MEMORANDUM

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TO: Jennifer Gonda
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FROM: Rudolph M. Konrad, Deputy City Attorney

DATE: November 3, 2005

RE: Assembly Bill 778 relating to actions against manufacturers, distributors, sellers, and promoters of products

You have asked the City Attorney to comment on Assembly Bill 778 generally, and to comment specifically about the effect of the bill, if enacted, on the City's lead-based paint lawsuit, *Milwaukee v. NL Industries, Inc.*, et al.

On April 9, 2001, the City of Milwaukee sued producers of lead pigment and paint to pay for the cleanup of houses contaminated by lead paint. The lawsuit was brought against NL Industries, Inc, formerly known as National Lead Company, and Mautz Paint, Inc. (Mautz Paint, Inc., was subsequently acquired by another paint manufacturer.)

Lead poisoning of children is a sever problem in Milwaukee's inner city, where nearly four out of ten inner-city children suffer childhood lead poisoning, which damages their brains and nervous systems. Milwaukee has a program to clean up lead paint in properties located in certain target areas that pose a high risk to children. But at the present, completion of the abatement will take decades, during which thousands of Milwaukee children will be needlessly poisoned. The lawsuit seeks to compel the defendants to pay for an expedited cleanup, compensation and damages.

On September 26, 2003, the trial court dismissed Milwaukee's case because the city could not prove that the particular defendants' (NL Industries and Mautz

Paint) conduct or products were a substantial factor in causing the injury. The court held that the city had not met its burden of proving that, at a minimum, the NL Industries' pigment or lead paint or Mautz's lead paint is present on windows in the target area properties and that their conduct somehow caused the paint to become a hazard to children.

On November 9, 2004, the Court of Appeals reversed the trial court and reinstated the case. The appeals court held that whether the defendants' product and conduct contributed to the harm was a question of fact for the jury to decide.

The defendants petitioned the Wisconsin Supreme Court to reverse the opinion of the Court of Appeals, but the Supreme Court dismissed the petition on August 1, 2005. The case is now pending in the trial court.

While the appeal was pending, the Wisconsin Supreme Court decided *Thomas v. Mallett,* 2005 WI 129, which changed the kind of proof required in lawsuits against the manufacturers of products that are basically the same. The court held that product manufacturers that contributed to the risk of harm should contribute to pay the damages awarded, even if the injured party cannot prove that a particular manufacturer's product caused the individual harm.

Assembly Bill 778, as amended (as of October 31, 2005) provides generally that manufacturers, distributors, sellers, and promoters of a product cannot be held liable unless the injured party proves that the defendant manufactured, distributed, sold, or promoted the product that cause the harm. But in cases where the injured party cannot identify the product, the bill permits the case to proceed against the defendants if certain specific conditions are met. If the injured party cannot prove who manufactured, distributed, sold, or promoted the product that caused the harm, then the defendants, nevertheless, can be held liable if the injured party proves all of the following:

1) no other lawful process exists for the injured party to seek damages;

2) the injury could have been caused only by a product that is chemically identical to the specific product that allegedly caused the injury;

3) the defendant manufactured, distributed, etc., a product that was chemically identical to the injuring product during the relevant production period;

4) during the relevant production period, the defendants named in the action manufactured, distributed, etc, within this state collectively at least 80% of all products that were chemically identical to the injuring product.

The bill further limits liability under the non-identified product provision to products that were manufactured, distributed, etc., within 25 years of the date of injury. The bill also exempts manufacturers from the non-identified product liability provision who manufactured the identical product for less than five years. The bill defined "relevant production period" as the time period during which the specific product that allegedly caused the claimants injury or harm was manufactured, distributed, sold or promoted.

This bill, if passed, would make it extremely difficult, if not impossible, for the city to win its suit against the lead-based paint manufacturers. Lead-based paint has been off the market for the last 30 years. The city's target areas consist of housing stock built between the turn of the century and World War II. When dealing with lead poison, defendants will attempt to prove that products not chemically identical to the lead in lead-based paint, for example, lead found in soil, could have contributed to the injury. Even if all defendants who sold chemically identical products are named as defendants, their collective market share might not have been 80% during the relevant production period because many manufacturers might have gone out of business in the interim and no longer exist.

The City of Milwaukee, therefore, should oppose the bill if its primary concern is the effect of the legislation on the city's lead-based paint lawsuit. But if the city's concern about the lawsuit is secondary to its concern about the effect of the *Mallett* decision on economic development (the rationale of the proponents of the bill), than it will have to take those arguments into account in arriving at its position.

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