

---

---

CAN GOVERNMENTS IMPOSE A NEW TORT DUTY TO  
PREVENT EXTERNAL RISKS? THE “NO-FAULT”  
THEORIES BEHIND TODAY’S HIGH-STAKES  
GOVERNMENT RECOUPMENT SUITS

*Victor E. Schwartz\**  
*Phil Goldberg\*\**  
*Christopher E. Appel\*\*\**

INTRODUCTION

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 always been the lynchpin for tort liability. In these new lawsuits, companies are targeted solely because their products have created external costs that others have borne. Under this theory, litigation could arise whenever users of products, for example guns, harm others with those products. Cases also could be filed when personal or environmental injuries are caused by inherent risks in products, such as with prescription medicines, or user neglect, as with deteriorated lead paint. In these situations, the product does not need to be defective or the manufacturer at fault. Rather, government lawyers argue that the manufacturers ought to be liable because a product’s price should incorporate its “true” cost to society.

---

\* Victor E. Schwartz is Chairman of the Public Policy Group in the Washington, D.C., office of the law firm of Shook, Hardy & Bacon L.L.P. He coauthors the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ’S TORTS (11th ed. 2005). He has served on the Advisory Committees of the American Law Institute’s *Restatement (Third) of Torts: Products Liability*, *Apportionment of Liability*, *General Principles*, and *Liability for Physical and Emotional Harm* projects. Mr. Schwartz received his B.A. summa cum laude from Boston University and his J.D. magna cum laude from Columbia University.

\*\* Phil Goldberg is an attorney in the Public Policy Group in the Washington, D.C., office of Shook, Hardy & Bacon L.L.P. He has served as an aide to several Democratic members of Congress. Mr. Goldberg received his B.A. cum laude from Tufts University and his J.D. from The George Washington University School of Law, where he was a member of the Order of the Coif.

\*\*\* Christopher E. Appel is an attorney in the Public Policy Group in the Washington, D.C., office of Shook, Hardy & Bacon L.L.P. He received his B.S. from the University of Virginia’s McIntire School of Commerce and his J.D. from Wake Forest University School of Law.

The argument goes that if companies profit from 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 explain in the current draft of the *Restatement (Third) of Torts: Liability for Physical Harm*, is that people only have “a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”<sup>1</sup> A manufacturer’s duty of care is to make a product that is not defective in manufacture, design, or warning.<sup>2</sup> Eliminating this duty requirement and the subsequent requirement that the duty be breached takes the rudder of wrongdoing out of the civil-justice system. The result is liability 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 beer.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> The lawsuits sought reimbursement of those government funds that were spent on smoker health and

---

1. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 7 scope note (Proposed Final Draft No. 1, 2005) (emphasis added).

2. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998).

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

4. *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999) (dictum).

5. See Master Settlement Agreement 1, 2 (Nov. 23, 1998), available at [http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724\\_103246\\_8605\\_cigmsa.pdf/file\\_view](http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_103246_8605_cigmsa.pdf/file_view). For examples of cases from individual plaintiffs, see *Ross v. Philip Morris & Co.*, 328 F.2d 3, 4–6, 15–16 (8th Cir. 1964); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 22 (5th Cir. 1963); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1240–41, 1255 (N.J. 1990).

6. *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 with the public’s desire “to be free from unwarranted injury, disease, and sickness and ha[s] caused damage to the public health, the public safety, and the general welfare of the citizens”).

provided “a set of detailed regulations governing many aspects of [the manufacturers’] operations, including advertising directed toward young people, which are strikingly similar to proposals previously rejected by Congress.”<sup>7</sup> From the industry’s perspective, the MSA was a “business settlement,” not a legal one based on the merits of the claims.<sup>8</sup> Nevertheless, the settlement demonstrated to government attorneys that externalization-of-risk-based lawsuits could succeed and lead to significant policy changes and substantial revenue streams for governments or the attorneys’ own causes.<sup>9</sup>

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.”<sup>10</sup> 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.<sup>11</sup> By positioning the government as the plaintiff, these lawsuits hope to succeed where private lawsuits to create no-fault liability failed.<sup>12</sup> 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.<sup>13</sup> They have further argued that governments suing to protect

---

7. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914 (2008); see also Lauren F. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 487 (2002).

8. 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).

9. See Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, 437 POL’Y ANALYSIS 1, 6 (2002); see also Mark A. Behrens & Rochelle M. Tedesco, *Addressing Regulation Through Litigation: Some Solutions to Government Sponsored Lawsuits*, 3 ENGAGE 109, 109 (2002); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215 (2001).

10. See 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; Walter Olson, Editorial, *Fizzy Scapegoat for Our Fat Kids*, STAR-LEDGER (Newark, N.J.), Feb. 7, 2006, at 21; Walter Olson, Opinion, *First Smokes, Now Cokes*, N. JERSEY REC., Feb. 15, 2006, at L11; Editorial, *Is Junk Food the Next Tobacco?*, ALEMEDA-TIMES STAR, June 8, 2003; see also *Suit Against Gun Makers Like Tobacco Suit*, TIMES-PICAYUNE (New Orleans, La.), Dec. 8, 1998, at B4.

11. See discussion *infra* Part I.A.

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

13. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE

public welfare should not have to meet the same burden of proving wrongful causation as individuals suing over specific injuries.<sup>14</sup> They suggest that they should only have to show through statistics and generalized studies that a product contributed to a particular harm, not that it caused anyone's actual injury.<sup>15</sup>

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 manufacturers.<sup>16</sup> 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.<sup>17</sup> The Supreme Court of Iowa rebuffed giving states greater rights to sue than individual plaintiffs through *parens patriae* and quasi-sovereign doctrines.<sup>18</sup> But as of this writing, public-nuisance theory is still being considered for this purpose in Wisconsin, California, and some federal courts.<sup>19</sup>

Even if these particular cases or these theories fail, experience shows that government lawyers, as well as the contingency-fee lawyers who often fund these suits, will look for other courts and other theories that will allow their endgame-oriented claims to succeed. Regardless of the name of the legal theory used, though, externalization of risk will be the genie behind the curtain.

---

ENVTL. L. & POL'Y F. 57, 59–60 (2005).

14. See Wade, *supra* note 12, at 826.

15. 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 as to whether "[l]awsuits brought by states rather than individuals may also allow for looser causation rulings").

16. See *State v. Lead Indus. Ass'n*, 951 A.2d 428, 434–35 (R.I. 2008).

17. See *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 538 (3d Cir. 2001); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 922 (8th Cir. 1993); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1147–48 (Ill. 2004); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 112–13 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007).

18. See *State ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401, 406 (Iowa 1998).

19. See *City of Milwaukee v. NL Indus.*, 691 N.W.2d 888 (Wis. Ct. App. 2004) (pretrial ruling allowing public-nuisance cause of action in this case), *review denied*, 703 N.W.2d 380 (Wis. 2005) (pretrial denial of defendants' appeal), *review further denied*, 765 N.W.2d 579 (Wis. 2009) (trial ended in defense verdict, and allowance of the public-nuisance claim was not part of plaintiffs' postverdict appeals); *County of Santa Clara v. Superior Court*, 188 P.3d 579 (Cal. 2008) (review granted July 23, 2008); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (appeal pending under docket No. 05-5104).

Traditional tenets of products liability and tort law, including the 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 in the tobacco litigation, if these "new regulations are 'voluntarily' accepted by the industry through a settlement agreement, then the constitutional and other legal objections become moot."<sup>20</sup> Indeed, Professor Robert Reich, President Clinton's Secretary of Labor, called these lawsuits "faux legislation, which sacrifices democracy."<sup>21</sup> This Article will expose and analyze externalization of risk as the overarching theory for this new duty on product manufacturers and will discuss the lawsuits' goals and why courts should continue to reject them.

#### I. THE INFRASTRUCTURE FOR GOVERNMENT EXTERNALIZATION-OF-RISK LITIGATION

The drivers of externalization-of-risk litigation are the government attorneys who file the claims and the private contingency-fee lawyers who often underwrite them in exchange for a portion of an award. This Part 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 his or her jurisdiction and to provide counsel to the executive branch.<sup>22</sup> The office dates back to English law, where the attorney general was "the principal counsel of the Crown."<sup>23</sup> In the past twenty years, some dedicated government attorneys have looked beyond their law-enforcement roles in an

20. Bill Pryor, *Curbing Government Lawsuit Abuse*, INTELL. AMMUNITION, Sept. 1, 2001, available at [http://www.heartland.org/policybot/results/30/Curbing\\_Government\\_Lawsuit\\_Abuse.html](http://www.heartland.org/policybot/results/30/Curbing_Government_Lawsuit_Abuse.html).

21. Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22.

22. The National Association of Attorneys General identifies five functions that the office of the attorney general 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 REV. POL. 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).

23. Charles Sweet, A DICTIONARY OF ENGLISH LAW 75 (London, Henry Sweet 1882); Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 204 (2000).

effort to find new and innovative ways to serve their constituents. This metamorphosis has led government attorneys to have greater influence over policy matters, which traditionally have been the province of legislatures and regulators.<sup>24</sup> There have been few checks and balances in this expansion of power, which in large part is due to the fact that the authority of government attorneys has developed from various sources, including state constitutions, statutory enactments, and common law.<sup>25</sup> State attorneys general have filed the largest externalization-of-risk lawsuits, though similar actions have been filed by lawyers for municipalities, counties, and school districts in firearms, lead-paint, and other contexts.<sup>26</sup>

Consider state attorneys general. A confluence of factors has allowed them to bring externalization-of-risk litigation. First, their roles are often broadly defined, as they generally can “exercise all such authority as the public interest requires” with “wide discretion in making the determination as to the public interest.”<sup>27</sup> They also have “a monopoly, or a near monopoly, on the state executive branch’s access to the courtroom.”<sup>28</sup> Therefore, they largely determine which legal actions are brought in the name of the sovereign and can emphasize particular areas of interest. Second, should a state attorney general overextend into the legislative or regulatory arena in bringing these lawsuits, there are few practical barriers. In large part, this is because attorneys general are most

---

24. See Clayton, *supra* note 22, at 527–28; see also David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. TIMES, Nov. 9, 1997, § 3, at 1 (interview with Senator John McCain criticizing modern attorneys general and questioning, “Who do these people think they are?”).

25. See David Edward 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) (noting that 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 state”); 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.”).

26. See *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*5 (N.D. Cal. Sept. 17, 2007) (case filed by the Attorney General); *County of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Ct. App. 2008), *review granted*, 188 P.3d 579 (Cal. 2008) (case filed by Santa Clara County); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005) (case filed by the City of Chicago); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 434 (R.I. 2008) (case filed by the Attorney General).

27. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 267–69 (5th Cir. 1976) (noting that “the State of Florida through its Attorney General commenced an ambitious and highly publicized antitrust action against seventeen oil companies”).

28. Meyer, *supra* note 25, at 886, 890 (discussing state attorneys general as operating “within a unique set of institutional and political constraints to create state-based regulation with nationwide impact in policy areas”).

often popularly elected.<sup>29</sup> Governors have little ability to restrict their activities,<sup>30</sup> and legislatures, which have the authority to pull back an overreaching attorney general, are neither efficient nor effective in this regard.<sup>31</sup> The result is that attorneys general can, although many do not, unilaterally determine that a practice is contrary to the public interest and initiate an action to curtail it.<sup>32</sup>

Third, beginning in the 1980s, some state attorneys general began cooperating with each other on new ways to commence multistate litigation.<sup>33</sup> Many of these actions focused on enforcement, but others had more of a policy or regulatory function, and they were born out of financial constraints. Sharing information, discovery materials, and litigation staff saved costs.<sup>34</sup> It also had tactical advantages, and soon, state attorneys general designed state actions to leverage the financial impact of multistate litigations.<sup>35</sup> 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.”<sup>36</sup> The “tobacco litigation model” has been tried to advance policy preferences for other products, such as asbestos,<sup>37</sup> lead paint,<sup>38</sup> firearms,<sup>39</sup> HMOs,<sup>40</sup> fast food,<sup>41</sup> and products that

---

29. State attorneys general are popularly elected in forty-three states and governor-appointed in five states. See STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15 (Lynne M. Ross ed., 1990). Maine and Tennessee have other appointment systems. See *id.*

30. See Meyer, *supra* note 25, at 892.

31. 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 (2008) (prohibiting lawsuits by Attorney General against food producers based on obesity and weight gain); TENN. CODE ANN. § 29-34-205 (2000) (also prohibiting lawsuits by Attorney General against food producers based on obesity and weight gain).

32. 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 15, at 689.

33. An early multistate case involved enforcement of antitrust laws. See *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1294–95 (D. Md. 1981), *settlement approved*, 605 F. Supp. 440 (D. Md. 1984).

34. See Lynch, *supra* note 22, at 2004.

35. See *id.*

36. Zefutie, *supra* note 8, at 1383; see also Richard L. Cupp, Jr., *Tobacco's Big Loss Sets a Bad Precedent*, USA TODAY, Nov. 24, 1999, at 31A.

37. See, e.g., *Amchem 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).

38. See, e.g., *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); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008).

39. See, e.g., *Hamilton v. Accu-tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996); *In re Firearms Cases*, 24 Cal. Rtr. 3d 659 (Ct. App. 2005); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042

contribute to global warming.<sup>42</sup> 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.”<sup>43</sup>

Thus, while NAAG was founded in 1907, the tobacco MSA has been described as its “coming out party.”<sup>44</sup> NAAG now is the “central body to encourage other [state attorneys general] to join a lawsuit.”<sup>45</sup> It has several meetings each year; task forces to identify, target, and facilitate specific litigation;<sup>46</sup> and working sessions to instruct attorneys general on initiating specific litigation.<sup>47</sup> The organization also directly funds litigation through a pool from which attorneys general can draw to pay for expert witnesses and other litigation-related expenses.<sup>48</sup> 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] issue[s].”<sup>49</sup>

Other attorneys general, including Alabama’s William Pryor, now a federal judge, have called the policy-focused suits “the

---

(Fla. Dist. Ct. App. 2001); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005).

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

41. *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 on behalf of obese children).

42. *See, e.g., California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

43. Steven Andersen, *The Rise of State Attorneys General*, CORP. LEGAL TIMES, Aug. 2003, at 1, 38.

44. *Id.*

45. Meyer, *supra* note 25, at 907. *See generally* 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 (2003).

46. *See* National Association of Attorneys General, About NAAG: Information on the Association, [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (last visited July 18, 2009).

47. For example, NAAG identifies eleven areas to promote attorney general knowledge and enforcement efforts. *See* National Association of Attorneys General, NAAG Projects: Issues and Research, <http://www.naag.org/projects.php> (last visited July 18, 2009).

48. 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. *See* Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34, 40 n.24 (2001) (mentioning a separate fund).

49. Morrow, *supra* note 24, at 1.

greatest threat to the rule of law today.”<sup>50</sup> Their concern was that these actions circumvented legislative and regulatory bodies that set public policies.<sup>51</sup> Businesses were coerced to pay litigation costs and change practices even when those practices were wholly within existing law, regulations, and policies.<sup>52</sup> In fact, some attorney general actions have sought changes inconsistent with or contrary to findings of federal or state agencies.<sup>53</sup>

#### B. *Private Contingency-Fee Attorneys*

When government attorneys have forayed into the speculative world of externalization-of-risk litigation, they have found it costly and time-consuming with a high risk-reward ratio. Rather than litigate these cases on the public’s dime, many have entered into contingency-fee agreements with private personal injury lawyers experienced with such risk to bring the claims.<sup>54</sup> 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 by government attorneys looking for help in advancing policy agendas.<sup>55</sup> 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, and private contingency-fee lawyers provide the fuel.<sup>56</sup> For personal injury lawyers, becoming “public injury lawyers” has provided the opportunity to litigate cases with the scope of statewide class actions

50. William H. Pryor, Jr., Att’y Gen. of Ala., Address at the Reagan Forum: Fulfilling the Reagan Revolution by Limiting Government Litigation 2 (Nov. 14, 2000).

51. See Cupp, *supra* note 15, at 687 (noting that since the MSA, many attorneys general have seen themselves as bridging the gap between regulatory agencies and consumers).

52. See Schmeling, *supra* note 45, at 433 (“[F]ifty state governments filing suit at once would alter the calculations of risks. . . . In 1996 alone, the industry was estimated to have spent \$600 million on legal fees, without having taken one case to trial.”).

53. See Trevor Maxwell, *Rowe Wears Priorities—and Blaine House Ambition—on His Sleeve*, ME. SUNDAY TELEGRAM, Mar. 16, 2008, at B1 (reporting on efforts to force alcohol companies to change advertising practices).

54. See *City and County of S.F. v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1136 n.3 (N.D. Cal. 1997) (disagreeing that the plaintiffs’ contingency-fee arrangement was necessary for “the financially strapped government entities to match resources with the wealthy tobacco defendants”).

55. See Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 COLUM. J. ENVTL. L. 335, 339 (2005) (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.”).

56. See generally Allan Kanner & Tibor Nagy, *The Use of Contingent Fees in Natural Resource Damage and Other Parens Patriae Cases*, 19 TOXICS L. REP. 745 (2004).

without the requirements of class-action law.<sup>57</sup> 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.<sup>58</sup>

These arrangements have stirred significant controversy, particularly given the historical purpose of contingency-fee arrangements in this country.<sup>59</sup> Once illegal in the United States,<sup>60</sup> these agreements have a worthy purpose in today's civil-litigation environment: to provide access to the legal system regardless of means.<sup>61</sup> 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 lawyer to prosecute his claim."<sup>62</sup> This rationale, however, does not apply when the government is the "client," and relying on it can lead to situations that violate public policy. For example, contingency fees motivate lawyers to maximize recovery, and contingency-fee lawyers have been barred from enforcing criminal codes where there is concern that injecting a profit motive would create misincentives and possibly corrupt justice.<sup>63</sup>

Similarly, financial incentives could improperly distort government civil actions that require similar prosecutorial-type judgments.<sup>64</sup> The Supreme Court of the United States has cautioned

---

57. 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 [that] the plaintiff's bar is getting interested in social issues in a global way. Instead of being legal entrepreneurs, they're becoming policy entrepreneurs.").

58. See *Attorney's Fees & the Tobacco Settlement: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 36 (1997) (statement of Lester Brickman, Cardozo School of Law).

59. See Alfred D. Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 MOD. L. REV. 330, 333–34 (1965). Several states have enacted legislation to limit attorney general use of contingency-fee lawyers. See COLO. REV. STAT. §§ 13-17-301 to -304 (2006); 2005 CONN. PUB. ACT. 05-3, § 104(a) (Spec. Sess.); KAN. STAT. ANN. § 75-37,135 (1997); MINN. STAT. ANN. § 8.065 (West 2005); N.D. CENT. CODE § 54-12-08.1 (2008); TEX. GOV'T CODE ANN. § 2254.103 (Vernon 2008); VA. CODE ANN. § 2.2-510.1 (2008).

60. 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."); AMERICAN BAR ASSOCIATION, CODE OF ETHICS Canon 13 (1909) (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").

61. See Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43–44 (1989).

62. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-20 (1979); see also *Lewis v. Casey*, 518 U.S. 343, 375 n.4 (1996) ("[T]he promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases.").

63. See Brickman, *supra* note 61, at 40–41.

64. See David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Pariae Litigation by Contingency Fee*, 51

that attorneys representing governments are “the representative[s] 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.”<sup>65</sup> The conflict arises where the public interest is not served through monetary relief, where nonmonetary interests supersede material recovery, or where a determination ought to be made that the litigation should be discontinued.<sup>66</sup> 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.”<sup>67</sup>

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 claim.<sup>68</sup> 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.”<sup>69</sup> 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;<sup>70</sup> they expand an attorney general’s office in ways that could not be accomplished through the legislature.<sup>71</sup> “[U]nless the Attorney General has been expressly

---

DEPAUL L. REV. 315, 324–25 (2001).

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

66. *See Dana*, *supra* note 64, at 324–25; *see also* *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) (“[T]he Government wins its point when justice is done in its courts.”).

67. James V. Grimaldi, *Lawyers Could Get Billions in Tobacco Deal—Attorneys Assumed Huge Risk in Taking Suits; Agreements Give Them From 3 to 30 Percent*, SEATTLE TIMES, Oct. 5, 1997.

68. *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*, 74 Cal. Rptr. 3d 842 (Ct. App. 2008), *review granted*, 188 P.3d 579 (Cal. 2008); *see also* Order Regarding Defendants’ Motion to Bar Payment of Contingent Fees to Private Attorneys, *County of Santa Clara v. Atl. Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct. Apr. 4, 2007).

69. *Clancy*, 705 P.2d at 352.

70. *See Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997). Several state high courts, however, have reached the opposite conclusion. *See Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1244 (Md. 1998); *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998).

71. *See Dana*, *supra* note 64, at 319 (“The most persuasive explanation for why AGs would retain contingency-fee counsel is that the AGs perceive a need to bypass state legislatures.”).

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.”<sup>72</sup> Recently, the Rhode Island Supreme Court held that if contingency fees were used, the attorney general must retain absolute control of the matter.<sup>73</sup>

The concerns of these courts and attorneys general have been borne out in practice. In some states, the private attorneys hired were political donors, friends, or colleagues of the hiring government official, creating the appearance of impropriety, or worse, resulting in unfair preferential treatment and back-room dealings outside the public’s view.<sup>74</sup> 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.<sup>75</sup> Such considerations have given rise to backlash against the government’s use of contingency-fee lawyers.<sup>76</sup> Several states,

---

72. *Meredith*, 700 So. 2d at 481. One newspaper column observed that “[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*, WIS. ST. J., Mar. 21, 1999, at A1.

73. *See State v. Lead Indus. Ass’n*, 951 A.2d 428, 475, 477 (R.I. 2008) (noting that the Attorney General must have “absolute and total control over all critical decision-making,” including veto power over any decision made and that a senior government attorney must be involved in all stages of the litigation and appear to be exercising such control).

74. Lawyers retained to represent the government are “often from the ranks of their own campaign contributors and cronies.” Stuart Taylor, Jr., *How a Few Rich Lawyers Tax the Rest of Us*, 31 NAT’L J. 1866, 1867 (1999). In Texas, the 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, *Rise and Fall: Why Did Dan Morales Exchange Good Judgment for the Good Life?*, TEX. LAW., Oct. 27, 2003, at 10. 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*, PHILA. INQUIRER, Oct. 4, 1999, at A1.

75. *See* CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., TRIAL LAWYERS, INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA 2003, at 6 (2003); Susan Beck, *The Lobbying Blitz over Tobacco Fees*, LEGAL TIMES, Jan. 6, 2003, at 1.

76. *See* JOHN FUND, U.S. CHAMBER INST. FOR LEGAL REFORM, CASH IN, CONTRACTS OUT: THE RELATIONSHIP BETWEEN STATE ATTORNEYS GENERAL AND THE PLAINTIFFS’ BAR 1 (2004) (arguing that 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”), available at [http://www.instituteforlegalreform.com/get\\_ilr\\_doc.php?id=820](http://www.instituteforlegalreform.com/get_ilr_doc.php?id=820); Andersen, *supra* note 43 (“AGs occupy a unique and increasingly significant junction of policymaking, enforcement and advocacy, and their potency will only grow.”); Hans Bader, COMPETITIVE ENTER. INST., *The Nation’s Ten Worst State Attorneys General*, Jan. 24, 2007, at 1 (“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

including Colorado, Kansas, North Dakota, Texas, and Virginia, have enacted laws to require an open, competitive bidding process for awarding contingency-fee contracts,<sup>77</sup> and President Bush signed an executive order barring the use of contingency agreements at the federal level.<sup>78</sup>

## 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-manufacturing process, namely, defects in the manufacture, design, or warnings of a product.<sup>79</sup> 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.<sup>80</sup> 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 caused by consumers in harming others.<sup>81</sup>

The duty to pay for injuries caused by external risks, therefore, is not on the manufacturer (i.e., the knife maker), but on the responsible party who either assumed the risk or misused the product and ought to pay the costs of his or her own actions. 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 (Third) of Torts: Liability for Physical Harm* explains, strict liability is imposed only under "certain circumstances," and "[e]ach of these rules has its own elements, which the plaintiff must prove in order to render the rule operational."<sup>82</sup> Where strict liability is not available and there is no

---

our democratic system.").

77. See KAN. STAT. ANN. § 75-37,135 (1997); VA. CODE ANN. § 2.2-510.1 (2008).

78. See Exec. Order No. 13433, 72 Fed. Reg. 28,441 (May 16, 2007) ("[I]t is the policy of the United States that organizations 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.").

79. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (1998).

80. 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).

81. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 2 (Proposed Final Draft No. 1, 2005).

82. *Id.* ch. 4 scope note.

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.<sup>83</sup>

A. *Externalization-of-Risk Theory Has Already 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.<sup>84</sup> Over time, courts recognized that true strict liability applies only 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.<sup>85</sup> When strict liability was extended to design and warning defects, courts put up boundaries so that manufacturers would not be subject to liability when they were not at fault and injury was caused by external risks.<sup>86</sup> These courts recognized adverse public-policy implications of super-strict liability.

Specifically, the Supreme Court of Michigan in *Prentis v. Yale Manufacturing Co.*<sup>87</sup> 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

---

83. See *Guilmette v. Alexander*, 259 A.2d 12, 14–15 (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.” (citing *Baldwin v. State*, 215 A.2d 492, 494 (Vt. 1965))).

84. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 182 (Mich. 1984) (stating that the courts considering the question of design defects were “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, *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. REV. 317, 348–51 (2006) (discussing the development of strict liability).

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

86. See 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. 1263, 1270–73 (1991); David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. ILL. L. REV. 743, 754–55 (1996).

87. 365 N.W.2d 176 (Mich. 1984).

customers of less careful competitors.<sup>88</sup>

Courts throughout the United States have largely adopted these principles, rejecting strict liability for design and warning defects.<sup>89</sup> The consumer-expectation, risk-utility, and reasonable-alternative-design tests each derive from these principles. For example, in recognition of this prevailing fault-based approach, the *Restatement (Third) of 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.”<sup>90</sup> Thus, the *Restatement* places well-defined limits on design defect; it narrows the inquiry to whether an alternative design exists and is reasonable. Further, none of the affirmative duties proposed in the draft *Restatement (Third) of Torts: Liability for Physical Harm* would create the kind of expansive duty sought in risk-externalizing lawsuits.<sup>91</sup>

### B. *The Forms of Risk-Externalization Litigation*

Current attempts at externalization-of-risk litigation put the old wine of these rejected private products liability suits into new government bottles. In short, by positioning the government as the plaintiff and suing for collective or generalized harms, the government lawyers are trying to bolster the perceived legitimacy and judicial reception of the claims.

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 would have to give governments standing to bring claims even though they are not the injured parties, which is why the initial claims have been brought under *parens patriae* standing or legal theories, such as public nuisance, where governments have

88. *Id.* at 185.

89. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 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.”).

90. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998). See generally James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters’ Travelogue*, 30 U. MICH. J.L. REFORM 563 (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).

91. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 37 cmts. c–d, 40 (Proposed Final Draft No. 1., 2005) (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).

standing. Second, courts would have to change essential elements of existing causes of action. Third, courts would have to 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.<sup>92</sup> The original purpose of the *parens patriae* doctrine was to give governments standing to protect people suffering from a legal disability preventing them from acting for themselves.<sup>93</sup> These individuals were “legally unable, on account of mental incapacity . . . to take proper care of themselves and their property.”<sup>94</sup> In recent years, some courts relaxed the doctrine to give states standing to seek redress when their “quasi-sovereign” interests are injured.<sup>95</sup> A quasi-sovereign interest, as the Supreme Court of the United States explained, “is a judicial construct that does not lend itself to a simple or exact definition.”<sup>96</sup> 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.<sup>97</sup> “[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.”<sup>98</sup>

In addition, in *parens patriae* suits, the harms suffered have traditionally been “causally connected to . . . residency within that particular state.”<sup>99</sup> For example, *parens patriae* standing may be appropriate in suits for environmental hazards that harmed people living in a particular state. It may also be appropriate when the economic harms alleged were due to a person’s status as a citizen of

---

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

93. See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 671 n.47 (1959).

94. *Snapp*, 458 U.S. at 600 (quoting JOSEPH CHITTY, JR., ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 155 (London, Joseph Butterworth & Son 1820)).

95. See, e.g., State v. City of Dover, 891 A.2d 524, 528–29 (N.H. 2006).

96. *Snapp*, 458 U.S. at 601.

97. See *id.* at 602 (“A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.”); *id.* at 604 (“[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.”).

98. *Snapp*, 458 U.S. at 607; Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 98 (D. Mass. 1998).

99. Gifford, *supra* note 7, at 937.

that state.<sup>100</sup> But in product-based suits “the state of residence and the harm sustained are independent variables”; the victim’s statehood is not related to the harm at all.<sup>101</sup>

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 a claim cannot be resolved simply by reference to the general principle of *parens patriae*; like everyone else, the government must state a legitimate cause of action against a culpable party.<sup>102</sup> A New York court further explained, stating that *parens patriae* only allows the attorney general “to enforce the law”; it cannot assume “the quintessentially legislative authority to alter the law” by weakening standards for recovery or changing a tort’s elements.<sup>103</sup>

A federal district court in *Texas v. American Tobacco Co.*<sup>104</sup> is the only court that disregarded this history to allow a government to move ahead with an externalization-of-risk lawsuit.<sup>105</sup> In 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 cigarette makers.<sup>106</sup> The court 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 had 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 that liability could be assigned through statistics and market share.<sup>107</sup> Thus, the entire industry was placed in a Cuisinart of liability.

The following year, the Supreme Court of Iowa rejected this argument.<sup>108</sup> The court held that, even assuming the state would be granted standing through the *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 hundreds of millions of dollars to provide medical care for tobacco-

---

100. *See id.*

101. *Id.*

102. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972).

103. *People ex rel. Spitzer v. Grasso*, 836 N.Y.S.2d 40, 52 (App. Div. 2007).

104. 14 F. Supp. 2d 956 (E.D. Tex. 1997).

105. *See id.* at 966 (“[T]he Court is not persuaded that this action is a ‘production liability action.’”).

106. *See id.* at 962–63.

107. *See id.* at 968.

108. *See State ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401, 406–07 (Iowa 1998).

related illnesses”<sup>109</sup> did not alleviate the requirement that the state 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.<sup>110</sup> “[F]ailure to apply the remoteness doctrine” for government programs, the court continued, “would permit unlimited suits to be filed”<sup>111</sup> and, with the other shortcuts sought, would give governments greater power to collect money damages than the allegedly injured people themselves would have had.

## 2. *Public-Nuisance Theory*

Since the late 1990s, public-nuisance theory has become the tort du jour for government externalization-of-risk litigation.<sup>112</sup> 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.<sup>113</sup> Governments have standing to bring public-nuisance actions but can only seek injunctions or abatement, not damages.<sup>114</sup> The four indispensable elements of the theory are (1) injury to a public right; (2) unreasonable conduct; (3) control, either at the time of abatement or when the nuisance was created; and (4) proximate cause.<sup>115</sup> During its entire history, public nuisance has always focused on conduct, not manufacturing.<sup>116</sup> 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.<sup>117</sup> The manufacturer of the materials or stereo used to create the public nuisance, to extend the hypothetical, was never a party to the lawsuit.

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

---

109. *Id.* at 404.

110. *Id.* at 407.

111. *Id.*

112. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 743 (2003); Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 541 (2006).

113. See Schwartz & Goldberg, *supra* note 112, at 541.

114. See Gifford, *supra* note 112, at 745–46.

115. Schwartz & Goldberg, *supra* note 112, at 561–70.

116. Gifford, *supra* note 112, at 745.

117. See RESTATEMENT (SECOND) OF TORTS § 821B 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 *id.*

the word nuisance “has meant all things to all people.”<sup>118</sup> 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.*,<sup>119</sup> 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.<sup>120</sup> The court appreciated that regulating the manufacture 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.”<sup>121</sup> In the next two decades, similar private-sector attempts also failed.<sup>122</sup>

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.<sup>123</sup> 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 too.<sup>124</sup> As the court stated in *Detroit Board of Education v. Celotex Corp.*,<sup>125</sup> “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.<sup>126</sup> 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

---

118. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF 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).

119. 97 Cal. Rptr. 639, 641 (Ct. App. 1971) (seeking an injunction against 293 named corporations and municipalities, as well as 1000 unnamed defendants, for air pollution).

120. *See id.* at 642–46.

121. *Id.* at 645.

122. *See, e.g.*, *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974); *Sabater v. Lead Indus. Ass’n*, 704 N.Y.S.2d 800 (App. Div. 2000).

123. *See Gifford, supra* note 112, at 751.

124. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (“[A]ll courts that have considered the question have rejected nuisance as a theory of recovery for asbestos contamination.”).

125. *Id.*

126. *Id.*

culpability or of the availability of other traditional tort law theories of recovery.”<sup>127</sup>

The 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. The suit sought “reimbursement of state expenditures for Medicaid and other medical programs.”<sup>128</sup> 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 . . . caused damage to the public health, the public safety, and the general welfare of the citizens.”<sup>129</sup> A federal district court in *Texas v. American Tobacco Co.*,<sup>130</sup> 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.”<sup>131</sup>

The theory, nevertheless, became part of the tobacco litigation legend of success and was quickly picked up in firearms litigation brought by municipalities for the costs of gun crimes.<sup>132</sup> 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.<sup>133</sup> As in other attempts to stretch

---

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

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

129. *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997) (barring recovery under public-nuisance and other theories).

130. *Id.*

131. *Id.* at 973.

132. 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, 1172 (2000) (stating that although tobacco public-nuisance claims “never [won] in court,” they were a “vehicle for settlement” and a model for gun suits).

133. See *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001) (alleging that “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 that 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”).

public-nuisance theory, a few maverick courts accepted the novel application.<sup>134</sup> In *City of Gary v. Smith & Wesson Corp.*,<sup>135</sup> the court recognized that 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.”<sup>136</sup> The Supreme Court of Illinois, in rejecting a similar claim, stated the majority view.<sup>137</sup> The court explained that the city’s theories did not fit the tort’s elements.<sup>138</sup> For example, the “right to be free from the threat that members of the public may commit crimes against individuals” was a personal, not public, right.<sup>139</sup> Other courts agreed, adding that the manufacturers lacked control over the source—the criminals who illegally used the firearms<sup>140</sup>—and that balancing guns’ harm and utility was better suited for legislation.<sup>141</sup>

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 cost of abating lead paint in homes and buildings throughout the state, which was estimated at \$4 billion.<sup>142</sup> The presence of lead paint in older homes, when allowed to chip from poor maintenance, was a health hazard for small

---

134. See *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003) (allowing a public-nuisance claim to proceed); *Cincinnati*, 768 N.E.2d at 1143–44 (allowing a public-nuisance claim to proceed). But see *City of Phila. 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 under Connecticut law); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (same under Florida law); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (same under Illinois law); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 203 (App. Div. 2003) (same under New York law).

135. 801 N.E.2d 1222 (Ind. 2003).

136. *Id.* at 1234.

137. *City of Chi.*, 821 N.E.2d at 1111.

138. See *id.* at 1118 (“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.”).

139. *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 (“[T]he scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.”).

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

141. See *City of Chi.*, 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.”).

142. See Petition for Writ of Certiorari ¶ 1, *State v. Lead Indus. Ass’n*, No. 99-5226 (R.I. Super. Ct. Mar. 2, 2004); Edward Fitzpatrick, *Paint Maker Seeks Ruling on Judge in Lead Case*, PROVIDENCE J., Aug. 19, 2005, at B1.

children who might eat those paint chips.<sup>143</sup> While this suit was being litigated, Motley Rice and other lawyers partnered with the cities of St. Louis, Chicago, and Milwaukee; certain California counties; and several municipalities in New Jersey to bring similar public-nuisance claims.<sup>144</sup> 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."<sup>145</sup> They argued that because they represented the government, they should not have to meet the same burdens of proof as private plaintiffs when seeking recovery under public-nuisance law.<sup>146</sup>

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 have rejected them.<sup>147</sup> *State v. Lead Industries Ass'n*<sup>148</sup> was the highest-profile case involving these theories because the trial ended in a verdict for the State.<sup>149</sup> In this 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.<sup>150</sup> The court replaced unreasonable conduct with unreasonable injury, saying that this element would be satisfied if the children "ought not to have to bear" their injuries.<sup>151</sup> Finally, for control and proximate

---

143. See, e.g., *State v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at \*6 (R.I. Super. 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).

144. See Schwartz & Goldberg, *supra* note 112, at 559.

145. Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1370 (2001).

146. See Schwartz & Goldberg, *supra* note 112, at 557–59.

147. See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 112–13 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); see also *City of Chi. v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005); *City of Toledo v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000 (Ohio Ct. Com. Pl. Dec. 12, 2007). Thus far, public-nuisance claims in Wisconsin and California have survived initial appeal. See *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Ct. App. 2006); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004).

148. 951 A.2d 428.

149. See Peter B. Lord, *Three Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006, at A1.

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

151. Jury Instructions at \*12, *State v. Atl. Richfield Co.*, C.A. No. 99-5226, 1999 Jury Instr. LEXIS 17 (R.I. Super. Ct. Jan. 1, 1999).

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.”<sup>152</sup> 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.”<sup>153</sup>

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”<sup>154</sup> in order to lower liability standards.<sup>155</sup> 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 and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.”<sup>156</sup> 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.”<sup>157</sup>

### 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 have been part of attempts to recover Medicaid costs related to those who smoked “light” cigarettes.<sup>158</sup> These statutes generally allow governments as well as private individuals to collect civil penalties for and injunctions against trade practices considered “unfair or deceptive.”<sup>159</sup> The terms “unfair” and “deceptive” are intentionally

---

152. *Id.* at \*17.

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

154. *See City of Chi. v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567, at \*4 (Ill. Cir. Ct. Oct. 7, 2003).

155. *See, e.g., City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007).

156. *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

157. *Id.* at 501.

158. *See, e.g., Philip Morris USA Inc. v. Hines*, 883 So. 2d 292, 293 (Fla. Dist. Ct. App. 2003); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 481 (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).

159. *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., CAL. BUS. & PROF. CODE* § 17203 (West 2007) (stating that standing limitations for private litigants do not apply to the attorney general or other public attorneys); IOWA CODE § 714.16(7)

broad in language and amorphous in practice, and the limits of the statutes' reach are often not clearly defined.<sup>160</sup> Consequently, business practices that are entirely legal can be the basis upon which consumer protection act 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.<sup>161</sup> For example, several actions have been threatened or filed against food and beverage providers to force them to offer healthier items,<sup>162</sup> 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.*,<sup>163</sup> plaintiffs argued that McDonald's and other fast-food companies are responsible for customer weight gain and health conditions under the New York consumer protection act<sup>164</sup> for creating a "false impression that [their] food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily."<sup>165</sup> The court dismissed *Pelman* because plaintiffs "fail[ed] to cite any specific advertisements or public statements that may be considered 'deceptive.'"<sup>166</sup> 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 exercise.<sup>167</sup> The court of appeals temporarily reinstated the case, stating that the factual reasons for

---

(2003) (authorizing enforcement by state attorney general).

160. See 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); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 33 (2005) (discussing plaintiffs' attempts to expand the confines of consumer protection laws).

161. See Schwartz & Silverman, *supra* note 160, at 16 ("[N]early every state CPA provides consumers with a private right of action in addition to government enforcement.").

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

163. (*Pelman I*) 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

164. See N.Y. GEN. BUS. LAW § 349 (McKinney 2004).

165. *Pelman v. McDonald's Corp.* (*Pelman III*), 396 F.3d 508, 510 (2d Cir. 2005). *Pelman* was initially dismissed. *Pelman I*, 237 F. Supp. 2d at 543. An amended complaint was refiled and dismissed. *Pelman v. McDonald's Corp.* (*Pelman II*), No. 02 Civ. 7821(RWS), 2003 WL 22052778, at \*15 (S.D.N.Y. Sep. 3, 2003). The U.S. Court of Appeals vacated the court's dismissal and remanded the case, see *Pelman III*, 396 F.3d 508, which is pending. See also *Pelman v. McDonald's Corp.* (*Pelman IV*), 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005); *Pelman v. McDonald's Corp.* (*Pelman V*), 452 F. Supp. 2d 320, 328 (S.D.N.Y. 2006).

166. *Pelman I*, 237 F.3d at 522.

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

the trial court's dismissal were appropriate for a summary judgment ruling, not in response to a motion to dismiss.<sup>168</sup> The reaction from the legislative community was harsh and swift; nearly twenty-five states legislatively banned obesity-related lawsuits within a few years.<sup>169</sup>

Despite the fact that 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.<sup>170</sup> The group recognized that 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.<sup>171</sup> Kraft, soon thereafter, removed trans fats from Oreos<sup>172</sup> and reduced or eliminated trans fats in about 650 other products.<sup>173</sup> The lawsuit was withdrawn.<sup>174</sup> 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 cost.<sup>175</sup> The suit was never filed; the industry decided not to sell sodas in elementary and middle schools and to provide only diet sodas and sports beverages in high schools.<sup>176</sup>

168. See *Pelman III*, 396 F.3d at 512.

169. See, e.g., FLA. STAT. § 768.37 (2005); GA. CODE ANN. § 26-2-432 (2003); KY. REV. STAT. ANN. § 411.610 (LexisNexis 2005); LA. REV. STAT. ANN. § 9:2799:6 (2009); MICH. COMP. LAWS SERV. § 600.2974 (LexisNexis 2004); OHIO REV. CODE ANN. § 2305.36 (LexisNexis 2005).

170. See Amended Complaint for Injunctive Relief, *Bantransfats.com, Inc. v. Kraft Foods N. Am., Inc.*, Case No. CV 032041, 2003 CA Sup. Ct. Pleadings 32041, at \*3-7 (May 5, 2003).

171. *Id.* at \*13.

172. See Delroy Alexander, *Healthier Oreo May Not Race to Stores*, CHI. TRIB., Dec. 21, 2005, §3, at 1 (reporting that Kraft had been working to develop a formula for Oreos without trans fat); see also *bantransfats.com*, *Ban Trans Fats: The Campaign to Ban Partially Hydrogenated Oils*, <http://www.bantransfats.com/> (last visited Aug. 3, 2009).

173. 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.

174. See John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, BUS. WK., Oct. 30, 2006, at 34 ("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.").

175. See Caroline Mayer, *Lawyers Ready Suit Over Soda; Case Being Built Linking Obesity to Sale in Schools*, WASH. POST, Dec. 2, 2005, at D2; see also Melanie Warner, *Lines Drawn for Big Suit Over Soda*, N.Y. TIMES, Dec. 7, 2005, at C1.

176. The State of Massachusetts mandated that in elementary, middle, and high schools, only fruit juices, water, and milk may be sold. See *An Act to Promote Proper School Nutrition*, H.R. 4452, Reg. Sess. (Mass. 2005)

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.<sup>177</sup> 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.<sup>178</sup> Their concern focused on the “physiological effect” that consuming alcohol and stimulants together has, leaving a person feeling less intoxicated than he actually is.<sup>179</sup> The Alcohol and Tobacco Tax and Trade Bureau reportedly “explained to the attorneys general that it had thoroughly reviewed, monitored, and approved the labeling and formulation of these drinks.”<sup>180</sup> 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.<sup>181</sup> The companies were not charged with specific wrongdoing, yet several agreed to remove the products from the market.<sup>182</sup> This episode followed similar attorney general actions against “alcopop” beverages and efforts, based on their own policy preferences, to raise the industry-accepted rule for what percentage of an audience viewing an advertisement must be at or above the legal drinking age.<sup>183</sup>

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

---

(introduced Oct. 27, 2005).

177. *AG’s Investigating Anheuser-Busch, Miller Brewing Marketing Practices*, ST. LOUIS BUS. J., Feb. 20, 2008.

178. See Letter from Att’y Gen. to The Honorable John J. Manfreda, Adm’r, Alcohol and Tobacco Tax and Trade Bureau (Aug. 20, 2007), available at [http://www.marininstitute.org/alcopops/resources/TTB\\_Letter\\_Final\\_Sigs\\_08172007.pdf](http://www.marininstitute.org/alcopops/resources/TTB_Letter_Final_Sigs_08172007.pdf).

179. *Id.*

180. *AG’s Investigating Anheuser-Busch, Miller Brewing Marketing Practices*, *supra* note 177.

181. See David Kesmodel, *Anheuser, Miller Face Marketing Probes*, WALL ST. J., Feb. 21, 2008, at A4 (“The companies haven’t been charged with any wrongdoing. . . . If attorneys general find evidence of wrongdoing, they could file civil lawsuits.”); *States Probe Miller Brewing, Anheuser-Bush Marketing Practices*, ST. LOUIS BUS. J., Feb. 21, 2008.

182. 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 C3.

183. See Ivan Penn, *Bad Buzz for Alcoholic Energy Drinks*, ST. PETERSBURG TIMES (Fla.), June 21, 2008, at 1A; Lisa Riley Roche, *Shurtleff Seeks Store Ban on Malt ‘Alcopop’ Sales*, DESERET NEWS (Salt Lake City), Sep. 21, 2005, at B4.

associated with their products. But litigation and the threat of such litigation can have the same effect by getting companies to modify or remove lawful products, even when customers want and buy them.

*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.<sup>184</sup> They could “convert almost every products liability action” into an externalization-of-risk claim.<sup>185</sup>

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 nondefective, lawful product or service . . . and a lawsuit [would be] born.<sup>186</sup>

But there is no precedent for such absolute liability under either products liability or tort law.<sup>187</sup>

Liability absent wrongdoing is only found in specific, defined areas of the law, namely, abnormally dangerous activities such as keeping wild animals in residential settings<sup>188</sup> or using explosives in populated areas.<sup>189</sup> The premise of such liability is the introduction of “a dangerous condition not commonly accepted or reciprocated in

184. See *Johnson County v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (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 change gives “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 a fault requirement, and circumvents any pre-suit notice requirement”).

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

186. *Spitzer*, 761 N.Y.S.2d at 196.

187. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 4 (Proposed Final Draft No. 1, 2005) (discussing the limited areas where strict liability is imposed).

188. 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* § 345, at 947 (2000). For domestic pets, “liability is imposed when the keeper of the animal knows or has reason to know that his animal is abnormally dangerous in some way.” *Id.* § 344, at 945; see also *Van Houten v. Pritchard*, 870 S.W.2d 377, 378 (Ark. 1994); *Smith v. Jalbert*, 221 N.E.2d 744, 746 (Mass. 1966); *Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex. 1974); *Jividen v. Law*, 461 S.E.2d 451, 457 (W. Va. 1995); RESTATEMENT (SECOND) OF TORTS § 509 cmt. c (1977).

189. See VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE & SCHWARTZ'S TORTS* 697–702 (11th ed. 2005).

the social unit.”<sup>190</sup> This principle, derived from the English case *Rylands v. Fletcher*,<sup>191</sup> applies in the narrow instances where a product’s use could not be made safe even through exercising “utmost care.”<sup>192</sup> The first *Restatement of Torts* called these acts “ultrahazardous.”<sup>193</sup> The *Restatement (Second) of Torts* changed the name to “abnormally dangerous activities” to reflect that it is only appropriate for conduct outside the “norm.”<sup>194</sup> The new draft *Restatement (Third) of Torts* maintains this terminology.<sup>195</sup> Examples of abnormally dangerous activities are using explosives,<sup>196</sup> blasting,<sup>197</sup> setting off fireworks,<sup>198</sup> launching rockets,<sup>199</sup> and disposing of certain volatile products.<sup>200</sup> 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 dangerous products’ manufacturers. Said one state high court: “Absolute liability attaches only to ultrahazardous or abnormally dangerous *activities* and not to ultrahazardous or abnormally dangerous *materials*. . . . [I]f the rule were otherwise, virtually any commercial activity involving substances which are dangerous in the abstract automatically would

---

190. DOBBS, *supra* note 188, § 348, at 942.

191. (1868) 3 L.R.E. & I. App. 330 (H.L.). In *Rylands*, defendant was strictly liable 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 188, § 347, at 952.

192. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

193. DOBBS, *supra* note 188, § 347, at 953. The *Restatement (Second)* developed a six-factor test to determine whether something was an abnormally dangerous activity: (a) a high degree of risk of some harm, (b) a likelihood that the harm will be great, (c) an inability to eliminate the risk by reasonable care, (d) the extent to which the activity is not common, (e) the inappropriateness of the activity to the locale, and (f) the extent to which its value is outweighed by its dangers. RESTATEMENT (SECOND) OF TORTS § 520 (1977). This approach was criticized for resulting in no real standard. *See* KEETON ET AL., *supra* note 118, at 554–56; Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 616 n.16 (1998); *see also* William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1710 n.22 (1992).

194. 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.” *Id.* § 519.

195. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 (Proposed Final Draft No. 1, 2005).

196. *See, e.g., Harper v. Regency Dev. Co.*, 399 So. 2d 248, 252 (Ala. 1981); *Lobozzo v. Adam Eidemiller, Inc.*, 263 A.2d 432, 434 n.2 (Pa. 1970).

197. *See, e.g., Harper*, 399 So. 2d at 250; *Lobozzo*, 263 A.2d at 435.

198. *See, e.g., Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991).

199. *See, e.g., Smith v. Lockheed Propulsion Co.*, 56 Cal. Rptr. 128, 137 (Ct. App. 1967); *Berg v. Reaction Motors Div.*, 181 A.2d 487, 494 (N.J. 1962).

200. *See, e.g., Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975).

be deemed as abnormally dangerous. This result would be intolerable.”<sup>201</sup> Courts also have rejected attempts to include more activities as abnormally dangerous, rejecting claims involving handguns,<sup>202</sup> sport utility vehicles,<sup>203</sup> and driving while intoxicated.<sup>204</sup> Courts have instead relied on negligence and products-liability law to deter those risks, allowing liability only where a standard of care was violated.<sup>205</sup> Otherwise, there would be no fair notice that an activity or product could lead to liability.<sup>206</sup>

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

Allowing the government to base a lawsuit on a product’s external risks would 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 when they refused to do so for private plaintiffs.<sup>207</sup> As Part III will discuss, the resulting litigation would be out of step with traditional liability law and would invade regulatory oversight of product innovation.

201. *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 465 (R.I. 1996).

202. 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, 143–45 (2001); Andrew O. 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.”).

203. See Kevin Case, *Tanks in the Streets: SUVs, Design Defects, and Ultrahazardous Strict Liability*, 81 CHI.-KENT L. REV. 149, 177, 191–96 (2006).

204. See *Goodwin v. Reilley*, 221 Cal. Rptr. 374, 377 (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.”).

205. 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.”).

206. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 47 (1991) (O’Connor, J., dissenting) (stating in a punitive damages case that the vagueness doctrine applies to court-made law, such as tort liability).

207. See *In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007) (“[T]he 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, although legal when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers.”).

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

The fundamental change externalization-of-risk-based 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.<sup>208</sup>

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: "[T]he underlying cause of the nuisance is the manufacturing activity. . . . [T]he chain of causation begins at manufacture, and ends with the existence of the public nuisance."<sup>209</sup> The court also ruled out superseding causes, including landlord misconduct, stating that the cause was the foreseeable and natural deterioration of the product.<sup>210</sup> 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.<sup>211</sup> These efforts have appropriately failed. In 2007 and again in 2009, draft provisions were penciled into federal legislation that would have allowed for causation in these suits to be based on "statistical or epidemiological" evidence, but the troublesome provisions were stripped before the bills were considered.<sup>212</sup>

As the supreme courts of Rhode Island, New Jersey, Missouri, and Illinois have stated, causation cannot be generalized just because the government is suing.<sup>213</sup> Proving actual causation is essential to all liability, regardless of the theory used. Dan B. Dobbs in *The Law of Torts* wrote, "proximate cause limitations are

---

208. See *State v. Lead Indus. Ass'n.*, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS 32, at \*24-25 (Feb. 26, 2007).

209. *Id.* at \*26, \*31.

210. See *id.* at \*49-54.

211. See Phil Goldberg, *Will Proposed Changes to Medicare Law Inspire New Wave of Health Care-Related Tort Suits?*, 23 LEGAL BACKGROUNDER 1 (2008).

212. See *id.* at 2; see also PHIL GOLDBERG, KUDOS TO CONGRESS FOR SAYING "NO" TO RENEWED ATTEMPTS TO TURN MSP INTO NEW VEHICLES FOR LITIGATION ABUSE (BNA's Medicare Rep. 2009).

213. See, e.g., *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1127 (Ill. 2004) (stating that an "element of the public nuisance claim that must be present . . . is 'resulting injury,' or, more precisely, proximate cause").

fundamental and can apply in any kind of case in which damages must be proven.”<sup>214</sup> 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.”<sup>215</sup> 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 each defendant is in a better position to know the course of harm.<sup>216</sup> 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 have also 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.<sup>217</sup> It argued that it “incurred costs and has suffered harms due to lead pigment, and that many of those harms will go uncompensated.”<sup>218</sup> The City of St. Louis based its lead-paint lawsuit on a similar premise.<sup>219</sup> 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.<sup>220</sup> The decision to spend taxpayer funds on a health or safety issue does not 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

---

214. DOBBS, *supra* note 188, § 180, at 443 n.2.

215. FOWLER V. HARPER et al., 4 HARPER, JAMES AND GRAY ON TORTS § 20.2 (3d ed. 2006).

216. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245–46 (Mo. 1984).

217. *State v. Lead Indus. Ass’n.*, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS 32, at \*175 (Feb. 26, 2007) (“where an element of public nuisance is that the State has suffered harms”).

218. *Id.* at \*172.

219. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007).

220. See *id.* at 116 (“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 the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties.”).

litigation to solve. For example, governments spend millions of dollars related to the enforcement, treatment, and health effects of alcoholic beverages.<sup>221</sup> 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 to reimburse governments for funding mental-health programs for prescription-drug abusers, makers of bottles 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 a product's use or misuse does not justify changing common law liability just because a defendant or its products violate a government attorney's personal moral judgment that a certain activity, such as smoking or drinking, should be condemned. Most recently, a cottage industry of litigation over global warming has developed, which *Business Week* called "an ambitious legal war on oil, electric power, auto, and other companies."<sup>222</sup> 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.<sup>223</sup>

Connecticut Attorney General Richard Blumenthal brought a federal public nuisance action against six electric power companies for their operation of fossil-fuel-fired power plants. While this action is not a product-based case such as those discussed throughout this Article, his and others' comments are instructive about the policy-orientation of the claims:

[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

---

221. See CITY OF ST. LOUIS, MISSOURI FISCAL YEAR 2007 ANNUAL OPERATING PLAN 159 (June 16, 2006) (noting a line item for \$350,000 for alcohol-related activities).

222. Carey & Woellert, *supra* note 174, at 34; see also ROBERT MELTZ, CONG. RESEARCH SERV. REP. FOR CONG., CLIMATE CHANGE LITIG.: A GROWING PHENOMENON 1 (2008) ("Roughly two dozen cases pursuing multiple legal theories are now pending."), available at [http://www.elaw.org/system/files/CRS\\_4\\_7\\_08.pdf](http://www.elaw.org/system/files/CRS_4_7_08.pdf).

223. See MELTZ, *supra* note 222, at 33 ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that while making only a small contribution to mitigating climate change, may prod the national government to act.").

coming from the federal government. . . . [We were] brainstorming about what could be done.<sup>224</sup>

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. . . . [I]t's a shame that we're here, here we are trying to sue [companies] . . . because the federal government is being inactive.<sup>225</sup>

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, . . . [s]o the courts, for better or worse, are taking the lead.<sup>226</sup>

It has become clear that these suits are not about enforcing laws or seeking recompense from wrongdoers, but about changing "the way the industry does business. . . . We want them to do the things necessary to reduce their emissions by about 3% a year."<sup>227</sup> The action was initially dismissed on political grounds because "[t]he scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation."<sup>228</sup> Companies meeting the arbitrary policy might be exonerated, but those falling short, even by a little, might still face the lawsuits.<sup>229</sup> The Second Circuit reinstated the case, saying that the political question doctrine did not forbid the court from hearing the case.<sup>230</sup>

---

224. *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, *supra* note 55, at 339. General Blumenthal led the first joint climate-change action. *See Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

225. *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, *supra* note 55, at 342–43.

226. Carey & Woellert, *supra* note 174, at 34.

227. *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, *supra* note 55, at 340.

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

229. 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,"* 23 LEGAL BACKGROUNDER 1, 3 (2008).

230. *Connecticut v. Am. Elec. Power Co.*, Nos. 05-5104-cv, 05-5119-cv, 2009 WL 2996729 (2d Cir. Sept. 21, 2009). Within a few weeks of this decision, there were two developments in private cases brought under similar theories. The Fifth Circuit echoed *American Electric Power Co.* in a case brought by private victims of Hurricane Katrina against U.S. energy, fossil-fuel, and chemical industries. *See Comer v. Murphy Oil USA*, No. 07-60756, 2009 WL 3321493, at \*1 (5th Cir. Oct. 16, 2009). The *Comer* court set a low bar for when such claims

California Attorney General William Lockyer filed a similar suit against automakers for contributing to global warming.<sup>231</sup> Unlike the Blumenthal case, this was a product-based public nuisance action. Attorney General Lockyer ultimately withdrew the case, but before he did so, the Michigan Attorney General filed a brief *against* the case because, he said, the issues “are fundamentally political questions that should be addressed by Congress and the executive branch, not the Courts.”<sup>232</sup> Said one newspaper editorial: “[The lawsuit] is akin to suing fishermen for depleting the ocean, even when they stick scrupulously to fishing quotas.”<sup>233</sup> Knowledgeable observers sympathetic to reducing global warming have rebuked both lawsuits.<sup>234</sup>

Courts should reject these lawsuits, just as they did thirty years ago when tried by private plaintiffs. As Dean John Wade explained in the 1970s, it would be impossible for manufacturers to police customers to ensure that products are not used or neglected in ways that cause injury:

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,

---

could proceed, namely where federal law does not preempt the claim and a plaintiff can “merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged.” *Id.* at \*7. By contrast, a district court in the Ninth Circuit rejected a nearly identical case filed by an Alaskan village for global-warming injuries, saying that courts do not have the “legal tools” to determine such complex policy issues and “reach a ruling that is ‘principled, rational, and based on reasoned distinctions.’” *Native Village of Kivalina v. ExxonMobil Corp.*, No. C 08-1138 SBA, 2009 WL 3326113, at \*6 (N.D. Cal. Sept. 30, 2009) (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)).

231. California *ex. rel.* *Lockyer v. Gen. Motors Corp.*, No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006), *dismissed*, 2007 WL 2726871 (2007) (ruling that “the claim presents a non-justiciable political question”).

232. Press Release, Michigan AG Urges Judge to Throw Out California Global Warming Suit (Jan. 20, 2007).

233. Editorial, *Cars as Global Warming’s Causes*, L.A. TIMES, Sept. 22, 2006, available at <http://www.latimes.com/news/opinion/la-ed-lockyer22sep22,0,5434065,print.story>. 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*, 549 U.S. 497, 504–06 (2007); *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 513–14 (9th Cir. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 300, 399 (D. Vt. 2007).

234. See Frank Harris, III, *The All-Purpose Culprit*, HARTFORD COURANT (Conn.), June 1, 2007, at A7; Ben Stein, *Suddenly, California Hates the Car*, N.Y. TIMES, Oct. 1, 2006, at 4.

[and] anyone cut by a knife could sue the maker.<sup>235</sup>

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.<sup>236</sup> 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 either unpopular defendants, such as tobacco manufacturers, or costly problems, such as reducing global warming.

*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 when 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 that are unavoidably unsafe, such as prescription medicines. 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 directions and warning," the product is not unreasonably dangerous and the manufacturer is not subject to liability.<sup>237</sup> By contrast, risk-externalization theory would subject

---

235. See Wade, *supra* note 12, at 828; see also *Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 719 (R.I. 1999) ("A component part supplier . . . should not be required to act as insurer for any and all accidents that may arise after that component part leaves the supplier's hands."); *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 782 (R.I. 1988) (manufacturers cannot be "insurers of their products").

236. See, e.g., *Nugent v. Utica Cutlery Co.*, 636 S.W.2d 805, 811–12 (Tex. App. 1982).

237. 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

the manufacturer to liability whenever a patient suffers *any* side effect, even where the risk was accurately described on the label, the FDA forbade a stronger warning, the prescribing doctor explained the risk, and the patient gave his or her consent.<sup>238</sup> The cost of this liability would cause higher prices for medications, particularly ones powerful enough to deal with serious disease but that come with significant side effects.

Allowing externalization-of-risk-based suits in these and similar circumstances would significantly interfere with regulatory regimes that specifically permit these 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.<sup>239</sup> 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.<sup>240</sup> Notwithstanding the fact that MTBE has led to a reduction in smog,<sup>241</sup> gasoline manufacturers have faced years of externalization-

---

(2005).

238. The liability system safeguards patients from inadequate risks by requiring drug warnings to be approved by the FDA. See Victor E. Schwartz et al., *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.L. & PUB. 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) OF TORTS: PRODS. LIAB. § 6 cmt. b (1998).

239. See Protection of Environment, 40 C.F.R. §§ 50.1–50.15 (2008). 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 U.S. Environmental Protection Agency, National Ambient Air Quality Standards (NAAQS), <http://www.epa.gov/air/criteria.html> (last visited Sept. 15, 2009). The EPA also sets emission standards for other types of pollution. See, e.g., 40 C.F.R. § 63.1444 (setting emission standards for primary copper smelting); *id.* § 63.642 (setting emission standards for petroleum refineries); *id.* § 63.7690 (setting emission limits for iron and steel foundries).

240. 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 Aug. 3, 2009). 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.

241. See JAMES E. MCCARTHY & MARY TIEMANN, CONG. RESEARCH SERV. REP.

of-risk suits based on ground contamination more appropriately aimed at owners of the leaky tanks.<sup>242</sup>

In this way, 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 brain cancer due to "thermal" health effects of radiofrequency radiation.<sup>243</sup> Despite significant research, no causal relationship has been established between cell phones and cancer, and the Federal Communications Commission ("FCC") has declined to tighten related regulations.<sup>244</sup> Corresponding litigation has properly failed.<sup>245</sup> 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.<sup>246</sup> Yet there has been speculation that it could provide the "next tobacco" suits because of a theory that nanoparticles might cause harm when inhaled, absorbed into skin, or introduced into the environment.<sup>247</sup> GMOs result from combining rDNA of one organism with another so that a crop may be enhanced.<sup>248</sup> Drought- or pest-resistant GMOs

---

FOR CONG., MTBE IN GASOLINE: CLEAN AIR AND DRINKING WATER ISSUES (2006), available at [http://www.csa.com/discoveryguides/ern/00may/air-26.php?SID=65puni4r6ba422ju84t3tpaq37#\\_1\\_1](http://www.csa.com/discoveryguides/ern/00may/air-26.php?SID=65puni4r6ba422ju84t3tpaq37#_1_1) ("[MTBE] is credited with producing marked reductions in emissions in carbon monoxide emissions . . . and the volatile organic compounds that react with other pollutants to produce smog.").

242. See, e.g., *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 328 (S.D.N.Y. 2002).

243. Peter W. French et al., *Mobile Phones, Heat Shock Proteins and Cancer*, 67 DIFFERENTIATION 93, 93 (2000).

244. See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 12 F.C.C.R. 13494, 13505, ¶ 31 (1997); Sara Hoffman Jurand, *Lawsuits Call for More Information on Dangers of Cell Phone Radiation*, TRIAL, July 2005, at 12, 13. 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).

245. See *EMR Network v. FCC*, 391 F.3d 269, 271–72 (D.C. Cir. 2004); *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 559 (D. Md. 2004).

246. 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, 401–03 (2007).

247. See Mandel, *supra* note 246, at 1340–44; see also Barnaby Feder, *Study Raises Concerns About Carbon Particles*, N.Y. TIMES, Mar. 29, 2004, at C5 (discussing potential toxicity and cancer-causing issues related to a material in nanotechnology); Rick Weiss, *Nanoparticles Toxic in Aquatic Habitat, Study Finds*, WASH. POST, Mar. 29, 2004, at A2; First International Symposium on Occupational Health Implications of Nanomaterials, *Nanomaterial—A Risk of Health At Work?* § 3.2 (October 12–14, 2004).

248. See Kristopher A. Isham, *Caveat Venditor: Products Liability and Genetically Modified Foods*, 2 J. FOOD L. & POLY 85, 89 (2006); Matthew Rich,

could lead to sustainable, affordable world food supplies.<sup>249</sup> But such manufacturers are already being targeted for litigation over unknown risks.<sup>250</sup> Both technologies have been pursued with significant congressional, regulatory, and international oversight.<sup>251</sup>

In these situations, legislators and regulators can react in real time when external risks become known.<sup>252</sup> 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.

#### 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.<sup>253</sup> 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

---

*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).

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

250. See *id.* at 425.

251. See Plant Protection Act, 7 U.S.C. §§ 135–136(y), 2321–2583, 7701–7772 (2006); Kenneth W. Abbott et al., *A Framework Convention for Nanotechnology?*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10507 (2008); Linda K. Breggin & Leslie Carothers, *Governing Uncertainty: The Nanotechnology, Environmental, Health, and Safety Challenge*, 31 COLUM. J. ENVTL. L. 286–87 (2006); Comment, *Regulation of Genetically Engineered Foods Under the Federal Food, Drug, and Cosmetic Act*, 33 AM. U. L. REV. 899, 900–01 (1984).

252. 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 & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 29 (1889).

253. See Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61 (2005).

should continue to be, the “paramount basis of liability.”<sup>254</sup> Plaintiffs may recover for injuries by showing that a product was defective without having to prove that a manufacturer was negligent in putting the product into the stream of commerce.<sup>255</sup> This approach facilitates recovery and provides companies with an incentive to exercise due care in making products.<sup>256</sup>

Externalization-of-risk actions, regardless of the legal theory used, do not relate to the manufacture and sale of products, but to consumer conduct and accepted product risks.<sup>257</sup> 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 the personal beliefs and policy agendas of the government attorneys, not wrongdoing. If society decides to subject people to such liability, the elected legislatures and the regulators they empower should make those decisions.

---

254. SCHWARTZ ET AL., *supra* note 189, at 718; *see also* Henderson & Twerski, *supra* note 86, at 1267.

255. *See* Wade, *supra* note 12, at 825.

256. *Id.* at 826.

257. *See* Billings v. N. Kan. City Bridge & R.R., 93 S.W.2d 944, 946–47 (Mo. 1936) (“If 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., 192 S.W. 1022, 1022–25 (Mo. 1917) (holding that a manufacturer’s “valid sale to a legitimate purchaser” cannot be equated with unreasonable conduct for causing a public-nuisance injury).