

IN THE MISSOURI SUPREME COURT

CITY OF ST. LOUIS

Appellants,

vs.

BENJAMIN MOORE & COMPANY;
MILLENNIUM CHEMICALS, INC.;
MILLENNIUM HOLDINGS, LLC;
MILLENNIUM INORGANIC
CHEMICALS, INC.; NL INDUSTRIES,
INC.; PPG ARCHITECTURAL FINISHES,
INC.; SCM CORPORATION, THE
SHERWIN-WILLIAMS COMPANY, AND
XBD, INC.

Respondents.

APPEAL NO. ED 87702

**BRIEF IN SUPPORT OF MOTION TO APPEAR AS AMICI CURIAE AND
ON BEHALF OF AMICI ALLIANCE FOR HEALTHY HOMES, THE ST.
LOUIS LEAD PREVENTION COALITION, AND THE CHILDREN’S
HEALTH ADVOCACY PROJECT**

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I. INTEREST OF AMICI

The interests asserted by the undersigned *amici* are as follows:

The Alliance for Healthy Homes works to protect children from lead and other home environmental health hazards. A national, non-profit public interest organization, the Alliance advocates for policy solutions and builds the capacity of communities to prevent in-home hazards from harming the health of children, their families, and all residents. The Alliance is working to ensure that state and government lawsuits to hold the lead industry accountable for problems stemming from lead-based paint are structured to maximize public health benefits.

The St. Louis Lead Prevention Coalition (SLLPC) is a nonprofit organization incorporated under the laws of the state of Missouri and registered with the Internal Revenue Service as a 501(c)(3). The mission of the SLLPC is to catalyze community efforts towards reduction and ultimate elimination of lead poisoning and lead hazards in our region. Childhood lead poisoning is an environmental health issue impacting the welfare of our residents and the future of our community. The enormity of the impact is clearly reflected in the extensive remediation needed to make housing units lead-safe for families. This remediation places an overwhelming financial burden on individual property owners, community-based organizations and local governments. The St. Louis Lead Prevention Coalition supports all efforts to make housing lead-safe for families and the efforts of St. Louis City to seek funding from the source of the lead paint poisoning, the lead paint manufacturers.

The Children's Health Advocacy Project is a Missouri nonprofit corporation, established in 2006. Its purposes, among others, include (a) reducing the health risks to children from their environment by using the legal system to prevent their exposure to health risks; and (b) providing free legal assistance to low-income families with children who are sick or disabled, when legal assistance can help alleviate the health problems of children. It provides these services primarily in conjunction with the health care provided at local children's hospitals.

II. PRELIMINARY STATEMENT

The City of St. Louis has brought this lawsuit on behalf of its citizens in pursuit of a solution to the problem of lead poisoning in the City. The impact of lead poisoning on children and society as a whole is staggering. In children, an elevated blood lead level can cause permanent brain damage, learning disabilities, and behavioral disorders, as well as other serious harms including kidney damage, hearing loss, and more. Lead exposure is associated with poorer school performance, higher dropout rates, attention difficulties, reduced lifetime earnings (and tax contribution), aggressive and delinquent behavior, and adult criminality. At more severe exposure levels, lead can cause brain swelling, seizures, and—rarely today—death. For society, lead poisoning results in generations of children whose potential is thwarted and significant monetary costs to fund programs to combat the disease at all levels, from screening, treatment, and abatement programs to educational and mental health programs.

The damage must stop. Government entities have a responsibility to protect the public against lead hazards prevalent in the housing stock of St. Louis as a result of the conduct of those companies that manufactured, promoted, and sold lead pigment, including through litigation, if necessary.

This suit is rooted in long-standing principles of common law public nuisance, a cause of action that is uniquely suited to protect the public health and welfare. In light of all the scientific research conducted on the topic of childhood lead poisoning and the recognition of the dangers that it poses to health and life, there can be no doubt that the most vulnerable members of the citizenry—children—need protection from lead's destructive impact.

Many non-governmental organizations are also working diligently to assist families impacted by lead poisoning and advance primary prevention. This is a national public health problem about which the Alliance for Healthy Homes, the St. Louis Lead Prevention Coalition, and the Children's Health Advocacy Project have invested considerable effort to catalyze awareness and action to protect children from lead poisoning. The American Public Health Association has urged governments to initiate litigation against the manufacturers of lead because:

"doing so in the case of lead paint could help increase public visibility of the issue; and that doing so may help discourage corporations from engaging in future irresponsible behavior that damages the environment or the public health." (APHA, Resolution No. 9704, November, 1997).

Litigation by government entities to force responsible polluters to the table to help remove the polluters' toxins from homes will dramatically benefit the public health, protect our children, bring justice to taxpayers, and ensure corporate accountability. This lawsuit targets the source and cause of the public nuisance. The former lead pigment companies named as parties caused and contributed to the creation of the public nuisance and therefore should bear some responsibility for creating the solution. These companies acted carelessly and with complete disregard for the health and safety of the children of St. Louis.

In spite of their primary role in creating the problem of lead poisoning, these companies have utterly failed to help resolve it; they refuse to accept a scintilla of responsibility for the harm to children, which their conduct has caused. In essence, these lead pigment companies ask this Court to immunize them from liability as a matter of law by upholding the dismissal of this case, leaving the burden of lead poisoning on government, social service organizations, and lead poisoned children and their families. This Court must not sanction their outrageous display of corporate irresponsibility. After over a century of denying the toxicity of lead and then sidestepping responsibility by blaming others, it is time for these companies to become part of the solution.

III. PROCEDURAL HISTORY

Amici hereby rely upon the procedural history set forth in the Substitute Brief of Appellants.

IV. STATEMENT OF FACTS

Amici hereby rely upon the statement of facts set forth in the Substitute Brief of Appellants.

V. ARGUMENT

A. IN DETERMINING THIS APPEAL, THE COURT MUST CONSIDER THE MAGNITUDE OF THE PROBLEM OF LEAD POISONING IN ST. LOUIS

As the City discusses in its brief, “[a]bout 40% of the children in the City of St. Louis are lead poisoned,” putting St Louis “in the top ten U.S. cities for the number of children with elevated blood levels.” *See* Substitute Brief of Appellants at 13 (hereinafter “App. Br.”). While this percentage is extremely high, it is merely a snapshot in time and fails to account for previously poisoned children whose levels have returned to less than 10µg/dL. While a decreasing blood lead level is a step in the right direction for a child’s health, the neurological damage that occurred while the blood lead level was elevated is believed to be irreversible.

One of the most disturbing aspects of lead poisoning is that a child is most in danger in his or her home. A home should be a place of safety and sanctity, where children are protected from the insults and perils of the outside world. But in homes where lead paint has been applied to the walls and woodwork, the children are living amidst poison. “An estimated 79% of St. Louis buildings were constructed prior to 1950 [when lead concentrations in paint were highest; also, the older the home, the more likely it is to have multiple coats of high-lead paint

on a greater number of painted surfaces] [*See* http://www.afhh.org/hhe/hhe_lead.htm] and 90 percent prior to 1978, when residential use of lead-based paint was prohibited. The Health Department estimates about 140,000 housing units in St. Louis contain lead paint.” *See* City of St. Louis Department of Health Website, Lead Poisoning Facts. Moreover, “[l]ead the size of three grains of sugar eaten over a period of time can poison a child. It is estimated that the average US house with lead paint has about 100 pounds of lead.” St. Louis County Department of Health Website, 2/5/2007. Therefore, the majority of housing in St. Louis is unsafe for children because of the harm or threat of harm posed by lead-based paint.

Lead poisoning strikes innocent children at a critical point in their development—from birth to 6 years of age. City of St. Louis Department of Health Website, Lead Poisoning Facts. In fact, exposure often occurs when children simply behave as children—by crawling on the floor, pulling themselves up by holding onto windowsills, and engaging in normal hand-to-mouth behavior.

While the number of lead-poisoned children and the prevalence of lead-based paint in housing reflect the fact that lead poisoning can and does impact children and families of all backgrounds, the reality is that lead poisoning affects lower income and minority children at substantially higher percentages. “Childhood lead poisoning disproportionately affects minorities, disadvantaged, and low income people.” City of St. Louis Department of Health Website, Lead Poisoning Facts. In the most recent publication on this subject, which covers data

from 1999 to 2002, the CDC found that non-Hispanic Black children 1-5 years old were about 2 ½ times as likely as white children to have blood lead levels 10 or greater (1.3% of white children had blood lead levels 10 or greater vs. 3.1% of non-Hispanic black children. *See* www.cdc.gov/mmwr/preview/mmwrhtml/mm5420a5.htm. Also, more recent data indicate that immigrant children are more likely to have blood lead levels higher than the general population. *See* <http://pediatrics.aappublications.org/cgi/content/abstract/108/1/158>. *See* <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5402a4.htm>

Combating lead poisoning is important to advancing social justice because the disease disproportionately impacts minority, disadvantaged, and distressed communities. Perhaps not surprisingly, the communities hardest hit by lead poisoning most lack the resources to address the problem. Indeed, according to CDC, some 59% of the reported cases of lead poisoning in the US occur in ten cities (including St. Louis), and these ten cities are among those at highest risk as measured by the two risk factors linked to elevated blood lead levels in children—household poverty and pre-1950 housing (*See* Scorecard, <http://www.scorecard.org/env-releases/lead/rank-counties>).

Despite the plans and programs instituted by legislation and the tireless efforts of medical professionals and community groups, childhood lead poisoning is a devastating environmental health problem for the children of St. Louis today. The City of St. Louis must have the opportunity to exercise their longstanding

rights to bring an action for common law public nuisance to remediate and abate against the lead companies, whose conduct is at the source of this environmental health problem.

B. THE IMPACT OF LEAD POISONING ON CHILDREN, TOWNS, AND HOMEOWNERS IS SEVERE AND LONG LASTING.

There is no cure for lead poisoning. Once lead is absorbed into the human body, it “affects virtually every system in the body, and often occurs with no distinctive symptoms.” *See* App. Br. at 12. That damage is permanent and irreversible; no prescription medication or surgical procedure can reverse lead’s adverse effects. The Centers for Disease Control has established 10µg/dL of lead in blood as the level of concern—the level at which lead causes damage. However, “[e]ven at low levels, lead poisoning causes loss of IQ and attention span, hyperactivity, aggressive behavior, reading disabilities, and other learning and behavioral problems.” *See* City of St. Louis Department of Health Website, Lead Poisoning Facts. “[I]t is now known that children suffer intellectual impairment before technically being poisoned with 10 micrograms per deciliter of lead. The April 17, 2003, *New England Journal of Medicine*’s lead research article documents a loss of over seven IQ points in children before they reach this threshold.” Berg, MD, Daniel, *Lead Poisoning in Saint Louis*, 34 *Synthesis/Regeneration* Spring 2004. This is why controlling lead hazards *before* children are poisoned is so critical. However, because of a lack of resources,

homes usually are not inspected until *after* the health department receives notice that a child has been poisoned there, and the risk of exposure to lead awaits children in thousands of other homes.

Not only are lead poisoning's physical, mental, emotional, and financial manifestations devastating to the child and his or her family as they attempt to cope on a day-to-day basis with this disease, they also impact the child's future. "Lead poisoning has been linked to increased juvenile delinquency, increased behavior problems, decreased intelligence/ability to learn, hearing problems, kidney damage, seizure and even death." 2005 Fact Sheet, City of St. Louis' Lead Poisoning Prevention Program. These special accommodations can put a financial and emotional burden on the family. They also strain the cities and towns where these children reside because these children require services and programs that drain the resources of local school systems, health programs, and juvenile justice systems.

Due to the strict mandates of Missouri's prevention-oriented law, lead poisoning imposes a tremendous cost on homeowners as well. Under the current statute, property owners are saddled with an enormous financial burden attributable to the presence of lead paint in their homes. The cost of lead paint abatement is often prohibitive. These expenses often drive property owners to perform paint repair or to complete removal work by themselves, often in an unsafe manner, which may further expose the current residents to lead without permanently protecting future residents. In high-risk properties in marginal and

distressed communities, unless all lead paint is removed from a home in a safe manner, the presence of that lead may continue to be a hazard.

Furthermore, property owners are generally on their own when it comes to financing lead hazard reduction; some homeowners are eligible for lead remediation grants through public and private agencies, but this funding is very limited. Despite the best efforts of city agencies working together on abatement and remediation, at the rate they are making homes lead free in St. Louis, the City “will not be lead-free until after the year 3000.” Berg, MD, Daniel, *Lead Poisoning in Saint Louis*, 34 Synthesis/Regeneration Spring 2004. Considering what is involved to qualify and inspect a single property, contract for the work, and complete one abatement, it is clear that, without more funding for this work, children will continue to be used as “lead detectors” in St. Louis, and this public health crisis will persist.

C. A PUBLIC NUISANCE CLAIM IS UNIQUELY SUITED TO SOLVE THE EPIDEMIC LEAD POISONING PROBLEM IN ST. LOUIS.

The City of St. Louis has a long-standing cause of action available to it for resolving this public health problem that plagues its children. As a government entity acting in its representative capacity, the City is uniquely well positioned to bring an action for public nuisance, which would allow hazardous properties to be inspected and abated before children are poisoned.

This City has the power to act on behalf of its citizens; in fact, by virtue of its traditional police power, the City is obligated to do so as government actors responsible for the public health and welfare. *See* St. Louis, Missouri Revised Charter art. 1 § 25 *Nuisances* (1914) ("[The City may] define and prohibit, abate, suppress and prevent or license and regulate all acts, practices conduct...and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city and all nuisances and causes thereof."); St. Louis, Missouri Revised Charter art. 1 § 33 *General welfare* (1914)("[The City may] do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare...of the [city's] inhabitants."); *see also*, Mo. Rev. Stat. § 71.780 (2005)("[C]ities...shall have...the power to suppress all nuisances which are, or may be injurious to the health and welfare of the inhabitants of said cities...."); *Kansas City v. Mary Don*, 606 S.W.2d 411, 415 (Mo. Ct. App. 1980)("It cannot be questioned that the city may suppress and abate nuisances which are a menace to public health."); *St. Lee's Summit v. Browning*, 722 S.W.2d 114, 116 (Mo.Ct.App. 1986).

Government actors have the unique ability to enact uniform changes and remedies in order to best serve their constituencies. Under the current system, funding constraints and other resource limits make routine, proactive inspections and enforcement impossible. Even were this possible, it is not sound public policy to issue abatement orders that will impoverish the homeowner and even cause

foreclosure and homelessness. As a result, governments to date have sought to minimize the effects of the harm, by retroactively offering medical intervention to poisoned children and attempting to bring about, through enforcement and assistance, some reduction of lead hazards. Remedies available through a public nuisance cause of action would enable screening, inspections, enforcement, and abatement to be instituted proactively to prevent harm from ever occurring. Thus, a public nuisance approach is critical to enabling cities and counties to fulfill their responsibilities as protectors of the public.

However, these government actors are not the only parties who have worked toward eliminating childhood lead poisoning as a public health crisis. Voluntary non-profit, religious, and other private associations of involved members of the community; homeowners and rental property owners; and individual families with young children all have contributed substantial effort and resources toward combating lead paint hazards over many decades. There is no question that these stakeholders are actively and passionately involved in protecting the welfare of children at risk for lead poisoning. Only one stakeholder is noticeably absent from the list of those contributing to the solution: the companies that made and profited from the sale of the toxic lead pigment product.

At a most basic level, the former lead pigment manufacturers in this suit are responsible for creating the public nuisance brought about by the widespread presence of lead-based paint in the City's housing stock. Absent the lead, paint in older homes would not present the toxic threat it does today. The lead industry

produced the lead pigment in paint currently found in homes throughout the City. Despite this, these companies have fought every effort to include them in seeking solutions.

In short, these companies have created a public nuisance. St. Louis' children and their families have a right to live in homes free from harm or the threat of harm. Lead-based paint in housing throughout the state presents "an unreasonable interference with common community rights such as the public health, safety, peace, morals, or convenience." *St. Lee's Summit*, 722 S.W.2d at 115.

Despite their clear culpability, former lead pigment manufacturers companies have succeeded in laying the entire burden upon property owners, who happen to purchase old homes with lead paint; municipalities, who are charged with redressing common harms; and poisoned children and their families. Yet most property owners cannot bear the cost of abatement or recoup it at sale, and most municipalities lack funding to adequately address the harms in a proactive way.

The companies, however, are well-positioned to assist property owners, municipalities, and families with the goal of eliminating childhood lead poisoning.

The City of St. Louis has a strong public interest in protecting its children from lead poisoning and its attendant costs. Its capacity to pursue such a policy would be seriously undermined if these former lead pigment manufacturers are insulated from liability for their irresponsible and willful conduct.

D. PRODUCT IDENTIFICATION IS NOT A REQUIREMENT TO PROVE CAUSATION IN A PUBLIC NUISANCE CAUSE OF ACTION

The City of St. Louis brought this action on behalf of its citizens against the Defendants for creating a public nuisance - not based on any claim or theory of product liability. Previously, the former lead pigment manufacturers argued product liability concepts in order to mislead the lower court into believing that the City needed to be able to prove that a particular Defendant's lead pigment was on a particular wall or window in St. Louis in order to prove causation of a public nuisance. This false premise led the court to commit the error that serves as the basis for this appeal.

The inquiry before this Court at this time is whether the City's public nuisance claim requires that, as a matter of law, the City prove the existence of each Defendant's lead pigment in particular homes and buildings throughout the City. The City contends that the conduct of the Defendants, individually and collectively, in manufacturing, marketing, and promoting lead, is sufficient to establish liability for creating a public nuisance in the City of St. Louis.

The City's public nuisance claim requires proof of the existence of a condition in St. Louis that causes an unreasonable harm or threat of harm to the public and proof that the Defendants' conduct created, maintained, or contributed to the condition alleged to be the public nuisance. *See State of Rhode Island v. Lead Industries Ass'n*, 2001 WL 345830 at * 7 (RI. Super. Apr. 2,

2001)(Silverstein, J.); *see also State of Rhode Island v. Lead Industries Ass'n*, C.A.No. 99-5226, Decision (Feb. 26, 2007)(Silverstein, J.) (reaffirming the application and definitions of public nuisance and liability in a government entity lead pigment case in denying Defendants' motion for a new trial/judgment as a matter of law after jury verdict against three industry defendants). Proof of product identification is not required to establish either of these elements of the City's public nuisance claim, and, therefore, the lower court erred in so holding.

To satisfy the first element, the City submits that the public nuisance is the collective presence of lead throughout St. Louis and not, as Defendants suggest, particular paints on particular walls on particular homes in the City. In short, the public nuisance claim that the City presses against these manufacturers has nothing to do with the presence or condition of a specific manufacturer's lead pigment in any particular home or group of homes throughout the City. The City does not even seek in this action "to hold the defendants liable on the basis that their products caused harm to the plaintiff." *City of St. Louis v. Benjamin Moore & Co.*, 2006 WL 3780785 *4 (Mo.App. E.D.,2006). No matter how Defendants label the City's case to this Court, the City's claim is not based in product liability law, but in common law public nuisance.¹ The nuisance was the direct result of

¹ Defendants, and the lower court, relied heavily on the holding and reasoning of the *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) case. For all of the reasons set forth in Appellant's brief and reply, Amici urges this Court to reject

the Defendants' manufacturing, marketing, and distributing of lead products in ways that ensured the continued use of lead pigment in paints and coatings long after the Defendants knew, or should have known that such use would create hazards to human health. Proof of such collective public nuisance does not concern any property specific information, including information concerning the presence or condition of lead paint in any property or particular group of properties, or the identity of the particular brand or manufacturer of lead products contained in paints and coatings that is present throughout the City. Instead, it concerns evidence of the Defendants' marketing, distribution, and sales practices both within and outside St. Louis, conduct that is detailed in the City's Complaint.

Focusing specifically on the determination of liability, courts across the country have consistently held that liability for a nuisance lies when one creates, maintains, or contributes to the creation or maintenance of a public nuisance. *See State of Rhode Island*, 2001 WL 345830 at * 7 (“[o]ne is subject to liability for a

the application of *Zafft*. Additionally, this Court should reject *Zafft* because that was purely a product liability case, which necessarily imposed proof that an identifiable product caused harm. However, in the City's case, where it seeks to impose public nuisance liability on Defendants based on their conduct that caused the nuisance, product identification is not required to prove actual causation. The lower court applied the incorrect standard to the City's case; as such, this Court should reverse its decision dismissing the City's public nuisance claim.

nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.”) (citing 4 Restatement (Second) *Torts* § 834 at 149 (1979)); *See also* 58 Am. Jur. 2d *Nuisances* § 116 (1999) (emphasis added) (“[a]s a general rule, one who creates a nuisance is liable for the resulting damages, and ordinarily his liability continues as long as the nuisance continues. Furthermore, liability for nuisance may be imposed upon one who sets in motion the forces which eventually cause the tortious act, and all who participate in the creation or maintenance of a nuisance are liable for injuries suffered by others as a result of such nuisance.”); *City of New York v. Beretta Corp.*, 315 F. Supp. 2d 256, 282 (E.D.N.Y. 2004) (“Persons who join or participate in the creation or maintenance of a public nuisance are liable jointly and severally for the wrong and resulting injury.”); *Bubalo v. Navegar, Inc.*, 1997 U.S. Dist. LEXIS 8551, *13 (N.D. Ill. 1997) (“under Illinois law, liability [for a public nuisance] may be established by demonstrating that the defendant was the creator of the nuisance”); *North Carolina ex rel. Howes v. W.R. Peele*, 876 F. Supp. 733, 741 (E.D.N.C. 1995) (“The person who creates the nuisance is liable and that liability continues as long as the nuisance exists.”); *New Jersey Dep’t of Env’tl. Protection & Energy v. Gloucester Env’tl. Mgmt. Servs.*, 821 F. Supp. 999, 1012 (D.N.J. 1993) (“It is enough for a nuisance claim to state that the [defendants] . . . allegedly contributed to the creation of a situation which, it is alleged, unreasonably interfered with a right common to the general public.”); *New York v. Fermenta ACS Corp.*, 608 N.Y.S.2d 980, 985 (Super. Ct 1994)

(“While generally nuisance actions are brought against landowners... ‘everyone who creates a nuisance or participates in the creation or maintenance . . . of a nuisance are liable. . . for the wrong and injury done thereby.’”(citations omitted)); *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.*, 221 Cal. App. 3d 1601, 1619-20 (5th Dist. 1990) (“any person creating or assisting to create and maintain the nuisance was liable to be sued for its abatement and for damages”); *Philadelphia Elec. Co. v. Hercules, Inc.*, 587 F. Supp. 144 (E.D. Pa. 1984), *rev’d on other grounds*, 762 F.2d 303 (3d Cir. 1985); *Duncan v. Flagler*, 132 P.2d 939, 940 (Okla. 1942) (“the general rule is stated that all those who participate in the creation . . . of a nuisance are liable to third persons for injuries suffered there from”); *Shurpin v. Elmhurst*, 148 Cal. App. 3d 94, 101 (2d Dist. 1983) (“the party or parties who create or assist in [the creation of a nuisance] . . . are responsible for the ensuing damages”); *Armory Park Neighborhood Ass’n v. Episcopal Community Servs.*, 712 P.2d 914 (Ariz. 1985).

Further, the parties who created a harmful physical condition constituting a public nuisance are liable for the continuing harm caused by the physical condition. As explained in comment e to Restatement (Second) of *Torts* § 834:

Activities that create a physical condition differ from other activities in that they may cause an invasion of another’s interest in the use and enjoyment of land after the activity itself ceases. . . . if the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person

who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm. His active conduct has been a substantial factor in creating the harmful condition and so long as his condition continues the harm is traceable to him. This is true even though he is no longer in a position to abate the condition and to stop the harm.

See also Adams v. NVR Homes, Inc., 193 F.R.D. 243, 251 (D. Md. 2000) (“Where the work or finished product of a third party is inherently dangerous and constitutes a public nuisance, such third party may be held liable for the creation of the public nuisance even though the third party no longer has control of the work or product creating the public nuisance.”).

The City alleges that the Defendants were the creators of the public nuisance about which it complains. The Defendants, individually and collectively, manufactured, distributed, and/or promoted the use of lead-based paint, a substance they knew or should have known was toxic to children, for use in and on homes and buildings. *See* City’s Fourth Amended Petition at ¶15. In so doing, the Defendants ensured that lead would be present on homes and buildings throughout the City, thus causing devastating health effects (and possibly even death) to residents and visitors to these homes and buildings. *Id.* at ¶¶18, 21. They thereby participated in the creation of the nuisance. Indeed, it was the Defendants who had the ability to prevent the creation of the nuisance by refraining from fraudulent

and deceptive marketing practices, warning consumers of the dangers of exposure to lead, and discontinuing the sale of lead-based paint, yet they failed to do these things. *Id.* at ¶¶ 25-28. Thus, the Defendants’ conduct as alleged “remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did.” *Commonwealth v. Barnes and Tucker*, 353 A.2d 471, 479 (Pa. Commw. Ct. 1976), *aff’d*, 371 A.2d 461 (Pa. 1977).

The City’s inability to identify the manufacturers of lead products contained in paints and coatings in its homes and buildings is not fatal to its public nuisance claim, as Defendants contended and the lower court held. In *City of Milwaukee v. NL Industries, Inc.*, 691 N.W. 2d 888 (Wisc. App. 2004), the Wisconsin Court of Appeals had occasion to examine, and reject, this very issue. In that case, the City of Milwaukee sued manufacturers and promoters of lead pigment and lead paint, alleging that the defendants were “a substantial factor in contributing to the community-wide, lead-based public nuisance in Milwaukee.” *Id.* at 893. The defendants moved for summary judgment, claiming that the City was required to prove “at a minimum, that [defendants’] pigment or lead paint. . . is present on windows in. . . properties and that their conduct somehow caused the paint to become a hazard to children.” The court rejected the defendants’ position, finding instead that product identification and property specific evidence was not required to prove that a community-wide public nuisance existed or that the

defendants were liable for that nuisance. The court found that under the theory advanced by the defendants (the same theory that was adopted by the court below)

the concept of public nuisance would have no distinction from the theories underlying class action litigation, which serves to provide individual remedies for similar harms to large numbers of identifiable individuals. Here, the allegation at its essence is that defendants sold and promoted a dangerous product to a community and that product caused a serious public health problem in that community. The City, rather than only the sick children, has suffered and sustained an injury. This injury, unlike injury suffered by individuals, is community-wide and affects even those whose health is not compromised by lead-paint poisoning.

Id. at 893. The court went on to also find that:

‘Causation is a fact; the existence of causation frequently is an inference to be drawn from the circumstances by the trier of fact.’ As long as the City can establish genuine issues of material fact with respect to these alleged causes, summary judgment is precluded. * *

*

The City believes its facts establish a basis upon which a jury could conclude that defendants caused this nuisance by selling lead paint in Milwaukee and promoting its use there. The City’s evidence and expert testimony indicate that defendants sold lead for use in paint,

or lead paint, in Milwaukee. . . . Based on our review of the current record, we are persuaded that there are disputed material facts concerning the extent of both defendants' sales in Milwaukee and whether those sales were a substantial cause of the alleged nuisance. We conclude, therefore, that this is an issue for the jury.

We likewise conclude that the extent and effect of promotion of lead paint sales by both defendants is an issue of material fact for the jury. The record discloses that NL Industries promoted its lead paint, Dutch Boy, to the general public through substantial advertising. There is evidence that Mautz promoted the use of its lead paint, including through its sales force.

. . . Evidence that Mautz and NL Industries each promoted the use of lead paint directly to the public and through sales staffs creates a genuine issue of material fact for the jury on the question of whether defendants participated in the creation of a public nuisance of childhood lead poisoning in the City of Milwaukee.

Id. Thus, the Wisconsin Court of Appeals determined that allegations of marketing, promoting, and manufacturing lead for use in paints and coatings were sufficient to establish liability for creating a public nuisance in the absence of product and/or manufacturer identification.

The Defendants raised these very same arguments in the Rhode Island lead case—arguments that the trial court rejected. Specifically, the Defendants filed a

motion for summary judgment, urging the trial court to dismiss the case because the State could not identify the presence of particular defendants' products on particular homes and buildings throughout the State. The Defendants pressed the court to dismiss, claiming that proof of Defendants' manufacture, marketing, distribution and/or sale of lead pigments and lead pigment containing paints in Rhode Island was insufficient to establish liability for the public nuisance. The court rejected these arguments, finding that "the issue . . . was not as to if such pigment in any particular building or group of buildings (however numerous) constituted a public nuisance, but rather whether the cumulative effect of all such pigment in such properties constituted a single public nuisance." *State of Rhode Island v. Lead Ind. Ass'n, Inc.*, 2005 WL 1331196, at *2 (R.I. Super. June 3, 2005) (Silverstein, J.). The court further stated that "[f]irst, and of some significance, the present case is *not* a products liability case," explaining that

During the course of argument, defendants seemed to read into *Gorman* and the other cases they cited, a requirement for product identification in this public nuisance case, a requirement that this Court does not find. This is not a case where it is alleged that one defendant out of a number of defendants (but plaintiff cannot tell which) made a product causing injury to a single individual but rather it is a case where it is claimed that each of the defendants through their own separate actions or conduct was a substantial cause of the massive public nuisance and harms and/or injuries resulting therefrom. What the Court does find is that if what plaintiff contends for, that is to say that each defendant's conduct or activities were a proximate cause of the public nuisance alleged, the cumulative effect of lead pigment in buildings throughout the state (sometimes stated as the collective presence of lead pigment in buildings throughout the state of Rhode Island), and of injury resulting therefrom then indeed liability of the defendants may be found. In order to prove that causation, defendants must establish

that each defendant's conduct was a substantial cause of the public nuisance and that the public nuisance was a substantial factor in causing injury to the public which injury is subject of this action.

Id. That decision is in accord with established Missouri law of public nuisance and supports Plaintiff's arguments on the so-called product identification requirement.

This conclusion is consistent with other cases that have found that a manufacturer's marketing, promotion, and manufacture can create public nuisance liability. Those courts have found that liability arises not simply because the Defendants have manufactured and sold defective and dangerous products, as it would in a product liability case, but instead because the Defendants engaged in wrongful conduct independent of their status as product manufacturers. Case law from around the country reveals numerous instances in which courts have found that manufacturers of hazardous products are liable under nuisance law for injury caused by their products when the manufacturers' conduct created that public nuisance. *See Chase Manhattan Bank, N.A. v. T&N PLC*, 905 F. Supp. 107 (S.D.N.Y. 1995) (finding that the plaintiff could maintain an action for public nuisance against the manufacturer of an asbestos fire-proofing spray); *New York v. Fermenta ASC Corp.*, 616 N.Y.S.2d 702 (Suffolk Co. 1994) (finding the manufacturer of a pesticide could be liable under public nuisance for contamination of groundwater caused by the product); *Page County Appliance Center, Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 177 (Iowa 1984) (finding the manufacturer of a computer system that emitted radiation materially participated

in the creation of the nuisance and could be held liable). Similarly, numerous courts concluded that allegations concerning the tobacco industry's conduct in manufacturing, marketing and distributing tobacco products stated a claim for public nuisance. *See Alaska v. Philip Morris*, Case No. 1JU-97-915CI, Transcript of Oral Argument at 5 (1st Jud. Dist. Juneau Apr. 29, 1998) (Oct. 9, 1998) (the court deciding the State of Alaska had stated a claim for public nuisance by alleging "defendants targeted and addicted minors, denied that nicotine is addictive while manipulating nicotine levels to promote addiction, and lied about the ill-effects of tobacco while suppressing safer products."); *Wisconsin v. Philip Morris*, Case No. 97-CV-328, Decision & Order at 22 (Branch 11 March 17, 1998) (finding the tobacco defendants "interfered with the public's right to be free of unwarranted injury and illness, and have directly caused the State to incur substantial costs in order to lessen the negative effects of tobacco-related health problems. . . . Accordingly, this [public nuisance] claim is necessary . . . to provide compensation for economic injuries."); *Oklahoma v. R.J. Reynolds*, No. CJ-96-1499, Transcript at 171 (Cleveland Co. July 7, 1998) ("to the extent that the jury finds wrongful acts such as targeting and addicting minors, denying that nicotine is addictive, secretly manipulating nicotine levels to promote addiction, misdirecting public opinion, misdirecting advertising, lying about ill effects of tobacco, and suppressing the promotion of safer products, to the extent the state can establish that and a jury finds that those wrongful acts did occur, that can rise to the level of public nuisance in Oklahoma."); *Montana ex rel. Mazurek v. Philip*

Morris, Inc., No. CDV97-306, Memorandum & Order (1st Jud. Dist. Ct. Sept. 22, 1998); *Iowa v. Philip Morris, Inc.*, Co. CL 71048, Ruling (Dist. Ct. Aug 26, 1997); *Puerto Rico ex rel. Rossello v. Brown & Williamson*, No. 97-1910JAF, Opinion and Order (D.P.R. June 3, 1998); *Oregon v. Philip Morris*, No. 9706 04457, Amended Order (Cir. Ct. July 6, 1998); *Massachusetts v. Philip Morris*, No. 96-148, Transcript (Super. Ct. Oct 22, 1997); *New Mexico v. The American Tobacco Co.*, No. SF 97-1235 (C), Decision (1st Jud. Cir. Ct. Feb. 3, 1998); *Mississippi ex rel. Moore v. American Tobacco Co.*, No. 94-1429, Judgment (Ch. Ct. Feb. 21, 1995); *See City of New York v. Beretta Corp.*, 315 F. Supp.2d 256 (E.D.N.Y. 2004) (finding that “a claim for public nuisance may lie against members of the gun industry whose marketing and sales practice lead to the diversion of large numbers of firearms into the illegal secondary gun market); *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003); *Ileto v. Glock*, 349 F.3d 1191 (9th Cir, 2003); *White v. Smith & Wesson Corp.*, 97 F.Supp.2d 816 (N.D.Ohio 2000); *Chicago v. Beretta U.S.A. Corp.*, 337 Ill.App.3d 1, 271 Ill.Dec. 365,785 N.E.2d 16(2002); *Young v. Bryco Arms*, 327 Ill.App.3d 948, 262 Ill.Dec. 175, 765 N.E.2d 1(2001); *City of Gary v. Smith & Wesson. Corp.*, 801 N.E.2d 1222 (Ind. Dec. 23, 2003); *Boston v. Smith & Wesson Corp.*, 2000 WL 1473568 (Mass.Super. July 13, 2000); *James v. Arms Tech. Inc.*, 359 N.J.Super. 291, 820 A.2d 27 (2003); *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002); *Johnson v. Bulls Eye Shooter Supply*, 2003 WL 21639244

(Wash.Super.Jun 27, 2003); *Lemongello v. Will Co., Inc.*, 2003 WL 21488208 (W.Va.Cir.Ct. June 19, 2003).

In short, a product manufacturer may be liable for creating a public nuisance where the manufacturer “had not taken steps to alert customers to the risks of the product, or [had] intentionally marketed the product to customers who it knew or should have known would dispose of [the product] in a manner that would harm the environment.” *Bubalo*, 1998 U.S. Dist. LEXIS 3598 at * 10-11. This finding is consistent with the allegations about Defendants’ conduct in the City’s complaint. Accordingly, the City can meet the actual causation standard as set forth in the Restatement and applicable Missouri law to prove liability for a public nuisance. Neither the law nor the facts of this case require the City to prove product and/or manufacturer identification in order to establish the liability of these Defendants for the public nuisance alleged herein.

E. APPELLANTS’ CLAIMS MUST BE PERMITTED TO PROCEED IN ORDER TO FURTHER THE INTERESTS OF THE CITY OF ST. LOUIS’ CHILDREN

The City acknowledges the importance of dealing with the problem of lead poisoning. It has dedicated substantial resources to ending this disease, which plagues thousands of children and their families every year. It has not only committed tax revenues, but also the time and effort of entire city departments to work on programs that address lead poisoning. The City must spend more on special education to accommodate children poisoned by lead. For the most part,

the City can ill afford to expend these resources, and yet it has risen to the occasion and put forth the best effort within its means.

Lead poisoning imposes burdens in many other arenas and on many other people. Parents of poisoned children must confront their resultant physical and developmental obstacles. They face increased medical and educational expenses, such as testing and tutoring costs.

Children with lead poisoning have less success in school, limiting their potential to earn a sustainable living. As a result, lead poisoned children may be dependent on their parents well into adulthood—a further strain on the parents' financial situation.

The medical community has substantially invested in defeating this epidemic problem. Medical professionals have developed screening programs for children and have worked in conjunction with the local boards of health in order to assist them in protecting the health, safety, and general welfare of the City's children. The statute has imposed significant burdens upon physicians—burdens they would not have to bear if these manufacturers had not introduced lead into young patients' environment. The screening and follow-up with patients alone presents an onus on medical professionals.

In light of the fact that all these other members of society have devoted time, money and effort to address the problems associated with childhood lead poisoning, it is only fair and just that these lead companies, who profited immensely from their toxic product, also should contribute to solving the problem

of removing this product from St. Louis homes. For over one hundred years, these companies have denied that lead is toxic and shirked their responsibility for the harm that lead has caused, placing an unfair burden on all elements of society. They caused this crisis; it is time for them to become part of the solution. Government entities have struggled for years to make a dent in the problem, but severely constrained city and state budgets have minimized their success. The time has come for these lead companies to pay their fair share toward the solution by contributing resources to remove lead hazards before any more children are harmed.

VI. CONCLUSION

For all of the above reasons, the *amici* respectfully request that this Court reverse the Order below dismissing Appellants' case.

April 5, 2007

Respectfully submitted on behalf
of *amici* Alliance for Healthy
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of MO. R.CIV. 55.03 and MO. R.CIV. P. 84.06, it is proportionately spaced, using Times New Roman, 13 point type, and contains 7,149 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the CD-ROM that I am providing, in lieu of a floppy disk, has been scanned for viruses and has been found to be virus-free.

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