IN THE SUPREME COURT OF MISSOURI
No. SC 88230

CITY OF ST. LOUIS,
Appellant,

v.

BENJAMIN MOORE & COMPANY, et al.,
Respondents.

Appeal from the Circuit Court of St. Louis City
Honorable Steven R. Ohmer, Judge

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TORT REFORM ASSOCIATION

NATIONAL CHAMBER LITIGATION CENTER, INC.
Robin S. Conrad
Amar D. Sarwal
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337 (Phone)

AMERICAN TORT REFORM ASSOCIATION
Sherman Joyce
101 Connecticut, Ave., N.W.
Suite 400
Washington, DC 20036
(202) 682-1163 (Phone)

SHOOK HARDY & BACON, L.L.P.
Robert T. Adams #34612
Victor E. Schwartz
Philip S. Goldberg
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004
(202) 783-8400 (Phone)
(202) 783-4211 (Fax)

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America and
American Tort Reform Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF FACTS 3

POINTS RELIED ON 4

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. This Lawsuit Pursues a New and Unsound Path in the Decades-Long Pursuit of Former Manufacturers of Lead Pigments and Paints 8

A. Products Liability Claims 10

B. The Birth of Industry-Wide Theories 11

C. The Public Nuisance Strategy 11

II. Allowing This Case To Proceed Would Irreparably Distort Public Nuisance Law 13

A. The Purpose and Elements of Government Public Nuisance Actions 13

B. Appellant's Claim Requires Fundamental Changes to Traditional Public Nuisance Law in Missouri 17

1. The Government Does Not Have a Lesser Standard of Proof for Causation in Public Nuisance Cases 18

2. There Is No Injury Giving Rise to a Public Nuisance Claim 22

3. Manufacturing a Lawful Product Is Not "Unreasonable Conduct" 25
III. Appellant's Public Nuisance Theory Would Have Adverse Public Policy Consequences 28
A. Liability Would Be Unpredictable 29
B. Government Spending Decisions Would Become Liability Causing Events 30
C. Undermining Public Nuisance Law Could Lead to Unsound Regulation Through Litigation 31
CONCLUSION 33
RULES 84.05(c) CERTIFICATION 34
CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Page

Cases

44 Plaza, Inc. v. Gray-Pac Land Co.,
845 S.W.2d 576 (Mo. App. 1992) 14, 16

Bellflower v. Pennise,
548 F.2d 776 (8th Cir. 1977) 18, 26

Billings v. North Kansas City Bridge & R.R. Co.,
338 Mo. 1122, 93 S.W.2d 944 (Mo. 1936) 16, 26

Brenner v. Am. Cyanamid Co.,
699 N.Y.S.2d 848 (App. Div. 1999) 11

Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.,
273 F.3d 536 (3d Cir. 2001) 6-7

City of Bloomington v. Westinghouse Elec. Corp.,
891 F.2d 611 (7th Cir. 1990) 17, 26

City of Chicago v. Am. Cyanimid Co.,
No. 02 CH 16212, 2003 WL 23315567 (Ill. Cir. Ct. Oct. 7, 2003)
aff'd 823 N.E.2d 126 (Ill. App. Ct. 2005) 13

City of Chicago v. Beretta U.S.A. Corp.,
821 N.E.2d 1099 (Ill. 2004) ..... passim

City of Kansas City v. New York-Kansas Building Associates,
96 S.W.3d 846 (Mo. Ct. App. 2003) 22

City of Lee's Summit v. Browning,
722 S.W.2d 114 (Mo. Ct. App. 1986) 14

City of Manchester v. Nat'l Gypsum Co.,
637 F. Supp. 646 (D. R.I. 1990) 16, 26
City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888
(Wis. Ct. App. 2004), cert. dismissed 703 N.W.2d 380 (Wis. 2005) 17
City of Philadelphia v. Lead Indus. Ass'n,
No. 90-7064, 1992 U.S. Dist. LEXIS 5849 (E.D. Pa. Apr. 23, 1992) 10
City of Philadelphia v. Lead Indus. Ass'n,
994 F.2d 112 (3rd Cir. 1993) 11
City of St. Louis v. Benjamin Moore & Co.,
No. ED-87702, 2006 WL 3780785 (Mo. Ct. App. Dec. 26, 2006) ..... passim
City of St. Louis v. Cernicek,
145 S.W.3d 37 (Mo. Ct. App. 2004) 12-13
City of St. Louis v. Varahi, Inc.,
39 S.W.3d 531 (Mo. App. E.D. 2001) 18
City of Sturgeon v. Wabash Ry. Co.,
17 S.W.2d 616 (Mo. Ct. App. 1929) 14
Clancy v. Sup. Ct. of Riverside County,
705 P.2d 347, 353 (Cal. 1985) 28
County of Johnson v. U.S. Gypsum Co.,
580 F. Supp. 284 (E.D. Tenn. 1984) 12
County of Santa Clara v. Atlantic Richfield Co.,
40 Cal. Rptr. 3d 313 (2006), cert. denied (June 21, 2006) 17
Detroit Bd. of Educ. v. Celotex Corp.,
493 N.W.2d 513 (Mich. Ct. App. 1992) 17, 25

Diamond v. General Motors Corp.,
97 Cal. Rptr. 639 (Ct. App. 1971) 17
Hagen v. Celotex Corp.,
816 S.W.2d 667 (Mo. 1991) 19
Higgins v. Conn. Light & Power Co.,
30 A.2d 388 (Conn. 1943) 23
In re Lead Paint Litigation, No. A-1946-02T3, 2005 WL 1994172
(N.J. Super. Ct. App. Div. Aug. 17, 2005) (unpublished),
cert. granted 886 A.2d 662 (N.J. 2005) 17-18
Jackson v. City of Blue Springs,
904 S.W.2d 322 (Mo. Ct. App. 1995) 15
Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.,
580 F. Supp. 284 (E.D. Tenn. 1984), set aside on other grounds
664 F. Supp. 1127 (E.D. Tenn. 1985) 29
Kelly v. Boys' Club of St. Louis,
588 S.W.2d 254 (Mo. Ct. App. 1979) 15
Lee v. Rolla Speedway, Inc.,
668 S.W.2d 200 (Mo. Ct. App. 1984) 14
Lippard v. Houdaille Industries, Inc.,
715 S.W.2d 491 (Mo. 1986) 27
Mispagel v. Missouri Highway & Transp. Comm'n,
785 S.W.2d 279 (Mo. 1990) 26
Nesselrode v. Executive Beechcraft, Inc.,
707 S.W.2d 371 (Mo. banc 1986) 27

Norwood v. Lazarus,

634 S.W.2d 584 (Mo. App. 1982) 9

Pacific Mut. Life Ins. Co. v. Haslip,

499 U.S. 1 (1991) 28

Penelas v. Arms Tech., Inc.,

778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) 31, 32

Sabater v. Lead Indus. Ass'n,

704 N.Y.S.2d 800 (Sup. Ct. 2000) 10, 13

Santiago v. Sherwin Williams Co.,

3 F.3d 546 (1st Cir. 1993) 10

Skipworth v. Lead Indus. Ass'n,

665 A.2d 1288 (Pa. Super. Ct. 1995) 11

Spitzer v. Sturm, Ruger & Co.,

309 A.D. 91 (N.Y. App. Div. 2003) 29

Spring Branch Indep. Sch. Dist. v. NL Indus., Inc.,

No. 01-02-01006-CV, 2004 WL 1404036 (Tex. App. June 24, 2004) 11

State v. Errington,

317 S.W.2d 326 (Mo. 1958) 15, 23

State v. Irving,

700 S.W.2d 529 (Mo. Ct. App. 1985) 14

State v. Kansas City Firefighters Local No. 42,

672 S.W.2d 99 (Mo. Ct. App. 1984) 21

State v. Schenectady Chems., Inc.,

459 N.Y.S.2d 971 (Sup. Ct. 1983) 12

State ex rel. Attorney General v. Canty,
105 S.W. 1078 (Mo. 1907) 15, 22
State ex rel. Chicago, B. & Q.R. Co. v. Woolfolk,
190 S.W. 877 (Mo. 1916) 6, 16
State ex rel. Miller v. Philip Morris, Inc.,
577 N.W.2d 401 (Iowa 1998) 21
State ex rel. Wallach v. Oehler,
159 S.W.2d 313 (Mo. App. 1942) 18, 25
State ex rel. Weatherby, Pros. Atty. v. Dick & Bros. Quincy Brewing Co.,
192 S.W. 1022 (Mo. 1917) 25
State of Rhode Island v. Lead Indus. Ass'n,
No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007) 17, 23
Stevens v. Durbin-Durco, Inc.,
377 S.W.2d 343 (Mo. 1964) 29
Texas v. Am. Tobacco Co.,
14 F. Supp. 2d 956 (E.D. Tex. 1997) 12
Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.,
984 F.2d 915 (8th Cir. 1993) 6
Zafft v. Eli Lilly & Co.,
676 S.W.2d 241 (Mo. 1984) ..... passim

Statutes

42 U.S.C. § 4801 8
42 U.S.C. § 4851(5) 8
R.S. Mo. § 701.300 8

St. Louis City Rev. Code § 11.22.030 8

St. Louis City Rev. Code § 11.22.120 10

Other Authorities

63A Am. Jur. 2d Products § 927 25

1 Am. Law of Prods. Liab. § 1:18 (Timothy E. Travers et al., eds., 3d ed. 1987) 25

American Standards Ass'n, American Standards Specifications to Minimize Hazards to Children from Residual Surface Coating Materials, (Z66.1-1955) (approved Feb. 16, 1955) 9

Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755 (2001) 10

App. Pet. in Benjamin Moore, 2006 WL 3780785 (Mo. Ct. App. filed June 9, 2006) 24

Assoc. Press, Michigan AG Urges Judge to Throw Out Calif. , Global Warming Suit, Jan. 20, 2007 32

City of St. Louis FY 2007 Annual Operating Plan, Adopted June 16, 2006 available at http://stlouis.missouri.org/government/budget07/ (last visited Mar. 2, 2007) 30

Complaint, State ex. rel. Lockyer v. General Motors Corp., No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006) 32

Dan B. Dobbs, The Law of Torts § 180 (2001) 19

Geri L. Dreiling, Lead Counsel, Riverfront Times, July 3, 2002 12

Fast Food on Trial, Nat'l Pub. Radio broadcast, Aug. 8, 2002,
available at http://banzhaf.net/docs/npr.html (last visited Mar. 2, 2007)..... 32

Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort,
71 U. Cin. L. Rev. 741 (2003)..... 24

Fowler V. Harper et al., The Law of Torts § 20.2 (1986)..... 20

James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products
Liability Frontier: The Rejection of Liability Without Defect,
66 N.Y.U. L. Rev. 1266 (1991)..... 27

W. Page Keeton et. al., Prosser & Keeton on Torts 616 (5th ed. 1984)..... 14

Lead Paint Poisoning: Legal Remedies and Preventive Actions,
6 Colum. L.J. & Soc. Probs. 325 (1970)..... 10

Martha Mahoney, Four Million Children at Risk: Lead Paint Poisoning and the Law,
5 Stan. Envtl. L. J. 46, 58 (1990)..... 9

Paint Maker Seeks Ruling on Judge in Lead Case,
Providence J., Aug. 19, 2005, at B1..... 12

William L. Prosser, Private Action for Public Nuisance,
52 Va. L. Rev. 997 (1966)..... 5, 14

Robert B. Reich, Don't Democrats Believe in Democracy?,
Wall St. J., Jan. 12, 2000, at A22..... 32

Requirements for Notification, Evaluation and Reduction of
Lead-Based Paint Hazards in Federally Owned Residential
Property and Housing Receiving Federal Assistance
64 Fed. Reg. 50,139 (Sept. 15, 1999) 9

Restatement (Second) of Torts § 821B cmt. a. (1979) 13

Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts ,
Cases and Materials 718 (11th ed. 2005) 26-27

Victor E. Schwartz & Phil S. Goldberg, Closing the Food Court:
Why Legislative Action Is Needed to Curb Obesity Lawsuits,
Briefly Nat'l Legal Center for the Pub. Int., Wash. D.C., Aug. 2004 31

Victor E. Schwartz & Phil Goldberg, The Law of Public Nuisance:
Maintaining Rational Boundaries on a Rational Tort,
45 Washburn L.J. 541 (2006) 5

Victor E. Schwartz, Cary Silverman & Phil Goldberg, Neutral Principles of
Stare Decisis in Tort Law, 58 S.C. L. Rev. 317 (2006) 16

Scott A. Smith, Turning Lead into Asbestos and Tobacco:
Litigation Alchemy Gone Wrong,
71 Def. Couns. J. 119 (2004) 9

John W. Wade, On the Nature of Strict Tort Liability for Products,
44 Miss. L.J. 825 (1973) 6, 26

INTEREST OF AMICI CURIAE

Amici Curiae, Chamber of Commerce of the United States of America ("U.S. Chamber") and American Tort Reform Association ("ATRA"), submit this brief in support of Respondents' request that the Court affirm the Court of Appeals ruling to dismiss Appellant's public nuisance claim.

The U.S. Chamber is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 amicus curiae briefs in state and federal courts.

Founded in 1986, ATRA is a broad-based business coalition of more than 300 businesses, corporations, municipalities, associations and professional organizations that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation. For more than a decade, ATRA has filed amicus curiae briefs in cases before state and federal courts.

This case is of interest to Amici. The City of St. Louis ("Appellant") alleges that the presence of lead paint in buildings, regardless of its condition or location, is a public nuisance. It has sued some of the hundreds of former manufacturers of lead pigments and lead paints, along with one former local distributor, asserting that they created the public nuisance by manufacturing, promoting and selling lead paints and lead

pigments in the Appellant's jurisdiction sometime in the past. Appellant is not able to identify any of the defendants' product as being present in any building in its jurisdiction today. It is relying on historical business directories and advertising as its proof that defendants have caused the alleged public nuisance. It is seeking only damages for its past expenditures on public programs; it is not asking for injunctive relief or abatement.

The theory of liability posed by the City of St. Louis ("Appellant"), if accepted by this Court, would disregard and eliminate foundational requirements of public nuisance law. The implication of Appellant's argument is that a government's expenditure of public funds to address a health or safety issue could give rise to a public nuisance claim by the government against someone for monetary damages. In this case, that "someone" are the former manufacturers of a product, paint containing lead, that has not been made or sold in many decades. Appellant's major modification of traditional public nuisance law would impose liability on an industry-wide basis upon companies, such as these product manufacturers, that did not cause the underlying alleged injuries and do not have the present ability to abate the condition causing those injuries or the alleged public nuisance at issue. Placing liability on defendants regardless of their responsibility for an injury is repugnant to principles of fairness and law.

Appellant's theory, if accepted by the Court, also would vastly expand the law of public nuisance beyond its traditional elements, scope, and public policy purpose. In so doing, it would undermine and circumvent requirements of Missouri products liability law and grant governments unprecedented and unjustified "super plaintiff" powers. For these reasons, Amici respectfully submit that the Court reject this attempt to

change the elements and burdens of proof of government public nuisance actions.

JURISDICTIONAL STATEMENT

Amici adopt Respondents' Jurisdictional Statement.

STATEMENT OF FACTS

Amici adopt Respondents' Statement of Facts.

POINT RELIED ON

POINT RELIED ON: THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE MISSOURI LAW REQUIRES, AND SHOULD REQUIRE, APPELLANT TO DEMONSTRATE PROXIMATE CAUSE IN THAT PERMITTING APPELLANT'S PUBLIC NUISANCE CLAIM TO PROCEED WITHOUT A SHOWING OF PROXIMATE CAUSE WOULD UNWISELY AND IRREPARABLY DISTORT THE FUNDAMENTAL PRINCIPLES AND TRADITIONAL PUBLIC POLICIES OF PUBLIC NUISANCE LAW, WOULD BESTOW A GOVERNMENTAL PLAINTIFF WITH ARTIFICIALLY INFLATED RIGHTS, WOULD SUBVERT ESTABLISHED PRODUCTS LIABILITY LAW, AND WOULD CONSTITUTE REGULATION THROUGH LITIGATION.

Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 246 (Mo. 1984).

City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1127 (Ill. 2004).

State ex rel. Weatherby, Pros. Atty. v. Dick & Bros. Quincy Brewing Co.,192 S.W. 1022 (Mo. 1917).

Billings v. North Kansas City Bridge & R.R. Co., 338 Mo. 1122, 93 S.W.2d 944 (Mo. 1936).

SUMMARY OF THE ARGUMENT

The purpose of a government public nuisance action is to provide a means for governments to use the tort system to stop a quasi-criminal act which may not be illegal, but is deemed unreasonable given the circumstances and could cause injury to someone exercising a common public right. For example, blocking a public highway.

See William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 999 (1966). Over the last several years, a few prominent personal injury lawyers, sometimes working on behalf of government attorneys, have brought claims that have attempted to circumvent the basic requirements of this historic tort and pole vault the important requirements of other areas of tort law, especially products liability. See Victor E. Schwartz & Phil Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L.J. 541 (2006). These maverick claims seek to redefine the purpose of public nuisance actions and create confusion about the tort's required elements. The claim before this Court represents one such attempt; it would move public nuisance theory far outside its traditional boundaries and circumvent the well-defined structure of products liability law.

Appellant argues that the spending of government resources on its lead-paint programming amounts to a public nuisance. In order to impose liability on former manufacturers of lead pigment and paints, Appellant suggests it should not have to prove causation under traditional standards, but on generalized evidence, statistics, and untested market-share theories. Allowing such a claim would require fundamental changes to the core elements of Missouri public nuisance law. First, it would grant state and local governments a greater ability to sue than private plaintiffs. Second, it would expand the nature of an injury supporting a public nuisance claim to include any health or safety issue on which government spends its resources. Third, it would shift the traditional and sound requirement that conduct leading to a public nuisance is based on the use of a product, to how a product is manufactured, designed, promoted or labeled, which is the

predicate for products liability.

This Court has wisely adhered to the traditional, rational boundaries of public nuisance theory. Under public nuisance law in Missouri, a government may only bring a public nuisance action to require the abatement of, or stop conduct, that is causing a dangerous condition that is the direct result of a defendant's unreasonable interference with a public right. See, e.g., State ex rel. Chicago, B. & Q.R. Co. v. Woolfolk, 190 S.W. 877 (Mo. 1916). Maintaining the causation requirement, as well as the standards for public nuisance injury and remedy, has kept the broad term "nuisance" from creating sprawling lawsuits encompassing any condition that could be subsequently viewed as an annoyance or a possible danger to members of the public. As legendary torts scholar Dean John Wade has observed, if "a plaintiff would need only to prove that the product was a factual cause in producing injury . . . [an automaker] would be liable for all damages produced by a car, a gun maker would be liable to anyone shot by the gun, [and] anyone cut by a knife could sue the maker." John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 828 (1973) (emphasis added). Therefore, without the rational and well-defined boundaries adopted by this Court, public nuisance law 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).

Courts in this and other states have rejected product-based public nuisance suits. They have expressed concern that these lawsuits would cause significant ambiguity in the law, raise serious due process concerns, and make end runs around the basics of products liability law. See, e.g., Camden County Bd. of Chosen Freeholders v. Beretta

U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001) (recognizing that courts should "enforce the boundary between the well-developed body of products liability law and public nuisance law").

As this brief will demonstrate, allowing the instant case to proceed would assign to product manufacturers liability for any harm caused by people's use or misuse of their products, so long as government spends resources to combat it. This would be true regardless of intervening causes or other factors that other areas of the law, namely products liability, consider important to determining liability. Missouri law and sound public policy supports rejection of Appellant's appeal.

ARGUMENT

POINT RELIED ON: THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE MISSOURI LAW REQUIRES, AND SHOULD REQUIRE, APPELLANT TO DEMONSTRATE PROXIMATE CAUSE IN THAT PERMITTING APPELLANT'S PUBLIC NUISANCE CLAIM TO PROCEED WITHOUT A SHOWING OF PROXIMATE CAUSE WOULD UNWISELY AND IRREPARABLY DISTORT THE FUNDAMENTAL PRINCIPLES AND TRADITIONAL PUBLIC POLICIES OF PUBLIC NUISANCE LAW, WOULD BESTOW A GOVERNMENTAL PLAINTIFF WITH ARTIFICIALLY INFLATED RIGHTS, WOULD SUBVERT ESTABLISHED PRODUCTS LIABILITY LAW, AND WOULD CONSTITUTE REGULATION THROUGH LITIGATION.

Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984).

City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004).

State ex rel. Weatherby, Pros. Atty. v. Dick & Bros. Quincy Brewing Co.,192 S.W. 1022 (Mo. 1917).

Billings v. North Kansas City Bridge & R.R. Co., 338 Mo. 1122, 93 S.W.2d 944 (Mo. 1936).

I. THIS LAWSUIT PURSUES A NEW AND UNSOUND PATH IN THE DECADES-LONG PURSUIT OF FORMER MANUFACTURERS OF LEAD PIGMENTS AND PAINTS

Lead paint litigation, generally, arises out of injuries incurred by children who ingest lead paint. The injuries have occurred disproportionately in low-income areas in inner cities, where landlords have allowed paint in their aging residential properties to deteriorate, crack or peel.[1] Lead-based paints were used widely in residential communities in the early twentieth century. In 1955, spurred by potential health concerns, companies that manufactured lead paints supported a voluntary standard that effectively removed lead pigments from interior consumer paints (limiting it to one percent by weight). The standard was sponsored by the American Academy of Pediatrics and adopted by the American Standards Association, now the American National

[1] The federal government and most states, including Missouri, have decreed that well-maintained lead-based paint is not hazardous to the health of children residing in dwellings containing lead paint. See Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X), 42 U.S.C. §§ 4851(5), (15); St. Louis City Revised Code § 11.22.030; R.S. Mo. § 701.300 et seq.

Standards Institute (ANSI). American Standards Ass'n, American Standards Specifications to Minimize Hazards to Children from Residual Surface Coating Materials (Z66.1-1955) (approved Feb. 16, 1955). In 1971, Congress enacted the "Lead-Based Paint Poisoning Prevention Act," Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified at 42 U.S.C. §§ 4801, et seq.), which led to the 1978 ban of lead from paints for residential use by the Consumer Product Safety Commission. Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 64 Fed. Reg. 50,139, 50,141 (Sept. 15, 1999) (final rule).

Initial lawsuits to recover for alleged lead paint-related injuries to children, which started in the 1960s, properly targeted individual landlords who failed to maintain their residential properties. See, e.g., Norwood v. Lazarus, 634 S.W.2d 584 (Mo. Ct. App. 1982) (affirming judgment for tenant's child who ate lead paint flakes at two properties because landlords' use of lead-based paint in common areas was negligent); see also Martha Mahoney, Four Million Children at Risk: Lead Paint Poisoning and the Law, 5 Stan. Envtl. L. J. 46, 58 (1990) (providing additional examples). Claims brought against landlords proved to be a successful means for compensating victims of lead poisoning throughout the country and provided incentive to others to maintain properties to prevent injuries. "Damage awards in the hundreds of thousands even millions of dollars against residential landlords in lead paint are not uncommon." Scott A. Smith, Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong, 71 Def. Couns. J. 119, 124 (2004). Similarly, in St. Louis, responsibility for maintaining a lead

safe building lies with the landowner. See St. Louis City Rev. Code § 11.22.120 (requiring property owner to maintain a lead safe building and, if the city must correct the condition, it will "charge the costs thereof to the owner" and place a lien on the property "until the property owner reimburses the City of St. Louis' Lead Fund"). The lawsuits did not assert claims against paint and pigment manufacturers because it was not possible to show that conduct of a particular company was the proximate cause of a given injury; the property owner was the cause. See Lead Paint Poisoning: Legal Remedies and Preventive Actions, 6 Colum. L.J. & Soc. Probs. 325, 327 (1970).

A. Products Liability Claims

In the mid-1980s, personal injury lawyers grew unsatisfied with lawsuits only against landlords, setting their sights also on manufacturers who had, decades earlier, produced and sold lead pigment or paint. Such companies provided better targets: they were easy to find and purportedly had "deeper pockets." These actions, which asserted strict products liability and negligence against product manufacturers, uniformly failed. Plaintiffs could not satisfy the basic elements of a products liability claim, namely proving a defect and proximate cause. See, e.g., Santiago v. Sherwin Williams Co., 3 F.3d 546, 547 (1st Cir. 1993) ("[p]laintiff could not and cannot identify either which, if any, of the defendants are the source of the lead she ingested"); City of Philadelphia v. Lead Indus. Ass'n, No. 90-7064, 1992 U.S. Dist. LEXIS 5849, at *9 (E.D. Pa. Apr. 23, 1992) (finding no design defect in lead pigment, as lead is intrinsic to its nature); Sabater v. Lead Indus. Ass'n, 704 N.Y.S.2d 800, 805 (Sup. Ct. 2000) ("[T]here is no duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.").

B. The Birth of Industry-Wide Theories

In an effort to circumvent the need to show proximate cause, the next wave of lead paint lawsuits involved "novel and even radical" industry-wide theories of liability, such as market-share liability, enterprise liability, and concert of action. City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 127 (3rd Cir. 1993). These approaches, too, were universally unsuccessful. See, e.g., Brenner v. Am. Cyanamid Co., 699 N.Y.S.2d 848, 850 (App. Div. 1999) (finding lead paint litigation did not meet the standards that support dropping the proximate cause requirement in products liability law); Skipworth v. Lead Indus. Ass'n, 665 A.2d 1288, 1291-92 (Pa. Super. Ct. 1995) (finding Pennsylvania does not recognize market-share liability); Spring Branch Indep. Sch. Dist. v. NL Indus., Inc., No. 01-02-01006-CV, 2004 WL 1404036, at *4 (Tex. App. June 24, 2004) (rejecting market-share liability and stating plaintiff school district's position "disregards the bedrock principle of Texas law that a plaintiff must identify the manufacturer of the product that allegedly injured it").

C. The Public Nuisance Strategy

The current litigation strategy for avoiding the need to prove proximate cause involves the partnering of private lawyers with public entities to bring government public nuisance action against the former lead companies. The strategy was born in 1999 when the nationally recognized personal injury law firm of Motley Rice convinced the Attorney General of Rhode Island to file such an action in that state. Armed with the power of the sovereign, Motley Rice, who took the litigation under a contingency fee agreement, sought the costs of abating lead paint in homes and buildings throughout

Rhode Island, which they said could cost up to $4 billion. See Paint Maker Seeks Ruling on Judge in Lead Case, Providence J., Aug. 19, 2005, at B1. St. Louis was one of the first cities to follow this strategy when Mayor Clarence Harmon handpicked a friend to handle Appellant's lawsuit against former manufacturers of lead paint in 2000. See Geri L. Dreiling, Lead Counsel, Riverfront Times, July 3, 2002 (reporting how Appellant selected lawyers in this litigation).

This strategy is modeled after public nuisance actions brought by state and local governments in the 1990s, often brought with the aid and encouragement of contingency fee lawyers, against manufacturers of products that were either "unpopular" or could be used or misused in ways that created harm. See, e.g., City of St. Louis v. Cernicek, 145 S.W.3d 37, 43 (Mo. Ct. App. 2004) (firearms); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (tobacco); County of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (asbestos). The presumed goal of this strategy has been to find judges who might disregard precedent and stretch the rule of law to address perceived and potentially costly societal problems. See, e.g., State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971, 976 (Sup. Ct. 1983) (acknowledging it allowed public nuisance claim against a nontortfeasor with the surprising and open-ended observation that "[n]onetheless . . . [s]omeone must pay to correct the problem.").

Missouri and other judges schooled in the rules and policy behind the basics of tort law have not been fooled by this clever strategy; these courts have recognized that the new public nuisance actions are nothing more than another attempt to dodge the requirements of proving that a defendant caused a harm by using unsound and

amorphous market-share liability theories. See, e.g., Cernicek, 145 S.W.3d at 43 (public nuisance law does not apply to manufacturing firearms); City of Chicago v. Am. Cyanimid Co., No. 02 CH 16212, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (the lawyers "deliberately framed [their] case as a public nuisance action rather than a product liability suit") aff'd 823 N.E.2d 126 (Ill. App. Ct. 2005); Sabater, 704 N.Y.S.2d at 806 (Sup. Ct. 2000) ("A products liability action, where damages are restricted to the user of the product and result from its allegedly negligent manufacture, does not give rise to a nuisance cause of action.").

II. ALLOWING THIS CASE TO PROCEED WOULD IRREPARABLY DISTORT PUBLIC NUISANCE LAW

In order for Appellant to shoehorn a private products liability claim into a government public nuisance action, this Court would have to erase the burden of proof for actual and proximate cause and broaden other elements of public nuisance law. Such a ruling would unwisely and irreparably distort the fundamental principles and traditional public policies of public nuisance theory.

A. The Purpose and Elements of Government Public Nuisance Actions

Government sponsored public nuisance actions, developed in English and American common law over more than seven centuries ago, are specific types of lawsuits. See Restatement (Second) of Torts § 821B cmt. a. (1979). Public nuisance law started solely as an action by the state – through the King's sheriff, the equivalent of the modern state attorney general – to stop a private party from invading a common public right. See id. Its modern purpose is to provide the state and local governments with the

authority to terminate conduct that, while not necessarily regulated, conflicts with societal rights and could cause unfair injury to people exercising those public rights. Prosser, supra, at 999.

Public nuisance, therefore, is a conduct-based tort. It is based on activities engaged in by a defendant. Typical examples of defendants in public nuisance cases are those who obstruct a public highway, pollute a public river, operate an illegal gambling hall, or allow shrubs to grow along a roadway so as to block the view of drivers. See, e.g., 44 Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576, 580 (Mo. App. 1992) (allowing trees to block public view of roadway); Lee v. Rolla Speedway, Inc., 668 S.W.2d 200, 206 (Mo. Ct. App. 1984) (operating an automobile racing grounds in close proximity to other property owners); City of Sturgeon v. Wabash Ry. Co., 17 S.W.2d 616, 619 (Mo. Ct. App. 1929) (having buildings that blocked the view of oncoming trains); State v. Irving, 700 S.W.2d 529, 534 (Mo. Ct. App. 1985) (running a house of prostitution); City of Lee's Summit v. Browning, 722 S.W.2d 114, 116 (Mo. Ct. App. 1986) (operating a public salvage yard that was overly noisy and had oil spills throughout the grounds).

These cases show that despite the amorphous nature of the word "nuisance,"[2] the tort has well-defined elements. These include:

---

[2] The principal hornbook on the law of torts in the 1980s observed, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people . . . ." W. Page Keeton et al., Prosser &

Proximate cause: "Some causal connection must exist between the acts of the defendants and the nuisance complained of." Kelly v. Boys' Club of St. Louis, 588 S.W.2d 254, 257 (Mo. Ct. App. 1979); see also City of Chicago v. Beretta U.S.A., 821 N.E.2d 1099, 1127 (Ill. 2004) (defining proximate cause in public nuisance as "whether the injury is of a type that a reasonable person would see as a likely result of his conduct").

Injury to a public right: An injury that gives rise to a public nuisance claim must be of "public character," State ex rel. Attorney General v. Canty, 105 S.W. 1078, 1083 (Mo. 1907), and be against "rights or property of the whole community," not individuals or private properties. State v. Errington, 317 S.W.2d 326, 331 (Mo. 1958); Canty, 105 S.W. at 1080 (calling it an offense "against public order, the common good, and public decency and morals"). For example, blocking a public road may be a public nuisance; blocking a private driveway or numerous private driveways is not.

Unreasonable interference: Conduct that may constitute a public nuisance requires "unreasonable interference" with a public right. See Jackson v. City of Blue Springs, 904 S.W.2d 322, 328-29 (Mo. Ct. App. 1995).

Control: A part of the public nuisance analysis in Missouri is whether defendant had control of the alleged nuisance. As this Court has long and properly recognized, "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."

Keeton on Torts 616 (5th ed. 1984).

Billings v. North Kansas City Bridge & R.R. Co., 338 Mo. 1122, 1127, 93 S.W.2d 944, 946 (Mo. 1936); accord City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D. R.I. 1990) (calling control a "basic element of the tort").

Importantly, the ability to satisfy these core elements does not depend on whether the plaintiff is a government or private individual. The distinction between private and public plaintiffs is only relevant in determining standing to sue and the remedy. Government plaintiffs, such as Appellant, have standing to bring public nuisance actions. By way of contrast, a private individual has standing only if the person can "show a special injury to himself that differs in kind, and not just degree, from the injury to the general public." See 44 Plaza, Inc., 845 S.W.2d at 580. Other members of the general public, even if inconvenienced by the public nuisance, cannot use the tort. With regard to remedies, government actions are limited to enjoining the nuisance causing conduct or forcing abatement; only individuals with special injuries can receive money damages as compensation for harms caused by the nuisance. See Woolfolk, 190 S.W. at 878.

On occasion, one of these elements may be slightly modified to account for facts not previously considered, but not a wholesale re-writing of all four elements. See generally Victor E. Schwartz, Cary Silverman & Phil Goldberg, Neutral Principles of Stare Decisis in Tort Law, 58 S.C. L. Rev. 317 (2006). Appellant's claim is missing all four foundational elements.

B. Appellant's Claim Requires Fundamental Changes to Traditional Public Nuisance Law in Missouri

Appellant's attempt to expand public nuisance theory to allow it to recover damages against manufacturers of lawful products would fundamentally alter the entire character and public policy of the tort. Consequently, almost all courts from widely different geographic locations have rejected public nuisance actions against product manufacturers. See, e.g., Chicago v. Beretta, 821 N.E.2d at 1118 (dismissing public nuisance action against companies for selling firearms); Detroit Board of Education v. Celotex Corp.,493 N.W.2d 513 (Mich. Ct. App. 1992) (asbestos); City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611 (7th Cir. 1990) (PCBs in ground contamination); Diamond v. General Motors Corp., 97 Cal. Rptr. 639 (Ct. App. 1971) (air pollutants). Nevertheless, an occasional court has broken from traditional public nuisance theory and allowed such a case to proceed. See State of Rhode Island v. Lead Indus. Ass'n, No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007) (holding the mere presence of lead paints in private homes are a public nuisance and that "manufacturing is a cause of the public nuisance"); City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888 (Wis. Ct. App. 2004) (unlike Missouri, Wisconsin allows alternative theories of causation in products liability actions), cert. dismissed 703 N.W.2d 380 (Wis. 2005); County of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313 (2006) (not ruling on the causation issue before this Court), cert. denied (June 21, 2006); In re Lead Paint Litigation, No. A-1946-02T3, 2005 WL 1994172, at *21 (N.J. Super. Ct. App. Div. Aug. 17, 2005) (unpublished) (not ruling on the causation issue before this Court), cert. granted 886 A.2d

662 (N.J. 2005). No state supreme court has approved public nuisance actions against the former manufacturers of lead pigments and paints, and this Court should reject the faulty reasoning and results of these outlier cases.

1. The Government Does Not Have a Lesser Standard of Proof for Causation in Public Nuisance Cases

The primary issue on appeal is Appellant's request that Missouri courts substantially lower the burden of proof for government entities bringing public nuisance actions. See City of St. Louis v. Benjamin Moore & Co., No. ED-87702, 2006 WL 3780785, at *3 (Mo. Ct. App. Dec. 26, 2006) (adopting trial court's summary of Appellant's argument that "while perhaps private individuals should not be permitted to rely on market-share evidence, perhaps governmental entities bringing public nuisance claims should be"). Under Missouri law, however, public nuisance actions have the same proximate cause requirements as claims based on negligence and products liability. See Bellflower v. Pennise, 548 F.2d 776, 778 (8th Cir. 1977) (applying Missouri law and citing State ex rel. Wallach v. Oehler, 159 S.W.2d 313 (Mo. App. 1942)). In Bellflower, the Eighth Circuit recognized that under Missouri law "not only must a wrongful act of the defendant be shown but also the maintenance of the nuisance must be the natural and proximate cause of the injury." Id. As the Supreme Court of Illinois has carefully explained, even when a public nuisance action is brought by the government, an "element of the public nuisance claim that must be present . . . is resulting injury, or, more precisely, proximate cause." Chicago v. Beretta, 821 N.E.2d at 1118; accord City of St. Louis v. Varahi, Inc., 39 S.W.3d 531, 535-38 (Mo. Ct. App. 2001) (government must

show a causal link between defendant and the alleged public nuisance). The Illinois high court correctly stated that, just as in products liability and negligence actions, proximate cause "encompasses two distinct requirements: cause in fact and legal cause." Id.

Despite other requests to do so, this Court has not "relaxed the traditional causation standards." Hagen v. Celotex Corp., 816 S.W.2d 667, 671 (Mo. 1991). As the appellate court properly observed, this Court has already rejected the type of market share and statistical-based causation analysis requested by Appellant. See Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 246 (Mo. banc 1984). In Zafft, plaintiffs sought recovery for personal injuries allegedly caused by in utero exposure to the pharmaceutical DES that had been administered to their mothers during their mothers' pregnancies. Id. at 242. Plaintiffs asked the Court to allow them to use alternative theories of causation so that they could be relieved of traditional burden of having to identify the companies that manufactured, sold or distributed the particular products ingested by their mothers. Id. at 243. The Court was clear that its ruling in Zafft was not limited to products liability actions, stating, "under strict liability, as with any other tort theory, plaintiff must establish some causal relationship between the defendant and the injury-producing agent." Id. at 244 (emphasis added). Indeed, the Court recognized that establishing "a causal relationship between the defendants and the injury-producing agent" is a "precondition to maintenance of their causes of action." Id. at 247 (calling the concept "so fundamental" to all of tort law). Basic and highly respected tort treatises are in accord with the reasoning of this Honorable Court. See Dan B. Dobbs, The Law of Torts § 180, at 443 n.2 (2001) ("proximate cause limitations are fundamental and can apply in

any kind of case in which damages must be proven"); Fowler V. Harper et al., The Law of Torts § 20.2 (1986) ("Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability."). Further, the fundamental goal of market-share theory was not to create industry-wide liability, but to reverse the burden of proof under the belief that each defendant would be in a better position "to exonerate itself or to join, by third party petition," the culpable parties. Id. at 245.

As in Zafft, the instant case provides "insufficient justification . . . to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury." Id. at 247. Because Respondents have not made or sold lead pigments or paints in decades, they are not "in a better position to identify the course of the harm," which this Court said was "important to [the] application of the theory" of market-share liability. Id. at 244. Moreover, as successful litigation against property owners demonstrates, property owners who allow lead paint in their buildings to decay and chip are the proximate cause of injury from lead paint. Therefore, as in Zafft, "unlike the typical situation warranting application of alternative liability, all possible tortfeasors are not before the court and the actual wrongdoers may escape liability." Id. at 244. In fact, the property owners, who Missouri law holds primarily responsible for the creation of lead paint hazards, are not in this case at all. While perhaps politically expedient, removing legal incentives from landlords to obey the law and prevent injury is neither economically efficient nor wise public health or legal policy.

Eliminating the need for government plaintiffs to show causation or even identify the responsible tortfeasor would improperly treat governments as "super-plaintiffs" by providing them greater positioning to sue than a person who was actually injured by the nuisance. For example, while Ms. Zafft could not bring a products liability claim for her own costs, the state could have a public nuisance action against the same DES manufacturers for its costs of treating Ms. Zafft. Giving the government such "super-plaintiff" status violates fundamental principles of fairness and traditional tort law. It would also make nuisance law a canyon-sized escape hatch for the requirements of products liability law. See State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401, 407 (Iowa 1998) ("We are not inclined to open the proverbial floodgates of litigation to such an extent."). This Court properly declined to modify tort law when direct serious personal injury was involved. It clearly should not do so when the case involves indirect, economic costs to government.

Giving government greater ability to make out a public nuisance action against a potential tortfeasor than an individual with special injuries is also wholly incompatible with the tort's special injury rule. See State v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. Ct. App. 1984) (government public nuisance actions become private torts when the special injury rule is satisfied). The way the special injury rule operates is as follows: Suppose a landowner pollutes the ground and local river in a way that creates a public nuisance. The government will have a cause of action under public nuisance theory to stop the polluting activity and force the responsible party to abate the condition. A neighbor whose well water was polluted by the contamination,

thereby sustaining a particular injury from the public nuisance, could seek compensation for her own damages. Accepting Appellant's theory of liability to only allow a government action in certain circumstances would fundamentally change this rule of law. Sound public policy provides no support for discriminating between government and private plaintiffs with respect to these basic requirements of public nuisance law.

2. There Is No Injury Giving Rise to a Public Nuisance Claim

Defendants also did not cause any public nuisance because there is no intrusion into a societal right. The presence of lead paint, personal injuries caused by lead paint, and government costs associated with addressing hazards caused by lead paint do not give rise to the type of injury that is required to bring a public nuisance action.

Under well-settled Missouri law, the presence of lead paint in people's homes and other private buildings, in and of itself, cannot constitute the type of "injury" that would support a public nuisance claim. See Canty, 105 S.W. at 1083 (stating a public nuisance can only occur "at a place where the public have a right to go and congregate"). As a Missouri appellate court recently recognized, there is no common public right to enter private residences. See City of Kansas City v. New York-Kansas Building Associates, 96 S.W.3d 846, 859 (Mo. Ct. App. 2003). In City of Kansas City, the court held under these principles that the structural integrity of the private building in question "is not a public nuisance because it does not affect the public's health or safety. . . . The public does not, moreover, have a legal right to enter the Building as it is . . . private property." Id.

> In determining whether a public nuisance exists, the court must consider whether the alleged nuisance is located in a public place, a place where the public is likely to congregate, a place where the public has a right to go, or a place where the public is likely to come into contact with the nuisance. A nuisance is public when it affects rights to which every citizen is entitled such as traveling on a public street.

Id. Given this clear and sound Missouri precedent, the Court should not be influenced by the recent maverick Rhode Island trial court decision that "the cumulative presence of lead pigment in paints and coatings" in private homes can create a public nuisance. Rhode Island v. Lead Indus., No. PC 99-5226 at *34.

Similarly, lead paint-related injuries sustained by children or others in St. Louis do not give rise to a public nuisance action because they do not obstruct "the rights or property of the whole community." Errington, 317 S.W.2d at 331; see also App. Pet. in Benjamin Moore, 2006 WL 3780785 at *19 (conceding that "there is no individual injury asserted"). As other courts have explained, this is because "harm to individual members of the public" – no matter how many – is not the same as harm "to the public generally." Chicago v. Beretta, 821 N.E.2d at 1115-16; see also Higgins v. Conn. Light & Power Co., 30 A.2d 388, 391 (Conn. 1943) ("The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.") (internal quotation omitted). Thus, no matter how many individuals allege an injury from lead paint, personal injuries do not become public injuries.

Finally, Appellant's decision to spend public resources on lead-related issues does not constitute a public nuisance injury. See Benjamin Moore, 2006 WL 3780785, at *5 (stating the issue "is limited to the costs the City allegedly incurred abating and remediating lead paint in certain, albeit numerous properties"). A government's decision to spend taxpayer funds on a health or safety issue does not by some alchemy turn a matter into a public nuisance. As University of Maryland Professor Donald Gifford has explained, a "public interest" in government spending is not the same as a "public right."

> That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates "a public right." For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.

Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 815-16 (2003); see also App. Pet. in Benjamin Moore, No. ED-87702, 2006 WL 2029789, *19 (Mo. Ct. App. filed June 9, 2006) (referring to government spending on lead-related programs as an "injury to the public interest").

Rather, government abatement programs are remedies. In fact, the Missouri appeals court, in trying to make sense of this lawsuit, suggests that Appellant is

asserting that its claims "are akin to a private individual's claim of specific and particularized harm from the public nuisance of lead paint." Benjamin Moore, 2006 WL 3780785, at *5. Again, the special injury rule does not alter the criteria for public nuisance injury from requiring the implication of a public right and does not permit a government to seek money damages. A government is only permitted to seek injunction or abatement and Appellant is seeking neither in this case.

3. Manufacturing a Lawful Product Is Not "Unreasonable Conduct"

The former manufacturers of lead pigments and paints did not cause a public nuisance because, as with most courts, this Court has held that a manufacturer's "valid sale to a legitimate purchaser" cannot be equated with unreasonable conduct for causing a public nuisance injury. State ex rel. Weatherby v. Dick & Bros. Quincy Brewing Co., 270 Mo. 100, 192 S.W. 1022, 1024-25 (Mo. 1917) (holding a manufacturer or seller of beer is not responsible for any public nuisance related to a consumer's alcohol consumption); see also Detroit Bd. of Educ, 493 N.W.2d at 521 (Mich. Ct. App. 1992) ("The role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien."); 63A Am. Jur. 2d Products § 927; 1 Am. Law of Prods. Liab. § 1:18 (Timothy E. Travers et al., eds., 3d ed. 1987) ("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."). In Weatherby, the Court held a product manufacturer is not responsible for a public nuisance "even if the [purchaser], in conjunction with others, should thereafter create a public nuisance." Id.

Missouri law has long-recognized the distinction between the party who has made a product and a party who has engaged in an activity. For example, in Billings, 338 Mo. at 1127, 93 S.W.2d at 946, a bridge builder was not liable for any public nuisance that may be associated with the bridge after it sold the bridge to Appellant. As the Court explained, "[i]f the girder became a nuisance after the sale of the bridge, it was because of the manner in which the bridge was used or the girder maintained, neither of which the defendant had any control over or responsibility for." Id. 1128, 946-47; see also Mispagel v. Missouri Highway & Transp. Comm'n, 785 S.W.2d 279 (Mo. banc 1990) (holding lack of control by the defendant precluded imposition of liability); Bellflower, 548 F.2d at 778 (holding a defendant "is not civilly liable for a nuisance caused or promoted by others over whom he has not control; nor is he bound to go to expense or litigation to abate such a nuisance."). Furnishing a product, whether it be an automobile, a chemical, asbestos, a gun, or lead pigment and lead paint that another party uses to create a public nuisance is not the same as causing the nuisance itself. See City of Bloomington, 891 F.2d at 611 (holding Monsanto Corp., which sold PCBs to Westinghouse Electric Corp., was not liable because "Westinghouse was in control of the product and was solely responsible for the nuisance it created by not safely disposing of the product."). Id.; see also National Gypsum, 637 F. Supp. at 656 (after time of manufacture and sale, product manufacturers completely divest themselves of any connection with the instrumentalities that may be used to create a nuisance).

Rather, products liability law is, and should continue to be, the "paramount basis of liability" for claims related to products. Victor E. Schwartz et al., Prosser, Wade

and Schwartz's Torts Cases and Materials 718 (11th ed. 2005); see also James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1266, 1267 (1991) ("[D]efect is the conceptual linchpin that holds products liability law together."). Under products liability law, plaintiffs may recover for injuries caused by a defective product without having to prove a manufacturer was negligent in putting the product into the stream of commerce. See Wade, supra, at 825. This approach both facilitates plaintiffs' recovery and provides companies with legal incentive to exercise due care in making products. Id. at 826. "Consumer groups and plaintiffs' lawyers . . . argue that strict liability has acted as a surrogate policeman to make products safer." Schwartz et al., Torts, at 712.

In Missouri, "[t]he primary inquiry in a design defect case is whether the product – because of the way it is designed – creates an unreasonable risk of danger to the consumer or user when put to normal use." Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 375 (Mo. banc 1986). The "unreasonable risk of danger" test, therefore, is the means for assessing liability for products; "unreasonable interference" in public nuisance only applies to conduct. This Court properly rejected applying conduct-based torts to product manufacturing two decades ago, when it refused to apply strict liability for engaging in abnormally dangerous activities to the manufacturing of an inherently dangerous product. See, e.g., Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491, 515-16 (Mo. 1986) ("It is far from clear, however, that the policies behind strict liability for abnormally dangerous activities are the same as those relied upon by courts moving to

strict products liability. To the contrary, the respective policy reasons are different.") (internal quotation omitted). Nuisance and abnormally dangerous activity relate to a defendant's conduct, not the manufacture and sale of products.

As this Court has clearly appreciated, products liability provides a broad and adequate remedy to address injuries arising from defective products. Any alleged hazard caused by the products in this case resulted from conduct of property owners.

III. APPELLANT'S PUBLIC NUISANCE THEORY WOULD HAVE ADVERSE PUBLIC POLICY CONSEQUENCES

A government public nuisance action "involves a balancing of interests" and a "delicate weighing of values." Clancy v. Sup. Ct. of Riverside County, 705 P.2d 347, 353 (Cal. 1985) (public nuisance law requires the same kind of discretion as prosecutors bringing criminal actions). Traditional government public nuisance actions, therefore, are antithetical to the type of speculative litigation that would result from Appellant's request to lessen its burden to prove causation and to change the element of public nuisance law. Under Appellant's view of this case, government would have near limitless ability to impose liability on an industry. Companies would have few, if any, defenses or means to exculpate themselves from liability; they also would not have fair notice or adequate warning that they were engaging in behavior that would result in a tort through government action. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (O'Connor, J., dissenting) (the vagueness doctrine under the United States Constitution applies to tort liability.).

A. Liability Would Be Unpredictable

If the major alterations Appellant seeks to make in public nuisance law are permitted in this case, governmental plaintiffs, often in coordination with private lawyers, could "convert almost every products liability action into a nuisance claim." Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984), set aside on other grounds, 664 F. Supp. 1127 (E.D. Tenn. 1985). "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." Spitzer v. Sturm, Ruger & Co., 309 A.D. 91, 96 (N.Y. App. Div. 2003).

Thus, product manufacturers would be thrust into the almost impossible role of policing their customers to ensure that products are not used in ways that could create a public nuisance or other social ill. For example, cell phone manufacturers would have to stop people from talking on their cell phones while driving or be liable for any such accidents under public nuisance law. Livestock producers could be liable for heart disease caused by cumulative consumption of their meats. Sporting good companies would have to make sure that athletes wore sufficient protective gear in order to avoid injury on the field. Such industry-wide liability would require manufacturers to be absolute insurers of their products, a concept this Court has soundly rejected. See Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343, 346 (Mo. 1964) (a product manufacturer "is not liable as an insurer, and he is under no obligation to make the product accident

proof or foolproof"). As the Court held in Zafft, such a scenario "is unfair, unworkable, and contrary to Missouri law, as well as unsound public policy." Zafft, 67 S.W.2d at 246.

B. Government Spending Decision Would Become Liability Causing Events

City attorneys and the attorney general could convert legislative spending decisions into liability creating events. Governments would have unbridled power to determine which alleged social ills constitute a public nuisance and result in tort litigation. In Missouri, each time a public agency decides, or is legislatively mandated, to abate a "public health hazard," manufacturers who conduct business in the state could become the principal target to fund these multi-million (and potentially multi-billion) dollar projects. Such liability could be imposed regardless of how long ago the product was placed into the stream of commerce and used; whether the product satisfied governmental standards, were manufactured within a regulatory regime, or were specified by government; whether the product was defective; or how long public agencies had known about prospective health effects associated with the product. Liability would be entirely unpredictable and unfair.

Consider, for example, that Appellant's Department of Public Safety spends $350,000 related to the sales and consumption of alcoholic beverages. See City of St. Louis FY 2007 Annual Operating Plan, Adopted June 16, 2006, at 159, available at http://stlouis.missouri.org/government/budget07/ (last visited Mar. 2, 2007). Part of those funds are geared towards "minimizing underage drinking and overall consumption." Id. There is no denying that underage drinking is a significant societal

issue and may be worth the expenditure of government resources in appropriate situations, but under Appellant's theory of this case, these expenditures could give rise to a public nuisance action against the companies that lawfully make the alcoholic beverages sold in the City. The same is true, for example, for the Missouri Department of Mental Health programs for substance abuse of legal pharmaceuticals, the Missouri Department of Natural Resources Environmental Programs for air pollution control even when pollution is regulated by state law, and the Missouri Department of Public Safety highway patrol programs to keep the highways safe from those who exceed speed limits.

C. Undermining Public Nuisance Law Could Lead to Unsound Regulation Through Litigation

Another potential danger in allowing governments a reduced standard for public nuisance actions is that it would allow city attorneys and the state attorney general to subvert the legislative process. They could "use [their] injunctive powers to mandate the redesign of" products and regulate business methods. Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001). For example, governments could then bring public nuisance claims against food manufacturers of high calorie food items because people's consumption habits have led to obesity. See Victor E. Schwartz & Phil S. Goldberg, Closing the Food Court: Why Legislative Action Is Needed to Curb Obesity Lawsuits, Briefly (Nat'l Legal Center for the Pub. Int., Wash. D.C.) Aug. 2004, at 2, available at http://www.nlcpi.org/books/welcome.htm (last visited Mar. 2, 2007). Professor John F. Banzhaf III of George Washington University, lead organizer of recent attempts to sue the food industry for obesity, explained, "if the legislatures won't

legislate, then the trial lawyers will litigate." Fast Food on Trial (Nat'l Pub. Radio broadcast, Aug. 8, 2002), available at http://banzhaf.net/docs/npr.html (last visited Mar. 2, 2007).

But, "the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief." Penelas, 778 So. 2d at 1045. Former Labor Secretary Robert Reich has called such regulation through litigation "faux legislation, which sacrifices democracy." Robert B. Reich, Don't Democrats Believe in Democracy?, Wall St. J., Jan. 12, 2000, at A22. Nevertheless, the desire to create a revenue source or regulate an industry can be a powerful motivation for a city or state attorney to bring these new types of actions, such as in California, where Attorney General Lockyer brought a public nuisance claim against U.S. and Japanese automakers for making cars with emissions that contribute to global warming. See Complaint, State ex. rel. Lockyer v. General Motors Corp., No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006). As the Michigan Attorney General, who filed an amicus brief in the case stated, "These kinds of determinations are fundamentally political questions that should be addressed by Congress and the executive branch, not the Courts." Assoc. Press, Michigan AG Urges Judge to Throw Out Calif. Global Warming Suit, Jan. 20, 2007.

Public nuisance law is well-reasoned and sound. It has worked well for more than two centuries. Its basic elements should not be abandoned, and the tort converted into a vague and uncertain mechanism of regulation through litigation.

CONCLUSION

Based on the foregoing discussion and authorities, Amici respectfully urges this Court to reject this attempt change the elements and burdens of proof of government public nuisance actions.

Respectfully Submitted,

NATIONAL CHAMBER LITIGATION CENTER, INC.
Robin S. Conrad
Amar D. Sarwal
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337 (Phone)

AMERICAN TORT REFORM ASSOCIATION
Sherman Joyce
101 Connecticut, Ave., N.W.
Suite 400
Washington, DC 20036
(202) 682-1163 (Phone)

SHOOK HARDY & BACON, L.L.P.

By:_____
Robert T. Adams, #34612

Victor E. Schwartz
Philip S. Goldberg
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004
(202) 783-8400 (Phone)
(202) 783-4211 (Fax)

ATTORNEYS FOR AMICI CURIAE
CHAMBER OF COMMERCE FOR THE UNITED STATES OF AMERICA AND
AMERICAN TORT REFORM ASSOCIATION

RULE 84.06(c) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (3) this Brief contains 10, 223, as calculated by the Microsoft Word software used to prepare this Brief.

Respectfully Submitted,

NATIONAL CHAMBER LITIGATION CENTER, INC.
Robin S. Conrad
Amar D. Sarwal
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337 (Phone)

AMERICAN TORT REFORM ASSOCIATION
Sherman Joyce
101 Connecticut, Ave., N.W.
Suite 400
Washington, DC 20036
(202) 682-1163 (Phone)

SHOOK HARDY & BACON, L.L.P.

By:_____
Robert T. Adams, #34612

Victor E. Schwartz
Philip S. Goldberg
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004
(202) 783-8400 (Phone)
(202) 783-4211 (Fax)

ATTORNEYS FOR AMICI CURIAE
CHAMBER OF COMMERCE FOR THE UNITED STATES OF AMERICA AND
AMERICAN TORT REFORM ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk (that the undersigned certifies was scanned for viruses and is virus free) have been mailed, first class mail postage prepaid, on March 7, 2007, to:

Michael Garvin
Suite 200
75 West Lockwood Ave.
St. Louis, MO 63119

Patricia Hageman
St. Louis City Hall
Room 314
1200 South Market St.
St. Louis, MO 63103

Richard Banks
Suite 101
1000 St. Louis Union Station
St. Louis, MO 63103

Steven Kovac
City Hall, Room 314
1200 South Market St.
St. Louis, MO 63103

ATTORNEYS FOR APPELLANT

Jerome Simon
Attorney for Benjamin Moore & Co.
Suite 400
100 South 4th St.
St. Louis, MO 63102-1821

Peter Gullborg
Co-Counsel for Benjamin Moore & Co.
Suite 400
100 South 4th St.
St. Louis, MO 63102

Thomas Dee
Co-Counsel for Benjamin Moore & Co.
Suite 600
190 Carondelet Plaza
St. Louis, MO 63105

Shirley Padmore
Co-Counsel for Benjamin Moore & Co.
Suite 600
190 Carondelet Plaza
St. Louis, MO 63105-3441

Mark Arnold
Attorney for Millennium Chemicals, Inc.
Suite 600
190 Carondelet Plaza
St. Louis, MO 63105-3441

Charles Kohn
Attorney for NL Industries, Inc.
Suite 2410
One US Bank Plaza
St. Louis, MO 63101

Robert Murray
Co-Counsel for NL Industries, Inc.
Suite 2410
One US Bank Plaza
St. Louis, MO 63101

Kenneth Mallin
Attorney for XBD, Inc.
One Metropolitan Sq.
211 North Broadway, Suite 3600
St. Louis, MO 63102

Christopher Schmidt
Co-Counsel for XBD, Inc.
Suite 3600
211 North Broadway
St. Louis, MO 63102

Daniel Carpenter
Attorney for PPG Industries, Inc.
Suite 3600
211 North Broadway
St. Louis, MO 63102

Arindam Kar
Co-Counsel for PPG Industries, Inc.
Suite 3600
211 North Broadway
St. Louis, MO 63102

James Newbold
Attorney for The Sherwin-Williams Company
Thompson Coburn, L.L.P.
One US Bank Plaza
St. Louis, MO 63101-1693

Daniel Cox
Co-Counsel for The Sherwin-Williams Company
Suite 2600
One US Bank Plaza
St. Louis, MO 63101

ATTORNEYS FOR RESPONDENTS

_____
Robert T. Adams, #34612