

SC88230

IN THE MISSOURI SUPREME COURT

CITY OF ST. LOUIS,

Plaintiff-Appellant

v.

BENJAMIN MOORE & COMPANY, et al.

Defendants-Respondents

ON APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS

Honorable Steven R. Ohmer, Judge

BRIEF OF AMERICAN CHEMISTRY COUNCIL
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

AND SUMMARY OF ARGUMENT

Amicus Curiae American Chemistry Council (“ACC”) submits this brief in support of the trial court judgment because the relief sought by the City of St. Louis requires the adoption of the type of policy decision that should be made by the state legislature and not by courts of law. Although the City seeks preferential treatment in this action—as distinguished from private citizens—courts should treat everyone equally in the eyes of the law in the absence of an express legislative directive to the contrary.

The ACC represents the leading companies engaged in the business of chemistry, which is a \$558 billion enterprise and accounts for ten cents out of every dollar in U.S. exports.¹ The ACC is committed to improved environmental, health and safety performance through Responsible Care® (a global chemical industry performance initiative), common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. Further, the chemical industry is among the nation’s largest employers with nearly one million workers. ACC is very interested in the questions presented by this case because its members are periodically involved in litigation in Missouri and are likely to be affected by the precedents set in this case.

ACC’s interest in this case is in promoting judicial deference to the legislature—the branch of government best equipped to make public policy determinations. It is

¹ See American Chemistry Council’s website, www.americanchemistry.com.

important in this case, as well as in other cases, that courts defer to duly-elected legislators to resolve complex issues of public policy. This deference is particularly important when policy decisions involve granting particular rights and privileges to some groups that are denied to others. Courts should not sit as legislative bodies making factual findings and policy declarations. By design, and by an electoral process that reflects the will of the people, that responsibility belongs to the legislature. This is particularly true in litigation involving injuries or harm attributed to exposure to products that are pervasive in our society—where it is inappropriate to focus on solutions resulting from litigation’s narrower perspectives. The present controversy regarding lead-based paints remarkably illustrates this concern.

ARGUMENT

I. THE IDENTITY OF THE CLAIMANT SHOULD NOT BE THE BASIS FOR LOWERING THE CAUSATION STANDARD

This Court has already ruled that without product identification and causation, a claimant cannot recover damages. See Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. banc 1984). “Mere logic and common sense dictates that there be some causal relationship between the defendant’s conduct and the injury or event for which damages are sought.” Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. banc 1993). The fact that the claimant here is a city, as opposed to a private person, is a distinction without a difference. There is no rational justification for creating an arbitrary and opportunistic common law “short cut” for municipalities in this matter, especially

when the change fundamentally alters the landscape of tort law in Missouri. The type of remedy sought—recovery of past costs for abatement and remediation—does not alter the character of the tort upon which the claim is based, and it should not alter the burdens of proof historically required by the “logic and common sense” traditionally applied by this Court. Accordingly, the appellate court below properly refused to accept the City’s argument that “its status as a governmental entity or the public nature of the injury should set this apart from the other public nuisance or subject it to lesser causation standards.” City of St. Louis v. Benjamin Moore & Co., ___ S.W.3d ___, 2006 WL 3780785, *5 (Mo. App. E.D. 2006).

II. IT IS THE LEGISLATURE’S ROLE TO SET THE PUBLIC POLICY OF THE STATE

The City of St. Louis is asking the Court to make a special exception in the law for it because the City is a governmental entity. Traditionally, it is the legislature, not the courts, that makes public policy decisions such as that requested by the City—granting rights and privileges to some entities and excluding others. It has long been recognized that “a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.” Lawton v. Steele, 152 U.S. 133, 136 (1894). As this Court has already stated:

[I]f [] changes [in the law] are to be effected [,] such changes should be made by the legislature, the law-enacting branch of government, rather than by the judiciary, the law-interpreting branch. (internal citation omitted)

* * *

Obviously, the general assembly is not only better equipped than this court to investigate and develop the facts pertinent to a determination of this phase of public policy but also has greater authority to deal with the particular problem and at the same time the related ones.

Brawner v. Brawner, 327 S.W.2d 808, 812-13 (Mo. banc 1959). This Court has acknowledged that the legislature, rather than the judiciary, determines public policy, due in large part to the fact that legislators are elected by, and directly responsible to, the citizens of the State. See Menorah Medical Center v. Health & Educational Facilities Authority, 584 S.W.2d 73, 89 (Mo. banc 1979) (“Formulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate . . .”). If citizens feel that legislators’ decisions are not in accordance with their interests, citizens are armed with the power to vote those officials out of office.

Among the three branches of government, the legislative branch is uniquely equipped to address issues like the relief requested by the City of St. Louis—a special exception for governmental entities to the causation requirements of product liability cases in which factual, scientific, legal, economic and political issues will collide. Courts generally recognize the primacy of the legislature’s investigative abilities, because representative assemblies have vast fact and opinion gathering and synthesizing powers unavailable to courts. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide.

In the past the legislature has chose to give some rights to governmental entities that are not available to private citizens, but that task of line-drawing belongs to the legislature rather than the judiciary. For instance, private citizens can bring civil suits under the Missouri Merchandising Practices [consumer fraud] Act. But those claims are limited to situations where there is a purchases or lease of merchandise primarily for personal, family or household purposes and the purchaser suffers an ascertainable loss of money or property. Mo. Rev. Stat. § 407.025. In contrast, the Missouri Attorney General can bring civil suits whether or not a purchase or lease has occurred, whether or not the merchandise is primarily for personal, family or household purposes, and whether or not an “ascertainable loss” can be determined. Mo. Rev. Stat. § 407.100. While the legislature concluded that the Attorney General should have powers beyond that of the citizenry, the legislature did not give any special rights to cities or other political subdivisions.

The legislature determined that cities should receive some special treatment under the state antitrust laws. A civil suit can be brought on behalf of the political subdivisions for violations of the antitrust laws, but the power to bring such suits belongs to the state attorney general. Mo. Rev. Stat. § 416.061.

The legislature has the benefit of considering all pertinent issues in their entirety, rather than being limited to the record generated by parties involved in litigation. As a result, legislative policy choices are likely to strike a fairer and more effective balance between competing interests because they are based on broad perspectives and ample information. See Timothy D. Lytton, [Lawsuit Against the Gun Industry: A Comparative](#)

Institutional Analysis, 12 Conn. L. Rev 1247, 1271 (2000). The Missouri legislature has made the decision on when state government or political subdivisions should have special rights. The legislature has not concluded that the state or its political subdivisions should be granted special litigation rights of the type sought by the City here. This Court should not usurp the legislative function to make that call.

III. LEAD PAINT LITIGATION, LIKE ALL LITIGATION INVOLVING PERVASIVELY USED PRODUCTS, RAISES COMPLEX ISSUES NOT SUITABLE TO THE APPLICATION OF MARKET SHARE LIABILITY

1. LEAD PAINT IS NOT A FUNGIBLE PRODUCT

The City makes analogies to rulings that approved the use of “market share” principles in pharmaceutical litigation. Lead-based paint, however, unlike the drug DES,² is not a fungible, generic, or uniform product.³ All DES used for the treatment of pregnant women was manufactured according to an identical formula and presented an

² Diethylstilbestrol (a/k/a DES), was a synthetic estrogen hormone that was marketed to women as a miscarriage preventative from 1947 to 1971. In 1971, a link was discovered between fetal exposure to DES and the development many years later of certain rare forms of cervical and vaginal cancer. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, 925 & 927 (Cal. 1980).

³ Black’s Law Dictionary 465 (6th ed. 1991) defines fungibles as “[g]oods which are identical with others of the same nature, such as grain and oil.”

identical risk of harm. Sindell, 607 P.2d at 936. In contrast, lead paint had different chemical formulations, contained different amounts of lead, and differed in potential toxicity. Skipworth v. Lead Industries Ass'n, Inc., 690 A.2d 169, 173, (Pa. 1997).

Lack of fungibility is one of the reasons New York courts, which use market-share liability in DES cases, rejected its use in lead paint cases. Brenner v. American Cyanamid Co., 699 N.Y.S.2d 848, 854 (App. Div. 4th Dep't 1999) (noting that lead pigments other than white lead carbonate were used in lead-based paint; white lead carbonate is used for products other than interior residential paint; lead pigments are found in products other than lead-based paint; and lead-based paint is not fungible.). On the issue of fungibility, the New York court noted the following:

Arguably, the white lead carbonate used as a raw material in some lead-based paint did not differ between manufacturers. However, paint manufacturers used differing amounts of white lead carbonate, or some other lead pigment, in their paints. Some lead-based paint contained 10% lead pigment, while other paint was more toxic, containing as much as 50% lead pigment. Not only did the amount of lead pigment vary, but so did the type of lead pigment used. Thus, unlike DES, the finished product that was used by consumers here, *i.e.*, lead-based paint, was not fungible.

Brenner, 699 N.Y.S.2d at 853.

2. LEAD-BASED PAINTS HAD DIFFERING LEVELS OF BIOAVAILABILITY

The term “bioavailability” refers to “the extent to which the lead is in a form which is easily internalized by the body, *i.e.*, the extent to which it is in a form which can be physiologically transported through the lungs, gastrointestinal tract, skin, etc. and absorbed into the bloodstream. . . .” Skipworth, 690 A.2d at 173 n.5. Differing formulas of lead paint result in differing levels of bioavailability of the lead. Putting this concept into the context of lead paint litigation the Pennsylvania Supreme Court stated:

Because of differences in bioavailability, a child who ingests dust or chips of lead paint containing equal amounts of lead “derived from two lead paints will *not* generally develop equal elevation in internal lead level from the two paints. Rather, more highly bioavailable lead has a greater impact than lead in less bioavailable form.” . . . Thus, differing formulae of lead paint has a direct bearing on how much damage a lead paint manufacturer’s product would cause.

Id. at 173. The fact that differing paint formulas create different degrees of risk of harm was found to be “fatal” to plaintiffs claim that “market share” liability should be applied to their lead paint case because the court could not ensure that “each manufacturer’s liability would approximate its responsibility for the injuries caused by its own products.” Id. (citing Sindell, 607 P.2d at 937). The Skipworth court reasoned that in lead paint cases, apportioning liability on a manufacturer’s market share would not approximate that manufacturer’s responsibility for injuries caused by its lead paint. Id.

3. CHILDHOOD LEAD POISONING IS NOT CAUSED BY A SIGNATURE INJURY

In the DES cases, the plaintiffs' injuries (i.e., certain rare forms of cervical and vaginal cancer) were directly linked to fetal exposure to DES. Sindell, 607 P.2d at 925 and 927. Conversely, the harm or injury complained about in lead paint litigation (i.e., childhood lead poisoning as shown by elevated blood lead levels) is not solely linked to exposure to lead-based paint. Instead, childhood lead poisoning can be caused by any exposure to lead. Thus, courts considering this issue have found that a child's elevated blood lead levels may be caused by some source of lead other than lead-based paint. Brenner, 699 N.Y.S.2d at 853; Santiago v. Sherwin-Williams Company, 782 F. Supp. 186, 192 (D. Mass. 1992), aff'd, 3 F.3d 546 (1st Cir. 1993) (noting that "[h]eredity, social and environmental factors, or lead in other products, could have caused, or could have contributed to, Santiago's injuries").

4. LEAD HAZARDS ARE PERVASIVE IN SOCIETY

Exposure to lead occurs through every conceivable pathway. It is impossible to ascribe all instances of "childhood lead poisoning" to lead paint, as opposed to some other source of lead.⁴ Children may be exposed to lead when they eat food⁵ or candy⁶

⁴ See Richard Faulk and John Gray, Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel, 21 *Toxics L. Rptr.* (BNA) 1,071-98, 1,124-52, 1,172-96, at 1,080-84 & 1,142-50 (2006) (three-part series) (discussing alternative source of lead exposure).

⁵ Smog and haze accounts for an estimated 40% of lead in food, while the bulk of the remainder comes from contaminations during harvesting, transporting, processing,

contaminated with lead. Many children are exposed to lead when they drink the water in their homes⁷ or at their schools.⁸ Exposure to lead may occur from ingesting soils

packaging or preparing the food. Lead in meat and poultry is a result of lead emissions that settle onto forage, feed or onto soil that is directly ingested by animals. Air Quality Criteria for Lead, Nat'l Ctr. for Env'tl. Assessment-RTP Office, Office of Research and Dev., U.S. Env'tl. Prot. Agency, EPA/600/R-5/144aF (Oct. 2006) at 3-48 (EPA Lead Criteria) [hereinafter "Criteria Document"].

⁶ Several brands of candy manufactured in Mexico have been found to be wrapped in wrappers containing lead or bearing lead-containing ink. Letters from Alan H. Schoem, Director, Office of Compliance, Consumer Prod. Safety Comm'n, to U.S. Candy Importers (July 9, 2004) The FDA has also determined that some ingredients (chili powder and tamarind) used in candy products imported into the U.S. and marketed to the U.S. Hispanic population contain high levels of lead. FDA, Letter to Manufacturers, Importers, and Distributors of Imported Candy (Mar. 25, 2004).

⁷ Lead in drinking water contributes between 10 and 20% of the total lead exposure in young children. Fact Sheet: Lead and Drinking Water from Private Wells, Ctr. for Disease Control and Preventions, U.S. Dept. of Health & Human Serv. (2003); see also, Criteria Document, supra note 5, at 3-33; Richard P. Maas, *et al.*, Reducing Lead Exposure from Drinking Water: Recent History and Current Status, 120 PUB. HEALTH REP. 316-21, 318 (2005) (citation omitted).

containing lead from lead-based pesticides, leaded gasoline, and even lead weights used to balance tires.⁹ Young children are exposed to lead on baby cribs and their accessories,¹⁰ or toys,¹¹ costume jewelry,¹² and even through sidewalk chalk or crayons.¹³

⁸ The holding tanks on many older water fountains are made of lead. Lead tests in some public schools show that more than 80% of its schools have serious lead contamination in one or more drinking fountains. In some schools, virtually every drinking fountain in the school was above the EPA limit of 20 ppb. For example, one Seattle school had a drinking fountain with a lead level of 1,600 ppb. Mark S. Cooper, Get The Lead Out Of Schools' Water, Seattle Post-Intelligencer (July 2, 2004).

⁹ Jack Caravanos, *et al.*, An Exterior and Interior Leaded Dust Deposition Survey in New York City: Results of a 2-Year Study, 100 ENVTL. RES. 159-64 (2006). Criteria Document, supra note 5, at 3-16-17. Lead concentrations decrease both with depth and distance from roadways. Id. In many studies the age of housing was not a major factor, suggesting that the impacts of lead-based paint may be dominated by historic emissions of leaded gasoline additives. Id.

¹⁰ Children's jewelry is not the only product being sold for use by children that contain lead-based paint. As a result of testing, the Consumer Product Safety Commission ("CPSC") has found that some baby cribs and accessories being sold in the U.S. contain hazardous levels of lead paint. See CPSC, Danara Baby Crib Exercisers Recalled Because of Lead Hazard, Release No. 85-063 (Dec. 5, 1985); see also, CPSC, Musical Crib Mobile Recalled, Release No. 87-033 (June. 4, 1987); CPSC, The Little

Tikes Company Recalls Little Tikes Crib Center Due To Lead Paint Hazard, Release No. 92-094 (June 16, 1992); CPSC, Delta Enterprise Corp. Announce Recall of Certain Cribs Sold at Toys R Us Stores, New Release No. 06-036 (Nov. 22, 2005).

¹¹ Children are continually being given toys that are considered lead hazards. For example, it has been discovered that toys given just last year to children by at least 23 libraries across Missouri as reading prizes had unacceptable levels of lead. Robin Carnahan, Children's Bendable Dog and Cat Toys Recalled by Vendor, Missouri Secretary of State, New Release (Aug. 11, 2006).

¹² Recalls of children's jewelry that contain high concentrations of lead are seemingly becoming a common occurrence these days. In the last couple of years over a hundred million pieces of cheap and free children's jewelry have been recalled because of high lead concentrations. CPSC U.S. Toy Co. Recalls More Children's Butterfly Necklaces Due to Lead Poisoning, News Release No. 07-082 (Jan. 18, 2007); See also, CPSC, Metal Charms Sold with Twentieth Century Fox DVDs Recalled for Toxic Lead Hazard, New Release No. 06-156 (May 5, 2006). CPSC, Dollar Tree Stores Inc. Toy Jewelry Recalled for Lead Poisoning Hazard to Children, News Release No. 06-118 (Mar. 23, 2006); Oregon, Lead Poisoning Prevention, Juicy Couture Children's Jewelry Recalled for Lead Poisoning Hazard (May, 10, 2006); CPSC, CPSC Recall of American Girl Children's Jewelry, New Release No. 06-123 (Mar. 30, 2006); CPSC, CPSC Announces Recall of Metal Toy Jewelry Sold in Vending Machines; Firms Agree to Stop

A child may be exposed to lead through the tableware¹⁴ holding their food or the lunch boxes¹⁵ they take to school. They can be exposed by an older sibling's or parent's

Importation Until Hazard is Eliminated, News Release No. 04-174 (July 8, 2004); Assoc. Press, Lead Poisoning Threat Forces Kids Jewelry Recall, (Mar. 23, 2006).

¹³ See CPSC, CPSC And Concord Enterprises Announce Recall of Certain Crayons Because of Lead Poisoning Hazard, News Release No. 94-049 (Mar. 22, 1994) (recalling crayons made in China). Some of these crayons contained enough lead to present a lead poisoning hazard to young children who ate or chewed on the crayons. Id. In 2004, Target and Toys “R” Us had to recall sidewalk chalk they sold because it contained high levels of lead. CPSC, CPSC, Target Corporation Announce Recall of Multicolored Sidewalk Chalk, News Release No. 04-032 (Nov. 13, 2003); CPSC, CPSC, Toys “R” Us, Inc. Announce Recall of Solid-colored and Multi-colored Sidewalk Chalk, News Release No. 04-038 (Nov. 24, 2003).

¹⁴ Lead is used as a coloring element in ceramic glazes used in common tableware, notably in the colors red and yellow. Michael McCann, Lead Glazes in the Americas, 18 ART HAZARD NEWS 2 (1995). Cases of severe lead poisoning are due to very high levels of lead in the glazes (as much as 75-85%) and poor firing conditions that result in glazes that leach a great deal of lead. Id.

¹⁵ “In 2005, when government scientists tested 60 soft, vinyl lunchboxes, they found that one in five contained amounts of lead that medical experts consider unsafe—and several had more than 10 times hazardous levels.” Martha Mendoza, CPSC Didn't Fully

cosmetics,¹⁶ hobby materials, folk remedies,¹⁷ or candles.¹⁸ There are countless sources of lead to which a young child may be exposed.

5. DEFINING THE APPROPRIATE MARKET IS PROBLEMATIC

It is one thing to determine a reasonable market share during a nine-month period when a woman is pregnant, but it is a far different and more complex problem to determine the market share during a period in excess of a century where multiple manufacturers have entered and exited the market. It is highly unlikely that either the plaintiffs or defendants possess the necessary records to determine the market shares of lead paint or lead pigment in 1880, 1900, or 1920. Courts considering this issue have

Tell Public About Lead In Lunch Boxes, Report Says, KSDK NewsChannel 5, St. Louis, Missouri (Feb. 19, 2007).

¹⁶ Lead is used in some non-Western cosmetics, such as surma and kohl and some types of hair colorants, cosmetics and dyes contain lead acetate. Draft Toxicological Profile for Lead, Agency for Toxic Substances and Disease Registry (ATSDR), Public Health Service, U.S. Department Of Health And Human Services (Sept. 2005) (Public Health Statement for Lead).

¹⁷ Id. at 315 (discussing non-Western folk remedies such as Alarcon, Ghasard, Alkohl, Greta, Azarcon, Liga, Bali Goli, Pay-loo-ah, Coral and Rueda).

¹⁸ CPSC, CPSC Bans Candles With Lead-Cored Wicks, News Release No. 03-105 (Apr. 7, 2003); see also CPSC, Metal-Cored Candle Wicks Containing Lead and Candles With Such Wicks; Final Rule, 68 FED. REG. 19142-48 (Apr. 18, 2003).

reasoned that even if plaintiffs could determine each defendant's average market share during the relevant market period, the application of such percentages would result in the possibility of assessing liability against a manufacturer that was not in the market at the time the lead-based paint was used in plaintiffs' residence. Brenner, 699 N.Y.S.2d at 853.

Without narrowly tailored, accurate and adequate evidence, apportioning damages will be inherently unfair. See Conley v. Boyle Drug Co., 570 So. 2d 275, 284 (Fla. 1990) (market should be as narrow as possible to impose liability on only those companies most likely to have produced drug that caused plaintiff's harm). Under these circumstances, it is possible—even likely—that the manufacturer that actually sold the product will not be before the court. Some manufacturers may not be served, have gone out of business, have merged with other companies and due to successor liability laws cannot be held liable for sales of lead paint, or are not amenable to suit in the forum state. To impose liability when it is quite possible (or probable) that defendants are not before the court is an unacceptably speculative exercise for the courts—and if such a radical approach is to be entertained, the legislature is the best forum to resolve such controversial and competing concerns.

CONCLUSION

Traditionally, it is the legislature, not the courts, that makes public policy decisions which grant rights and privileges to some entities and exclude others. Given the narrow scope and limited records of individual judicial proceedings, courts should not sit as legislative bodies making broad policy decisions. By constitutional design, and by an electoral process that reflects the will of the people, that responsibility belongs to the legislature.

The courts' deference to the legislature is particularly important in cases such as lead-based paint litigation because the legislature is uniquely suited to sort through and weigh the myriad of complex scientific, medical, and other issues raised by theories such as "market share" liability. Issues such as (i) the absence of fungibility, (ii) bioavailability, (iii) lack of signature injury, (iv) the undeniable existence of a plethora of alternative sources of lead exposure, and (v) an extraordinarily length market share time period are critical considerations that demonstrate that "market share" ideas cannot be justly applied in lead paint cases—irrespective of the public or private character of the party making the claim. Any initiative that attempts to reconcile these issues requires broad public policy perspectives that are best applied and debated in legislative chambers, rather than those of the judiciary.

For these reasons, the Court should affirm the judgment below and uphold summary judgment granted by the trial court.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains no more than 4,900 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 27,900 limit in the Rule). The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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