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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1946-02T3

IN RE: LEAD PAINT LITIGATION

Argued: October 20, 2004 - Decided: AUG 17 2005

Before Judges Fall, Payne and C.S. Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Case Code 702 MT.

Michael Gordon (Gordon & Gordon), Liaison Counsel, and Fidelma Fitzpatrick of the Rhode Island bar, admitted pro hac vice, argued the cause for appellants City of Newark and Township of West Orange (Gordon & Gordon, attorneys); City of Plainfield (Glenn A. Clouser, Michael J. Perrucci, Fischbein Badillo Wagner & Harding and Hobbie Corrigan Bertucio & Tashjy, attorneys); Borough of North Plainfield, City of Gloucester, Town of Phillipsburg, Borough of Collingswood, County of Gloucester (Glenn A. Clouser, Michael J. Perrucci, and Fischbein Badillo Wagner & Harding, attorneys); City of Camden (Fischbein Badillo Wagner & Harding and Morris G. Smith, attorneys); City of Bayonne, City of East Orange, City of Jersey City, City of Linden, City of Passaic, and Town of West New York (Michael P. Burakoff and Jon L. Gelman, attorneys); County of Essex and Township of Irvington (Michael P. Burakoff, Jon L. Gelman, and Bross, Cummings & Periera, attorneys); Borough of Highland

Park, Township of Hillside, Borough of Roselle, Borough of Roselle Park, County of Union, and Township of Union (Michael P. Burakoff, Jon L. Gelman and James J. Plaia, attorneys); City of Union City (Michael P. Burakoff, Jon L. Gelman, and Robert E. Levy, attorneys); County of Cumberland (Basile & Testa, attorneys); and City of Orange (Marvin T. Braker, attorney) (Mr. Gordon, Steven L. Schepps (Gordon & Gordon) and Ms. Fitzpatrick, on the brief).

Ezra D. Rosenberg (Dechert), Liaison Counsel, and Charles H. Moellenberg of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondents Atlantic Richfield Company (Dechert and Philip H. Curtis and William H. Voth, of the New York bar (Arnold & Porter), admitted pro hac vice, attorneys); American Cyanamid Co. and Cytec Industries, Inc. (Klett Rooney Lieber & Schorling, and Richard W. Mark and Daniel T. Thomasch of the New York bar (Orrick, Herrington & Sutcliffe), admitted pro hac vice, attorneys); ConAgra Grocery Products Company (Lowenstein Sandler, and James P. Fitzgerald, of the Nebraska bar (McGrath, North, Mullin & Kratz), admitted pro hac vice, attorneys); E.I. duPont de Nemours and Company (Riker, Danzig, Scherer, Hyland & Perretti, and Steven R. Williams, of the Virginia bar (McGuire Woods), admitted pro hac vice, attorneys); Millenium Inorganic Chemicals, Inc. (Porzio, Bromberg & Newman, and Michael T. Nilan, of the Minnesota bar, Scott A. Smith, of the Minnesota and Indiana bars (Halleland Lewis Nilan Sipkins & Johnson), admitted pro hac vice, attorneys); NL Industries, Inc. (McCarter & English, and Elizabeth Thompson and Andre M. Pauka, of the Illinois bar (Bartlit Beck Herman Palenchar & Scott), admitted pro hac vice, attorneys); and Sherwin-Williams Co. (Herrick Feinstein, and Paul Michael Pohl, Mr. Moellenberg and Laura E. Ellsworth, of the Pennsylvania bar, and James Rue

Wittstein, of the New York bar (Jones Day Reavis & Pogue), admitted pro hac vice, attorneys) (Mr. Rosenberg and John M. Bellwoar (Dechert), on the joint brief).

Drinker Biddle & Reath, attorneys for amici curiae Johnson & Johnson, Pfizer, Inc., and Merck & Co., Inc. (Kenneth J. Wilbur, on the joint brief) and Sedgwick, Detert, Moran & Arnold, attorneys for amicus curiae Bristol-Myers Squibb Company (Michael A. Tanenbaum, on the joint brief).

PER CURIAM

In this mass tort lead-paint litigation, appellants are twenty-six governmental entities. They appeal from an order issued in the Law Division on December 16, 2002, dismissing their complaints filed against various lead-paint manufacturers and distributors, seeking to recover their costs for detecting and removing lead paint; for providing medical care to lead-poisoned residents; and for developing programs to educate residents concerning the hazards of lead paint. The subject complaints allege claims based on fraud, public nuisance, civil conspiracy, unjust enrichment, and duty to indemnify.

The plaintiffs-public entities are: City of Newark; Borough of Collingswood; Borough of North Plainfield; City of Camden; City of Gloucester; City of Plainfield; County of Gloucester; County of Cumberland; Town of Phillipsburg; Township of West Orange; Town of West New York; City of Bayonne; City of Passaic; City of East Orange; County of Essex; Borough of

Highland Park; Township of Hillside; Township of Irvington; City of Jersey City; City of Linden; Borough of Roselle; Borough of Roselle Park; City of Orange; City of Union City; County of Union; and Township of Union. The defendants are: Atlantic Richfield Co.; NL Industries, Inc.; Millenium Inorganic Chemicals, Inc.; The Sherwin-Williams Co.; American Cyanamid Co.; Cytec Industries, Inc.; ConAgra Grocery Products Company; and E.I. duPont de Nemours and Company.

On February 11, 2002, Chief Justice Poritz issued an order of the Supreme Court directing that

> in the matter of all pending and future litigation involving damages or other relief arising out of the manufacture, sale, distribution and/or use of lead-based paint, all complaints that have been filed in the various counties and are under case management or in discovery or awaiting case management and discovery are transferred from the county of venue to the Superior Court, Law Division, Middlesex County (Vicinage No. 8), and assigned to the [toxic tort judge].

On April 17, 2002, the trial court issued case management order #2 providing, inter alia, a filing and hearing schedule on defendants' motions to dismiss plaintiffs' claims. Defendants' motions to dismiss were argued in the Law Division on August 6, 2002. On November 4, 2002, the motion judge issued a comprehensive written opinion, and an order dismissing the

complaints of plaintiffs. The motion judge concluded that local governmental entities are not permitted to sue and recover damages from manufacturers of a legal product deemed to have created a public nuisance. In so concluding, the judge stated, in pertinent part:

> Plaintiffs seek an unwarranted and impermissible expansion of their role as local government entities to act on behalf of the public. Unlike the Attorney General or other appropriate executive branches of the state government, these plaintiffs over step their role and authority by bringing suit against the defendants cloaked under the guise of public interest litigation. Such actions violate the constitutional doctrine of separation of powers and fail under the doctrine of remoteness and existing New Jersey case law.
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> * * * *
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> The parties before this court are currently involved in a health problem affecting not just New Jersey but the nation. The epicenter of plaintiffs' complaint lies with the contemporary use of the common law tort of nuisance. Nuisance, a criminal concept once used in the English court has been transmuted into one utilized in a civil action. The similarities to a criminal case are evident as the focus of the examination lies in the parties' conduct and not necessarily the social deterrence of such actions.
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> The remedial usage of this theory by these plaintiffs is in direct conflict with statutory, constitutional and case law provisions. However, to narrowly examine a [party's] conduct without the concomitant

> considerations of control, causation and duty is insufficient for maintaining the action. To merely cloak the action in parens patriae without having pled a substantial cause of action is impermissible. As currently pled, this court holds that these plaintiffs are prohibited from proceeding with their lawsuits in New Jersey.

On appeal, plaintiffs present the following arguments for our consideration:

> POINT I
> THE APPELLANTS HAVE STATED A VIABLE CLAIM FOR PUBLIC NUISANCE.
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> POINT II
> PROPER STATUTORY CONSTRUCTION MANDATES A FINDING THAT THE LEGISLATURE DID NOT PREEMPT APPELLANTS PROPOSED ACTIONS.[1]
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> POINT III
> THE CLAIMS FILED BY THE GOVERNMENT[AL] ENTITY PLAINTIFFS DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.
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> POINT IV
> THE APPELLANTS' ACTION[S] IN THIS MATTER ARE NOT BARRED BY THE COMMERCE CLAUSE.
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> POINT V
> REMOTENESS IS NO BAR TO THE CLAIMS OF THE GOVERNMENTAL ENTITY PLAINTIFFS.
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> POINT VI
> APPELLANTS HAVE STATED A CAUSE OF ACTION FOR UNJUST ENRICHMENT.

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[1] The issue of preemption was not dealt with nor adjudicated by the trial court; therefore, we decline to address that issue.

POINT VII
PLAINTIFFS HAVE STATED A CAUSE OF ACTION AGAINST DEFENDANTS BASED ON THEIR FRAUDULENT ACTIONS.

POINT VIII
THE APPELLANTS PROPERLY BROUGHT A VALID CAUSE OF ACTION FOR CIVIL CONSPIRACY.

Since the November 4, 2002 opinion issued by Judge Corodemus in this matter, we issued our opinion in James v. Arms Technology, Inc., 359 N.J. Super. 291 (App. Div. 2003). In that case, the City of Newark had brought a products liability action against gun manufacturers, trade organizations, and gun distributors or retailers, seeking to recover the cost of governmental services associated with gun violence. Id. at 303-04. The complaint advanced causes of action for defective and negligent design; failure to include safety devices; failure to provide adequate warnings that guns were unreasonably dangerous; negligent marketing and distribution; negligence in failing to develop safer guns; creation of a public nuisance; unjust enrichment of defendants; punitive damages; and liability under the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1 to -11. Id. at 304.

On motions by the defendants, the trial court in James "dismissed the counts sounding in strict liability and unjust enrichment[,]" but "denied the motion as to the City's

negligence, public nuisance and punitive damage claims[.]" Id. at 304-05. We affirmed, applied the standard applicable to a motion to dismiss for failure to plead a cause of action as articulated in Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989), and ruled "that the City should be permitted to go forward with its claims of negligence, public nuisance and punitive damages[,]" and "reject[ed] defendants' arguments that, based on the pleadings, the City's alleged damages are too remote from defendants' conduct to satisfy the proximate cause requirements as a matter of law[,]" and "their argument that the City's pleadings do not set forth a cognizable claim of public nuisance." James, supra, 359 N.J. Super. at 305.

I.

Here, the trial court correctly acknowledged the relatively low standard that a complaint must meet in order to survive a R. 4:6-2(e) motion. Specifically, the trial court must assume that the complaint's allegations are true, and must give the plaintiff the benefit of all reasonable inferences. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002). The court must search the complaint "in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement." Id. at 250. Thus, the

complaint will be dismissed "only in rare instances," and a court should be even more hesitant to dismiss "when the legal basis for the claim emanates from a new or evolving legal doctrine." Ibid.

Nonetheless, the motion to dismiss should be granted if not even a generous reading of the allegations reveals a legal basis for recovery. Camden County Energy Recovery Assocs. v. Department of Envtl. Prot., 320 N.J. Super. 59, 64-65 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001). The motion may not be denied on the possibility that discovery may establish the requisite claim; rather, that claim must be apparent from the face of the complaint itself. Id. at 64. In James, supra, we applied this liberal standard, concluding that the city should be permitted to go forward with its claims. 359 N.J. Super. at 305, 311.

Here, the trial court perceived three separation-of-powers objections to allowing local governments to sue paint-industry defendants in this context. First, the court found that plaintiffs' action would interfere with remedial processes enacted by the Legislature. The judge observed that the Legislature, through the Lead Paint Statute, N.J.S.A. 24:14A-1 to -11, had established a comprehensive procedure by which lead-paint hazards could be abated. That statute declares that the

presence of lead paint on any surface accessible to children is a "public nuisance," N.J.S.A. 24:14A-5, and confers upon the municipal boards of health the authority to investigate violations and enforce the Act. N.J.S.A. 24:14A-6. A health board's enforcement mechanisms include ordering a property owner to remove or cover the paint, N.J.S.A. 24:14A-8. If the property owner fails to do so, the board may abate the hazard itself and then recover the costs in a civil action against the owner. N.J.S.A. 24:14A-9. Additionally, if the State Department of Health finds that a local board is not enforcing the Act, it may prosecute disorderly persons complaints against violators. N.J.S.A. 24:14A-10.

The trial court also noted that the statute governing local boards of health grants those bodies the power to abate public nuisances. See N.J.S.A. 26:3-46, -50, and -54. Moreover, local boards may also seek an injunction against continuance of a nuisance. N.J.S.A. 26:3-56.

The court further noted that the Hotel and Multiple Dwelling Law, N.J.S.A. 55:13A-1 to -28, and regulations promulgated thereunder, impose a duty on the property owner, but not on the local government, to abate nuisances in multiple dwellings.

The judge also found that, at common law, the Attorney General has the power to sue to abate a public nuisance in cases in which the interest of the public (as opposed to a private party) is at stake.

From the existence of the foregoing statutes and common law, the trial court inferred that the Legislature had intended that lead-paint abatement be performed only in the ways legislatively specified, and that because tort suits by municipalities were not among those enumerated remedies, they were not permitted. The court invoked the principle that a municipality has no powers except those granted by the Legislature or New Jersey Constitution, and that when a state law prescribes procedures for curing local problems, the municipality may not pursue other remedies.

In James, we did not address the issue of separation-of-powers, since there was no statute that purported to address abatement of the hazards associated with handguns.

Here, plaintiffs argue that the trial court misread the Lead Paint Statute, and that nothing in the language of that statute, or in its underlying policy, suggests that an action by a municipality to recover for its own damages was intended to be precluded by the Legislature. Applying the five-part preemption analysis set forth in Overlook Terr. Mgmt. v. Rent Control Bd.,

71 N.J. 451, 461-62 (1976), plaintiffs argue that: (1) this lawsuit does not conflict with the Lead Paint Statute and, indeed, is consistent with it; (2) the statute was not intended to be the exclusive means of abating lead-paint hazards; (3) there is no need for uniformity as to the identity of those who may abate the public nuisance; (4) the statutory scheme is not so comprehensive as to preclude an action by a municipality; and (5) these actions do not represent an obstacle to the aims of that statute.

Plaintiffs also contend that the separation-of-powers clause[2] would not be violated if their action proceeds. That clause is designed to prevent one branch of government from aggregating the powers of another, with the aim of avoiding oppression and despotism by any of the three branches. Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 573 (App. Div. 2000). Nonetheless, the branches should not be treated as "watertight compartments," and the clause "should be flexibly interpreted to

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[2] That clause reads, as follows:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.
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> [N.J. Const., Art. III, ¶ 1.]

encourage a 'cooperative accommodation among the three branches.'" Ibid. (quoting Communication Workers of Am., AFL-CIO v. Florio, 130 N.J. 439, 449 (1992)). Hence, their powers should be deemed "complementary." Bullet Hole, supra, 335 N.J. Super. at 574 (citing Knight v. City of Margate, 86 N.J. 374, 389 (1981)).

A court should intervene to enforce the branches' boundaries only when the fundamental integrity of a branch would be imperiled. Bullet Hole, supra, 335 N.J. Super. at 574. No such peril is at stake here, argue plaintiffs, because this action is in harmony with and complements the Lead Paint Statute.

In response, defendants deny that the trial court rested its decision on a preemption theory. Rather, they contend that the court correctly perceived that the constitutional principle of separation of powers would be violated if plaintiffs were permitted to sue outside the framework of the Lead Paint Statute, which imposes on property owners—not manufacturers and distributors—the responsibility of abating any lead-paint hazards, and which confers enforcement authority on local boards of health, not municipalities. Defendants assert that to permit this lawsuit to continue would "severely dislocate" the remedial structure created by the Legislature.

The fundamental question is, however, whether the existence of the Lead Paint Statute demonstrates the Legislature's intention that no remedies other than those set forth in the statute may be pursued.

The Lead Paint Statute confers upon the municipal boards of health the power to detect and remediate any "public nuisance" caused by lead paint on surfaces accessible to children. It declares any violation to be a "disorderly persons offense," and hence subject to criminal prosecution, and permits a local board to sue the property owner in a civil suit. However, nothing in the Lead Paint Statute purports to limit lead-paint remedies to those specified. Absent such express limitation, courts must assume that the statute was not intended to bar any common-law remedy that is not inconsistent with those authorized in the Act. In Terrace Condo Ass'n v. Midlantic Nat'l Bank, 268 N.J. Super. 488, 500 (Law Div. 1993), the court stated:

> Unless there is a clear legislative expression to the contrary, a statutory right or remedy does not preempt an existing common law right or remedy; but rather, is deemed to be additional to or cumulative of the latter. See DeFazio v. Haven Savings and Loan Ass'n, 22 N.J. 511, 519 (1956); Blackman v. Iles, 4 N.J. 82, 89 (1950); Wildstein v. Tru Motors Inc., 227 N.J. Super. 331, 335 (1988).

See also Aden v. Fortsh, 169 N.J. 64, 85 (2001) ("There is a well-recognized presumption that the Legislature has not acted to adopt a statute that derogates from the common law").

We concur with plaintiffs' contention that to allow their action to proceed would not subvert the goals of the Lead Paint Statute, and, in fact, such action would foster those goals. Each remedial tool looks to different responsible parties. The Lead Paint Statute imposes a duty of abatement on property owners, while this civil action demands that the named paint-industry defendants compensate the cities for their expenditures caused by defendants' creation of a public nuisance. This civil suit can proceed on a parallel track that need not ever intersect with the mechanism set forth in the Lead Paint Statute. The relief demanded in the complaint—funding future programs and compensating the municipalities for their abatement and health-care expenses—would not interfere with the municipalities' ongoing enforcement efforts under the Lead Paint Statute; their boards of health remain free to sue property owners for the costs of removal. And, the State Department of Health may prosecute disorderly persons complaints against violating owners. None of the statute's enforcement tools may be used against manufacturers or distributors. Hence, the two

classes of remedies are complementary, not conflicting or duplicative.

We therefore conclude that the trial court erred in ruling that to permit this action to proceed would offend the constitutional principle of separation of powers by sanctioning a remedial process independent of that created by the Legislature.

The trial court also found that plaintiffs' action contravenes constitutional principles in that it exceeds municipal police powers by infringing on fiscal policy. The court concluded that the Lead Paint Statute restricts local governments' authority to the designated abatement procedures, and that the general "police power" cannot be read to expand those limits. We disagree. In James, supra, we stated in pertinent part:

> A municipality's right to abate a nuisance is derived from its "police power." See Township of Andover v. Lake, 89 N.J. Super. 313, 319 (App. Div. 1965) (it is an entirely proper exercise of police power to protect the health, safety and welfare of local residents by abatement of nuisances); see also N.J.S.A. 40:48-2 (vesting in municipalities legislative police power to adopt ordinances in order to protect the general welfare); Mayor & Council of Borough of Alpine v. Brewster, 7 N.J. 42, 53 (1951) (a municipality's police power to legislate in order to protect the general welfare of its citizens "comprehends the power to make

> such laws effective"). A municipal body also has a common-law right to abate a public nuisance by summary proceedings. Ajamian v. Township of North Bergen, 103 N.J. Super. 61, 72-73 (Law Div. 1968), aff'd, 107 N.J. Super. 175 (App. Div. 1969), cert. denied, 398 U.S. 952, 90 S. Ct. 1873, 26 L. Ed. 2d 292 (1970); Weil v. Ricord, 24 N.J. Eq. 169, 173 (Ch. 1873); see also 6A McQuillin Mun. Corp. § 24.65 (3rd 1997).
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> [359 N.J. Super. at 325 (footnote omitted).]

We find no conflict between the Lead Paint Statute and the general police power; rather, they are in harmony. Both mechanisms authorize different, and complementary, processes to address the same problem. Therefore, the inherent police powers of municipalities to abate a nuisance are unaffected by the Lead Paint Statute.

The third separation-of-powers obstacle found by the trial court was that to permit plaintiffs to sue out-of-state manufacturers would run afoul of the Commerce Clause, U.S. Const., Art. I, § 8, clause 3, which grants to Congress the exclusive power "[t]o regulate Commerce . . . among the several States." The trial court stated:

> In essence, the plaintiffs in this case seek punitive damages in order to punish out of State lead pigment manufacturers for the past sale of lead pigments to paint companies inside the State. They wrongfully seek to regulate lawful conduct occurring outside the borders of New Jersey. The

> governmental entities here may not reach out to other states and impose their policy choices on them. It is for these reasons that plaintiffs' lawsuit is deficient. This court must respect the balance between the branches of government. It cannot act as a superlegislature.

This theory was not raised or addressed in James.

However, plaintiffs persuasively argue that the Commerce Clause is not implicated here because their complaint does not seek to restrict defendants' future sale of paint in or outside of New Jersey, but rather to hold defendants responsible for abating the public nuisance caused by existing lead paint within the borders of their municipalities.

This "Commerce Clause" theory has been rejected in gun-manufacturer cases, in which private persons or local governments have asserted public nuisance claims against gun manufacturers:

> Here, the State's interest in protecting the health and safety of its residents is clearly legitimate, and whatever indirect burden an award of damages to the plaintiffs might have on the defendants, it does not approximate the public interest in protecting the health and safety of California's citizens. In sum, the defendants' Commerce Clause argument is meritless and we reject it.
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> [Ileto v. Glock, Inc., 349 F. 3d 1191, 1217 (9th Cir. 2003).]

And:

> The Commerce Clause is not designed to prevent individual states from protecting those within the state from tortious action by those engaged in commerce whose products or activities put the state's citizens at risk. The Commerce Clause furnishes no defense under the circumstances of the instant case to conduct occurring inside and outside the state that causes a public nuisance within the state; any burden placed on interstate commerce is far outweighed by the substantial positive effect on the New York public's health and safety that more scrupulous supervision of the sale of their handguns by gun manufacturers and distributors would have.
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> [N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 464 (E.D.N.Y. 2003) (citations omitted).]

See also Cincinnati v. Beretta U.S.A. Corp., 768 N.E. 2d 1136, 1150 (Ohio 2002).

Moreover, it is unsettled whether the Commerce Clause, which typically is applied only to state or local legislation, also acts as a barrier to common-law tort suits. Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 254 (D.N.J. 2000), aff'd, 273 F. 3d 536 (3d Cir. 2001). There, the District Court noted the questionable applicability of the Commerce Clause to the public-nuisance action brought by the county against gun manufacturers, while holding that the clause would not be violated by allowing the suit to proceed:

> The Court finds that plaintiff's claims in this case would almost certainly have a negative effect upon interstate commerce, but also that there would undoubtedly be strong local benefits involved if the county succeeded in stemming the tide of gun violence within its borders.
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> [Id. at 255.]

We agree with plaintiffs that the Commerce Clause should not bar their complaint. Indeed, lead-based paint is no longer sold; it has not been sold since 1978. Therefore, even if plaintiffs prevail, defendants' marketing of their current products would not be impaired.

The trial court also ruled that plaintiffs' public-nuisance claim was barred by the "municipal cost recovery" rule, which "holds that a public body cannot recover the cost of governmental emergency services necessitated by a tortfeasor's conduct, absent legislative authority." James, supra, 359 N.J. Super. at 326. The policy behind that rule is that it is part of a local government's function to protect the public against safety hazards, and that any change in that policy must come from the Legislature, not the courts. Ibid.

The trial court found that the municipal-cost-recovery rule would be violated here, since there was no statute that permitted the recovery plaintiffs seek and because that recovery

would conflict with the remedies provided by the Lead Paint Statute. In support of the viability of the cost-recovery rule in New Jersey, the court cited to Township of Cherry Hill v. Conti Const. Co., 218 N.J. Super. 348, 349-50 (App. Div.), certif. denied, 108 N.J. 681 (1987), in which we applied the rule as a bar to a township's negligence action against a construction company to recover its costs for police overtime in dealing with the consequences of a ruptured natural gas main. We cited the "fireman's rule" as a typical application of the bar. Id. at 349.

Distinguishing Cherry Hill both legally and factually, in James, supra, we decided that the municipal-cost-recovery rule should not apply to a claim alleging an ongoing public nuisance of the kind asserted there, stating:

> We respectfully question the continued vitality of Cherry Hill's holding, since it was bottomed on the policy of "spreading the risk" as expressed by the fireman's rule cases. The fireman's rule has now been abrogated by statute N.J.S.A. 2A:62A-21. In any event, Cherry Hill involved a single incident, resulting in a nominal expense to the municipality. We do not accept the proposition that its reasoning should apply in a case such as this, where the City claims a repeated course of conduct on defendants' part, requiring the City to expend substantial governmental funds on a continuous basis. Finally, there is authority for the proposition that the Municipal Cost Recovery Rule does not apply

> to cases, as here, where a municipality seeks to recover damages for the cost of abating a nuisance. [City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co. 719 F. 2d 322, 324 (9th Cir. 1983)]. See also David C. McIntyre, Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents, 55 Fordham L. Rev. 1001, 1023 n. 129 (1987) (and cases cited therein).
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> [359 N.J. Super. at 326-27.]

In James, we further endorsed recent academic criticism of the cost-recovery rule, "given the economic realities faced by cities, and the unfairness of the notion that taxpayers must subsidize the conduct of industrial tortfeasors." Id. at 327. We explained:

> If tortious conduct exists, the consequence is that the gun manufacturers are subsidized for their wrongful acts, and the cost of the governmental services must be borne by the taxpayers of the City. This result is fundamentally unfair, given the City's limited resources and strained ability to provide other essential services to its citizens. Application of the rule also serves as a disincentive; if culpable, the insulated defendants have no reason to obtain liability insurance to cover the cost of their conduct, or to take reasonable measures to eliminate, or at least reduce, the harm resulting from the use of their product.
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> [Id. at 328.]

The rationale in James is persuasive in the analogous context presented here. First, as noted in James, the rule may no longer represent desirable public policy in any context, as it tends to unfairly shield corporate tortfeasors, who are better able to bear the risk of their own conduct. Id. at 327. Second, the fact that the harm alleged here is a public nuisance as opposed to a single injury caused by a single act of negligence distinguishes this case from the other New Jersey cases applying the rule. See Cherry Hill, supra, 218 N.J. Super. at 349; City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 178-79 (Law Div. 1976). In Bridgeton, the court refused to allow a city to recover the cost of assigning firefighters to prevent spread of an oil spill, because fire prevention is one of the traditional functions of government. However, in dicta, the court added that a city should not be "denied recovery for other losses by reason of its status as a municipal corporation." 146 N.J. Super. at 179. Removal of lead paint lies outside the scope of a local government's traditional functions.

Moreover, the municipal-cost-recovery bar, even if viable after the demise of the fireman's rule, has been held to be inapplicable to public-nuisance actions. James, supra, 359 N.J. Super. at 327. In another gun-manufacturer case, the court

observed that, under New Jersey law, the municipal-cost-recovery rule does not prevent a local government from suing for its costs in abating a public nuisance. Camden County, supra, 123 F. Supp. 2d at 265-66.

The trial court also observed that New Jersey courts had limited public-nuisance claims to cases involving impairment of usage of real property, as opposed to harm caused to persons by products. In James, supra, we rejected that premise. 359 N.J. Super. at 329. Rather, we adopted the view: "Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts, § 821B, comment h (1979).

Plaintiffs challenge the trial court's corollary reasoning that their public-nuisance cause of action should more properly be analyzed as a products liability claim. In reaching that conclusion, the trial court relied on the following language from the treatise entitled American Law of Products Liability, 3d, § 27.3 (1987) (footnotes omitted):

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

> nuisance theory for harm caused by a defect in the product. Thus, a products liability action where the harm is restricted to the user of the product, and results from its allegedly negligent manufacture does not give rise to a nuisance cause of action. Similarly, no liability on the ground of nuisance arises from the manufacturer's failure to warn of product-caused dangers.

The trial court also relied on the Third Circuit's rationale in refusing to sustain a public-nuisance action against gun manufacturers:

> Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law "would become a monster that would devour in one gulp the entire law of tort." Tioga Public Sch. Dist. v. U.S. Gypsum Co., 984 F. 2d 915, 921 (8th Cir. 1993). If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity.
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> [Camden County, supra, 273 F. 3d at 540-41.]

The trial court reasoned that lead-paint manufacturers exercised no control over their paint, which was a lawful

product before 1978, once they placed it in the stream of commerce. Hence, they could not be liable under New Jersey's public-nuisance common law. The court also stated that plaintiffs had not sought a remedy under New Jersey's Products Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11.

In James, supra, we rejected a similar argument by the gun manufacturers, distinguishing products liability claims from nuisance and negligence claims, as follows:

> The remaining claims, negligence and public nuisance, do not focus on the design defects of defendants' product or defendants' failure to warn of its dangerous propensities. Rather, the negligence-based and nuisance claims are predicated on defendants' conduct; their purposeful or negligent "feeding" of their product to an illegal gun market. Whether or not the City establishes a prima facie case based on these theories will not, in any way, be based on product liability law.
>
> [359 N.J. Super. at 328.]

However, plaintiffs' complaint, while not alleging that the lead paint was defectively designed or manufactured, does allege that defendants failed to disclose and warn against the known hazards of lead paint. That conduct arguably falls within N.J.S.A. 2A:58C-2b (the product was not safe because it "failed to contain adequate warnings or instructions"). And, the kind of harm claimed by plaintiffs—their costs to detect and remove

lead paint and to provide health care to those injured—arguably meets one of the PLA's definitions of "harm": any "other loss deriving from any type of harm" from property damage or personal injury. N.J.S.A. 2A:58C-1b(2)(d).

Notwithstanding the apparent inapplicability of our reasoning in James, the PLA cannot apply to these facts because plaintiffs' complaint is in the nature of an "environmental tort action," to which the PLA expressly does not apply. See N.J.S.A. 2A:58C-6 ("The provisions of this act shall not apply to any environmental tort action"). The PLA defines "environmental tort action" to mean "a civil action seeking damages for harm where the cause of the harm is exposure to toxic chemicals or substances, but does not mean actions involving drugs or products intended for personal consumption or use." N.J.S.A. 2A:58C-1b(4).

Thus, in James v. Bessemer Processing Co., 155 N.J. 279, 296-96 (1998), the Court held that the PLA did not apply to decedent-employee's suit against his former employer alleging that his cancer was caused by prolonged exposure to the employer's chemical products without the employer's warning him of their hazardous properties. Hence, the plaintiff could resort to common-law actions in negligence and strict liability. Id. at 296. The same conclusion was reached in cases involving

employees' exposure to a fungicide, Macrie v. SDS Biotech Corp., 267 N.J. Super. 34, 39 n.1 (App. Div.), certif. denied, 134 N.J. 565 (1993), and an employee's exposure to a dry-cleaning solvent, Magistrini v. One Hour Martinizing Dry Cleaning, 109 F. Supp. 2d 306, 310-11 n.4 (D.N.J. 2000).

The alleged public nuisance in this case—creation of a toxic hazard causing plaintiffs to incur expenses—qualifies as an environmental tort, in that the cause of the alleged "harm is exposure to toxic chemicals or substances," N.J.S.A. 2A:58C-1b(4). Commentators have suggested that the environmental tort exception would probably exclude from the PLA cases involving environmental exposure to asbestos. William A. Dreier, Eric D. Katz and Hannah G. Goldman, New Jersey Products Liability & Toxic Torts Law, § 1:2-2 at 10 (2003). Lead-paint hazards fall into the same category

The trial court also ruled that plaintiffs had not established the prerequisite element of proximate cause, in that plaintiffs' alleged harms were too "remote" from defendants' alleged misconduct.

"A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts, § 821B(1). To recover for a public nuisance, a plaintiff must allege that the defendant had "control" over the nuisance,

or that the defendant substantially participated in it. Camden County, supra, 123 F. Supp. 2d at 265; James, supra, 359 N.J. Super. at 332. Since public nuisance is a tort, a plaintiff must also establish proximate cause. N.A.A.C.P v. AcuSport, Inc., supra, 271 F. Supp. 2d at 492. See also Restatement (Second) of Torts, supra, § 821B comment b. ("the common law tort of public nuisance still exists").

In ruling that plaintiffs' alleged harms were too remote, the trial court adopted the United States Supreme Court's analysis of proximate cause in the federal antitrust context: there must be "some direct relation between the injury asserted and the injurious conduct alleged," such that an injury is "too remote" when it flows "merely from the misfortunes visited upon a third person." Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 1318, 117 L. Ed. 2d 532, 544 (1992).

The Holmes Court identified three policy reasons for discounting "remote" injuries:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs

> removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.
>
> [503 U.S. at 269-70, 112 S. Ct. at 1318-19, 117 L. Ed. 2d at 545 (citations omitted).]

The trial court found that plaintiffs' alleged costs were "derivative of personal injuries to persons other than plaintiffs" and of "property damage to property owned by persons other than plaintiffs." Thus, ruled the court, the chain of causation was too attenuated:

> In order for plaintiffs to incur the costs for which they now seek recovery, an individual must first purchase lead paint, a city resident must then be exposed to lead paint. If this sequence does not occur, plaintiffs sustain no damages. Therefore, plaintiffs' injury is not direct. The alleged harm to the government entities is entirely contingent on the injury of third parties. Accordingly, as a matter of law, plaintiffs' claims are too remote from the defendants' alleged wrongful conduct to permit recovery.

The trial court found that all three of the Holmes Court's policy considerations compelled the conclusion that plaintiffs'

damages were too indirect to be vindicated in this lawsuit, stating:

> With regard to the policy considerations as expressed in Holmes, the remoteness of plaintiffs' injuries make [sic] it difficult to ascertain the amount of damages attributable to defendant's wrongful conduct as distinct from other factors.
>
> Second, since plaintiffs themselves were not purchasers of lead paint, they cannot identify which defendants' alleged conduct caused lead exposures in their respective towns. Recognizing the plaintiffs' claims would force the court to adopt the complicated rules apportioning damages that the Holmes court rejects.
>
> Finally, the need to grapple with these problems is simply unjustified. The directly injured lead poisoning victims are a more appropriate party to vindicate the law as private attorneys general.

In James, supra, we rejected the gun manufacturers' similar remoteness theory. First, we concluded that the Holmes analysis, which was grounded in antitrust law, "does not fit squarely in a case, as here, involving application of traditional tort concepts under New Jersey law." 359 N.J. Super. at 310. Nonetheless, we found that the policy factors stressed in Holmes were not implicated in James because: (1) at the motion to dismiss stage, the court had to give Newark "the benefit of the doubt" that it could prove that its damages were

attributable to defendants' misconduct, as opposed to other causes; (2) as the only plaintiff was Newark, the court need not devise complicated rules of apportioning damages among plaintiffs at different levels of injury; and (3) no entity other than Newark was able to vindicate the special kinds of damages suffered by Newark. Id. at 316-17.

We also added that proximate cause was not defeated by any doubts about Newark's standing to seek redress for the increased costs associated with the gun manufacturers' maintaining an illegal gun market, stating:

> The City is not asserting the right of a third party; it clearly has a "sufficient stake" in seeking redress for damages to it directly attributable to defendants' conduct. In fact, no other party has a more direct interest in protecting the public fisc than the City itself. Moreover, as previously noted, the expenses incurred by the City are "direct" and independent of the costs of treating the victims of gun violence.
>
> [Id. at 321.]

There, the city's costs were "independent" of the costs of treating victims because some of the costs of preventing, prosecuting and punishing handgun crimes would be incurred even without someone actually being shot. Id. at 322.

Here, plaintiffs are not complaining of wrongs committed against individual victims of lead poisoning, but rather of wrongs committed against themselves as governmental bodies, which they expressly pleaded in their complaints. That defendants' misconduct also harmed individual residents should not preclude plaintiffs from seeking "their own, unique damages."

We recognize that in James there was no claim, as here, for the cost of medical treatment of those afflicted as a result of the public nuisance. However, that distinction does not support defendants' remoteness or cost-recovery-bar arguments. Inevitably, public health problems such as lead-paint contamination and illnesses causally linked thereto require the expenditure of public funds to provide medical diagnostic and treatment services, particularly to members of the public who have no access to health coverage or have insufficient resources to attend to their healthcare needs. In such circumstances, the expenditure of public funds to meet those needs is hardly remote. Moreover, as we noted in James, supra, the municipal cost-recovery bar should not operate to preclude a cause of action where a repeated course of conduct on defendants' part has created a public nuisance that necessitates the expenditure of public funds to abate. 359 N.J. Super. at 326-27.

Moreover, plaintiffs' claimed expenditures do not depend entirely on there being persons poisoned by lead paint. The very presence of lead paint—even lead paint that is never ingested—has purportedly caused plaintiffs to incur costs of removing lead paint and of funding detection and education programs. Thus, the complaint's key proximate cause averment is not only that defendants' wrongful conduct injured residents, which in turn prompted plaintiffs to incur health-care costs. Plaintiffs also allege damages to themselves from, in addition to health-care costs, "the costs of discovering and abating Lead, the expenditure of City funds to detect lead poisoning . . . and the costs of education programs for residents of the City due to the damages present as a result of Lead in the City."

After analyzing the record in the light of the written and oral arguments advanced by the parties, we thereby conclude that the trial court erred in dismissing the public-nuisance cause of action asserted by plaintiffs.

II.

Plaintiffs also argue that the trial court erred in dismissing their cause of action based upon a theory of unjust-enrichment. We disagree.

In count four of their complaint, plaintiffs alleged that they had conferred benefits on defendants by paying for

abatement of lead paint and by incurring the associated health-care costs. Those benefits consisted of allowing defendants, (1) to avoid the costs of the litigation that defendants otherwise would have to defend and, (2) to continue to reinvest their profits from past sales of lead paint. In a related claim, count five, plaintiffs asserted a right to indemnity from defendants for the cost of exercising plaintiffs' non-delegable duty to pay the costs necessitated by defendants' improper conduct.

Unjust enrichment is not an independent theory of liability; rather, it is an element of quasi-contractual liability. National Amusements, Inc. v. Turnpike Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd, 275 N.J. Super. 134 (App. Div.), certif. denied, 138 N.J. 269 (1994). "A party who confers a benefit upon another party outside the framework of an express contractual relationship may seek recovery for unjust enrichment on the basis of a quasi-contractual obligation." Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 143 (App. Div. 2003).

"To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Moreover, the plaintiff

must have "expected remuneration from the defendant at the time it performed or conferred a benefit on defendant." Ibid. The "benefit" need not be in the form of a direct payment to another; it may also take the form of satisfying another's debt or duty, or of saving another from an expense or loss. Restatement (First) of Restitution, § 1, comment b. (1937). And, the benefit must be conferred by the party seeking reimbursement, not by some third party. Eli Lilly and Co. v. Roussel Corp., 23 F. Supp. 2d 460, 496 (D.N.J. 1998).

The trial court dismissed plaintiffs' claim of unjust enrichment on the ground that the alleged benefit to defendants was conferred not by plaintiffs themselves but rather by the State of New Jersey. The court relied on what it perceived as plaintiffs' concession in their motion brief that the funds that they were forced to expend "came from the State's coffers." The court added that there was no direct relationship between plaintiffs and defendants, a prerequisite for a quasi-contract, or unjust enrichment claim, citing to Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109 (App. Div. 1966) ("quasi contract cases involve either some direct relationship between the parties or a mistake on the part of the person conferring the benefit").

On appeal, plaintiffs contend that there is a "direct relationship" between plaintiffs and defendants, in that defendants' creation of the public nuisance caused plaintiffs to spend money to abate the nuisance. They contest the court's premise that the State, not plaintiffs, incurred all costs, insisting that plaintiffs also contributed to the expenditures, and that, but for defendants' wrongful conduct, plaintiffs would have been able to devote their own and the State's contributions to other social services.

Plaintiffs contend that identical claims were allowed in two out-of-state lead-paint cases. In State v. Lead Indus. Ass'n, No. 99-5226, 2001 WL 345830 (R.I. Super. April 2, 2001), the State of Rhode Island filed a complaint similar to the one in this case, seeking recovery for its costs in removing lead paint and providing medical services to the victims of lead-paint poisoning. The trial court refused to dismiss the state's unjust-enrichment cause of action. After setting out the common law of unjust enrichment in Rhode Island, the court summarily ruled that "[i]t is impossible for the Court to determine at this stage that the State's lead-related expenditures have not added to the defendants' . . . advantage or saved them from loss."

Plaintiffs also cite to City of New York v. Lead Indus. Ass'n, 644 N.Y.S. 2d 919, 925 (App. Div. 1996), in which the court denied the lead-paint manufacturers' motion to dismiss the city's indemnity cause of action, in which the city demanded reimbursement for its expenses in removing lead paint from city-owned buildings and in treating children who had suffered lead poisoning. The court reasoned:

> To deny plaintiffs the right to seek recovery of the very substantial sums that they have been caused to expend, in remediating and inhibiting the potential for injury and damages due to defendants' unsafe product, would be to permit the alleged defendant-wrongdoers to be "unjustly enriched" by insulating them, at plaintiffs' expense, from potential tort and indemnity liability that would otherwise have arisen. This is precisely the kind of inequitable result, and unjust enrichment, that an indemnity action is designed to prevent.
>
> [Ibid.]

Defendants argue that under New Jersey case law, plaintiffs' unjust-enrichment claim is unsustainable. They insist that the benefits alleged by plaintiffs are too remote and speculative to trigger recovery under an unjust-enrichment theory. Hence, plaintiffs cannot fairly claim to have "expected remuneration" for that kind of benefit. Thus, in New Jersey Carpenters Health Fund v. Philip Morris, 17 F. Supp. 2d 324, 344

(D.N.J. 1998), the court dismissed an unjust-enrichment count against tobacco companies by employee health funds that had paid medical expenses for employees sickened by tobacco-related diseases, stating:

> The argument that the Funds conferred a benefit on defendants because the defendants may ultimately be found liable for the medical costs that the Funds have already paid . . . is simply too remote and speculative to constitute a recoverable benefit. Every other court to reach this issue has agreed.

See also National Amusements, supra, 261 N.J. Super. at 477-78 ("benefit" was not established by "hypothetical" future savings that defendant might realize).

In an Illinois action by parents of children exposed to lead paint, the appeals court upheld the trial court's dismissal of the count alleging that defendants-manufacturers were unjustly enriched by plaintiffs' paying for assessment and screening of plaintiff's children. Lewis v. Lead Indus. Ass'n, Inc., 793 N.E. 2d 869, 877 (Ill. App. 2003). The court reasoned, as follows:

> In order for a cause of action for unjust enrichment to exist, there must be some independent basis which establishes a duty on the part of the defendant to act and the defendant must have failed to abide by that duty. . . .

> In this case, the plaintiffs do not allege that the defendants were under any independent duty to pay for the screening of minor children for lead-poisoning. Rather, as earlier noted, the plaintiffs merely assert that they paid for medical monitoring made necessary by the defendants' alleged tortious conduct. To accept the plaintiffs' theory of liability would create an action for unjust enrichment in every case where the commission of a tort results in the plaintiff being required to expend funds for which he or she is entitled to recovery.
>
> [Ibid. (citation omitted).]

So too here. Plaintiffs do not, and could not, claim that defendants had the independent duty to pay the costs assumed by plaintiffs. Although plaintiffs may be able to hold defendants liable under a public-nuisance theory, their unjust-enrichment theory provides them no added basis for recovery.

"Restitution for unjust enrichment is an equitable remedy, available only when there is no adequate remedy at law." National Amusements, supra, 261 N.J. Super. at 478. Accord Duffy v. Charles Schwab & Co., Inc., 123 F. Supp. 2d 802, 814 (D.N.J. 2000). Here there is an adequate remedy at law—the public-nuisance cause of action.

It should be noted that in count five plaintiffs asserted a separate cause of action in indemnity, alleging:

78. As a direct and proximate result of the Defendants' conduct, the City was obligated to pay, has paid, and in the future will have to pay for the care of Lead-poisoned children and adults, abating Lead hazards, and other costs associated with the hazards created by the Defendants.

79. The City has a non-delegable legally imposed duty to pay the aforementioned sums even though it did not conduct itself in any wrongful manner in being so obligated to pay and in paying the aforementioned sums.

80. The City's expenditures for the aforementioned sums arose because of the Defendant's intentional and/or other wrongful conduct.

81. As between the City and the Defendants, the obligation to pay for abating Lead hazards, and other costs associated with Lead should be borne by the Defendants.

The trial court did not separately analyze the indemnity claim asserted in count five. Rather, the court applied its unjust-enrichment reasoning as justifying dismissal of both the unjust-enrichment and the indemnity counts.

Defendants correctly observe that plaintiffs "make no argument in their brief (with no requisite point heading) as to why they contend the trial court's dismissal of the indemnity claim should be reversed." Hence, they argue that plaintiffs should be deemed to have abandoned any challenge to the dismissal of count five. See, e.g., Liebling v. Garden State

Indemn., 337 N.J. Super. 447, 465-66 (App. Div.) (noting that an issue not briefed is deemed waived, unless deemed to be an issue of sufficient public concern), certif. denied, 169 N.J. 606 (2001).

Here, plaintiffs brief the indemnity claim for the first time in their reply brief. Normally, an appellant may not raise an issue for the first time in a reply brief. A.D. v. Morris County Bd. of Social Services, 353 N.J. Super. 26, 30 (App. Div. 2002).

However, in considering that argument, we conclude that the trial court properly dismissed the indemnity claim. A party is not entitled to common-law indemnity from another unless it and the other party have been found liable in tort to a third party for the same harm. U.S. v. Manzo, 182 F. Supp. 2d 385, 411 (D.N.J. 2000). Indemnity is a mechanism for shifting the cost of liability from one joint tortfeasor to another. "Generally, common law indemnification shifts the cost of liability from one who is constructively or vicariously liable to the tortfeasor who is primarily liable." Harley Davidson v. Advance Die Casting, Inc., 150 N.J. 489, 497-98 (1997). As we have stated:

> The right of indemnity rests upon a difference between the primary and secondary liability of two persons, each of whom is made responsible under the law to an injured

> party. It is a right which inures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.
>
> [Enright v. Lubow, 202 N.J. Super. 58, 85 (App. Div. 1985), certif. denied, 104 N.J. 376 (1986).]

Here, plaintiffs and defendants have not been named as joint tortfeasors in any action by victims of lead-paint harm. Plaintiffs' attempt to employ the indemnity theory as an independent theory of recovery against defendants for their torts is prevented by our case law. We therefore conclude that the trial court correctly dismissed the unjust-enrichment and indemnity causes of action.

III.

Plaintiffs also argue that the trial court erred in dismissing their cause of action based upon fraud. In their fraud count (count one), plaintiffs alleged that, despite knowing about the health hazards of lead, defendants fraudulently misrepresented to the public the safety of lead, with the intent to induce the public to buy and use lead paint. Plaintiffs assert that the result was to create "a false sense of security in the public regarding the safety of Lead and its

use." The complaint charged that defendants engaged in this fraudulent conduct both "individually and in concert."

In the factual-allegations portion of the complaint, plaintiffs set forth excerpts from defendants' advertisements and publications in which they either affirmatively or by omission represented to the public that lead paint was safe. They further alleged that, "Beginning in at least 1904, Lead was recognized by the Defendants and members of the medical and scientific community, but not the general public, as a source of childhood lead poisoning." They attributed to defendants a purpose of concealing the hazards from "local, state and federal regulators," in order to avoid regulation of lead.

The trial court read the fraud count as asserting alternative theories of recovery: common-law fraud and "fraud on the market." The court noted that common-law fraud demands five elements of proof: (1) a misrepresentation of fact; (2) defendants' belief in its falsity; (3) intent that another person rely on it; (4) reasonable reliance by that other person; and (5) resultant damages. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). The court ruled that plaintiffs' common-law fraud theory was deficient because the complaint failed to allege that plaintiffs themselves, as

opposed to "the public," received defendants' misrepresentations and relied on them to their detriment.

With respect to the theory of "fraud on the market," under which a plaintiff is excused from proving direct reliance by an individual plaintiff, the trial court observed that our Supreme Court has expressly declined to apply that theory in New Jersey, citing to Kaufman v. i-Stat Corp., 165 N.J. 94 (2000). The court reaffirmed that "New Jersey plaintiffs seeking to prove common law fraud must demonstrate direct reliance."

Plaintiffs argue that the court erred by requiring direct reliance, stating that the Court in Kaufman acknowledged that indirect reliance may be sufficient to satisfy the reliance element of fraud, by stating:

> Indirect reliance allows a plaintiff to prove a fraud action when he or she heard a statement not from the party that defrauded him or her but from that party's agent or from someone to whom the party communicated the false statement with the intention that the victim hear it, rely on it, and act to his or her detriment.
>
> [Id. at 108.]

As defendants correctly note, however, even when a plaintiff received indirect notice of the alleged false statement, the plaintiff still must plead that he or she actually relied on that statement. Thus, in Kaufman, the Court

explained that "this Court's standard for reliance, even indirect reliance, requires that the plaintiff have actually relied on the misstatement, i.e., that the plaintiff actually received and considered the misstatement or omission, however indirectly uttered, before he or she completed the transaction." Ibid. The Court added: that "[t]he actual receipt and consideration of any misstatement remains central to the case of any plaintiff seeking to prove that he or she was deceived by the misstatement or omission." Id. at 109.

The failure to plead reliance by individual plaintiffs has been deemed fatal to fraud causes of action in three lead-paint cases brought by individual victims of lead poisoning. See Lewis, supra, 793 N.E. 2d at 876; Brenner v. American Cyanamid Co., 732 N.Y.S. 2d 799, 801 (App. Div. 2001); Jefferson v. Lead Industries Ass'n, Inc., 106 F. 3d 1245, 1254 (5th Cir. 1997). In Lewis, supra, 793 N.E. 2d at 876, the court dismissed a fraud count because "[t]he plaintiffs do not allege that they exposed their children to lead-based paint in reliance upon any statement made by any of the defendants, nor did they allege that the defendants' failure to disclose any fact caused them to expose their children to lead-based paint."

Here, plaintiffs failed to plead that they—as individual municipalities—received, whether directly or indirectly, any of

defendants' alleged misrepresentations, or that they relied on them in any way. Rather, it was "the public" that plaintiffs alleged was misled by defendants' statements. In their brief, plaintiffs concede that defendants' alleged misrepresentations "were always targeted toward consumers of their products." Plaintiffs were not the "consumers"; their self-appointed role in this case is as the ameliorators of the deleterious effects suffered by the consumers, who were the victims of lead poisoning and owners of buildings covered with lead paint. Thus, the trial court correctly dismissed the common-law basis of plaintiffs' fraud theory.

In the alternative, plaintiffs urge that this court should adopt, for the first time in New Jersey, the "fraud on the market" theory, by which reliance by individual plaintiffs may be presumed. That theory evolved in federal securities cases as a mechanism for allowing class actions by those who purchased stock on the basis of attractive prices that had been artificially lowered by the issuers' false representations. While such purchasers do not directly rely on the misrepresentations, they do rely on the resulting lower prices; hence that indirect reliance satisfies the reliance element of a fraud cause of action. Kaufman, supra, 165 N.J. at 97, 101.

Plaintiffs disagree that the Kaufman Court "completely foreclosed from future use" the theory of "fraud on the market" in order to excuse a failure to prove actual reliance on a misstatement. They point to the Court's dicta as leaving open the possibility that the theory might be tenable under the right circumstances:

> We . . . leave to another day whether in a proper case we would accept use of a theory akin to fraud on the market if it were possible to determine reliably through such a theory that an unheard misrepresentation, in fact, was the factor inducing a fraudulent transaction.
>
> [Id. at 117-18.]

Plaintiffs contend that the "another day" posited by the Court has now arrived, and that the Court "would be comfortable" in applying this theory to this case.

To the contrary, the Kaufman Court went on to express its caution against expanding the theory beyond its original context of federal securities law. Id. at 118. Thus, it refused to accept "fraud on the market as proof of reliance in a New Jersey common-law fraud action." Ibid. In a recent case, New Jersey's federal district court read Kaufman as evidencing our Supreme Court's antipathy to using the fraud-on-the-market theory outside the context of securities fraud. Brown ex rel. Estate

of Brown v. Philip Morris, Inc., 228 F. Supp. 2d 506, 518 (D.N.J. 2002).

As defendants note, other jurisdictions, in unpublished decisions, have rejected the fraud-on-the-market theory in lead paint cases. See Coleman v. Danek Medical, Inc., 43 F. Supp. 2d 629, 635 n.4 (S.D. Miss. 1998) ("no court has ever adopted a 'fraud on the market' type theory outside the securities fraud context").

Therefore, we conclude that the trial court correctly granted defendants' motion to dismiss the fraud count.

IV.

Plaintiffs also argue that the trial court erred in dismissing its cause of action based on allegations of a civil conspiracy. Plaintiffs alleged, in pertinent part, that "[d]efendants knowingly, willingly and wantonly combined and agreed with one another to conceal the known hazards of Lead, to mislead the public and the government as to those hazards, and to market and promote the use of Lead despite such knowledge of the hazards."

The trial court ruled that a cause of action for civil conspiracy is not an independent cause of action; rather, it depends on the existence of an underlying tort. See, e.g., Farris v. County of Camden, 61 F. Supp. 2d 307, 326 (D.N.J.

1999) (under New Jersey law, civil conspiracy is not an independent cause of action; it is a mechanism for expanding liability in the event that the plaintiff can prove the underlying tort); Board of Educ., Asbury Park v. Hoek, 38 N.J. 213, 238 (1962) ("The gravamen of an action in civil conspiracy is not the conspiracy itself but the underlying wrong which, absent the conspiracy, would give a right of action").

In lead-paint cases in other states, courts similarly have required an actionable tort in order to justify a civil-conspiracy claim. Lewis, supra, 793 N.E. 2d at 878; Brenner, supra, 732 N.Y.S. 2d at 800.

Citing the conspiracy allegations of the complaint, the trial court observed that "[t]he underlying wrong which gives rise to plaintiffs' claim for civil conspiracy is plaintiffs' fraud claim." However, because the court had ruled that the fraud claim was unsustainable, it concluded that the civil-conspiracy claim "fails as well." We agree. The fraud cause of action is the only one of the four other counts (fraud, public nuisance, unjust enrichment, indemnity), that could qualify as a tort underlying the civil-conspiracy allegation. Only the fraud theory encompassed the kind of misleading conduct as to which defendants were alleged to have conspired. Thus, the key conspiracy charge was that defendants knowingly conspired to

conceal the hazards, to mislead the public, and to promote the use of lead. That behavior, minus the conspiracy aspect, also formed the basis of the fraud allegations. None of the other three theories of recovery depended on any intentionally misleading conduct. Therefore, the trial court properly dismissed the conspiracy claims.

In summary, that part of the order issued on December 16, 2002, dismissing plaintiffs' public-nuisance cause of action, is reversed and the matter is remanded for further proceedings. In all other respects, the December 16, 2002 order of dismissal is affirmed.