Dean Reuter: Welcome to the Federalist Society's Practice Group Teleforum conference call. Your telephone has been muted until the question-answer portion of the call. Please hold, and we'll begin the call momentarily.

Welcome to the Practice Group's Teleforum conference call as today we give an update in lead paint litigation. I'm Dean Reuter, general counselor, vice president, director of Practice Groups here at The Federalist Society. We're very pleased to welcome two experts to Teleforum today. We'll hear in order from each of them.

Erin E. Murphy is a partner at Kirkland & Ellis. I should mention that Kirkland & Ellis is also representing ConAgra Grocery Products in litigation. And then we'll hear from Michael Carvin. He's a partner at Jones Day, and the Jones Day firm is representing the Sherwin-Williams company in litigation.

We'll get about eight to ten minutes of opening remarks from each, maybe a little bit of back and forth. But as always, we're looking for questions from the audience, so please have those in mind. I think we're going to hear first, as I mentioned, from Erin Murphy, who's going to talk about due process, then Mike Carvin on First Amendment and related issues. With that, Erin Murphy, the floor is yours.

Erin Murphy: Thanks so much, and thanks everybody for joining us today to hear about this case in which Mike and I both have companion petitions pending for the court on some really important issues. This is really important and not just because of this case, which is certainly an important and consequential one in its own right, but because it has extraordinary consequences and potential to impact class and mass litigation and public nuisance litigation all throughout the nation and in a wide variety of industries.

This particular case is one that arises out of efforts to bring litigation against lead paint manufacturers or, in my client's case, someone who bought a company that long ago used to manufacture lead paint. And basically, what the litigation began as is an effort by several counties in California to figure out a way to hold the lead paint industry responsible for remediating all potential injuries and everything that might relate to lead paint within the counties.

This lawsuit kind of came on the heels of several decades of efforts by plaintiff's lawyers to figure out a way to bring cases against the lead paint industry, and these cases just consistently didn't work. Courts rejected them time and again because they suffered from all sorts of problems when you try to bring traditional tort law claims or class action claims here for a variety of reasons. One being that lead paint hasn't been sold commercially or residentially for decades, and so any lead paint that is the subject of these lawsuits is lead paint that has presumably been around for long before anybody tried to bring any of this litigation, which means people don't know who bought it, when it was put

there, who manufactured it, who it was purchased from. All the basic facts that you would need to have to bring a traditional tort law claim.

And on top of that, you have all sorts of regulatory efforts that have gone on for some decades now around lead paint that hold various different people responsible for remediating lead paint and puts that responsibility on landlords, on property owners, on folks other than someone who may have manufactured and sold lead paint half a century ago. So what you saw was courts for quite some time rejecting these claims and saying, "This just doesn't work under basic traditional principles of any sort of tort theories that you might try to use to bring class or mass litigation."

So along came this case. And with the assistance of some private claims lawyers, some counties in California managed to convince the California courts to come up with what is really a very broad, expansive, and completely foreign to traditional concepts theory of public nuisance laws. And essentially what the state courts said is, "Well, we realize that there is a problem with having you identify actual homes with actual lead paint that was sold by any particular manufacturer or for whom any particular manufacturer actually bears responsibility, so we're going to relieve you of the obligation to prove any of those things. Instead, we're going to deem the injury here just the single indivisible injury of the bare existence of any deteriorating lead paint anywhere in the county."

And effectively, the courts just presumed that of course there must be some lead paint somewhere in the county. Indeed, the trial court here actually precluded the defendants in the case from even trying to take discovery and go figure out where there might be homes and if they actually had lead paint that was deteriorating and, if so, how long it had been there and who really bore responsibility for it.

So you started out with the court basically presuming that there was an injury, and then the court said that all that needed to be proven to hold the defendants, the lead paint manufacturers here, jointly and severally liable for remediating all deteriorating lead paint anywhere in the counties was that through their efforts to promote lead paint at some point in history, here principally a few instances early in the first half of the 20th century, so you're talking over a hundred years ago, as long as those efforts played some small role in causing anyone out there ever to maintain lead paint and played any small role in the existence of any lead paint in the county, then the defendants could be held jointly and severally liable for remediating all of the lead paint in each of the counties that brought this litigation.

Unsurprisingly, that wasn't a difficult burden for the plaintiffs to satisfy in these cases because they essentially had to prove nothing. They put on no evidence of any particular homes or any particular structures that had lead paint. They conceded that they had no evidence of any particular individuals who ever

relied on any particular promotions by any defendant as to lead paint at any point in history. And they didn't make any effort to really tie anything that was supposedly the wrongful conduct here to any individualized injury. So what you end up with is basically a theory of public nuisance under which if you hear marketed a product that has caused some sort of public problem, you can be held responsible for remediating the entirety of that problem.

And what this really ends up being is, in our view, a massive due process problem and also, as Mike with talk in more detail about, in this particular case, so now it's a First Amendment problem. But to focus a little bit on the due process problem, what you essentially ended up with was a theory of liability under which you barely have to prove injury, and you don't have to prove it in any individualized sense. You don't have to prove any theory of individualized causation. And ultimately, it's not even clear what damage there is to be remediated. Indeed, the ultimate money that the defendants were ordered to pay here was to be paid into a fund for the defendants to go and figure out if there are homes out there that have lead paint that needs remediating. So essentially, they were held liable and then told, "And now, go figure out if there's something for which you've been held liable."

And all of this is, as I said at the outset, it's a great injustice in this particular case, but it has enormous implications for all sorts of industries out there. We've already seen the same theories being used in other nationwide litigation initiated by municipalities and states. The same kind of sweeping public nuisance theory is being used in most of the opioid litigation. It's being used to try to hold fossil fuel companies liable for everything associated with climate change.

So this is really just the beginning of what can ultimately prove, without Supreme Court intervention here, to begin a brave new world of mass litigation in which lawsuits can be brought ostensibly on behalf of counties or states, but as this particular case illustrates really with the backing and funding of the plaintiff's lawyers and brought in a way that eliminates all of the protections that the Supreme Court has worked so hard to create and reinforce over the past few decades in the realm of class action litigation. The importance of individualized injury always being necessary before somebody can be held liable and required to remedy damages.

And this case is tremendously important as really sort of a benchmark for what we're going to see in the future of class and mass litigation, and it poses serious due process problems and poses extreme First Amendment problems that I'll kick things over to Mike to talk about.

Michael Carvin: Oh, yes. Thanks, Erin. And just to, I think, start where she was ending, which is that Erin's quite right that there's broad consequences to this case that go well beyond the particular facts or the particular tort theory. And that's mainly because there's been a trend in states, as Erin alluded to, to seek to invent tort

liability for companies or products that the states or the plaintiff's bar doesn't particular like from fossil fuels to prescription drugs to guns and all of that.

The amazing thing about most of these suits and certainly the case involved here is they're not targeting the products themselves, the fact that the products were manufactured because they can't because of the statute of limitations issues and because the products were legal to sell or they were certainly legal at the time they were sold. So the way they try and get around that in this case and others is they don't attack the products, they attack the promotion. So you have this bizarre legal regime where the company's not liable for producing or selling the product, but they're liable for promoting the product. And so under this regime, speech has less protection than commercial conduct, which obviously turns the First Amendment on its head. And that is what I want to focus on, that this is just a naked assault on the First Amendment's commercial speech protection in this case.

We are being held liable along with the other defendants for hundreds of millions of dollars to abate lead paint in homes without a scintilla of proof that Sherwin-Williams paint is in those homes or is causing any harm. In addition to the manifest due process problems that Erin articulated, it's important to focus on how Sherwin-Williams is being held liable for a product that they haven't shown to cause any harm and which they haven't sold since 1955.

The basis for their liability, the lower court was quite explicit, is that they ran an ad in 1904 that mentioned lead paint. And from 1937 to 1941, they made some contributions to a trade association, which wholly unbeknownst to Sherwin-Williams was in other context promoting the use of lead paint. So now they're attaching liability to people for engaging in speech and joining an association.

Maybe the best way to illustrate why that's an affront to the First Amendment is imagine a law that said, "We're fining Sherwin-Williams $500 million for engaging in sale of a lawful product in a truthful and non-misleading way." Obviously, that would be struck down as facially unconstitutional, and I would argue that it's worse that courts are imposing the same kind of retroactive liability by inventing a new tort.

So again, the main point is that everything Sherwin-Williams said was truthful and non-misleading. They were selling their product without making any claims of any kind that were false or misleading or half-truths. The California court said, "Yeah, but the product is harmful." Well, you can say truthful and non-misleading speech about products regardless of whether they're harmful as long as they're legal. And that's because the courts have recognized if you don't like the product, you can ban the product.

But if you've decided to let the product be sold, what you can't do is ban speech about the product. So therefore, truthful, non-misleading speech about liquor, cigarettes, alcohol, gambling, all kinds of potentially hazardous activities or

products can nonetheless not be suppressed under the First Amendment. If you think the product is dangerous, suppress the product. Don't suppress the speech about the product.

This is a particularly perverse application in this case, however, because it's not as if Sherwin-Williams knew in 1904 that lead paint was in any way harmful. It is stipulated that Sherwin-Williams didn't know any more about the hazards of lead paint than anybody else. They just learned as the public learned and the public authorities learned that there was some potential dangers if you didn't maintain interior lead paint a particular way. But the California courts never suggested that Sherwin-Williams was hiding some secret knowledge, and they didn't suggest that they had violated any failure to warn. It was just literally the simple act of promoting their product.

The final point on why this is violative of the First Amendment echoes what Erin was saying a minute ago about due process, there's literally no causation analysis. It's stipulated that nobody ever relied on this ad, that the ad didn't contribute to the amount of lead paint in California much less in the plaintiff's counties. So what you've done is turn a commercial speech regime, which allows you to penalize speech if it's misleading in a way that on which consumers detrimentally rely and which harms consumers. But now you've got the California courts penalizing speech that's not misleading and which has never been detrimentally relied on by anyone and which actually hasn't harmed them.

So it's an obvious affront to the First Amendment. I thought I'd just wind up by talking about whether or not we think the court will take this case and whether or not it should. It is true that if you went through sort of the normal, formalistic, check-a-box analysis that there's only a split in the circuits in one respect in our case. And that revolves around the California's courts assertion that we were liable because we contributed to an association that did something. But there is a split on that.

The Third Circuit went the other way in a case involving an asbestos association, and helpfully, the author of that opinion was then-Judge Alito on the Third Circuit. And he made the obvious point, which comes from NAACP versus Claiborne Hardware and other cases, that you can't hold a person liable, there's no such thing as guilt by association, particularly in the First Amendment context. You need to show that the association was pursuing illegal aims and that the ...

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Michael Carvin: ... was pursuing illegal aims and that the member had specific intent and direct knowledge of those illegal aims, none of which is true in these circumstances. A, there was nothing illegal. B, the association was not designed to do anything

illegal, and to the extent they did something wrong, there was no evidence or finding that Sherwin-Williams had any intent to promote it.

But wholly apart from that associational split, my broader point is, this is the kind of case that the Supreme Court needs to take, regardless of whether or not there's a split in the circuits. Almost by definition, if one state goes out on a limb and comes up with a brand new tort theory, which violates the commercial speech doctrine, there won't be a split in the circuits, because of California, at least for now, is doing that damage. But it doesn't seem to me to make a lot of sense to say if they are impinging on a core First Amendment right in a way that's costing hundreds of millions of dollars, that's something that the court should ignore.

When Huey Long was taxing newspapers in Louisiana, the court didn't say, well we're not going to take that case, we'll just allow this unconstitutional regime to go, because it's only happening in Louisiana. And the reason for that, obviously, is if you chill First Amendment speech, that's irreparable injury. That's sort of black letter law, and any kind of infringement on free speech is irreparable injury that the court should take account of. But more importantly, to return to the point that I think Erin was making earlier, it's not going to be limited to California. It's spreading like a virus.

If you think about this theory of public nuisance law, if you can get people who manufactured lead paint or ran an ad 114 years ago to pay for what otherwise would come out of the public fisc, this gives municipalities, counties, and states across the country a huge incentive to go ahead and save their citizens money by going after manufacturers who literally have nothing to do with the harm. And they're particularly incentivized to do that, because usually these cases are brought by attorneys who are being paid under a contingency fee analysis. So it's not just that the ongoing regime is hurting people in California, it establishes a model that right now is, and certainly will be, spreading like wildfire.

And it's too late after it's spread to other states and other industries, like the oil industry or the prescription drug industry, to put that genie back in the bottle. It's too late to un-ring the bell if you've already chilled and penalized commercial speech. So the basic point that I think both of us were making in our cert petitions was, this is the kind of case that cries out for the court to step in now and not to allow some percolation like this was, you know, a dispute about some provision of the ERISA statute, since this is a very important constitutional injury, and the kind of assault on it needs to be killed in its crib right now. Thank you.

Dean Reuter: Well, my thanks to both of you. Let's open the floor to questions right away. In a moment we'll all hear an announcement that will say the floor mode is on. After you hear that announcement, if you have a question, push the star button and then the pound button on your telephone.

Automated: The floor mode in on. To request the floor, enter star then pound.

Dean Reuter: If you have a question for either of our guests, push the star button and then the pound button on your telephone. We can use the balance of our time for that, but before we go there, let me see if Erin Murphy has anything she wants to add to her opening remarks, given what Mike Carvin said.

Erin Murphy: The only point I just wanted to make that really dovetails with what Mike was saying at the end of his remarks is that there is, on the one side of the equation, this enormous temptation for states and municipalities to take advantage of this, and on the flip side, I think one of the reasons it's really important for the court to step in now is, and if you think about the scope of the type of liability that potentially can be imposed under these theories, there's the kind of enormous settlement pressure that you typically have in the class action context, but magnified just even more.

I mean, if you take this case, the initial judgment in this case was over a billion dollars, and if you have the prospect of facing billions of dollars in liability through theories like this, it's not entirely clear that cases will find their way all the way to the Supreme Court in the future, because it's going to take industries and companies with a pretty stiff backbone to not try to find their way out of the cases earlier on. So I do think it creates a really bad dynamic to leave something like this out there.

Dean Reuter: Makes it less likely a circuit split develops. Is that argued in your briefs as well, that point?

Erin Murphy: Yeah. No, it's certainly something that we talked about, in terms of just all of the ways in which this presents problems in the future and problems that not only will lead this to certainly not be the last case to do this, but also that may create impediments to the issues really finding their way up through the courts.

Michael Carvin: Well, I'd just echo Erin's point. I mean look, the court's been relatively diligent about focusing on due process and abuses of the class action system, because I think they've taken a realistic view that if you allow these classes to sort of grow, then it will create this inexorable pressure to settle that Erin just referenced. Well, all of the constraints they've got on class actions about commonality and identifying injuries and all those sorts of things literally fly out the window if you accept this unbounded public nuisance theory that California has invented for the first time. So for all the reasons the court's been relatively good about policing class action abuses and violations of due process and violations of the individual causation principles in other contexts, those concerns are magnified in this context.

Dean Reuter: Once again, if you're in the audience, if you have a question, push the star button then the pound button on your telephone. We've got just one question pending, so let's check in with our first caller today.

Speaker 1: Hello, Michael and Erin. I'm calling from Connecticut, and the question that I have is, in order to prevail in this public nuisance type of action in this case, do you have to have a corollary state public nuisance law in place, i.e., if different states have public nuisance laws of one kind or another, other states don't have any, I think. So do you have to have anything on the state level in place in order to prevail or not to prevail?

Michael Carvin: No, that's an excellent point. This is Mike Carvin. Nothing about this is statutory. Nothing about this is something where the legislature weighed the cost and benefits. This is a very ancient tort. Richard Epstein wrote a very good amicus brief in this case, along with a number of other amicus briefs that recognize the importance of this case. Public nuisance used to be a very straightforward kind of thing. If you were polluting the pond that the community was using, then you would identify the particular area and the way that you're interfering with it here.

Here, as Erin described earlier in her description of the case, they don't even know what houses supposedly constitute this public nuisance. It's not as if it's interfering with some kind of public right of way, or public as defined, it's in certain isolated houses on the interior of them. And again, all of the normal constraints about showing causation, and the fact that the people you're suing are actually causing the problem, were thrown out the window. Again, there's not a scintilla of evidence that any of the paint that's going to be abated in this $100 million abatement program was ever sold or manufactured by Sherwin-Williams, much less put in their place.

And the final point, of course, is that it's not really the paint manufacturers that are creating the public health problem, it's the landlords and people who own the properties, who are not properly maintaining it, which is a particularly salient point when you recognize that nobody's sold lead paint since 1978. Sherwin-Williams's share of the market was always infinitesimal, and they stopped selling any kind of lead paint in 1955. So it's a classic situation where liability is wholly disproportionate to culpability; indeed, as far as we can tell, Sherwin-Williams had nothing to do with this problem, and yet it is being stuck with the entire bill. This is the kind of retroactive, wholly disproportionate due process violation that occurs when the court takes a relatively modest, relatively recognizable tort like public nuisance and strips it of all of its limiting characteristics.

Speaker 1: Just to follow up really quickly if I can, what's the difference between this and strict liability in its understood sense?

Michael Carvin: Well, I've already talked. I'll let Erin talk about that, but she made the point that they tried under the normal strict liability theories and failed pretty consistently, which is why they switched to public nuisance, but ...

Erin Murphy: Yeah, and you know, I mean, I think as a practical matter, when you think about it, that there's not a whole lot here that ends up being all that different from strict liability, because to the extent there's anything that has to be proven beyond there's a public problem and somebody who we think we could force to foot the bill, it's so watered down that it really does largely just become, are you someone who's in the industry that we think has some sort of responsibility writ large for some sort of problem writ large?

But even in the world of strict liability, you have limitations of needing individualized litigation with individualized injuries, and you don't even have that here. So I think in many respects, you know, this sort of combines the worst aspects of concerns with strict liability with then making it all retroactive and making it at such a high level of generality that you don't even have the protections that would come with individualized litigation at the level where strict liability would exist.

Michael Carvin: Yeah, I always say look, if it's a public nuisance, you should be able to identify the people who did the nuisance, and you should be able to identify the public that's being harmed. You don't have to do either one of these in this new-found tort invented by the California courts.

Dean Reuter: Once again, if you have a question, push the star button then the pound button on your telephone. We've got one question pending. This is Dean. I think I Mike Carvin mention a stipulation that there was no knowledge on the part of the defendants of the harmfulness of the product, if that's right. And I think I also just heard you say, not explicitly, but allude to the idea that the product is safe if used as directed. That is, even if you used lead paint 40 or 50 years ago, if you've painted over it without sanding it down or without disturbing the underlying lead paint, it's safe. Are you saying that as well, or does that matter?

Michael Carvin: Right. Well, I mean, to go back into history, lead paint was always viewed as the gold standard for paint, and it was widely promoted by both California and the federal government, because it was considered an excellent paint. It gradually became known in the '70s that interior lead paint, if not properly maintained, through paint chips and that kind of thing, could hurt people, particularly young children. And then into the 1990s, we began to realize that what were generally viewed as de minimus exposure to lead paint, and other forms of lead, by the way, water, etc., could cause more harm than we originally thought.

But again, the point is, they banned the sale of lead paint in 1978. Sherwin-Williams got out of the business well before that, and always a very infinitesimal part of their business was interior lead paint, which is the only places where lead paint is dangerous. And even with respect to that relatively small subset, as long as it's properly maintained, it's not a problem. So if you're worried about maintenance issues, you would presumably think about the people who were supposed to be maintaining and not the people who manufactured it 50, 60 years ago.

Dean Reuter: What do the plaintiffs say about a principle stopping point? It sounds like under this sort of analysis that anything, any product that's found even retroactively to be harmful, creates just general liability. Is that right?

Michael Carvin: Yeah.

Erin Murphy: Especially if [crosstalk 00:30:40].

Dean Reuter: Do they offer a stopping point there or not?

Erin Murphy: I certainly don't read any particular stopping point myself in their theory. I mean, they certainly resist the proposition that they didn't have to prove any causation, but I don't think they dispute or can dispute that the only sense in which they had to prove causation was sort of at this level of, well, if you sold it, then probably you have something to do with the fact that maybe there's some of it here, even though nobody's even figured out if there is lead paint, or if so, where it is or where it came from.

They certainly say that the courts required some theory of causation and that that's a constraint, but I don't think it's a meaningful one, and it's particularly evident in the First Amendment context, where causation is typically tied in ... the way you prove causation in the First Amendment context is actual reliance on the speech, the statements that are supposed to be tortious here. As to that, they did in fact stipulate that there was no evidence of reliance, so I don't really see how that you can claim that there's a limitation in terms of causation as to the promotional materials, when it is in fact stipulated in the case that there simply was no evidence of any kind of reliance by any individual.

Dean Reuter: Help me understand how under this theory, why automobile manufacturers wouldn't be liable for selling a product that has some benefits, obviously. Everybody loves cars, they love to drive their cars. But it kills tens of thousands of peoples a year. Why is there no liability for that under this theory, or is there?

Michael Carvin: I don't think there's a product that causes harm that you couldn't apply some variation of this theory to, whether it's beneficial drugs that are misused in pain management. Obviously, guns being the most obvious example, or selling petroleum for cars. It's not as if this-

Dean Reuter: Well, I'm talking about the cars themselves.

Michael Carvin: Yeah. I'm sorry, go ahead, yeah.

Dean Reuter: You would include the cars themselves under this theory? There's manufacturer liability or sales liability for promoting cars?

Michael Carvin: Cars cause pollution, and they cause injuries to people, and all of that can be recharacterized as public nuisance. And if you told somebody to buy a

Chevrolet, I don't know why they wouldn't be equally susceptible to suit as our clients in the lead paint context.

Dean Reuter: Okay. That's what I was getting at, so ...

Michael Carvin: Yeah. And I guess I'll just echo what Erin said. They made a relatively feeble attempt to articulate a limiting principle. They did say causation, but A, they didn't say it in the First Amendment context, and even in just terms of the product itself contributing to this problem, I think they were quite explicit at both the courts below and in the briefing that if you were a very minor part of a huge problem, you were responsible for alleviating the entire problem.

Dean Reuter: That's joint and several liability.

Michael Carvin: So if cars contribute to global warming, then there's no reason in the world that they ...

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Michael Carvin: And there's no reason in the world that you couldn't hold the manufacturers of cars or the people who sell them the petroleum liable for whatever pops into your head as a good solution for global warming.

Erin Murphy: I think it's particularly, when you think about the backward way this happened, going back what Mike was saying in terms of how the mere existence of lead paint isn't in itself harmful. It is the deterioration of it. It is other aspects of it. Yet, here by not even requiring the proof of the existence, let alone proof of the existence of deteriorated, they really did issue a remedy that said, "Go find out if there's a problem."

And if you take that and apply it in other industries and think about it, then it's not a defense to say, 'Oh, well, some of this is not attributable to the pollution from cars, or some of our cars haven't caused any problems. The theory ends up becoming, "Yeah, that's something to be figured out on the backend," when we're deciding where you should put the money to remediate the problem. You don't get to actually bring in to the litigation the facts that you would normally use to defend yourself and explain to a court, if it's a court, it's a fact finder, to a jury, to whoever it is.

You don't get to actually put on your case as to why you are in fact not responsible or if you are responsible, are responsible only for some very small amount of whatever happens to be a bigger problem. The court basically said, "Well, we'll settle that after we've already held you liable and ordered you to pay hundreds of millions of dollars."

Michael Carvin: Yeah. I don't know if we've emphasized, the first hundred or two hundred million dollars of this remedy is to go find the problem. It's completely

backwards, right? Go find houses with this problem, and start cleaning it up. We don't even know the houses, so how in the world could we know if you contributed to the problem in the first place? As Erin points out, that's all not part of liability, that's all part of remedy. They just assume the guilt and then make you go find the victims, as opposed to vice versa.

Dean Reuter: Once again, we're speaking with Mike Carven and Erin Murphy, if you have a question press the star button and the pound button on your telephone. We've got two questions pending so let's head in the direction of our next caller.

Tom Kamenick: Hi, this is Tom Kamenick from the Wisconsin Institute for Law and Liberty. I'm familiar with this broader topic because here in Wisconsin for about six years or so we had a brand new common law theory of market share strict liability for paint manufacturers that are Supreme Court created before it was overturned by the legislature. How is this similar to that, or different than that?

Michael Carvin: This is Mike Carven. This is market share liability on steroids, right? The Wisconsin decision was completely wrong because it said, "Well, we don't know if Conagra's Sherwin Williams paint ever got into your house, or whatever product you're talking about, but we'll just assume if you had 20% of the market we'll apportion that much of the remedy to you without any of the normal prerequisites for showing that the plaintiff was actually harmed by this particularized defendant."

So, that eliminates a very basic principle of tort law, but for the reasons we've been talking about here, it goes much beyond what relative market share you had, you literally, again, could have 0% market share, 0% in any of the houses being abated, and under this public nuisance theory, you're liable. So, at least the market share is some kind of cap. You were involved in the transaction that caused the problem, and it's capped at whatever your market share is.

Here, you neither need to be involved in any transaction of any kind, with anybody that caused the problem, and you're not capped out in terms of your market share. And that is why, until the California courts jumped into this, even relatively liberal courts had accepted market share theory liability. In other context, like the Rhode Island Supreme Court said, "No, this theory of public nuisance goes way too far, and it's antithetical to basic principles of due process, causation, and tort law."

Dean Reuter: Erin Murphy, anything on this point?

Erin Murphy: No, I don't really have anything to add to it. I think Mike covered that one pretty well.

Dean Reuter: Out there in the audience, if you have a question, push the star button, then the pound button on your telephone. We got one question pending. Let me interject a question if I could. It seems to me, and my experience in the legal

profession extends back 30 years or so, but it seems to me that legal theories are getting more and more creative and I'm curious as to whether or not you agree with that and if you agree with that what's the cause of that? Is it, as maybe has been suggested a little bit, pinches on state and local government budgets, is it contingency fees that drive ligation, is it larger companies that end up having deeper pockets, or is it just the passage of time and the evolution of law?

Erin Murphy: I think one aspect of it is a bit of a kind of whack-a-mole aspect. If you think about it as that you had some diligence, as Mike suggested, from the Supreme Court in putting real constraints on some of the theories that have traditionally been used to try and have pretty expansive class actions and try and get rid of the need to really prove individualized injury and causation, and all of these things in the class and mass context and put in procedural and substantive constraints there, then it sort of forces ... Instead of thinking of it as, "Okay, let's go litigate cases the way the courts are telling us we should," it becomes, "Alright, let's see what can to get around that.

And I don't think it's an accident that all of this creative thinking here is coming into state court context where there is some thought of where the hope ... I think on the side of the plaintiffs in these cases is that they'll be able to escape. They don't have to be reviewed by a federal court of appeals, unless the Supreme Court steps in, they think they can probably get away with more. So, I think some of it is just a product of being every time any path gets closed off it's, "Let's see what else we can figure out." The more paths that are closed off, the more completely outside the mainstream you end up being forced to go.

Dean Reuter: Mike Carven, anything on this point?

Michael Carvin: As always, Erin covered it beautifully, so I've got nothing to add.

Dean Reuter: We've got just one question pending. If you'd like to join the queue, press the star button, then the pound button on your telephone. Let's check in with another member of our audience now.

David Emerson: Yes, it's David Emerson, the San Francisco Federal Society Chapter. From what I've heard, this has not been the first attempt by the plaintiffs and the plaintiff's bar in this situation. I believe that I heard there's also a strict liability attempt that was made and it failed. So, my first question, if I could be allowed two questions is, how are the plaintiff's managing to get multiple bites of the apple under the doctrine of exhaustion of remedies, why aren't they just foreclosed having not brought this up the first time? And the second question I had had to do with, really, just this whole notion of just effuse liability for all the potential actors here, regardless of their market share.

It seems to me that what they do that is the assumption that it's just impossible to identify which paint came from which manufacturer and although, I'm not a

chemist, I expect that if you actually did look at a paint sample and conducted some analysis you'd be able to identify, with specificity, which manufacturer paint reached that paint sample, because there's certain proprietary formulations that these manufacturers use, which may not be identifiable on the surface, but it's certainly subject to scientific inquiry. So I'm trying to understand how that baked-in presumption that we kind of just throw up our hands and cannot figure out who made this paint sample could fly.

Erin Murphy: So, to start with your first question, here in this there's been both broader litigation in a lot of other places, and litigation here, in this particular ... This case has been going on for, I think it's something like two decades, and essentially they went through four iterations of their complaint, and kept having theories rejected, until they finally were able to settle on something that go through the courts. So, basically, the state courts allowed them to just keep trying again until they found something and then they sort of crafted the rest of the case around the theory once they had it.

So, while other courts had rejected it, and really there's certainly the argument that this is completely inconsistent with what California had ever allowed before as well, but they basically just kept getting more and more bites of the apple in this particular litigation until they managed to find a way up to the theory they have.

Now, on the second piece of it, at least in the context of this particular litigation, there was never even an opportunity to try to test that theory because the court said, "We don't care. You are foreclosed from doing any discovery to go and look at houses and figure out, look at the paint, find out if it's deteriorating, try to figure out how long it's been there, who is responsible." And, I think it's also that, it's not just a question of who manufactured it, because as, I think both Mike and I have talked about, is that you would have intervening problems of the manufacturer is at this point, quite far removed from the chain of who really one would think bears responsibility given that most states, including California itself, have long had laws and regulations on the books that require property owners and landlords to be the one to take care of any problems with deteriorating lead paint.

Michael Carvin: Yeah, that covers it. I'll just make the point that throughout the extraordinarily long litigation we're always saying, "Let's get a representative sample of houses, could the plaintiffs please give us some idea of where in the county they think this problem exists?" And, oh, that was rejected by the trial court because of a theory, as Erin said, really didn't matter, so why bother why trying to figure out which house has the problem, just order a generic remedy. And then we'll go find the houses. So, again, they really put the cart before the horse.

Dean Reuter: Let me make another call for questions. There are no questions pending. If you have a question, now is the time. Let me ask a final question, and give each of you a chance to wrap up and then you might or might not want to address this

question. But, I've heard mention of the opioid cases, the climate change public nuisance cases, is there a way to distinguish this case? Is it more egregious, is it the same type, or do you want to get into those issues on this call?

Michael Carvin: Yeah, it's hard for me to rank order which of them is more frivolous, but I would think climate change would give them a run for their money. The opioid issue is a real issue, I mean there's some bad actors, some people have done some bad things. But, I guess my basic point of all these things, if there's a real public health issue and they've either engaged in full open misleading speech or otherwise mislead the public about the product, there's was to get at it under traditional tort and statutory theories.

The reason the plaintiff's bar is inventing this theory is because they want to hold you liable for truthful speech and lawful products. Which sounds almost like a non-sequitur, but that's really at the end of the day where they're going. So, I can't ban, say petroleum, so what I'm going to do is try and sue Exxon and claim that they knew something more about climate change than the rest of us did. And that's why you have this perverse result, as I began the conversation, where courts are penalizing speech more than conduct because the conduct can't fall within any traditional tort theory. And as long as you say, "Promotion of a lawful product somehow is not protected by the first amendment," then it gives everybody a free shot at accomplishing through the back door what they couldn't through the front door. And it's bizarre that the back door is constitutionally protected speech, rather than normal ... The first amendment is giving you less protection in the commerce clause, which is just insane.

Erin Murphy: Just to kind of echo what Mike said, I think, add to the question of applying this theory of public nuisance, it's hard to ... The theory itself is inherently problematic. There may be other ways, and other theories, and other torts, that could be easier to apply in context that don't have some of the distinct problems with trying to go after an industry for a product that hasn't been sold for half a century, but when you take the theory of public nuisance that has been blessed by the California courts here, and essentially say, as long as there's sort of a generic indivisible large public problem, that we can claim this defendant has even a minor role in causing, it's hard to see how you can ever apply that theory to any industry without causing enormous due process problems.

Dean Reuter: Well, it looks like we had our final question from our audience. Do you have any further final thoughts, Mike Carvin or Erin Murphy before we adjourn?

Michael Carvin: Nope, I've covered it. Thanks.

Dean Reuter: Erin Murphy?

Erin Murphy: No.

Dean Reuter: Well, let me-

Erin Murphy: [crosstalk 00:49:10][inaudible 00:49:10]

Dean Reuter: I want to thank you both for joining us, as we mentioned this is a sur petition so we expect further action on the court from this in the near future, and we look forward to having you both back and some point in the near future as things develop. But we do wish you both the best. Thank you very much for joining us. I want to thank the audience as well for dialing in, for your thoughtful questions, a reminder to check The Federalist Society's website, monitor your e-mails for upcoming telephone conference calls, but until the next call, we are adjourned. Thank you very much everyone.

PART 3 OF 3 ENDS [00:49:41]