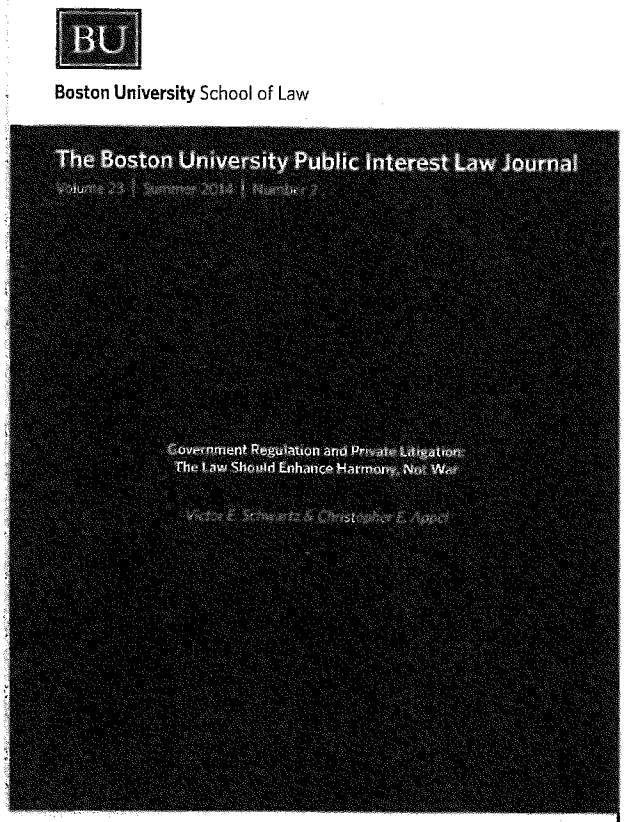
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Government Regulation and Private Litigation:
The Law Should Enhance Harmony, Not War
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ARTICLES

GOVERNMENT REGULATION AND PRIVATE LITIGATION: THE LAW SHOULD ENHANCE HARMONY, NOT WAR

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Two separate, but important drivers of the creation of law in the United States are the federal regulatory agencies and the litigation system. Federal agencies are empowered to develop regulations in a broad range of areas—anything from food safety[1] to air emissions[2]—and the litigation system is the primary engine for the development of the common law.[3] Sound public policy suggests these drivers work in harmony with each other and not at cross purposes.

Fortunately, the goals of the federal regulatory system and the private litigation system can, and usually do, work together. For example, the Consumer Products Safety Commission generally works to keep people safe from defective products, often before injuries occur.[4] When private litigation is involved, it is typically directed at compensating people hurt by defective products after someone is injured. Both the regulatory system and the tort system may, at times, overstep their bounds in pursuing the goal of protecting society from defective products,[5] but at least both forces move in the same direction.

There are several highly controversial areas, however, where the government regulatory system and the private litigation system may be at odds, or even at war, with each other. The purpose of this Article is to bring those areas to the attention of judges, legislators, and others who formulate public policy, and to suggest that they work toward harmonizing the goals of each system. This Article will discuss four specific areas and provide suggestions for how regulatory and litigation goals can work together.

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[1] *See, e.g.*, FDA Food Safety Modernization Act of 2010, Pub. L. No. 111-353, 124 Stat. 3885 (2011). The Act "aims to ensure the U.S. food supply is safe by shifting the focus of federal regulators from responding to contamination to preventing it." *Food Fact Sheets and Presentations*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247546.htm (last updated May 2, 2014).

[2] *See* Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (stating that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide by the Environmental Protection Agency); *see also* 42 U.S.C. § 7411 (2012).

[3] *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 1 (12th ed. 2010) ("[T]ort law has been principally a part of the common law, developed by the courts through the opinions of the judges in the cases before them.").

[4] *See* 15 U.S.C. §§ 2051–2089 (2012) (providing relevant consumer product safety laws); *see also Regulations*, U.S. CONSUMER PROD. SAFETY COMM'N, http://www.cpsc.gov/en/Regulations-Laws—Standards/Regulations-Mandatory-Standards-Bans/ (last visited May 12, 2014) (providing listing of consumer product safety regulations).

[5] *See infra* Part III.

First, the Article will discuss real and potential conflicts between the government and the litigation system that were labeled by former U.S. Secretary of Labor Robert Reich as "regulation through litigation."[6] Here, the government, through the democratic political process, has made a decision not to regulate a particular activity.[7] The judgment may, for instance, be based on the absence of need for regulation, the costs and burdens of potential regulation, or the desires of the American public as conveyed to their elected representatives. Regulation through litigation occurs when enterprising plaintiffs' lawyers suggest to courts, via lawsuits, that the judiciary should regulate an industry through the threat of imposing broad liability against entities in that industry, even though the government has chosen not to regulate.[8] This Article examines whether the clash of goals between government and private litigation is in the public's interest and concludes it is not.

A second area where the government and private litigation system may be at odds occurs where government regulatory bodies are overly aggressive in pursuing a goal they believe to be in the public's interest and inadvertently create liability exposure for the regulated entity. An example is where regulators demand that employers turn over employees' private health records in the name of assuring workplace safety.[9] In doing so, the government agency may have pushed the regulated entity into clutches of tort law and privacy-related lawsuits simply for doing what the government has asked.[10] The government provides no liability shield to the regulated entities, but government action has touched off a war of competing values. This Article suggests such a situation creates fundamental unfairness for those who are regulated.

A third area of potential conflict occurs where a federal regulatory body has created specific rules for safety or made a determination that a product is safe. The war between government regulation and private litigation occurs when the tort litigation system decides it somehow knows more about safety than the expert regulatory agency.[11] As a result, the litigation system may impose more rigid or even contradictory rules on regulated entities.[12] The conflict between

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[6] Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22; *see also* Mark A. Behrens & Rochelle M. Tedesco, *Addressing Regulation Through Litigation: Some Solutions to Government Sponsored Lawsuits*, 3 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Apr. 2002, at 109, 109; 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).

[7] *See infra* Part II.A.

[8] *See infra* Part II.A.

[9] *See infra* Part II.A.

[10] *See infra* Part II.A.

[11] *See infra* Part IV.

[12] *See infra* notes 179–84 and accompanying text.

government regulation and the litigation system often occurs under the legal term "preemption": has the government preempted private lawsuits?[13] The public policy battle, however, is deeper than judicial attempts to discern whether preemption by congressional intent has, in fact, occurred. This Article probes beyond the question of fathoming congressional intent; it will examine whether the government's regulatory action is undermined by the tort litigation system and, if so, what may be done to neutralize that effect.

Finally, the Article will examine a practice in which government regulatory agencies and private litigants each rebel against the traditional functioning of their respective system. This occurs when private plaintiffs team up with a regulatory agency to circumvent both the regulatory development and review process and the adversarial litigation process.[14] Federal agencies use litigation "settlements" to accelerate rulemaking procedures or even make new substantive law without adhering to required checks on government regulation, such as in the Administrative Procedure Act[15] and Office of Management and Budget oversight.[16] Instead, the government and private litigants, supposed adversaries in litigation, enter into a settlement and act as allies who share an interest in accelerating the development of new regulations and skirting regulatory procedures. Such actions have been labeled "sue and settle."[17] This Article examines how and whether this conflict within the systems themselves should be resolved.

In each of the four scenarios, the Article concludes that judges offer the principal means by which to harmonize government regulation and private litigation. It is, therefore, imperative that judges understand how these conflicts can develop and what may be done to diffuse them. Just as judges are called upon to serve as "gatekeepers" in disputes among private parties,[18] they must

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[13] *See* Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety,* 84 TUL. L. REV. 1203, 1207–11 (2010) (discussing preemption cases involving federal safety regulations).

[14] *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Appeals Court Rebuffs Federal Agency's Attempt at Sue and Settle Regulation,* 22 LEGAL OPINION LETTER (Wash. Legal Found., Washington, D.C.), July 19, 2013, at 1.

[15] *See* Pub. L. No. 79–404, 60 Stat. 237 (1946).

[16] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 18, 2001); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011); *see also Office of Information and Regulatory Affairs*, WHITE HOUSE OFFICE OF MGMT. AND BUDGET, http://www.whitehouse.gov/omb/inforeg_default (last visited May 13, 2014) (discussing oversight responsibilities).

[17] *See, e.g.*, *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COMMERCE (May 13, 2014, 12:30 PM), http://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors.

[18] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993); *see also* Victor

also act as "peacemakers" when the government regulatory system and the private litigation system work at cross-purposes.

I. The Clash Between Government Regulation and Private Litigation Over Whether to Regulate An Activity

There has been a continued effort by certain ideological groups, and some members of the plaintiffs' bar, to have courts use private tort litigation to regulate industry either where the government has chosen not to do so or where more forceful regulation is desired.[19] A court cannot directly "regulate" an activity, but through massive liability exposure, a court can effectively force an industry into settlement, and in that settlement, the industry "agrees" to significant self-regulation. Hence, in the end, *de facto* regulation is accomplished through litigation, and absent government involvement.

In modern times, regulation through litigation began with litigation against the tobacco industry.[20] In response to the federal government's longstanding decision not to regulate tobacco products, and decades of unsuccessful private litigation against tobacco product manufacturers, a number of state attorneys general joined together with members of the plaintiffs' bar in the 1990s to sue the tobacco industry.[21] They alleged a novel liability theory, which sought recovery on behalf of a state's residents, of funds expended through the state's Medicaid program on tobacco-related diseases.[22] Ultimately, forty-two state attorneys general joined together to bring such litigation and effectively forced the tobacco industry to negotiate a settlement worth over $200 billion in 1998.[23]

E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 221–24 (2006) (discussing court's gatekeeping function).

[19] *See* Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 Val. U. L. Rev. 369, 379–80 (2012) [hereinafter Schwartz et al., *Tools for Regulating*] (discussing basis of climate change litigation); Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 938–49 (2009) [hereinafter Schwartz et al., *New Tort Duty*] (discussing legal theories used in attempts at regulation through litigation).

[20] *See* W. Kip Viscusi & Joni Hersch, *Tobacco Regulation Through Litigation* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 15422, 2009).

[21] *See* Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smothers, and the Substance of the Master Settlement Agreement*, 63 Vand. L. Rev. 1081, 1086–95 (2010) (discussing the "waves" of tobacco litigation leading up to the tobacco Master Settlement Agreement); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. Rev. 67 (2010).

[22] *See* Traylor, *supra* note 21, at 1093.

[23] *See* Susan Beck, *The Lobbying Blitz over Tobacco Fees: Lawyers Went All Out in*

The tobacco litigation has proven to be the pinnacle of regulation through litigation.[24] As part of its Master Settlement Agreement (MSA), the tobacco industry agreed not only to make substantial payments to states, but also agreed to a wide variety of self-regulatory activities, including some that may have waived First Amendment rights to freedom of speech.[25] For instance, the industry was prohibited under the MSA from advertising directly to the youth population, advertising on any outdoor billboards, and advertising on signs and placards in arenas, shopping malls, arcades, or on transit systems.[26] Payments collected under the MSA were also intended to be used to fund mass anti-smoking campaigns; the industry basically agreed to fund efforts to reduce the sale of its products.[27] Interestingly, many of the funds collected were not used for this perceived purpose or in relation to tobacco-related illnesses, but instead to help states balance their general budgets.[28]

Whether tobacco industry regulation through litigation accomplished its goals, other than the large transfer of funds from the industry to states and private attorneys, will be left for history to decide. Today, the government, under the Food and Drug Administration (FDA), does regulate tobacco, and conflicts between the goals of the regulatory system and the private litigation system appear to have been resolved.[29]

The precedent set by the litigation against "Big Tobacco," however, has fueled other attempts to regulate industry in place of regulatory agencies. For example, litigation has included efforts to regulate guns, lead paint, greenhouse gases, "junk food," and, most recently, food ingredients. The ongoing question

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Pursuit of Their Cut of a Historic Settlement. And the Arbitrators Went Along, LEGAL TIMES, Jan. 6, 2003, at 1 (estimating tobacco settlement at $246 billion); W. KIP VISCUSI, SMOKE-FILLED ROOMS: A POST-MORTEM ON THE TOBACCO DEAL 41–44 (2002) (stating that most reports value the tobacco Master Settlement Agreement at $206 billion through 2023, but that the actual value through 2023 is slightly more than $211 billion).

[24] *See* Schwartz et al., *New Tort Duty*, *supra* note 19, at 924–27.

[25] *See* F. A. Sloan, C. A. Mathews & J. G. Trogdon, *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 TOBACCO CONTROL 356, 356 (2004); *Master Settlement Agreement*, STATE OF CAL. DEP'T OF JUSTICE OFFICE OF THE ATTORNEY GEN., http://oag.ca.gov/tobacco/msa (last visited May 13, 2014).

[26] *See* Traylor, *supra* note 21, at 1096–1101 (discussing the economic and regulatory provisions of the tobacco Master Settlement Agreement).

[27] *See id.*; *see also* Sloan et al., *supra* note 25, at 358–59.

[28] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 734 (2011) ("Though the money was intended for health- and smoking-related initiatives, several states announced that they would use it to balance their general budgets."); Shaila Dewan, *States Look at Tobacco to Balance the Budget*, N.Y. TIMES, Mar. 20, 1999, at A9.

[29] *See Tobacco Products, Product Requirements Marketing & Labeling*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., http://www.fda.gov/TobaccoProducts/Labeling/default.htm (last updated Oct 2, 2013); *see also* B. Ashby Hardesty, Jr., *Joe Camel Versus Uncle Sam: The Constitutionality of Graphic Cigarette Warnings Labels*, 81 FORDHAM L. REV. 2811 (2013).

focuses on the true value of regulation through litigation and whether the clash of goals between government and private litigation is in the public's interest.

A. *Regulation Through Litigation Attempts Targeting Industry*

1. Gun Manufacturers

Following the economic success of the tobacco litigation, enterprising plaintiffs' counsel quickly turned their sights on other "unpopular" industries, believing a similar model could be used to effectuate regulation.[30] Among the first targets were gun manufacturers.[31] The theory developed for this pursuit alleged that although guns, like cigarettes, were a lawful product, the marketing and distribution practices and policies of the gun manufacturers facilitated the illegal secondary market for firearms, thereby interfering with the public health of the community.[32] This interference, plaintiffs argued, constituted a "public nuisance" and entitled public and private parties to injunctive relief and damages.[33]

In making such a claim, plaintiffs sought to dramatically expand the traditional boundaries of public nuisance law.[34] Most courts, however, were unwilling to oblige.[35] For example, the Illinois Supreme Court, in a pair of decisions, rejected public nuisance claims brought by both public and private plaintiffs against gun manufacturers.[36] The court specifically found that "there is no authority for the unprecedented expansion of the concept of public rights" asserted in plaintiffs' public nuisance liability theory, and that "there are strong public policy reasons to defer to the legislature in the matter of regulating the

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[30] *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 555–57 (2006).

[31] *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).

[32] *See* Schwartz & Goldberg, *supra* note 30, at 555–57.

[33] *See id.*

[34] As the Illinois Supreme Court stated in dismissing a suit against gun manufacturers, "[p]laintiffs 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." City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1118 (Ill. 2004).

[35] *See, e.g.*, City of Phila. v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3d Cir. 2002); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001); Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 115 (Conn. 2001); City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d at 1148; People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 203 (App. Div. 2003).

[36] *See Beretta*, 821 N.E.2d at 1112; Young v. Bryco Arms, 821 N.E.2d 1078, 1083 (Ill. 2004).

manufacture, distribution, and sale of firearms."[37] The court further concluded that any change affecting the gun industry's liability "must be the work of the legislature, brought about by the political process, not the work of the courts."[38]

Other courts have reached the same conclusion.[39] No court has allowed such an action to proceed to a jury; a result cemented, in part, by Congress's 2005 enactment of the Protection of Lawful Commerce in Arms Act, which legislatively bars lawsuits against gun makers related to gun crime.[40] Accordingly, the effort to regulate the manufacture of firearms through the imposition of tort liability has failed. Nevertheless, this setback has not deterred plaintiffs' lawyers, state attorneys general, and other groups from following the tobacco regulation through litigation blueprint in other areas.

2. Lead Paint

Around the same time lawsuits were being brought against gun makers to bring about more forceful gun regulation, enterprising plaintiffs' lawyers and some state attorneys general partnered to sue former makers of lead paint and pigments.[41] The liability theory here, similar to the litigation against gun makers, was that the mere presence of lead paint in homes and buildings constituted a "public nuisance."[42] Lawsuits sought damages for the cost of abating lead paint in homes and buildings throughout a state, county, or municipality.[43] Thus, the lawsuits sought to push the scope of public nuisance law into new territory—namely the manufacture and sale of products—and remedy a broader range of product-related injuries than available under traditional products liabil-

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[37] *Beretta*, 821 N.E.2d at 1116, 1121.

[38] *Id.* at 1148.

[39] *See e.g.*, City of Phila. v. Beretta U.S.A. Corp., 277 F.3d at 421; Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d at 540; *Penelas*, 778 So. 2d at 1045; *Ganim*, 780 A.2d at 115; City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d at 1148; *Spitzer*, 761 N.Y.S.2d at 203.

[40] Pub. L. No. 109-92 (2005) (codified at 15 U.S.C. §§ 7901–7903, 18 U.S.C. §§ 922, 924).

[41] *See* Schwartz et al., *New Tort Duty, supra* note 19, at 943–45 (discussing lead paint litigation); *see also* 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.

[42] *See* Schwartz et al., *New Tort Duty, supra* note 19, at 943–45. The lawsuits alleged that the presence of lead paint in older homes, when allowed to chip from poor maintenance, was a health hazard for small children who might eat those paint chips. *See, e.g.*, State v. Lead Indus. Ass'n, No. 99-5226, 2001 WL 345830, at *6 (R.I. Super. Apr. 2, 2001).

[43] *See, e.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008); 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); City of Chi. v. Am. Cyanamid Co., 823 N.E.2d 126, 128 (Ill. App. Ct. 2005); Brenner v. Am. Cyanamid Co., 699 N.Y.S.2d 848 (App. Div. 1999); City of Toledo v. Sherwin-Williams Co., No. G-4801-CI-200606040-000 (Ohio Ct. Com. Pl. Dec. 12, 2007).

ity law.[44]

Perhaps the most high profile of the lead paint cases involved a partnership between the Rhode Island Attorney General and the law firm Motley Rice. This lawsuit sought abatement costs, estimated at nearly $4 billion, for homes and buildings throughout Rhode Island.[45] At the trial court level, the case ended in a verdict for the state,[46] but the Rhode Island Supreme Court reversed that decision and dismissed the lawsuit.[47] In reaching this decision, the state high court explained that "public nuisance law simply does not provide a remedy for this harm"[48] and that "[t]he law of public nuisance never before has been applied to products, however harmful."[49] The court also stated that although the state General Assembly had recognized that lead paint created a public health hazard, it adopted several statutory schemes to address the problem, none of which authorized the type of action brought by the state on behalf of its residents.[50] Therefore, the court made clear that any change permitting industry-wide liability must come from the legislature, not the courts.

Courts in other states, including the state Supreme Courts of Missouri and New Jersey, have also rejected these lawsuits.[51] Overall, the attempt to impose more forceful regulation on paint and pigment companies in place of the legislature has failed. Still, this setback has not deterred plaintiffs' lawyers, state attorneys general, and other groups from continuing to follow the tobacco regulation blueprint through litigation blueprint in other areas.

3. Greenhouse Gas Emitters

In the early 2000s, as lawsuits were being pursued against the gun and paint industries, some environmentalists, frustrated with the pace at which the federal government was addressing climate change, partnered with plaintiffs' lawyers and state attorneys general to target emitters of greenhouse gases (GHGs).[52] Even though GHGs are emitted by a myriad of natural sources, including

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[44] *See* Schwartz et al., *New Tort Duty, supra* note 19, at 943–45.

[45] *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.

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

[47] *Lead Indus. Ass'n*, 951 A.2d at 435–36.

[48] *Id.* at 436

[49] *Id.* at 456.

[50] *Id.* at 457–58; *see also In re* Lead Paint Litig., 924 A.2d 484, 487 (N.J. 2007) (providing that tort action "would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims").

[51] *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 at 487.

[52] *See* Schwartz et al., *Tools for Regulating, supra* note 19, at 379–80.

human breathing,[53] these groups resolved to hand-pick specific GHG emitters among the nation's largest utility, energy, and automobile companies to name as defendants in litigation.[54] These plaintiffs relied upon another expansive public nuisance theory; that the selected companies engaged in operations or made products that contributed to the build-up of GHGs in the atmosphere, causing the earth to warm, thereby creating the public nuisance of global climate change.[55] The real objective of these lawsuits, as the lawyers bringing these suits acknowledged,[56] was to force companies to lower their GHG emissions under the threat of massive tort liability, and impose emission standards in place of Congress and regulators.

In all, four major climate change tort actions have been brought, and each has ultimately been rejected or withdrawn.[57] Tellingly, courts at every level of the federal judiciary have rejected these claims. For example, the first climate

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[53] *See Overview of Greenhouse Gases*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/ghgemissions/gases/co2.html (last visited May 14, 2014) ("Carbon dioxide is constantly being exchanged among the atmosphere, ocean, and land surface as it is both produced and absorbed by many microorganisms, plants, and animals.").

[54] *See* Schwartz et al., *Tools for Regulating, supra* note 19, at 382–86 (discussing the four major climate change cases).

[55] *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005) (internal quotation marks omitted) (noting that allegations for common law public nuisance were attributed to global warming which will allegedly cause irreparable harm to citizens and the environment).

[56] *See, e.g.*, Robert Meltz, *Climate Change Litigation: A Growing Phenomenon*, CRS REPORT, RL 32764 (Cong. Research Serv., Washington, D.C.), April 7, 2008, at 1 ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that, while making a small contribution to mitigating climate change, are also aimed at prodding the national government to act."); Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1091 (2009) ("Climate change litigation of various kinds is clearly on the rise, and the trend is to hold that potential damage from climate change is a legally cognizable injury."); Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 339 (2005) (quoting Connecticut Attorney General Richard Blumenthal, the lead attorney general in the first joint climate-change action, that the lawsuit was based on a "gut feeling [and] emotion, that CO2 pollution and global warming were problems that needed to be addressed," and they were "brainstorming about what could be done" because action "wasn't coming from the federal government").

[57] *See* Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013); Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013); Comer v. Murphy Oil USA, Inc., No. 1:05–CV–436–LG–RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); 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), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).