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Lead Paint: 
Who Will Bear the Cost of Abating the Latest Public Nuisance?

GREG J. CARLSON*

INTRODUCTION

Consider Paint Co., a hypothetical paint manufacturer, who in the early 20th century used lead pigment to manufacture its paint products. Such was a common industry practice at the time, and Paint Co.'s competitors did the same. After Paint Co.'s routine production, the paint was shipped from the plant and sold to consumers. The consumers then took the paint and applied it to the walls of private residences all across America.

As decades passed, the paint began to chip off the walls of these homes, and in many instances would end up in a child's mouth. It was discovered that lead-based paint could cause serious harm to humans if ingested. Numerous lawsuits surfaced seeking to hold Paint Co. and its competitors liable for the harm caused by the lead-based paint, but plaintiffs could not find a viable theory to hold Paint Co. liable, and the litigation faded away.

Years later, to Paint Co.'s alarm, the tempered lead paint litigation that had seemed to all but disappear, flared up once again as government entities found a new plausible legal theory and began to sue lead paint manufacturers on behalf of citizens who were harmed by lead-based paint. The government claimed that the widespread use of lead paint created a public nuisance, or, in other words, created "an unreasonable interference with a right common to the general public"—the right to live in a safe and healthy environment. Though this new theory of liability seemed tenuous at best, the court accepted it and ordered Paint

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1. Restatement (Second) of Torts § 821B (1979).
Co. to abate the nuisance, or, to follow a particular set of measures to eliminate the paint and its hazards.

Because the abatement process would be very expensive to the company, Paint Co. was relieved that it had obtained business liability insurance. Like almost every manufacturer in the country, Paint Co. had entered into a contract with a commercial insurer to protect against the financial consequences of business liability claims. The contract, called a Commercial General Liability (CGL) policy, specified that among other categories of coverage, the insurer would cover amounts that Paint Co. is legally obligated to pay as “damages.” Paint Co. looked to its insurer for coverage. But the insurer denied the claim, pointing out that costs of abating a hazard are not “damages.” Paint Co. argued the costs should be covered. The insurer maintained that they should not.

So what is the ending to Paint Co.’s story? There isn’t one yet. Just like the Paint Co. hypothetical, after nearly two decades of fruitless efforts to hold former lead paint and lead pigment manufacturers liable for the damaging effects of widespread use of lead paint in private residences, the first signs of success are blossoming. On February 22, 2006, a Rhode Island jury

render[ed] a verdict determining that: (1) the presence of lead pigments in paints throughout Rhode Island was a public nuisance; (2) three former manufacturers, suppliers, and promoters of lead pigments... were liable for that public nuisance; and (3) the responsible defendants were required to abate the existing nuisance.

With various cities, counties and states having already litigated the same issue, and others currently litigating the issue in the wake of Rhode Island, some commentators have referred to this new wave of litigation as “the next tobacco” or “the next asbestos.” While the formerly “untouchable” lead paint manufacturers may be ordered to abate the nuisance, the answer to the aforementioned critical question still remains uncertain: Who will ultimately bear the cost of such abatement? The manufacturer or its insurer?

2. See Scott A. Smith, Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong, 71 DEF. COUNS. J. 119, 119 (2004) (noting that “lead paint and pigment defendants had never lost or settled a case since the first wave of lawsuits against them began in 1987”).


5. See id. (current litigation by city or county found by clicking on links for individual states).

6. Smith, supra note 2, at 120.
LEAD PAINT: WHO WILL BEAR THE COST?

The economic impact to either party would be substantial. Estimated costs of abatement in Rhode Island alone could soar as high as $3.74 billion.\(^7\) If manufacturers bear the cost, in many instances the burden will fall on companies that are innocent successors-in-interest of former lead paint manufacturers.\(^8\) If insurers bear the cost, they may be forced to pay for harm resulting from a risk that was never intended to be covered in the insurance policy.\(^9\) While the language of the insurance contract between an insurer and the insured manufacturer generally spells out when coverage exists and when it does not, CGL policy language tends to raise more questions than answers when applied to public nuisance claims seeking costs of abatement.

Specifically, a CGL policy requires an insurer to provide coverage for “damages” the insured paint manufacturer becomes legally obligated to pay.\(^10\) The term “damages” generally refers to a legal remedy awarded by a court, and “[m]oney damages are... the classic form of legal relief.”\(^11\) Thus, only when there is a remedy for damages is the insurer obligated to provide coverage. Abatement, or the physical removal and elimination of lead paint hazards, however, is an equitable remedy\(^12\) and will not oblige coverage under a CGL policy because abatement alone does not fall within the classification of “damages.” But where “costs of abatement” are part of the remedy, it begs the question: Is money required to be paid by the manufacturer to abate the public nuisance within the meaning of “damages,” or are such payments viewed only as a necessary element of an equitable abatement remedy?\(^13\) Some believe

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\(^{8}\) Smith, supra note 2, at 120 (“Most of the companies sued as former manufacturers of lead pigment never made the product but are alleged successors-in-interest (even, in some cases, successors to successors) of companies that once manufactured lead pigment more than half a century ago.”).

\(^{9}\) See generally Kenneth S. Abraham, Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 955–76 (1988) (discussing the effect of expansive insurance policy coverage of environmental liabilities).


\(^{12}\) The abatement remedy awarded by a jury has been characterized as an equitable remedy. Transcript of Record at *1, Rhode Island v. Lead Indus. Ass’n, No. 99-5226, 2006 WL 691803 (R.I. Super. Ct. Feb. 28, 2006).

\(^{13}\) See generally NL Indus., Inc. v. Commercial Union Ins. Co., 926 F. Supp. 446, 457 (D.N.J 1996) (“The Court of Appeals of New York has not addressed the breadth of the term ‘damages’ in
costs of abatement are equitable in nature, others believe they are clearly legal in nature. Because the decision in the Rhode Island case, Rhode Island v. Lead Industries Ass'n, is the first of its kind, there are no reported decisions that give definitive guidance with respect to this particular issue in the lead paint abatement context.

This and related issues, however, are not entirely novel with the emergence of recent developments in lead paint litigation. Remedying public nuisances and abating toxic substances have similarly occurred in asbestos, tobacco, firearms, and environmental contamination situations. These particular contexts are similar to the recent lead paint litigation in that in each a toxic substance or manufactured product was singled out as the root harm to a significant portion of the public population. Yet, despite the similarities, none of these other contexts provide an authoritative solution that analogously applies in determining who bears the costs of abatement where lead paint creates a public nuisance.

For example, where asbestos is concerned, because the manufacturer of a material containing asbestos can be readily identified, a product liability theory, and not a public nuisance theory, has been the path to successful litigation. Thus, the asbestos context sheds no light on how to treat costs of abatement in a public nuisance context. Similarly, where tobacco is concerned, successful litigation is not based on a public nuisance theory, but rather on a product liability theory. Thus, past tobacco litigation also fails to address the role of insurers under a theory.
of public nuisance. In litigation against firearm manufacturers, though public nuisance has been (and still is) the predominant theory, there have not been any monumental decisions to use as precedent for how costs of abatement should be classified within the terms of a CGL policy. Finally, though there has been much litigation in the realm of environmental contamination, most of the cases arise under specific environmental protection statutes or ordinances rather than under a public nuisance theory, and treatment of insurance coverage of abatement costs has been mixed. Therefore, a determination as to whether or not an insurer will be obligated to cover the costs of lead paint abatement cannot wholly rely on any of these other areas of litigation.

Part I of this Note will define “public nuisance” and explain the history, legal context, as well as several past and pending cases using the public nuisance theory in the lead paint context. Part II will analogize and distinguish the recent lead paint litigation with already litigated cases that considered asbestos, tobacco, firearms, and environmental contamination. Finally, Part III of this Note will consider whether courts should decide in favor of treating costs of abatement as “damages” for purposes of CGL policies.

I. HISTORY AND CONTEXT OF PUBLIC NUISANCE

A. WHAT IS A PUBLIC NUISANCE?

The Second Restatement of Torts states:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

21. See id. at 929 (“[G]overnments have alleged that the handgun industry has created a public nuisance by failing to design all guns with sophisticated safety mechanisms.”).

22. See id. (“The firearms industry suits have had some success, but clearly have not been landslide victories reminiscent of the tobacco wars.”).


24. See, e.g., Int'l Ins. Co. v. RSR Corp., 426 F.3d 281, 288 (5th Cir. 2005) (“Today, a majority of courts have abandoned the technical legal/equitable distinction between types of damages altogether and have found that 'damages' may include 'response costs' 'cleanup costs' and costs of remediation under CERCLA . . . .”); Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., 842 F.2d 977, 985 (8th Cir. 1988) (“[T]he term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses. In the insurance context, however, the term 'damages' is not ambiguous, and the plain meaning of the term 'damages' as used in the insurance context refers to legal damages and does not include equitable monetary relief.”).
(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The essence of the public nuisance tort "is to allow governments to use the tort system to stop quasi-criminal conduct that, while not illegal, is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right." But while the tort is typically used to prevent acts such as "dumping sewage into a public river or blasting a stereo when people are picnicking in a public park," it has more recently been used by governments as an innovative liability theory for "mass tort litigation" against tobacco, firearm, and lead paint manufacturers — contexts that arguably fit more appropriately under a product liability theory.

The government may use a public nuisance claim to "seek an injunction to stop the activity causing the public nuisance or force the party to abate the public nuisance itself," remedies that are both equitable in nature. In other words, "the government may only seek

27. Id. at 541–42.
29. See Schwartz & Goldberg, supra note 26 ("They are attempting to move public nuisance theory far outside its traditional boundaries by using it to sue product manufacturers in an effort to circumvent the well-defined structure of products liability law."). There has been much recent discussion with respect to the appropriateness of using public nuisance as a way to "circumvent the well-defined structure of products liability law," and whether or not this "'new' public nuisance tort has resulted from a sufficiently principled and intellectually rigorous common law development of torts theory." Id.; Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 746 (2003). However, considering the decision in Lead Industries Ass'n, and the reliable assumption that the decision will not be overturned, it is apposite that there be more discussion addressing the ramifications flowing from the use of public nuisance as a theory for mass products liability, however controversial such use of the "new" public nuisance may be. Karen Ertel, Rhode Island Lead Paint Victory May Be First of Many, Lawyers Say, Trial, May 2006, at 82–83 ("Jorge Elorza, a law professor at Roger Williams University in Bristol, Rhode Island, said unless there is a critical piece of evidence that was incorrectly admitted or excluded in the case, the ruling is likely to be upheld."). Consequently, the purpose of this Note is not to delve deeper into a discussion on the appropriate use of public nuisance, rather it is to look at the tension such a theory will trigger between lead paint manufacturers and their insurers.
30. Schwartz & Goldberg, supra note 26, at 542.
injunction or abatement, not monetary damages” where a public 
uinance theory is used. Individuals, however, “who have sustained a 
particular injury, such as harm to one’s personal property from the public 
uinance, can use the tort to seek compensatory damages.”
Compensatory, or monetary, damages are also the typical award when a 
product liability theory is used. But when the government brings a claim 
of public nuisance in a representative capacity and the defendant 
manufacturer incurs “costs of abatement,” the remedy classification as 
either equitable or legal crosses over into a grey area. Are costs of 
abatement considered part of an equitable abatement remedy, or are 
they more similar to an award of monetary damages? And what if it is 
true that these government plaintiffs are indeed using the public nuisance 
theory solely to “circumvent the well-defined structure of products 
liability law”? Is it reasonable that the remedy be classified as 
“equitable” where a public nuisance theory is used, yet be classified as 
“legal” when there is a product liability claim, knowing that in the end 
the manufacturer is held liable for the same harm? Or does it even 
matter which theory is used if in the end the wrongdoer is held 
accountable?

To the government plaintiff and those interested in making certain 
the lead paint manufacturers are held liable, it does not matter which 
theory is used because, in the end, the manufacturer is held liable either 
way. However, to the manufacturer and its insurer, the liability theory 
may make all the difference with respect to who will ultimately bear the 
costs of abatement. A CGL policy provides that the insurer will pay on 
behalf of the insured “all sums that [the insured] is legally obligated to 
pay as damages because of bodily injury or property damage.” It is clear 
that if a defendant were ordered to carry out the actual abatement itself, 
then there is no “sum[] that [the insured] is legally obligated to pay as 
damages” and thus there is no coverage. Where a court awards 
“monetary damages” because of bodily injury or property damage, the 
insurer will certainly have to pay. But, again, “when lead paint 
abatement costs are incurred following a finding of public nuisance,” 
such a circumstance does not fit squarely into either category.

31. Id.
32. Id.
33. Id. at 541.
35. Id. (emphasis added).
36. Though never explicitly stated as a reason for arguing that damages, and not abatement, is the 
appropriate remedy in Lead Industries Ass'n, the defense most likely understood that a damages 
classification would shift the burden of cost to insurance companies, and this may have been a 
motivating factor behind the defense's position. See Position Paper on Abatement, supra note 11, at 
1–17.
37. SIMPSON THACHER & BARTLETT LLP 2006, supra note 10, at 3.
B. Litigation History: Past and Present Cases

Lead pigment was widely used by paint manufacturers in the 1920s, 1930s and early 1940s.\textsuperscript{38} By the mid 1950s, lead paint manufacturers had phased out the use of lead pigment and had discontinued the manufacture and sale of interior residential lead-based paints.\textsuperscript{39} Communities themselves began to ban the sale of lead paint, and finally in 1978 "the federal government banned the sale of lead-based paint for consumer or residential purposes."\textsuperscript{40}

In 1987, the first suit against former lead paint manufacturers, Santiago v. Sherwin Williams Co., was filed.\textsuperscript{41} Because the defendant could not identify "which, if any, of the defendants [were] the source of the lead she ingested or when the alleged injury-causing paint may have been applied to the walls and woodwork of her childhood home," the plaintiff requested that the court consider market-share liability for this particular action.\textsuperscript{42} The plaintiff also argued that the court should consider a concert of action theory.\textsuperscript{43} The court ultimately rejected these claims and affirmed the summary judgment which had been granted by the lower court in favor of the defendant.\textsuperscript{44} With respect to the market-share liability claim, the First Circuit reasoned that allowing the plaintiff to recover damages while she was unable to specify the time of the named defendants' negligence would endanger the policy of holding wrongdoers liable only for harm they have caused and may "impermissibly intermingle" tortfeasors with innocent actors.\textsuperscript{45}

Since Santiago, and through 2004, there have been more than sixty actions against lead paint manufacturers and their successors-in-interest.\textsuperscript{46} These actions have included attempts to hold lead paint manufacturers liable using theories such as concert of action, market-share liability, enterprise liability, civil conspiracy, and alternative liability.\textsuperscript{47} However, like Santiago, these attempts have been futile and have borne fruitless results for the plaintiffs. For example, in 1993 the Third Circuit considered certain plaintiffs' market-share liability, alternative liability and enterprise liability claims in City of Philadelphia
v. Lead Industries Ass'n, but ultimately "affirm[ed] the dismissal of plaintiffs' complaint in its entirety." A Pennsylvania state court later reached the same conclusion by rejecting market-share liability and alternative liability theories. Under Louisiana law, the Fifth Circuit would not adopt a market-share liability theory for reasons similar to those in Santiago. Even in New York, where the state had adopted market-share liability in other contexts, the court refused to apply market-share liability to the lead paint context. In Wisconsin and Maryland, litigation in similar cases rendered like results. Though market-share liability and alternative liability theories made up the bulk of the early lead paint cases, plaintiffs also tried to reach the manufacturers through conspiracy, fraud and misrepresentation, and design defect, but wholly failed.

With a long history of failed attempts to hold lead paint manufacturers liable, interested parties turned to an old theory and tried to give it an innovative twist. Though it was an "unusual" theory for lead paint litigation, the public nuisance claim has nonetheless proven to be "an applicable theory, well recognized in the law." However, the first attempts to use public nuisance in these types of cases were not successful. For example, in City of Chicago v. American Cyanamid Co., the City of Chicago alleged that former lead paint manufacturers had substantially participated in creating a public nuisance and should be required to abate the nuisance. The court reasoned:

defendants do not have the power to abate the described nuisance as plaintiff requests because they are not in control of the premises containing the painted surfaces.... As a matter of basic equitable jurisprudence, the court would not enter an order compelling defendants to do something that they have no power to do.

On January 14, 2005, the appellate court upheld the lower court's
ruling. The Illinois Supreme Court denied the City's petition for leave to appeal the decision.

It was not until Lead Industries Ass'n that the public nuisance claim became accepted as a valid theory in lead paint litigation. After its original filing in 1999, the court dismissed several of the claims, including product liability, equitable relief to children, and unfair trade practices, but allowed the claim for public nuisance, among several other claims, to move forward. In October of 2002, "a trial on whether the presence of lead paint in Rhode Island buildings is a public nuisance, ended in a mistrial when the jurors voted 4–2 against the state, but was unable to reach a unanimous verdict." A second trial began on November 1, 2005 to consider the public nuisance claim. On February 22, 2006, the jury returned a verdict finding that the presence of lead pigments and lead paint in buildings throughout Rhode Island constituted a public nuisance. The court also found that the defendant manufacturers "caused or sub[s]tantially contributed to the creation of the public nuisance and should be ordered to abate [it]." The defendants appealed and oral arguments to the Rhode Island Supreme Court were heard on May 15, 2008. A decision by the Rhode Island Supreme Court is still pending.

In addition to Rhode Island, several other states, cities and counties have litigated or are currently litigating the same issue. States that have already litigated the issue, such as New Jersey, have not succeeded under the public nuisance theory. Those that are currently litigating the issue, such as several counties in California, still have hope that they will see the same result as in Rhode Island. There is also a case involving the City of Milwaukee where the public nuisance theory has been accepted, but no paint manufacturers have been held liable as of yet. While there are many more governmental entities that have commenced litigation on

61. State Breakdown, supra note 4 (click on Rhode Island link).
63. State Breakdown, supra note 4 (click on Rhode Island link).
64. Id.
66. State Breakdown, supra note 4 (click on Rhode Island link).
68. State Breakdown, supra note 4 (click on New Jersey link).
69. Id. (click on California link).
70. Id. (click on Wisconsin link).
the issue, a brief overview of the litigation in New Jersey, California and Milwaukee will demonstrate the divergent ways in which the lead paint/public nuisance cases are currently being resolved.

1. New Jersey

In 2002, twenty-six New Jersey towns and municipalities “brought suit against manufacturers, sellers, and promoters of lead pigment seeking to recover costs for detecting and removing lead paint, providing medical care to lead-poisoned residents and for developing educational programs.” Public nuisance was one of the many claims brought by the government entities. The defendants motioned to dismiss the case and the motion was granted, but was subsequently reversed on appeal as to the public nuisance claim, allowing the case to move forward on a theory of public nuisance. In June 2007, the New Jersey Supreme Court reversed the appellate court’s decision holding that the lead paint based claims were inconsistent “with the well-recognized parameters” of the tort of public nuisance.

While the New Jersey Supreme Court ultimately rejected the public nuisance claim, the appellate court entertained some discussion on what is abatement and what are damages where costs of abatement are involved. The court stated:

The [New Jersey] Lead Paint Statute imposes a duty of abatement on property owners, while this civil action demands that the named paint-industry defendants compensate the cities for their expenditures caused by defendants’ creation of a public nuisance.... The relief demanded in the complaint[—]funding future programs and compensating the municipalities for their abatement and health-care expenses[—]would not interfere with the municipalities’ ongoing enforcement efforts under the Lead Paint Statute ... [T]he two classes of remedies are complementary, not conflicting or duplicative.

The very presence of lead paint[—]even lead paint that is never ingested[—]has purportedly caused plaintiffs to incur costs of removing lead paint and of funding detection and education programs.

The court appears to treat the duty of abatement imposed on property owners and the paint industry’s obligation to reimburse the costs of abating the nuisance as two separate remedies, but both as having a

71. See Sprague, supra note 3, at 643.
73. Id.
77. Id. at *13.
connection to an abatement remedy in general. The court later seems to classify the reimbursement for abatement costs as "damages" when it states, "[p]laintiffs also allege damages to themselves from . . . 'the costs of discovering and abating Lead . . . and the costs of education programs for residents of the City . . . '" Considering these two statements together, the court apparently considers "costs of abatement" as relating both to an abatement remedy and a legal remedy of damages. Again, even though the New Jersey Supreme Court ultimately rejected the public nuisance claim, this particular discussion serves as an example of the issue insurers and lead paint manufacturers will have to sort out if the public nuisance claim becomes lucrative for government plaintiffs in other jurisdictions.

2. California

On March 3, 2006, approximately one week after Lead Industries Ass'n came down in Rhode Island, the California Court of Appeal reversed a lower court judgment, reinstating a demurred public nuisance claim. In this case, "[a] group of governmental entities acting for themselves, as class representatives, and on behalf of the People of the State of California, filed a class action against a group of lead manufacturers." One of the many claims in the case is that the defendants "should be required to abate the public nuisance created by lead paint." As in Rhode Island, the "remedy sought [in this case] is abatement 'from all public and private homes and property so affected throughout the State of California.'"

The defendants have argued that abatement is the only remedy available for public nuisance, and that since abatement is not within their control a public nuisance theory should not succeed. The court addressed the nature of the abatement remedy in the context of defendants' above argument, stating:

"[A]lthough California's general nuisance statute expressly permits the recovery of damages in a public nuisance action brought by a specially injured party, it does not grant a damage remedy in actions brought on behalf of the People to abate a public nuisance." The plaintiffs in a representative public nuisance action may not avoid this rule by seeking damages in the form of the "costs of abatement."
The court sheds some light on the tug of war between the “legal” and “equitable” classification of costs of abatement where a government entity sues in a representative capacity. The court favors the equitable classification—associating costs of abatement more with the act of abatement than with money damages—given that government plaintiffs in a representative capacity may not avoid the general rule of the court issuing an abatement remedy for a public nuisance “by seeking damages in the form of the ‘costs of abatement.’” The court further specifies that where a plaintiff seeks damages on his own behalf, the proper method for seeking relief is through a product liability claim, not a public nuisance claim. This case has not yet reached a final outcome.

3. Wisconsin

Similar to the New Jersey case, “[t]he City of Milwaukee appeal[ed] from a judgment and an order dismissing its complaint” against two lead paint manufacturers to recover costs of abating lead paint hazards. Among the claims was public nuisance, “alleging that the defendants were ‘a substantial factor in contributing to the community-wide, lead-based public nuisance in Milwaukee.’” The city was seeking to recover costs it incurred after “[a] 1998 study found that one in five children in Milwaukee suffered from lead paint poisoning[ and] in response, the city launched a lead-abatement program in all the affected homes.” The City of Milwaukee “ask[ed] the paint manufacturers to pay $85 million for the citywide cleanup.” After the court severed the claims against the two defendant paint manufacturers (Mautz and NL Industries) and the trial proceeded in 2007, a Milwaukee jury found that “lead paint in city buildings was a public nuisance, but that NL Industries did not intentionally engage in conduct that caused it.”

II. COSTS OF ABATEMENT IN SIMILAR CONTEXTS

Because there is no current authority to definitively provide an answer as to whether or not costs of abating a public nuisance in the lead paint context are an “equitable” or a “legal” remedy, perhaps the best way to predict and/or propose the correct outcome would be to look at how similar litigation in other contexts has handled the issue. Unfortunately, these other contexts—asbestos, tobacco, environmental

86. Id.
87. Id. at 331.
89. Sprague, supra note 3, at 645 (quoting NL Indus., 691 N.W.2d at 893).
90. Sileo, supra note 55, at 80.
91. Id.
contamination and firearms—do not offer perfect assistance. They do, however, provide authority as to how to treat costs of abatement as a remedy for public nuisance.

A. Asbestos

Asbestos actions typically arise under a products liability theory, and more specifically have arisen in two different situations:

(1) . . . against suppliers of raw asbestos fiber, wherein employees of manufacturers of asbestos products actually or allegedly had contracted asbestos-related diseases as a result of exposure . . . and

(2) . . . against manufacturers of products . . . where insulators and other asbestos workers allegedly or actually had contracted asbestos-related diseases as a result of exposure . . .

Because it is relatively easy to identify the manufacturer of the asbestos-containing material, asbestos plaintiffs generally rely on a theory of product liability and avoid “resort[ing] to theories of liability not requiring product identification evidence,” such as public nuisance. Specifically, most asbestos cases attempt to show that a specific manufacturer’s asbestos-containing material caused “bodily injury” and that damages should compensate for such bodily injury (falling within a CGL policy’s coverage of “all sums which the insured shall become legally obligated to pay as damages because of bodily injury”). Thus, because a plaintiff in asbestos product liability cases can identify a specific manufacturer, show that asbestos caused bodily injury, and be directly compensated through monetary damages, the asbestos context renders no comparable solution as to how costs of abatement should be treated in a public nuisance context.

B. Tobacco

Similar to asbestos litigation, there has never been a hopeful prospect of successful tobacco litigation based on a public nuisance theory, but states and individuals have been successful in bringing suit

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94. Smith, supra note 2, at 121.
95. See Tod Zuckerman & Mark Raskoff, Environmental Insurance Litigation: Law and Practice § 27:13 (2002) (“[T]here have been more asbestos bodily injury claims than asbestos property damage claims. For this reason, there have also been many more asbestos bodily injury coverage disputes (and coverage cases) than asbestos property damage coverage disputes (and case decisions.”).
97. See Pryor et al., supra note 19, at 631 (“The sale of tobacco is so unlike the categories of public nuisance well-established in case law—such as noxious odors, loud noise, and other types of unpleasant and inappropriate uses of property—that we do not see how tobacco sales can be argued to fall within the definition of public nuisance.”).
against tobacco companies using a product liability theory. However, this is not to say that states have never attempted to use a theory of public nuisance against tobacco manufacturers. In fact, plaintiff states have brought cases against the tobacco companies under a theory of public nuisance in an attempt "to avoid many of the defenses available to tobacco companies against more traditional product tort claims filed by individual victims of tobacco-related illness, such as defenses based on the smoker's own conduct and statutes of limitations." But these public nuisance claims by plaintiff states never ran their full course because "[t]he states' lawsuits against the tobacco companies were settled before courts could address the viability of public nuisance claims in the context of mass products . . ." Thus, as with the asbestos cases, tobacco litigation also fails to address how costs of abatement should be classified under a theory of public nuisance because the public nuisance claims never reached judicial analysis. Nonetheless, the settlements made in the tobacco cases have largely "inspired states and municipalities and their attorneys to file similar claims against the manufacturers of handguns and lead-pigment."

C. ENVIRONMENTAL CONTAMINATION

Environmental contamination cases are similar to lead paint cases in that in both contexts there is a toxic substance that is ordered to be abated, removed, or cleaned up. In many instances, where the cleanup has already occurred, costs of abatement are awarded. However, there

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98. See Dean, supra note 20, at 916.
100. Id.
101. Id.
102. See, e.g., Int'l Ins. Co. v. RSR Corp., 426 F.3d 281 (5th Cir. 2005) (seeking declaratory judgment that insurer was not obliged to reimburse insured for environmental remediation costs); Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co., 118 F.3d 1263 (8th Cir. 1997) (seeking an order for insurer to continue payments where insurer stopped making payments for the cost of cleaning up contaminants improperly disposed of by the insured); SnyderGeneral Corp. v. Century Indem. Co., 113 F.3d 536 (5th Cir. 1997) (seeking reimbursement from the excess insurer where insured spilled a toxic chemical and subsequently cleaned it under direction of environmental authorities); Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., 842 F.2d 977 (8th Cir. 1988) (seeking reimbursement for costs of abatement that was required due to improper disposal of toxic chemicals); Maryland Cas. Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) (seeking reimbursement of costs from its insurer for environmental cleanup costs plaintiff was required to pay under CERCLA); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1235 (4th Cir. 1986) (seeking payment from insurer for the cost of cleaning up environmental damage to a disposal site); United States v. Price, 688 F.2d 204 (3d Cir. 1982) (requesting preliminary equitable relief through funding to perform diagnostic studies and to provide an alternate water supply where a landfill owner did not properly dispose of toxic chemicals, thereby contaminating the city's water supply); Certain Underwriters at Lloyd's of London v. Super. Ct., 16 P.3d 94 (Cal. 2001) (asserting that insurers must indemnify the insured under a CGL policy for costs expended in complying with CERCLA); AIU Ins. Co. v. Super. Ct., 799 P.2d 1253 (Cal. 1990) (seeking declaratory relief that insurer must reimburse the costs of a cleanup pursuant to CERCLA); Helena Chem. Co. v. Allianz Underwriters Ins. Co., 594 S.E.2d 455 (S.C. 2004) (seeking
are legal issues that distinguish environmental cases from the recent lead paint cases. First, “[i]n environmental cases, abatement orders are often precipitated by damage that is traceable back to a particular defendant whose conduct had an effect on specific property.” As a result, in the environmental case:

[the legal analysis regarding the nature of damages was done in the context of quantifiable, traceable damage. Conversely, the public nuisance theory in the lead paint case premises liability on the sole fact that a company was one of many that manufactured a particular product that may have possibly or may not have ended up in any number of homes in the jurisdiction.]

Second, the cases arising in the environmental contamination context are almost always brought under a specific environmental protection statute or ordinance as opposed to a theory of public nuisance. For these reasons, it is difficult to find solid authority for how to treat costs of abatement in the lead paint context by analogy to environmental contamination cases.

Notwithstanding these two differences, it would nonetheless be difficult to find undisputed authority from environmental cases regarding how to classify costs of abatement in the insurance context due to the courts’ inconsistent treatment of the issue. In earlier environmental cleanup cases, courts tended to favor treating cleanup costs, or costs of abatement, as not falling within the meaning of the term “damages” in a CGL policy. For example, in *Maryland Casualty Co. v. Armco, Inc.*, where Armco was seeking reimbursement from its insurer for cleanup costs expended to remedy a hazardous waste site, the court explained that a “general comprehensive liability policy between the parties covers ‘damages,’ but not the expenditures which result from complying with the directives of regulatory agencies.”

In this, and other cases, the

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For example, in *Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky*, the insureds allowed rain water mixed with radioactive waste to contaminate the soil of a site, causing measurable increases of radiation in the soil on and near the premises. Similarly, in *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, the insureds released chemicals into the soil in close proximity to their operations.

104. Id. at 6–7.

105. See cases cited supra note 23.

106. See cases cited supra note 24.

107. 822 F.2d at 1352. For more examples of earlier environmental cleanup cases where the court did not equate the environmental cleanup costs as triggering coverage in a CGL policy, see *Cont’l Ins. Cos.*, 842 F.2d at 985, stating “[i]n the insurance context . . . the term ‘damages’ is not ambiguous, and the plain meaning of the term ‘damages’ as used in the insurance context refers to legal damages and does not include equitable monetary relief”; *Mraz*, 804 F.2d at 1329, holding that “response costs” to remedy environmental damage are independent of, and cannot be equated with “property damage”
courts favored the insurer by drawing a line between actual monetary damages and money paid pursuant to an equitable remedy.

However, more recent environmental cleanup cases, such as International Insurance Co. v. RSR Corp., have taken an opposing position.\(^{108}\) In International Insurance Co., a commercial liability insurer was seeking declaratory judgment that the insurer was not obliged to reimburse the insured company for environmental remediation costs imposed by the Environmental Protection Agency (EPA) after lead pollution had been discovered at a smelting site.\(^{109}\) In addressing whether or not the insurer would have to reimburse the costs of remediation, the court stated, "[t]oday, a majority of courts have abandoned the technical legal/equitable distinction between types of damages altogether and have found that ‘damages’ may include ‘response costs’ ‘cleanup costs’ and costs of remediation under CERCLA."\(^{110}\) Other courts, in more recent decisions, have similarly held in favor of the insured, deciding that insurers are obligated to reimburse or repay environmental remediation costs expended by the insured.\(^{111}\)

While the more recent trend in environmental remediation cases is to hold in favor of the insured rather than the insurer, and to order reimbursement of cleanup costs under CGL policies, the fact that there were many cases decided only a decade earlier that held the opposite shows that there is at least some degree of uncertainty in this area of the law. Additionally, the legal theories used in nearly all environmental cases do not include public nuisance. There is, therefore, a foundation to conclude that because the recent majority of environmental cleanup cases have held in favor of the insured,\(^{112}\) the same reasoning should be extended to the lead paint context. But knowing that past cases have held the other way, that public nuisance is not generally used as a theory under a general liability insurance contract and, thus, such remedial response costs are not covered in the insurance policy; and Price, 688 F.3d at 212, holding that a request for funds for abatement of the contaminated water supply “is not, in any sense, a traditional form of damages.”

\(^{108}\) 426 F.3d 281 (5th Cir. 2005).
\(^{109}\) Id. at 284-85.
\(^{110}\) Id. at 288.
\(^{111}\) See Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co., 118 F.3d 1265, 1271 (8th Cir. 1997) ("[W]e interpret the term ‘as damages’ to include both legal damages and equitable relief because that interpretation favors the insured."); Snyder-Representational Corp. v. Century Indem. Co., 113 F.3d 536, 539 (5th Cir. 1997) ("Environmental cleanup costs, whether incurred by the federal government under CERCLA or by an individual who voluntarily undertakes the task of cleaning up hazardous waste, are damages [and thus are covered by the language of a CGL policy]."); AIU Ins. Co. v. Super. Ct., 799 P.2d 1253, 1269 (Cal. 1990) ("To the extent that policy language is ambiguous in light of the way environmental statutes authorize relief, our goal remains to protect the objectively reasonable expectations of the insured."); Helena Chem. Co. v. Allianz Underwriters Ins. Co., 594 S.E.2d 455, 459 (S.C. 2004) ("[T]here is a split of authority over whether environmental cleanup costs constitute ‘damages’ under an insurance policy. The majority of state courts have held that there is coverage for these costs.").

\(^{112}\) SIMPSON THACHER & BARTLETT LLP 2007, supra note 7, at 4–5.
in environmental cases, and that (as demonstrated in Part III) there are recent cases in other contexts that treat costs of abatement as not being "damages," there is uncertainty as to the propriety of extending the holdings in environmental cleanup cases to the lead paint context.

D. **FIREARMS**

Though public nuisance is a primary theory used in suits against handgun manufacturers, plaintiffs have met limited success in their efforts to hold handgun manufacturers liable for damages under the theory. Some plaintiffs have convinced the courts to allow their cases to move forward under a public nuisance theory in the handgun context, but there has not been a monumentally successful case to use as precedent as to how costs of abatement should be classified in terms of coverage under a CGL policy. One of the reasons there has been such limited success in this context is that "[p]roduct manufacturers contend that introducing public nuisance into this area would only lead to instability because existing products liability doctrines already govern the production and marketing of products. Accordingly, they have urged courts to refrain from expanding the concept of public nuisance beyond its traditional boundaries." For example, in 2001, the Third Circuit, in a case against handgun manufacturers, stated:

Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law "would become a monster that would devour in one gulp the entire law of tort."

Without a "landslide" case against handgun manufacturers under a theory of public nuisance, where abatement or costs of abatement are involved, handgun litigation does not offer much help in determining how to treat costs of abatement in the lead paint context.

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114. See, e.g., White v. Smith & Wesson Corp., 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (stating plaintiff's nuisance claim survives the defendant's motion to dismiss the claim); Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1143-44 (Ohio 2002) (stating appellant adequately stated its public nuisance claim so as to overcome the appellee's motion to dismiss the claim).
115. See Dean, *supra* note 20, at 419.
III. Who Should Bear the Costs of Abatement?

Without clear precedent from any other context, courts will have to decide who will bear the cost of abating a lead paint public nuisance. With an understanding of mass litigation in other similar contexts and an understanding of the tort of public nuisance, it seems that the "best" or the "most justifiable" outcome would be to hold lead paint manufacturers, and not their insurers, responsible for the costs of abatement.

However, courts may ultimately resolve the issue in the alternative. There is a long history and a strong policy of interpreting policy language against insurers if the policy is found to be "ambiguous." Thus, if a court determines there is ambiguity in what is meant by the term "damages," insurers may have to overcome the court's inclination to interpret in favor of the insured. Also, the proposition that the insured, and not the insurer, should bear the costs of abatement has been opposed by commentators. Specifically, Miller's 1997 Environmental Claims Journal article suggested that costs of abating lead paint hazards are covered under CGL policies.

In the context of environmental contamination, courts have long since held that costs expended to mitigate future environmental damage are covered absent a formal legal action against a policyholder.

By analogy, lead-based paint abatement costs are also covered because, in most cases, abatement of the lead-based paint hazard is undertaken to mitigate future bodily injury.

It is possible that courts considering the issue will accept this analogy and draw the same conclusion.

Yet, while courts often interpret policies to favor the insured, and courts may agree with commentators that costs of abatement should be covered by CGL policies, as was mentioned at the outset of this Section, it is not clear that courts should reach this result. First, a rule that says where there is ambiguity courts will interpret in favor of the insured presupposes that there is indeed ambiguity in the insurance contract. However, before applying the rule of construction regarding ambiguity, courts must first apply other rules and make every effort to determine the true meaning of a contract in an attempt to avoid the rule for ambiguity in the first place. Second, there have been several new developments in the lead paint context that did not exist at the time of Miller's 1997 article. While it is true that, as the article states,

119. See supra Part II.
120. ALLAN D. WINDT, 1 INSURANCE CLAIMS AND DISPUTES 4TH § 6:2 (2007).
121. See Miller, supra note 15, at 38.
122. Id.
123. See Windt, supra note 120.
environmental damage abatement costs have been covered under CGL policies, the article does not consider what effect the recent acceptance of public nuisance as a valid theory in the lead paint context might have on the analogy; the theory succeeded for the first time in 2006, nine years after the article was written. Thus, any analogy drawn between the lead paint and environmental contamination contexts that suggests costs of abatement are covered under a CGL policy must consider any impact the recent acceptance of the nuisance theory might have on the comparison. Additionally, the article overlooks the fact that many cases in the past have come down in favor of the insurer where costs of abatement are involved.

The Rhode Island court, in *Lead Industries Ass'n*, may one day have the opportunity to consider these arguments in an attempt to resolve the issue. It is particularly interesting to note that the defense in the Rhode Island case has raised an argument that, were it accepted by the court, would seemingly resolve the issue in favor of the insured. In its attempt to show that abatement is not an appropriate remedy for the case, the defense simply argues that where there is payment of money, the remedy is legal, not equitable. Specifically, the defense states, “[a]n ‘injunction’ that seeks to compel the payment of money is properly characterized only as legal, not equitable, relief.” The defense further states, “[d]espite the State’s tactical decision to characterize its funding request for lead-related programs as something other than a remedy at law, the relief is not equitable. For this reason, the State’s demand for abatement or abatement funds cannot be awarded in equity.” If this is true, and the remedy is legal, coverage under a CGL policy would be triggered since the money paid would then be classified as “damages.”

But there are also strong arguments in opposition to the defense’s suggestion that would result in treating costs of abatement as “equitable,” rather than “legal.” First, abatement, and not damages, is the appropriate remedy for a claim of public nuisance in general. As stated in Part I of this Note, government entities may use a public nuisance theory to “seek an injunction to stop the activity causing the public nuisance or force the party to abate the public nuisance itself.” Both of theses remedies are equitable in nature, neither having any association with a legal remedy. While private individuals “can use [a

124. See *supra* Part II.C.
125. See cases cited *supra* note 107.
126. See *Position Paper on Abatement*, *supra* note 11, at 5-6.
127. *Id.* at 6.
128. *Id.* at 7.
130. *Id.*
public nuisance claim] to seek compensatory damages," a government plaintiff can only seek an equitable remedy, such as abatement. Thus, the actual costs associated with an equitable remedy, under a theory that may offer only an equitable remedy, should be equitable in nature as well. To say that a legal remedy should stem from a claim that, when invoked by a government entity can offer only equitable recourse, muddles the bounds of public nuisance. To maintain a separate identity for government claims of public nuisance, the remedy should not be equated with "damages," a legal remedy.

Second, though no cases give direct authority as to how to treat costs of abatement in the lead paint context, at least one recent case in the handgun context has sided with the interpretation that costs of abating a public nuisance are equitable, and thus do not trigger coverage by the insurer. In *Ellett Bros. v. U.S. Fidelity & Guaranty Co.* an insured handgun manufacturer sought declaratory judgment against its insurers under CGL policies, alleging that the insurer was obligated to indemnify the insured for costs of abating the public and private nuisances created by the manufacturer’s marketing of handguns, among other complaints.

In an earlier case, the Fourth Circuit had held that “damages” in an insurance contract means legal damages only and do not extend to equitable relief. Assuming costs of abatement to be “equitable” in nature, the court decided that since “damages” are a purely legal remedy, interpretation of the CGL policy should not necessarily be construed in favor of the insured. Ultimately, the court concluded that none of the complaints in *Ellett Bros.* sought “damages,” or compensation for past injuries. Though “money” was sought in part as a reimbursement for costs of abatement, the court held that none of this “money” constituted “damages.” Thus, the insured’s CGL policy coverage was not triggered, and the insurer was not liable to pay any costs of abatement. *Ellett Bros.* is a good example of a recent case that has considered how costs of abatement in public nuisance should be classified, and such an interpretation could easily extend to the recent lead paint cases.

Additionally, particular language used in one of the pending lead paint cases also gives some clarity to the proper classification of costs of

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131. Id.
132. Id.
133. 275 F.3d 384, 386–87 (4th Cir. 2001).
134. Id. at 387 (citing Cincinnati Ins. Co. v. Milliken & Co., 875 F.2d 979, 981 (4th Cir. 1988)).
135. See id.
136. See id.
137. See id. at 386–87. But see id. at 390 (Michael, J., concurring in part and concurring in the judgment) (stating that in other circumstances, the term “damages” may involve forms of equitable relief).
abatement. In County of Santa Clara v. Atlantic Richfield Co., the court stated that a damage remedy may not be sought in a representative capacity where a public nuisance is involved.\(^{138}\) This statement, specifically applied to the lead paint/public nuisance context, favors treating costs of abatement as "equitable" since damages are not allowed under a public nuisance theory. The court also called attention to another California case that gave even more clarity to the proper classification of costs of abatement.\(^{139}\) In City of San Diego v. U.S. Gypsum Co., the City of San Diego brought an action against manufacturers of asbestos-containing building materials, seeking to recover damages for money it had spent and would spend to identify and abate asbestos danger and for loss of use and declining value of its property.\(^{140}\) However, in disallowing the city to bring an action under public nuisance (because the city brought the action on its own behalf for a "defective product," not in a representative capacity), the court noted that in all other asbestos-related "product liability" cases, no party could recover damages for the defective product under a theory of nuisance.\(^{141}\) This further supports the notion that damages are not recoverable under a theory of nuisance brought in a representative capacity, and therefore the costs of abatement associated with a public nuisance should fall within the equitable remedy of abatement.

It is unclear whether courts will ultimately decide to interpret CGL policies in favor of the insured by analogizing to the more recent environmental cleanup cases, or whether they will decide to equate only equitable remedies with government public nuisance claims, and look to cases such as Ellett Bros. to find in favor of the insurers. But if the courts do decide to favor the insured, at the very least they should consider the impact of "expansive" policy interpretations on insurers.\(^{142}\) Specifically, where insurers expect the limits of their policies to be clear and fixed and then judicial interpretation expands policy coverage beyond what the insurers had expected, it "undermines insurers' actuarial calculations" and "destabilizes the insuring function."\(^{143}\) While noting the issue is sharply divided as to whether "damages" do or do not include costs of abatement in the insurance context,\(^{144}\) one court, in reference to the idea that the defining damages in a CGL policy should be narrowly construed, stated:

\(^{139}\) Id. at 325–29.
\(^{140}\) 35 Cal. Rptr. 3d 876, 878 (Cal. Ct. App. 1994).
\(^{141}\) Id. at 883 (citing several California cases that reject the idea of allowing recovery of damages under a theory of nuisance).
\(^{142}\) See generally Abraham, supra note 9.
\(^{143}\) Id. at 960.
The expansive reading of the term "damages" urged by the state would render the term "all sums" virtually meaningless. "If the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract ... would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase 'to pay as damages' would be obliterated." 4

No matter how courts decide to handle the issue, there will be justification for their decision either way. With a recent trend of finding in favor of the insured in the environmental cleanup context and with a policy to interpret in favor of the insured where there is ambiguity, it is very possible the courts will hold insurers responsible for the costs of abatement. But whether or not courts should decide that a legal remedy is available under a theory that generally offers only equitable remedies is a different question. Perhaps the answer to the question of how the issue should be resolved can be found in a simple statement from Rhode Island Attorney General Patrick Lynch when, referring to Lead Industries Ass'n, he said the "suit has always been about abatement," rather than damages. Thus, in a suit under a theory of public nuisance, where the remedy sought is abatement, it seems that it would be most appropriate to classify the remedy as "equitable" regardless of whether the remedy is the actual abatement itself, or the costs of abating the nuisance in the alternative.

CONCLUSION

Will insurers bear the cost of abating the latest public nuisance? The answer remains unanswered by case law. There has yet to be a strong authoritative answer regarding how to treat abatement costs where a theory of public nuisance is used in lead paint litigation. Costs of abatement are not new to the field of insurance and have been an issue in environmental contamination and handgun manufacturing in the past. Similar mass tort litigation has run its course in the contexts of asbestos and tobacco. In most of these contexts, the theory of public nuisance has found its way into court discussion. Yet the recent lead paint litigation opens a new chapter, and will ultimately merit new answers to these old questions placed in this new context.

While courts will be justified either way in deciding that costs of abatement are or are not covered by CGL policies in the lead paint context, perhaps the best answer is that costs of abatement should not trigger insurance coverage under a CGL policy. A theory of public nuisance has, in the past, offered as its principal remedy "abatement,"

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145. Id. at 986 (quoting Md. Cas. Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987)).
146. Ertel, supra note 29, at 82.
and the costs of carrying out the abatement should not be treated any differently than the equitable remedy itself.

**POSTSCRIPT**

This note was submitted for publication prior to the Rhode Island Supreme Court’s decision in *Rhode Island v. Lead Industries Ass’n.* On July 1, 2008, the Rhode Island Supreme Court reversed the judgment of the lower court, dismissing the case because the state had failed to allege the necessary facts to support its public nuisance claim. With this decision, the answer to the question of who should bear the cost of abating a lead paint public nuisance remains unanswered for a while longer, and perhaps for good if the remaining states still actively litigating the issue follow the same path that Rhode Island has taken. While the question may still be answered in the near future, for now the issue remains unresolved.

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148. *Id.* at *2.