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Form CA-43

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October 6, 1999

Alderman Michael J. Murphy
16th Aldermanic District
Room 205 – City Hall

Re: Lead-Based Paint Litigation

Dear Ald. Murphy:

This letter is in response to your letter of January 22, 1999 in which you requested our opinion concerning the feasibility of the City initiating legal action to recover damages from the paint industry for the harm caused to the City by lead-based paint. You pointed out that lead-based paint is a serious health and environmental hazard in Milwaukee, particularly for young children who live in older homes. Even though the use of lead-based paint has been illegal for over 20 years, the City is currently spending public funds to help lead-damaged children, to inspect homes, and to oversee lead-abatement work.

For the past five years, the city of Milwaukee has expended approximately $750,000 to $1,000,000 per year to provide lead-based-paint-related services. The services include inspections, family education, care coordination, and laboratory analysis of lead-level blood tests. In addition, the City has spent a total of $450,000 in 1994, 1995, and 1996 for lead abatement. The City also has spent funds that are received through grants from the state of Wisconsin, the Center for Disease Control, the Department of Housing and Urban Development and the Environmental Protection Agency. Those expenditures, of course, would have been higher had more funding been available to deal with lead-based-paint-related issues.

The harmful effects of ingesting lead-based paint have been known for a long time. Germany banned lead-based paint in the late 19th century. Most of Europe followed in 1921. Lead-based paint has been banned in residential construction in the United States since 1978. The primary cause of childhood lead poisoning in the United States is exposure to lead-based paint in the interior of their homes. The majority of lead pigments, the toxic substance in lead-based paint, was manufactured by nine companies between the 1920's and the 1950's.

Although a number of cities have sued lead-based paint manufacturers for damages incurred by the cities as a result of the use of lead-based paint, no published opinion indicates that any city has obtained a judgment against any lead-based paint manufacturer. In your letter you ask us to examine the legal merits of a lawsuit by the city of Milwaukee to recover the damages caused by lead-based paint.

Most of the suits brought by cities against the lead-based paint manufacturers were brought to recover the cost of removing lead-based paint from property owned by the cities themselves; nevertheless, those suits foundered on various issues, including the difficulty of identifying the actual manufacturer of the specific paint involved. See, for example, *City of Philadelphia v. Lead Industries Association*, 994 F.2d 112 (3d Cir. 1993). The case brought by the city of New York and its housing authority is still pending. *City of New York v. Lead Industry Association*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996).

A lawsuit by the city of Milwaukee to recover lead-based-paint-related costs is problematic, but may be a possible avenue of recovery of lead-abatement expenses. Wisconsin law generally prohibits municipalities from suing to recover the cost of public services, unless authorized by statute. Although municipalities are authorized by statute to sue for damages to abate a nuisance, no court to date has held a manufacturer that was not in control of the product at the time the nuisance occurred liable on a nuisance theory. Most suits against lead-based paint manufacturers have been brought by either injured children or property owners, including cities and housing authorities, for the cost of removing lead-based paint from properties that they owned. The suit contemplated by the City would seek to recover the costs of its lead-abatement program on private property not owned by the City. Those damages might be too remote to sustain a cause of action. Because there is no way to identify the manufacturers of any

specific lead-based paint, any suit would have to include all of the manufacturers and seek to hold them liable under a market-share liability theory, or some other collective liability theory. Wisconsin courts have approved the application of a collective liability theory in a case against drug manufacturers arising out of the ingestion of diethylstilbestrol (DES) during pregnancy, but the Wisconsin theory has not been applied, either in Wisconsin or other states, in other contexts.

PUBLIC-SERVICES RULE

Any tort-based theory of recovery is subject to dismissal simply because it might be viewed as an attempt to recover the costs of a tax-supported public service. "The general rule is that public expenditures made in the performance of governmental functions are not recoverable." *Koch v. Consolidated Edison Co*, 62 N.Y.2d 548 (1984), *cert. denied*, 469 U.S. 1210 (1985). "Governments, to paraphrase the Declaration of Independence, have been instituted among men to do for the public good those things which the people agree are best left to the public sector . . . there remains an area where the people as a whole absorb the cost of such services—for example, the prevention and detection of crime." *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 53-54 (N.J. App. 1976). The rationale for prohibiting municipalities from recovering for the costs of providing governmental services was stated by then-Judge, now Justice, Kennedy in *City of Flagstaff v. Atchison, Topeka and Santa Fe Railway Co.*, 719 F.2d 322 (9th Cir 1983):

> [We] conclude that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence created the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement. This is so even though the tortfeasor is fully aware that private parties injured by its conduct, who cannot spread the risk to the general public, will have a cause of action against it for damages proximately or legally caused. . . . Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government had chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes,

> rather than the court, is the appropriate forum to address such fiscal concerns.

Id. at 324.

Wisconsin follows the general rule. The Wisconsin Supreme Court in *Department of Natural Resources v. Wisconsin Power and Light,* 108 Wis. 2d 403, 312 N.W.2d 654 (1982), and *Town of Howard v. Soo Line Railroad,* 63 Wis. 2d 500, 217 N.W.2d 329 (1974), held that a railroad that negligently caused a fire was not liable under the common law to the municipality for the cost of extinguishing the fire. Any such liability must be imposed by statute. Product liability, negligence, indemnification, restitution, and other tort-based theories, therefore, might be dismissed on the grounds that in Wisconsin a municipality may not sue to recover the cost of tax-supported services, unless a statute specifically provides for recovery. (The state of Wisconsin case against the tobacco companies was brought under § 14.11(1), Wis. Stats., which authorizes the state to sue to protect the rights, property, and interests of the state. *Wisconsin v. Philip Morris et al.*, Case No. 97-cv-328 (Branch 11, March 17, 1998). Cities may recover the costs of certain services to properties—weed control, repair of sidewalks, garbage disposal, etc.—but those costs may only be charged against the property served. §66.60(16), Wis. States.)

The issue raised by the public-service rule is whether lead abatement, testing of children, and treating child victims of lead poisoning is the kind of traditional public services for which there is no public expectation of a demand for reimbursement, or whether it can be classified as a governmental service for which reimbursement is expected. Support for the latter proposition is provided for in *City of New York v. Lead Industry Association*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), where the intermediate appellate court, without discussing the issue, allowed the city and the housing authority to proceed with their case on the equitable theory of restitution to recover costs expended in inspecting, testing, and abating lead-based hazards in city buildings, and in testing and treating of lead-poisoned children.

> A person who has performed the duty of another by supplying things or services although acting without the other's knowledge or consent is entitled to restitution from the other if . . . the things or

> services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

Id. 644 N.Y.S.2d at 922.

Implicit in the court's decision is the idea that when a public service reduces the future liability costs of another person (the paint manufacturers) the city is entitled to restitution for those costs; otherwise, the paint manufactures would be unjustly enriched at the expense of the taxpayer. This idea, if accepted, would provide the basis for an exception to the public-services rule in cases where a wrongdoer is unjustly enriched. The argument, simply stated, is that a person unjustly enriched should not expect the taxpayers to foot the bill. Although the argument is compelling, it has been made before, and rejected before. The public-services rule been applied to bar the recovery of disaster-response costs. D. McIntyre, "Tortfeasor Liability For Disaster Response Costs: Account For The True Cost of Accidents,"55 Fordham L. Rev. 1001 (1987) (arguing against application of the general rule to disaster-response costs).

NUISANCE

Because of the public-service rule, the viability of a suit against lead-based paint manufacturers should be examined also in light of Wisconsin statutes. The Wisconsin nuisance statute provides a possible avenue of recovery. Section 254.01(2), Wis. Stats., defines human health hazard as follows: "Human health hazard" means a substance, activity, or condition that is known to have the potential to cause acute or chronic illness or death if exposure to the substance, activity or condition is not abated. Section 254.58, Wis. Stats., provides that "any city, village, or town may take any action permitted under s. 254.59, may institute and maintain court proceedings to prevent, abate, or remove any human health hazard under s. 254.59 and may institute and maintain any action under ss. 823.01, 823.02, and 823.07." Section 254.59(5), provides that the "cost of abatement or removal of a human health hazard . . . may be at the expense of the municipality and may be collected from the owner or occupant, or person causing, permitting or maintaining the human health hazard . . ." Section 823.01, Wis. Stats., provides that "[a]ny person, county, city, village or town may maintain an action to recovery damages or to abate a public nuisance from which injuries particular to the complainant are suffered, so far as necessary to protect the complainant's rights." Section 823.03, Wis. Stats., provides that the "[p]laintiff in a nuisance shall have a judgment for damages and costs." The fact that

the City does not own the lead-based paint properties is not an obstacle to a nuisance action. In *Town of East Troy v. Soo Line R. Co.*, 653 F.2d 1123 (7th Cir. 1980), the court held that the town was entitled under the Wisconsin nuisance statute (§ 823.01) to recover the cost of remedying ground-water pollution caused by the railroad's negligence, irrespective of the fact that that the town did not own any of the damaged properties.

The critical question concerning a nuisance action is whether the law of nuisance will support an action against the manufacturers of a product. No Wisconsin court has addressed this issue. The courts that have addressed this question have answered that it will not.

> It has been stated that there is "perhaps no more impenetrable jungle in the entire law that that which surrounds the word 'nuisance.' It has meant all things to all people." W. Keeton, *Prosser and Keeton on Torts* § 86, at 616 (5th ed. 1984). One issue on which the courts appear to agree, however, is that nuisance law does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of that product in the building. All of the courts that have considered the issue have rejected nuisance as a theory of recovery in such cases. *City of Manchester v. National Gypsum Co.*, 637 F.Supp. 646, 656 (D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F.Supp. 126, 133 (D.N.H. 1984); *County of Johnson v. United States Gypsum Co.*, 580 F.Supp. 284, 294 (E.D. Tenn. 1984); *Detriot Bd. of Educ. v. Celotex Corp.*, 196 Mich.App. 694, 702-03, 493 N.W.2d 513, 517-18 (Ct.App. 1992). These courts have noted that liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance. Each court found that a defendant who had sold an asbestos-containing material to a plaintiff lacked control of the product after the sale. *City of Manchester*, 637 F.Supp at 656; *Town of Hooksett*, 617 F.Supp at 133; *County of Johnson*, 580 F.Supp. at 294; *Detroit Bd. of Educ.*, 196 Mich.App. at 702-03, 493 N.W.2d 513, 517-18. We believe these decisions are well reasoned, and it seems clear

> to us that USG cannot be held liable to Tioga under traditional nuisance theory.

Tioga Public School District v. U.S. Gypsum, 984 F.2d 915, 920 (8th Cir. 1993) (denying recovery on a nuisance theory to a school district for the cost of removing asbestos-containing plaster used to coat the school ceilings). The court was not dissuaded by the fact that the case was brought under North Dakota's nuisance statute.

> . . . [T]o interpret the nuisance statute in the manner espoused by Tioga would in effect totally rewrite North Dakota tort law. Under Tioga's theory, any injury suffered in North Dakota would give rise to a cause of action under section 43-02-01 regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery. Nuisance thus would become a monster that would devour in one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute.

Id. at 921.

Wisconsin cases applying the nuisance statute all appear to arise in the classic context of a landowner or other person in control of a property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor. See, for example, *State v. Quality Egg Farm*, 104 Wis. 2d 506, 311 N.W.2d 560 (1981). A review of Wisconsin nuisance cases does not disclose any case that extends the application of the nuisance statute to a manufacturer of a product.

The issue was addressed in *City of Bloomington v. Westinghouse Electrical Corp.*, 891 F.2d 611 (7th Cir. 1989). In that case, the city sued the manufacturer of polychlorinated biphenyls (PCBs) (Monsanto) under Indiana nuisance law for damages resulting from the contamination of the city's landfill, sewer system, and sewage treatment plant. The damages resulted from use of chemicals in the buyer's (Westinghouse) manufacturing operations. The court dismissed the nuisance claim against the manufacturer of the PCBs because the manufacturer, at the time of sale, retained no right to control the PCBs beyond the point of sale. The buyer, not the

manufacturer, was in control of the product after purchase and was solely responsible for the nuisance it created by not safely disposing of the product. *Id.* at 614.

DAMAGES

Unlike the city of Bloomington, the city of Milwaukee has not been directly injured by lead-based paint on properties it owns. The city has incurred costs associated with removal of lead-based paint from properties owned by others, and in testing and monitoring children to determine if they have excessive levels of lead in their blood. This fact raises the question whether the city's damages are too remote under the law of damages. Generally, a plaintiff whose claimed injury is remote and derivative may not recover for those injuries. *Holmes v. Securities Investor Protection Corp.*, 503 U.S.258, 268-69 (1992). Any tortious act might cause harm to persons other than the person directly injured. For example, when an employee is injured in an automobile accident, the employer is harmed if the employer must hire a replacement worker at a higher cost. The law, however, has long precluded persons who suffer indirect and derivative injures from recovering those cost from the tortfeasor. "[A] person who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's act [is] generally said to stand at too remote a distance to recover." *Id.* at 268-69, *citing*, 1 Sutherland, Law of Damages 55-56 (1882). This principle was applied to dismiss Milwaukee's suit for damages against mortgage lenders and brokers for allegedly entering into a scheme to defraud the Department of Housing and Urban Development. *City of Milwaukee v. Universal Mortgage*, 692 F.Supp 992 (E.D. Wis. 1988).

CAUSATION

Assuming that the liability of the lead-based paint manufacturers can be established, the problem of identifying the lead based-paint manufacturer that caused the harm will have to be addressed. The inability to meet this proof lead to the dismissal of the city of Philadelphia case against the lead industry. *City of Philadelphia v. Lead Industries Association*, 994 F.2d 112 (3rd Cir. 1993) (rejecting various collective liability theories as a "significant departure from Pennsylvania's traditional requirement that a plaintiff prove proximate case." *Id.* at 126).

Wisconsin addressed the collective-liability theory in *Collins v. Lilly*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied,* 469 U.S. 826 (1984). In a case brought by the injured daughter of a mother who took the drug diethylstilbestrol (DES) during pregnancy, the court held that the plaintiff was not required to prove any facts relating to the time or the geographic distribution of the drug. The court rejected various collective-liability theories and instead allowed the case to proceed against one drug manufacturer, placing the burden on the defendant manufacturer to join the other drug manufacturers. If more than one manufacturer were to be joined in the action, the plaintiff would be entitled to recover from each manufacturer damages proportionate to the jury's assignment of liability under Wisconsin's comparative-negligence scheme. Under the comparative-negligence doctrine, the amount of liability and proportion of total damages is determined in proportion to the percentage of cause of negligence attributable to each defendant.

The decision in *Collins,* however, has not been followed in other jurisdictions and has not been applied in Wisconsin in any other context. Injury from lead differs from injury from DES in two respects. Unlike DES, the symptoms associated with lead poisoning can be caused by other factors. People suffering from lead poisoning have been exposed to sources of lead other than paint. Those distinctions have persuaded one court to reject market-share liability in a case brought against the lead-based paint industry by a plaintiff suffering from lead poisoning. *Santiago v. Sherwin-Williams Co.*, 782 F.Supp. 186 (D. Mass. 1992). The role of the property owner in creating the hazard by not maintaining the property creates an additional causation issue that no market-share liability theory has addressed.

POLICY ISSUES

In addition to the legal issues, there are certain policy issues the Common Council might consider. How will this affect our current efforts at lead-based paint removal, which depends upon the cooperation of property owners? If the lead-based paint manufacturers seek to join the property owners as co-defendants, how will it affect our lead-abatement efforts? Should the City be in court advocating expansive theories of liability when the City itself is the target of many lawsuits, and has the privilege of special defenses under the law?

The issues discussed in this opinion do not preclude the filing of a lawsuit against lead-based paint manufacturers if the Common Council and the Mayor so direct. This opinion describes the state of the law concerning major issues to be addressed in any such litigation. How these legal principles will be applied in the context of any given case cannot be precisely predicted, because the application of legal principles is dependent on the facts of each case. At this early stage of investigation, no one can predict what facts will be discovered in the course of litigation or how those facts will be viewed in the context of the legal principles discussed.

If, after due consideration, the Common Council and Mayor decide to proceed further, we recommend that the City Attorney be authorized to enter into a agreement with a law firm or firms on a contingency basis to further investigate and, if finally deemed appropriate, commence the lawsuit. In light of the many novel and undecided issues that will arise in any litigation commenced against the lead-based paint manufactures, we believe a contingency-fee contract is the best way to proceed, provided we can negotiate a contract that provides for a reasonable fee and allows us to settle upon our terms. We recommend that the following criteria be established to select the law firm or firms: (1) experience in suing lead-based paint manufacturers, (2) capacity to handle time consuming, complex, and innovative litigation. (3) a contingency-agreement proposal favorable to the City. (4) demonstrated ability to adequately address the issues raised in this opinion, and (5) adequate malpractice insurance. Any agreement entered into will, of course, be subject to Common Council approval.

Very truly yours,

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