

**IN THE SUPREME COURT OF MISSOURI**

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**Case No. SC 88230**

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**CITY OF ST. LOUIS,**

**Appellant,**

**v.**

**BENJAMIN MOORE & COMPANY, et al.,**

**Respondents.**

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**Appeal from the Twenty-Second Judicial Circuit (St. Louis City)  
The Honorable Steven R. Ohmer, Judge**

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**BRIEF OF *AMICUS* MISSOURI CHAMBER LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENTS SCM CORPORATION, MILLENNIUM  
INORGANIC CHEMICALS, INC., MILLENNIUM CHEMICALS, INC. and  
MILLENNIUM HOLDINGS, L.L.C.**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Missouri Chamber Legal Foundation (hereinafter “Foundation”) is a general non-profit corporation organized and existing pursuant to the laws of the state of Missouri. Founded in 1997, the Foundation supports limited government, individual economic freedom and the free enterprise system. The Foundation is dedicated to support for economic growth and positive public policy for all Missourians. The Foundation focuses on enhancing Missouri’s climate for businesses and its workers.

The Foundation is appearing in its own behalf. The Foundation is here to present the viewpoint and interests of the manufacturers who support enforcement of Missouri tort law, which requires that before any defendant can be determined to be liable for an injury, the plaintiff must prove causation. In addition, because of its knowledge and involvement of the manufacturing industry in Missouri, the Foundation is able to present a more detailed perspective of the effect of the theory of causation on manufacturing businesses.

In this regard, it is not the Foundation’s purpose or intent to respond contention by contention to every argument or sub-part thereof, made by Appellant in its brief. The Foundation’s brief is more limited to the interplay of the theories of market-share and public nuisance liabilities and analyses of the legal issues involved.

This brief is being filed with the consent of the Respondents but not the consent of the Appellant.

**TABLE OF AUTHORITIES**

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## I.

### (Responds to Point I.A. of Appellant's Brief)

In advocating that this Court reconsider its holding in *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. banc 1984), and adopt a market share theory system of liability, the City of St. Louis ("City") is asking the Court to adopt a policy which (1) is contrary to the tort principle requiring a causal connection between the defendant's action and the plaintiff's injury, (2) usurps the power of the legislature to regulate industries in the state by interposing a common law system of regulation, and (3) discourages individual economic freedom and free enterprise by interposing the uncertainty of a new system of liability for otherwise legal economic activity that is not based on causation but mere participation in the market. Market share theory is not good public policy when viewed in the context of economic activity as a whole. However, even if the Court were inclined to believe that the theory may, in the abstract, have a viable place in Missouri tort law, this is not the case for such an application. What the City seeks is nothing less than a court-imposed, court-defined and court administered surrogate system of regulation of commercial activity. The Court should either reject outright the City's plea for adoption of what one authority has correctly termed a system of social welfare,<sup>1</sup> or severely and clearly restrict its reach so that Missouri's industries and businesses are not caught up in

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<sup>1</sup> Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943 (2006).

the net that will surely be cast in the trial courts of this state if the City's position is adopted.

As noted by this Court, the theory of market-share liability was first adopted in *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140 (1980). *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. banc 1984). Both the *Sindell* and *Zafft* plaintiffs alleged an increased risk of developing cancer due to the ingestion of the drug DES to prevent miscarriages by their mothers. *Sindell, supra; Zafft, supra*. As the plaintiffs could not identify the specific manufacturer of the DES drug, the plaintiffs demanded that each manufacturer should be liable for damages in proportion to its share of the DES market. *Sindell, supra; Zafft, supra*. The *Sindell* court adopted the plaintiffs' position, embracing what is known as the "market share" theory of liability by which a causal link between a specific defendant and the plaintiff's injuries is no longer required. Instead, liability is to be apportioned according to each market participant's share of the market. *Sindell, supra*, at 936. Four years later, this Court refused to accept the theory of market-share liability, finding that the theory was "...unfair, unworkable, contrary to Missouri law, as well as unsound public policy." *Zafft, supra*, at 246.

Market-share liability, which holds manufacturers of similar products liable without requiring proof that any specific manufacturer caused the alleged injury is based on two presumptions: that the manufacturers produced a product that was identical in its attributes and this identical product which caused the plaintiff's injury cannot be traced

back to the original manufacturer. (Thus, in *Sindell*, the DES products at issue were all made from an “identical formula” and it could not be determined which manufacturer produced the product actually taken by the plaintiff. *Sindell, supra*, at 936.) A third prerequisite for the theory to be applied is that the court must be able to determine a manufacturer’s share of the market with accuracy in order to correctly apportion liability.

As noted above, the *Sindell* decision was based on a determination that each drug manufacturer produced identical DES. However, not all products are fungible. It is likely that very few are. In recognition of this point, this Court stated, “The court in *Sindell* failed to resolve numerous problems with application of the (market-share liability) theory. These problems persist and discourage courts and other jurisdictions from embracing the theory as the solution...” *Zafft, supra*, at 246. When products are not identical, it is nearly impossible to determine if certain products produced a greater degree of the alleged harm than other products from different manufacturers. Market-share liability requires uniformity in degree of risk. *Zafft, supra*, at 243. Otherwise, one engaging in commerce becomes an “insurer” not only for the characteristics of its products in terms of freedom from defects but for the differing characteristics of the products of other manufacturers, as well.

It has already been held, and correctly so, that lead-based paint produced by different manufacturers is not identical. *Brenner v. American Cyanamid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999). As noted in *Brenner*, lead paint could contain between ten and fifty percent lead pigment and that the type of lead pigment varied. *Id.* at 853.

The court also determined that differing formulas of lead paint would have different effects when ingested. *Id.* Lead pigment contained in lead paint manufactured before 1955 varied in weight from less than two percent to more than seventy percent. *Id.* Even if a plaintiff was able to determine a manufacturer's market share, such determination would not accurately reflect the degree of risk due to the different compositions of the products. *Id.*

Also, unlike the DES cases where the plaintiffs were able to determine the time period within which their mothers took the drug to prevent miscarriages, lead paint ceased being sold for residential purposes in 1978, though lead paint had been used for 100 years preceding that date. *Skipworth v. Lead Industries Ass'n, Inc.*, 690 A.2d 169 (Pa. 1997). Manufacturers have entered and left the market and it is impossible to determine the market shares of specific manufacturers during a certain time period. Without the ability to determine who the manufacturers are, a court cannot make an assessment of market shares. *Id.*

The market share theory of liability has problems of fundamental fairness and application both in its general employment and in its specific employment to the lead paint industry. It is not surprising, then, as this Court accurately foretold in *Zafft, supra*, "The prediction of the dissenters in *Sindell* that few courts would follow the majority lead has proved correct." *Zafft, supra*, at 243-246. The City is clearly wrong in its assertion that many courts have adopted the theory of market share liability. The courts throughout

the country have had over twenty years to consider the theory in the proving grounds of the courts and found it wanting.

The Fifth U.S. Circuit Court of Appeals has rejected a market share liability approach to causation. *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247-8 (5<sup>th</sup> Cir. 1997). Pennsylvania law does not support the rescission of the requirement of proximate causation. *Hurt v. Phila. Hous. Auth.*, 806 F.Supp. 515 (E.D. Pa. 1992). In addition, Pennsylvania does not allow market share liability as a theory of recovery in product liability actions. *Bortell v. Eli Lilly & Company*, 406 F.Supp.2d 1 (D.C.D.C. 2005).

When state law requires proof of causation for tort liability, a plaintiff cannot proceed against industry defendants on a group liability theory. *Barasich v. Columbia Gulf Transmission Co.*, \_\_\_\_ F.Supp.2d \_\_\_\_, 2006 WL3333797 (E.D. La.). The Ohio Supreme Court has held that market share liability is not available within that state. *Sutkowski v. Eli Lilly & Company*, 696 N.E.2d 187 (Oh. 1998). This ruling was most recently adhered to by an Ohio appellate court when it granted summary judgment to a manufacturer after the plaintiff asserted the market share theory. *Jackson v. Glidden Company*, Slip Op., 2007 WL 184662 (Ohio App. 8 Dist.).

In the specific application to the lead paint industry, the attempt to use market share liability against lead pigment manufacturers has been largely rejected by the courts. *City of Philadelphia v. Lead Indus. Ass'n.*, 994 F.2d 112, 129 (3<sup>rd</sup> Cir. 1993) (“We hold that none of the theories advocated by plaintiffs – market share liability, alternative

liability or enterprise liability – may be invoked to impose liability on the lead pigment industry for the costs of lead-based paint abatement.”); *see, also Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 552 (1<sup>st</sup> Cir. 1993) (dismissing the plaintiff’s cause of action against lead paint manufacturers because “plaintiff’s market share and concert of action claims fails as a matter of law”); *Jefferson v. Lead Indus. Ass’n*, 930 F.Supp. 241, 247 (E.D. La. 1996), *aff’d*, 106 F.3d 1245 (5<sup>th</sup> Cir. 1997) (dismissing plaintiff’s complaint and refusing to adopt market share liability); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 854 (N.Y. App. Div. 1999) (holding market share liability was inapplicable against lead paint manufacturers); *Skipworth v. Lead Indus. Ass’n*, 690 A.2d 169, 173 (Pa. 1997) (declining to apply market share liability in lead paint cases because to do so “would grotesquely distort liability” and make the determination of culpability unfair).”

This Court has clearly required a causal relationship between the plaintiff’s injury and the defendant’s conduct. *Zafft, supra*. Because it is unable to prove that any of the Respondents’ products were used within its buildings, the City is attempting to use market-share theory to overcome its inability to identify the requisite causal link. Assuming *arguendo* that causation does not need to be proven, market-share theory fails when the products are not identical, when the conduct of the manufacturers is not identical, and the products do not pose a uniform level of risk. When market-share liability theory cannot determine financial responsibilities based on the above-listed factors, a court cannot appropriately make an assessment of damages. This Court

expressed the same sentiment when it said, “The court in *Sindell* failed to resolve numerous problems with application of the (market-share liability) theory. These problems persist and discourage courts and other jurisdictions from embracing the theory as the solution...” *Zafft, supra*, at 246.

Clearly, the great weight of authority and “trend,” is consistent with what this Court determined in *Zafft* some twenty-three years ago and has found no cause to reconsider in the intervening years. In the position adopted by the Court, it has required a causal relationship between the plaintiff’s injury and the defendant’s conduct. *Zafft, supra*. There is no reason to reverse course now.

There is another compelling reason for this Court to reject the City’s request for the Court to re-write tort liability in Missouri. In *Zafft*, the Court correctly recognized that the abandonment of the requirement of a nexus between an act of a defendant and an injury is more appropriately decided by the legislature. *Zafft, supra*, at 247. Other courts have likewise held that only a legislature could approve the placement of liability on a defendant who was not proven to have caused the injury. *Milcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Ia. 1986). The Third U.S. Circuit Court of Appeals refused to recognize liability under a market share theory because Ohio statutes did not provide for market-share liability. *Kurczi v. Eli Lilly & Co.*, 113 F.3d 1426 (3<sup>rd</sup> Cir. 1997). The court held that, since the legislature had been silent regarding market-share liability, it would imply that the legislature did not favor market share liability. *Id.* It has been held that a radical change in tort law, which eliminates the requirement of proof that the defendant caused

the injury, should be determined by the legislature. *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690 (Del. Super. Ct. 1986).

The Illinois Supreme Court has expressed concern about imposing liability on manufacturers when the legislature had failed to do so and further suggested that litigation should not be used to achieve legislative goals. *City of Chicago v. Beretta, U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). The court held that no state statute authorized the recovery sought by the plaintiffs against manufacturers. The court held:

Any change of this magnitude in the law ... must be the work of the legislature, brought about by the political process, not the work of the courts. In response to the suggestions that we are abdicating our responsibility to declare the common law, **we point to the virtue of judicial restraint.** (Emphasis added)

*Id.* at 1148.

Whether one accepts that market share theory is a form of social welfare or not, Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943 (2006), it should be beyond dispute that it is a drastic re-assignment of risks inherent in commercial markets for businesses in Missouri. In the traditional tort doctrine of strict products liability, one who places a product within the stream of commerce may effectively “insure” that its product is free from defects that are likely to cause injury or damage to

the foreseeable users of those products. But even under the theory of strict products liability, the business does not become the insurer of the products of every one of its competitors in the marketplace. Such an expansion of risk and insuring of the products of the market (rather than the products of the individual market participant) occurs with adoption of the market share theory of liability. Such a drastic departure from accepted and traditional norms of social risk sharing are clearly a matter better left to the legislature to determine. As has been recognized with respect to the role of the legislature in the expansion of tort liability beyond the traditional common law, “The legislature is better equipped to deal with myriad considerations. The political machinery of the legislature has the requisite sophisticated tools for gathering data, conducting studies, receiving public opinion, and, finally, implementing the policy in carefully expressed and well-defined legislation.” *Harriman v. Smith*, 697 S.W.2d 219, 221-22 (Mo. Ct. App. 1985). *See, also, Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001)( “The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation”); *Greenbriar Hills Ctry. Club v. Dir. of Rev.*, 47 S.W.3d 346, 357 (Mo. banc 2001)( public policy decisions must be made by the legislature and are not within the jurisdiction of a court). The City’s attempt to restructure the state’s system of tort liability is more appropriately addressed to the legislature and not the courts.

## II.

### (Responses to Point I.B. of Appellant's Brief)

The City also argues that a governmental entity should be allowed to recover under a theory of market share liability when its recovery is based on the tort of public nuisance. As one authority has pointed out, however, public nuisance suits brought by public entities against the manufacturing sector encroach on the authority of the legislature every bit as much as re-writing the tort law to allow private parties such a recovery. Amber E. Dean, Comment, *Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a Troubling Picture for Lead Paint Manufacturers?* 28 PEPP. L. REV. 915, 936 (2001). Public entities should not be allowed to manipulate tort law through the judicial process when the legislature is the correct venue for enacting policy changes. *Id.* As noted in the previous point, the courts of the State have refrained from such a usurpation of the legislative process. *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001); *Greenbriar Hills Ctry. Club v. Dir. of Rev.*, 47 S.W.3d 346, 357 (Mo. banc 2001); *Harriman v. Smith*, 697 S.W.2d 219, 221-22 (Mo. Ct. App. 1985).

Nor is the theory of market share liability consistent with, or applicable to, the tort of public nuisance. This Court has explained what a public nuisance is in the following terms:

"A public or common nuisance is an offense against the public order and economy of the state, by unlawfully doing

any act or by omitting to perform any duty which the common good, public decency, or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons, even though the extent of the annoyance, injury, or damage may be unequal, or may vary in its effect upon individuals. Another factor in defining a nuisance is that consideration should be given to places where the public have the legal right to go or congregate, or where they are likely to come within the sphere of its influence. A nuisance is not public though it may injure a great many persons, the injury being to the individual property of each. A nuisance is public when it affects the rights enjoyed by citizens as part of the public, as the right of navigating a river, or traveling a public highway; rights to which every citizen is entitled."

*City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 535 (Mo. App. E.D. 2001), quoting *State by Major ex rel. Hopkins v. Excelsior Powder Mfg. Co.*, 169 S.W.2d 267, 273 (1914).

*See, also, State v. Errington*, 317 S.W.2d 326, 331 (Mo. 1958) (“A public or common nuisance is an offense against the public order and economy of the state by unlawfully doing any act or by omitting to perform any duty which the common good, public decency, or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons, even though the extent of the annoyance, injury, or damage may be unequal or may vary in its effect upon individuals”), quoting *State ex rel. Collet v. Scopel*, 316 S.W.2d 515 (Mo. 1958). Most commonly, a claim for public nuisance arises from a defendant’s use of its property, the public nuisance either arising from conditions on the property, *City of Clarkson Valley v. Jones*, 872 S.W.2d 531 (Mo. App. 1994) (barbed wire fence in residential neighborhood), or from activities being conducted on the property. *See, e.g., Lee v. Rolla Speedway, Inc.*, 668 S.W.2d 200 (Mo. App. 1984) (operation of racetrack); *State v. Irving*, 700 S.W.2d 529 (Mo. App. 1985) (operation of massage parlor at which unlawful sexual activity was occurring).

Less frequently, the courts have reviewed purely economic activities unrelated to a use of property under the legal doctrine of public nuisance. *State v. Errington*, 317 S.W.2d 326, 331 (Mo. 1958) (unauthorized practice of medicine); *State ex rel. Collet v. Scopel*, 316 S.W.2d 515 (Mo. 1958) (unauthorized practice of medicine); *State ex rel. Leake v. Harris*, 334 Mo. 713, 67 S.W.2d 981 (1934) (loan shark business charging unlawful rates of interest); *State ex rel. Igoe v. Joynt*, 341 Mo. 788, 110 S.W.2d

737 (1937) (lease of unlawful gambling devices); *State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99 (Mo. App. 1984) (unlawful strike). The common denominator in these purely economic activity public nuisance cases are: the activity which constitutes the public nuisance is itself (1) an unlawful activity (2) at the time the activity is being carried out. *See, e.g., State v. Errington*, 317 S.W.2d 326, 331 (Mo. 1958).

There is no contention that any law prohibiting the sale of lead paint existed prior to 1978 when sales of the product for residential purposes ceased or prior to 1940 when 80 percent of lead paint was applied. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 823 (2003)(hereafter *Public Nuisance as a Mass Products Liability Tort*), citing “President’s Task Force on Environmental Health Risks and Safety Risks to Children, Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards,” 2 and 22 (2000). There is no contention that at any time the product was being sold, there was some law proscribing its use in whole or in part. Nor is there any contention that there was some law regulating its sale or use that was violated at the time of those sales. In essence, the City is asking the Court to impose an ex post facto, or retroactive, regulation of the paint industry under the guise of a theory of public nuisance. Nothing would be more destructive of economic activity in the state than to inject the uncertainty of a court-imposed retroactive regulation on their commercial activities. A healthy business environment, and a fair business environment, for the state requires some degree of certainty of potential liability. The expansion of the

doctrine of public nuisance proposed by the City not only reduces certainty but imposes a great measure of uncertainty for businesses. The City's proposed doctrine would do substantial public injury and produce minimal public benefit.

The City's public nuisance argument is further defective because the right which it seeks to enforce is not a public right, i.e., it is not a right common to all members of the public. *See, City of St. Louis v. Varahi, Inc.*, 39 S.W.2d at 535 (a public nuisance impinges on the rights of the public). The City is not seeking to enforce a public right relating to lead paint. It is seeking to recover its costs in abating lead paint in buildings owned by it. In this regard, it is important to remember that the City stands in no better position than any other private owner of property and is not acting under any grant of governmental authority to it or exercising its police power.

Thus, what has been held with respect to private causes of action under the public nuisance doctrine is equally *apropos* to the City's action. To reiterate what was said in *City of St. Louis v. Varahi, Inc.*, "[a] nuisance is not public though it may injure a great many persons, the injury being to the individual property of each. A nuisance is public when it affects the rights enjoyed by citizens as part of the public, as the right of navigating a river, or traveling a public highway; rights to which every citizen is entitled." This same principle was restated by a Georgia court in a case dealing with lead paint. When a public nuisance suit was filed, based on

injuries suffered by some Georgia citizens, the court dismissed the action holding that a public nuisance must injure all members of the public who come in contact with it. *Davis v. City of Forsyth*, 621 S.E.2d 495, 499 (Ga. App. 2005). See also *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. Ct. 2005) (public right is not “an assortment of claimed private individual rights.”)

The *City of Chicago* court also quoted favorably Professor Gifford’s analysis:

**“The concept of public right as that term has been understood in the law of public nuisance does not appear to be broad enough to encompass the right of a child who is lead poisoned as a result of a exposure to deteriorated lead-based paint in private residences or child care facilities operated by private owners.** Despite the tragic nature of

the child’s illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home.

Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes – obstruction of highways and waterways or pollution of air or navigable streams. D.

Gifford, *Public Nuisance As a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 818 (2003).”

*City of Chicago, supra*, at 132-133 (Emphasis added.).

The issue of proximate cause must also be considered in determining the fate of a public nuisance claim. The Illinois Supreme Court dismissed a complaint when the city

failed to identify any specific manufacturer as the cause of the harm. *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. 1 2005). The court noted that there had been no Illinois public nuisance case upheld in which the identification and causation of the nuisance was not known. *Id.* at 220. The court relied on the Illinois Supreme Court case of *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (1990) in dismissing the case on the grounds that plaintiff had failed to allege sufficient facts that the manufacturers were the cause of the alleged nuisance. *Id.* at 220.

By filing a public nuisance claim, Appellant is attempting to avoid the adverse consequences that will befall it on more traditional theories of liability, including products liability. Because government parties cannot succeed under these traditional theories because they must show causation, they attempt to bypass the causation requirement through the filing of a public nuisance claim. Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 905 (2004). “If plaintiffs cannot prevail in their lawsuits against manufacturers/defendants under well-established theories of recovery, courts should not permit them to move their crusades into the utterly uncharted territory of public nuisance.” *Public Nuisance as a Mass Products Liability Tort*, 71 U.CIN. L. REV. at 837.

It bears repeating that the effect of what the City is requesting is the establishment of a court-imposed, court-defined and court-administered surrogate system of regulation of commercial activity. If the City wants to maintain such an action that is so in derogation of the common law, the place to seek such a right is with the Legislature.

That body is better able to determine what the parameters of such a right should be and is better situated to allow participation by all those who might be affected by such a right and to balance the interests of all in defining what the public policy of the state will be. *Amicus* requests that this Court affirm that in Missouri a plaintiff is required to establish a causal relationship between an alleged injury and a defendant.

### **CONCLUSION**

The judgment of the trial court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF ATTORNEY**

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 5,787 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 1/2" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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James B. Deutsch

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of *Amicus* Missouri Chamber Legal Foundation in Support of Respondents SCM Corporation, Millennium Inorganic Chemicals, Inc., Millennium Chemicals, Inc. and Millennium Holdings, L.L.C., was sent by U.S. Mail, postage prepaid, this 7th day of March, 2007, to the following:

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