Richard Epstein: My name is Richard Epstein and I'm here to talk about a recent case that has been brought by two major companies, Sherwin-Williams and ConAgra, against the state of California dealing with the problem of public nuisance. When I say the case is brought against them, it's actually an invert. There was a suit which was brought in California by the people against both of these companies, claiming that they were responsible for the cleanup charges in all residences built with lead paint made by any party at any time before the year 1951. The alleged theory on which this rested was a theory of public nuisance law. And a particular version of public nuisance law that was urged in this particular case, was that the situation arose because these two companies had either directly, or through their trade associations at some point before 1951 promoted the use of lead paint. There were several circulars that were sent around to sell the paint in 1904 and the trade association was active in the late 1930s.

The remedy in this case was that the companies were to pay for a fund. The fund was to find various houses that were contaminated with lead paint in this particular period and then to clean them up. The estimated cost of this particular remedy is in the neighborhood of one billion dollars, perhaps more. The case only covered eight counties in California. So if this thing were to go national, it would obviously multiply. That's actually what is happening.

The question then is, what happened inside California? The Intermediate Court of Appeals approved this particular theory after it had been given down below. The California Supreme Court refused to review it in its own discretionary jurisdiction by a vote of four to two. The case now is going before the Supreme Court, the two companies hope, on a writ of certiorari. There are two theories involved in this case. I'm not going to bother to distinguish between the two companies and what they said.

There was a previous press conference in which Michael Carvin and Paul Clement, who are the ablest appellate lawyers in the United States, represented their respective companies on these things. What I'm going to try to do is, since that original tape was lost, is to give some kind of an amalgam of what has happened.

The reason that I got involved in this case, I was asked to write a pro bono brief on behalf of several law professors, explaining why it was that the Supreme Court should take this case up. And I was more than glad to do so because I think that the decision of the California court below, was a serious miscarriage of justice and if imitated in other cases, holds the possibility of holding any company that made anything at any time liable for any damages in any court. That's a rather extreme statement. I think it's important to explain how it is that it actually bears some truth in this case.

To understand what's going on, when you're seeking certiorari in the United States Supreme Court, it is not sufficient to show that an opinion was simply egregious violation of state law. What one has to show in addition to that, is

that there were several important issues that are protected under federal constitutional law that were violated by the judicial system. This happens in many cases. The most famous case in defamation law, for example, was the case of New York Times against Sullivan, in which the issue was whether or not the State of California could [inaudible 00:04:07] the New York Times of five hundred thousand dollars in damages in a number of cases in which advertisers were published in the paper, which was said to disparage Mr. Sullivan, who was the commissioner of the police at that time. And the Supreme Court said, "No, you cannot do that. Because it turns out that the definition of defamation that you're using under state law is so broad and utterly inconsistent with the first amendment. That, in fact, it is a violation of federal constitutional law."

There was no statute involved in that case, but there was a clear notion that the first amendment clearly applies not only to the congress, not only to state legislature, but also to judicial behavior. Just that kind of approach is absolutely appropriate in this particular case and so let me now mention what the two theories are.

One of the theories in question is that you cannot bring a case with respect to speech unless you can show that it falls within one of a series of very narrow categories of speeches, which are in fact, to be actionable given the Constitution. Thus, it's been long held, say for the last 30 or so years, that in the federal situation, if you wish to sue somebody for a sales or an advertisement, what you have to do is to show that it was false and misleading in some particular way, which is, you have to show that to some extent it involves a misrepresentation. If you can show that kind of misrepresentation, then what you're doing, is you're just punishing ordinary speech and it takes a very powerful justification for that, none of which is generally supplied.

The second one of these claims is a claim that has to do with the question of whether or not there's been a taking of private property without due process of law. The due process of law [inaudible 00:05:48] enigmatic, but it is long been held to mean that is involved whenever the government takes property from you without just compensation, or by the use of procedures that are so far off base that it's quite clear that a massive shift in wealth is going to take place, via the application of skewed and biased kinds of rules.

It turns out, therefore, that even though state law torts are not normally reviewed by these federal courts under constitutional issues, if it turns out that you don't get a situation in which you have some kind of predicate offense which you're going to post the liability, then you're involved either with a naked restriction of freedom of speech on the one hand, or a naked expropriation of property on the other. So it is very important to examine the kinds of theories that could be used in order to support the result that was done below. What happens in this particular case, none of the possible grounds for imposition of liability are remotely satisfied under these circumstances.

To put the thing in slightly more vivid, or precise form, there are four possible ways in which you can start to look at this case. First of these ways is to actually look at the question of promotion, which was the theory that was explicitly used to create a public nuisance. Then, once that's done, it's important to see why this case failed as a traditional public nuisance case, why it fails as a product liability case, and why it also failed as a misrepresentation case.

To begin with the promotion theory, there actually is a brand of liability under product's liability, that deals with promotions. To be more precise about it, it's a field that deals with over promotion. If you have a particular product that you're targeting to a particular audience, and you engaged in an advertisement campaign which suggests that this thing is suitable for certain kinds of purposes, for which it is not ideal, the constant repetition of the campaign can in rare circumstances, create liability. The theory being that the barrage of advertisements is so overwhelmed, the consumer in this particular case, to whom all these advertisements were targeted, that some form of relief has to be made.

So if there's a drug like Vioxx for example, which is generally supposed to be used in serious clinical situations where there's perhaps been a surgery, maybe blood clotting, or to treat major degrees, to publish this as a drug that you ought to use just to make yourself feel better, or more comfortable after exercise, could be regarded as a form of over promotion.

It's quite clear that the promotions involved in this particular case bear no relation whatsoever to the over promotion theory that surfaced in the 1970's. The first thing, is there was no over promotion. There were a couple of promotions to people who were not going to use the product in any way, and what the promotion said was lead paint is easy to apply and it looks well. There was no effort to try to push it for a useful, which it was not appropriate at the time, there was no suggestion that the use of lead paint was illegal, it was widely understood, and still understood today, that properly applied and maintained, lead paint is superior to virtually every other kind of paint that happened. There were no health claims that were made in any of the advertisements, there was nothing targeted to consumers in order to influence their behavior.

So this promotions theory has absolutely nothing to do with the over promotion theories, which had had some kind of a tenuous hold in modern product liability. You cannot simply get rid of all of the essential elements of that particular tort, and now hold somebody responsible for truthful advertisements made to unrelated third party 100 years ago, 80 years ago, and so forth, and that's what this particular promotion theory is designed to do.

The second kind of liability that's being imposed in this particular case talks about the law of public nuisance, but it turns out that the California court misapplied and misunderstood the tort of public nuisance, which has been

around for a very very long time. It's origins dating back in fact to about 1535, in an English case which states the law pretty much in its final form. So what is a public nuisance? Well, the first thing is it's in contrast to a private nuisance.

How do we distinguish between the two of them? Well, a public nuisance essentially involves some kind of wrong against a public body. That is a waterway, or a public highway, and what that wrongdoer does is, for example, is to create an obstacle on a public highway so that traffic cannot go through and vote, digging a hole, putting some kind of a rock or something in the middle of the road. Public nuisance with respect to public waters involves a case in which you, for example, would nick pollutions into the river, which leads to a buildup of algae, kills the fish, makes it impossible to navigate the river, or something of the sort.

It's very clear that a public nuisance is governed by the same principles that govern private nuisances, but a private nuisances are the kind of emissions or disruptions that take place with respect to private property. In this particular case, the plaintiff's waived the argument that they're making a private nuisance case, that they know they cannot establish any damages, but what they do, is they simply re-label a private nuisance case as though it's a public nuisance case, because they're still alleging that there are damages to a series of private homes that the defendants have to do. But if you have 100 private homes, that's not one public nuisance, it's simply 100 private nuisances, all of which require that you make the same showing of actual damages.

If you now look at this as though it's a public nuisance case, and you ask yourself, "Well, what is the public body that has been harmed?", that answer is there has been none, and so you don't even have to get to the remedial stage. In fact, if you did get to the remedial stage, what happens is, if there's somebody who is a special subject, with a special injury from the public nuisance, that is somebody who runs up against the blockade, somebody who's own fish that happened to be killed in the river, they may be able to get private damages, special damages they're called, but if it just turns out it's a diffuse harm, the appropriate response is always been to have the government fine the defendant by some amount that roughly compensates for the particular loss, and then spend it to remediate the nuisances.

Since they haven't identified any public harm whatsoever, to a public river, to a public land, the thought that this is a public nuisance case is wrong. The over promotion theory isn't available. The promotion theory therefore fails as well. If you fail on this particular theory, the question is, can you then try and rest this case on the grounds that, since paint is a product, that you could call this a product liability case of some form or other. The answer is, you cannot do that either. If you're dealing with a case in which you're talking about a product liability situation, the central concept is that you must show that the product has been defective before it enters into the stream of commerce, and that in its

defective condition it was used in ways that harm certain kinds of individuals, either in their person or in their property.

There is no allegation of defect in this particular case that meets that situation, because there is no claim that any of the products that were sold, were sold by the defendants in these cases. In order to make a good kind of product liability case, the typical way is that...what you do is sell something, say some food, and it contains contaminations. When people eat it in its original condition, they suffer some kind of an illness. The fact that the manufacturer did not sell the good directly to the consumer is generally regarded as irrelevant. The so called privity limitation no longer applies, and it turns out that the consumer can sue the manufacturer, at least so long as the product is in its original condition or its original container.

Modern law has rejected some of the limitations on the earlier product liability case, but they all require that a product in a defective condition stem from the action of the defendant, and here there's no claim that the defendant sold any kind of product at all. So the thought that this is a product liability case is also completely inadequate under the circumstances.

So the last potential theory of liability is a theory of misrepresentation. That's the argument that you said something false, the false statement was material, that false material statement was something on which other individuals relied, and when they relied upon it, they acted in ways that came to their detriment. So the various elements associated with fraud are five. One has to be a known misrepresentation, two the statement has to be false, three the statement has to be material, four somebody has to rely on that statement, and five there has to be damage.

The difficulty with the misrepresentation theory is that you miss on all five points. For the first thing, there's no allegation of fraud whatsoever. This was not a case in which there was an effort to conceal some kind of a danger associated with lead paint. Indeed, at the time of these representations, lead paint was the preferred vehicle, and places like the state of California itself, commonly used and commonly endorsed the use of lead paint. It was only years later when people realized that lead paint, or lead generally, could result in lead poisoning, that people began to tamp down on it. It was a very successful public health program, want to take lead out of gasoline so that children would not eat it when they started to play in their driveways. They took it out of exterior paint, and they took it out of interior paint, one way or another, as the risk became larger, the behavior started to change, which is exactly what you want in these circumstances.

So there's no element of fraud, and come to think of it, there's no element of misrepresentation at all, because there was no claim expressed or implied, about any health issues, and these claims were not made to any of the people actually used it or relied on this statement. There was no element of reliance at

all, and there was no claim of materiality in this particular thing, and there's not claim of individual damages. So what the promotion theory is designed to do, is to allow for another circumvention of the misrepresentation theory, the product liability theory, and the public nuisance theory.

So you put this all together and what's the kind of situation that you come up with? Let's suppose we have a piece of legislation that read as follows, "The state of California hereby declares that all lead paint was, and was always known to be, a danger, and we hereby impose on all the manufacturers of lead paint in the year 1900, liability for x billion dollars." Somebody would look at that statute and say, "This is not an effort to hold people responsible for the things that they did wrong. This is an effort to simply tax one group of individuals to engage in what you think to be an appropriate public health project." You can't simply target people like that, unless you can show that they're somehow responsible for it, and you can't show that they're responsible for it unless you have some viable theory of liability and the four theories already mentioned: over promotion, public nuisance, product liability and misrepresentation, all float.

So this is no more than a simple declaration. We want to basically make you pay a billion dollars in order to clean up lead paint. There is a procedure for doing that, if one thinks it to be a health hazard, and that's to impose a general revenue tax. Yet if you were to ask the state of California, given its financial situation, would you spend a billion dollars of your own money in this vain quest to try to find some buildings that are at least 70 years old, in which there is lead paint, which caused danger in its original condition? The answer is most people would regard that as a huge waste of money.

When you put a contingency lawyer on the situation, then it will get one-third of the findings, or the recovery, and they will then take that kind of an inquiry, perhaps use the money in passing for other kinds of purposes, and it turns out to be a complete misallocation of resources. So the correct answer in all of these cases, is if you think there is a public health hazard, broadly defined, the correct way to deal with that is with a tax, broadly based, in order to counteract the situation.

If this particular decision is allowed to go through, what will happen is that that sensible principle of public finance will no longer be the case. It is therefore absolutely imperative in all cases like this, that some stop be put to these types of behaviors. As I've already mentioned, the United States Supreme Court has already intervened in defamation cases, states cannot gin up liability where none exists. It has already intervened in misrepresentation cases. You cannot punish truthful statements. It surely should intervene in public nuisance cases, because it is not possibly to simply make a nuisance by declaring something to be such. Indeed, when I think about it, that has also happened in the first amendment area. There've been a number of cases in which, there's alleged for example, the showing of movies in an outdoor amphitheater, is a public

nuisance, and the Supreme Court has always responded, "You cannot define public nuisance willy nilly, to the extent that you're dealing with freedom of expression." What you'll have to do is give a standard [inaudible 00:18:50] and that's going to force you back to the common law rules.

Essentially what happens is, the usual statement is, that the federal government does not concern itself with state tort law, but only with larger principles, but in fact that's not quite right. What it surely does, is it always concerns itself with the extreme variations of state tort law, that represent a genuine encroachment, either to properties or liberties, that's what's happened in this case. There's no reason why the United States Supreme Court should intervene on constitutional grounds, to figure out where the burden of proof lies on contributory negligence, and it generally will not do so...but where there's a gross deviation which sweeps away every single constraint against liability that the common law has imposed, then it's appropriate for the federal government to intervene, when the state government does not. That's the purposes of these lawsuits.

It is in my judgment, extremely important that the United States Supreme Court take up this case. That's why I was prepared to write this pro bono brief, in order to call attention to what I think is an extremely dangerous trend, in which when people are frustrated by legislation, what they do is they turn to the courts to create fabricated theories of liability that have no intellectual substance behind it.

So my name is again, Richard Epstein. I did write this particular brief, and I very much hope that the United States Supreme Court will hear this case. I think in this particular instance, I'm speaking as well for Michael Carvin and for Paul Clement, who wrote the two splendid briefs on the petition for certiorari. Thank you, and goodbye.