

IN THE
SUPREME COURT OF MISSOURI

NO. SC88230

CITY OF ST. LOUIS,
Plaintiff/Appellant,

v.

BENJAMIN MOORE & COMPANY, ET AL.,
Defendants/Respondents.

APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
HONORABLE STEVEN R. OHMER
CIRCUIT COURT JUDGE

BRIEF OF *AMICUS CURIAE*
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association consisting of 127 American and international product manufacturers. A list of PLAC’s corporate members is attached in the Appendix at A1 to A4. In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

PLAC seeks to contribute to the improvement and reform of law affecting product liability in the United States and elsewhere. PLAC’s perspective reflects the experience of its corporate members in diverse manufacturing industries. Since 1983, PLAC has filed over 750 amicus curiae briefs in state and federal courts, including this Court, presenting the broad views of product manufacturers seeking fairness and balance in product liability litigation.

PLAC’s members, and product manufacturers throughout the nation, have a strong interest in the fundamental tort elements of fault, defect, and legal cause. In Missouri, as in other states, product liability law has always required an injured plaintiff, a defective product, and proof that the defendant caused the plaintiff’s injury before permitting recovery. This suit lacks these elements. Liability is not limited to any manufacturer’s own products or marketing. Plaintiffs advocate collective, industry-wide liability, which Missouri has not recognized.

Fundamental principles of causation limit manufacturers' liability to their own products.

This *amicus curiae* Brief is respectfully submitted to address the public importance of these issues apart from the immediate interests of the parties to this case.

CONSENT OF THE PARTIES

Amicus Curiae PLAC has received written consent from Defendants/Respondents to file this Brief. Plaintiff/Appellant did not consent to the filing of this Brief. PLAC, therefore, files concurrently with this Brief a motion for leave under Mo. Sup. Ct. R. 84.05(f)(3).

JURISDICTIONAL STATEMENT

PLAC adopts the Jurisdictional Statement of Defendants/Respondents.

STATEMENT OF FACTS

PLAC adopts the Statement of Facts of Defendants/Respondents.

INTRODUCTION

The City's Fourth Amended Petition is remarkable for what it does not allege.

- The City does not allege any act by any defendant after 1978.
- The City does not allege actions by any defendant in St. Louis at any time – other than the sale of a legal product in a legal manner.
- The City does not allege that any defendant did anything to cause the claimed gradual deterioration of lead paint over time. No defendant is alleged to have encouraged any property owner's improper maintenance of what became a "Lead Paint hazard."
- The City does not allege that any defendant acted illegally or facilitated illegal acts by others.
- The City does not allege – and does not intend to prove – where any defendant's product is currently located.
- The City does not allege sales of lead-based paint in St. Louis after that product was banned in 1978.

Nevertheless, the City demands that defendants underwrite testing and lead-based paint removal programs of the sort the City has already been operating. Petition ¶¶14, 41 & *ad damnum* ¶1.

Because the City fails to allege that any defendant owns anything or is currently doing anything, this is not a proper public nuisance case. There is nothing for any court to enjoin, since no defendant currently controls or contributes to the purported nuisance. Defendants are being told to pay for removal of paint other people put on other people's property decades after the fact, no matter what the paint's condition. If Defendants did not act, there cannot be causation. The vague (and ancient) allegations in the Petition fail to relate to any specific person, property, product, or injury.

Once before the City sought to characterize a legal product as a public nuisance. See City of St. Louis v. Cernicek, 145 S.W.3d 37 (Mo. Ct. App. E.D. 2004) (alleging firearms as public nuisance).¹ This novel view of public nuisance would convert litigation into a new means of municipal finance. All levels of government are chronically short of funds and reluctant to tax their residents. Politically, it is easier to raise revenue by suing non-resident corporations. The

¹In Cernicek, the legislature passed a prohibitory statute. Mo. Rev. Stat. § 21.750. As a result that suit was dismissed without consideration of the City's unprecedented theory. 145 S.W.3d at 43 ("Having found the legislature has prohibited this type of suit in Missouri, we need not address the merits of this suit").

judicial branch of government, however, should not be enlisted as a *de facto*, unelected taxing authority.

PLAC respectfully requests the Court to affirm the trial court's rejection of the City's unprincipled legal theory for several reasons:

Missouri Law Rejects Collective, Industry-Wide Tort Liability:

Appellant City of St. Louis (the City) cannot impose collective, industry-wide liability – indistinguishable from an unauthorized tax – for all paint pigment containing lead. Settled Missouri law bars collective liability against product manufacturers, whatever the theory might be called. Almost every other state agrees. No jurisdiction in the nation that has, as this Court has, rejected market share liability for DES injuries has ever recognized such liability for any other product.

Public Nuisance Does Not Lie Against Product Manufacturers:

Missouri has never recognized public nuisance the manufacturer of a legal product. Rather, in Missouri public nuisance has only been applied to property uses and those who violate statutory prohibitions. The defendant must control the purported nuisance. In this regard, Missouri is in agreement with the law of the vast majority of other states.

The City Improperly Seeks A Judicially-Imposed Tax: The City seeks as “damages” the cost of its municipal testing and lead abatement programs. This

amounts to taxation without representation. Without legislative authorization, governmental units may not sue for reimbursement of ordinary costs of governance. There is a name for collective, industry-wide liability to a governmental body. It is called a “tax” – and only legislative bodies can impose taxes.

Dramatic Departures From Existing Law Should Only Come From The Legislature: The legislative and administrative bodies that have addressed this issue impose legal responsibility for lead-based paint upon landowners. The City seeks a dramatic reworking of fundamental tort principles to circumvent these decisions of co-equal branches of government. The issues here implicate interests far beyond any set of litigants, they should continue to be decided by the Legislature.

No jurisdiction in the country that has rejected market share liability in a DES case, as this Court held in Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. banc 1984), has adopted market share liability in a lead paint/pigment case. Lead-based paints and pigments are certainly inappropriate candidates. The relevant market and apportionment headaches would be far worse here than in Zafft because:

- The Petition alleges that paints containing lead pigments were used in houses over the course of many decades.
- The City does not identify the source of any paint or paint pigment in any dwelling.

- The City does not allege who (of the thousand or so manufacturers) produced lead paints or pigments at what times.
- Lead-based paint and pigments have not been sold for residential use since 1978; thus, the City’s claimed damages would be borne entirely by purchasers of unrelated products.
- Unlike DES, there are other sources of environmental exposure to lead besides lead-based paints and pigments.
- These products are not fungible, with several chemically distinct lead pigments – presenting differing degrees of lead bioavailability – having been used in different concentrations in different types of paint at different times.

This Court, therefore, should affirm the trial court’s dismissal of the City’s Petition.

STANDARD OF REVIEW

“Whether summary judgment should have been granted is a question of law.” Highfill v. Hale, 186 S.W.3d 277, 280 (Mo. banc 2006). Thus, the appellate standard of review for summary judgment orders “is essentially de novo.” ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). “Summary judgment is proper where the movant establishes that there is no genuine dispute as to the material facts and that she is entitled to

judgment as a matter of law.” Highfill, 186 S.W.3d at 280. “Facts set forth by affidavit or otherwise in support of a party’s [summary judgment] motion are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion.” ITT Commercial Fin., 854 S.W.2d at 376. The non-moving party may not rest on its pleadings:

[I]f there is no [factual] contradiction and the movant has shown a right to judgment as a matter of law, the non-movant must create a genuine dispute by supplementing the record with competent materials that establish a plausible, but contradictory, version of at least one of the movant’s essential facts.

Id. at 383. This Court may affirm on any ground appearing in the record. “This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court’s judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground.” Missouri Soybean Ass’n v. Missouri Clean Water Comm’n, 102 S.W.3d 10, 22 (Mo. banc 2003).

ARGUMENT

I. For Sound Policy Reasons, Most Courts Preclude Public Nuisance Theories In Product Liability Litigation.

As the City's pleading demonstrates, its claim lacks most of the elements Missouri law considers essential to public nuisance. This action is not really a public nuisance claim, but a stealth product liability action. For good reason, numerous other jurisdictions decline to mix the oil of public nuisance liability with the water of product liability. As a leading treatise explains, product-related public nuisance claims amount to pounding a square legal theory into a round legal hole:

A product which has caused injury cannot be classified as a nuisance to hold liable the manufacturer or seller for the product's injurious effects. A product manufacturer who builds and sells the product and does not control the enterprise in which the product is used is not in the situation of one who creates a nuisance and is not liable in a products liability case under a nuisance theory for harm caused by a defect in the product.

2 American Law of Products Liability 3d § 27.3 ("Liability for Nuisance"), at 8 (Lawyers Coop. 1987).

The poor fit between public nuisance and product liability recently led neighboring Illinois to reject an identical theory. See City of Chicago v. Am.

Cyanamid Co., 823 N.E.2d 126 (Ill. App. Ct. 2005), appeal denied, 833 N.E.2d 1 (Ill. 2005). Illinois and Missouri law are closely analogous in all relevant respects. Illinois, like Missouri: (1) has not expanded public nuisance law to legal products, and (2) has rejected collective, industry-wide liability in both DES and asbestos litigation.² Because both states' laws impose similar limits upon liability, the Illinois courts' recognition of limits beyond which the capacious concept of public nuisance should not be stretched is particularly persuasive:

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 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

²See City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004) (rejecting firearms as a public nuisance); Young v. Bryco Arms, 821 N.E.2d 1078 (Ill. 2004) (same, non-municipal plaintiff); McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242 (Ill. 1999) (rejecting industry-wide liability in asbestos litigation); Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990) (rejecting market share liability in DES case).

own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes.

Chicago v. Am. Cyanamid, 823 N.E.2d at 133 (citation and quotation marks omitted).

Similarly, the Illinois Supreme Court recoiled from the tremendous mischief that would result if public nuisance were applied, as here, to a product that was legally marketed and sold. “[W]e are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another.” City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1116 (Ill. 2004). Liability could be “endless,” and the manufacturer of any product – although legal and non-defective – could be sued for public nuisance:

For example, the purchase and consumption of alcohol by adults is legal, while driving under the influence is a crime. If there is public right to be free from the threat that others may use a lawful product to break the law , [t]his public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all

of whom could be said to contribute to an interference with the public right.

Similarly, cell phones, DVD players, and other lawful products may be misused by drivers, creating a risk of harm to others. In an increasing number of jurisdictions, state legislatures have acted to ban the use of these otherwise legal products while driving. A public right to be free from the threat that other drivers may defy these laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be, or are likely to be, used by drivers, distracting them and causing injury to others.

We conclude that there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs.

Id.

Another reason for rejecting public nuisance was to maintain comity with the legislative branch of the government – something that judicial imposition of broad public nuisance liability against manufacturers of legal products would destroy.

[W]e have no indication from the legislature that it would be inclined to impose public nuisance liability for the manufacture and sale of a product that may be possessed legally We are reluctant to interfere in the lawmaking process.

Young v. Bryco Arms, 821 N.E.2d 1078, 1091 (Ill. 2004).³

The City counters by relying on Wisconsin law, specifically City of Milwaukee v. NL Industries, 691 N.W.2d 888 (Wis. Ct. App. 2004), review dismissed, 703 N.W.2d 380 (Wis. 2005).⁴ Wisconsin law, however, is much different from Missouri law. A quarter century ago, this Court in Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. banc 1984), rejected Wisconsin’s expansive “risk-

³See also Bubalo v. Navegar, Inc., No. 96 C 3664, 1998 WL 142359, at *4-5 (N.D. Ill. Mar. 20, 1998) (nuisance liability would impose “social policy” by “judicial decree”); Levit v. Gen. Motors Corp., 682 F. Supp. 386, 387 (N.D. Ill. 1988) (public nuisance not a proper theory in automotive product liability case).

⁴Another court interpreted Wisconsin law to bar public nuisance claims against legal products. Insolia v. Philip Morris Inc., 216 F.3d 596, 607 (7th Cir. 2000) (rejecting public nuisance claim against cigarettes; “declin[ing] to invent what would be a truly novel tort claim”).

contribution” form of collective, industry-wide liability. See pp. 51-55, *infra*.⁵ Wisconsin’s industry-wide liability is based upon an interpretation of that state’s “open courts” constitutional provision as giving courts *carte blanche* to create new theories of liability.⁶ This Court has construed the Missouri Constitution (Mo. Const. art. I, § 14) in exactly the opposite fashion – as protecting only “recognized cause[s] of action.” Snodgras v. Martin & Bayley, Inc., 204 S.W.3d 638, 640 (Mo. banc 2006).

The question [of] whether the “certain remedy” provision created any new causes of action not recognized by the common law has been answered in the negative on at least two recent occasions. The claimed constitutional violation is again denied.

⁵This Court in Zafft specifically addressed Collins v. Eli Lilly Co., 342 N.W.2d 37, 50 (Wis. 1984) (where manufacturer unknown; plaintiff could sue any defendant, regardless of market share, whose product allegedly contributed to the overall risk); see Thomas v. Mallett, 701 N.W.2d 523 (Wis. 2005) (extending “risk contribution” liability to white lead carbonate pigments).

⁶Collins, 342 N.W.2d at 45 (interpreting Wis. Const., art. I, § 9), 52 n.12 (courts need not wait for legislature to change established law).

Fust v. Attorney Gen., 947 S.W.2d 424, 431 (Mo. banc 1997).⁷

If the City, or anyone, can create massive public nuisance liability with a petition that alleges as little as this Petition does about the defendants' activities, then the scope of potential liability would become endless. Public nuisance could be "applied indiscriminately to everything." City of San Diego v. U.S. Gypsum, 35 Cal. Rptr.2d 876, 882 (Ct. App. 1994), review denied (Cal. Feb. 23, 1995). If use of lead-based paint in private buildings can be a public nuisance, manufacturers of virtually any type of construction materials would face similar liability – contrary to all precedent.⁸ Since both chemicals and automobiles can

⁷Accord Findley v. City of Kansas City, 782 S.W.2d 393, 395 (Mo. banc 1990) (open courts provision did not "create, of its own vigor, any new rights or remedies") (citation and quotation marks omitted); Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 63 (Mo. banc 1989) (open courts provision gives "simply the right to pursue in the courts the causes of action the substantive law recognizes").

⁸Temple v. Fence One, Inc., No. 85703, 2005 WL 3436354, at *5-6 (Ohio Ct. App. Dec. 15, 2005) (public nuisance claim rejected against manufacturer of treated lumber); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (same; against insulation manufacturer), appeal denied, 512 N.W.2d 318 (Mich. 1993); San Diego v. U.S. Gypsum, 30 Cal. App.4th at 584-85 (same); Miller v. Home Depot, U.S.A., Inc., No. 2:01 CV 0859, 2001 WL

cause personal injury, similar charges could be made against their manufacturers.⁹ Indeed, any product with an inherent risk could be challenged as a nuisance.¹⁰

1844232, at *4 (W.D. La. Dec. 7, 2001) (same; treated lumber); Appletree Square 1 Ltd. P'ship v. W.R. Grace & Co., 815 F. Supp. 1266, 1274 n.13 (D. Minn. 1993) (same; insulation), aff'd, 29 F.3d 1283 (8th Cir. 1994) ; City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) (same) (applying New Hampshire law); Town of Hooksett Sch. Dist. v. W.R. Grace Co., 617 F. Supp. 126, 133 (D.N.H. 1984) (same); Jackson v. Tennessee Valley Auth., 413 F. Supp. 1050, 1056 n.1 (M.D. Tenn. 1976) (same; skylight), aff'd, 595 F.2d 1120 (6th Cir. 1979).

⁹Cf. DiCarlo v. Ford Motor Co., 409 N.Y.S.2d 417, 418-19 (N.Y. App. Dist. 1978) (public nuisance cannot lie against automobile manufacturer); ES Robbins Corp. v. Eastman Chem. Co., 912 F. Supp. 1476, 1493-94 (N.D. Ala. 1995) (same involving plasticizing chemical); Levit, 682 F. Supp. at 387 (same; automobiles).

¹⁰See First Nat'l Bank v. Nor-Am Agric. Prods., Inc., 537 P.2d 682, 686 (N.M. Ct. App. 1975) (rejecting claim that seed disinfectant could be a nuisance), cert. denied, 536 P.2d 1085 (N.M. 1975); Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 422 (5th Cir. 2001) (nuisance claim improper against products with known, inherent risks, such as cigarettes) (applying Texas law); Corrie v. Caterpillar, Inc., 403 F. Supp.2d 1019, 1031 (W.D. Wash. 2005) (bulldozer not a public nuisance

Even the brewing industry – long a presence in St. Louis and Missouri generally – would inevitably be targeted as a “public nuisance.”¹¹ If not firmly reigned in, public nuisance claims of the sort alleged here would “become a monster that would devour in one gulp the entire law of tort.” Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993) (applying North Dakota law). The City’s public nuisance claim was properly dismissed.

In Detroit Board of Education v. Celotex Corp., 493 N.W.2d 513 (Mich Ct. App. 1992), app. denied, 512 N.W.2d 318 (Mich. 1993), the court affirmed dismissal of a school district’s nuisance claim concerning asbestos, holding:

[T]he role of the “creator” of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien. . . . [M]anufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for

because third person may break law while using product) State v. Am. Tobacco Co. 14 F. Supp.2d 956, 973 (E.D. Tex. 1997) (cigarettes not public nuisance).

¹¹See Alston v. Advanced Brands & Importing Co., No. Civ. 05-72629, 2006 WL 1374514, at *10-11 (E.D. Mich. May 19, 2006) (dismissing claim that beer commercials were a public nuisance); Goodwin v. Anheuser-Busch Cos., No. BC310105, 2005 WL 280330, at *4 (Cal. Super. Ct. Los Angeles Co. Jan. 26, 2005) (same).

injuries caused by the defect. To hold otherwise would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products.

Id. at 521 (citation omitted).

A New York court similarly rejected public nuisance as a legitimate theory in a product liability action brought by a municipality, due to “judicial resistance to the expansion of duty” and “practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.” People v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 196 (N.Y. App. Dist. 2003), app. denied, 801 N.E.2d 421 (N.Y. 2003). Public nuisance liability would invite “a host of societal problems . . . into the courthouse”:

[A] common-law public nuisance cause of action . . . will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.

Id.¹²

¹²See also Saldivar v. I.J. White Corp., 780 N.Y.S.2d 28, 30 (N.Y. App. Dist. 2004) (nuisance claim in product liability action “palpably insufficient as a matter of law” and “totally devoid of merit”); DiCarlo v. Ford Motor Co., 409

Similarly, California on several occasions rebuffed attempts to declare legal products with inherent risks to be public nuisances. In In re Firearm Cases, 24 Cal. Rptr.3d 659 (Ct. App. 2005), the court dismissed on the merits the same firearms nuisance claim that the City brought in Cernicek. The court roundly rejected imposition of nuisance liability for supposed improper marketing:

The potential impact . . . [would be] staggering: Any manufacturer of an arguably dangerous product . . . can be hauled into court The manufacturer[']s liability will turn not on whether the product was defective, but whether its legal marketing and distribution system somehow promoted [improper] use of its product Imposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and is a form of regulation administered through the courts rather than the state[']s regulatory agencies. . . . Courts should therefore be chary of adopting broad new theories of liability, lest they undermine the democratic process

N.Y.S.2d 417, 418-19 (N.Y. App. Dist. 1978) (“[a] products liability action . . . does not give rise to a nuisance cause of action”) (citation omitted); Sabater v. Lead Indus. Ass’n, Inc., 704 N.Y.S.2d 800, 806 (N.Y. Sup. Ct. 2000) (following DiCarlo); but see NAACP v. Acusport Corp., 271 F. Supp.2d 435, 457-58 (E.D.N.Y. 2003).

through which the people normally decide whether, and to what degree, activities should be fostered or discouraged

24 Cal. Rptr.3d at 682 (citations and quotation marks omitted).¹³

Many other courts have refused to breach the line between product liability and nuisance:

- **Alabama:** ES Robbins Corp. v. Eastman Chem. Co., 912 F. Supp. 1476, 1493-94 (N.D. Ala. 1995) (manufacturer cannot be sued for nuisance).
- **Delaware:** Sills v. Smith & Wesson Corp., No. 99C-09-283-FSS, 2000 WL 33113806, at *7 (Del. Super. Ct. Dec. 1, 2000) (“Delaware has yet to recognize a cause of action for public nuisance based upon products”), app. denied, 768 A.2d 471 (Del. 2001).

¹³See also City of Modesto Redevelopment Agency v. Superior Court, 13 Cal. Rptr.3d 865, 873 (Ct. App. 2004), review denied, (Cal. Sept. 15, 2004) (“the law of nuisance is not intended to serve as a surrogate for ordinary products liability”; no nuisance on allegations that defendants “produced or supplied defective products”); San Diego, 35 Cal. Rptr.2d at 883 (“[A]llowing a nuisance action under these circumstances would convert almost every product liability action into a nuisance claim”); but see County of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr.3d 313, 328-29 (Ct. App. 2006), review denied, (Cal. June 21, 2006).

- **District of Columbia:** District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 650 (D.C. 2005) (en banc) (“we decline to relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize [a] broad claim of public nuisance”), cert. denied, 126 S. Ct. 399 (2005).
- **Florida:** Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (public nuisance claims interfere with legislative prerogative to regulate products), rev. denied, 799 So. 2d 218 (Fla. 2001).
- **Louisiana:** Morial v. Smith & Wesson Corp., 785 So. 2d 1, 16 (La. 2001) (public nuisance liability threatens uniform statutory enforcement); Miller v. Home Depot, U.S.A., Inc., No. 2:01 CV 0859, 2001 WL 1844232, at *4 (W.D. La. Dec. 7, 2001) (allegations of a defective product “are not consistent with . . . nuisance claims”) (citations omitted).
- **Minnesota:** Appletree Square 1 Ltd. P’ship v. W.R. Grace & Co., 815 F. Supp. 1266, 1274 n.13 (D. Minn. 1993) (nuisance claim improper because manufacturers do not retain control of their products), aff’d, 29 F.3d 1283 (8th Cir. 1994).
- **New Mexico:** First Nat’l Bank in Albuquerque v. Nor-Am Agric. Prods., Inc., 537 P.2d 682, 686 (N.M. Ct. App. 1975) (claim that product “should not have been manufactured at all” dismissed as improper “nuisance” claim;

product “manufactured pursuant to authority granted by the federal government”), cert. denied, 536 P.2d 1085 (N.M. 1975).

- **New Hampshire:** City of Manchester v. Nat’l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) (nuisance claim improper because manufacturers do not retain control of products) (New Hampshire law); Town of Hooksett Sch. Dist. v. W.R. Grace Co., 617 F. Supp. 126, 133 (D.N.H. 1984) (same).
- **New Jersey:** Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001) (no public nuisance claim “may proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce”); but see In re Lead Paint Litig., No. A-1946-02T3, 2005 WL 1994172, at *11-13 (N.J. Super. Ct. Aug. 17, 2005) (allowing product-related public nuisance claim) (non-precedential), certif. granted, 886 A.2d 662 (N.J. 2005).
- **Ohio:** Temple v. Fence One, Inc., No. 85703, 2005 WL 3436354, at *5-6 (Ohio Ct. App. 2005) (legal product cannot be public nuisance; otherwise “the legislature would never allow any [of the product] to be installed”).
- **Pennsylvania:** City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3d Cir. 2002) (“courts have enforced the boundary between the well-developed body of product liability law and public nuisance law”).

- **Tennessee:** Johnson County v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (product-based nuisance claims “would convert almost every product liability action into a nuisance claim”), vac. on other grounds, 664 F. Supp. 1127 (E.D. Tenn. 1985) (non-nuisance issue); Jackson v. Tennessee Valley Auth., 413 F. Supp. 1050, 1056 n.1 (M.D. Tenn. 1976) (product liability does not “encompass the concepts of public nuisance”), aff’d, 595 F.2d 1120 (6th Cir. 1979).
- **Texas:** Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 422 (5th Cir. 2001) (nuisance claims barred by statute prohibiting product liability claims for known, inherent risks); State v. Am. Tobacco Co., 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (court “unwilling . . . to expand a claim for public nuisance” to products).¹⁴

The City’s reliance on the Restatement (Second) of Torts provides as little support for its claims as this Court’s precedent. The authors of the Restatement

¹⁴A few other jurisdictions have allowed public nuisance claims against legal products, mostly against firearms manufacturers. City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002), James v. Arms Technology, Inc., 820 A.2d 27, 48-49 (N.J. Super. 2003). These cases are of doubtful validity, since they prompted Congress to abolish the cause of action altogether. See 15 U.S.C.A. §§ 7902-03.

(Second) concluded that “public nuisance in th[e] broad, vague and general sense has become anachronistic.” Restatement (Second) of Torts § 821B cmt. c (1979).

If a defendant’s conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.

Id. cmt. e. Repeatedly, the Restatement (Second) cautions against broad construction of nuisance liability. Restatement (Second) of Torts div. 10, ch. 40 introductory note (1979) (“careless usage of ‘nuisance’ to include almost anything unpleasant, harmful or disagreeable . . . has no proper application in the law”); Restatement (Second) of Torts § 821A cmt. a (1979) (cases giving nuisance a “loose connotation” “must be completely disregarded” if nuisance “is to have any definite legal significance”)

Moreover, the Restatement (Second) of Torts treats nuisance in 27 sections and 96 pages, none of which mentions manufacture, distribution, or sale of any product. See Restatement (Second) of Torts §§ 821A-840E (1979). None of the Restatement (Second) of Torts’ 83 nuisance “illustrations” involves a product. Conversely, nuisance is not mentioned in Restatement (Second) of Torts § 402A (1965). The Restatement (Third) of Torts: Products Liability (1997), is a 382-page

book in which the word “nuisance” (public or private) does not appear.¹⁵ While “the Restatement does not accurately reflect Missouri’s nuisance law,” Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876, 880 (Mo. banc 1985), even if it did, nothing in either the Restatement (Second) or Restatement (Third) supports the City’s attempt to extend public nuisance into the realm of product liability. Its claims were properly dismissed.

If these important limitations on public nuisance are cast aside, any number of controversial, yet legal, economic activities will inevitably be subject to the litigation equivalent of guerilla war. As one appellate court observed, this cause of action opens the door to “politically motivated” and “exploitative” litigation:

[W]e see on the horizon, were we to expand the reach of the common-law public nuisance tort in the way plaintiff urges, the outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce – some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative.

People v. Sturm, Ruger, 761 N.Y.S.2d at 202-03. The sociological emphasis in the City’s briefing (Br. at 9-12, 45) amply confirms the accuracy of these observations.

¹⁵A Westlaw search for “nuisance” in the Restatement (Third) of Torts produced no product liability results.

If this type of cause of action is permitted, governments will come to court on a routine basis, bringing “a myriad of societal problems – real, perceived or imagined,” and seeking judicial overrides of social and political judgments made by other branches of government. 761 N.Y.S.2d at 203.

The sheer range of products against which public nuisance claims have been unsuccessfully asserted – alcohol, tobacco, firearms, asbestos, vehicles, farm products, and construction materials in addition to paint – illustrates its expansive potential. If non-defective, legally sold products can be “public nuisances,” manufacturers of every product to which there is ideological opposition, from fast food to sport-utility vehicles, will be subject to suit.

II. Missouri Law Prohibits Imposition of Collective, Industry-Wide Liability Upon Product Manufacturers.

The City’s suit also fails because Missouri law flatly prohibits imposition of collective, industry-wide liability upon product manufacturers. Manufacturers are responsible for their own products, not for their competitors’ actions or products. This prohibition was made absolutely clear in Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. banc 1984). Zafft rejected market share liability, the same theory of collective, industry-wide liability the City has advanced here, as “unfair, unworkable, and contrary to Missouri law, as well as unsound public policy.” Id. at 246 (expressly “agree[ing]” with defendants’ argument).

The plaintiffs in Zafft were inherently unable to identify who made the product that allegedly injured them.¹⁶ They sued scores of companies who made that type of product, alleging that all the products shared the same defect, and seeking a relaxed causation standard that would allow them to proceed against the entire industry. The Court held that, even where product identification is concededly impossible, Missouri law does not dispense with defendant-specific causation, a “fundamental concept of tort law.” 676 S.W.2d at 247.

Manufacturer-specific causation – what the Zafft Court called “the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury,” id., – is grounded in “strong countervailing considerations.” Id. at 246. Neither “logic,” “fairness,” nor any other reason for legal innovation justified the elimination of causation from tort law:

Missouri law does not guarantee relief to every deserving plaintiff. If the injury may have resulted from one of two causes . . . and, if the evidence leaves it to conjecture, the plaintiff must fail in his action. The development of products liability and comparative negligence in this state leave this established requirement of proving causation

¹⁶The product in Zafft was diethylstilbestrol (“DES”), which caused injury only after the passage of many years, and which allegedly was manufactured and sold generically by many different companies. Id. at 243.

intact; neither logic nor fairness requires this Court to dispense with this requirement in the present cases because it previously adopted strict products liability and comparative negligence. To shift the burden of proof on causation to respondents substantially alters the existing rights and liabilities of the litigants.

Id. at 246-47 (citations and quotation marks omitted).

Zafft also addressed market share liability as a “public policy choice.” Id. at 247. If “all companies” were to “face potential liability regardless of their efforts,” there would be very “little incentive to production of safe products.” Id. Moreover, if market share liability were adopted, “the consequences of imposing liability without identification [would] extend to other areas of products liability law.” Id.¹⁷ Passage of time has only confirmed the truth of the Court’s prediction, as market share liability has been asserted – and usually rejected – against almost every sort of product imaginable. See, infra, at pp. 67-71.

Market share liability also presented practical drawbacks. What the “relevant market” should be was “not defined.” Id. at 246. Also, “[d]ifficulties in determining market share for the purposes of apportioning damages remain[ed].”

¹⁷Citing Sheffield v. Eli Lilly & Co., 192 Cal. Rptr. 870 (Ct. App. 1983) (vaccine); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983) (asbestos), cert. denied, 465 U.S. 1102 (1984).

Id. Over a quarter century has passed since Zafft, and neither of these issues has been satisfactorily resolved.

Thus, for numerous weighty reasons the Zafft Court was “not persuade[d] . . . to abandon the Missouri tort law, which has always required a causal relationship between the defendant and the injury-producing agent. Id. at 247.

Nor is Zafft this Court’s last word. Hagen v. Celotex Corp., 816 S.W.2d 667 (Mo. banc 1991), applied Zafft to reject aggregated liability in an asbestos case where the plaintiff introduced no particularized causation evidence against several of the twelve defendants found liable. The Hagen Court reversed the verdicts against those defendants. The Court relied upon Zafft to hold that “the element of causation must be established as to each defendant sought to be held liable”:

[T]he plaintiffs have failed to establish any more than that the death was caused by exposure to asbestos dust and that [the defendant’s] products may have supplied the fatal exposure. This does not establish causation under the standards of our law. The problem differs only in degree and not in kind from the one we considered in Zafft.

816 S.W.2d at 671 (Zafft citation omitted).

Outside of product liability, in Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993), the Court firmly reaffirmed the requirement of “but for” causation – holding that “causation in fact” was required by simple “logic” in multiple tortfeasor cases:

Plaintiff contends that because this injury resulted from multiple tortfeasors and more than one cause, the substantial factor causation test should be applied rather than the “but for” test. . . .

The “but for” causation test provides that “the defendant’s conduct is a cause” of the event if the event would not have occurred “but for” that conduct. Put simply, “but for” causation tests for causation in fact. Mere logic requires causation in fact.

Id. at 860-61 (citation omitted). “Causation in fact” – that the defendant did something that hurt the plaintiff – is an “absolute minimum” causation standard for both single and “multiple cause tort cases. Id. at 862. “[L]ogic and common sense dictate that there be some causal relationship between the defendant’s conduct and the injury or event for which damages are sought.” 863 S.W.2d at 862.

Thus, in Missouri, “[p]laintiffs must show that defendant committed a tort [and] that the action caused the plaintiff’s injury.” Bennett v. Rapid Am. Corp., 816 S.W.2d 677, 678 (Mo. banc 1991). The Zafft rule requiring that the defendant must have injured the plaintiff has been consistently applied by other courts

interpreting Missouri law. In Elam v. Alcolac, Inc., the court discussed Zafft at length – reiterating that Missouri law does not allow liability in “indeterminate defendant” situations:

Zafft treats the question of indeterminate defendant [A] plaintiff may not maintain a cause of action in tort against a defendant the pleading cannot identify as an actor responsible for the substance which caused harm to the plaintiff. . . . The relinquishment of the identification of the defendant requirement would mean abandonment of [a] fundamental concept of law. . . . Zafft reaffirms the policy that a plaintiff who seeks recovery in tort against one joined as a defendant must identify that defendant as an actor in the production of the harm for which the plaintiff seeks recovery.

765 S.W.2d 42, 182-83 (Mo. Ct. App. W.D. 1988) (quotations to Zafft omitted), cert. denied, 493 U.S. 817 (1989). In Elam, the defendant was not “indeterminate” because it “was the only reasonably possible point source of the pollution.” Id. at 182. Such an allegation is precisely what the City cannot make here.

The court in D.S. Sifers Corp. v. Hallak, 46 S.W.3d 11, 19-20 (Mo. Ct. App. W.D. 2001), transfer denied (Mo. June 26, 2001), rejected alternative liability because, under Zafft, “speculation . . . cannot be the basis for imposing liability.” In Hargan v. Sears, Roebuck and Co., 787 S.W.2d 766, 768 (Mo. Ct. App. E.D.

1990), the court affirmed a directed verdict under Zafft where the plaintiff had “insufficient evidence to prove a causal connection between the fall and any act of negligence by defendants.” In Richardson v. Holland, 741 S.W.2d 751, 754 (Mo. Ct. App. S.D. 1987), the court relied upon Zafft to reject an aiding and abetting theory against the manufacturer of a firearm that had been criminally misused, holding that “[a]n injury cannot be the basis for recovery unless there is an act of the defendant which is the proximate cause.” See also Dorman v. Bridgestone/Firestone, Inc., 992 S.W.2d 231, 237 (Mo. Ct. App. E.D. 1999) (plaintiff must prove that “defendant’s product was a substantial factor in causing the injury”), transfer denied (Mo. June 29, 1999); Weaks v. Rupp, 966 S.W.2d 387, 393 (Mo. Ct. App. W.D. 1998) (“[a]ctionable negligence requires a causal connection between the conduct of the defendant and the resulting injury to the plaintiff”);¹⁸ Williams v. Van Biber, 886 S.W.2d 10, 14 (Mo. Ct. App. W.D. 1994)

¹⁸In Paull v. Shop N Save Warehouse Foods, Inc., 890 S.W.2d 401, 403 (Mo. Ct. App. E.D. 1995), Oldaker v. Peters, 869 S.W.2d 94, 100 (Mo. Ct. App. W.D. 1993), transfer denied, (Mo. Feb. 22, 1994), Dale v. Edmonds, 819 S.W.2d 388, 390 (Mo. Ct. App. E.D. 1991), Pyle v. Prairie Farms Dairy, Inc., 777 S.W.2d 286, 290-91 (Mo. Ct. App. S.D. 1989), and Sirna v. APC Bldg. Corp., 730 S.W.2d 561, 564 (Mo. Ct. App. W.D. 1987), the courts cited Zafft for the identical proposition as Weaks.

(“‘but for’ or direct causation must be met in all cases”); Patterson v. Meramec Valley R-III Sch. Dist., 864 S.W.2d 14, 16 (Mo. Ct. App. E.D. 1993) (“a causal connection must exist between [defendant’s] conduct and the . . . plaintiff’s injury”); Chism v. W.R. Grace & Co., 158 F.3d 988 (8th Cir. 1998) (“Missouri law requires a plaintiff to establish a causal connection between the defendant’s conduct and the plaintiff’s resulting injury”) (applying Missouri law). The logical, legal, and policy underpinnings of Zafft are as firm today as when this Court decided it nearly a quarter century ago.

III. Nothing Since Zafft Justifies Adopting Market Share Liability As A Form Of Collective, Industry-Wide Liability.

A. Market Share Liability Remains A Distinctly Minority Doctrine.

The “public nuisance” claim asserted by the City is just old wine in a new bottle – a different label for the discredited concept of collective, industry-wide liability. For years plaintiffs in lead-based paint litigation, municipal and otherwise, have tried and (largely) failed to bring identical claims under the rubric of market share liability. Only recently, an appellate court in Ohio became the latest to reject relaxation of product identification in lead pigment litigation:

[T]he injuries [plaintiff] claimed are from different products, by different manufacturers, some of whom incorporated the lead pigment into paint and some who merely provided the lead pigment for third

parties to incorporate into paint. In addition, the paint manufacturers utilized their own formulas for incorporating white lead into paint. Further, there are a variety of lead pigments other than white lead carbonate that were used in paint formulations. Moreover, there is no single, defined injury that results from lead poisoning.

Jackson v. Glidden Co., No. 87779, 2007 WL 184662, at *4 (Ohio Ct. App. Jan. 25, 2007). Many other courts agree. See Skipworth v. Lead Indus. Ass'n, Inc., 690 A.2d 169, 173 (Pa. 1996) (“entities who could not have been the producers of the lead paint which injured [plaintiff] would almost assuredly be held liable” due to length of relevant time period; product not fungible due to differences in bioavailability); Brenner v. Am. Cyanamid Co., 699 N.Y.S.2d 848, 852-53 (N.Y. App. Dist. 1999) (lead pigment “not fungible”; liability over “extended time period” improper; “plaintiffs attempt to hold defendants liable for manufacturing white lead carbonate, regardless of how the product was used”); Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245, 1248 (5th Cir. 1997) (“such change should come from the legislature”) (Louisiana law); Santiago v. Sherwin Williams Co., 3 F.3d 546, 550-51 (1st Cir.1993) (given “plaintiff’s inability to pinpoint with any degree of precision the time the injury-causing paint was applied” “tortfeasors and innocent actors would not be adequately separated”) (applying Massachusetts law); City of Philadelphia v. Lead Indus. Ass'n, Inc., 994 F.2d 112, 125-26 (3d Cir.

1993) (theory “clearly inapposite because the products were not fungible”; finding “no current trend . . . to expand the parameters of tort law”; citing “dangers of expanding tort recovery”) (applying Pennsylvania law). The only contrary appellate authority, Thomas v. Mallett, 701 N.W.2d 523 (Wis. 2005), imposed Wisconsin’s peculiar form of “risk contribution” only by effectively abolishing the requirement – uniformly shared even by other market share states – that the product had to be “fungible.”¹⁹

No jurisdiction rejecting market share liability in DES has adopted it for any other product. But, even in DES litigation, this court’s position in Zafft – rejecting collective, industry-wide liability and retaining the traditional, common sense requirement that tort liability depends upon the defendant having injured the plaintiff – remains the majority view. In twenty-seven years since a theory of

¹⁹Thomas held that fungibility is “not . . . capable of being defined with categorical precision,” 701 N.W.2d at 561, so the court gave it three meanings – functional interchangeability, physical similarity, and similarity of risk. Id. at 561-62. The court allowed any or all of these to be a “common denominator,” id. at 562, even though admitting that an automobile and a saxophone could be “functionally interchangeable” for some purposes. Id. at 561. Santa Clara v. Atlantic Richfield, 40 Cal. Rptr.3d 313, does not address, or even mention, market share liability, although California originated the theory.

market share liability was first formulated in Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980), cert. denied, 449 U.S. 912 (1980), only six states have adopted any form of market share liability. See also Smith v. Cutter Biological, 823 P.2d 717 (Haw. 1991) (blood products case) ; Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), cert. denied, 493 U.S. 944 (1989); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984), cert. denied, 469 U.S. 826 (1984); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984).

Even in DES litigation – where market share liability first emerged – it remains a distinctly minority doctrine. In addition to Zafft, appellate courts in eight additional states have refused to apply market share liability even to DES. Sutowski v. Eli Lilly & Co., 696 N.E.2d 187, 193 (Ohio 1998); Gorman v. Abbott Labs., 599 A.2d 1364, 1364 (R.I. 1991); Smith v. Eli Lilly & Co., 560 N.E.2d 324, 345 (Ill. 1990); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986); Payton v. Abbott Labs., 437 N.E.2d 171, 189-90 (Mass. 1982); Namm v. Charles E. Frosst & Co., 427 A.2d 1121, 1129 (N.J. Super. Ct. App. Div. 1981); Wood v. Eli Lilly & Co., 38 F.3d 510, 513-14 (10th Cir. 1994) (applying Oklahoma law);

Tidler v. Eli Lilly & Co., 851 F.2d 418, 425 (D.C. Cir. 1988) (applying Maryland law).²⁰

In particular, no jurisdiction that, like Missouri, rejects market share liability in its core DES context has ever adopted such a theory in a lead paint/pigment case. New York, which allows market share liability for DES, rejects it for lead paint pigments, for several valid factual reasons:

- The “relevant period” for determining the product market is drastically longer – spanning decades rather than a few months.
- Lead paint pigments are not a single chemical, and the at least five different compounds that were used in the decades that lead-based paint pigments were legally on the market, varied significantly in terms of the amount of bioavailable lead.

²⁰Trial courts in other states reject market share liability in DES litigation. Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637 (D.N.J. 1982), aff’d without op., 696 F.2d 984 (3d Cir. 1982); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981). See Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978) (rejecting similar claims pre-Sindell). Cf. Burnside v. Abbott Labs., 505 A.2d 973, 986 (Pa. Super. Ct. 1985) (rejecting other non-identification theories; mentioning, but not allowing market share liability).

- Lead-based paints were only a hazard for household use – not for industrial uses like shipbuilding – but there are no statistics concerning the pigment market for residential use.
- The defendants were not in exclusive control of the risk. Rather, the subsequent activities of paint manufacturers (who chose how much lead to use), paint sellers (who promoted paint for various uses), painters (who used paint for various uses), and property owners (who failed to maintain painted surfaces) drastically changed the nature of the risk.
- There are many other sources of environmental lead, and lead injury does not involve a “signature disease.”

Brenner, 699 N.Y.S.2d at 852-53.

In Sindell, a bare 4-3 majority elected to abandon the requirement that defendants be proven to cause injury and to hold DES manufacturers liable in proportion to their market shares – as long as an undefined “substantial share” of an unspecified “market” was joined. 607 P.2d at 937-38. Sindell’s theory was unprecedented. As the Pennsylvania Supreme Court noted, “this theory emanated from an article written by a law review student.” Skipworth, 690 A.2d 169, 172 n.3 (citation omitted).

Even the few courts that have, unlike Missouri, allowed market share liability frankly acknowledge it as a departure from prior law. Martin recognized that its “alternative market share” remedy “deviat[ed] from traditional notions of tort law.” 689 P.2d at 381. In Hymowitz, 539 N.E.2d at 1075, the court admitted it was “modif[y]ing . . . existing doctrine” in response to a “singular case.”²¹ As one would expect, courts rejecting market share liability concur with this Court’s description of it as a “novel theor[y].” Zafft, 676 S.W.2d at 246. The Supreme Court of Ohio observed that its legislature had modified product liability law in a number of ways, but had never adopted this “atypical theory of tort recovery.” Sutowski, 696 N.E.2d at 189. Even if one assumes a constitutional statute could be enacted, it was wise to leave such a “substantial” change to the legislature:

[M]arket-share liability is not an available theory of recovery in a products liability action. . . . It is . . . the role of the court to interpret the law, not to legislate. We believe the General Assembly should decide the policy question of whether [plaintiff’s] claims, or others like hers, warrant substantially altering [the] tort law.

Id. at 193. In Illinois:

²¹See Collins, 342 N.W.2d at 45 (court “deviat[ed] from traditional notions of tort law”); Sindell, 607 P.2d at 936 (market share liability a “modification” and “adaptation” of existing law).

We have not in the past been hesitant to develop new tort concepts; however, in this instance we decline to do so [T]his is too great a deviation from a tort principle which we have found to serve a vital function in the law, causation in fact

Smith, 560 N.E.2d at 344-45. In Pennsylvania:

Adoption of . . . market share liability . . . would result in a significant departure [and] would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair.

Skipworth, 690 A.2d at 173 (citation and footnote omitted). In Iowa:

Plaintiffs request that we make a substantial departure from our fundamental negligence requirement of proving causation The imposition of liability upon a manufacturer for harm that it may not have caused is the very legal legerdemain, at least by our long held traditional standards, that we believe the courts should avoid

Mulcahy, 386 N.W.2d at 76. There is thus “no disagreement that [market share liability] represents a radical departure from traditional theories of tort liability.”

Clayton v. Owens-Corning Fiberglas Corp., 662 A.2d 1374, 1383 n.10 (D.C. 1995) (citation and quotation marks omitted). Market share liability is widely regarded

as “novel” and “radical.”²² The City “cannot pretend that any such theory is consistent with common law principles of tort liability.” Senn v. Merrell-Dow Pharms., Inc. , 751 P.2d 215, 233 (Or. 1988).

²²Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1068 (2001) (“novel theory”); Black v. Abex Corp., 603 N.W.2d 182, 189 (“novel remedy”) (N.D. 1999); Shackil v. Lederle Labs., 561 A.2d 511, 517, 526 (N.J. 1989) (a “bold foray into *terra incognita*”; “excessive exposure to liability [from] imposition of this novel theory”) (citation and quotation marks omitted); Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 185 (N.Y. 1982) (“novel theories of ‘enterprise’ and ‘market share’ liability”); Bly v. Tri-Cont’l Indus., Inc., 663 A.2d 1232, 1244 (D.C. App. 1995) (“radical departure from traditional tort law”); Bixler v. Avondale Mills, 405 N.W.2d 428, 430 (Minn. Ct. App. 1987) (“a radical change in tort analysis”); Lyons v. Premo Pharm. Labs, Inc., 406 A.2d 185, 190 (N.J. Super. Ct. App. Div. 1979) (“radical shifting of burdens”), certif. denied, 412 A.2d 774 (N.J. 1979); Philadelphia v. Lead Indus., 994 A.2d at 127 (“courts also consistently have characterized market share liability as novel and even radical”); Tidler, 851 F.2d at 425 (“novel methods”); Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1483 (11th Cir. 1985) (“novel theory”) (applying Georgia law); Thompson, 714 F.2d at 583 (“radical departure[.]”); Dawson v. Bristol Labs., 658 F. Supp. 1036, 1038 (W.D. Ky. 1987) (“novel theories”); Griffin v. Tenneco Resins, Inc. ,

Nor has market share liability as a form of collective, industry-wide liability enjoyed much acceptance in other areas that – like lead-based paint pigments – are outside of the DES context where this theory was invented. Rather, market share liability has been advanced, and rejected, in cases involving a tremendous range of other products.

- **Antibiotics:** Dawson v. Bristol Labs., 658 F. Supp. 1036 (W.D. Ky. 1987).
- **Asbestos brake pads:** Black v. Abex Corp., 603 N.W.2d 182 (N.D. 1999); Becker v. Baron Bros., 649 A.2d 613 (N.J. 1994); Ferris v. Gatke Corp., 132 Cal. Rptr.2d 819 (Ct. App. 2003), review denied, (Cal. July 9, 2003).
- **Asbestos generally:** Gaulding v. Celotex Corp., 772 S.W.2d 66 (Tex. 1989); Case v. Fibreboard Corp., 743 P.2d 1062 (Okla. 1987); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987); Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985); Leng

648 F. Supp. 964, 966-67 (W.D.N.C. 1986) (“radical mode of expansion of tort law”; “the term ‘quantum leap’ describes. . .these novel theories”) (citation and quotation marks omitted); Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 186 (S.D. Ga. 1982) (“unprecedented departure”; “novel theories”); Mizell, 526 F. Supp. at 596 (“a radical departure”).

v. Celotex Corp., 554 N.E.2d 468 (Ill. App. Ct. 1990), appeal denied, 555 N.E.2d 377 (Ill. 1990); Mullen v. Armstrong World Indus., Inc., 246 Cal. Rptr. 327 (Ct. App. 1988); Robertson v. Allied Signal, Inc., 914 F.2d 360, 379-81 (3d Cir. 1990) (applying Pennsylvania law); White v. Celotex Corp., 907 F.2d 104, 105 (9th Cir. 1990) (applying Arizona law); Menne v. Celotex Corp., 861 F.2d 1453 (10th Cir. 1988) (applying Nebraska law); Bateman v. Johns-Manville Sales Corp., 781 F.2d 1132 (5th Cir. 1986) (applying Louisiana law); Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1483 (11th Cir. 1985) (applying Georgia law); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983) (applying Louisiana law), cert. denied, 465 U.S. 1102 (1984).

- **Batteries:** York v. Lunkes, 545 N.E.2d 478 (Ill. App. Ct. 1989).
- **Blood products:** Spencer v. Baxter Int'l, Inc., 163 F. Supp.2d 74 (D. Mass. 2001); In re factor VIII or IX Concentrate Blood Prods. Litig., No. Civ.A. 94-0382, 2000 WL 282787 (E.D. La. March 14, 2000); Doe v. Cutter Biological, 852 F. Supp. 909 (D. Idaho 1994); Poole v. Alpha Therapeutic Group, Inc., 696 F. Supp. 351 (N.D. Ill. 1988).
- **Breast implants:** In re New York State Silicone Breast Implant Litig., 631 N.Y.S.2d 491 (N.Y. Sup. Ct. 1995), aff'd mem., 650

N.Y.S.2d 558 (N.Y. App. Div. 1996) (adopting trial court opinion); In re Minnesota Breast Implant Litig., 36 F. Supp.2d 863 (D. Minn. 1998); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989), aff'd without op., 898 F.2d 146 (4th Cir. 1990); In re Dow Corning Corp., 250 B.R. 298 (Bankr. E.D. Mich. 2000).

- **Cigarettes:** DaSilva v. Am. Tobacco Co., 667 N.Y.S.2d 653 (N.Y. Sup. Ct. 1997).
- **Clothing:** Bixler v. Avondale Mills, 405 N.W.2d 428 (Minn. Ct. App. 1987); Mason v. Spiegel, Inc., 610 F. Supp. 401 (D. Minn. 1985).
- **Dental Amalgam:** Barnes v. Kerr Corp., 418 F.3d 583, 589 (6th Cir. 2005) (applying Tennessee law).
- **Dye:** Griffin v. Tenneco Resins, Inc., 648 F. Supp. 964 (W.D.N.C. 1986).
- **Ethylene Oxide:** Catherwood v. Am. Sterilizer Co., 532 N.Y.S.2d 216 (N.Y. Sup. Ct. 1988).
- **Firearms:** City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001); District of Columbia v. Beretta U.S.A. Corp., 2002 WL 31811717 (D.C. Super. Dec. 16, 2002), aff'd in part and rev'd in part

on other grounds, 872 A.2d 633 (D.C. 2005), cert. denied, 126 S. Ct. 399 (2005).

- **Fish:** Santarelli v. BP Am., 913 F. Supp. 324 (M.D. Pa. 1996).
- **Gasoline:** Bly v. Tri-Cont'l Indus., Inc., 663 A.2d 1232 (D.C. 1995).
- **Insulation:** Gifaldi v. DuMont Co., 569 N.Y.S.2d 284 (N.Y. App. Div. 1991).
- **Ipecac syrup:** Mellon v. Barre-Nat'l Drug Co., 636 A.2d 187 (Pa. Super. Ct. 1993), appeal denied, 648 A.2d 789 (Pa. 1994).
- **Latex gloves:** Kennedy v. Baxter Healthcare Corp., 50 Cal. Rptr.2d 736 (Ct. App. 1996); Mills v. Allegiance Healthcare Corp., 178 F. Supp 2d 1 (D. Mass. 2001).
- **Multi-piece wheels:** Healey v. Firestone Tire & Rubber Co., 663 N.E.2d 901 (N.Y. 1996); Coerper v. Dayton-Walther, No. 85 C 6887, 1986 WL 4111, at *1 (N.D. Ill. Mar. 27, 1986); Bradley v. Firestone Tire & Rubber Co., 590 F. Supp. 1177 (D.S.D. 1984).
- **Oral Contraceptives:** Gurski v. Wyeth-Ayerst Div. of Am. Home Prods. Corp., 953 F. Supp. 412 (D. Mass. 1997).
- **Pallets:** McLaughlin v. Acme Pallet Co., 658 A.2d 1314 (N.J. Super. Ct. App. Div. 1995).

- **Paint and varnish:** Setliff v. E.I. Du Pont de Nemours & Co., 38 Cal. Rptr.2d 763 (Ct. App. 1995) (non-lead).
- **Perfume:** Sanderson v. Int'l Flavors & Fragrances, Inc., 950 F. Supp. 981 (C.D. Cal. 1996).
- **Pipe:** Edwards v. A.L. Lease & Co., 54 Cal. Rptr. 2d 259 (Ct. App. 1996).
- **Plywood:** Herlihy v. Ply-Gem Indus., Inc., 752 F. Supp. 1282 (D. Md. 1990).
- **Roofing materials:** Pulte Home Corp. v. Ply Gem Indus., Inc., 804 F. Supp. 1471 (M.D. Fla. 1992).
- **Tape:** Kinnett v. Mass Gas & Elec. Supply Co., 716 F. Supp. 695 (D.N.H. 1989).
- **Vaccines:** Shackil v. Lederle Labs., 561 A.2d 511 (N.J. 1989); Senn, 751 P.2d 215; Sheffield v. Eli Lilly & Co., 192 Cal. Rptr. 870 (Ct. App. 1983).
- **Wire:** Pennfield Corp. v. Meadow Valley Elec., Inc., 604 A.2d 1082 (Pa. Super. Ct. 1992).

To follow the Thomas decision, and neuter the fungibility requirement of market share liability, could just as easily subject any of these other products to non-identification liability. A hit-and-run victim could even sue the automobile

industry claiming that, from a pedestrian's standpoint, all cars are "functionally interchangeable" and defective. Even natural disasters and acts of God could become actionable:

The Court has not found a controlling or persuasive case . . . in which a plaintiff could collect damages from an industry as a whole without demonstrating any individual connection between any single member of the industry and the plaintiff's harm, and in which liability would be assessed against industry defendants on a group liability theory. The court concludes that such cases do not exist because they would subvert the notion of causation that underlies the system of tort liability.

Barasich v. Columbia Gulf Transmission Co., ___ F. Supp.2d ___, Nos. 05-4161, 05-4569, 2006 WL 3333797, at *18 (E.D. La. Sept. 28, 2006) (oil industry not liable for Hurricane Katrina damage). A broad-brush theory of non-identification liability that might be applied to almost any product or situation would be a radical change with nothing to recommend it.

B. Market Share Liability Could Not Be Fairly Allocated Because There Is No Consensus Among The States.

Sindell acknowledged that defendants would necessarily be paying plaintiffs they did not injure. Since market share liability only requires proof of a

“substantial share” of the market, and does not require that all manufacturers be joined, it may be that none of the defendants in a given case caused the plaintiff’s injury. 607 P.2d at 936-37. Sindell tried to offset the unfairness of liability without cause-in-fact by limiting liability to each defendant’s market share: a “defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff’s injuries.” 607 P.2d at 937. According to Sindell, “each manufacturer’s liability” would thus “approximat[e] its responsibility for the injuries caused by its own products.” Id. This non-traditional allocation is the “great superficial appeal” of market share theories. David A. Fischer, Products Liability – An Analysis of Market Share Liability, 35 Vand. L. Rev. 1623, 1626 (1981). In practice, however, “fair approximation” has proven illusory.

Any possible “fairness” of collective, industry-wide liability has been undermined by its distinct lack of nation-wide acceptance. As already discussed, many more states have rejected market share liability – especially in non-DES cases – than have adopted it. But even in the small minority of jurisdictions that allow market share liability, there is no consistency.

Initially, it has never been clear what “market share” is. There is no single “market share liability,” only several theories, each criticizing the others for unfair liability allocation. Sindell declined to define what “substantial share” of what

“market” a plaintiff must prove, and conceded that “discrepancy in the correlation between market share and liability is inevitable.” 607 P.2d at 937. Later, in Brown v. Superior Court, 751 P.2d 470, 485-87 (Cal. 1988), that court refined Sindell to impose several, not joint, liability and to reject “inflation” of market shares to 100% of damages.

Sindell was vigorously criticized in Martin for “inherent distortion of liability.” 689 P.2d at 380. Martin adopted a different formulation, precluding 100% recovery of damages but allowing suit against as small a percentage of the relevant market as the plaintiff chose. Martin also required the relevant “market” to be the smallest determinable unit. Id. at 381-83.

Both Sindell and Martin were criticized and rejected in Hymowitz, which found Sindell “ambigu[ous]” and Martin “unfair and perhaps impossible” to administer. 539 N.E.2d at 1076, 1077. Despite admitting that its result also would “likely result in a disproportion between the liability of individual manufacturers and the actual injuries each manufacturer caused,” Hymowitz imposed a national market for all cases. Unlike either Sindell or Martin, Hymowitz refused to allow a manufacturer to exculpate itself – even a defendant that proved it could not

possibly have sold the DES that was prescribed to the plaintiff. 539 N.E.2d at 1078.²³

The City’s favorite jurisdiction, Wisconsin, rejected the Sindell market share approach altogether – criticizing “the practical difficulty of defining and proving market share” and finding it a “waste of judicial resources.” Collins v. Eli Lilly Co., 342 N.W.2d 37, 48-49 (Wis. 1984). Rather than opting for traditional law, however, Collins went even farther afield, allowing the plaintiff to sue as few as one company, as long as that “defendant produced or marketed the type of DES” involved in the case. Id. at 50. The court shifted “the burden of proof on time and geographic distribution” to the defendant, so that if neither side could prove market share, the defendant would be 100% liable. Id. at 52.

Thus it would not be enough merely to adopt “market share liability.” This Court would have to pick among inconsistent and admittedly approximate theories. This utter lack of consensus about what “market share liability” means is another good reason not to deviate from established legal principles of causation:

²³Hymowitz was the product of unique circumstances – passage of DES-specific legislation reviving time-barred DES cases by the New York legislature. 539 N.E.2d at 1075. The court reasoned that the legislature must have intended to permit DES litigation. Id. There is no comparable sign here that the Missouri Legislature supports expanded liability.

Our conviction is strengthened by the numerous disparate versions of market share liability in existence. Some states apportion liability based on market share, while other states hold defendants liable for the amount of risk they created that the plaintiff would be injured, with market share being a relevant factor in this inquiry. Compare Collins (risk approach) with Hymowitz (market share approach). To calculate the market share of defendants, some states utilize sales in the national market, while others examine local markets. Compare Smith v. Cutter Biological, Inc., 823 P.2d 717, 728 (Haw. 1991) (national market) and Hymowitz, 539 N.E.2d at 1077 (same) with Conley, 570 So.2d 275, 283 (local market) and George v. Parke-Davis, 733 P.2d 507, 512 (Wash. 1987) (en banc) (same). Although all states use only several and not joint and several liability, their approaches vary greatly. In some states, a plaintiff must prove the actual market share of each defendant. See, e.g., Sindell, 607 P.2d at 935-37; Hymowitz, 539 N.E.2d at 1077-78. Other states impose a rebuttable presumption that all defendants have an equal market share, totaling one hundred percent. See, e.g., Martin, 689 P.2d 368, 383; Conley, 570 So.2d at 286. Each defendant may rebut this presumption by showing that its actual market share was less. Martin,

689 P.2d at 383; Conley, 570 So.2d at 286. The liability of defendants that cannot prove their actual market share then inflates so plaintiff receives a total recovery. Martin, 689 P.2d at 383; Conley, 570 So.2d at 286.

The differences go on and on. And each highest state court that has adopted market share liability has harshly criticized its predecessors for either distorting defendants' liability or creating administratively unworkable schemes.

City of Philadelphia v. Lead Indus., 994 F.2d at 127 (rejecting market share liability).

The City would like the Court to ignore the weight of precedent, overrule Zafft, and recognize some form of collective, industry-wide liability. The multiplicity of conflicting judicial approaches to this question only confirm that this is not an issue that courts, as opposed to legislative bodies, are well-equipped to handle.

C. Decades Of “Market Share” Are Not Susceptible To Proof.

Sindell abdicated to lower courts how “market share” should be proved, declaring that “[w]e are not unmindful of the practical problems involved in defining the market and determining market share, but these are largely matters of proof which properly cannot be determined at the pleading stage of these

proceedings.” 607 P.2d at 937-38. In practice, this “matter[] of proof” has proved intractable. See Paul D. Rheingold, The Hymowitz Decision – Practical Aspects of New York DES Litigation, 55 Brooklyn L. Rev. 883, 893-97 (1989) (describing practical problems under New York law).

As one California judge observed, “The harsh blunt fact that the evidence has shown is that that information and data is just not available’ and ‘when the Supreme Court, . . . without having any evidence says that you can determine what the [sales are] as to a particular manufacturer, it’s just, just not there. That data doesn’t exist.” Smith, 560 N.E.2d at 337 (quoting Stapp v. Abbott Labs., No. C344407 (Cal. Super. Ct. Los Angeles County)). In Collins, the court conceded “the practical difficulty of defining and proving market share” created by the absence or complexity of necessary records. 342 N.W.2d at 48-49.²⁴

The evidentiary problems here dwarf even the DES situation, since as discussed in Brenner, the period for which some sort of “market” would have to be reconstructed spans decades and lead paints (and thus lead pigments) were used to paint many things – such as ships, cars, and outdoor structures of all kinds – which

²⁴As discussed, *supra*, at p. 75-76, Collins essentially discarded the “market share” in market share liability in favor of a “risk contribution” model allowing juries to apportion liability by assessing the “risk” each defendant created. 342 N.W.2d at 53.

did not pose the sort of risks the City decries. 699 N.Y.S.2d at 852-53. Lead-based residential paints went off the market decades ago. Many of the properties the City complains about are undoubtedly a century or more old. There are no surviving witnesses with knowledge of the market conditions for lead pigments (or paints) so long ago. Thus, it is fantasy to suggest that sufficient evidence exists to define market shares on anything more than a speculative basis.

An absence of market share evidence will not, of course, preclude an attempt to determine market shares. See Rheingold, 55 Brooklyn L. Rev. at 894 (noting the “many econometricians involved on all sides, giving what apparently amounted to nothing more than educated guesses about what the market was”). The likelihood that such attempt would lead to anything more than a judicial fiction is vanishingly small. See id. at 894-95 (discussing the rejection, in the New York DES litigation, of the market share determinations made in California). In the end, these estimates would not be rational but arbitrary. As the Pennsylvania Supreme Court unanimously concluded, the distortion of liability would be “grotesque”:

Market share liability is grounded on the premise that it ensures that each manufacturer’s liability would approximate its responsibility for the injuries caused by its own products. Yet, in this case, apportioning liability based upon a manufacturer defendant’s share of the market (even if it were possible to obtain an accurate statistic

considering the lengthy relevant time period at question) would not serve to approximate that defendant's responsibility for injuries caused by its lead paint. . . . [W]e find that application of market share liability to lead paint cases would grotesquely distort liability.

Skipworth, 690 A.2d at 173 (citation and quotation marks omitted).

D. Collective, Industry-Wide Liability Would Erode A Manufacturer's Responsibility For Its Own Products.

Once it is understood that market share liability's promise of rough justice is in practice illusory, see Smith, 560 N.E.2d at 344, the only remaining justification is "risk spreading" or "income transfer" – here the City wishing to increase its "tight budget" at the expense of these defendants. Br. at 42. Product liability, however, is not a free "court-constructed insurance plan." Goldman, 514 N.E.2d at 702 (citation and quotation marks omitted). Accord Wood, 38 F.3d at 513; Blackston, 764 F.2d at 1483. Nor should litigation be viewed as an irregular, judicially-conferred power to tax.

Collective, industry-wide liability has deleterious social effects. Elimination of product-specific causation would make every manufacturer liable not only for its own products, but also for generically similar products manufactured by its competitors – with predictable erosion of the primary responsibility of the manu-

facturer whose product actually caused the injury. Pennsylvania rejects market share liability for this reason:

Second, expanding culpability of . . . manufacturers could reduce the ability to spread losses by insurance and otherwise distribute risk.

Third, application of such a novel theory of causation would raise serious questions of fairness Thus, even if this Court were not bound . . . to require proof of exposure to a particular defendant's products to establish proximate cause, significant policy reasons favor retention of proximate cause as an essential element.

Robertson, 914 F.2d at 379-80 (citation and quotation marks omitted). Liability should not extend to a manufacturer having “no control over the production of [another manufacturer’s product] . . . no role in placing that rim in the stream of commerce, and deriv[ing] no benefit from its sale.” Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222, 226 (N.Y. 1992). For good reason, the law does not hold competitors responsible for the misdeeds of their rivals.²⁵ Collective,

²⁵E.g., Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996) (a “manufacturer generally does not have a duty to warn or instruct about another manufacturer’s products”); Pluto v. Searle Labs., 690 N.E.2d 619, 621 (Ill. App. Ct. 1997) (refusing to require a “manufacturer to rely upon the representations made by a competitor”); Powell v. Standard Brands Paint Co., 212

industry-wide liability of the sort sought by the City would only weaken the deterrent effect of tort liability by encouraging those manufacturers less concerned about safety to expect a “free ride” at the expense of their competitors.

IV. The City Cannot Allege The Essential Elements Of Public Nuisance.

Missouri has never employed public nuisance to impose collective, industry-wide liability. Because this has never been a proper nuisance case, the City cannot allege the proper elements of a nuisance cause of action, and its suit was properly dismissed. The condition the City alleges – various types of lead paint remaining inside numerous private structures decades after their legal sale to and use by independent third persons – is not properly considered a public nuisance.

First, the City does not, and cannot, allege that defendants control the purported nuisance. Public nuisance in Missouri is predicated upon a defendant’s current ability to control, and thus to abate, the alleged nuisance. This Court made clear in Billings v. North Kansas City Bridge & Railroad Co., 93 S.W.2d 944 (Mo.

Cal. Rptr. 395, 398 (Ct. App. 1985) (“the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products”); Baughman v. Gen. Motors Corp., 780 F.2d 1131, 1133 (4th Cir. 1986) (manufacturer “cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers”) (applying South Carolina law).

1936), that control is an essential element of public nuisance. Billings requires juries to be instructed that the alleged nuisance “constituted a nuisance during the time when it was under the control of defendant, because if it was not a nuisance at the time defendant parted with control over it, then it could not thereafter become a nuisance for which defendant would be liable.” 93 S.W.2d at 946. Under Billings, a defendant is not liable for a public nuisance “if the nuisance was created . . . after defendant’s control over it had ceased.” Id.

Billings is squarely on point here. Lead paint pigment was not a nuisance when sold – rather, it was a legal product. Nor, as the City’s Petition confirms, is fresh, undamaged lead-based paint hazardous; not when applied, nor even under today’s regulatory standards. See Petition ¶20 (lead based paint “would degrade, deteriorate and/or be disturbed over time”). By the time any nuisance arose, the product was beyond the defendants’ control – often decades later. The City is claiming precisely what Billings held is not a public nuisance – a hazard arising only after a defendant parted with control.

The Billings holding is based on simple common sense – only one who controls a purported nuisance can be required to abate it. See City of Webster Groves v. Erickson, 763 S.W.2d 278, 279 (Mo. Ct. App. E.D. 1988) (nuisance liability turns on “who has the right to control the premises so as to abate the nuisance thereon”). A defendant “is not civilly liable for a nuisance caused or

promoted by others over whom he has no control; nor is he bound to go to expense or litigation to abate such a nuisance.” Bellflower v. Pennise, 548 F.2d 776, 778 (8th Cir. 1977) (applying Missouri law). “[T]here must be some evidence of defendants’ control over the nuisance causing property.” Rychnovsky v. Cole, 119 S.W.3d 204, 210 (Mo. Ct. App. W.D. 2003) (citation and quotation marks omitted). “[T]he test for liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance.” Rosenfeld v. Thoele, 28 S.W.3d 446, 452 (Mo. Ct. App. E.D. 2000) (quoting 58 Am. Jur. 2d, Nuisances § 117 (1989)).²⁶ Even ownership is not as important as control:

It is not necessary in order to charge a person with liability for a nuisance that he should be the owner of the property on which it is created, but it is sufficient that he created the nuisance or exercises control over the nuisance-causing property.

²⁶See City of St. Louis v. Varahi, Inc., 39 S.W.3d 531, 538 (Mo. Ct. App. E.D. 2001) (hotel not a public nuisance for catering to prostitutes because “[t]here was no evidence that the prostitutes. . .were agents or employees of the hotel or that defendant controlled them in any way”); Gittemeier v. Contractors Roofing & Supply Co., 932 S.W.2d 865, 871 (Mo. Ct. App. E.D. 1996) (no nuisance liability for conduct of truck drivers that defendant “has no control over”).

Rosenfeld, 28 S.W.3d at 452; accord City of Webster Groves v. Erickson, 763 S.W.2d 278, 279 (Mo. Ct. App. E.D. 1988) (ownership for nuisance purposes includes “right to control . . . so as to abate the nuisance”), cert. denied, 493 U.S. 814 (1989).

There is not – and cannot be – any allegation of control in this litigation. None of these defendants is alleged to have done anything at all in St. Louis for decades, and none is *ever* alleged to have controlled the properties where their products were supposedly used.

Second, the City’s suit lacks the “public” nature essential to a “public nuisance.” No “public” condition is alleged – only paint inside private property that solely endangers the residents. There is no claim of risk to passers-by or to the public as a whole. The City alleges a large number of private residences are affected, but this Court has long held that “a great many” hazards on “individual property” does not create a public nuisance:

A public or common nuisance is an offense against the public order . . . which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community 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.

State v. Excelsior Powder Mfg. Co., 169 S.W. 267, 271 (Mo. 1914) (quoted in City of St. Louis v. Varahi, Inc., 39 S.W.3d 531, 535 (Mo. Ct. App. E.D. 2001)).
Accord Restatement (Second) of Torts § 821B cmt. g (1979).²⁷

A nuisance is “a public one, if it affects all those who are using a right which is in common to all.” Metro. St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643, 654 (Mo. 1973). The residences mentioned in the Petition are not open to the public – thus the City’s claim does not impact any “common” right. By contrast, the stored explosives in Excelsior Powder would have injured anyone in the vicinity. The “great many” private properties here are just the “individual property of each” owner. Excelsior Powder, 169 S.W. at 271. Missouri law does not permit the City to concoct a public nuisance merely by aggregating a large number of intrinsically private claims.

²⁷The Restatement (Second) closely tracks this Court’s holding in Excelsior Powder, stating “[c]onduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature.” § 821B, cmt. g.

Third, there is no allegation that the defendants own (or otherwise control) land or that the defendants have violated any law or ordinance. Without an allegation of illegal conduct, “[t]he crux of a nuisance case is unreasonable land use. The broad categories within which previous cases fit illustrate ways to prove unreasonable land use.” Frank v. Env'tl. Sanitation Mgmt., Inc., 687 S.W.2d 876, 880 (Mo. banc 1985) (listing pollution cases).²⁸ Conduct is not the key to public nuisance. Indeed, “[n]egligence will only support a finding of nuisance when it constitutes an unreasonable use of land.” Id. at 882.

Because defendants are not alleged to have misused any land, the nuisance claims were properly dismissed. There is no allegation that the mere presence of

²⁸Except in cases of illegal conduct, the Court has never recognized a public nuisance that did not involve some sort of misuse of land. See State ex rel. Dresser Indus., Inc. v. Ruddy, 592 S.W.2d 789 (Mo. banc 1980) (pollution by barite tailings); Zykan, 495 S.W.2d 643 (water runoff from defendant’s property a public nuisance); Somerset Villa, Inc. v. City of Lee’s Summit, 436 S.W.2d 658 (Mo. 1968) (water runoff flooded streets); State ex rel. Allai v. Thatch, 234 S.W.2d 1 (Mo. banc 1950) (obstruction of public roads); Clutter v. Blankenship, 144 S.W.2d 119 (Mo. 1940) (operation of funeral home in residential neighborhood); see also State ex rel. Collet v. Errington, 317 S.W.2d 326 (Mo. 1958) (illegal practice of medicine by unlicensed individual was a public nuisance).

lead-based paint on a property is a hazard – unless that property is poorly maintained. Nor does any statute or ordinance require removal of properly maintained lead-based paint.

Fourth, the City’s Petition fails to allege proximate causation. “[A] person is not liable where his property is, by the act of independent third parties, made the instrumentality of a nuisance, since their act is the proximate cause.” Bellflower, 548 F.2d at 778. In circumstances remarkably similar to the City’s allegations, this Court rejected the claim that a brewery’s “valid sale to a legitimate purchaser” proximately caused a public nuisance “even if the [purchaser], in conjunction with others, should thereafter create a public nuisance by drinking and raising a disturbance.” State ex rel. Weatherby v. Dick & Bros. Quincy Brewing Co., 192 S.W. 1022, 1024-25 (Mo. 1917). The defendant brewery lawfully sold beer, through an agent, to Missouri purchasers. Id. at 1023. Those purchasers allegedly resold the beer “indiscriminately,” resulting in “large crowds” of rowdy persons “assembl[ing] . . . for the purpose of buying and drinking intoxicating liquors.” Id. The brewery did not cause that nuisance. Its business was legal, and the nuisance was the result of third-party use (or misuse) of the product.

The petition . . . undertakes to restrain defendant from engaging in its legitimate business, in selling to persons authorized by law to purchase its goods, for the alleged reason that it enables diverse

persons, who have no connection with defendant, to sell intoxicating liquors in violation of the local option law

Id. at 1025; accord State ex rel. Chicago, Burlington & Quincy R.R. Co. v. Woolfolk, 190 S.W. 877 (Mo. banc 1916) (railroad transporting liquor to “boot-leggers” not liable for “public nuisance” of drunkenness and disorderly conduct). Here, as in Weatherby, the defendants sold a legal product that only caused problems because of how third persons used it. These facts do not describe a public nuisance in Missouri.

The defendants here do not own and have no control over any of the properties on which the purported nuisance exists. Plaintiff does not allege that it uses any land at all. Nor does Plaintiff allege that defendants have done anything at all in decades. When the product here was sold, it was entirely legal – defendants are not alleged to have broken any laws. The “risk” claimed is not to the public *en masse* but only to residents of discrete private properties. The City’s Petition does not describe anything remotely resembling a public nuisance in Missouri.

The public nuisance theory here is but an excuse. This is a product liability action clad in ill-fitting nuisance garb to avoid the traditional elements of product liability under Missouri law – particularly the requirement that only the actual manufacturer can be liable for defects in a product.

V. The Municipal Cost Recovery Rule Precludes Governments From Using Tort Litigation As A Form Of Taxation To Finance Their Activities.

Another fundamental reason for dismissing the City's claims is that "taxation without representation" is "repugnant to and inconsistent with the American idea of government and true citizenship." State ex rel. Gordon v. Becker, 49 S.W.2d 146, 151 (Mo. banc 1932). "[T]he establishment of a tax levy is an exercise of legislative function." Lane v. Lensmeyer, 158 S.W.3d 218, 225 (Mo. banc 2005). In particular, "Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from lawmaking power." Berry v. State, 908 S.W.2d 682, 685 (Mo. banc 1995) (citation and quotation marks omitted). Nor may the City enlist the courts to exercise for it taxation powers beyond those conferred by law. "[T]he power of taxation belongs to the Legislature, not to the courts." Massey v. Howard, 240 S.W.2d 743, 745 (Mo. Ct. App. 1951) (citation and quotation marks omitted). Taxation "is not a judicial function to be performed in a [court] proceeding . . . , but is purely a legislative function." Peatman v. Worthington Drainage Dist., 176 S.W.2d 539, 456 (Mo. Ct. App. 1943).

The City already has the power to tax its citizens and those doing business within its boundaries. It also has the power to force St. Louis property owners to

remove lead paint. This resort to litigation in an attempt to expand the City's powers beyond their legislatively-set boundaries is both improper and unwise.

The City's invocation of collective, industry-wide liability to force the lead industry to augment the City's paint remediation budget is a tax by any definition. Such liability "would amount to a regressive excise tax." imposed without legislative action. Int'l Bhd. of Teamsters, Local 734 Health & Welfare Fund v. Philip Morris, Inc., 196 F.3d 818, 825 (7th Cir. 1999) (applying Illinois law). It is also *ultra vires* under well-established law.

The principle that governments may not finance their operations through tort recoveries, commonly called the "municipal cost recovery rule" (or sometimes "free public services doctrine,"²⁹) was recognized by the United States Supreme Court in United States v. Standard Oil of California, 332 U.S. 301, 314 (1947). There, the Court rejected a lawsuit by the United States to recoup hospitalization costs for a soldier tortiously injured by the defendant. The Supreme Court correctly perceived the issue as "not . . . simply a question of creating a new liability in the nature of a tort," but rather one of "fiscal policy" and what branch of government properly sets such policy. Id. at 314.

²⁹See In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1310 (7th Cir. 1992) (admiralty law).

The Standard Oil court rejected the government’s “tort law analogy” as a basis for “establishing . . . fiscal and regulatory policies.” Id. The task of funding government services belongs to the legislature, not the courts:

[This] is a proper subject for Congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. . . . [and] the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

Id. at 314-15.

“[T]he government constantly sustains losses [from] tortious or even criminal conduct,” and a legislature can decide whether to authorize recovery. Id. at 315. The “exercise of judicial power to establish the new liability . . . would be intruding within a field properly within Congress’ control and as to a matter concerning which it has seen fit to take no action.” Id. at 316. Unless the legislature “acts to establish the liability, this Court and others should withhold creative touch.” Id. at 317.

These powerful words apply as fully to municipalities in Missouri as they do to the federal government. A century ago, this Court recognized the same rule in

Montgomery County v. Gupton, 39 S.W. 447 (Mo. 1897). A local government attempted to recover from the estate of a deceased insane asylum inmate the money it had expended for that person's care. The Court held that, since the county was legally obligated to care for insane indigents, id. at 448, it had no right – without a statute – to seek to recoup those expenses by lawsuit:

It is well settled at common law that the provision made by law for the support of the poor is a charitable provision, from which no implication of a promise to repay arises, and moneys so expended cannot be recovered of the pauper, in the absence of fraud, without a special contract for repayment.

Id. To allow the government to recover – without legislative authority – funds it was legally obligated to spend “is a palpable non sequitur, and to give it effect is simply judicial legislation.” Id. at 449. Governments cannot recover such expenses through litigation: “the proposition . . . should be addressed to the legislature, and not to the courts.” Id.

Most recently, the municipal cost recovery rule was reaffirmed by the Illinois Supreme Court in Chicago v. Beretta. The court held that the rule against governments funding their operations through litigation could not be circumvented by calling the proceedings “public nuisance.” The rule does “not turn on the underlying theory of tort liability, or on the question of proximate or legal cause of

the expenditures. Rather, the identity of the claimant and the nature of the cost combine[s] to deny recovery.” 821 N.E.2d at 1144.

We agree that where a system already exists for the rational allocation of costs, and where society as a whole relies upon that system, there is little reason for a court to impose an entirely new system of allocation. This is particularly true where, as here, allowing recovery of the costs of routine police and other emergency services could have significant unintended consequences.

Id. at 1145. It “defied common sense,” to allow a City to sue for recovery of “ongoing” expenses of services it was already obligated to perform. Given the “staggering” consequences of allowing municipal suits of this sort, the City’s remedy was to seek an exception from the legislature, not the courts:

It defies common sense to suggest that the more predictable the expense, the greater the ability of the city to recover its costs in tort. The potential unintended consequences of such a rule are staggering. We agree with defendants that when the need for emergency services in response to an alleged nuisance is ongoing, the municipal cost recovery rule is stronger, not weaker, because the legislature is better able to consider need for cost-recovery legislation than in cases of sudden disaster. If the legislature concludes that the costs of a certain

public service should be borne by the parties whose conduct necessitates that service, rather than by the taxpayers in general, it has the ability to enact a statute expressly authorizing recovery of such costs.

Id. at 1147. Whether or not municipal liability might provide “economic incentive” for more responsible product marketing was irrelevant – as “this is a question for the legislature.” Id.³⁰ The same is true here. The Legislature has conferred certain taxing and abatement powers upon the City, and not others. It is improper for the City to use litigation to obtain authority that the Legislature has not seen fit to provide.

Significantly, Chicago v. Beretta also addressed a Missouri decision, Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. Ct. App. W.D. 1984), in which the state was allowed to sue for recovery of extraordinary expenses caused by an illegal strike. Observing that Ashcroft “expressly disclaimed any liability for damages under the theory of public nuisance,” 821 N.E.2d at 1146 (citing Ashcroft, 672 S.W.2d at 114), the court found it entirely consistent with the municipal cost recovery rule. An award of damages [in

³⁰See also Champaign County v. Anthony, 337 N.E.2d 87, 88 (Ill. App. Ct. 1975) (a “state can never sue in tort in its political or governmental capacity”), aff’d, 356 N.E.2d 561 (Ill. 1976).

Ashcroft] was “implicitly consigned” to the courts by a Missouri statute criminalizing firefighters’ strikes – which both “recogni[zed] a cause of action” and “creat[ed] the proper remedy.” 821 N.E.2d at 1146 (quoting Ashcroft, 672 S.W.2d at 109).

Chicago v. Beretta is the latest in a long line of decisions recognizing the municipal cost recovery rule in one context or another. A municipality sought a similar tort-based tax in District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984), suing an airline for “the costs of emergency services and cleanup required in the aftermath” of an air crash. Id. at 1078. The court unanimously found the claim to be untenable:

The general common-law rule in force . . . provides that, absent authorizing legislation, the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. . . . Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement.

Id. at 1080 (footnote omitted).³¹

³¹Following City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983) (applying Arizona law).

The government's reliance upon "new tort doctrines" in Air Florida was unconvincing, because "a generally fair system for spreading the costs of accidents is already in effect . . . through assessing taxpayers the expense of emergency services." 750 F.2d at 1080. Rather, the municipality was attempting to foist a "legislative policy decision" onto the courts:

We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions. . . . [I]t is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties.

Id. "If the government has chosen to bear the cost . . . the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum" City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 324 (9th Cir. 1983) (applying Arizona law).

The municipal cost recovery rule is widely accepted. "The state can never sue in tort in its political or governmental capacity." William Prosser & W. Page Keeton, The Law of Torts § 2, at 7 (5th ed. 1984). The "general rule is that public expenditures made in the performance of governmental functions are not

recoverable.” Koch v. Consol. Edison Co., 468 N.E.2d 1, 7-8 (N.Y. 1984) (citations omitted), cert. denied, 469 U.S. 1210 (1985).³²

The municipal cost recovery rule is “grounded in considerations of public policy.” Id., 468 N.E.2d at 8. Governments cannot supplement taxing authority by suing for the cost of the very services they exist to provide. “[T]he public . . . should not have to pay twice, through taxation and through individual liability, for [government] service.” Calatayud v. State, 959 P.2d 360, 363 (Cal. 1998) (citation and quotation marks omitted).

We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government’s decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions. Furthermore, it is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent

³²Accord In re AA, 594 N.Y.S.2d 430, 432 (N.Y. App. Dist. 1993); Austin v. City of Buffalo, 586 N.Y.S.2d 841, 842 (N.Y. App. Dist.), app. denied, 594 N.E.2d 933 (N.Y. 1992); New York v. Long Island Lighting Co., 493 N.Y.S.2d 255, 257 (N. Y. Co. Ct. 1985) (all holding that expenses of performing governmental functions are “not recoverable” in tort litigation).

parties. In particular, a government entity may not, as the County seeks to do in this case, recover the costs of law enforcement absent authorizing legislation.

County of San Luis Obispo v. Abalone Alliance, 223 Cal. Rptr. 846, 851 (App. 1986) (citation, quotation marks, and footnote omitted), rev. denied, (Cal. June 24, 1986).³³

³³Other California cases enforce the municipal cost recovery rule: People v. Am. Art Enter., Inc., 656 P.2d 1170, 1173 & n.11 (Cal. 1983) (no recovery of nuisance abatement costs); Dep't of Mental Hygiene v. Hawley, 379 P.2d 22, 25 (Cal. 1963) (no recovery of law enforcement costs); People v. Minor, 116 Cal. Rptr. 2d 591, 594-97 (App. 2002) (same); County of Lassen v. California, 6 Cal. Rptr. 2d 359, 362 (Ct. App. 1992) (same); Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 603 (Ct. App. 1990) (no recovery of nuisance abatement costs), review denied (Cal. Sep. 25, 1990); City of Los Angeles v. Shpegel-Dimsey, Inc., 244 Cal. Rptr. 507, 510-11 (Ct. App. 1988) (no recovery of fire abatement costs); People v. Wilson, 49 Cal. Rptr. 792, 794 (App. 1966) (same). In Santa Clara v. Atlantic Richfield, unlike here, the plaintiff municipality was not seeking money, but rather demanding private abatement. 40 Cal. Rptr.3d at 329 (county could seek “an abatement order” but “may not recover damages or reimbursement”).

In addition to Illinois, New York and California, jurisdictions with similar rules are:

- **Alaska:** Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 760-61 (Alaska 1999) (“free public services doctrine” bars recovery of municipal response costs except by statute).
- **Arizona:** Flagstaff v. Atchison, Topeka, 719 F.2d at 323 (“[w]here [municipal] services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement”).
- **Arkansas:** Ouachita Wilderness Inst., Inc. v. Mergen, 947 S.W.2d 780, 784 (Ark. 1997) (“[p]ublic policy would be violated if a citizen was said to invite private liability merely because he happened to create a need for public services”).
- **Connecticut:** Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909, at *6 & n.7 (Conn. Super. Ct. Dec. 10, 1999) (city cannot sue for “recoupment” of municipal expenditures), aff’d on other grounds, 780 A.2d 98 (Conn. 2001).
- **Delaware:** Baker v. Smith & Wesson Corp., No. Civ.A. 99C-09-283-FS, 2002 WL 31741522, at *4-5 (Del. Super. Ct. Nov. 27, 2002) (“governmental entities themselves currently bear the cost in

question ; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns”).

- **District of Columbia:** Air Florida, 750 F.2d at 1080 (no recovery of government response costs to airplane crash).
- **Florida:** Penelas v. Arms Tech., No. 99-1941 CA-06, 1999 WL 1204353, at *2 (Fla. Cir. Ct. Dec. 13, 1999) (“costs to provide 911, police, fire and emergency services are not, without express legislative authorization, recoverable by governmental entities”), aff’d on other grounds, 778 So.2d 1042 (Fla. Dist. Ct. App. 2001), rev. denied, 799 So.2d 218 (Fla. 2001).
- **Georgia:** Kapherr v. MFG Chem., Inc., 625 S.E.2d 513, 515 (Ga. Ct. App. 2005) (“it offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services”); Torres v. Putnam County, 541 S.E.2d 133, 136 & n.4 (Ga. Ct. App. 2000) (allegation that defendant “caus[ed] the county to spend money enforcing its laws and protecting its citizens” failed to state a claim).
- **Hawaii:** Thomas v. Pang, 811 P.2d 821, 825 (Haw. 1991) (“it offends public policy to say that a citizen invites private liability merely

because he happens to create a need for those public services”) (citation and quotation marks omitted).

- **Idaho:** Canyon County v. Syngenta Seeds, Inc., No. CV05-306-S-EJL, 2005 WL 3440474, at *6 (D. Idaho Dec. 14, 2005) (“[a]t common law, a governmental entity generally [i]s not allowed to recover the cost of its services from a non-contracting party”) (citation and quotation marks omitted).
- **Louisiana:** Mayor & Council of City of Morgan City v. Jesse J. Fontenot, Inc., 460 So.2d 685, 688 (La. Ct. App. 1984) (the law “does not include within the ambit of its protection the risk that public property and funds will be expended”).
- **Maryland:** Crews v. Hollenbach, 751 A.2d 481, 489 (Md. 2000) (“taxpayers should not be subjected to . . . one charge in the form of state tax and the second in paying damages in [a government] civil suit”).
- **Massachusetts:** Town of Freetown v. New Bedford Wholesale Tire, Inc., 423 N.E.2d 997, 997-98 (Mass. 1981) (no recovery of governmental services “maintained for the benefit of the public and without pecuniary compensation or emolument”) (citation and quotation marks omitted).

- **Michigan:** Brandon Twp. v. Jerome Builders, Inc., 263 N.W.2d 326, 328 (Mich. Ct. App. 1977) (no recovery in nuisance for governmental expenses; “the appropriate remedy in such a situation is not a suit for damages”).
- **Nebraska:** Syracuse Rural Fire Dist. v. Pletan, 577 N.W.2d 527, 533 (Neb. 1998) (“citizen[s] should not be made to pay twice for the rendering of a public service, once through taxation and a second time through damages”).
- **New Hampshire:** Portsmouth v. Campanella & Cardi Constr. Co., 123 A.2d 827, 830-31 (N.H. 1956) (liability for municipal fire fighting expenses limited to statute).
- **New Jersey:** Cherry Hill Twp. v. Conti Constr. Co., 527 A.2d 921, 922 (N.J. Super. Ct. App. Div. 1987) (“recogniz[ing] the public policy of spreading the risk of certain losses by shifting from a negligent tortfeasor to the taxpayers), certif. denied, 532 A.2d 253 (N.J. 1987); City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49, 54-55 (N.J. Super. Ct. Law. Div. 1976) (“a municipal corporation may not recover as damages the costs of its governmental operations which it was created to perform”); but see James v. Arms Tech., Inc., 820 A.2d 27, 48-49

(N.J. Super. Ct. App. Div. 2003) (rejecting limitations upon municipal cost recovery).

- **North Carolina:** North Carolina Highway & Pub. Works Comm'n v. Cobb, 2 S.E.2d 565, 567 (N.C. 1939) (“no governmental expenditure paid out for apprehension of a criminal or the maintenance or recovery of his custody incident to the punishment or correction of such a crime can be construed into a tortious invasion of the property rights of the State”).
- **Pennsylvania:** City of Pittsburgh v. Equitable Gas Co., 512 A.2d 83, 84 (Pa. Cwlth. 1986) (“[t]he cost of public services for protection from a safety hazard is to be borne by the public as a whole, not assessed against a tortfeasor whose negligence creates the need for the service”), app. denied, 520 A.2d 1386 (Pa. 1987); City of Philadelphia v. Beretta U.S.A., Inc., 126 F. Supp.2d 882, 894-95 (E.D. Pa. 2000) (same), aff'd on other grounds, 277 F.3d 415 (3d Cir. 2002).
- **Utah:** Fordham v. Oldroyd, 131 P.3d 280, 284 (Utah Ct. App. 2006) (“it offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services”) (citation and quotation marks omitted), cert. granted, 138 P.3d 589 (Utah 2006).

- **Virginia:** Board of Supervisors of Fairfax County v. U.S. Home Corp., 85225, 1989 WL 646518, at *1 (Va. Cir. Ct. Aug. 14, 1989) (“cost of public services . . . is to be borne by the public as a whole, not assessed against a tortfeasor”) (citation omitted).
- **Wisconsin:** Dep’t of Natural Res. v. Wisconsin Power & Light Co., 321 N.W.2d 286, 288 (Wis. 1982) (“no common law liability permitting a governmental entity to charge [a defendant] for fire suppression expenses”); Town of Howard v. Soo Line R.R. Co., 217 N.W.2d 329, 330 (Wis. 1974) (same).

Opposed to the municipal cost recovery rule are City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1149-50 (Ohio 2002), and James, 820 A.2d at 48-49. The rationale in Cincinnati for departing from all prior appellate precedent is two sentences long. First, “continuing . . . misconduct may justify the recoupment of such governmental costs.” 768 N.E.2d at 1149. Second, *dictum* in Flagstaff that government cost recovery can be “allowed ‘where the acts of a private party create a nuisance.’” Id. at 1150 (quoting 719 F.2d at 324).

Neither reason is persuasive. Governmental recoupment of “continuing” expenditures even more closely resembles a judicially imposed tax than recovery for a discrete incident. Chicago v. Beretta, *supra*. Flagstaff was not a nuisance case, and the cases cited in its *dictum* did not hold that nuisance trumps the

municipal cost recovery rule.³⁴ Moreover, the “nuisance” reasoning in Cincinnati is a transparent bootstrap – dependent upon the simultaneous decision of the 4-3 majority to create an unprecedented “public nuisance” theory of liability.

James refused to follow the municipal cost recovery rule because New Jersey had abolished the professional rescuers doctrine. 820 A.2d at 48. The so-called “fireman’s rule” is, however, alive and well in Missouri.

Firemen and police officers generally cannot recover for injuries attributable to the negligence that required their assistance because the relation between those persons and the public specifically calls them to confront certain hazards on behalf of the public. . . . The party whose negligence created the hazard has no right or duty to control police or firemen in the exercise of their functions. Thus, it is unreasonable to burden landowners or others to require them to

³⁴Two of the three cases cited in Flagstaff involved statutorily-based nuisance claims. Town of East Troy v. Soo Line R.R. Co., 653 F.2d 1123, 1132-33 (7th Cir. 1980) (citing statutes), cert. denied, 450 U.S. 922 (1981); United States v. Illinois Terminal R.R. Co., 501 F. Supp. 18, 21 (E.D. Mo. 1980) (same). The remaining case held only that a federal common-law action for nuisance existed, without addressing remedies. City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1019 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980).

prepare themselves or their property for the arrival of police officers or firefighters. . . . The most persuasive and most nearly universal rationale for the fireman’s rule is public policy.

Krause v. U.S. Truck Co., 787 S.W.2d 708, 712 (Mo. banc 1990); accord, e.g., Gray v. Russell, 853 S.W.2d 928, 931 (Mo. banc 1993) (applying firefighters rule); Hallquist v. Midden, 196 S.W.3d 601, 605 (Mo. Ct. App. E.D. 2006) (same), transfer denied (Mo. Aug. 22, 2006).

The City is baldly seeking a court-ordered subsidy for its functions. Br. at 37 (“to help pay for the City’s costs of abating the lead paint”). This pursuit of a judicial tax to subsidize its municipal services, such as lead-based paint testing and removal, is as blatant as it is improper. These sorts of services are precisely why governments exist and why they collect taxes. The Legislature has provided the City power to collect taxes and abate nuisances locally, not nationally. Tort law does not allow the City to augment its statutory powers – especially against non-resident defendants who marketed legal, non-defective products decades ago.

VI. Whether Liability Might Be Socially Desirable Is A Fundamental Policy Decision Properly Made By The Missouri General Assembly.

This Court has repeatedly held that it is the General Assembly that determines public policy for the State of Missouri. Powell v. Am. Motors Corp., 834 S.W.2d 184, 191 (Mo. banc 1992) (citing State v. Dunbar, 230 S.W.2d 845,

849 (Mo. 1950) (“Questions of public policy are to be determined by the legislature.”); Sch. Dist. Of Kansas City v. Kansas City, 382 S.W.2d 688, 698 (Mo. banc 1964) (“[I]t is for the legislative body and not the judiciary to determine the policy of the law.”). This Court recognized the importance of leaving policy decisions with such far-reaching impact to the Legislature in Duisen v. State, 441 S.W.2d 688 (Mo. banc 1969):

If [] policy is to be changed . . . , that is the function of the legislature; not the court. The genius and constitution of such rules and standards as might be established and, more important, the determination of whether they are necessary, desirable and practical is a public policy question which should and will be left to the legislative branch whose members, directly responsible to the people, have an authority this court does not have.

Id. at 692-93.

For the same reasons, this Court should decline the City’s invitation to detour into the realm of legislation by fashioning a novel remedy (assuming, *arguendo*, it could even withstand constitutional scrutiny) that many legislative and administrative bodies have declined to authorize.

When faced with similar requests to alter long-standing tort principles, which, by their very nature implicate a multitude of public policy concerns,

constitutional issues, and social consequences, this Court has consistently affirmed the importance of leaving such decisions to the legislature. In Powell v. American Motors Corp., 834 S.W.2d 184, 185-86 (Mo. banc 1992), for example, plaintiffs requested the Court to expand tort liability to recognize a civil action for the loss of parental or filial consortium. This Court rejected plaintiff's request, finding "that if Missouri is to recognize a cause of action for loss of consortium by the children or the parents of an injured party, the decision to do so should be made by the legislature and not by this Court." Id. at 185. It further held that, as here, the parties had extensively briefed the differing views of jurisdictions across the nation, citing this as persuasive evidence that such a radical change should only be made by the Legislature. Id.

Powell also recognized that a court, dealing as it must with a discrete controversy and a limited record, is in a disadvantageous position to effect such significant legal change, concluding that "[e]mbarking into a new area of litigation such as this lends itself better to prospective legislative enactment than to the case-by-case, issue-by-issue approach that this Court would be required to undertake if these causes of action were to be recognized by common law decision." Id. at 190.

This Court likewise declined a plaintiff's invitation to alter Missouri tort jurisprudence by extending the charitable immunity doctrine in Blatt v. George H. Nettleton Home for Aged Women, 275 S.W.2d 344, 349 (Mo. banc 1955). The

Court recognized that altering tort liability would require it to declare public policy for the State of Missouri, a pronouncement it was ill-equipped to make:

Our conclusion is, therefore, that Missouri's charitable immunity doctrine has never been extended to protect funds derived by charitable organizations from commercial enterprises wholly unconnected with their charities. But, even so, should this court now, by present decision, extend the immunity doctrine as heretofore applied to relieve a charitable organization from liability under the present facts? . . . "[P]ublic policy" is a vague and uncertain thing, incapable of precise definition. It is unnecessary for us to attempt to define "public policy" or to attempt to state precisely the limits upon our judicial power to declare "public policy." Suffice for proper disposition of instant case to say that we are unwilling to declare that the "public policy" of this state requires the extension of our rule of charitable immunity to cover the factual situation in this case. . . . We deem it far safer and certainly wiser to apply in this case . . . the usual established rules of tort liability until such time as the legislature may determine that immunity should be granted in this type of case.

Id.

All of the reasons this Court has articulated for deferring to the legislature on questions of policy-making apply here. Lead-based paint does not cause injury if it is properly maintained. Issues of control, immediacy, and economy have caused legislative bodies to impose responsibility elsewhere. The proper response to the City's plea for more funding for its lead-based paint testing and abatement programs is traditional legislative action designed to increase its public expenditures for valid municipal needs, not judicial legislation.

The reasons for judicial deference to the Legislature are both prudential and deeply rooted in the judicial function. When radical legal change is made, such as the City seeks here, the consequences would be widespread, affecting individuals and activities far outside the courtroom. These are legislative issues. Powell, 834 S.W.2d at 185-86; Blatt, 275 S.W.2d at 349.

The question here is one of public policy. And the institution endowed with the right and responsibility of deciding policy questions is the Missouri General Assembly. The imposition of liability here would be a misguided judicial exercise of essentially legislative power. As Justice Cardozo observed,

A judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his

inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.

Benjamin N. Cardozo, Nature of the Judicial Process, at 141 (1921).

This Court should reaffirm traditional principles of separation of powers and refuse the City's invitation to make a radical departure from well settled principles underlying the rule of law in Missouri.

CONCLUSION

For these reasons, *Amicus Curiae* Product Liability Advisory Council, Inc. respectfully requests that the Court affirm the trial court's dismissal of the City's Fourth Amended Petition.

Date: March 7, 2007

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE
WITH MO. SUP. CT. R. 84.06**

The undersigned hereby certifies that on this 7th day of March, 2007, two true and correct copies of PLAC's Brief, and one disk containing PLAC's Brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the Brief, has been scanned for viruses and is virus-free.

APPENDIX

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PLAC Corporate Members List..... **A1**

Corporate Members of the Product Liability Advisory Council, Inc.

as of 2/23/2007

3M

A.O. Smith Corporation

Altec Industries

Altria Corporate Services, Inc.

American Suzuki Motor Corporation

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Purdue Pharma L.P.	The Heil Company
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Rheem Manufacturing	TK Holdings Inc.

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Watts Water Technologies, Inc.

TRW Automotive

Whirlpool Corporation

UST (U.S. Tobacco)

Wyeth

Vermeer Manufacturing Company

Yamaha Motor Corporation, U.S.A.

Volkswagen of America, Inc.

Yokohama Tire Corporation

Volvo Cars of North America, Inc.

Zimmer, Inc.

Vulcan Materials Company