RECOUPING COSTS FOR REPAIRING "BROKEN WINDOWS": THE USE OF PUBLIC NUISANCE BY CITIES TO HOLD BANKS LIABLE FOR THE COSTS OF MASS FORECLOSURES

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INTRODUCTION

"[I]f a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in run-down ones."[1] Underlying the *Broken Windows Theory*, stated above, is the premise that community controls and communal barriers—"the sense of mutual regard and the obligations of civility"[2]—breakdown when behavior and actions within a community signal that no one cares.[3] In 1969, Stanford psychologist, Philip Zimbardo, conducted an experiment illustrating the negative effects of untended property on a community.[4] Zimbardo arranged to have two identical cars without license plates and with their hoods up left on a street in the Bronx, New York and on a street in Palo Alto, California.[5] Within ten minutes the car parked on the street in the Bronx was targeted by vandals.[6] "The first to arrive were a family—father, mother and young son—who removed the radiator and battery. Within twenty-four hours, virtually everything of value had been removed. Then random destruction began—windows smashed, parts torn off, upholstery ripped."[7] The car in Palo Alto remained untouched for more than a week.[8] Zimbardo

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[1] James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, March 1982, at 29, *available at* http://www.theatlantic.com/doc/198203/broken-windows.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

then destroyed part of the car with a sledgehammer.[9] "Within a few hours, the car had been turned upside down and utterly destroyed."[10]

Abandoned and uncared for property, as Zimbardo's experiment illustrates, precipitates a downward spiral in the quality of life of a community[11]: Homes are abandoned and boarded-up, yards are neglected and weeds grow up, litter accumulates, families move out, inebriates sleep on sidewalks, gangs gather on street corners, fights occur, muggings take place, cars are stripped, prostitutes solicit customers, drugs change hands, and crime flourishes. Recently, the interactions of the overly-eager, yet severely unqualified borrower and the nation's leading banks and financial institutions have increased the number of abandoned and untended to properties in communities across the country. Over a number of years, banks and other lenders, desiring unbounded profits, routinely made unconscionable mortgage loans to borrowers who lacked any realistic means to pay. Inevitably, a large number of these borrowers defaulted resulting in a wave of mass foreclosures.

While the consequences of foreclosure for the individual borrower are heart-wrenching, the impact on the community in the aggregate is devastating. Take for

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* ("[A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. . . . A stable neighborhood of families who care for their homes. . . can change, in a few years or even a few months, to an inhospitable and frightening jungle.).

example one block in Portland, Oregon: Judy Myer, who lived on Southeast Main Street in Portland Oregon, stopped taking her prescription pills and pawned her wedding ring in an unsuccessful attempt to avoid foreclosure on her home of eighteen years.[12] Her son, Steve, who lived on the same street, was also unsuccessful in saving his home when he fell behind on his second mortgage, which he had taken out to pay for his seven year old daughter's heart surgery.[13] Across the street, Judy's neighbor, Ron, received notice to vacate his mother's home one month after she died. Ron, age 51, was too young to assume his mother's reversible mortgage and could not refinance the loan because he was permanently disabled.[14] In total, fourteen homeowners on the block were hit with foreclosure filings,[15] leaving an entire block virtually untended to.

To counteract the destructive effects of untended property created by mass foreclosures, cities have mobilized. Specifically, cities have increased fire and police expenditures to prevent abandoned homes from becoming possible fire hazards and targets for criminals and looters.[16] Additionally, cities have expended money to

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[12] Steve Law, *Mortgage Losses Mounting: More Area Homeowners at Risk as Foreclosure Proceedings Double*, PORTLAND TRIBUNE, Oct. 16, 2008, updated Oct. 20, 2008.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Complaint at 2-3, City of Cleveland v. Deutsche Bank Trust Co., No. 08-cv-00139 (N.D. Ohio Jan. 16,2008).

demolish foreclosed homes.[17] To implement these measures cities are forced to draw on dwindling funds. Foreclosures have devalued homes directly affected, as well as, surrounding properties, reducing the tax base and revenue available to cities.[18]

Seeking to recoup the funds spent to repair their communities' "broken windows," some cities have brought suits against the major banks and financial institutions. Currently four cities, Cleveland, Ohio, Buffalo, New York, Baltimore, Maryland and Minneapolis, Minnesota, have filed such suits.[19] Cleveland's suit, the exclusive focus of this Note, seeks to hold twenty-one of Wall Street's biggest banks and lenders, including Merrill Lynch, Bank of America, and Morgan Stanley, accountable for predatory lending practices using the theory of public nuisance.[20] Similarly, Buffalo is using public nuisance law, as well as New York State's property maintenance code, to recoup costs

[17] *Id.*

[18] *Id.*

[19] Julie Kay, *Empty Homes Spur Cities' Suits*, NATIONAL LAW JOURNAL, May 5, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1202421240174 ("While the details of the suits differ, they all allege that cities are losing tax revenue from foreclosed and neighboring homes whose values are reduced, and from having to keep the abandoned houses free from rats, vagrants and disrepair—and from potentially turning into crack houses.").

[20] *Id.*

from lenders for demolishing homes that were foreclosed upon and then abandoned.[21] Utilizing different strategies, Minneapolis filed suit on consumer fraud grounds,[22] and Baltimore alleged violations of the federal Fair Housing Act.[23]

The amorphous concept of "nuisance," in particular "public nuisance," has made it ripe for use by entrepreneurial lawyers in creative ways. At the convenience and whim of the lawyer and court many wrongs have been indifferently termed "public nuisance": the keeping of diseased animals, the storage of explosive, the practice of medicine by one not qualified, houses of prostitution, public profanity, bad odors, and the obstruction of a highway or navigable stream.[24] Today, creative lawyers are stretching and manipulating the concept of public nuisance to reapportion liability for macro-social problems between cities and private actors. Specifically, attempts have been made to use public nuisance

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[21] *Id.* Specifically, Buffalo is suing thirty-nine lenders, including Citibank, Chase Manhattan and Bank of America, to recover $16,000 for each of fifty-seven homes it was forced to demolish when the banks foreclosed upon them and then abandoned them. *Id.*

[22] *Id.* Minneapolis filed two lawsuits targeting a Minnesota developer, TJ Waconia, which converted 140 homes into rental units. *Id.* The suits allege that Waconia "engaged in a complex and fraudulent residential real estate scheme to illegally drive up housing prices in north Minneapolis and then leave the area blighted with foreclosures." *Id.*

[23] *Id.* The Baltimore suit targets one lender, Wells Fargo, and alleges that the lender discriminated against minority borrowers by charging them a higher interest rate resulting in a greater rate of foreclosure among minorities as compared to whites. *Id.*

[24] PROSSER AND KEETON ON THE LAW OF TORTS 643-44 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984).

laws to impose liability on lead pigment manufacturers for childhood lead poisoning,[25] handgun manufactures for crime,[26] car manufactures for global warming,[27] the tobacco industry for tobacco-related diseases[28] and, most recently, banks and financial institutions for mass foreclosures.

The success or failure of Cleveland's public nuisance claim against the banks and financial institutions will largely depend on the eagerness of the court to involve itself in the national credit crisis debate and the willingness of the court to stretch the concept of public nuisance to do so. Given, however, the past reluctance of most courts to expand the concept of public nuisance to shift liability for the costs of remedying macro-social

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[25] *See e.g.*, State of Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428 (R.I. 2008); *In re* Lead Paint Litigation, 924 A.2d 484 (N.J. 2007).

[26] *See e.g.*, Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A., Corp., 273 F.3d 536 (3d Cir. 2001); City of Cincinnati v. Beretta U.S.A., Corp., 768 N.E.2d 1136 (Ohio 2002); Ganim v. Smith and Wesson Corp., 780 A.2d 98 (Conn. 2001); City of Boston v. Smith & Wesson Corp., 2000 WL 1473568 (Mass. Super. Ct. 2000).

[27] *See e.g.*, California v. General Motors Corp., 2007 WL 2726871 (N.D. Cal. 2007) (seeking damages from various automobile manufactures for creating and contributing to the alleged public nuisance of global warming); Connecticut v. American Electric Power Co., 406 F.Supp.2d 265 (S.D.N.Y 2005) (seeking abatement of greenhouse gas emissions by electric utilities that allegedly contributed to global warming).

[28] *See e.g.*, City of New York v. A.E. Sales LLC, 2005 WL 3782442 (S.D.N.Y. 2005) (alleging that shipping cigarettes sold over the Internet to person in New York City created a public nuisance).

problems from cities to private actors, the chance of success is minimal. Part I of this Note will define public nuisance and describe the elements comprising the cause of action. Part II will explore the largely unsuccessful attempts of cities and states to use public nuisance to hold private parties liable for macro-social problems, specifically childhood lead poisoning and handgun related crime. Part III will evaluate the chances of success in holding banks and financial institutions liable under public nuisance theory for damages caused by mass foreclosures, concluding that success is unlikely.

I. Public Nuisance Defined

The Restatement (Second) of Torts § 821B defines a public nuisance as "an unreasonable interference with a right common to the general public."[29] Desiring to give this term greater precision of meaning and predictability of application, courts have distilled four elements essential to establishing public nuisance: 1) an unreasonable interference; 2) with a right common to the general public; 3) by a person or people with control over the instrumentality alleged to have created the nuisance; 4) that caused the public nuisance.[30]

A. Unreasonable Interference

Whether an interference with a public right is unreasonable depends upon the activity in question and the magnitude of intrusion.[31] Analogous to the private nuisance analysis, liability for public nuisance requires that the interference-creating activity be intentional, negligent or reckless, or that for which strict liability attaches based on

[29] Restatement (Second) Torts § 821B (1979)

[30] State of Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 446-47 (R.I. 2008).

[31] *Id.* at 447.

participation in an abnormally dangerous activity.[32] Liability is not normally imposed for pure accidental interference.[33]

Moreover, the interference must rise to the level of unreasonableness. Subsection two of the Restatement (Second) provides three non-exclusive circumstances in which an interference may warrant a finding of unreasonableness: 1) conduct involving "a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience"; 2) conduct that is "proscribed by statute, ordinance or administrative regulation; or 3) conduct that is "of a continuing nature or has produced a permanent or long-lasting effect and, to the actor's knowledge, has a substantial detrimental effect upon the public right."[34]

Additionally, to determine whether the interference is unreasonable, a court may undertake a traditional harm verse social utility analysis, balancing the nature and gravity of the harm against the utility of the conduct and the burden and cost of preventing the harm.[35] If the harm caused by the defendant's conduct outweighs the social utility of the conduct, the interference with the public right will be deemed unreasonable. If, on the other hand, the social utility of the conduct is high and the harm is minimal, the conduct will not be deemed unreasonable. The balancing is intended to accommodate socially useful activities that, while harmful, are necessary in modern society.[36]

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[32] Restatement (Second) Torts § 821B, cmt. e (1979)

[33] *Id.*

[34] *Id.*

[35] Edward J. Kionka, TORTS IN A NUTSHELL 321 (4th ed. 2005).

[36] *Id.*

B. Public Right

In addition to being unreasonable, the interference must also "affect an interest common to the general public, rather than peculiar to one individual or several."[37] It is not enough that the conduct merely interfere with the use and enjoyment of land by a large number of individuals; it must interfere with the collective rights common to all members of the general public.[38] The Restatement (Second) provides the following example to illustrate this distinction: If a defendant pollutes a stream and the pollution deprives fifty to one hundred downstream landowners of the use of the water for purposes connected with their land the interference has not affected a public right and is therefore not a public nuisance.[39] If, however, the pollution interferes with the public's use of beaches along the stream's shoreline or kills fish in the stream, the interference has deprived members of the community of public rights and therefore is a public nuisance.[40]

To constitute an interference with a public right, it is not, however, necessary that the entire community be affected by the interference, so long as the conduct injures the citizens generally who are so circumstanced as to come into contact with the interference.[41] For example, the thereat of communicating small pox to a single person, may be enough to constitute a public nuisance because of the possibility of initiating a

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[37] PROSSER AND KEETON ON THE LAW OF TORTS 645 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984).

[38] Restatement (Second) Torts § 821B, cmt. e (1979).

[39] *Id.* at cmt. g

[40] *Id.*

[41] *Id.*

smallpox epidemic.[42] The test, therefore, is not the number of persons annoyed by the interference, but the possibility of annoyance to the public by the invasion of its rights. [43]

C. Control over the Instrumentality

Identifying the party exercising control over the instrumentality unreasonably interfering with the public right—the party responsible for the public nuisance—is most often a straightforward exercise. For example, in the situation described above involving the pollution of a stream, the upstream power plant or waste disposal facility discharging waste into the stream clearly exercise the requisite control the instrumentality, the waste, alleged to have unreasonably interfered with the public right to use the beach or fish. The control analysis, however, becomes complicated when applied to macro-social problems such as, childhood lead poisoning and handgun-related crime.

When applying public nuisance to macro-social problems, the instrumentality at issue is, most often, a product placed in the stream of commerce by a manufacturer that ultimately comes to rest in the hands of another. Thus, in attempting to impose liability on the manufacturer for the alleged public nuisance created by the product, the question is whether the manufacturer retains the requisite control over the instrumentality, the product, after it has come under the control of another. The courts are split over whether the manufacturer retains sufficient control to impose liability.

Some courts that have addressed the issue hold that the manufacturer does not retain the requisite control over the instrumentality alleged to have created the nuisance

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[42] *Id.*

[43] Higgens v. Connecticut Light and Power Co. 30 A.2d 388, 391 (Conn. 1943) (quoting Nolan v. New Britain, 38 A. 703, 706 (Conn. 1897)).

because it does not control the product at the time it causes damages.[44] Specifically, the manufacturer does not control the enterprise in which the product is subsequently used and therefore does not have sufficient control over the product when it causes the public nuisance. Without control of the product at the time the damage occurs the manufacturer cannot abate the nuisance, the principal remedy available for public nuisance.[45] Thus, a manufacturer who makes a product that is then carried by the currents of commerce does not retain control over the product and thus is not liable for the nuisance created.[46]

Conversely, other courts hold that the manufacturer's lack of control over the product at the exact moment the harm occurs is not fatal to the public nuisance claim.[47] A product manufacturer controls the creation and supply of the product that later creates the public nuisance.[48] Any party who participates in the creation or maintenance of the instrumentality thus retains sufficient control over the instrumentality and can be held liable for the nuisance such product creates.[49]

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[44] State of Rhode Island v. Lead Industries Ass., Inc., 951 A.2d 428, 449 (R.I. 2008).

[45] *Id.* (concluding that a defendant who does not have control over the instrumentality, no longer has the power to abate the nuisance).

[46] *Id.* at 450.

[47] City of Cincinnati v. Beretta U.S.A., Corp., 768 N.E.2d 1136, 1143 (Ohio 2002).

[48] *Id.* at 1143.

[49] City of Boston v. Smith & Wesson Corp., 2000 WL 1473568, *14 (Mass. Super. Ct. 2000)

D. Causation

The party alleging the existence of a public nuisance must demonstrate that the conduct complained of is both the cause-in-fact and the proximate cause of the unreasonable interference with the public right.[50] Similar to the control analysis, the normally straightforward cause-in-fact determination becomes convoluted when public nuisance is applied to remedy macro-social problems. Multiple causative antecedents exist in the context of macro-social harms. For example, in the case of lead poisoning, not only is the existence of lead in the paint a cause of the harm, the deteriorating conditions in buildings, such as flaking paint, which allow children to ingest the lead based paint also, and more immediately, causes harm. Thus, in cases where multiple factors contribute to cause the harm, the cause-in-fact test relaxes and the focus is on whether a party's conduct was a substantial factor in bringing about the harm.[51]

In addition to proving that the conduct at issue is the cause-in-fact of the public nuisance, a party must also demonstrate that the conduct proximately caused the harm. As a matter of policy, the courts limit legal responsibility to those causes which are so closely connected with the result and of such significance that imposing liability is justified.[52] The proximate cause inquiry involves an assessment of foreseeability, in which the courts ask whether the harm is of a general type that a reasonable person would see as a likely result of the conduct undertaken.[53] In the current application of public

[50] State of Rhode Island v. Lead Industries Ass., Inc., 951 A.2d 428, 452 (R.I. 2008).

[51] Edward J. Kionka, TORTS IN A NUTSHELL 33 (4th ed. 2005).

[52] *Rhode Island*, 951 A.2d at 451 (internal quotation marks omitted) (citation omitted).

[53] *Id.* (internal quotation marks omitted) (citation omitted).

nuisance to remedy macro-social problems, the focus of the proximate cause inquiry is on whether liability for the nuisance should be predicated on the prior cause which furnishes the occasion for an injury resulting from an intervening cause or whether, for policy reasons, the intervening cause should be deemed the superseding cause and liability cut off. The resolution depends on the facts of the particular case.

E. Relation to Land

In addition to the elements discussed above—unreasonable interference, existence of a public right, control over the instrumentality, causation—courts are split as to whether the existence of a public nuisance also requires that the interference and resulting harm be linked to a specific location. Some courts mandate that the interference-causing conduct be tied to the party's own property to be liable under public nuisance.[54] Other courts, however, do not require that public nuisance actions be connected to real property, finding that public nuisance is not so narrow that a claim will fail unless it arises from activities on or related to property.[55]

II. APPLICATION OF PUBLIC NUISANCE TO MACRO-SOCIAL PROBLEMS

Public nuisance has emerged as a weapon of choice of cities and states looking to recoup the costs of remedying large-scale societal problems. To date, attempts have been made to use the concept to impose liability on lead pigment manufacturers for childhood lead poisoning, automobile manufacturers for global warming, firearm manufacturers for

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[54] *Id.* at 452.

[55] City of Cincinnati v. Beretta U.S.A., Corp., 768 N.E.2d 1136, 1142 (Ohio 2002); City of Boston v. Smith & Wesson Corp., 2000 WL 1473568, *14 (Mass. Super. Ct. 2000).

handgun-related crime and tobacco companies for tobacco-related disease.[56] Interestingly, despite its wide-scale use, the public nuisance theory has almost always failed in the courts.[57] The theory's application to childhood lead poisoning and handgun-related crime cases is illustrative.

A. Childhood Lead Poisoning

Lead, a naturally occurring metal, has been utilized over the years in a variety of goods, including paint, plastics and batteries.[58] Juxtaposed against its utility, however, are the particularly adverse health effects lead poses to the development and behavior of children.[59] In an effort to hold lead paint manufacturers accountable for these ills, states have brought suit against them seeking to impose liability under public nuisance.

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[56] Donna L. Wilson, *Public Nuisance: A New Battleground for Policyholders and Insurers: The Current Wave of Public Nuisance-based Tort Litigation is Focused on Two Areas, Lead Paint and Global Warming*, RISK AND INSURANCE, Apr. 1, 2008, *available at* http://www.findarticles.com/p/articles/mi_m0BJK/is_4_19/ai_n25337698.

[57] *Id.* The courts are wary of expanding the breadth of public nuisance law, worrying that "the outpouring of an unlimited number of theories of public claims for courts to resolve and perhaps impose and enforce—some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative[,]" will expand the common-law public nuisance tort beyond recognition. City of New York v. A.E. Sales LLC, 2005 WL 3782442, *3(S.D.N.Y. 2005) (internal quotation marks omitted).

[58] *In re* Lead Paint Litigation, 924 A.2d 484, 489 (N.J. 2007).

[59] State of Rhode Island v. Lead Industries Ass., Inc., 951 A.2d 428, 437 (R.I. 2008).

In 1999, the state Attorney General of Rhode Island, on behalf of the State of Rhode Island, filed suit against eight former lead pigment manufacturers and the Lead Industries Association, a national trade association of lead producers.[60] In its complaint, the state alleged that the cumulative presence of lead pigments in paints in or on buildings throughout the state of Rhode Island constituted a public nuisance.[61] Specifically, the state asserted that the manufacturers, with knowledge or constructive knowledge that lead was hazardous to human health, made, promoted, distributed and sold inadequately tested lead pigment for use in residential paint, failed to warn Rhode Island residents of the hazardous nature of lead, and concealed the hazards from the public or misrepresented that they were safe thereby creating a public nuisance.[62] The state sought compensatory and punitive damages and an order requiring the manufacturers to abate lead pigment in all Rhode Island buildings accessible to children and to fund educational and lead-poisoning prevention programs.[63]

The manufacturers promptly moved to dismiss the claim arguing that the state failed to establish that the manufacturers' conduct interfered with a public right and that the manufacturers' exercised sufficient control over the instrumentality, the paint, at the time it allegedly caused harm to the children of Rhode Island.[64] The trial judge disagreed

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[60] *Rhode Island*, 951 A.2d at 440.

[61] *Id.* at 434.

[62] *Id.* at 440.

[63] *Id.*

[64] *Id.*

and denied the motion.[65] On the issue of control, the trial judge held that the manufacturers' participation in the creation of the nuisance potentially subjected them to liability whether or not they currently controlled the lead-poisoned property.[66]

Later, the manufacturers moved for summary judgment arguing that the state could not prove that the manufacturers in fact caused the problem; specifically that the state could not identify any specific manufacturer whose lead pigment was used in or on any building in the state.[67] The trial judge again disagreed and denied the motion.[68] Finding that the specific identification of a product to a manufacturer is not a necessary element in a public nuisance suit, the trial judge held that the state could successfully prove causation if it could show that each manufacturer engaged in activities that were a substantial factor in bringing about the alleged public nuisance and that the interference with the public right was proximately caused by the manufacturers' conduct.[69]

Having successfully navigated through pre-trial roadblocks—a victory in and of itself—the state's public nuisance claim proceeded to trial before a jury. After a lengthy trial, the jury returned a verdict in favor of the state.[70] The jury found that the cumulative presence of lead pigment in paints on Rhode Island properties constituted a public nuisance and that the manufacturers were liable for causing or substantially contributing

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[65] *Id.*

[66] *Id.*

[67] *Id.* at 441.

[68] *Id.*

[69] *Id.* (internal quotation marks omitted) (citation omitted).

[70] *Id.* at 442.

to the creation of the public nuisance. The jury further found that the manufacturers should be ordered to abate the public nuisance,[71] a cost estimated as high as $2.4 billion.[72]

The state's landmark public nuisance victory, however, was short-lived. On appeal, the Rhode Island Supreme Court, in *State of Rhode Island v. Lead Industries Ass.*,[73] reversed, concluding that "[h]owever grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm."[74] Examining the facts in the light most favorable to the state, the court held that the state had not and could not allege any set of facts in support of its public nuisance claim that would establish that the manufacturers' production and marketing of lead pigment interfered with a right common to the general public or that the manufacturers controlled the lead pigment at the time it caused harm to children in the state.[75]

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[71] *Id.* at 442.

[72] Donna L. Wilson, *Public Nuisance: A New Battleground for Policyholders and Insurers: The Current Wave of Public Nuisance-based Tort Litigation is Focused on Two Areas, Lead Paint and Global Warming*, RISK AND INSURANCE, Apr. 1, 2008, *available at* http://www.findarticles.com/p/articles/mi_m0BJK/is_4_19/ai_n25337698.

[73] 951 A.2d 428 (R.I. 2008).

[74] *Rhode Island*, 951 A.2d at 435.

[75] *Id.* Finding a lack of the requisite control and no interference with a public right, the court concluded that the state had not stated a clam for public nuisance. The court did not reach the issue of whether the manufacturers' conduct was unreasonable or whether the manufacturers' activities in fact caused the injury to the children. *Id.* at 455.

Upon review, the Rhode Island Supreme Court concluded that the state's conception of the public right at issue—"the public's right to be free from the hazards of unabated lead"[76]—was not within the traditional understanding of that term in the law of public nuisance.[77] Drawing from the Restatement (Second) the court declared that a public right is "one common to all members of the general public."[78] In fleshing out the scope of the public right, the court reasoned that the term "is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way."[79] Despite the tragic nature of the child's illness, the right of an individual child not to be poisoned by lead paint, the court reasoned, is similar to non-public rights, such as the individual right to free from assault or fraud,[80] and not public rights, such as the freedom from obstruction of a public highway or pollution of a public stream.[81]

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[76] *Id.* at 453.

[77] *Id.*

[78] *Id.* at 448 (internal quotation marks omitted) (citation omitted).

[79] *Id.* at 453.

[80] Restatement (Second) Torts § 821B, cmt. g (1979). The potential injuries resulting from exposure to lead-based paint are individual in nature and do not affect the public at large. *Rhode Island*, 951 A.2d at 45. "While it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing." *Id.* at 448 (internal quotation marks omitted) (citations omitted).

[81] *Rhode Island*, 951 A.2d at 454. While a public nuisance is actionable when the interference occurs on private property, the interference must affect the rights of the

Finding the right to be free from hazards of unabated lead a public right, the court concluded, would be "antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended."[82]

On the issue of control, unlike the trial court, which held that the manufacturers' participation in the creation of the nuisance was enough to subject them to liability regardless of whether they currently controlled the instrumentality,[83] the Rhode Island Supreme Court held that for the alleged public nuisance to be actionable, the state would have had to assert both that the manufacturers produced and marketed the lead pigment and that they controlled the pigment at the time it caused injury to children in Rhode Island.[84] To justify requiring present control of the instrumentality, the court asserted that only the party in control of the instrumentality is in a position to abate the nuisance—the principal remedy for the harm caused by nuisance.[85] Applying this reasoning, the court concluded that a product manufacturer who makes and sells a product does not control the enterprise in which it is later used; specifically that the lead based paint manufacturer does not control the property to which its paint is applied.[86] Thus, lacking

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general public. *Id.* at 447-48. For example, a fire hazard on private land is an interference with a public right because of the danger of a conflagration. Restatement (Second) Torts § 821B, cmt. g (1979).

[82] *Id.* at 453.

[83] *Id.* at 440.

[84] *Id.* at 455.

[85] *Id.* at 449.

[86] *Id.* at 449-50.

the requisite control of the paint at the time it caused harm to the children of Rhode Island, the lead pigment manufacturers could not be held liable for public nuisance.

Considering facts virtually identical to those presented in the Rhode Island case,[87] the Supreme Court of New Jersey, in *In re Lead Paint Litigation*,[88] similarly concluded that lead pigment manufacturers could not be held liable under they theory of public nuisance. In reaching its decision, the court concluded: "[W]ere 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."[89]

The critical issue focused on by the court in reaching its conclusion was the issue of sufficient control.[90] The trial court initially dismissed the suit, pursuant to a motion to

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[87] Twenty-six municipalities and counties in New Jersey brought suit against manufacturers and distributors of lead paint alleging public nuisance. The municipalities and counties sought to recover the costs of detecting and removing lead paint from homes and buildings, of providing medical care to residents affected with lead poisoning, and of developing educational programs about the dangers of lead paint. In re Lead Paint Litigation, 924 A.2d 484, 487 (N.J. 2007).

[88] 924 A.2d 484 (N.J. 2007).

[89] *Id.* at 494.

[90] Unlike in the Rhode Island, the New Jersey State Legislature had enacted a statute, the *Lead Paint Act*, declaring that the "continuing presence of lead paint in homes qualifies as an interference with a common right sufficient to constitute a public nuisance for tort purposes." *Id.* at 501.

dismiss, finding, among over things, that the manufacturers' lack of control of the premises where the nuisance could be found was fatal to recovery.[91] The Appellate Division reversed.[92] In analyzing the parameters of the public nuisance claim, the Appellate Division held that the manufacturers may be liable for a public nuisance even if they do not control the instrumentality causing the nuisance or the property where the nuisance is found at the time the nuisance is created or exists.[93]

The New Jersey Supreme Court disagreed. Similar to the Rhode Island Supreme Court, the New Jersey Supreme Court held that the manufacturers' lack of control of the location of the nuisance foreclosed liability.[94] The court reasoned that the conduct giving rise to the public health crisis was the poor maintenance of premises where lead paint was found by the owners of those premises.[95] Thus, although the lead-based paint in its current deteriorated state interfered with public health, the conduct of the manufacturers in making and distributing the product, at the time they did, did not bear the necessary link to the current health crisis caused by deteriorating building conditions.[96] To find the

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[91] *Id.* at 488.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 499

[95] *Id.*

[96] *Id.* ("In public nuisance terms, then, were we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it.").

manufacturers nonetheless liable for public nuisance, the court concluded, would "separate conduct and location and thus eliminate entirely the concept of control of the nuisance."[97] Thus, the manufacturers' lack of control of the premises at the time the nuisance occurred was fatal to the state's public nuisance claim.

B. Handgun-Related Crime

A growing numbers of municipalities are bringing public nuisance suits against handgun manufacturers, distributors, trade associations and retailers to recover the costs associated with firearm violence, including increased expenses for police services, emergency services, health care and social services, reduced property values, loss of economic development and tax revenues due to lost productivity and deterioration of communities and families. The courts have split over whether these suits state a viable cause of action to survive a motion to dismiss.[98]

In *Ganim v. Smith and Wesson Corp.*,[99] the city of Bridgeport, Connecticut and its mayor brought suit against handgun manufacturers, trade associations, and retail gun sellers in public nuisance seeking to recover the costs associated with handguns suffered

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[97] *Id.*

[98] City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (providing that public nuisance suits against handgun manufacturers in the District Court for the Northern District of Ohio and the Superior Court of Massachusetts have survived motions to dismiss, while cases before the Third Circuit and the Supreme Court of Connecticut have been dismissed).

[99] 780 A.2d 98 (Conn. 2001).

by the city.[100] The city alleged that the handgun manufacturers, trade association and retail gun sellers unlawfully participated in and contributed to the illegal flow of handguns into the city, the natural consequence of which was to create a dangerous condition in the city, to injure the city's citizens and damage their property.[101] Specifically, the city argued that the retailers contributed to this harm by selling handguns to purchasers who they knew or had reason to know would illegally transfer the handguns to persons unauthorized to purchase them.[102] Similarly, the city argued that the manufacturers inflicted injury on the public health and safety by distributing handguns that they knew or should have known would be used in crimes without making a meaningful effort to impose distribution standards and by targeting their advertising to persons they knew or should have known would use the guns illegally.[103]

Moreover, the city asserted that the manufacturers and retailers unreasonably used land, including storefronts on city streets to market and sell handguns which they knew or should have known would end up in the illegal market.[104] Finally, the city alleged that the existence of the nuisance was a proximate cause of injuries and damages suffered by the city, specifically, that the flow and presence of illegal guns in the city increased costs associated with enforcing the law arming the police force, treating the victims of handgun

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[100] Ganim v. Smith and Wesson Corp., 780 A.2d 98, 101-02 (Conn. 2001).

[101] *Id.* at 113.

[102] *Id.*

[103] *Id.* at 113-14.

[104] *Id.* at 114-15.

crimes, implementing social service programs and improving the social and economic climate of the city.[105]

In evaluating the city's claim, the Connecticut Supreme Court concluded that the sheer number of steps in the chain of causation were too numerous to impose liability on gun manufacturers and retailers for the resulting harms.[106] The lengthy chain of causation connecting the conduct to the harm, as the court reasoned it, existed as follows: 1) the manufacturers lawfully sold handguns to distributions; 2) the distributors lawfully sold handguns to retailers; 3) the retailers either sold handguns to legitimate customers or illegally sold handguns to unauthorized buyers; 4) some guns entered the illegal market; 5) the buyers misused the guns causing injuries or purposefully used guns to commit crimes; and 6) the citizens of the city suffered harm and the city incurred costs in remedying those harms.[107] Thus, given the temporal distance between the actions of the manufacturers and retailers and the resulting harm, the manufactures and retailers were simply too far removed to be liable for the resulting harm.

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[105] *Id.* at 115.

[106] *Id.* at 132. While the Connecticut Supreme Court acknowledged that the definition of common law public nuisance was broad enough to include the city's allegations—recognizing that the harms alleged by the city were harms that injured its citizens who were so circumstanced as to come within the influence of that conduct—it concluded that the city lacked standing to sue because the harms were too remote. *Id*

[107] *Id.* at 123.

Similarly, in *Camden County Board of Chosen Freeholders v. Beretta U.S.A., Corp.*,[108] the Third Circuit held that Camden County, New Jersey failed to state a valid public nuisance claim against handgun manufacturers. In *Camden*, the county alleged that the manufacturers' conduct in manufacturing, marketing and distributing handguns endangered the public safety, health and peace of its citizens and imposed inordinate financial burdens on the county.[109] Specifically, the county argued that the handgun manufacturers knowingly put in place a distribution scheme that provided criminals and youths easy access to handguns.[110]

The Third Circuit refused to hold handgun manufacturers liable under the theory of public nuisance for the costs associated with handgun violence. Finding that the New Jersey courts have never allowed a public nuisance claim to proceed against a manufacturer of a lawful but defective product lawfully placed in the stream of commerce, the court concluded that "if defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity."[111]

Moreover, the Third Circuit held, even if public nuisance law were extended to embrace the manufacture of handguns, the county failed to allege that the handgun manufacturers exercised sufficient control over the source of the interference with the

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[108] 273 F.3d 536 (3d Cir. 2001).

[109] Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A., Corp., 273 F.3d 536, 538 (3d Cir. 2001).

[110] *Id.*

[111] *Id.*

public right to be liable under public nuisance.[112] The court rejected the county's argument that conduct that merely contributes to the source of the interference is sufficient.[113] While a handgun manufacturer can be required to bring its own conduct or activities at a particular physical site under control, its limited ability to exercise control beyond its sphere of immediate activity limits its liability under public nuisance law.[114] Thus, the court concluded that public nuisance required a degree of control over the source of the interference that was lacking here.[115] Finally, similar to the Connecticut Supreme Court, the Third Circuit concluded that the chain required to link the manufactures of handguns with municipal crime-fighting costs was too lengthy and too attenuated to hold manufacturers liable in public nuisance.[116]

Unlike either the Supreme Court of Connecticut or the Third Circuit, the Supreme Court of Ohio, in *City of Cincinnati v. Beretta U.S.A. Corp.*,[117] held that the public nuisance claim brought by the city of Cincinnati against handgun manufacturers and

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[112] *Id.* at 541.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* ("In the initial steps the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use.").

[117] 768 N.E.2d 1136 (Ohio 2002).

distributors survived the manufacturers' motion to dismiss.[118] The city alleged, and the court agreed, that the handgun manufacturers, distributors and trade association "created and maintained a public nuisance by manufacturing, marketing, distributing, and selling firearms in ways that unreasonably interfere with the public health, welfare, and safety in Cincinnati and that the residents of Cincinnati have a common right to be free from such conduct."[119]

In reaching its conclusion that the city stated a viable claim in public nuisance sufficient to move beyond the pleading stage, the Supreme Court of Ohio held that public nuisance does not necessarily require an injury to real property.[120] Public nuisance law, the court reasoned, was not strictly limited to "actions connected to real property or to statutory or regulatory violations involving public health or safety."[121] On the contrary, the broad definition of public nuisance, they concluded, could encompass a claim for injuries caused by a product if the facts established that the design, manufacturing, marketing, or sale of the product unreasonably interfered with a right common to the

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[118] City of Cincinnati v. Beretta U.S.A., Corp., 768 N.E.2d 1136, 1141 (Ohio 2002). *Id.* at 1141.

[119] *Id.* Specifically, city alleged that the intentional and negligent conduct of the manufacturers in failing to make guns safer fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and created a public nuisance. *Id.* at 1140.

[120] *Id.* at 1142

[121] *Id.*

general public.[122] Therefore, the court held, that "the city should be permitted to bring suit against the manufacturer of a product under a public nuisance theory, when, as here, the product has allegedly resulted in widespread harm and widespread costs to the city as a whole and to its citizens individually."[123]

Additionally, the court held that the manufacturers' lack of control over the actual firearms at the moment the harm occurred was not fatal to the city's public nuisance claim.[124] The court reasoned that the handgun manufacturers and distributors controlled the creation and supply of handguns facilitating the illegal, secondary market for firearms and thus creating a public nuisance.[125]

Similarly in *City of Boston v. Smith & Wesson Corp.*,[126] the Superior Court of Massachusetts held that the city of Boston had alleged sufficient facts to state a claim for public nuisance against handgun manufacturers, distributors and retailers.[127] In its compliant the city alleged, and the court agreed, that the handgun manufacturers, distributors and retailers intentionally and negligently created and maintained an illegal, secondary handgun market that unreasonably interfered with the public health, safety and peace and undermined enforcement of Massachusetts firearms law.[128]

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[122] *Id.*

[123] *Id.*

[124] *Id.* at 1143.

[125] *Id.*

[126] 2000 WL 1473568, *14 (Mass. Super. Ct. 2000)

[127] *Id.* at *14.

[128] *Id.*

While acknowledging that the case represented a unique use of the theory of public nuisance, the Superior Court of Massachusetts held that that alone was not a reason to dismiss the complaint at the pleading stage.[129] The court concluded that a public nuisance is not necessarily one related to property therefore the city's claim did not fail because it did not arise from activities on or related to land.[130] Moreover, the court held that the city's claim did not fail because the handgun manufacturers did not own or control the land or instrumentality that caused the harm.[131] The city alleged, and the court agreed, that the handgun manufacturers created and supplied an illegal, secondary market and thus could exercise control and abate the alleged nuisance by ceasing to maintain the illegal, secondary market.[132]

III. Public Nuisance and Mass Foreclosure

A. Cleveland's Public Nuisance Suit

Seeking to recoup the costs associated with the wave of mass foreclosures, including increased fire and police expenditures to prevent looters and criminals from targeting vacant properties, demolition costs, and compensation for the loss of tax revenue resulting from the decrease in property values caused by foreclosures, the city of Cleveland, on or about January 10, 2008, filed suit against twenty-one of the nation's leading banks and lenders alleging liability under public nuisance for their respective roles in proliferating "toxic sub-prime mortgages" to Cleveland residents, under

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[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

circumstances that made the resulting wave of foreclosures a foreseeable and inevitable result.[133]

In its complaint, the city asserts that the banks and financial institutions routinely made loans to unqualified borrowers who inevitably defaulted resulting in foreclosure.[134] The resulting foreclosures, the city alleges, left homes abandoned and boarded-up, transforming them into eyesores, possible fire hazards, and targets for both looters and criminals.[135] Moreover, the city asserts, that the foreclosure crisis has destroyed the city's property-tax revenue, which turns upon the appraised value of the homes.[136] Foreclosures have devalued not only the home directly foreclosed upon, but surrounding

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[133] Complaint at 26, City of Cleveland v. Deutsche Bank Trust Co., No. 2008 cv 00139 (N.D. Ohio Jan. 16,2008). The lenders named in the original complaint were: Duetsche Bank Trust Company, Ameriquest Mortgage Company, Bank of America, Bear Stearns, Citigroup, Countrywide Financial, Credit Suisse, Fremont General, GMAC, Goldman Sachs, Greenwich Capital Markets, HSBC Holding, Indymac Bancorp, JP Morgan, Lehman Brothers Holding, Merrill Lynch, Morgan Stanley, Novastar Financial, Option One Mortgage, Washington Mutual, and Wells Fargo. *Id.*

[134] *Id.* at 4.

[135] *Id.* "Having had absolutely nothing to gain from the sub-prime industry, Cleveland now must deal with the devastation it has inflicted upon the City. Each and every foreclosure creates certain tangible costs for Cleveland, particularly if the property remains vacant for any extended period of time. . . In many individual cases, the City's expenses range well into five figures." *Id.* at 25.

[136] *Id.* at 25.

properties as well.[137] For example, Cleveland alleges that homes in Cuyahoga County collectively depreciated more than $462 million.[138]

Cleveland further asserts that while sub-prime lending abuses have inflicted similar damages upon other cities, Cleveland's predicament is distinctive both because its foreclosure rates far surpass those experienced in other cities and because the city's housing market and economy were not booming at the time sub-prime lending reached its peak.[139] Given the unique market circumstances in Cleveland, "the purveyors of sub-prime mortgages could have and should have foreseen (and in all likelihood actually did foresee) a foreclosure crisis as the inescapable consequence of their conduct."[140]

In defense, the banks assert that the propagation of sub-prime mortgages in Cleveland and the corresponding foreclosures do not constitute a public nuisance under

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[137] *Id.*

[138] *Id.*

[139] *Id* at 4. Between 2002 and 2007, Cleveland alleges that the number of foreclosures in the city jumped from 111 to 7,562. *Id.* at 23. Daily in 2007, twenty Cleveland homeowners in all parts of the city faced foreclosure. *Id.* Moreover, in 2003, when sub-prime lending began, Cleveland ranked among the poorest cities in the nation. *Id.* at 21. During the peak of sub-prime lending Cleveland's "Rust-Belt" economy struggled due to the disappearance of manufacturing sector jobs and the city's inability to attract replacement industries. *Id.*

[140] *Id.*

Ohio law.[141] The banks assert that the harms alleged did not directly or proximately result from actions or omissions on the part of the banks; rather, to the extent the city suffered harm, it was caused by intervening or superseding events, factors, occurrences, or conditions which were not caused or controlled by the banks.[142]

B. Success or Failure?

The success or failure of Cleveland's suit will depend on the eagerness of the court to involve itself in addressing the national credit crisis and its willingness to stretch the concept of public nuisance to impose liability on banks and other financial institutions for the consequences of sub-prime lending. As to the former, given the pervasive political response to the credit crisis and the tenuous state of the national economy, the court may be hesitant to involve itself in the debate. Even if, the court wades into the waters left by the wave of mass foreclosures, it may be unwilling to manipulate the concept of public nuisance to provide relief. As in the lead poisoning and handgun-related crime cases, Cleveland will encounter difficulty in proving the existence of a public right, requisite control, relation to land, and causation.

The public right at issue, as framed by the city's complaint, is the common right of Cleveland residents to be free from the unreasonable risks of harm to the public health, welfare and safety created by mass foreclosures. Specifically, the danger to person and property produced when entire blocks and neighborhoods are abandoned creating the potential for criminals and looters, which significantly disturbs the peace and tranquility

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[141] Answer and Affirmative Defenses of Defendant Bank of Am. Corp. at 3, City of Cleveland v. Deutsche Bank Trust Co., No. 08-cv-00139 (N.D. Ohio January 22, 2008).

[142] *Id.* at 14-15.

of a city and thus threaten its fabric and viability as a community. Given that the Restatement (Second) recognizes "public safety, health, peace, comfort or convenience" as a right common to the general public[,]"[143] the banks' conduct, therefore, seems to fall squarely within the contours of "public right" as developed by the courts.

The issue of control, however, will be more difficult for the city to prevail on. Cleveland argues, similar to its predecessors in the lead poisoning and handgun-related crime cases, that creating the source of the public nuisance and thereby contributing to the public nuisance through or with the conduct of others, or through an instrumentality no longer in the bank's control at the time and place it does the harm, is sufficient for liability. The city asserts that the banks set the foreclosure crisis in motion by intentionally and recklessly marketing and making mortgage loans to borrowers they knew or should have known would not be able to make payments.

As discussed above the courts are split as to the degree of control necessary to hold a party liable in public nuisance. Cleveland, however, may benefit from the fact that the Ohio Supreme Court in *City of Cincinnati v. Beretta U.S.A., Corp.*,[144] held that the city's public nuisance claim against handgun manufacturers did not fail because the manufacturers did not control the actual firearms at the moment the harm occurred. The court was amenable to the possibility of holding the gun manufacturers accountable for the injuries sustained from the guns they manufactured. Similarly here, the court may be amenable to holding the banks liable for marketing and making predatory mortgage loans to unqualified borrowers thereby creating the inevitable foreclosures that followed.

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[143] Restatement (Second) of Torts § 821B (1979).

[144] 768 N.E.2d 1136, 1142 (Ohio 2002).

Proximate causation will also pose difficulties for the city's claim. The city asserts that the mere fact that the intervention of another actor, the borrower, can be traced between the banks wrongful act and the injury complained of does not absolve the banks from liability if the injury ensued in the ordinary course of events and if the intervening cause was set in motion by the banks. Weighing in Cleveland's favor is the relatively compact causal chain associated with foreclosures. Unlike the lengthy chain of causation in the gun manufacturer cases, there is only one intervening cause between the issuance of the mortgage and the default—the homeowner's failure to pay. In the lead poisoning cases, however, the one intervening cause, the landlord or homeowner's failure to properly maintain the property, was adequate to cut off the manufacturers' causal liability. The issue of proximate causation will ultimately be resolved by the court as a public policy decision. Here, therefore, more than anywhere else in the analysis, the court will be required to decide whether it desires to interpose itself in the national credit crisis debate.

Finally, similarly difficult to overcome may be the claim's lack of connection to real property. The banks will raise the argument that public nuisance claims are narrowly circumscribed to address only actions involving a party's use of or effect upon real property. Again, beneficial for the city's claim, the Ohio Supreme Court in *City of Cincinnati v. Beretta U.S.A., Corp.*,[145] held that public nuisance law is not strictly limited to actions connected with real property.[146] Moreover, even if the court were to require connection to land, the banks' actions do in fact involve its use of or effect upon real

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[145] 768 N.E.2d 1136, 1142 (Ohio 2002).

[146] City of Cincinnati v. Beretta U.S.A., Corp., 768 N.E.2d 1136, 1142 (Ohio 2002).

property. A mortgage interest in real property gives the bank the right to possession of the property upon default of the borrower. Therefore, it can be argued, that the bank's choice to foreclose on the property is an action connected with real property sufficient to establish a public nuisance claim.

CONCLUSION

Abandoned property, as the *Broken Windows Theory* illustrates, precipitates a downward spiral in the quality of life of communities. Recently, the interactions of unqualified borrower and the nation's leading banks have resulted in a tremendous increase in the number of properties left abandoned and untended to in communities. Lenders made predatory mortgage loans to borrowers who lacked any realistic means to pay thereby resulting in defaults and a wave of foreclosures. To counteract the destructive effects of untended property created by foreclosures cities have increased fire and police expenditures to prevent abandoned homes from becoming possible fire hazards and targets for criminals and looters. As costs have increased, however, revenue has plummeted as a result of the drop in property values caused by foreclosures.

Seeking to recoup the costs of repairing its "broken windows," the city of Cleveland brought a public nuisance suit against the nation's leading banks. The city, however, faces an uphill battle. Creative lawyers have been largely unsuccessful in their attempts to stretch public nuisance to impose liability for macro-social problems, such as lead poisoning and handgun-related crime, on those with whom the problem originates. The ultimate success of the cities' suits will depend on the willingness of the court to engage in the credit crisis debate and to mold the concept of public nuisance to do so.