in each type of action (whether products liability, nuisance, conspiracy, etc.) This section recounts the emergence of lead poisoning as a public health concern, the rise of government regulation, and the failure of state programs to eliminate adequately enduring lead hazards.

Part II describes the kinds of claims brought against lead paint manufacturers in the context of this country's early toxic products litigation. Here, causation, and the role it plays in negligence actions,[8] can be teased out from the ultimate disposition of the suits. By way of illustration, this section also compares the relevant facets of the initial lead paint cases to asbestos litigation involving public nuisance claims. Here, the relative merits of alternative liability theories, and their inapplicability to lead paint, are explained.

Part III considers five recent lead paint cases, each of which features a government entity's attempt to use public nuisance doctrine to secure abatement funds from lead paint manufacturers, and compares them to the outcome in *Rhode Island*. These five cases are: *City of Chicago v. American Cyanamid*,[9] "*American Cyanamid*"; *County of Santa Clara v. Atlantic Richfield Co.*,[10] "*Santa Clara*"; *City of Milwaukee v. NL Indus., Inc.*,[11] "*Milwaukee*"; *In re Lead Paint Litigation*,[12] "*New Jersey Consolidated Lead*"; and *City of St. Louis v. Benjamin Moore & Co.*,[13] "*St. Louis*." Half of these cases (*American Cyanamid*, *New Jersey Consolidated Lead*, and *St. Louis*) have reached the end of their judicial journey while the other half (*Santa Clara*, *Milwaukee*, and *Rhode Island*[14]) are still pending; nonetheless, all inform the argument made in this article. Since *Rhode Island* is the only example in which a jury found the defendants liable, the analysis in this article is best couched in terms of why the state prevailed here and why other government entities have not.

In conclusion, Part IV argues that the classification of lead paint contamination as a public nuisance is not a significant part of the debate. Rather, this article argues that courts dismissing the public nuisance claims misconstrue the causation burden that plaintiffs must bear in arguing a public nuisance. Unlike claims sounding in some version of negligence, the public nuisance doctrine does not require product identification, and to the extent

that courts blend the notion of negligence-type causation with public nuisance-type causation, they commit error. In closing, this section argues that government entities bringing public nuisance actions against lead paint manufacturers must diligently reframe the issues before the court. Failure to clarify the requirements of a public nuisance claim, with respect to causation, will likely allow defendant manufacturers to distract busy courts with inappropriate negligence arguments.

Part I. An Introduction to Lead Paint

Lead is a useful substance. It powers our car batteries; it protects us from excessive x-rays; it insulates millions of miles of cable; it is indispensable to welders as the primary source of solder because of its high malleability and fusibility.[15] In paint, lead was added to increase the vibrancy of color, to reduce drying time, and to create a durable, washable surface. These qualities were particularly cost-effective for hospitals, schools, and public housing (where small budgets demand function at the lowest cost), but also appealed to the general public. Until the federal ban in 1978,[16] lead paint was sold in U.S. markets for many purposes, including exterior and interior residential decoration, coatings on toys and furniture, and industrial applications. Although the toxic qualities of lead paint were known within the industry,[17] the medical profession,[18] and the government,[19] lead paint went virtually unregulated throughout the late 1800s and into the 1960s.[20] While several American cultural realities contributed to this regulatory delay,[21] the effectiveness of a proactive information campaign coordinated by lead manufacturers, and later the Lead Industries Association (LIA),[22] was arguably the most important factor in delaying regulation.[23] Despite individual state efforts to regulate lead paint, LIA and its member companies promoted lead across the national market in order to "meet" the issue of lead poisoning and "protect the good name of lead."[24] This proactive effort, similar to the practices of both asbestos and tobacco trade groups, is, of course, the normal function of trade groups.[25] However, these efforts to delay regulation extended the period of mass exposure much longer than it otherwise might have been.[26]

While most early studies demonstrating lead's toxicity were easily dismissed as inconclusive,[27] over time, as the medical evidence became impossible to ignore, manufacturers shifted tone and asserted that regulation was unnecessary because lead hazards could be neutralized by consumers.[28] However, medical experts have publicly criticized the notion that the risks of lead exposure can be neutralized.[29] In response, lead manufacturers asserted that painters (owners or landlords) assumed the responsibility and risk by painting the walls with lead paint.[30] In assuming this risk, the manufacturers argued, the responsibility to manage the danger lead paint posed to human health fell on the individual consumer, not the companies that initially made the product.[31]

Given that interior use of lead paint was banned in 1978, the recent appearance of public nuisance cases might seem anachronistic; however, recent municipal health investigations, in addition to documenting the enduring existence of lead paint hazards despite the ban, have begun to quantify the long-term developmental effects of lead on children.[32] Considering that pediatric studies have determined that the level of lead necessary to poison is surprisingly small,[33] the quantity of lead that remains in older houses is often sufficient to create a potential hazard, and if any painted surface is abraded, sanded, renovated, or chewed, the potential hazard becomes immediate. Because lead affects neurological development in children, the damage is irreversible and symptoms of poisoning, absent screening, occur too late to allow preventive intervention.[34] Thus, unless lead is abated in advance, eventual lead poisoning victims will be permanently injured.

To achieve complete abatement, however, is costly and governments cannot afford simply to engage in large-scale remediation,[35] nor can most tenants exposed to lead paint hazards afford to abate the problem themselves. As a result, most lead-poisoned individuals sought damages from landlords, whether private or state-owned.[36] This individualized model for remediation cannot solve the problem of lead paint hazards because private plaintiffs are limited in their recovery by statutes of limitations, judgment-proof defendant-landlords, the inefficiency of this piecemeal approach, and in some cases statutory protections for the landlords themselves.[37] Even for private plaintiffs who do not face these additional, practical obstacles, there are several legal principles that will get in the way.

Part II. Why Governments Are Best Suited to Seek Remedies for Lead Paint Contamination and Why Negligence-Type Claims Will Fail

A. Finding a Claim

Lead paint is not the first mass product from which individuals and governments have sought relief from the original manufacturers; nor is public nuisance the first theory to be asserted in lead paint cases. Rather, plaintiffs often started (and many continue to assert) claims sounding in negligence or its offshoots.[38] Negligence, the most basic tort claim, has expanded and given rise to related theories such as strict liability and products liability.[39] What began as a theory applied especially to protect consumers from tainted food and drink[40] has evolved into the settled theory of strict liability employed to do justice, as conceived by the judiciary and applied to a host of different products.[41] Individuals in such cases, injured by defective products, can recover from the particular manufacturer by proving defective design or failure to warn. Once a defect or failure to warn is proven, plaintiffs then bear the same causation and injury burden that a

plaintiff would be required to bear in a pure negligence case.[42] Meaning, plaintiffs must prove "not only that the actor's conduct [was] negligent toward the other, but also that the negligence of the actor [was] a legal cause of the other's *harm*."[43] This, as we will see, presents evidentiary difficulties (namely product identification) for people injured by lead paint and ultimately makes negligence-type theories a poor choice for resolving the problem.

For tenants living in housing that contains lead paint, identifying the manufacturer of the paint on the walls is an evidentiary nightmare. Because a housing structure inevitably outlasts its paint job, multiple coats of different paint are applied and removed over the course of time. Similarly, ownership of the housing structure will often change hands many times over the decades just as manufacturers will alter paint formulations many times over the life of the product line, further muddying a particular house's paint history. Getting provable facts to line up in favor of a lead-poisoned plaintiff, such that the injury to the individual can be traced to a particular exposure of a particular manufacturer's lead paint product, becomes virtually impossible. Proving this negligence-type causal link (essentially product identification) in cases where the injury from a product is not readily traceable to a particular manufacturer was a legal impossibility until the asbestos cases in the 1970s, in which courts began to recognize the liability of multiple possible defendants for individual injuries involving delayed or latent diseases.[44] The first instance in which an individual, exposed to multiple sources of asbestos, successfully recovered damages against a manufacturer of insulation containing asbestos materials, *Borel v. Fibreboard Paper Products Corp., et al.*,[45] sparked a flood of subsequent lawsuits.[46] The *Borel* court, in discussing the complications for multiple exposure victims observed:

> In the instant case, it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to Borel. It is undisputed, however, that Borel contracted asbestosis from inhaling asbestos dust and that he was exposed to the products of all the defendants on many occasions. It was also established that the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury. We think, therefore, that on the basis of strong circumstantial evidence the jury could find that each defendant was the cause in fact of some injury to Borel. . . .[47]

The physical similarities between toxic lead paint and toxic asbestos would seem to suggest that the reasoning in asbestos cases would bolster lead paint claims.[48] However, the success of the plaintiff in *Borel* does not readily translate to lead-poisoned plaintiffs or the governments that represent them. Unlike asbestos cases, where individuals are exposed to multiple products from *identifiable* manufacturers, lead- poisoned individuals are exposed to multiple products from *unidentifiable* manufacturers.[49] Thus, the harm caused to a particular individual by lead paint cannot be attributed to a particular manufacturer except in highly unlikely circumstances.[50] As a result, plaintiffs cannot make the requisite product identification to satisfy the negligence-type causation standard. This makes reliance on negligence-type claims unwise for lead-poisoned individuals, as well as government entities, since the injury from the product will still be measured at the individual/citizen level and thus will require a similar showing of causation.

B. Looking Beyond Negligence

The causation problem that lead paint plaintiffs face in strict liability cases is the same limitation faced by daughters whose mothers took DES and that led to the creation of market-share liability theory, developed in the landmark California case *Sindell v. Abbott Labs*.[51] There, plaintiffs were allowed to use data demonstrating the individual market share for each defendant-drug company in order to determine the allocation of liability for damages. Based on public policy reasons, the court decided that the normal causation requirements should not apply.[52] For lead-poisoned plaintiffs facing causation proof problems, market-share liability theory, a special kind of alternative liability,[53] would seem an excellent alternative and in fact many plaintiffs have asserted it.[54] However, most courts have refused to extend this alternative liability theory to lead paint. The decision by the Supreme Court of Pennsylvania in *Skipworth v. Lead Indus. Ass'n*[55] is representative of those jurisdictions refusing to add lead paint to the short list of products that meet the requirements for the market-share liability theory.[56] Confusion arises, however, because the *Sindell-Skipworth* line of cases, as well as those rejecting claims that appear to rely on *Sindell*, focus judicial attention on causation without emphasizing the further distinction between causation of the injury and causation of the hazard.[57] The former forms the basis for arguments for defendant-lead paint manufacturers,[58] while the latter is the actual issue in public nuisance cases.[59] It is telling that government plaintiffs in *Santa Clara* and *Milwaukee*, suing in the two states most accommodating to market-share liability theory chose not to pursue such a claim, suggesting that parties familiar with market-share liability theory, understand that it is not in conflict with public nuisance nor are the facts sought to be proven in support of a public nuisance dependent on the acceptance of market-share liability theory.[60]

Beyond negligence, but still well within the realm of tort law, lies nuisance. Nuisance is admittedly a difficult

concept to define,[61] and the very murkiness of the concept contributes to its misinterpretation. Because public nuisance is a common law principle inherited from English law, it has become ensconced in American tort law and its existence is generally not questioned. However, its status as a common law principle also leads to state-specific jurisprudence and codification that makes minor alterations to its specific attributes. Courts divide nuisance into two types: public and private. A private nuisance is defined in the Restatement as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[62] Logically, lead paint, once applied to the walls of a house located on land, could affect the enjoyment of that land without amounting to a trespass when it becomes abraded or deteriorated through normal use, thus creating a health risk to family members.[63] However, like negligence-type claims, private nuisance claims also require a form of product identification at the property-specific level because the injury is measured by the impact on the use and enjoyment *of land,* not on the type of conduct involved.[64] Private plaintiffs are thus unable to make much headway under this theory.[65] Public nuisance, then, remains the only viable claim to deal efficiently with widespread lead hazards.

Public nuisance is different. Public nuisance is generally defined as "an unreasonable interference with a right common to the general public."[66] To satisfy this definition, the plaintiff's burden can be broken down as requiring proof of:

1. the existence of a public right,
2. that the right has been interfered with,
3. that the interference was unreasonable, and
4. that the plaintiff has a right to bring the action.

Whether the interference is with a public right is not a strict "population affected" test, but rather must be a right that is public in nature.[67] For example, toxic waste dumped into a stream may affect dozens of downstream riparian owners, but an interference with waterfront property does not affect a public right. If the toxic waste killed fish and forced the public beach to close, however, then a public right has been affected.[68] In the case of lead paint, the elimination of private rights of action to remediate lead paint hazards has shouldered the government with the cost of investigating and abating lead hazards, finding and treating lead-poisoned citizens, and educating children whose cognitive development has been negatively affected by lead exposure. The public right, namely protection of public health, must be paid for by public tax dollars.[69] In determining whether there has been interference, the court must determine whether the facts support a finding that the defendants created or assisted in the creation of a nuisance that caused or threatened to cause harm to the public that the public ought not to have to bear.[70] This element is closely tied to the causation requirement discussed later. In determining whether the interference with public health is unreasonable, a court generally looks at three areas, any of which alone may support a finding of unreasonableness:

> (a) Whether the conduct involves a significant interference with the public health . . . safety . . . peace . . . comfort or . . . convenience, or (b) whether the conduct is proscribed by statute . . . , or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[71]

In the case of lead paint, plaintiffs must show that the effect on public health from the lingering presence of lead paint rises to the level of significant effect or that the defendant-manufacturers knew or should have known that that their marketing and distribution activities would create a permanent effect on public health.[72]

C. Why the Government Is Best Suited to Pursue a Public Nuisance Claim

To meet the final requirement in asserting a claim in public nuisance, the plaintiff must have a right to bring the action. Originally, a public nuisance was a crime against the Crown, and the Crown was responsible to prosecute offenders.[73] Today, public nuisance is still primarily a claim for the government, but where the interference with a public right affects an individual in a special and different way, he or she will have the right to sue in public nuisance.[74] Absent such a special harm, the government is the only party with the right to sue in public nuisance, and that right is limited to a suit in its representative capacity.[75] Given the uniform nature of the interference created by lead paint manufacturers, and the relative failure of government entities to meet the special harm requirement in the most agreeable circumstances (California), to expect a private citizen to be able to show a special harm sufficient to carry the burden in a public nuisance action seems at best ineffective and at worst foolish.

Aside from legal obstacles to private plaintiffs, there are practical reasons why a government entity is better suited to bring a public nuisance action. Reliance on individual plaintiffs to seek redress for conduct that interferes with a public right puts too much pressure on the individual plaintiff to discover all the necessary facts. A public nuisance, by its nature, will affect the entire community and that requires decades of historical data, population-wide statistical information, and significant costs in finding and joining all the relevant defendants.[76] The government is best suited to carry out these tasks.[77,78]

Part III. Charting the Actual Cases and Why *Rhode Island* Got It Right

A. What Is a Nuisance?

In 1999, the State of Rhode Island filed suit against the Lead Industries Association and several paint manufacturers, including Sherwin-Williams Company, NL Industries, Inc. (formerly National Lead Company), and Millennium Holdings, LLC. After an initial mistrial, the case ended in the first jury verdict in the country to find lead paint manufacturers liable, on a public nuisance theory, to abate the hazard their products had caused to the State of Rhode Island.[79] The jury instructions articulate succinctly Rhode Island law as determined by the court and deserve quotation in full:

> [Y]ou will be asked to decide whether each Defendant individually or whether more than one Defendant through collective conduct is or are responsible for *creating, maintaining or substantially contributing to the creation or maintenance* of such public nuisance in Rhode Island. . . . A public nuisance is something that *unreasonably interferes with a right common to the general public*; it is something that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community. An essential element of a public nuisance claim is that persons *have suffered harm or are threatened with injuries* that they ought not to have to bear.[80]

The court went on to define "an interference" as "an injury, invasion, disruption, or obstruction of a right held by the general public."[81] In considering the unreasonableness of the interference, the jury was instructed to "consider a number of factors including the nature of the harm, the numbers of the 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."[82] This interpretation is substantially similar to the rules articulated in the Restatement and does not indicate some radical departure unique to Rhode Island.[83] The courts in *American Cyanamid*, *Santa Clara*, *Milwaukee*, *New Jersey Consolidated Lead*, and *St. Louis* are generally in agreement with the Restatement (or offer a definition that is more accommodating from the plaintiff's perspective) and therefore support the argument that public nuisance could include lead paint hazards in housing stock.[84]

The *American Cyanamid* court, after hinting that a public right may not be at issue,[85] chose to base its dismissal of the plaintiff's public nuisance claim on a failure to show causation. The court relied heavily on an opinion by the Illinois Supreme Court in *City of Chicago v. Beretta U.S.A. Corp*[86] issued two days after oral arguments in *American Cyanamid*. The *American Cyanamid* court found that plaintiffs failed to *allege* causation in fact because they failed to prove product identification.[87] Despite acknowledging that the proper test in determining causation (the substantial factor test) was fact-specific and a matter for the jury, the court upheld the dismissal of the complaint, doing so without any citation or analysis.[88] Instead, the court moved immediately to a discussion of market-share liability and the requisite causation proof for that claim. This is a clear example of the court mistaking the issue. The *American Cyanamid* court relied on the *Beretta* decision in asserting the need for product identification, but the *Beretta* opinion makes no mention of product identification. Rather, the court there was concerned with the superseding acts of illegal handgun purchasers. As the *Beretta* court remarked and the *American Cyanamid* court quoted:

> Legal cause will not be found where the criminal acts of third parties have broken the causal connection and the resulting nuisance is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the original wrong.[89]

The analogy to lead paint cannot be maintained. Handgun manufacturers do not sell their product knowing that, when used legally, the product will create a public health risk. Lead paint manufacturers, on the other hand, were well aware of the toxic nature of the product and when selling it fully intended the paint to be applied to walls. There are no intervening criminal acts in the application of lead paint. Furthermore, the *Beretta* court noted that the *third person* is not under the control of the handgun manufacturers when he or she shoots the gun. Thus, the manufacturers cannot be said to have caused the injury. Lead paint is not an intervening person. It causes injury by itself when used in the manner anticipated by the manufacturers.

The *American Cyanamid* plaintiffs were also working against an earlier legislative pronouncement that *intact* lead paint was not a hazard.[90] To account for this, plaintiffs argued that lead paint is a public nuisance because it will *inevitably* deteriorate.[91] The court was not persuaded by that argument but chose, instead, to take issue with the causation element. The court in *New Jersey Consolidated Lead* dismissed the plaintiff's public nuisance claims as soon as it reached a perceived statutory limitation.[92] The New Jersey Supreme Court, in a split 4-2 decision, decided that New Jersey's Lead Paint Act (LPA) and the Product Liability Act (PLA) effectively barred plaintiff's public nuisance action because, rather counter-intuitively, the legislature affirmatively declared lead paint in homes a public nuisance[93] and therefore, because *landlords* are regulated under the act, this bars plaintiffs from seeking relief from the original *manufacturer*.[94] Contrary to every other court in the country to consider the issue, the New

Jersey Supreme Court found that lead paint hazards are best pursued under a products liability theory.[95]

The dissent, citing substantial case law, rightly pointed out that the legislature cannot be deemed to have extinguished a common law right unless it expressly does so in the statute[96] and thus the definition of nuisance under common law should be left to the courts. The dissent observed further: "In fact, the [LPA] does not even concern tort liability. Rather, it is an enabling statute authorizing local health boards to enforce lead paint regulations."[97] There is simply no language in the LPA that limits the government's public nuisance action, even if such a limitation were allowed. Much like the dissent in *New Jersey Consolidated Lead*, the *Rhode Island* court found that Rhode Island's Lead Poisoning Prevention Act (LPPA) "does not preclude the State from maintaining [a] public nuisance action."[98] Much like the LPA in New Jersey, the LPPA in Rhode Island was "not intended to 'authorize' the presence of lead paint [as defendants argued] or otherwise insulate actors such as the Defendants from public nuisance liability."[99] Accordingly, the *New Jersey Consolidated Lead* dissent would hold, and the *Rhode Island* court did hold, that statutory directives to government health departments and landlords do not preclude common law claims against lead paint manufacturers.[100]

We see, then, that lead paint statutes should not, by themselves, define a nuisance for purposes of common law nor limit manufacturer liability under a public nuisance theory, and the New Jersey Supreme Court's decision to do so is simply bad law. This position is supported by the fact that California,[101] Missouri,[102] and Wisconsin[103] all have similar lead poisoning prevention laws and *none* refer to manufacturer liability or immunity, public nuisance, or common law rights. Nor did the courts in *Santa Clara*, *St. Louis*, or *Milwaukee* even mention potential conflicts with these acts. Defining lead paint hazards as a public nuisance, then, should not be a significant hurdle for plaintiff governments.[104] Rather, it is the element of causation that has given government plaintiffs the most trouble in proving a public nuisance claim.[105]

B. How to Prove Causation of a Public Nuisance

Disagreement among the courts in these cases occurs when determining how a nuisance is caused and how that causation can be linked to the defendant-manufacturers. The critical distinction this article attempts to make is between causation of harm to individual lead-poisoned citizens and causation of a public nuisance that interferes with a public right. As the *Rhode Island* court told the jury: "You are not asked to decide whether each separate property that may contain such lead pigment is by itself a public nuisance but rather whether the cumulative presence of all such pigment on properties throughout the State constitutes a single public nuisance."[106] This essentially does away with the product identification requirement present in negligence-type claims. The focus, instead, is on harm to the general public. As the *Milwaukee* court remarked: "Were it otherwise, the concept of public nuisance would have no distinction from the theories underlying class action litigation, which serves to provide individual remedies for similar harms to large numbers of identifiable individuals."[107] Rather, the *Milwaukee* court found that the plaintiffs "must show that defendants' conduct or products were 'substantial factors' in causing the injury."[108] In the words of the *Santa Clara* court, phrased in a more useful way: "the critical question is whether the defendant created or assisted in the creation of the nuisance."[109] In essence, the defendants are on trial for causing the nuisance or the injury that *is* the nuisance. Plaintiffs are not required to prove that each defendant caused injury to an individual person.

Bound up in the determination of the cause of a public nuisance is a subordinate issue often called the "control of instrumentality issue." This issue arose in *American Cyanamid*, *Santa Clara*, *New Jersey Consolidated Lead*, and *Rhode Island*. In *Rhode Island*, the defendants argued that they must have control over the nuisance before they can be liable to abate it. The court dismissed this notion stating:

> The Court has consistently rejected the proposition that control of specific property is required to find liability, 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.[110]

This is the crux of the article. The *Rhode Island* court's interpretation is consistent with the Restatement[111] and consistent with other case law outside the context of lead paint.[112] The court in *American Cyanamid* cited the Restatement, but evidently stopped reading after the phrase "carried on" because it stated: "Defendants here are not carrying on or participating in carrying on anything"[113] and thus "plaintiff's reliance on substantial participation as a substitute for control misreads the Restatement."[114] Had the court continued a bit further in the Restatement, it would have encountered the phrase transcribed in note 111, which imposes liability "even though he [who caused the nuisance] is no longer in a position to abate the condition."[115] Without the support of the Restatement, the *American Cyanamid* court is left with its reliance on *Beretta*. That reliance is misplaced because, by its own words, the argument in *Beretta* was based on two elements: (1) that the alleged harm resulted from the criminal acts of third parties, and (2) that the conduct was too remote from the alleged injury for liability to attach.[116] These elements are absent from the lead paint context because there are no intervening criminal acts and the lead paint manufacturers knew of the toxic nature of the product and knew that in its ordinary use it would mobilize and present a hazard.[117]

The court in *Santa Clara*, faced with a similar lack-of-control argument, quickly dispatched with defendants' argument that they cannot be held liable for the public nuisance because they lacked the ability to abate, instead finding that:

> Liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.[118]

The dissenting opinion in *New Jersey Consolidated Lead* quotes this same phrase, as well as other case law, in opposition to the majority's finding that control of the property is a necessary prerequisite to finding liability for the causation of a public nuisance.[119] The majority in *New Jersey Consolidated Lead* adopted a more restricted view of public nuisance. The majority would place blame on owners who applied the lead paint because it is they, in accordance with the Restatement, who have "engaged in the conduct that involves a significant interference with the public health," not the manufacturers.[120] This argument, again, fails to consider the difference between public and private nuisance. In a private nuisance, where an individual sues for damages caused by lead paint, the owner of the particular house in which the plaintiff was exposed to lead paint might bear a more direct responsibility for those injuries than the original manufacturer. In the context of a public nuisance, however, the owner of the property becomes irrelevant because the injury is the threatened harm to the public health. To be in control of *that* property would require ownership of the entire political subdivision represented by the government plaintiff and surely that cannot be the outcome implied by the section of the Restatement quoted by the majority opinion. Having articulated the ill-founded finding that control of the property was relevant, the majority went on to find that the absence of control translates into an absence of causation. How the majority makes this leap is not clear. The majority tried to buttress this finding by referring to the LPA's focus on landlords, but for reasons already stated the LPA should not apply to the government's public nuisance claim.

Aside from the effect of the LPA, the majority held that the public nuisance action would have failed even if "the continuing presence of lead paint in homes qualifie[d] as an interference with a common right sufficient to constitute a public nuisance for tort purposes."[121] To support this, the court says only that "plaintiffs' complaints aim wide of the limits of [the public nuisance] theory."[122] The court then reasoned that the true cause of the lead paint crisis was poor maintenance by owners and that to ignore this, plaintiffs "would separate conduct and location and thus eliminate entirely the concept of control of the nuisance."[123] Aside from the legal error in making control a requirement, this argument also fails to account for a critical factual reality: even well-maintained houses still threaten to harm public health because people, in the normal use of their home, will abrade painted surfaces (whether opening a window, closing a door, or renovating the kitchen) and mobilize the toxic lead dust.[124] Lead paint manufacturers were aware of this reality and lobbied strenuously to keep this information from the public.[125]

C. The Effect of the Remedy Sought

While not a central consideration when determining causation, the type of remedy sought by a government entity in a public nuisance action perhaps has the starkest impact. The *St. Louis* case outlines the ramifications of remedy choice most succinctly. In *St. Louis*, the city sued in public nuisance seeking reimbursement for the costs of lead paint abatement. Like in *American Cyanamid*, the *St. Louis* court, sitting in a jurisdiction that had previously rejected *Sindell* market-share liability,[126] found that market share evidence could not be the sole evidence of causation. Over a vigorous 4-3 dissent, the *St. Louis* court held that the product identification requirement announced in *Zafft* applied to the city's claim despite the city's assertion that "the damage was not an individual injury, but a widespread health hazard."[127] The court observed that this was not the case:

> The damages [the city] seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous properties. In this way, the city's claims are like those of any plaintiff seeking particularized damages allegedly resulting from a public nuisance.[128]

As the majority suggests: "The city's argument, accepted by the dissent . . . does not apply to the damage suit [the city] has actually brought."[129] Implicitly, had the city argued only for an injunction to stop the nuisance, it would not have been seeking particularized damages and so would not have to bother with site-specific product identification.[130]

Compare to this outcome, the *Rhode Island* case. After dismissing the state's claims for indemnification, unjust enrichment, and compensatory damages, the court allowed the public nuisance claim, seeking only abatement, to go to the jury. The state was prohibited from presenting evidence on past damages.[131] According to the Restatement:

> (1) In order to recover damages in an *individual action* for a public nuisance, one must have suffered [particularized harm].
>
> (2) In order to maintain a proceeding to *enjoin to abate a public nuisance*, one must

> (a) have the right to recover damages, as indicated in Subsection (1), *or*
>
> (b) *have authority as a public official* or public agency to represent the state or a political subdivision in the matter, or
>
> (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.[132]

There is no requirement to show damages, and thus the causation of those damages, when the state seeks only to enjoin to abate a public nuisance. The court in *Rhode Island* expressly communicated this difference, saying on one hand: "abatement means the public nuisance is to be rendered harmless or suppressed . . . if you decide that abatement shall take place, it will be for the Court to determine the manner in which such abatement will be carried out."[133] Separately, the court noted: "The jury never considered damages during its deliberations."[134] This distinction has a significant bearing on causation. In the first instance, where an entity seeks damages, the injury has already occurred and should, at the time of trial, be quantifiable. Such quantification would include the particular source or cause of that individual injury. However, if the relief sought is abatement of a nuisance, the injury is by its very nature unquantifiable because relief is sought as a preventive measure. To be sure, evidence of past injury may be relevant to prove that the nuisance is unreasonable or an interference, but it should not complicate a simple showing that defendant-manufacturers substantially contributed to the creation of the nuisance itself.

In perhaps the most glaring misconstruction of the public nuisance theory, the court in *American Cyanamid*, discussing the nature of the remedy sought, remarked: "Defendants argue that plaintiff cannot escape the requirement of showing causation in fact by stylizing a products liability claim as a public nuisance action."[135] Admittedly this is a paraphrasing of the defendants' position, yet the court does not reject or correct it. Rather it builds on the premise, essentially accepting the assertion that plaintiff's "real" claim is actually in products liability. Moreover, the plaintiffs are not seeking to escape any causation requirement, rather they argue that they are "not seeking to recover for an injury to a particular person or property but, instead [are] asserting the right of the public as a whole to be free from threats to its health and safety."[136] How a *threat* to public safety can be conceived of in terms of money damages is unclear. The *New Jersey Consolidated Lead* court took a more reasoned approach noting: "The complaints seek damages rather than remedies of abatement. . . . Plaintiffs . . . cannot identify any special injury."[137] As indicated in section 821C of the Restatement (Second) of Torts, absent a showing of special or particularized injury, the state cannot maintain such an action.[138]

Wisconsin, evidently, follows a more liberal rule. As the court observed with approval in *Milwaukee*: "The City asks that defendants pay the costs associated with the City's abatement program. Specifically, the suit seeks: (1) compensatory and equitable relief for abatement of the toxic lead hazards . . . (2) restitution . . . and (3) punitive damages."[139] The court also quoted from a 1929 Wisconsin Supreme Court case, *Brown v. Milwaukee Terminal Ry. Co.*, which held: "The damage that may be recovered in actions based upon nuisance must always be the natural and proximate consequence of the danger created by the nuisance."[140] The court there made no distinction between public and private nuisance, but seems to allow for recovery of damages under either theory. Imbedded in this reference to an early 20th Century case, however, is a distinction that bears heavily on the central issue in this article. The court in *Brown* spoke of the *danger* created by the nuisance and not the activity of the defendants. Expounding on this idea is the function of the next section.

Part IV. Where Conduct Yields to Danger

In thinking about the difference between conduct and danger, and how that distinction affects proof of causation of a public nuisance, several terms must be distinguished. Consider the word "harm." In some instances this might refer to the injury actually sustained by an individual from contact with a toxic product. In such an example, the individual sustains damages for which he or she might seek to recover from whoever is responsible for the presence of the toxic product. Alternatively, "harm" could refer to the threat of a condition that may affect a public right as when a toxic substance is dumped on a public beach. Here, no one sustains a personal injury, but there is still harm to the public right. Harm, then, does not always require a demonstrated injury. Consider the word "cause." Take the broad example of flagging investor confidence that in turn *causes* the stock market to decline, yet no single devaluation of stock can be traced to the actions of a single investor. The term "cause" is used, but we understand it to mean "led directly to an outcome" because it is the *condition* to which investors contribute (through their lack of confidence) that we blame for the subsequent turn of events. It is not the individual actions of a single investor that concerns us.

Applied to the case of lead paint, these terms are equally mutable. However, by drawing a critical distinction, part of the judicial confusion surrounding public nuisance might be explained. Conceptually, the causation element in public nuisance must be bifurcated so that each plaintiff actually has two steps to prove: (1) that each defendant-manufacturer engaged in activities that were a substantial cause of the public nuisance, and (2) that the

nuisance itself was a substantial factor in causing harm, whether actual or threatened, to the public. Viewed in this fashion, it is easier to see why each government plaintiff considers public nuisance a viable argument. Evidence introduced to show the first part need not be the same evidence introduced to prove the second. For instance, the state could submit market-share data to demonstrate that each manufacturer operating in the jurisdiction affirmatively engaged in conduct that was a substantial cause of the distribution and application of lead paint. This would not raise the specter of market-share liability because damages are not being sought for any particular injury and so fair apportionment (the basis for *Sindell*-type departure from negligence principles) is not yet an issue. The state could then offer evidence that lead paint is a substantial factor is causing a public health risk.

In the *Milwaukee* case, the court carefully articulated the position of the plaintiffs, namely:

> [D]efendants are responsible for [abatement costs] because their conduct in marketing and selling substantial quantities of lead [paint] in the City of Milwaukee and after the construction of these dwellings, when they knew the hazards of lead poisoning related to their product, was a substantial factor creating the public nuisance.[141]

This quotation is perhaps most important for what it does not say. The plaintiffs in *Milwaukee* did not claim (and the court did not require them to prove) that the defendants were responsible for the lead paint hazard on the walls of houses in Milwaukee; rather the city focused on the defendants' individual and collective conduct in the marketing and selling of lead paint. Absent this marketing and selling, lead paint would not have entered Milwaukee and would never have been applied to walls there. It was the marketing and distribution that was the conduct creating the nuisance. The court in *Santa Clara* encountered similarly targeted allegations that claimed defendants were "liable in public nuisance in that they created . . . contributed to . . . or assisted in the creation . . . or were a substantial contributing factor in the creation of the public nuisance by engaging in a massive cam-paigning to promote the use of Lead. . . ."[142] Again, the defendants were not accused of causing injury to anyone by causing harmful contact between an individual lead product and an individual person. Rather, the plaintiffs, and the courts in both cases, were focused on the danger created by the defendants. Where the danger was sufficient to constitute a public nuisance, the court then turned *separately* to the effect of that nuisance on the public right. This was precisely the approach that the court in *Rhode Island* instructed the jury to take.[143] In the end, that jury returned a unanimous verdict for the state. Had the courts in *American Cyanamid*, *New Jersey Consolidated Lead*, and *St. Louis* been handed similarly straightforward guidance, perhaps the outcomes would have been in keeping with the principles underlying public nuisance.

To give all these observations practical meaning, we must return to the underlying principles at stake in each of the central cases. Public nuisance, as a common law theory, is admittedly broad. But that is its charm. It is designed to relieve the unfairly burdened public from an interference it ought not to have to bear. It is designed to be used when all other theories fail. No one seriously disputes the premise that lead paint presents a hazard to the public. The operative question, rather, is who can fairly be held liable. Making that determination is the province of the jury and, as we have seen in both Wisconsin and Rhode Island, it can be difficult.[144] It is imperative, therefore, that plaintiff-governments ensure clarity of the issues to minimize the distraction often created by defendants' misplaced negligence-type arguments. Plaintiffs must be more nimble in the public relations game by taking every opportunity to reframe the issues, always returning to the notion that a lead-free housing stock is a right and companies that profited from the sale of a toxin should pay their fair share to fix the problem. To get to a jury, however, the plaintiff must plead a cause of action that can survive summary judgment. Public nuisance is that cause of action. What happens once the jury is sworn in is very far beyond the scope of this article.

Endnotes

1. As used in this article, the term "lead paint manufacturers" includes manufacturers and distributors of lead-based paint and lead pigment, successors-in-interest to such manufacturers and distributors, trade associations for both the paint and lead industries, and lead extraction and processing companies.
2. *See Rhode Island v. Lead Indus. Ass'n*, No. PC 99-5226, 2007 R.I. Super. LEXIS 32, at *1 (R.I. Super. Ct. Feb. 26, 2007) (decision on post-trial motions, filed February 26, 2007, discussing the unanimous jury verdict for the state).
3. *See* notes 6, 54, & 57, and discussion p 13.
4. *See generally* RESTATEMENT (SECOND) TORTS § 821B(2)(a) (1979); *see also* notes 66, 83, & 120.
5. This argument, often called the "product identification requirement," stems from the notion that any claim based on negligence requires plaintiffs to identify a particular product made by a particular defendant-manufacturer at a particular location that caused injury to a particular individual.
6. *See, e.g., Spring Branch Indep. School Dist. v. NL Indus.,* No. 01-02-01006-CV, 2004 WL 1404036 (Tex. App. 1 Dist. June 24, 2004) (holding that plaintiff's failure to produce direct evidence of product identification, and the inapplicability of alternative liability to lead paint hazards, justified the dismissal of plaintiff's product liability action against lead paint manufacturers).
7. *See, e.g., Milwaukee v. NL Indus.*, 691 N.W.2d 891, 892-93 (drawing a critical distinction between causation of the nuisance, at issue, and the causation of the injury, not directly at issue); *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 117 (Wolff, C.J., dissenting) (noting that issues in alternative liability cases are irrelevant to public nuisance claims because the focus is on contribution to the problem and not individual injury).
8. This concept will be expanded later in this article, but readers should note now that "negligence actions" here refers to claims

based on negligence, products liability, and strict liability since these claims all stem from negligence.

9. 823 N.E.2d 126 (Ill. App. 1 Dist. 2005).

10. 40 Cal. Rptr. 3d 313 (App. 6 Dist. 2006).

11. 691 N.W.2d 888 (Wis. App. 2004) *review dismissed by City of Milwaukee v. NL Indus., Inc.*, 703 N.W.2d 380 (Wis. 2005)

12. 924 A.2d 484, (N.J. 2007).

13. 226 S.W.3d 110 (*Mo. en banc*, 2007).

14. Only *Rhode Island* and *Milwaukee* have reached a verdict. In *Rhode Island*, the verdict was for the plaintiff-State. In *Milwaukee*, the verdict, by a vote of 10-2, found that defendant-manufacturers were not liable for the public nuisance.

15. *See* Iain Thornton, *et al*. Lead: The Facts, IC Consultants Ltd., London (Dec. 2001) *available at* http://www.ldaint.org/factbook/index.htm.

16. The ban became effective on February 27, 1978. *See* Establishment as Banned Hazardous Products, 42 Fed. Reg. 44,199 (Sept. 1, 1977) (to be codified at 16 C.F.R. pt. 1303).

17. *The Chameleon*, Sherwin-Williams Internal Newsletter, Dec. 1899 noted: "It is also familiarly known that white lead is a deadly cumulative poison . . ." and *The S.W.P.*, Sherwin-Williams Public Newsletter, July 1904, stated that "white lead is poisonous in a large degree, both for the workmen and for the inhabitants of a house painted with white lead colors." Note: Sherwin-Williams reversed its position after acquiring a white lead processing plant in 1910. In 1928, the company joined the Lead Industries Association.

18. Gerald Markowitz & David Rosner, *Cater to the Children: The Role of the Lead Industry in a Public Health Tragedy, 1900-1955*, 90 Am. J. Pub. Health, Jan. 2000, at 36, 36, [hereinafter "Markowitz, *Cater to the Children*"] citing M. D. Stewart, *Notes on Some Obscure Cases of Poisoning by Lead Chromate Manifested Chiefly by Encephalopathy*, 1887 Med. News 676, and A. Hamilton, *Industrial Diseases, With Special Reference to the Trades in Which Women are Employed*, 20 Charities and the Commons 655, 658 (1908).

19. House Interstate and Foreign Commerce Committee, *Hearings on H.R. 21901, Manufacture, Sales, etc., of Adulterated or Mislabeled White Lead and Mixed Paint*, 61st Cong., 2d sess., 31 May 1910 (The testimony of Marion E. Rhodes of Missouri speaks to the general consensus that lead is a poison.).

20. Many other countries, by contrast, after recognizing the dangers of lead, banned lead paint outright. *See* Markowitz, *Cater to the Children*, at 37 (by 1934 most industrialized countries had restricted the use of white lead in paint).

21. *See* Christian Warren, *Toxic Purity: The Progressive Era Origins of America's Lead Paint Poisoning Epidemic*, 73 The Business History Review, Winter, 1999, at 705 (exploring the independence of Master Painters and the social acceptance of heightened health risks in the name of industrial expansion).

22. The Lead Industries Association (LIA) was formed to prevent other metal industries, such as zinc and titanium, from replacing lead as the principal paint pigment. The LIA functioned as a clearinghouse for information related to lead mining, processing, manufacturing, and sale.

23. In 1923, National Lead ran advertisements in the Saturday Evening Post claiming, "Lead helps to guard your health." In 1949, Maryland passed a "toxic finishes" law that required children's furniture and toys finished with lead paint to be labeled. LIA immediately held several private conferences with Maryland governmental authorities and succeeded in having the law repealed a year later. *See* Gerald Markowitz & David Rosner, Deceit and Denial: The Deadly Politics of Industrial Pollution, 95 (University of California Press 2002) [hereinafter Markowitz, *Deceit and Denial*]. Similar attempts to regulate lead paint were thwarted in New York, Massachusetts, New Jersey, and other state legislatures.

24. Markowitz, *Deceit and Denial*, *supra* note 23 at 93-94. For an illustrated summary of the Gerald Markowitz's lead advertising timeline in *Cater to the Children*, visit http://www.cincinnatichildrens.org/research/project/enviro/hazard/lead/lead-advertising/.

25. In several cases, however, these efforts went beyond information sharing and advocacy, reaching levels of conspiracy sufficiently cognizable to warrant scrutiny in several lawsuits. *See, e.g.*, *Hoffman v. Allied Corp.*, 912 F.2d 1379 (11th Cir. 1990) (asbestos); *In re New York City Asbestos Litig.*, 842 N.Y.S.2d 333 (N.Y. Sup. Ct. 2007) (asbestos); *Milwaukee v. NL Indus.*, 703 N.W.2d 380 (lead paint); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (tobacco).

26. As a practical consequence, this broad window of exposure makes market share liability theory difficult to apply to lead paint cases. *See* notes 52 & 54.

27. The first medical study, written in English, was conducted in Australia by J. L. Gibson, who concluded that the lead-based paint on walls and porch railings was the source of the lead poisoning observed in his patients. The lead industry dismissed these findings as anomalies, calling them inconclusive. See J. Lockhart Gibson, *A plea for painted railings and painted rooms as the source of lead poisoning amongst Queensland children*, 23 Australas. Med. Gazette 149-53 (1904).

28. This remains a prominent argument in public nuisance cases today where companies point to the responsibility of landlords to maintain the habitability of their buildings and prevent deterioration of lead paint. *See* note 37.

29. *See* U. Tr. 28:4 19, Nov. 7, 2005 PM Session, *Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32, at *59, (testimony of Dr. James Girard, chemist and witness for the plaintiff, stating that lead paint deterioration was inevitable and efforts to neutralize the dust and chips would fail), and U. Tr. 124:10 126:16, Nov. 3, 2005 PM Session (testimony of Dr. Philip Landrigan, public health specialist and witness for the plaintiff, noting that even intact paint presented an immediate hazard when used in certain places (i.e., window frames, door jambs, floors, banisters, etc.)).

30. *See, e.g.*, Brief for Def.'s-Respondents NL Indus. at 35-36, *Milwaukee v. NL Indus.*, 2004 WL 4908152, (Wis. App. 1 Dist. 2004) (No. 01CV003066).

31. This argument, however, rings hollow in the public nuisance context because individual injury is not the focus of the claim. Rather, government entities seek abatement of a nuisance that affects the public at large and so the public (through the government representative) is the party seeking relief.

32. *See, e.g.*, Scott Grosse, *et al.*, *Economic Gains Resulting from the Reduction in Children's Exposure to Lead in the United States*, 110 Envtl. Health Persp., June 2002, at 563.

33. To get a workable idea of how much lead is required to poison a child, take a packet of sweetener, divide it into 1 million piles. Discard 999,990 piles and place the remaining 10 piles in a 1/5 cup of water. This would approximate 10 micrograms per deciliter, the current limit as set by the EPA. *See* U.S. EPA, Addressing Lead at Superfund Sites, http://www.epa.gov/superfund/lead/health.htm. However, recent studies have indicated that the current "safe" level is not stringent enough to protect children from injury. *See* Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children, Appendix: A Review of Evidence of Adverse Health Effects Associated with Blood Lead Levels < 10 µg/dL in Children (2005).

34. *See* Herbert L. Needleman, *et al.*, *Deficits in Psychologic and Classroom Performance of Children with Elevated Dentine Lead Levels*, 300 New England Journal of Medicine 689 (1979). While chelation therapy can lower the blood lead level of a child, the physiological damages, once wrought, cannot be repaired by current medical science.

35. In 2001, a State Inter-Agency Task Force in New Jersey estimated that total lead paint abatement would cost the state $50 billion.

At the individual property level, the cost of abatement ($12,000) is similarly beyond the reach of many owners. *In re Lead Paint Litigation*, 924 A.2d at 507 (N.J. 2007). In *Rhode Island*, considering only the *future* costs of lead abatement in residential homes, the state estimated the cost to be between $1.37 and $3.74 billion. *Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 at *282. While a municipality or state could, in theory, appropriate sufficient funds to remove lead paint from the existing housing stock, such an exercise would ignore consideration of the potential responsibility resting on the manufacturers and would render an exploration of recent litigation purposeless.

36. *See, e.g.*, *Gould v. Housing Authority of New Orleans*, 595 So.2d 1238 (La. App. 4th Cir. 1992) (suing a public housing authority for damages based on lead poisoning); *Scroggins v. Dahne*, 645 A.2d 1160 (Md. 1994) (suing private landlord for injuries caused by lead paint ingestion).

37. Donald Gifford & Paolo Pasicolan, *Market-share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Cases?*, 58 S.C. L. Rev. 115, 127 (Autumn 2006). Professor Gifford notes in a 2005 article that in the Washington Metro region, plaintiffs have not been unsuccessful in their claims against landlords when the landlords can afford to pay. Donald Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products* 64 Md. L. Rev. 613, 626 (2005).

38. *See* Edmund J. Ferdinand, III, *Asbestos Revisited: Lead-Based Paint Toxic Tort Litigation in the 1990s*, 5 Tul. Envtl. L.J. 581, 595 (1992) (discussing the initiation of suits against lead paint manufacturers in the late 1980s).

39. *See* Restatement (Second) Torts § 402A (1965) (treating strict liability as a special form of liability, under negligence, for a seller of a product causing harm to the user).

40. *See id.* (Reporter's Notes, Section 1, gathering cases from the 1930s through the 1960s).

41. *See, e.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (automobiles); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 899 (Cal. 1963) (power tools); *McQuaide v. Bridgeport Brass Co.*, 190 F.Supp. 252 (D.Conn. 1960) (insecticides).

42. *See* Restatement (Second) Torts § 281 (1965). Relevant here is the fact that the *same* causation burden is common to all negligence-type claims.

43. Restatement (Second) Torts § 430 (1965).

44. Much like asbestos, lead paint causes injury that is delayed. Lead primarily affects neurological development of children at early ages.

45. 493 F.2d 1076 (5th Cir. 1973).

46. As of 2005, individuals injured by asbestos had filed over 600,000 claims. *See* Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting From Mass Products*, 64 Md. L. Rev. 613, 620 (2005).

47. *Borel*, 493 F.2d at 1093.

48. Indeed, as the dissent in *New Jersey Consolidated Lead* remarked: "There is no meaningful difference between the manufacturing of asbestos and the production of toxic lead pigment." *In re Lead Paint Litigation*, 924 A.2d at 509 (Zazzali, C.J. dissenting).

49. Lead paint cannot be traced to a particular source through any scientific testing process because the operative toxin in lead paint is uniform and has no identifiable chemical attributes. The court in *Brenner v. American Cyanamid Co.*, N.Y.L.J., Feb. 3, 1999, at 31 (N.Y. Sup. Ct. Feb. 2, 1999), in an unpublished opinion, found that all white lead pigment is identical in its chemical structure. *See also Milwaukee v. NL Indus.*, 691 N.W.2d at 893 (acknowledging the impossibility of identifying specific paint in particular houses); Brief for Def.'s-Respondents, *Milwaukee v. NL Indus.*, 2004 WL 4908152, at *53 (Wis. App. I Dist. 2004) (No. 01CV003066) (also arguing that the city cannot demonstrate sufficient facts to warrant the inference that each defendant's paint is present at particular locations); Brief for National Paints & Coating Association in Support of Respondents-Def.'s, *St. Louis v. Benjamin Moore & Co.*, 2007 WL 833839, at *16 (Mo. 2007) (No. SC88230) (asserting the impossibility of determining the source of a particular paint formula because they were historically kept secret).

50. Such circumstances would require a child to be born and raised in a single home, the paint in which came from a single batch of proprietary paint and that paint can, by unshakable testimony, be traced from the wall to the can to the retailer and back to the manufacturer. Such instances are exceedingly rare, but can happen. *See Pollard v. Sherwin-Williams Co.*, 955 So.2d 764 (Miss. 2007) (reversing dismissal and remanding claim for trial where testimony of a minister and others demonstrated that defendant's lead paint had been applied from time of construction in the 1930s through the 1978 ban on lead paint).

51. 607 P.2d 924 (Cal. 1980). The Court in *Sindell* authored the first decision that excused injured plaintiffs from establishing which defendant's product actually caused their injuries, allowing them instead to rely on market-share data to allocate liability. This doctrine allowed courts, in jurisdictions where it was adopted, to craft fair solutions in cases where (1) defendants' conduct was tortious, (2) plaintiffs suffered serious injuries as a result, and (3) the *only* obstacle to relief is an inability to match each injury to a particular defendant. The Court reasoned: "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." *Id.* at 936.

52. The court reasoned that the particular facts of the case allowed the market-share theory to be applied fairly. Specifically, the court found that the product in question was fungible (identical and easily substituted), the exposure window was narrow (nine months in utero), and the resulting rare form of cancer was a signature injury that was not likely caused by another source. *Id.* at 926, 936.

53. *See Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948) (defining alternative liability as a theory that shifts the causation-in-fact burden to defendants once innocent plaintiff proves tortious conduct by a single, unidentifiable defendant). For an example of enterprise liability, recall the seminal case *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y., 1972), where a federal court found that the sparsely populated blasting caps industry could be held collectively liable for the injuries their products caused to children because the industry had adhered to a common safety standard, which was insufficient to protect the children.

54. *See, e.g.*, *Jackson v. Glidden Co.*, 647 N.E.2d 879 (Ohio App. 8 Dist. 1995) (individual plaintiff claimed manufacturers were liable in enterprise liability or, alternatively, market-share liability); *Philadelphia v. Lead Indus. Ass'n, et al.*, 994 F.2d 112 (3d Cir. 1993) (city alleged manufacturers liable in alternative liability, enterprise liability, and market-share liability).

55. 690 A.2d 169 (Pa. 1997).

56. Courts such as the one in *Skipworth* tend to reject market-share theory for two reasons. First, unlike the chemical compound in *Sindell*, courts tend to find that lead pigment is not fungible. Rather, it has many chemical formulations that create differing levels of toxicity. This conclusion, while the majority rule, has not been universal. See *supra* note 39. Aside from fungibility, the *Skipworth* court also found that the relevant time period for market activity (spanning eight decades) and the time period for exposure to the lead paint (a period of years—often ages 0-6) were too broad to allow for any precision that would fairly apportion liability among the lead paint manufacturers operating over the course of many decades.

57. *See, e.g.*, *Spring Branch Independent School Dist. v. NL Indus.*, 2004 WL 1404036 at *3 (Tex. App. 1 Dist. 2004) (after finding no direct evidence of product identification, turning immediately to the jurisdiction's earlier rejection of market-share liability theory); *Chicago v. American Cyanamid*, 823 N.E.2d at 134 (mistakenly treating the public nuisance and products liability claims as having identical causation requirements).

58. *See, e.g.*, *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d at 114 (discussing the application of legal causation requirement as it is conceived of in negligence claims to the plaintiff's public nuisance claim).

59. Whether defendant-manufacturers assert these arguments with the intention of distracting the court or whether they are simply genuinely mistaken is irrelevant to the extent that the court itself articulates the ultimate decision and intention by the parties does not carry over into the opinion.

60. Neither the *Santa Clara* court nor the *Milwaukee* court addressed the market-share theory whether as an alternative, a fall back position, or a preferred avenue.

61. *See Chicago v. American Cyanamid*, 823 N.E.2d at 130 & n.2 (quoting the Illinois Supreme Court's dissatisfied observation that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance") (internal citations omitted). *See also In re Lead Paint Litigation*, 924 A.2d at 494.

62. RESTATEMENT (SECOND) TORTS § 821D (1979).

63. *See id.* at cmt. a (noting that the nature of the interest includes harm to members of the family and to chattel).

64. *See* RESTATEMENT (SECOND) TORTS § 822, at cmt. b (1979) (noting that the "[f]ailure to recognize that private nuisance has reference to the interest invaded and not the type of conduct that subjects the actor to liability has led to confusion").

65. Moreover, government entities cannot bring private nuisance actions except with respect to properties that the government owns.

66. RESTATEMENT (SECOND) TORTS § 821B(1) (1979). *Accord Chicago v. American Cyanamid*, 823 N.E.2d at 130; *Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 at *144; *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d at 118; *Milwaukee v. NL Indus.*, 691 N.W.2d at 891 (using the phrase "a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community"). California law, at issue in *Santa Clara*, is even broader. *See* West's Ann. Cal. Civ. Code § 3479-80 (1997).

67. *See* RESTATEMENT (SECOND) TORTS § 821(B), at cmt. g (1979).

68. *Id.*

69. *See, e.g.*, Brief for Appellants-Plaintiffs, *St. Louis v. Benjamin Moore & Co.*, 2007 WL 685162, at *24 (Mo. 2007) (No. SC88230).

70. *See* Jury Instructions at 10-11, *Rhode Island v. Lead Indus. Ass'n*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007). *Accord*, *In re Lead Paint Litigatio*n, 924 A.2d at 511; *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 327.

71. RESTATEMENT (SECOND) TORTS § 821B(2) (1979).

72. Indeed, this was the position taken by all plaintiffs in the major cases discussed in Part III. *See, e.g.*, *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 324-25 & n.4 (articulating the plaintiff's contention that defendant-manufacturers were aware of the hazards presented by lead paint and actively promoted the product).

73. *See* RESTATEMENT (SECOND) TORTS § 821C, at cmt. a (1979) (discussing the state as the original public authority to bring a public nuisance action and the 16th Century development of a private right of action).

74. RESTATEMENT (SECOND) TORTS § 821C (1979).

75. In *Santa Clara*, the government plaintiffs sued both in a representative capacity and an individual capacity for damage to public buildings, but the court upheld the defendants' demurrer to the cause of action in an individual capacity because the county was merely seeking "damages for injuries caused to plaintiffs' property by a product"). *Santa Clara v. Atlantic Richfield Co.,* 40 Cal. Rptr. 3d at 331.

76. In *Rhode Island*, defendants even requested site-specific discovery at nearly a quarter of a million properties after having been allowed initially to take property specific evidence at 114 properties. *See Rhode Island v. Lead Indus. Ass'n*, 1999 WL 34756543 (Trial order) (C.A. No. PC99-5226) (May 18, 2005).

77. *See* Brief for Appellant-Plaintiffs, *St. Louis v. Benjamin Moore & Co.*, 2007 WL 685162 at *31 (Mo. 2007) (No. SC88230).

78. Economically speaking, an industry has more to fear from the committed actions of several states than it does from the action of a hundred individual plaintiffs. Taking a similar approach to the big tobacco lawsuits, government entities may have a better chance of creating a litigative atmosphere that would lead companies to settle.

79. The case is currently before the Court to approve the appointment of a special master to oversee the implementation of the order to abate. *See Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 (2007).

80. Jury Instructions at 10-11, *Rhode Island v. Lead Indus. Ass'n*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007).

81. *Id.* at 11.

82. *Id.* at 12.

83. *See* RESTATEMENT (SECOND) TORTS §§ 821A, cmt. b, 821B, cmt. e, g, & i, 825 (1979).

84. *Chicago v. American Cyanamid*, 823 N.E.2d at 130; *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325-27; *Milwaukee v. NL Indus.*, 691 N.W.2d at 892 (finding that plaintiff must prove harm to the public, that defendants were a substantial factor is causing the harm, and abatement was reasonable); *In re Lead Paint Litigation*, 924 A.2d at 511; *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d at 116.

85. The court made much of one commentator's opinion that "public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned . . . in [a] private residence[]," but was forced to concede that "a difference panel of this court has stated that allegations substantially similar to those in the instant case sufficiently alleged the violation of a public right." *Chicago v. American Cyanamid*, 823 N.E.2d at 132-33 (*quoting Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 (2003).

86. 821 N.E.2d 1099 (Ill. 2004).

87. *Id.* at 134.

88. *Id.*

89. *Id.* at 138.

90. *See* Lead Poisoning Prevention Act, 410 I.L.C.S. 45/8(1)(E) (West 2000). The Act, however, deals only with inspection duties of the Department of Health and requires an inspection report that, among other things, must "[s]tate either that a lead hazard does exist or [not] . . . The existence of intact lead paint does not *alone* constitute a lead hazard for the *purposes of this Section*." *Id.* (emphasis supplied). This does not mean that lead paint might still constitute a public nuisance.

91. *See Chicago v. American Cyanamid*, 823 N.E.2d at 132.

92. *See In re Lead Paint Litigation*, 924 A.2d at 484.

93. N.J.S.A. 24:14A-5 (West 2007). The LPA directs local boards of health to abate the nuisance and attaches liability for costs to property owners. *Id.* § A-8.

94. *See In re Lead Paint Litigation*, 924 A.2d at 501.

95. *Id.* at 503. The court characterized lead paint as a consumer product relief from which would be actionable only under products liability, disregarding the equally reasonable view that the widespread, inevitable deterioration of that lead paint could *also* constitute a public nuisance.

96. *Id.* at 508 (Zazzali, C.J. dissenting).

97. *Id.* The dissent goes further into the inherent inconsistency between the majority's characterization of the legislature's broad sweeping effort to reduce lead hazards and the conclusion that the legislature meant to subsume all nuisance litigation over lead paint.

98. Jury Instructions at 10, *Rhode Island v. Lead Indus. Ass'n*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007).

99. *Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 at *52.

100. The *American Cyanamid* court, though it did not base its decision on such, would be forced to come to the same conclusion with respect to the Illinois equivalent of the LPA. *See* note 90.

101. *See* Ann. Cal. Health & Safety Code § 105275 *et seq.* (Childhood Lead Poisoning Prevention Act of 1991).

102. *See* Mo. St. § 701.300 *et seq.* (Lead Abatement and Prevention of Lead Poisoning 1998 amendments).

103. *See* W.S.A. 254.15 *et seq.* (West 2004). Note that this is the same subchapter dealing with asbestos and other toxic substances.

104. Indeed, the jury in *Milwaukee* returned a 10-2 verdict finding that lead paint in the city's housing *was* a public nuisance. It was on the second issue, whether the defendants had unreasonably engaged in activity that *caused* the nuisance, that the jury split 10-2 against the plaintiffs. This information comes from a real-time blogger who monitored the court proceedings. Full coverage is available online: Law and More, http://lawandmore.typepad.com/law_and_more/2007/06/page/4/ (June 22, 2007).

105. The court in *Santa Clara* similarly remarked: "Clearly [plaintiff's] complaint was adequate to allege the existence of a nuisance . . . The next question is whether defendants could be held responsible." *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325.

106. Jury Instructions at 10, *Rhode Island v. Lead Indus. Ass'n*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007) *reiterated in Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 at *78. The court stated specifically 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." *Rhode Island v. Lead Indus. Ass'n*, 2005 R.I. Super. LEXIS 95, (Jun. 3, 2005) at *2.

107. *Milwaukee v. NL Indus.*, 691 N.W.2d at 893.

108. *Id.*

109. *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325 (emphasis deleted).

110. *Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 at *148.

111. *See* RESTATEMENT (SECOND) TORTS § 834, cmt. e (1979) (providing: "If the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to liability for a nuisance, for the continuing harm. . . . This is true *even though he is no longer in a position to abate the condition* and to stop the harm.") (emphasis supplied).

112. *See, e.g.*, *Northridge Co. v. W.R. Grace & Co.*, 556 N.W.2d 345, 352 (Wis. App. 1996) (collecting cases in support of the notion that control of the property has never been a requirement to finding liability in the one who originally caused the nuisance).

113. *Chicago v. American Cyanamid*, 823 N.E.2d at 137.

114. *Id.*

115. *See* RESTATEMENT (SECOND) TORTS § 834, cmt. e (1979), *supra* note 111.

116. *See Chicago v. American Cyanamid*, 823 N.E.2d at 133.

117. The remaining issue, cause-in-fact, was for the jury to decide. *See Chicago v. Beretta U.S.A. Corp.*, 281 N.E.2d at 1132 (stating "[w]e are unwilling to state as a matter of law that plaintiffs have failed to raise an issue of material fact with regard to cause in fact").

118. *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325 (*quoting City of Modesto Redevelopment Agency v. Superior Court,* 13 Cal. Rptr. 3d 865 (2004)).

119. *In re Lead Paint Litigation*, 924 A.2d at 510 (Zazzali, C.J. dissenting) (citing several federal cases, including a 1993 case from the District of New Jersey, in which the courts "held that defendants are liable for abatement costs . . . even if the defendant no longer has control over the property where the nuisance exists.") *Id.*

120. *Id.* at 501 (quoting RESTATEMENT (SECOND) TORTS § 821B(2)(a) (1979)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *See In re Lead Paint Litigation*, 924 A.2d at 506 (Zazzali, C.J., dissenting).

125. It is this sense of injustice that animates the dissent's conclusion: "The majority's holding unfairly places the cost of abatement on taxpayers and private property owners, while sheltering those responsible for creating the problem." *Id.* at 512.

126. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (*Mo. banc* 1984).

127. *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d at 116.

128. *Id.*

129. *Id.*

130. By contrast, the *Santa Clara* court merely noted that "[t]he remedy sought was abatement from all public and private homes and property so affected" and never had cause to consider a tension between remedies. *See Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. at 324.

131. *See Rhode Island v. Lead Indus. Ass'n,* 2007 R.I. Super. LEXIS 32 at *6.

132. RESTATEMENT (SECOND) OF TORTS § 821C (1979) (emphasis supplied).

133. Jury Instructions at 16, *Rhode Island v. Lead Indus. Ass'n*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007).

134. *Rhode Island v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 at *100.

135. *Chicago v. American Cyanamid*, 823 N.E.2d 135.

136. *Id.*

137. *In re Lead Paint Litigation*, 924 A.2d at 502.

138. Ironically, the court in *New Jersey Consolidated Lead* found that all the injuries plaintiffs identified were general to the public at large, a finding that any other plaintiff would be thrilled to have. Here, however, because of the perceived conflict with the abatement requirements in the LPA, this finding works against the plaintiffs.

139. *Milwaukee v. NL Indus.*, 691 N.W.2d at 891.

140. *Brown v. Milwaukee Terminal Ry. Co.*, 224 N.W. 748, *on reargument*, 227 N.W. 385 (Wis. 1929).

141. *Milwaukee v. NL Indus.*, 691 N.W.2d at 890.

142. *Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 324.

143. *See* Jury Instructions at 12, *Rhode Island v. Lead Indus. Ass'n*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007).

144. Recall that the jury in *Milwaukee* was split on both questions (existence of a nuisance and liability for that nuisance) and that the *Rhode Island* case went through one mistrial and a deadlocked jury before a unanimous verdict for the plaintiff was reached.

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New Attorney Rules of Professional Conduct Took Effect April 1, 2009

By Yvonne Marciano

On December 17, 2008, former Chief Judge Judith S. Kaye and the Presiding Justices of the Appellate Division announced a new set of ethics rules for New York attorneys. In the official court announcement, Chief Judge Kaye stated, "This is an important day for New York's legal profession as we adopt new lawyer ethics rules that are accessible and understandable, consistent generally with national standards, and relevant to emerging practice areas and trends that are transforming how lawyers represent and communicate with clients."[1]

The new Rules of Professional Conduct, which became effective April 1, 2009, are the culmination of a five-year effort by the New York State Bar Association to review, evaluate and propose revisions to the existing New York Lawyer's Code of Professional Responsibility.[2]

While praising the Court's adoption of the new Rules of Professional Conduct and replacing New York's Code of Professional Responsibility with the model rule format that is used throughout the nation, New York State Bar Association (NYSBA) President Bernice K. Leber is quoted as stating:

> Because voluntary compliance with ethics rules is critical to maintaining the integrity of the Bar, it is essential that when lawyers have ethics questions they are able to locate easily and understand readily the rules governing them[.] The structure of the Model Rules of Professional Conduct provides a more readily accessible source of ethical guidance for New York lawyers than does the current Code of Professional Responsibility. We are therefore very pleased that the courts have decided to adopt the format of the Model Rules for the lawyers in New York.[3]

Historical Background

The Model Code of Professional Responsibility ("Model Code") was adopted by the American Bar Association (ABA) in 1969.[4] It became effective in New York shortly thereafter on January 1, 1970.[5] Thereafter, in August 1983, the ABA's House of Delegates adopted the Model Rules of Professional Conduct ("Model Rules").[6] The Model Rules were developed and ultimately adopted by the ABA due to "dissatisfaction with both the format and the substance of the Model Code."[7] As a result, the Model Rules emulate the Restatement-type format of using black-letter rules followed by commentary.[8] They also employed a format by which the rules are grouped according to lawyers' roles and tasks.[9]

A number of states considered whether to replace the Model Code with the newly adopted Model Rules.[10] In fact, New York was among one of the first states to consider replacing the Model Code with the Model Rules.[11] Ultimately though, New York rejected the proposal in November 1985.[12] At that time, only one other state had actually adopted the Model Rules—New Jersey.[13]

"The new Rules of Professional Conduct, which became effective April 1, 2009, are the culmination of a five-year effort by the New York State Bar Association to review, evaluate and propose revisions to the existing New York Lawyer's Code of Professional Responsibility."

Although New York declined to adopt the Model Rules in 1985, a recognition emerged that the Model Rules offered a number of improvements over the Model Code.[14] As a result, substantial amendments were made to New York's ethics rules in 1990 and 1999.[15] The end result—the current New York Lawyer's Code of Professional Responsibility—was an amalgam of both ABA Model Code and Model Rule provisions and New York-specific rules.[16]

Starting in 1987, the ABA periodically amended, expanded and refined the Model Rules.[17] By 1997, however, a recognition emerged that such piecemeal amendments were insufficient and a more wide-ranging and comprehensive approach was needed.[18] Thus, in 1997, the ABA embarked on a full-scale evaluation of the Model Rules. A broad range of amendments ensued in 2002, followed by an additional set of amendments in 2003 to address multijurisdictional practice and confidentiality.[19]

Between 1985 and the 2002 and 2003 sweeping amendments, a total of 47 states and the District of Columbia had adopted the Model Rules. Only New York, California, and Maine had not. This resulted in a significant degree of national uniformity and a nationwide body of law inaccessible to New York practitioners. According to the NYSBA, "This uniformity reflects not only the substantial benefits of rules that are consistent from one state to another, but also the wisdom and experience gained in nearly 25 years of using and refining the Model Rules."[20]

The NYSBA then initiated its own review of the Model Rules which culminated in a February 2008 report to the Administrative Board of the Courts. This Board appointed an internal committee to analyze the NYSBA's proposal and, ultimately, approved most of them, including the recommendation to transition to the Model Rules' format.[21]

The news ethics rules became effective in New York on April 1, 2009.

Noteworthy Changes

The new ethics rules adopted by the Courts in December 2008 will completely replace the State's existing Disciplinary Rules. They also will implement many important substantive changes to existing ethics rules for New York lawyers and are organized using a new format and numbering system based on the Model Rules.[22] The following details the more significant changes:

Format/Structure: Existing ethics rules utilized Disciplinary Rules (DRs) and Ethical Considerations (ECs). DRs are mandatory and establish minimum standards of conduct; they are grouped according to professional ideals, which are set forth as chapter headings and entitled "Canons." ECs started as non-binding "aspirational" goals and have evolved to serve two purposes: best practice guidelines and explanatory commentary on specific DRs. The format under the new ethics rules is organized according to an attorney's role (e.g., litigator, counselor, negotiator, etc.). It also mirrors that from the Model Rules and similar laws in almost every other jurisdiction in the country.

***Scope of Representation and Allocation of Authority Between Client and Lawyer*:** The new rules (Rule 1.2) codify a lawyer's obligation to both consult with his or her clients regarding the objectives of representation, including the manner in which those objectives will be pursued. The new rule also requires a lawyer to abide by his or her client's decisions relative to the objectives of representation. This includes whether to settle a civil matter, enter a plea in a criminal matter, waive the right to a jury trial or testify in a criminal matter.

***Client Communications*:** The new rules (Rule 1.4) codify a lawyer's duty to communicate effectively with his or her clients. Lawyers will now be specifically required to promptly inform clients of: (1) any decision or circumstance with respect to which the client's informed consent is required; (2) any information required by court rule or other law to be communicated to a client; and (3) material developments in the client's matter including settlement or plea offers.

Rule 1.4 also requires a lawyer to: (1) reasonably consult with clients about the manner in which their objectives will be accomplished; (2) keep clients reasonably informed about the status of their matters; (3) promptly comply with clients' reasonable requests for information; and (4) consult with clients about "any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by … law." Finally, this new rule mandates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

***Conflict Waivers*:** Existing DR 5-108 permits an attorney to represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client and/or use confidences or secrets of the former client so long as the former client gave consent after full disclosure. Verbal consent had been deemed acceptable under DR 5-108. Under the new counterpart (Rule 1.9), verbal consent will no longer be sufficient; written consent will be required in all circumstances.

***Conflicts of Interest for Former and Current Government Officers and Employees*:** DR 9-101 currently governs a lawyer's obligations relative to conflicts of interest when he or she moves from government to private practice. Under this existing law, a lawyer is barred from representing "a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee[.]"[23] This will no longer be the case under the new rules, except for matters in which the lawyer previously acted in a judicial capacity.[24] According to Rule 1.11, such conflicts of interest may be waived by the governmental entity upon informed, written consent. Rule 1.11(a) states:

> Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) shall comply with Rule 1.9(c); and
>
> (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, *unless the appropriate government agency gives its informed consent, confirmed in writing*, to the representation. (emphasis added)

***Pro Bono Service*:** Existing EC 2-34 declared that a lawyer "has a professional obligation to render public interest and pro bono legal service" and "should provide financial support for such organizations to assist in providing legal services to persons of limited financial means." This existing ethical consideration also established a goal of at least 20 hours of pro bono services annually. Though not enforceable, the new counterpart to EC 2-34 (Rule 6.1) reaffirms this responsibility by declaring that "[e]very lawyer should aspire: (1) to provide at least 20 hours of

pro bono legal services each year to poor persons; and (2) to contribute financially to organizations that provide legal services to poor persons."[25]

***Duties to Prospective Clients*:** New Rule 1.18 governs a lawyer's duties to a "prospective client," which is defined broadly to include "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter[.]"[26] In doing so, the rule applies the same duty of confidentiality that is owed to a former client. Thus, in order for a lawyer of law firm to oppose a former prospective client, both the lawyer's current client and the former prospective client must provide informed written consent.[27] As an alternative, the law firm may oppose a prospective client if certain enumerated conditions are satisfied such as prompt written notice to the former prospective client, timely screening of the disqualified lawyer and effective screening procedures to prevent the disqualified lawyer and the other lawyers in the firm from sharing information relative to the matter.[28]

***Representing a Client Within the Bounds of the Law*:** Canon 7, which is found in the existing ethics rules, governs "zealous representation."[29] Under this Canon, a lawyer's use of fraudulent, false, or perjured testimony or evidence is prohibited. DR 7-102 specifically mandates that when a lawyer receives information "clearly" establishing that his or her "client has, in the course of the representation, perpetrated a fraud upon a person or tribunal," the lawyer must "call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal[.]"[30] An exception exists where the information is protected as a confidence or secret.[31] Thus, where the information is so protected, a lawyer is not obligated to reveal the fraud.

Under the new rules, the prohibition against the use of fraudulent, false, or perjured testimony or evidence is preserved. However, a lawyer's obligation to rectify the matter is enhanced. Specifically, the previous exception for client confidential information has been done away with. According to Rule 3.3,

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[32]

Rule 3.3 provides a similar disclosure requirement where a lawyer who represents a client before a tribunal and knows that his or her client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding[.]"[33]

***Paid Advocacy*:** Under the new rules, a lawyer is now obligated to alert legislators and administrative agencies when he or she is advocating, not on his or her own behalf as a public citizen, but rather on behalf of a client. Rule 3.9 states specifically that:

> A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.[34]

"[T]hese changes will bring New York into accord with the ethics rules of almost every other State in the country and, as a result, will make it easier for New York lawyers to reference and understand the rules governing their conduct."

Rejected Recommendations

As stated above, the Administrative Board of Courts did not adopt all of the NYSBA's rule recommendations. For example, the Board rejected the recommendation regarding multi-jurisdictional practice. The recommendation had been made that out-of-state lawyers be required to conform their conduct to New York's ethical rules when performing any legal work in the state, including representing clients in arbitration and mediation proceedings or in contract negotiations. The Board also rejected the recommendation that prosecutors be obligated to initiate investigations in cases where evidence (e.g., DNA) strongly suggests that a criminal defendant is innocent.

Conclusion

All New York lawyers have new ethical rules to guide their conduct. The most striking change entails the adoption of the ABA Model Rules' format. There are also some significant substantive changes that all lawyers need to understand and incorporate into their daily practice going forward. In short, these changes will bring New York into accord with the ethics rules of almost every other State in the country and, as a result, will make it easier for New York lawyers to reference and understand the rules governing their conduct.

Although this article has briefly summarized some of the more significant changes, it is highly recommended that all lawyers review the new rules, which are available on the New York State Unified Court System's Web site.[35]

Endnotes

1. New York Courts Press Release, "New Attorney Rules of Professional Conduct Announced" (Dec. 17, 2008) ("Court Press Release").
2. NYSBA Final Report: Proposed Rules of Professional Conduct (Feb. 2008) ("NYSBA Report"), at p. vii.
3. NYSBA Press Release, "State Bar Association Applauds Appellate Divisions' Decision To Adopt Attorney Rules Of Professional Conduct" (Dec. 2008).
4. NYSBA Report, at p. vii.
5. *Id.*
6. *Id*. at p. vi.
7. *Id*. at p. xii.
8. *Id.*
9. *Id*. at p. xiii.
10. *Id*. at p. vi.
11. *Id.*
12. *Id.*
13. *Id.* at p. xi.
14. *Id*.
15. *Id*. at p. vii.
16. *Id*.
17. *Id*. at p. vii.
18. *Id*.
19. *Id*.
20. *Id*.
21. *See* Court Press Release.
22. *See id*.
23. New York Lawyer's Code of Professional Responsibility ("Code"), DR 9-101(B)(1).
24. Rules 1.11; 1.12(a).
25. Rule 6.1(a).
26. Rule 1,18(a).
27. Rule 1.18(d)(1).
28. Rule 1.18(d)(2).
29. Code, Canon 7.
30. Code, DR 7-102.
31. *Id*.
32. Rule 3.3(a)(3).
33. Rule 3.3(b).
34. Rule 3.9.
35. http://www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf.

***In Re Deseret Power Electric Cooperative*, PSD** Appeal No. 0703

Facts

On August 30, 2007 U.S. Environmental Protection Agency, Region 8 (Region), granted a prevention of significant deterioration (PSD) permit to Deseret Power Electric Cooperative (Deseret). The permit authorized the construction of a new waste-coal-fired electric generating unit at Deseret's Bonanza Power Plant in Bonanza, Utah. The Sierra Club seeks review of the permit by the Environmental Appeals Board (Board).

Issues

The first issue addressed is whether the Region violated the public participation provisions of the Clean Air Act (CAA) by failing to consider certain alternatives to the proposed facility.[1] Specifically, Sierra Club referred to U.S. EPA Region 9 that recommended alternatives in its comments on the draft environmental statement for White Pine Energy Station Project in Nevada.

The second issue raised is whether the Region violated the CAA by failing to apply best available control technology (BACT) to limit carbon dioxide emissions from the facility pursuant to the CAA.[2] *Massachusetts v. EPA* established that carbon dioxide may be an "air pollutant" within the meaning of the CAA.[3] The question addressed is whether the permit violated the requirement to include a BACT emissions limit for "each pollutant subject to regulation under [the Clean Air] Act."[4]

Reasoning

The Board denied review of the first issue concerning the Region's alleged violation of the Clean Air Act through its failure to consider the "alternatives" to the proposed facility. The CAA provides that a PSD permit may not be issued unless "a public hearing has been held with opportunity for interested persons . . . [to] submit written or oral presentations on the air quality impact of such source, alternatives thereto . . . and other appropriate considerations."[5] Sierra Club did not allege that it identified the alternatives during the public comment period that it raised in its petition. Instead, it argued that it was entitled to raise this issue on the grounds that the U.S. EPA Region 9 submitted its comments after the public comment period had closed for this case. The Board held that the CAA does not require a permit issuer to independently raise and consider alternatives that the public did not identify during public comment period. The CAA's requirement to consider alternatives does not obligate the permit issuer to "conduct an independent analysis of available alternatives" that were not identified by the public during the comment period.[6] Furthermore, the fact that Region 9 submitted comments after the close of the public comment period does not present grounds for raising this new issue for the first time on appeal.

The Board granted review of the second issue and remanded this issue to the Region for it to reconsider whether to impose a carbon dioxide BACT limit because the Board could not sustain the Region's decision on the present administrative record. On the one hand, Sierra Club's position is that Part 75 of Title 40 of the Code of Federal Regulations, which requires monitoring and reporting of carbon dioxide emissions and was adopted in accordance with section 821 of the Clean Air Act Amendments of 1990 (1990 Public Law), provides for a plain and unambiguous meaning of the word "regulation."[7] Consistent with the plain meaning, Sierra Club argued, CAA §§ 165 and 169, section 821 of the 1990 Public Law, and the Environmental Protection Agency's (EPA) Part 75 regulations make carbon dioxide "subject to regulation" under the CAA.[8] The Region, on the other hand, argued that the EPA has discretion to interpret "subject to regulation" and its historical interpretation has been "reasonable" and "permissible." The Region asserted that the EPA's historical interpretation of the term "subject to regulation under the Act" has been used to describe pollutant emissions that are actually controlled through statutory or regulatory provisions.[9] Thus, the Region asserted, the EPA does not have authority to impose carbon dioxide BACT limit because the Part 75 regulations require only monitoring and reporting, not actually controlling carbon dioxide emissions. Therefore, the Part 75 regulations implementing section 821 of the 1990 Public Law are not "under" CAA within the meaning of CAA § 165 and 169 because section 821 is not part of the CAA.

The Board rejected Sierra Club's argument that the term "subject to regulation" has a plain meaning and found that the statute does not dictate whether the EPA must impose a BACT limit for carbon dioxide in the permit. The Board also did not find any evidence that

Congress in its use of "regulations" in section 821 of the 1990 Public Law attempted to limit or construe the EPA's interpretation of "subject to regulation" in sections 165 and 169.[10] Also, the administrative record of the Region's decision did not support the Region's contention that it is bound by EPA's historical interpretation of the phrase "subject to regulation" as meaning "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" because the Region failed to provide any EPA documents expressly stating that "subject to regulation under this Act" has such meaning.[11]

The Board also rejected the Region's argument that any regulation arising out of section 821 cannot constitute regulation "under this Act" because section 821 is not part of the CAA. This argument is inconsistent with the EPA's prior statements regarding the relationship between section 821 and the CAA in the EPA's Part 75 regulations. Since the Board determined that the Region has discretion under the statute to interpret the term "subject to regulation under this Act" and that the Region was mistaken in limiting its construction to a historical EPA interpretation, the Board remanded the permit to the Region for it to reconsider whether to impose a carbon dioxide BACT limit and to develop an adequate record for its decision.

Conclusion

The Board remanded the permit to the Region for reconsideration of its application of BACT to limit carbon dioxide emissions. The Board recognized that this is an issue of national importance and its implications far exceed this individual proceeding. The Board recommended that the Region consider how EPA's interpretation of the phrase "subject to regulation under this Act" would better serve interested parties in the broader context of nationwide scope, rather than in this individual permit proceeding.

Nadya Kramerova, 2009

Endnotes

1. See 42 U.S.C. § 7475(a)(2).
2. See 42 U.S.C. §§ 7475(a)(4), 7479(3).
3. 549 U.S. 497 (2007).
4. 42 U.S.C. § 7479(3).
5. 42 U.S.C. § 7475(a)(2).
6. *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, Slip Op. at 37-44 (EAB Aug. 24, 2006), 13 E.A.D. at 39, *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007).
7. 40 C.F.R. § 124.19(c); Pub. L. No. 101-549, 104 Stat. 2399, 2699.
8. See *id.*
9. 42 U.S.C. § 7479(3).
10. *Id.*
11. See *id*.

* * *

Secretary of the Navy v. Natural Resources Defense Council, 555 U.S.__, __S.Ct. __ (2008)

Facts

The Navy uses waters off the coast of Southern California in order to conduct training exercises on the use of Mid-Frequency Active Sonar (MFA). These training sessions are used to prepare strike groups to coordinate attacks. This training has become important for defense because it is the best way for Navy strike groups to locate enemy submarines. The sonar waves transmitted in these training exercises are between 1 kHz and 10 kHz.

The waters where these training exercises are being performed are home to 37 species of marine mammals. These exercises have been performed in the same area for the past 40 years. Plaintiffs alleged that the use of MFA is hazardous to marine mammals, that it causes hearing loss, behavioral disruptions and decompression sickness. It was further alleged that these types of injuries violate the Marine Mammal Protection Act of 1972. The Secretary of Defense is permitted to exempt from the act where it is necessary in the pursuit of national defense. An exemption was granted for two years beginning in January 2007.

The Navy conducted an Environmental Assessment under the National Environmental Policy Act of 1969. It found that the training exercises did not cause significant harm to the environment and did not prepare an Environmental Impact Statement. Natural Resources Defense Council sued in district court for a preliminary injunction against the use of MFA. The district court granted the preliminary injunction. On appeal, the Court of Appeals for the 9th Circuit remanded because the court did not find cause for a blanket injunction against the use of sonar. The district court issued a new preliminary injunction with a list of mitigation conditions. The Navy appealed the fifth and sixth conditions imposed on them: (5) a 2,200-yard shutdown zone when nearing marine mammals, and (6) reducing the sonar power during surface ducting conditions.

The Navy then sought executive relief from the President and an exemption was granted based upon emergency circumstances of national security. However, the 9th Circuit refused to vacate the injunction. It weighed the interests of the parties and found in favor of the plaintiffs.

Issue

The issues addressed by the Supreme Court were whether the Navy should have been required to prepare an Environmental Impact Statement (EIS), and whether a preliminary injunction, including the two disputed mitigating conditions, was properly granted.

Reasoning

The Court began by defining the standard that should be used when deciding whether to grant preliminary relief. The plaintiff is required to show that the case is likely to succeed on its merits, that there is a likelihood that it will suffer irreparable harm in absence of the injunction, that the balance of equities is in its favor, and that an injunction is in the public interest.

The Court then noted that the 9th Circuit did not properly analyze all of the above factors. A preliminary injunction should be treated as an extraordinary remedy that should only be awarded upon a clear showing of entitlement. The 9th Circuit should have reconsidered the likelihood of "irreparable harm" in light of the unchallenged restrictions. The evidence did not show a likelihood of irreparable harm.

The activities carried out by the Navy have gone on for forty years. Environmental Impact Statements are generally used to procure information concerning environmental impacts where we would otherwise have no way to determine how to mitigate the environmental effects. In this case an EIS was not necessary because the Navy did an in-depth environmental assessment, and the exercises it was carrying out had been going on for a very long time.

Further, even if the plaintiffs had shown that irreparable harm was likely, the 9th Circuit did not properly weigh the competing claims of injury on each side, and understated the burden on the Navy as to the effect it could have on national security.

Several Navy officials have spoken on the importance of the training exercises. The Court gave great deference to these leaders' expertise. The techniques at work here are extremely important in identifying enemy submarines. The techniques have to be practiced in realistic conditions to be effective. This has implications for national security.

The plaintiffs claimed that they take whale-watching trips, observe marine mammals under water, and conduct scientific research on marine mammals. They claimed these activities will be affected by the testing of sonar devices.

For the plaintiffs, the most serious injury they claim is harm to an unknown number of marine mammals. For the Navy, lives and national security are at risk. As a result of the restrictions it would be nearly impossible for the Navy to carry out training exercises under realistic conditions, which are necessary for proper training. In this case the Court found the balance weighs against granting the injunction.

Conclusion

While the Court did not deny that injuries would occur for the plaintiffs, it found that those injuries did not outweigh the injuries that would occur for the Navy if the injunction were upheld. The burden on the Navy would simply be too heavy if the injunction were upheld. Thus, the injunction was vacated.

Richard Brodt

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