

Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits

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A fundamental shift is occurring in state and local government tort actions against product manufacturers: manufacturers are being sued without any tie to wrongdoing, which has historically been the lynchpin for tort liability. Instead, the companies are targeted solely because their products have created external costs that others have borne. This may occur where the user of a product, for example a gun, harms another with that product. It also may arise where personal or environmental injury is caused by an inherent risk in a product, such as with prescription medicines, or a user’s neglect, as with deteriorated lead paint. In none of these situations is the product defective in any way. Nevertheless, government lawyers argue the manufacturers ought to be liable for these costs, even when not at fault, because the product’s price should incorporate its “true” cost to society. The argument goes that if companies profited from these products, they should pay their share for harms caused by them. If history and sound legal public policies guide courts, these innovative legal claims will and should fail.

The “general principle” of tort liability, as the American Law Institute’s tort scholars stated in the current draft of the Restatement of the Law (Third): Torts: Liability for Physical

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Harm, is that “an actor has a *duty to exercise reasonable care* when the actor’s conduct creates a risk of physical harm.”¹ With regard to products liability, a manufacturer’s duty of care is to make a product that is not defective in manufacture, design or warning. Eliminating the duty and breach requirements from liability takes the rudder of wrongdoing out of the civil justice system, causing liability to be based on factors outside the control of those forced to pay. For example, a beer manufacturer may exercise all due care in making and selling its products, but cannot control and is not subject to liability for harms caused by those who drink its products.² Similarly, sugar producers who meet their standards of care are not subject to liability when a person eats too much sugar and develops a related health condition. Nevertheless, lawsuits grounded in these notions have been tried under various risk externalizing legal theories.

The touchstone event for government externalization of risk litigation was the \$246 billion Master Settlement Agreement (MSA) in 1998 between forty-six state attorneys general and manufacturers of tobacco products. This litigation followed years of failed private lawsuits against the same companies for smoking-related injuries.³ While there were some allegations of wrongdoing, the core premise of the suits was that tobacco products were inherently dangerous and caused harms for which government programs picked up the tab.⁴ The lawsuits sought reimbursement of those government funds that were spent on smoker health and provided “a set of detailed regulations governing many aspects of [the manufacturers’] operations, including

¹ Am. L. Inst., Restatement of the Law (Third): Torts: Liability for Physical Harm Proposed Final Draft No. 1 (April 6, 2005) page 708.

² See *Goodwin v. Anheuser-Busch Cos., Inc.*, No. BC310105, 2005 WL 280330 (Cal. Super. Ct. Jan. 28, 2005).

³ See Master Settlement Agreement, November 23, 1998, http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf. For examples of cases from individual plaintiffs see *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *Ross v. Philip Morris & Co., Ltd.*, 328 F.2d 3 (8th Cir. 1964); *Dewey v. R. J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990).

⁴ *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997) (stating that the reason for the litigation was that tobacco interfered the public’s desire “to be free from unwarranted injury, disease, and sickness and have caused damage to the public health, the public safety, and the general welfare of the citizens.”).

advertising directed toward young people, which are strikingly similar to proposals previously rejected by Congress.”⁵ From the industry’s perspective, the MSA was a “business settlement,” not a legal one based on the merits of the claims.⁶ Nevertheless, the settlement demonstrated to government attorneys that externalization-based lawsuits could succeed and lead to significant policy changes and substantial revenue streams for the state or attorney’s own causes.⁷

Given the sheer size and publicity of the MSA award, it is not surprising that state and local government lawyers have been looking for their “next tobacco.”⁸ In the past decade, they have filed externalization of risk actions against numerous product manufacturers, including gun makers for harms caused by gun violence, former manufacturers of lead pigment and paint for harms caused by deteriorated lead paint, and automobile and gasoline manufacturers for costs associated with global warming. By positioning the government as plaintiffs, these lawsuits hope to succeed where private lawsuits to create no-fault liability have failed.⁹ To overcome the duty requirement, government lawyers have used legal theories that already give governments standing to sue, such as *parens patriae*, public nuisance or state consumer protection acts. They

⁵ Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913 (2008); Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 Def. Couns. J. 484, 487 (2002).

⁶ See John J. Zefutic, Jr., *From Butts to Big Macs – Can the Big Tobacco Litigation and Nation-wide Settlement with States’ Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 Seton Hall L. Rev. 1383, 1383 (2004).

⁷ See Michael Dubow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, 437 Pol’y Analysis 1, 6 (2002); see also Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 Conn. L. Rev. 1215 (2001); Mark A. Behrens & Rochelle Tedesco, *Addressing Regulation Through Litigation: Some Solutions To Government Sponsored Lawsuits*, Engage – The J. of the Federalist Society’s Prac. Groups, Vol. 3, Apr. 2002, at 109.

⁸ See, e.g., *First Smokes, Now Cokes*, New Jersey Record, Feb. 15, 2006, at L11; Editorial, *Fizzy Scapegoat for Our Fat Kids*, Star-Ledger (Newark, N.J.), Feb. 7, 2006, at 21; Editorial, *Is Junk Food the Next Tobacco?*, Alameda-Times Star, June 8, 2003; Carolyn Barta, *Cities Look to Courts in Fight Against Gun-Related Crimes: Both Sides Call Issue of Firearm Suits the ‘Next Tobacco’*, Dallas Morning News, June 6, 1999, at 1A; *Suit Against Gun Makers Like Tobacco Suit*, Times-Picayune (New Orleans, La.), Dec. 8, 1998, at B4.

⁹ See discussion *infra* Section II-B; see also John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973).

have further argued that governments should not have to meet the same burden of proving wrongful causation as individuals because government suits protect public welfare generally, not collect for a specific person's injury.¹⁰ Rather, they suggest that they need only show, through statistics and generalized studies, that the products collectively contributed to the alleged harm.¹¹

Most courts have greeted these suits with appropriate skepticism. They have adhered to the “general principle” laid out in the draft Restatement that a breach of a duty of care is essential to subject one to liability. Most recently, the Supreme Court of Rhode Island, in a closely watched decision, rejected the use of public nuisance theory to create such a no-fault duty against former lead paint manufactures.¹² Public nuisance theory has also been rejected for these general purposes by high courts in Illinois, Missouri and New Jersey, as well as federal courts.¹³ The Supreme Court of Iowa rebuffed giving states greater rights to sue than individual plaintiffs through *parens patriae* and quasi-sovereign doctrines.¹⁴ But, as of this writing, public nuisance theory is still being considered in Wisconsin, California and some federal courts.¹⁵

Government lawyers and contingency fee lawyers who often fund the suits will continue searching for legal theories to bring their end-game oriented claims. Each time a theory fails, they will look for other courts and theories that will allow them. Regardless of the name of the

¹⁰ See *id.*

¹¹ See Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game*, 27 Pepp. L. Rev. 685, 689 (2000) (speculating whether “[l]awsuits brought by states rather than individuals may also allow for looser causation rulings”).

¹² See *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008).

¹³ See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D. R.I. 1986).

¹⁴ See *Miller v. Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998).

¹⁵ See *City of Milwaukee v. NL Industries*; Slip Op., 2008 WL 4977587 (Wisc. Ct. App. 2008); *County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)*, No. S163681 (review granted July 23, 2008); *State of Connecticut v. Am. Electric Power Corp.*, No. 04-CV-05669 (S.D.N.Y. filed July 21, 2004) (appeal pending); *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002) (pending).

legal theory used, externalization of risk will be the genie behind the curtain. Traditional tenets of products liability and tort law, including defendant's lack of wrongdoing, a product's utility, the overall public interest, and the lapse of time since the product was lawfully manufactured take a back seat to the desire to advance a policy agenda and create a new revenue source.

As the tobacco MSA demonstrated, if these "new regulations are 'voluntarily' accepted by the industry through a settlement agreement, then the constitutional and other legal objections become moot."¹⁶ This is the reason Professor Robert Reich, who was President Clinton's Secretary of Labor, called these lawsuits "faux legislation, which sacrifices democracy."¹⁷ This article will expose and analyze externalization of risk as the overarching theory for this new duty on product manufacturers and discuss the litigation's goals and why courts should reject them.

I. THE INFRASTRUCTURE FOR GOVERNMENT EXTERNALIZATION OF RISK LITIGATION

The drivers of current externalization of risk litigation are both government attorneys who coordinate the claims and private contingency fee lawyers who often underwrite them in exchange for part of an award. This section focuses on their roles in this developing litigation.

A. The Government Attorneys

The traditional role of the government attorney is to enforce violations of law within its jurisdiction and provide counsel to its executive branch.¹⁸ The office dates back to English law

¹⁶ Heartland Institute, *Curbing Government Lawsuit Abuse*, Intellectual Ammunition (2001).

¹⁷ Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22.

¹⁸ See State Attorneys General: Powers and Responsibilities 15 (Lynne M. Ross ed., 1990) [hereinafter Powers and Responsibilities]. The National Association of Attorneys General identifies five functions that the office performs: "(1) rendering advisory opinions on questions of law to government officials; (2) representing the state's legal interests. . . ; (3) drafting and promoting legislative proposals; (4) administering certain types of state expenditures in areas such as contracting and state bonding; and (5) disseminating information regarding legal issues confronting the state." Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 Review of Politics 525, 528 (1994); see also Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998, 2007-08 (2001).

where the attorney general was “the principal counsel of the Crown.”¹⁹ In the past twenty years, however, government attorneys have looked beyond their law enforcement roles and have sought greater influence over policy matters.²⁰ This metamorphosis has occurred with few checks and balances, as the authority of government attorneys has developed through a combination of state constitutions, statutory enactments, and the common law.²¹ In the last decade, state attorneys general have filed the largest externalization of risk lawsuits, though similar actions have been filed by municipalities, counties and school districts in firearms, lead paint and other contexts.²²

With regard to state attorneys general, their roles are often broadly defined, allowing them to “exercise all such authority as the public interest requires” with “wide discretion in making the determination as to the public interest.”²³ They also have “a monopoly, or a near monopoly, on the state executive branch’s access to the courtroom.”²⁴ Therefore, they determine which legal actions are brought in the name of the sovereign and can emphasize particular areas of interest. Finally, the constitutions of most states do little to place meaningful checks on the attorneys’ general authority to advance their own agendas. Because attorneys general are most

¹⁹ Charles Sweet, *A Dictionary of English Law* 75 (1882); see also Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 Rev. Lit. 187 (2000).

²⁰ See Cornell, *supra* note 19, at 528; see also David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. Times, Nov. 9, 1997, § 3, at 1 (interview of Senator John McCain criticizing modern attorneys generals and questioning, “Who do these guys think they are?”).

²¹ See Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 Cal. L. Rev. 885, 890 (2007) (“The heart of the attorney general’s power is found in the constitutional and statutory arrangements that create the office.”); David E. Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743, 749 (2000) (“Because the powers of state Attorneys General can derive from multiple sources, the power of the Attorney General in one state can be very different from that of another.”).

²² See *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428 (R.I. 2008); *State ex. rel. Lockyer v. General Motors Corp.*, No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006), *dismissed* (Sept. 17, 2007) (“claim presents a non-justiciable political question”); *County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)*, No. S163681 (review granted July 23, 2008); *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126 (Ill. Ct. App. 2005).

²³ *Florida ex rel Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976) (“State of Florida through its Attorney General commenced an ambitious and highly publicized antitrust action against seventeen oil companies”).

²⁴ Meyer, *supra* note 22, at 886 (discussing state attorneys general operation “within unique set of institutional and political constraints to create state-based regulation with nationwide impact in policy areas”).

often popularly elected,²⁵ governors have little ability to reprimand or remove them for overreaching their authority,²⁶ and the task of limiting attorney general enforcement actions is generally left to the legislatures, which are not efficient or effective bodies in this regard.²⁷ The result is that most attorneys general can unilaterally determine that a practice is contrary to the public interest, and initiate an action to curtail it.²⁸

Beginning in the 1980s, state attorneys general began cooperating with each other on new ways to commence multi-state litigation.²⁹ These efforts ranged from two states to all fifty, and were born out of financial constraints. Sharing information, discovery materials, and litigation staff, saved costs.³⁰ It also had tactical advantages, and soon, state attorneys general designed state actions to leverage the financial impact of multi-state litigations.³¹ The 1998 tobacco MSA, by including attorney general policy preferences and billions of dollars in state revenue, “introduced a new method through which unpopular industries could be persuaded, if not forced, to change their business practices.”³² The “tobacco litigation model” has been tried to advance policy preferences for other products, such as asbestos,³³ lead paint,³⁴ firearms,³⁵ HMOs,³⁶ fast

²⁵ State attorneys general are popularly elected in forty-three states and governor-appointed in five states. *See* Powers and Responsibilities, *supra* note 19, at 15. Maine and Tennessee have other appointment systems. *See id.*

²⁶ *See Meyer, supra* note 22, at 892.

²⁷ It is rare for legislatures to limit the scope of attorney general enforcement power, but it has been done in response to actions of an attorney general. *See e.g.*, Mo. Rev. Stat. § 537.595 (prohibiting lawsuits by attorney general against food producers based on obesity and weight gain); Tenn. Code Ann. § 29-34-205 (same).

²⁸ State-sponsorship may provide an inducement for defendants to settle unmeritorious claims, as it may permit lesser showings of causation or other legal requirements. *See Cupp, supra* note 12, at 689.

²⁹ An early multi-state case involved enforcement of antitrust laws. *See In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1289 (D. Md. 1981), *settlement approved*, 605 F. Supp. 440 (D. Md. 1984).

³⁰ *See Lynch, supra* note 19, at 2003-04.

³¹ *See id.*

³² Zefutie, *supra* note 7, at 1383; *see also* Richard L. Cupp, Jr., *Tobacco's Big Loss Sets a Bad Precedent*, USA Today, Nov. 24, 1999, at 31A.

³³ *See, e.g.*, *Amechem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992), *appeal denied* 512 N.W.2d 318 (Mich. 1993).

food,³⁷ and products that contribute to global warming.³⁸ Drew Ketterer, former Maine Attorney General and past President of the National Association of Attorneys General (NAAG), explained that for 200 years attorneys general “defended the state in cases brought by outside parties, or gave opinions to the governor and lawmakers on pending bills. . . . Nobody really knew who these people were. . . . AGs are now major political players and policymakers.”³⁹

Thus, while the National Association of Attorneys General (NAAG) was founded in 1907, the tobacco MSA was its “coming out party.”⁴⁰ NAAG now is the “central body to encourage other [state attorney generals] to join a lawsuit.”⁴¹ It has several meetings each year, task forces to identify, target and facilitate specific litigation,⁴² and working sessions to instruct attorneys general on initiating specific litigation.⁴³ The organization also directly funds litigation through a pool from which attorneys general can draw to pay for expert witnesses and other

³⁴ See, e.g., *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Brenner v. Am. Cyanimid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999).

³⁵ See, e.g., *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005); *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126 (Ill. Ct. App.), *appeal denied*, 833 N.E.2d 1 (Ill. 2005); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *In re Firearms Cases, Nos. A103211 & A105309*, 2005 WL 321967 (Cal. Ct. App. Feb. 10, 2005); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App.), *review denied*, 799 So.2d 218 (Fla. 2001); *Hamilton v. Accu-tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996).

³⁶ See, e.g., *In re Managed Care Litig.*, 150 F. Supp. 2d 1330 (S.D. Fla. 2001).

³⁷ See, e.g., *Pelman v. McDonald's Corp.*, No. CIV 02-7821, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) (dismissing class action claim brought against McDonald's Corporation, Burger King Corporation, KFC Corporation, d/b/a Kentucky Fried Chicken, and Wendy's International Corporation on behalf of obsess children).

³⁸ See, e.g., *California v. General Motors Corp.*, No. C06-05755 MJJ (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, Civ. No. 04CV 05669 (S.D.N.Y. filed July 21, 2004).

³⁹ Steven Anderson, *The Rise of State Attorneys General*, *Corporate Legal Times*, Aug. 15, 2003.

⁴⁰ *Id.*

⁴¹ Clayton, *supra* note 19, at 543; see also Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 *Law & Pol'y* 429, 431 (2003).

⁴² See About NAAG: Information on the Association, National Association of Attorneys General, at www.naag.org/about_naag.php.

⁴³ For example, NAAG identifies eleven areas to promote attorney general knowledge and enforcement efforts. See NAAG Projects: Issues and Research, National Association of Attorneys General, at www.naag.org/projects.php.

litigation related expenses.⁴⁴ As former Iowa Attorney General Tom Miller recognized, “What we’ve found is that by coming together, the dynamics of the cases change. . . . When a corporation discovered it had to face 30 states, instead of one, it suddenly became much more serious about dealing with the [policy issues].”⁴⁵

Other attorneys general, including Alabama’s William Pryor, now a federal judge, called these suits “the greatest threat to the rule of law today.”⁴⁶ Their concern was that these actions circumvented legislative and regulatory bodies that set public policies.⁴⁷ Business were coerced to pay litigation costs and change practices even when those practices are wholly within existing law, regulations and policies.⁴⁸ In fact, some attorney general actions have sought changes inconsistent with or contrary to findings of federal or state agencies.⁴⁹

B. Private Contingency Fee Attorneys

Speculative, externalization of risk litigation is generally costly, time-consuming and has a high risk-reward ratio. Rather than litigate them on the public’s dime, many government attorneys have entered into contingent fee agreements with private personal injury lawyers to bring the claims.⁵⁰ There has been a chicken-and-egg debate as to whether externalization of risk actions are generated by private attorneys seeking potentially large awards or government

⁴⁴ Attorney generals refer to this fund as the “milk fund” because it was created with the proceeds of a settlement in a milk price-fixing case. Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, Antitrust, Summer 2001, at 40.

⁴⁵ Morrow, *supra* note 21, at 1.

⁴⁶ William H. Pryor, Jr., *Fulfilling the Reagan Revolution by Limiting Government Litigation*, Address at the Reagan Forum 2 (Nov. 14, 2000).

⁴⁷ See Cupp, *supra* note 12, at 688 (noting since the MSA, many attorneys general have seen themselves as bridging the gap between regulatory agencies and consumers).

⁴⁸ See Schmeling, *supra* note 42, at 433 (“[F]ifty state governments filing suit at once would alter the calculations of risk. . . . In 1996 alone, the [industry] was estimated to have spent \$600 million on legal fees,” without a case going to trial.).

⁴⁹ See Trevor Maxwell, *Rowe Wears Priorities - and Blaine House Ambition - on His Sleeve*, Maine Sunday Telegram, Mar. 16, 2008, at B1 (reporting on efforts to force alcohol companies to change advertising practices).

⁵⁰ See *City and County of San Francisco v. Philip Morris*, 957 F. Supp. 1130, 1136 n. 3 (N.D. Cal. 1997) (disagreeing that contingent fee arrangement was necessary for “financially strapped government entities”).

attorneys looking for help in advancing policy agendas.⁵¹ Regardless, there is no doubt that their marriage has led to rapid and significant proliferation of externalization of risk litigation; public attorneys provide the vehicle for the litigation, private contingency fee lawyers provide the fuel.⁵² For personal injury lawyers, becoming “public injury lawyers” has provided the opportunity to litigate cases with the scope of a state-wide class action without the requirements of class action law.⁵³ By 1999, attorneys general in thirty-six states had entered contingency fee arrangements with eighty-nine firms for up to a third of any judgment or settlement reached.⁵⁴

These arrangements have stirred significant controversy, particularly given the historical purpose of contingency fee arrangements in this country.⁵⁵ Once illegal in the United States,⁵⁶ they have a worthy purpose in today’s civil litigation environment: to provide access to the legal system regardless of means.⁵⁷ They may “provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent

⁵¹ See *Symposium: The Role of State Attorneys General in National Environmental Policy*, 30 Colum. J. Envtl. L. 335, 339 (2005) [hereinafter *The Role of State Attorneys General*] (quoting Connecticut Attorney General Richard Blumenthal: “Very often [the lawsuit] begins with some informal contacts, private sector and public interest lawyers coming to attorneys general”).

⁵² See Allan Kanner & Tibor Nagy, *The Use of Contingent Fees in Natural Resource Damage and Other Patriae Cases*, 19 BNA Toxics L. Rep. 745 (2004).

⁵³ *Symposium: Regulation Through Litigation*, 71 Miss. L. J. 613, 616 (2001) (statement of Duke University School of Law Professor Francis McGovern) (“What is different is the plaintiff’s bar is getting interested in social issues in a global way. Instead of being legal entrepreneurs, they’re becoming policy entrepreneurs.”).

⁵⁴ See *Attorney’s Fees & The Tobacco Settlement: Hearing on H.R. 2740 Before the House Comm. on the Judiciary*, 105th Cong. 36 (1999) (statement of Lester Brickman, Cardozo School of Law).

⁵⁵ See Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965). Several states have enacted legislation to limit attorney general use of contingency fee lawyers. See Colo. Rev. Stat. §§ 13-17-301 to 13-17-304; 2005 Conn. Pub. Act. 3; Kan. Stat. Ann. § 75-37,135; Minn. Stat. § 8.065; N.D. Cent. Code § 54-12-08.1; Tex. Govt. Code § 2254.103; Va. Code Ann. § 2.2-510.1.

⁵⁶ See, e.g., *Butler v. Legro*, 62 N.H. 350, 352 (1882) (“Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void”); A.B.A. Rep. 80, at 579 (Canon 13 of the Canons of Ethics) (approving contingency fees, but noting that they “should be under the supervision of the court, in order that clients may be protected from unjust charges”).

⁵⁷ See Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989).

lawyer to prosecute his claim.”⁵⁸ This rationale does not apply when the government is the “client,” a situation that can violate public policy. For example, contingency fees motivate lawyers to maximize recovery, and have been barred for enforcing criminal codes where there is concern that injecting a profit motive would create mis-incentives and corrupt justice.⁵⁹

Similarly, financial incentives could improperly distort government civil actions that also require prosecutorial-type judgments.⁶⁰ The Supreme Court of the United States has cautioned that attorneys representing governments are “the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”⁶¹ The conflict arises where the public interest is not served through monetary relief, nonmonetary interests supersede material recovery, or a determination ought to be made that the litigation should be discontinued.⁶² This tension kept the Colorado Attorney General from using contingency fee attorneys in the tobacco litigation: “We tend to be more objective than private counsel who are employed on a contingency fee basis and who maintain their own personal financial interest in the outcome of the litigation.”⁶³

Accordingly, a few courts have constitutionally objected to the use of contingency fees in such instances. In 1985, the California Supreme Court held a contingency fee arrangement for enforcing public nuisance ordinances unconstitutional because it was “antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting” such a

⁵⁸ Model Code of Prof'l Responsibility EC 2-20 (1979).

⁵⁹ See *Lewis v. Casey*, 518 U.S. 343, 374 n. 4 (1996) (“the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases”); Brickman, *supra* note 58, at 40-41.

⁶⁰ See David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 324-25 (2001).

⁶¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁶² See *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963) (“[T]he Government wins its point when justice is done in its courts.”).

⁶³ Bob Van Voris, *That \$10 Billion Fee: The New Tobacco Deal Will Generate the Largest Fee Ever - And It May Grow*, Nat'l. L.J., Nov. 30, 1998, at A1.

claim.⁶⁴ The court reasoned that these actions “involve a balancing of interests” and a “delicate weighing of values” that “demands the representative of the government to be absolutely neutral.”⁶⁵ Louisiana’s Supreme Court held that the Attorney General’s use of contingency fee lawyers was an unconstitutional violation of the separation of powers principle;⁶⁶ they expand an attorney general’s office in ways which could not be accomplished through the legislature.⁶⁷ “[U]nless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power.”⁶⁸ Recently, the Rhode Island Supreme Court held that if contingency fees were used, the attorney general must retain absolute control of the matter.⁶⁹

The concerns of these courts and attorneys general have borne out in practice. In some states, the entering contingency-fee contracts reveals that government-hired private attorneys are often political donors, friends, or colleagues of the hiring government official, creating the appearance of impropriety, or worse, unfair preferential treatment and back-room dealings

⁶⁴ *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985). As of this writing, the California high court had granted review of a contingency fee arrangement in an externalization of risk suit against the former manufacturers of lead pigment and paint. *See County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)*, No. S163681 (review granted July 23, 2008); *see also Order Regarding Defendants’ Motion to Bar Payment of Contingent Fees to Private Attorneys, County of Santa Clara v. Atlantic Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct., Santa Monica Cty., Apr. 4, 2007).

⁶⁵ *Clancy*, 705 P.2d at 352.

⁶⁶ *See Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997). Several state high courts, however, have reached the opposite conclusion. *See State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998).

⁶⁷ *See Dana*, *supra* note 61, at 320 (“[t]he most persuasive explanation for why AGs would retain contingency fee counsel is that the AGs perceive a need to bypass state legislatures.”).

⁶⁸ *Ieyoub*, 700 So. 2d at 481. One newspaper column observed: “[t]here was little enthusiasm among legislators to spend state money on a lawsuit that some felt shouldn’t have been brought and others felt couldn’t be won.” Phil Brinkman, *Legal Bill Won’t Affect State Much: Although the Contract Was With the State, The Issue Is Really Between the Lawyers and The Tobacco Industry*, *Wisconsin State J.*, Mar. 21, 1999, at A1.

⁶⁹ *See State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 468-80 (R.I. 2008) (Attorney General must have “absolute and total control over all critical decision-making,” including veto power over any decision made; and a senior government attorney had to be involved in all stages of the litigation and appear to be exercising such control).

outside the public's view.⁷⁰ In many cases, the private attorney's potential take can be staggering. For example, tobacco litigation fees going to private attorneys instead of the public were estimated at \$13.6 billion.⁷¹ Such considerations have given rise to backlash against the government's use of contingency fee lawyers.⁷² Several states, including Colorado, Kansas, North Dakota, Texas, and Virginia have enacted laws to require an open, competitive bidding process for awarding contingency fee contracts,⁷³ and President Bush signed an executive order barring contingency agreements for use at the federal level.⁷⁴

II. GOVERNMENT EXTERNALIZATION OF RISK LITIGATION HAS NO BASIS IN TORT LAW

Externalization of risk litigation starts with the truism that any product or conduct can be the factual cause of an injury. Under traditional liability law, a legal duty of care is only imposed against manufacturers and distributors when injuries are caused by risks internal to the product

⁷⁰ Lawyers retained to represent the government are "often from the ranks of their own campaign contributors and cronies." Stuart Taylor, *How a Few Rich Lawyers Tax the rest of Us*, Nat'l J., June 26, 1999. In Texas, an attorney general was accused of demanding a million dollars in campaign donations from the private firms hired for the tobacco litigation. See Miriam Rozen & Brenda Sapino Jeffreys, *Why Did Dan Morales Exchange Good Judgment for the Good Life?*, Tex. Law., Oct. 27, 2003, at 1. In Mississippi, the attorney general retained his largest donor. See Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27. The firms tapped by the Pennsylvania attorney general were among his largest donors. See Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999, at A1.

⁷¹ See Susan Beck, *The Lobbying Blitz Over Tobacco Fees: Lawyers Went All Out in Pursuit of Their Cut of a Historic Settlement and the Arbitrators Went Along*, Legal Times, Jan. 6, 2003, at 1; Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003* 6 (2003).

⁷² See Anderson, *supra* note 40 ("AGs occupy a unique and increasingly significant junction of policymaking, enforcement and advocacy, and their potency will grow."); Hans Bader, *The Nation's Ten Worst State Attorneys General*, Competitive Enterprise Inst., Jan. 24, 2007 ("This sort of activism may benefit the political and policy ambitions of the officeholder and his allies, but it imposes real costs on consumers, businesses, the economy, and our democratic system."); John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar* 1 (U.S. Chamber Inst. for Legal Reform, 2004) (attorneys general "portray their activities as bringing wrongdoers to justice and raising money for their states, but their methods sometimes create enormous conflicts of interest and threaten the rule of law").

⁷³ See Colo. Rev. Stat. §§ 13-17-301 to 13-17-304; Kan. Stat. Ann. § 75-37,135; N.D. Cent. Code § 54-12-08.1; Tex. Govt. Code § 2254.103; Va. Code Ann. § 2.2-510.1.

⁷⁴ See Executive Order 13433, "Protecting American Taxpayers from Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007) ("the policy of the United States that organization or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law.").

manufacturing process, namely, defects in the manufacture, design or warnings of a product.⁷⁵ Conversely, injuries from external risks, which represent the universe of product risks outside of the manufacturer's purview, are not recoverable because manufacturers are not positioned to control or avoid them.⁷⁶ For example, many products, such as knives, candles, matches and safety equipment, have inherent risks that are assumed by the consumer, allowed by regulations based on risk-utility calculations, or created by consumers who use or misuse the product and harm themselves or others.

The duty to pay for these injuries is not the manufacturer's (*i.e.*, the knife maker), but the culpable party's who ought to pay costs of its own misconduct. Shifting liability to the manufacturer in these instances would result in broader strict liability than available under either products liability or tort law. As the Draft Restatement of the Law (Third): Torts explains, strict liability is imposed only under "certain circumstances" and "each of these rules has its own elements, which the plaintiff must prove in order to render the rule operational."⁷⁷ Where strict liability is not available and there is no culpable party, the injured person may have to bear the costs of his or her own injury or seek assistance from the government where elected leaders have decided to cover such costs through specific programs or medical care.⁷⁸

⁷⁵ See Restatement of the Law (Third): Torts: Products Liability § 1, Comment e.

⁷⁶ See Victor E. Schwartz & Christopher E. Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 Mo. L. Rev. 1, 19-25 (2008) (discussing control issues).

⁷⁷ Am. L. Inst., Restatement of the Law (Third): Torts: Liability for Physical Harm Proposed Final Draft No. 1 (April 6, 2005) page 276.

⁷⁸ See *Guilmette v. Alexander*, 259 A.2d 12, 15 (Vt. 1969) ("[I]t has never been suggested that everyone who is adversely affected by an injury inflicted upon another should be allowed to recover his damages. Recovery must be brought within manageable dimensions.").

A. Externalization of Risk Theory Has Been Rejected for Product Litigation

In the 1960s and 1970s, when courts molded the well-defined characteristics of products liability law, they rejected creating a broad duty on manufacturers to pay for external risks.⁷⁹ Over time, courts recognized that true strict liability only applies when a product is mismanufactured because the manufacturer is responsible for the production process and must accept liability when something goes wrong during that process.⁸⁰ When strict liability was extended to design and warning defects, courts put up boundaries so that manufacturers would not be subject to liability where they were not at fault and injury was caused by external risks.⁸¹ These courts recognized adverse public policy implications of super strict liability.

Specifically, the Supreme Court of Michigan in *Prentis v. Yale Manufacturing Co.*,⁸² set standards of care for when a design risk is internal to the manufacturer and gives rise to liability.

[A] fault system incorporates greater intrinsic fairness in that the careful safety-oriented manufacturer will not bear the burden of paying for losses caused by the negligent product seller. It will also follow that the customers of the careful manufacturer will not through its prices pay for the negligence of the careless. As a final bonus, the careful manufacturer with fewer claims and lower insurance premiums may, through lower prices as well as safer products, attract the customers of less careful competitors.⁸³

⁷⁹ See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962); *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984) (stating the court was “aware that they [were] engaged in the conscious task of molding the law of products liability”); see also Victor E. Schwartz, Cary Silverman & Phil Goldberg, *Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317, 350-51 (2006) (discussing development of strict liability).

⁸⁰ See generally Victor E. Schwartz, *The Death of “Super Strict Liability”: Common Sense Returns to Tort Law*, 27 Gonz. L. Rev. 179 (1991).

⁸¹ See David Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 754-55 (1996); James Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263 (1991).

⁸² 365 N.W.2d 176 (Mich. 1984).

⁸³ *Id.* at 185.

Courts throughout the United States have largely adopted these principles, rejecting strict liability for design and warning defects.⁸⁴ The consumer expectation, risk-utility, and reasonable alternative design tests each derive from such analysis. In recognition of this prevailing fault approach, the Restatement, Third, Torts: Products Liability states that a design defect exists only where “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.”⁸⁵ The Restatement thus places well-defined limits on design defect, narrowing the inquiry to whether an alternative design exists and is reasonable. Further, none of the affirmative duties proposed in the draft Restatement of the Law (Third): Torts: Liability for Physical Harm would create the kind of expansive duty sought in risk-externalizing lawsuits.⁸⁶

B. The Forms of Risk Externalization Litigation

Government externalization of risk lawsuits put the old wine of these rejected products liability suits into new bottles. By positioning the government as the plaintiff suing for general harms to society, they try to bolster the claims’ perceived legitimacy and judicial reception. During the last decade, government attorneys have “market-tested” legal theories to see which ones are malleable enough to allow recovery. The results suggest that courts would need to change the law in three ways for the suits to succeed. First, courts must give governments standing to bring claims even though they are not the injured parties, which is why the initial

⁸⁴ See Restatement of the Law Third, Torts: Products Liability, § 2, cmt. a (1998) (“In general, the rationale for imposing strict liability on manufacturers for harm caused in the manufacturing defects does not apply in the context of imposing liability for defective design and defects based on inadequate instruction or warning.”).

⁸⁵ See Restatement of the Third, Torts: Products Liability § 2(b) (1998); James A. Henderson, Jr. & Aaron D. Twerski, *Arriving At Reasonable Alternative Design: The Reporters’ Travelogue*, 30 U. Mich. J.L. Ref. 563, 563-64 (1997). The Restatement, Third, however, is not without its critics. See, e.g., Patrick Lavelle, *Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 Duq. L. Rev. 1059 (2000).

⁸⁶ See Am. L. Inst., Restatement of the Law Third, Torts: Liability for Physical Harm Proposed Final Draft No. 1 (April 6, 2005) page 708-718 (discussing affirmative duties stemming from “special relationships,” misfeasance and nonfeasance, natural risks, third-party risks, and conduct that increases the magnitude of natural or third-party risks).

claims have been brought under *parens patriae* standing or legal theories, such as public nuisance, where governments have standing. Second, courts must change essential elements of existing causes of action. Third, courts must strip manufacturers of traditional defenses, including assumption of the risk, contributory fault, time limitations, and product identification.

1. *Parens Patriae and The Quasi-Sovereign Doctrine*

Parens patriae, which literally means “parent of the country,” was one of the first doctrines used in government externalization of risk actions.⁸⁷ The original purpose of *parens patriae* doctrine was to give governments standing to protect people suffering from a legal disability preventing them from acting for themselves.⁸⁸ These individuals were “legally unable, on account of mental incapacity . . . to take proper care of themselves and their property.”⁸⁹ In recent years, some courts relaxed the doctrine to give states standing to seek redress when their “quasi-sovereign” interests are injured.⁹⁰ “Quasi-sovereign” interests, as the Supreme Court of the United States explained, “is a judicial construct that does not lend itself to a simple or exact definition.”⁹¹ It has generally included a state’s interest in its citizens’ well-being, including their health, safety, welfare and ability to live in a healthful environment.⁹²

⁸⁷ See Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-01 (1982).

⁸⁸ See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 671 n.47 (1959).

⁸⁹ *Snapp*, 458 U.S. at 600 (quoting J. Chitty, *Prerogatives of the Crown* 155 (1820)).

⁹⁰ See, e.g., *State v. City of Dover*, 891 A.2d 524, 528 (N.H. 2006).

⁹¹ *Snapp*, 458 U.S. at 601.

⁹² See *id.* (“[Q]uasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.”); *Georgia ex rel. Hart v. Tennessee Copper Co.*, 206 U.S. 230, 236-39 (1907) (“[I]f the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, The Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 Tul. L. Rev. 1859, 1882 (2000) (“[S]tates cannot be acting simply as enforcement agencies for small collections of private individuals. There must be a state interest beyond that of private parties to warrant a *parens patriae* action.”).

“[M]ore must be alleged than injury to an identifiable group of individual residents,” where the state is “standing in for individuals in an essentially private dispute.”⁹³

Even where *parens patriae* standing is granted, it is only the first step in the courthouse door for a government externalization of risk lawsuit. The United States Supreme Court has made it clear that, like everyone else, the government must state a legitimate cause of action against a culpable party.⁹⁴ A claim cannot be resolved simply by reference to the general principle of *parens patriae*; the injury must be compensable under statutory or common law. A New York court further explained, stating that *parens patriae* only allows the attorney general “to *enforce* the law”; it cannot assume “the quintessential legislative authority to *alter* the law” by weakening standards for recovery or changing a tort’s elements.⁹⁵ In addition, the harms suffered are generally “causally connected to their residency within that particular state.”⁹⁶ So, *parens patriae* standing may be appropriate in suits for environmental hazards that harmed people living in a particular state or where economic harms were due to a person’s status as a citizen of a state.⁹⁷ By contrast, in product suits “the state of residence and the harm sustained are independent variables” and the victim’s statehood is not related to the harm.⁹⁸

A federal district court in *Texas v. Am. Tobacco Co.*⁹⁹ is the only court that disregarded this history to allow a government to move ahead with an externalization of risk lawsuit.¹⁰⁰ In

⁹³ *Snapp*, 458 U.S. at 607.

⁹⁴ See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 259 (1972); see Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 *Duke Envtl. L. & Pol’y F.* 57, 61 (2005).

⁹⁵ *People v. Grasso*, 42 A.D.3d 126, 142 (N.Y. App. Div. 2007) (emphasis in original).

⁹⁶ Gifford, *supra* note 6, at 937.

⁹⁷ See *Id.*

⁹⁸ *Id.*

⁹⁹ 14 F. Supp. 2d 956 (E.D. Tex. 1997).

¹⁰⁰ See *id.* at 966 (“the Court is not persuaded that this action is a ‘production liability action’”).

1997, before the tobacco MSA, this court allowed Texas to use *parens patriae* standing, statutory authority, and the quasi-sovereign doctrine to create standing for a Medicaid recoupment suit against the cigarette-makers.¹⁰¹ It ignored the traditional tort law rule of subrogation, which says that a party bringing a subrogation claim can have no greater rights than the injured person whose economic cost is the predicate for the claim itself. Here, the state in bringing a claim for costs imposed upon it by a sick smoker should not have any greater right to sue than the smoker. Nevertheless, under the “made up” quasi-sovereign doctrine, the court eliminated the defenses of assumption of risk and contributory negligence, allowed the state to avoid showing that a specific product caused a specific harm, and said liability could be assigned through statistics and market share.¹⁰² Thus, the entire industry was placed in a Cuisinart™ of liability.

The following year, the Supreme Court of Iowa rejected this argument.¹⁰³ The court held that, even assuming the state would be granted standing through *parens patriae* doctrine, the government must satisfy the same elements of a tort as a private plaintiff. The fact that the State “was obligated to pay and has paid hundred of millions of dollars to provide medical care for tobacco-related illnesses”¹⁰⁴ did not alleviate the state’s requirement to have its own direct and legitimate cause of action against the defendants. In these situations, government programs are similarly situated to private health insurers, and courts have widely held that litigation for costs spent on people’s health care is “too remote . . . to recover upon it” directly.¹⁰⁵ “[F]ailure to apply the remoteness doctrine” for government programs, the court continued, “would permit

¹⁰¹ *See id.* at 962.

¹⁰² *See id.* at 968.

¹⁰³ *See Miller v. Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998).

¹⁰⁴ *Id.* at 404.

¹⁰⁵ *Id.* at 407.

unlimited suits to be filed” and, with the other shortcuts sought, would give governments greater power to collect money damages than the allegedly injured people themselves.¹⁰⁶

2. *Public Nuisance Theory*

Since the late 1990s, public nuisance theory has become the tort *du jour* for government externalization of risk lawsuits.¹⁰⁷ The tort, which has developed over centuries of English and American common law, is well-defined; it allows governments to use the civil justice system to stop unreasonable conduct that could cause injury to individuals exercising a public right.¹⁰⁸ Governments have standing to bring public nuisance actions, but can only seek injunctions or abatement, not damages. The four indispensable elements of the theory are (1) injury to a public right; (2) unreasonable conduct; (3) control, either at time of abatement or when the nuisance was created; and (4) proximate cause.¹⁰⁹ During its entire history, public nuisance has always focused on conduct, not manufacturing. Therefore, the typical defendant in a public nuisance case has been the person who blocks a public roadway or, in recent times, dumps materials into a public river or blasts a stereo in a public park.¹¹⁰ The manufacturer of the materials dumped or stereo, to extend the hypothetical, were never in the lawsuits.

The externalization of risk-based public nuisance suits try take advantage of the amorphous nature of the word “nuisance,” as well as the tort’s elements. As a leading textbook

¹⁰⁶ *Id.*

¹⁰⁷ See generally Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).

¹⁰⁸ See *id.*; Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003).

¹⁰⁹ See Schwartz, *supra* note 108, at 561-570.

¹¹⁰ See Restatement (Second) of Torts § 821A cmt. b (1979). Examples of public nuisances include storing explosives in a city, interfering with reasonable community noise levels, and interfering with breathable air by emitting noxious odors into a public area. See Restatement (Second) of Torts § 821B cmt. b (1979).

explains, the word nuisance “has meant all things to all people.”¹¹¹ The suits argue that recovery should be allowed whenever a lawfully made product becomes a “nuisance” to some segment of society. Private sector environmentalists were the first to use public nuisance theory for this purpose in *Diamond v. General Motors Corp.*,¹¹² a purported class action against scores of companies alleged to have contributed to air pollution in Los Angeles, California. The California Court of Appeal rejected the suit, reasoning that public nuisance theory is ill-suited for this type of litigation.¹¹³ The court appreciated that regulating the manufacturing of a lawful product is the province of the legislature: “Plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court.”¹¹⁴ In the next two decades, similar private sector attempts also failed.¹¹⁵

In the 1980s and 1990s, municipalities and schools joined these efforts, asserting public nuisance claims against manufacturers of asbestos-containing products to recover costs of removing asbestos from their own buildings.¹¹⁶ These governments were acting as private plaintiffs, but for the first time, it was alleged that the product itself constituted a public nuisance, not that the product was used to create a public nuisance. Courts rejected these suits,

¹¹¹ W. Page Keeton et. al., *Prosser & Keeton on Torts* 616 (5th ed. 1984). “In popular speech it often has a very loose connotation of anything harmful, annoying, offensive or inconvenient. . . . Occasionally this careless usage has crept into a court opinion. If the term is to have any definite legal significance, these cases must be completely disregarded.” *Restatement (Second) of Torts* § 821A cmt. b (1979).

¹¹² 97 Cal. Rptr. 639, 639 (Ct. App. 1971) (seeking an injunction against 293 named corporations and municipalities, as well as 1,000 unnamed defendants, for air pollution).

¹¹³ *See id.* at 642-46.

¹¹⁴ *Id.* at 645.

¹¹⁵ *See Sabater v. Lead Indus. Ass’n*, 704 N.Y.S.2d 800 (Sup. Ct. 2000); *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997); *City of Bloomington v. Westinghouse Electrical Corp.*, 891 F.2d 611 (7th Cir. 1990); *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974).

¹¹⁶ *See Gifford, supra* note 109, at 751.

too.¹¹⁷ As the court stated in *Detroit Board of Education v. Celotex Corp.*,¹¹⁸ “manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by [a product] defect” because creating a product is not the same as creating a public nuisance.¹¹⁹ Courts also were troubled by the suits’ practical implications, recognizing that the theory would “give rise to a cause of action . . . regardless of the defendant’s degree of culpability or of the availability of other traditional tort law theories of recovery.”¹²⁰

Tobacco litigation was the first use of public nuisance theory to recover a product’s external costs borne by the government in its public capacity. This suit sought “reimbursement of state expenditures for Medicaid and other medical programs.”¹²¹ While not every state tobacco suit included public nuisance claims, some did. The public nuisance allegation was that defendants “intentionally interfered with the public’s right to be free from unwarranted injury, disease, and sickness and have caused damage to the public health, the public safety, and the general welfare of the citizens.”¹²² A federal district court in *Texas v. American Tobacco Co.*,¹²³ the only court to rule on the claim, dismissed it because the allegations were not within the traditional bounds of public nuisance theory: “The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the State’s invitation to expand a claim for public nuisance.”¹²⁴

¹¹⁷ *Detroit Board of Education v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (“all courts that have considered the question have rejected nuisance as a theory of recovery for asbestos contamination.”).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 521.

¹²⁰ *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

¹²¹ Complaint, *Moore ex rel. State v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994).

¹²² *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 974 (barring recovery under public nuisance and other theories).

¹²³ *Id.*

¹²⁴ *Id.* at 973.

The theory, nevertheless, became part of the tobacco litigation legend of success and was picked up in city firearms litigation for the costs of gun crimes.¹²⁵ Governments alleged that firearm manufacturers' marketing and distribution practices and policies created a public nuisance by facilitating the illegal secondary market for firearms, which interfered with public health.¹²⁶ As in most attempts to stretch public nuisance theory, a few maverick courts accepted the novel application.¹²⁷ In *City of Gary v. Smith & Wesson Corp.*,¹²⁸ the court recognized it was acting without precedent in allowing the claim and fully accepted the externalization of risk concept: "If the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product."¹²⁹ The Supreme Court of Illinois, in rejecting a similar claim, stated the majority view.¹³⁰ The court explained that the City's theories did not fit the tort's elements.¹³¹ For example, the "right to be free from the threat that members of the public may

¹²⁵ Professor David Kairys of the Beasley School of Law worked with cities to file public nuisance claims against gun manufacturers. See David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1163, 1172 (2000) (stating although tobacco public nuisance claims "never [won] in court," they were a "vehicle for settlement" and a model for gun suits).

¹²⁶ See *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001) (alleging "the existence of the nuisance is a proximate cause of injuries and damages suffered by [the city], namely, that the presence of illegal guns in the city causes costs of enforcing the law, arming the police force, treating the victims of handgun crimes, implementing social service programs, and improving the social and economic climate of [the city]."); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141 (Ohio 2002) (alleging defendants "know, or reasonably should know, that their conduct will cause handguns to be used and possessed illegally and that such conduct produces an ongoing nuisance that has a detrimental effect upon the public health, safety, and welfare of the residents").

¹²⁷ See *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (dismissing public nuisance claims under Pennsylvania law); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (same under New Jersey law); *Ganim*, 780 A.2d at 133 (same); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (same); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2005) (same); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. 2003) (same). *But see Gary*, 801 N.E.2d at 1232 (allowing a public nuisance claim to proceed); *Cincinnati*, 768 N.E.2d at 1136 (same).

¹²⁸ 801 N.E.2d 1222 (Ind. 2003).

¹²⁹ *Id.* at 1234.

¹³⁰ *City of Chicago*, 821 N.E.2d at 1112.

¹³¹ See *id.* ("Plaintiffs concede that their public nuisance claim, based on the alleged effects of defendants' lawful manufacture and sale of firearms outside the city and the county, would extend public nuisance liability further than it has been applied in the past.").

commit crimes against individuals” was a personal, not public, right.¹³² Other courts agreed, adding that the manufacturers lacked control over the source – the criminals who illegally used the firearms¹³³ – and that balancing guns’ harm and utility was better suited for legislation.¹³⁴

Externalization of risk-based public nuisance actions took a giant leap forward when the law firm Motley Rice convinced the Rhode Island Attorney General to partner with it on a government public nuisance action for the costs of abating lead paint in homes and buildings throughout the state, which was estimated at \$4 billion.¹³⁵ The presence of lead paint in older homes, when allowed to chip from poor maintenance, was a health hazard for small children who might eat those paint chips.¹³⁶ While this suit was being litigated, Motley Rice and other lawyers partnered with St. Louis, Chicago, and Milwaukee, certain California counties, and municipalities in New Jersey, to bring similar public nuisance claims.¹³⁷ By cloaking the claims in the force and legitimacy of a state’s police power, the private contingency fee lawyers sought to take advantage of the belief that “participation of states and cities in a lawsuit brings credibility and a ‘moral authority’ to the cause.”¹³⁸ They argued that because they represented

¹³² *Id.* at 1114-16 (“We are also reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”); *see also Camden*, 273 F.3d at 539 (“the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights”).

¹³³ *See, e.g., Camden*, 273 F.3d at 539.

¹³⁴ *See City of Chicago*, 821 N.E.2d at 1121 (“We are reluctant to interfere in the lawmaking process . . . especially when the product at issue is already so heavily regulated by both the state and federal governments.”).

¹³⁵ *See State v. Lead Indus. Ass’n, Inc.*, No. 99-5226, Retainer Agreement, App. 4 to Pet. for Cert. ¶ 1 (R.I. filed Mar. 2, 2004); *Paint Maker Seeks Ruling on Judge in Lead Case*, Providence J., Aug. 19, 2005, at B1.

¹³⁶ *See, e.g., State v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct. Apr. 2, 2001). It is widely accepted that when the paint is allowed to crack or peel, children ingesting the paint chips can contract lead poisoning, which can impair cognitive function, stunt growth, and lead to behavioral problems. *See In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528, at *2 (N.J. Super. Ct. Law Div. Nov. 4, 2002).

¹³⁷ *See Schwartz, supra* note 108, at 557-561.

¹³⁸ Bryce A. Jensen, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries*, 86 Cornell L. Rev. 1334, 1370 (2001).

the government, they should not have to meet the same burdens of proof as private plaintiffs when seeking recovery under public nuisance law.

These theories have had some success at trial and mid-level appellate courts, but all state Supreme Courts – in Missouri, New Jersey, and Rhode Island – that have heard these cases rejected them.¹³⁹ *The State of Rhode Island v. Lead Indus. Ass’n, Inc.*¹⁴⁰ was the highest profile because the trial ended in a verdict for the State.¹⁴¹ In that case, the trial court altered all of the tort’s elements. Instead of requiring that a public right be implicated, the court allowed liability to be based on “the *cumulative presence* of lead pigment in paints and coatings” in private homes.¹⁴² The court replaced unreasonable conduct with unreasonable injury, saying this element would be satisfied if the children “ought not to have to bear” their injuries.¹⁴³ Finally, for control and proximate cause, the court instructed the jury that it “need not find that lead pigment manufactured by the Defendants, or any of them, is present in particular properties in Rhode Island to conclude that Defendants, or one or more of them, are liable.”¹⁴⁴ The Supreme Court of Rhode Island dismissed the case altogether, stating unequivocally that “public nuisance law simply does not provide a remedy for this harm” and that “[t]he law of public nuisance never before has been applied to products, however harmful.”¹⁴⁵

¹³⁹ See *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Chicago v. American Cyanamid*, 823 N.E.2d at 126; *City of Toledo, Ohio v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000 (Ohio Ct. Common Pleas Dec. 12, 2007). Thus far, public nuisance claims in Wisconsin and California have survived initial appeal. See *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004), review denied, 703 N.W.2d 380 (Wis. 2005) (defense verdict June 22, 2007); *County of Santa Clara v. Atlantic Richfield, Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

¹⁴⁰ 951 A.2d at 428.

¹⁴¹ See Peter B. Lord, *Three companies found liable in lead-paint nuisance suit*, Providence J., Feb. 23, 2006.

¹⁴² Peter B. Lord, *Lead-Paint Case Now in Jury’s Hands*, Providence J., Feb. 14, 2006, at B2 (quoting Judge Michael A. Silverstein) (emphasis added).

¹⁴³ Jury Instructions, *Rhode Island v. Atlantic Richfield Co.*, C.A. No. 99-5226, *12 (R.I. Super. Ct. Feb. 13, 2006).

¹⁴⁴ *Id.* at *14.

¹⁴⁵ *Lead Indus. Ass’n*, 951 A.2d at 435, 456.

Collectively, the Illinois, Rhode Island, New Jersey and Missouri high courts put a significant dent in the momentum for governments to “deliberately frame [a] case as a public nuisance action rather than a product liability suit”¹⁴⁶ in order to lower liability standards.¹⁴⁷ As the Supreme Court of New Jersey explained, “were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new entirely unbounded tort antithetical to the meaning and inherent theoretical limits of the tort of public nuisance.”¹⁴⁸ The result would be that “merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action.”¹⁴⁹

3. *Consumer Protection Acts Litigation*

Another source for externalization of risk suits absent wrongdoing are state consumer protection acts, which also formed part of the foundation for the tobacco litigation and has been part of attempts to recover Medicaid costs related to those who smoked “light” cigarettes.¹⁵⁰ These statutes generally allow governments, as well as private individuals, to collect civil penalties for and injunctions against trade practices considered “unfair or deceptive.”¹⁵¹ The terms “unfair” and “deceptive” are intentionally broad in language and amorphous in practice,

¹⁴⁶ See, e.g., *Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003).

¹⁴⁷ See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007).

¹⁴⁸ *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007)

¹⁴⁹ *Id.* at 501.

¹⁵⁰ See, e.g., *Philip Morris USA, Inc. v. Hines*, 883 So. 2d 292, 293 (Fla. Dist. Ct. App. 2004); *Aspinall v. Philip Morris, Inc.*, 813 N.E.2d 476, 480-81 (Mass. 2004); see also Elaine McArdle, Trial Lawyers, *AGs Creating a New Branch of Government*, Law. Wkly. USA, July 12, 1999, at B3 (discussing the rise of industry-wide lawsuits).

¹⁵¹ See Jack E. Karns, *State Regulation of Deceptive Trade Practices Under “Little FTC Acts”: Should Federal Standards Control?*, 94 Dick. L. Rev. 373, 373-74 n.2 (1990) (citing state statutes); see also, e.g., Iowa Code § 714.16(7) (authorizing enforcement by state attorney general); Cal. Bus. & Prac. Code § 17203 (stating that standing limitations for private litigants do not apply to the attorney general or other public attorneys).

and the limits of the statutes' reach are often not clearly defined.¹⁵² Consequently, entirely legal business practices can be the basis upon which consumer protection acts claims are filed.

In the past decade, state consumer protection acts have become darlings of interest groups who threaten or file suits to get businesses to conform to the groups' policy agendas.¹⁵³ For example, several actions have been threatened or filed against food and beverage providers to force them to offer healthier items,¹⁵⁴ even though risks of obesity and ailments such as diabetes and high blood pressure are solely in the control of consumers and external to the makers of the food. In *Pelman v. McDonald's Corp.*,¹⁵⁵ plaintiffs argued that McDonalds and other fast food companies are responsible for customer weight gain and health conditions under the New York consumer protection act¹⁵⁶ for creating a "false impression that [their] food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily."¹⁵⁷ The court dismissed *Pelman* because plaintiffs "fail[ed] to cite any specific advertisements or public statements that may be considered 'deceptive.'"¹⁵⁸ The court also held that proximate causation could not exist because obesity is caused by a number of factors, including family health, eating habits, and

¹⁵² See Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 33 (2006) (discussing plaintiffs attempts to expand the confines of consumer protection laws); Victor E. Schwartz, Cary Silverman & Christopher E. Appel, "That's Unfair!" Says Who – The Government or Litigant?: *Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 98-99 (2007).

¹⁵³ See *id.* at 16 ("[N]early every state CPA provides consumers with a private right of action in addition to government enforcement.").

¹⁵⁴ See Sarah Avery, *Is Big Fat the Next Big Tobacco?*, Raleigh News & Observer, at A25 (Aug. 18, 2002) (reporting studies into whether "fat in combination with sugar can trigger a craving similar to addiction.").

¹⁵⁵ 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (*Pelman I*), *vacated in part by*, *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005).

¹⁵⁶ See N.Y. Gen. Bus. L. § 349.

¹⁵⁷ *Pelman v. McDonald's Corp.*, 396 F.3d 508, 510 (2d Cir. 2005) (*Pelman III*). *Pelman* was initially dismissed. See *Pelman I*. An amended complaint was refiled and dismissed. See *Pelman v. McDonald's Corp.*, 2003 WL 22052778 (S.D.N.Y. Sep 03, 2003) (*Pelman II*). The U.S. Court of Appeals vacated the court's dismissal and remanded the case, see *Pelman III*, 396 F.3d at 508, which is pending. See *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439 (S.D.N.Y. 2005) (*Pelman IV*); *Pelman ex rel. Pelman v. McDonald's Corp.*, 2006 WL 2663214 (S.D.N.Y. Sep. 16, 2006).

¹⁵⁸ *Pelman III*, 396 F.3d at 522.

exercise.¹⁵⁹ The court of appeals temporarily reinstated the case, stating the factual reasons for the trial court's dismissal were appropriate for a summary judgment ruling, not in response to a motion to dismiss.¹⁶⁰ The reaction from the legislative community was harsh and swift; nearly twenty-five states legislatively banned obesity-related lawsuits within a few years.¹⁶¹

While these cases are generally not successful in court, they can lead to desired results. In California, a private interest group filed a claim against Kraft Foods alleging that the marketing of Oreo cookies to children violated the state's consumer protection act simply because Oreos contained trans fats.¹⁶² The group recognized this lawsuit was "problematic" because there was no "harm to any particular plaintiff," but urged the court to apply the act as a broad concept.¹⁶³ Kraft, soon thereafter, removed trans fats from Oreos¹⁶⁴ and reduced or eliminated trans fats in about 650 other products.¹⁶⁵ The lawsuit was withdrawn.¹⁶⁶ A similar situation occurred when the Center for Science in the Public Interest threatened a suit in Massachusetts alleging that the sale of sodas in schools violated the state's consumer protection act because soda contributed to childhood obesity and soda manufacturers should pay for this

¹⁵⁹ *Id.* at 538 ("No reasonable person could find probable cause based on the facts in the Complaint without resorting to wild speculation.") (internal quotation omitted).

¹⁶⁰ *See id.* at 512.

¹⁶¹ *See, e.g.*, Fla. Stat. Ann. § 768.37; Ga. Code Ann. § 26-2-432; 745 Ill. Comp. Stat. 43/10; Ky. Rev. Stat. Ann. § 411.610; La. Rev. Stat. Ann. § 9:2799:6; Mich. Comp. Law § 600.2974; Ohio Rev. Code Ann. § 2305.36.

¹⁶² *See* Amended Complaint for Injunctive Relief, *Bantransfats.com, Inc. v. Kraft Foods North America, Inc.*, Case No. CV 032041 (Cal. Super. Ct. May 1, 2003).

¹⁶³ *Id.*

¹⁶⁴ *See* Delroy Alexander, *Healthier Oreo May Not Race to Stores*, *Chic. Trib.*, Dec. 21, 2005, at 1 (reporting Kraft had been working to develop a formula for Oreos without trans fat); *see also* Ban Trans Fats: The Campaign to Ban Partially Hydrogenated Oils, Ban Trans Fats Homepage, at <http://www.bantransfats.com/>.

¹⁶⁵ *See id.* There also was an incentive to remove trans fats due to a new federal labeling requirement to list trans fats in the nutritional content. *See* Kim Severson, *Out of Cookies and Onto Labels: Bad Fat Steps Into the Daylight*, *N.Y. Times*, Dec. 28, 2005, at F2.

¹⁶⁶ *See* John Carey and Lorraine Woellert, *Global Warming: Here Come the Lawyers*, *Bus. Week*, Oct. 24, 2006 ("The mere threat of obesity lawsuits, for example, has sent soft drink and junk food purveyors scrambling to change their products and improve their public images.").

cost.¹⁶⁷ The suit was never filed; the industry decided not to sell sodas in elementary and middle schools, and only provide diet sodas and sports beverages in high schools.¹⁶⁸

In light of these private sector “victories,” government attorneys have begun following this model, sometimes with overt threats of litigation and other times with more subtle pressure. For example, state attorneys general recently threatened the beer industry with a consumer protection act claim for selling alcoholic drinks that included caffeine. Before threatening litigation, attorneys general from thirty states wrote a letter to the Alcohol and Tobacco Tax and Trade Bureau expressing concerns over youth consumption of alcohol beverages that contain caffeine, guarana, or any other stimulant.¹⁶⁹ Their concern focused on the “physiological effect” that consuming alcohol and stimulants together leaves a person feeling less intoxicated than they actually are.¹⁷⁰ The TTB reportedly “explained to the attorneys general that it had thoroughly reviewed, monitored, and approved the labeling and formulation of these drinks.”¹⁷¹ Nevertheless, state attorneys generals from at least sixteen states issued civil investigative demands against beer manufacturers related to their manufacture and marketing of the products, hoping to find an excuse to file consumer protection act claims against the companies.¹⁷² The companies were not charged with specific wrongdoing, yet several agreed to remove the products from the market.¹⁷³ This episode followed similar attorney general actions against

¹⁶⁷ See Caroline Mayer, *Lawyers Ready Suit Over Soda*, Wash. Post, Dec. 5, 2005, at D2; see also Melanie Warner, *Lines Are Drawn For Big Suit Over Soda*, N.Y. Times, Dec. 7, 2005.

¹⁶⁸ See H.B. 4452, Reg. Sess. (Mass. 2005) (introduced Oct. 27, 2005).

¹⁶⁹ See Letter from Attorneys General to Alcohol and Tobacco Tax and Trade Bureau 2 (Aug. 20, 2007).

¹⁷⁰ *Id.*

¹⁷¹ *AG’s Investigating Anheuser-Busch, Miller Brewing Marketing Practices*, St. Louis Bus. J., Feb. 20, 2008.

¹⁷² See David Kesmodel, *Anheuser, Miller Face Marketing Probes*, Wall St. J., Feb. 21, 2008 (“companies haven’t been charged with anything wrong. . . . If attorneys general find evidence of wrongdoing, they could file civil lawsuits.”); *States Probe Miller, Anheuser-Bush Marketing Practices*, St. Louis Bus. J., Feb. 21, 2008.

¹⁷³ See Joseph Spector, *A-B to Pull Caffeine from Alcohol Drinks*, USA Today, June 27, 2008, at 2B; Marc Lifsher, *Energy Drink Remix on Tap*, L.A. Times, June 27, 2008, at 3.

“alcopop” beverages and efforts to establish an arbitrary limit for the proportion of the audience for any advertisement that must be at or above the drinking age.¹⁷⁴

As these examples illustrate, consumer protection acts do not provide appropriate legal mechanisms for forcing the removal of lawful products or causing manufacturers to bear external risks associated with their products. But, litigation and the threat of litigation can cause companies to modify or remove lawful products that customers want and buy.

C. Risk Externalization Goes Beyond the Scope of Tort Law’s Boundaries and

Purpose

Many courts have appreciated that government attorneys, under the legal theories above, would have near limitless ability to impose liability against a manufacturer at any time if its product caused harm or risk to enough people.¹⁷⁵ They could “convert almost every products liability action” into an externalization of risk claim.¹⁷⁶ “All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service . . . and a lawsuit [would be] born.”¹⁷⁷ But, there is no precedent for such absolute liability under either products liability or tort law.¹⁷⁸

¹⁷⁴ See Ivan Penn, *Bad Buzz for Alcoholic Energy Drinks*, St. Petersburg Times, June 21, 2008, at 1A; Lisa Roche, *Shurtleff Seeks Store Ban on Malt 'Alcopop' Sales*, Deseret News, Sep. 21, 2005, at B4.

¹⁷⁵ See *Johnson County v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984); *Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003); see also Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecology L.Q. 755, 774-75 (2001) (public nuisance changes give “plaintiffs the opportunity to obtain damages and injunctive relief, lacks laches and other common tort defenses, is immune to administrative law defenses such as exhaustion, avoids the private nuisance requirement that the plaintiff be a landowner/occupier of affected land, eliminates the fault requirement, and circumvents any pre-suit notice requirement”).

¹⁷⁶ *Johnson County*, 580 F. Supp. at 294.

¹⁷⁷ *Spitzer*, 309 A.D. at 96.

¹⁷⁸ Am. L. Inst., *Restatement of the Law (Third): Torts: Liability for Physical Harm Proposed Final Draft No. 1* (April 6, 2005) page 276-416 (discussing the limited areas where strict liability is imposed).

Liability absent wrongdoing is only found in specific, defined areas of the law, namely abnormally dangerous activities such as keeping wild animals in residential settings¹⁷⁹ or using explosives in populated areas.¹⁸⁰ The premise of such liability is the introduction of “a dangerous condition not commonly accepted or reciprocated in the social unit.”¹⁸¹ This principle, derived from the English case, *Rylands v. Fletcher*,¹⁸² applies in the narrow instances where a product’s use could not be made safe even through exercising “utmost care.”¹⁸³ The First Restatement of Torts called these acts “ultrahazardous.”¹⁸⁴ The Restatement (Second) changed the name to “abnormally dangerous activities” to reflect that it is only appropriate for conduct outside the “norm.”¹⁸⁵ The new draft Restatement of Torts: Third maintains this terminology.¹⁸⁶ Examples of abnormally dangerous activities are using explosives,¹⁸⁷ blasting,¹⁸⁸

¹⁷⁹ Strict liability is imposed even where utmost care is used in keeping wild animals away from others. See Dan B. Dobbs, *The Law of Torts* § 947. For domestic pets, “liability is imposed even if the defendant exercised reasonable care” when the keeper knows or has reason to know his pet is abnormally dangerous. *Id.* at 945, 947; see also *Jividen v. Law*, 461 S.E.2d 451 (W. Va. 1995); *Van Houston v. Pritchard*, 870 S.W.2d 377 (Ark. 1994); *Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974); *Smith v. Jalbert*, 221 N.E.2d 744 (Mass. 1966); Restatement (Second) of Torts, §509 cmt. c (1977).

¹⁸⁰ See Prosser, *Wade & Schwartz’s Torts*, 697-702 (11th ed. 2005).

¹⁸¹ Dobbs, *supra* note 180, at § 942.

¹⁸² 3 L.R.-E. & I.App. 330 (H.L.1868). In *Ryland*, defendant was strictly liable for when water from his reservoir broke through a mine shaft because keeping a reservoir in coal mining country was abnormal. See *id.* The doctrine has achieved limited acceptance. See Dobbs, *supra* note 180, at § 952.

¹⁸³ Restatement (Second) of Torts § 519 (1976).

¹⁸⁴ Dobbs, *supra* note 180, at § 953. The Restatement Second developed a six-factor test to be an abnormally dangerous activity: (a) high degree of risk or some harm; (b) likelihood harm will be great; (c) inability to eliminate risk by reasonable care; (d) extent to which the activity is not common; (e) inappropriateness of activity to locale; and (f) extent to which its value is outweighed by its dangers. Restatement (Second) of Torts § 520 (1976). This approach was criticized for resulting in no real standard. See Prosser & Keeton § 78, 554-56; Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 U.C.L.A. L. Rev. 611 (1998); William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 Colum. L. Rev. 1705 (1992).

¹⁸⁵ Restatement (Second) of Torts §§ 519-520 (1977) (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”)

¹⁸⁶ Am. L. Inst., Restatement of the Law Third, Torts: Liability for Physical Harm Proposed Final Draft No. 1, § 20 (Apr. 6, 2005) (on file with authors).

¹⁸⁷ See *Harper v. Regency Dev. Co.*, 399 So.2d 248 (Ala. 1981); *Lobozzo v. Adam Eidemiller, Inc.*, 263 A.2d 432 (Pa. 1970).

setting off fireworks,¹⁸⁹ launching rockets,¹⁹⁰ and disposing certain volatile products.¹⁹¹ The *user* of the abnormally dangerous product, not its manufacturer, is subject to super-strict liability.

Accordingly, courts rejected attempts to expand abnormally dangerous liability to the a dangerous products' manufacturer. Said one state high court: "Absolute liability attaches only to ultrahazardous or abnormally dangerous *activities* and not to ultrahazardous or abnormally dangerous *materials*. . . . if the rule were otherwise, virtually any commercial activity involving substances which are dangerous in the abstract automatically would be deemed as abnormally dangerous. This result would be intolerable."¹⁹² Courts also have rejected attempts to include more activities as ultrahazardous, rejecting claims involving handguns,¹⁹³ off-road vehicles,¹⁹⁴ and driving while intoxicated.¹⁹⁵ Courts have, instead, relied on negligence and products liability law to deter those risks, allowing liability only where a standard of care was violated.¹⁹⁶ Otherwise, there would no fair notice that an activity or product could lead to liability.¹⁹⁷

¹⁸⁸ See, e.g., *Harper*, 399 So. 2d at 248 (Ala. 1981); *Lobozzo*, 263 A.2d at 432.

¹⁸⁹ See, e.g., *Klein v. Pyrodyne Corp.*, 810 P.2d 917 (Wash.), *modified*, 817 P.2d 1359 (Wash. 1991).

¹⁹⁰ See, e.g., *Smith v. Lockheed Propulsion, Co.*, 56 Cal.Rptr. 128 (Cal. Ct. App. 1967); *Berg v. Reaction Motors Div.*, 181 A.2d 487 (N.J. 1962).

¹⁹¹ See, e.g., *Cities Service Co. v. State*, 312 So.2d 799 (Fla. Dist. Ct. App. 1975).

¹⁹² *Splendorio v. Bilray Demolition Co., Inc.*, 682 A.2d 461 (R.I. 1996) (emphasis in original).

¹⁹³ See Marnie L. Sayles & James R. Lambden, *Stop Shooting Down Tort Liability: It Is Time to Resuscitate the Abnormally Dangerous Activity Doctrine Against Handgun Manufacturers*, 12 *Stan. L. & Pol'y Rev.* 143, 145 (2001); Andrew Smith, *The Manufacture and Distribution of Handguns As An Abnormally Dangerous Activity*, 54 *U. Chi. L. Rev.* 369, 383 (1987) ("Classifying the manufacture and distribution of handguns as an abnormally dangerous activity would be an extension of past doctrine.").

¹⁹⁴ See Kevin Case, *Tanks in the Streets: SUVs, Design Defects, and Ultrahazardous Strict Liability*, 81 *Chi.-Kent L. Rev.* 149, 177 (2006).

¹⁹⁵ See *Goodwin v. Reilley*, 221 Cal.Rptr. 374, 377 (Cal. Ct. App. 1985) ("[D]riving a motor vehicle under the influence of alcohol, although unquestionably dangerous and hazardous-in-fact, does not come within the rubric of an ultrahazardous or abnormally dangerous activity for purposes of tort liability.").

¹⁹⁶ See Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 *San Diego L. Rev.* 597, 598 (1999) ("[S]trict liability for abnormally dangerous activity... has evolved to the point of near extinction because courts have concluded that the negligence system functions effectively.").

¹⁹⁷ See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (O'Connor, J., dissenting) (stating in a punitive damages case that the vagueness doctrine applies to court-made law, such as tort liability).

III. THE ENDS DO NOT JUSTIFY THE MEANS FOR GOVERNMENT EXTERNALIZATION OF RISK LITIGATION

To allow the government to base a lawsuit on a product's external risks would, therefore, require a court to determine that the ends of achieving a policy goal or state revenue source would justify the means of changing the law for government plaintiffs. Courts would have to eliminate the duty requirement, remove wrongdoing, and change essential elements of a tort, even where they refused to do so for private plaintiffs.¹⁹⁸ As this section will discuss, the resulting litigation would be out-of-step with traditional liability law and invade regulatory oversight of product innovation.

A. Causes of Action Should Not Be Changed to Accommodate Government Litigation

The fundamental change these lawsuits require is the establishment of a new duty for liability absent wrongdoing. Once allowed, governments also would need shortcuts for getting around proximate cause requirements and asserting damages for which they could recover.

1. *The Bedrock Principles of Proximate Cause*

Public attorneys have said that they should not have to satisfy the traditional proximate cause requirement because their externalization of risk suits are for injuries to the public as a whole, not for a specific person's injury; thus, specific causation should not be applicable.¹⁹⁹

The Rhode Island trial court accepted this argument, allowing the state's public nuisance case against the former manufacturers of lead pigment and paint to proceed by assuming causation as a matter of law: "the underlying cause of the nuisance is the manufacturing

¹⁹⁸ See *In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007) ("the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products, which legal when sold, and although sold no more recently than a quarter century ago, have become dangerous through deterioration and poor maintenance by the purchasers").

¹⁹⁹ See *State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS 32, at *24-25 (R.I. Super. Ct. Feb. 26, 2007).

activity . . . [T]he chain of causation begins at manufacture, and ends with the existence of the public nuisance.”²⁰⁰ The court also ruled out superseding causes, including landlord misconduct, stating that the cause was the foreseeable and natural deterioration of the product.²⁰¹ This generalized notion of causation has also arisen in Medicare recoupment suits against manufacturers of cigarettes, prescription drugs, and medical devices, for the monies Medicare spent on recipients as a result of injuries from those products.²⁰² These efforts have appropriately failed. In 2007, a draft provision was penciled into federal legislation that would have allowed for causation in these suits to be based on “statistical or epidemiological” evidence, but the provision was ultimately stripped before the bill was introduced and passed.²⁰³

As the Supreme Courts of Rhode Island, New Jersey, Missouri and Illinois have stated, causation cannot be generalized just because the government is suing.²⁰⁴ It is essential to liability, regardless of the theory used. Dan B. Dobbs in *The Law of Torts* wrote, “proximate cause limitations are fundamental and can apply in any kind of case in which damages must be proven.”²⁰⁵ Fowler V. Harper stated, “[t]hrough all the diverse theories of proximate cause runs a common thread; almost all agree that defendant’s wrongful conduct must be a cause in fact of plaintiff’s injury before there is liability.”²⁰⁶ Also, the use of market share is a red-herring. Market share liability, where allowed, only reverses the burden of proof under the theory that

²⁰⁰ *Id.* at *26-31.

²⁰¹ *See id.* at *49-54.

²⁰² *See* Phil Goldberg, *Will Proposed Changes to Medicare Law Inspire New Wave of Health Care-Related Tort Suits?*, 23:36 Legal Backgrounder (Wash. Legal Found. Aug. 8, 2008) .

²⁰³ *See id.* at *1.

²⁰⁴ *See, e.g.,* *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1118 (Ill. 2005) (stating that an “element of the public nuisance claim that must be present . . . is resulting injury, or, more precisely, proximate cause”).

²⁰⁵ Dobbs, *supra* note 180, at 443 n.2.

²⁰⁶ Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (1986).

each defendant is in a better position to know the course of harm.²⁰⁷ When risks are external to the manufacturing process, the manufacturer is not in a better position to identify or alter the course of harm; those who caused the harm through neglect, use, or misuse of the product are. The bedrock principle of proximate cause must not be forsaken to aid government litigation.

2. *Government Spending Cannot Be the Liability Causing Event*

Governments also have sought to change damages law by basing liability on the fact that the government spent money caring for injured individuals or cleaning a hazard associated with a product. Again, using the Rhode Island lead paint case as an example, the state sought the financial “burdens that all citizens of Rhode Island have to bear” for the State’s lead paint program.²⁰⁸ It argued that it “incurred costs and has suffered harms due to lead pigment, and that many of those harms will go uncompensated.”²⁰⁹ The City of St. Louis based its lead paint lawsuit on a similar premise. But, as the high courts in both states held, the use of public funds to remediate an injury is not the same as injury itself.²¹⁰ The decision to spend taxpayer funds on a health or safety issue cannot by some alchemy give birth to a lawsuit.

If such a theory were permitted, public attorneys could convert every legislative spending decision into a liability creating event. They would have unbridled power to determine for which alleged social ills the manufacturer of a product would be “taxed” through litigation to solve. For example, governments spend millions of dollars related to the enforcement, treatment and

²⁰⁷ See *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980), *cert. denied*, 449 U.S. 912 (1980); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245 (Mo. 1984).

²⁰⁸ *State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS 32, at *92, 108 (R.I. Super. Ct. Feb. 26, 2007) (“where an element of public nuisance is that the State has suffered harms . . .”).

²⁰⁹ *Id.* at *105-106.

²¹⁰ See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007) (“Although the city characterizes its suit as one for an injury to the public health and suggests that it is for this injury that it is suing, that is not the case. The damages [the City] seeks are in the nature of a private tort action for the costs of the city allegedly incurred abating and remediating lead paint in certain, albeit numerous properties.”).

health effects of alcoholic beverages.²¹¹ These expenditures would create future government tort actions against companies that lawfully made the alcoholic beverages sold in that government's jurisdiction. Similarly, pharmaceutical companies could be sued for funding mental health programs for prescription drug abusers, makers of bottle and cans could be forced to pay for programs related to cleaning up after people who litter their products, and auto companies could fund highway patrol programs designed to keep highways safe from those who speed.

B. Revenue Streams and Policy Changes Are Not Legitimate Litigation Goals

Addressing societal issues associated with product use or misuse, however, does not justify changing common law liability for cigarette, lead paint, energy or other producers just because the defendants or their products violate a government attorney's personal moral judgment that smoking, drinking or other activity should be condemned. Consider the cottage industry of litigation over global warming, which *Business Week* called "an ambitious legal war on oil, electric power, auto, and other companies."²¹² With surprising candor, advocates of the litigation freely acknowledged that they seek policy changes and that the targets of their lawsuits against the manufacturers are really Congress and regulators, not the companies.²¹³

- Connecticut Attorney General Richard Blumenthal: "[T]his lawsuit began with a lump in the throat, a gut feeling, emotion, that CO2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done."²¹⁴

²¹¹ See City of St. Louis FY 2007 Annual Operating Plan, Adopted June 16, 2006, at 159 (noting a line item for \$350,000 for alcohol-related activities).

²¹² John Carey and Lorraine Woellert, *Global Warming: Here Come the Lawyers*, *Business Week*, Oct. 24, 2006; see also Robert Meltz, *Climate Change Litigation: A Growing Phenomenon*, Cong. Research Service Report for Congress, Apr. 17, 2008, at 1 ("more than two dozen cases pursuing multiple legal theories are now pending.").

²¹³ See Meltz, *supra* note 216, at 35 ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that, while making a small contribution to mitigating climate change, are also aimed at prodding the national government to act.").

²¹⁴ *The Role of State Attorneys General*, *supra* note 52, at 339. General Blumenthal led the first joint climate change action. See *Connecticut v. American Electric Power Co.*, Civ. No. 04CV 05669 (S.D.N.Y. filed July 21, 2004).

- Maine Attorney General Stephen Rowe: “I’m outraged by the federal government’s refusal to list CO2 as a pollutant. . . . I think the EPA should be more active. . . . it’s a shame that we’re here, here we are trying to sue [companies] . . . because the federal government is being inactive.”²¹⁵
- John Echeverria, Executive Director of Georgetown University’s Environmental Law & Policy Institute: “This boomlet in global warming litigation represents frustration with the White House’s and Congress’ failure to come to grips with the issue. . . . So the courts, for better or worse, are taking the lead.”²¹⁶

As Attorney General Blumenthal explained, the suits are not about enforcing laws or seeking recompense from wrongdoers, but changing “the way the industry does business. . . . We want them to do the things necessary to reduce their emissions by about 3% a year.”²¹⁷ The Michigan Attorney General, who filed a brief *against* a similar suit filed by California Attorney General William Lockyer against automakers for contributing to global warming,²¹⁸ objected because the issues “are fundamentally political questions that should be addressed by Congress and the executive branch, not the Courts.”²¹⁹ In dismissing the first action, a Federal court explained that “[t]he scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.”²²⁰ Companies meeting the arbitrary policy might be exonerated, but those falling short, even by a little, might still face the lawsuits.²²¹ Indeed, knowledgeable observers sympathetic to reducing global warming have also rebuked the

²¹⁵ *Id.* (Comments from Attorney General Stephen Rowe).

²¹⁶ John Carey and Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Business Week, Oct. 24, 2006.

²¹⁷ *The Role of State Attorneys General*, *supra* note 52, at 339.

²¹⁸ See Complaint, State ex. rel. Lockyer v. General Motors Corp., No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006), *dismissed* (Sept. 17, 2007) (ruling that “the claim presents a non-justiciable political question”).

²¹⁹ Assoc. Press, *Michigan AG Urges Judge to Throw Out Calif. Global Warming Suit*, Jan. 20, 2007.

²²⁰ Connecticut v. Am. Electric Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

²²¹ Under this suit, there is some level of emission that would not be tortious, and would not constitute a public nuisance, and “determining that level is a threshold part of ‘the issue.’” Jeffrey B. Margulies, *Ninth Circuit Should Reject California’s Legal Claim that Autos are a “Public Nuisance”*, Wash. Legal Found., Vol. 23 No. 45 (2008).

lawsuits.²²² Said one newspaper editorial: “[the lawsuit] is akin to suing fishermen for depleting the ocean, even when they stick scrupulously to fishing quotas.”²²³

Courts should continue rejecting these lawsuits, just as they did thirty years ago when tried by private plaintiffs, for the same reasons articulated then: it is impossible to police customers to ensure that products are not used or neglected in ways that cause injury.²²⁴ Dean John Wade eloquently explained the problem in the 1970s:

Strict liability for products is clearly not that of an insurer. If it were, a plaintiff would only need to prove that the product was a factual cause in producing his injury. Thus, the manufacturer of a match would be liable for anything burned by a fire started by a match produced by him, an automobile manufacturer would be liable for all damages produced by the car, a gun maker would be liable to anyone shot by the gun, [and] anyone cut by a knife could sue the maker.²²⁵

Take Dean Wade’s knife analogy. If a consumer cuts herself in the normal course of using the knife or is stabbed with the knife by an intruder, a private lawsuit by the consumer against the manufacturer will and should fail.²²⁶ Replacing the private plaintiff with a government attorney seeking Medicare costs associated with knife accidents or societal costs related to stabbing crimes does not change this fundamental civil justice equation. Nor should replacing the knife manufacturers with defendants unpopular with the public or the government attorney, such as tobacco manufacturers, or costly problems, such as reducing global warming.

²²² See Frank Harris, *The All-Purpose Culprit*, Hartford Courant (Conn.), June 1, 2007, at A7; Ben Stein, *Suddenly, California Hates the Car*, Oct. 1, 2006, at 34.

²²³ Editorial, *Cars as Global Warming’s Causes*, L.A. Times, Sept. 22, 2006. By contrast, lawsuits that are directly against the regulators seeking action on climate change have received better reception, even though they involve the same flawed principles. See *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombia*, 508 F. Supp. 2d 1151 (E.D. Cal. 2007); *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007).

²²⁴ See Wade, *supra* note 10, at 828; see also *Castrignano v. Squibb & Sons, Inc.*, 546 A.2d 775, 782 (R.I. 1988) (manufacturers cannot be “insurers of their products”); *Buonanno v. Colmar Belting Co.*, 773 A.2d 712, 716 (R.I. 1999) (“[P]art supplier should not be required to act as an insurer for any and all accidents that may arise after that component part leaves the supplier’s hand.”).

²²⁵ *Id.*

²²⁶ See, e.g., *Nugent v. Utica Cutlery Co.*, 636 S.W.2d 805 (Tex. Ct. App. 1982).

C. No-Fault Civil Litigation Interferes with Product Innovation and Regulation

Allowing government externalization of risk litigation would permit one or more public attorneys in a state or local jurisdiction to encroach into the legislative and regulatory domain of overseeing innovation. Liability would be imposed even where a product surpassed governmental standards, was manufactured within a regulatory regime, or was made to government specifications. It would be immaterial whether public agencies and consumers knew of and specifically accepted the product's risks.

Consider the impact on products, such as prescription medicines, that are unavoidably unsafe. The government and consuming public accept certain risks and costs associated with these products. With regard to prescription medicines, the United States Food & Drug Administration may approve a medicine because its benefits outweigh its risks for a class of patients. If a patient within that class experiences a harmful side effect from the medication, which was "accompanied by proper direction and warning," the product is not unreasonably dangerous and the manufacturer is not subject to liability.²²⁷ By contrast, risk externalization theory would subject the manufacturer to liability whenever a patient suffers any side effect, regardless of how accurately described on the label or explained by the prescribing doctor.²²⁸

²²⁷ Restatement (Second) of Torts § 402A cmt. k (1965) ("The seller of [unavoidably unsafe] products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."); Victor E. Schwartz & Phil Goldberg, *A Prescription for Drug Liability and Regulation*, 58 Okla. L. Rev. 135, 149 (2005).

²²⁸ The liability system safeguards patients from inadequate risks by requiring drug warnings to be approved by the FDA. See Victor E. Schwartz, Cary Silverman, Michael Hulka & Christopher E. Appel, *Marketing Pharmaceutical Products in the Twenty-First Century: An Analysis of the Continued Viability of Traditional Principles of Law in the Age of Direct-to-Consumer Advertising*, -- Harv. J. Law & Pol'y -- (forthcoming 2009). Under the learned intermediary rule, the manufacturer's duty to warn is supplanted by a duty to educate the treating physician about the drug's risks and benefits. See Restatement Third, Torts: Prods. Liab. § 6 cmt. b (1998).

The cost of this liability would cause higher prices for medications, particularly powerful ones taken for serious disease and that come with significant side effects.

The litigation would also interfere with regulatory regimes that specifically permit risks. For example, the United States Environmental Protection Agency (“EPA”) sets National Ambient Air Quality Standards that allow manufacturers to emit specified amounts of carbon monoxide, lead, nitrogen dioxide, particulate matter, ozone, and sulfur dioxide.²²⁹ Liability does not attach when emissions adhere to these limits, even though they may cause external risks. Similarly, in approving methyl tertiary butyl ether (“MTBE”) for use in gasoline to reduce air pollution, Congress and the EPA fully understood the risk from MTBE fortified gasoline associated with leaky underground storage tanks.²³⁰ Notwithstanding the fact that MTBE has led to a reduction in smog,²³¹ gasoline manufacturers have faced years of externalization of risk suits based on ground contamination more appropriately aimed at owners of the leaky tanks.²³²

Finally, the litigation would interfere with earnest efforts to develop knowledge and innovation. For example, some products including cell phones arouse suspicion of risk after being in the marketplace. There is speculation that holding a cell phone to one’s ear could cause

²²⁹ See 40 CFR 50. The Clean Air Act establishes national air quality standards; primary standards set limits to protect public health and secondary standards set limits to protect public welfare. See Environmental Protection Agency, *National Ambient Air Quality Standards (NAAQS)*, <http://www.epa.gov/air/criteria.html>. The EPA also sets emission standards for other types of pollution. See, e.g., 40 C.F.R. §63.7690 (setting emission limits for iron and steel foundries); 40 C.F.R. § 63.642 (setting emission standards from petroleum refineries); 40 C.F.R. §63.1444 (setting emission standards for primary copper smelting).

²³⁰ See Clean Air Act, 42 U.S.C. § 7545(k) (2006); U.S. Environmental Protection Agency, Frequently Asked Questions (FAQs) About MTBE and USTs, <http://www.epa.gov/swerust1/mtbe/mtbefaqs.htm> (last visited Mar. 21, 2006). Former U.S. Senator J. Bennett Johnston, who chaired the Senate Committee that wrote the 1990 Clean Air Act amendments on MTBE, noted that “MTBE’s water solubility risks and ability to clean the air were trade-offs we faced” and that energy producers “were operating under a federal mandate to use MTBE. The producers weren’t in a position to decide what oxygenate to use.” J. Bennett Johnston, Letter to the Editor, *Energy Producers Operated Under an MTBE Mandate*, Wall St. J., July 26, 2005, at A25

²³¹ See James E. McCarthy & Mary Tiemann, *MTBE in Gasoline: Clean Air and Drinking Water Issues*, Cong. Research Serv. (Mar. 24, 1998) (“[MTBE] is credited with producing marked reductions in emissions of carbon monoxide and of the volatile organic compounds that react with other pollutants to produce smog.”).

²³² See *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002).

brain cancer due to “thermal” health effects of radiofrequency radiation. Despite significant research, no causal relationship has been established between cell phones and the disease, and the Federal Communications Commission (“FCC”) has declined to tighten related regulations.²³³ Corresponding litigation has properly failed.²³⁴ Other examples include burgeoning areas of nanotechnology and genetically modified organisms (“GMOs”). Nanotechnology involves manipulating matter at atomic levels and could transform society through advances in health care, environmentalism, electronics, and energy storage.²³⁵ Yet, there has been speculation that it could provide the “next tobacco” suits because of a theory that nano-particles might cause harm when inhaled, absorbed into skin, or introduced into the environment.²³⁶ GMOs result from combining rDNA of one organism with another so that a crop may be enhanced.²³⁷ Drought or pest resistant GMOS could lead to sustainable, affordable world food supplies,²³⁸ but manufacturers are already being targeted for litigation over unknown risks.²³⁹ Both technologies have been pursued with significant congressional, regulatory and international oversight.²⁴⁰

²³³ See Sara Jurand, *Lawsuits Call for More Information on Dangers of Cell Phone Radiation*, Trial, July 2005, at 12, available at 41-JUL Trial 12; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 12 FCC Red 13494, 13505, ¶ 31 (1997). The FCC’s decision was challenged and upheld as being within the Commission’s discretion. See *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90-92 (2d Cir. 2000).

²³⁴ See Peter W. French et al., *Mobile Phones, Heat Shock Proteins and Cancer*, 67 Differentiation 93, 93 (2000); see also *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004); In re *Wireless Tel. Radio Frequency Emissions Prod. Liab. Litig.*, 327 F. Supp.2d 554 (Md. 2004)

²³⁵ Gregory Mandel, *Nanotechnology Governance*, 59 Ala. L. Rev. 1323, 1332-40 (2008); see also Note, *Top Ten Ways Nanotechnology Will Impact Life in the Next Ten Years*, 4 Nanotechnology L. & Bus. 401 (2007).

²³⁶ See *id.* at 1340-44; see also Rick Weiss, *Nanoparticles Toxic in Aquatic Habitat, Study Finds*, Wash. Post, Mar. 29, 2004, at A2; Barnaby Feder, *Study Raises Concerns About Carbon Particles*, N.Y. Times, Mar. 29, 2004 (discussing potential toxicity and cancer-causing issues related to a material in nanotechnology); Health and Safety Executive & Nat’l Inst. for Occupational Safety & Health, *Nanomaterials: A Risk to Health at Work?* 30-42 (2004).

²³⁷ See Kristopher A. Isham, *Caveat Venditor: Products Liability and Genetically Modified Foods*, 2 J. Food L. & Pol’y 85, 89 (2006); Matthew Rich, *The Debate Over Genetically Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice*, 54 Case W. Res. L. Rev. 889, 890-91 (2004)

²³⁸ See Ed Wallis, *Fish Genes Into Tomatoes: How the World Regulates Genetically Modified Foods*, 80 N.D. L. Rev. 421, 424 (2004).

²³⁹ See *id.*

²⁴⁰ See Kenneth W. Abbott et. al, *A Framework Convention for Nanotechnology?*, 38 Env’tl. L. Rep. News &

Legislators and regulators can react in real time when external risks become known.²⁴¹ They can regulate a product's manufacture, sale and use; remove a product from the market; or tax a product with revenues spent on programs to alleviate the harms. The judiciary only looks at a small slice of the issues and parties involved. Courts, therefore, remain the right place for handling liability based on wrongful conduct. Without the barometer of wrongdoing, however, liability might be applied years after good-faith decisions were made, regardless of whether consumers or governments assumed the risks, and even where manufacturers did not have superior knowledge of the risks or when they or others gained their knowledge.²⁴²

IV. CONCLUSION

When courts have dealt with uncertainty as to where boundaries of liability exist, they have carefully drawn lines guided by fundamental principles of law, logic, and public policy.²⁴³ These bounds place sensible limits on liability so that a person can recover when sustaining an injury caused by another's wrongful conduct, but cannot pursue an unreasonable or unmeritorious claim. With regard to harms caused by products, products liability law is, and should continue to be, the "paramount basis of liability."²⁴⁴ Plaintiffs may recover for injuries by

Analysis 10507 (2008); Env'tl. Law Inst., *Governing Uncertainty: The Nanotechnology, Environmental, Health and Safety Challenge*, 2-3 (2005); Michele J. Brace, *Regulation of Genetically Engineered Foods Under the Federal Food, Drug, and Cosmetic Act*, 33 Am. U. L. Rev. 899, 900-01 (1984); 7 U.S.C. §§ 7701-7772; 7 U.S.C. §§ 2321-2583; 7 U.S.C.S. §§ 135-136y.

²⁴¹ States can "prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society." *Minneapolis Ry. Co. v. Beckworth*, 129 U.S. 26, 29 (1889).

²⁴² See Meyer, *supra* note 22, at 886.

²⁴³ See Victor E. Schwartz, Mark A. Behrens & Phil Goldberg, *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14:1 J. Bankr. L. & Prac. 61, 185-194 (2005).

²⁴⁴ Prosser, Wade and Schwartz's *Torts* 718 (11th ed. 2005); see also James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991).

showing that a product was defective without having to prove a manufacturer was negligent in putting the product into the stream of commerce.²⁴⁵ This approach facilitates recovery and provides companies with incentive to exercise due care in making products.²⁴⁶

Externalization of risk actions, regardless of the legal theory used, do not relate to the manufacture and sale of products, but consumer conduct and accepted product risks.²⁴⁷ Allowing government attorneys to disregard this fact and alter causes of action to impose a new duty on manufacturers, creates limitless, unpredictable liability based on personal beliefs and policy agendas, not wrongdoing. If society decides to subject people to such liability, elected legislatures and regulators they empower should make those decisions.

²⁴⁵ See Wade, *supra* note 10, at 825.

²⁴⁶ *Id.* at 826.

²⁴⁷ See Billings v. North Kansas City Bridge & R.R. Co., 93 S.W.2d 944 (Mo. 1936) (“[i]f the girder became a nuisance after the sale of the bridge, it was because of the manner in which the bridge was used or the girder maintained, neither of which the defendant had any control over or responsibility for.”); Weatherby v. Dick & Bros. Quincy Brewing Co., 270 Mo. 100, 192 S.W. 1022, 1024-25 (Mo. 1917) (holding a manufacturer’s “valid sale to a legitimate purchaser” cannot be equated with unreasonable conduct for causing a public nuisance injury).